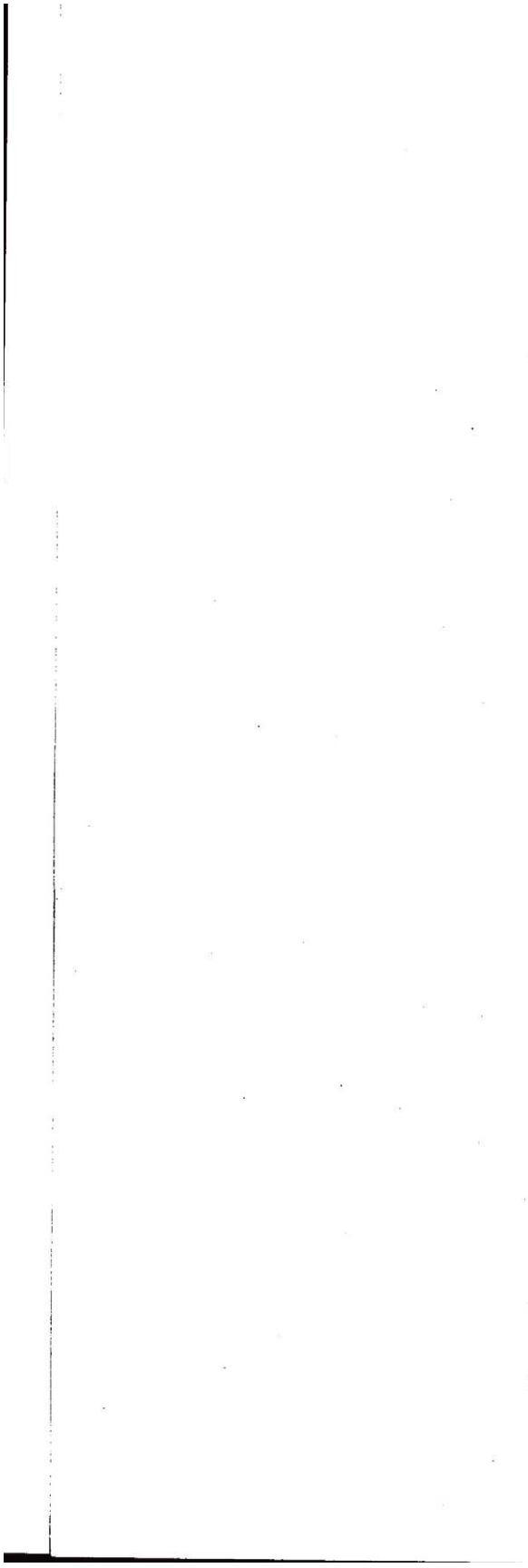
AKTEN DER GESELLSCHAFT FÜR GRIECHISCHE UND HELLENISTISCHE RECHTSGESCHICHTE

SYMPOSION 1990



AKTEN DER GESELLSCHAFT FÜR GRIECHISCHE UND HELLENISTISCHE RECHTSGESCHICHTE

begründet von

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Preface

The papers in this volume constitute the eighth in a series of conferences sponsored by the Gesellschaft für griechische und hellenistische Rechtsgeschichte, founded in 1971 by the late Hans Julius Wolff. Previous conferences have been held in Germany (1971, 1985), Italy (1974, 1988), France (1977), Greece (1979) and Spain (1982). The Proceedings of these earlier conferences have all been published in this series by Böhlau Verlag.

At the seventh "Symposion" held in Pisa and Sienna in 1988, I and my American colleagues, David Cohen and Edward E. Cohen, proposed to the Society that the eighth Symposion be held in the United States. Although there was some concern whether a sufficient number of European scholars would be able to travel to such a distant land, the proposal was strongly supported by most. As the three of us worked during the following months to bring our proposal to fruition, we were greatly aided by the strong support of many friends and colleagues, especially Joseph Mélèze Modrzejewski and Gerhard Thür. In addition to practical help and advice, they gave us constant encouragement to proceed; without their support the conference would never have come to pass.

The other crucial factor, funding, was generously provided by the Arete Foundation of Philadelphia. We are especially grateful to Ms. Donna Zanghi of the Foundation for her help in obtaining this support.

Symposion 1990 took place September 24-26, 1990 at the Asilomar Conference Center in Pacific Grove, California, with scholars from Denmark, France, Germany, Great Britain, Greece, Italy, the United States, and Yugoslavia in attendance. Excellent weather allowed the participants to enjoy the natural beauty of the area together with the intellectual feast of papers and discussion.

The sessions of this conference differed from those of its predecessors in the series in two important ways: the papers were restricted to the general areas of Criminal Law (including Procedure) and Family Law, whereas previous participants had given papers on any subject related to Law in the Greek or Graeco-Roman world; and a new format was introduced whereby most papers were followed by formal responses. This format proved to be very effective in stimulating discussion, though for publication I have tried to minimize the amount of additional responding to the responses. Thus the twenty-six papers and responses are here published in substantially the same form as they were originally delivered. I thank all the contributors for their cooperation in this effort.

As Editor of these Proceedings I am particularly grateful to Gerhard Thür, who has read all the papers and made valuable comments on many of them. He has also provided much useful advice about the production of camera-ready copy for the publisher. In addition, this publication would not have been possible without the tireless work of my assistant, Ms. Catherine E. Fowler. In all the editing process, including "translating" between different computer formats and programs as well as more traditional editing, I have relied on her efficient and cheerful skills. In preparing the index and in proofreading we have also had the help of Mr. David Dean-Jones. The final camera-ready copy was produced here at the University of Texas on a Macintosh IIcx computer, using Microsoft Word 4 and SMK Greekkeys, and was printed on a LaserWriter II.

Finally, let me again thank my colleagues David Cohen and Ed Cohen. The success of this conference depended on their efforts as much as mine, and they have been a source of support and advice from beginning to end. Throughout it all, it has been a pleasure working with them.

Michael Gagarin
Austin, Texas
November 25, 1991

Part One

HOMICIDE

Joseph Mélèze Modrzejewski (Paris)

La sanction de l'homicide en droit grec et hellénistique

Pour Pierre Lévêque

L'objet de cet article peut paraître, d'après son titre, trop ambitieux ou trop vaste. En fait, il s'agit simplement d'une mise au point.[1] Je n'ai pas l'intention de reprendre le sujet *ab ovo* en présentant ici une nouvelle interprétation du fameux épisode du Livre XVIII de l'Iliade décrivant la scène judiciaire du bouclier d'Achille (18.497-508), texte qui a déjà fait couler tant d'encre et qui, à défaut d'un antécédent crétois ou mycénien, lisible pour nous, demeure le point de départ pour l'étude de la répression pénale dans le monde grec et, plus généralement, pour toute réflexion sur l'origine de la procédure judiciaire en Grèce.[2] Je pense pouvoir cependant me dispenser d'aborder le problème de la sanction de l'homicide dans le monde homérique; il suffira de renvoyer aux travaux de Eva Cantarella sur l'homicide[3] et sur "norme et sanction" chez Homère,[4] ainsi qu'au récent ouvrage de Michael Gagarin sur le droit grec archaïque, sans oublier les discussions qu'il a suscitées.[5]

Les pièges de la protohistoire du droit grec étant ainsi écartés d'avance, nous pouvons également renoncer à dresser un cadre général pour le problème qui nous intéresse. On le trouvera dans le travail de Louis Gernet sur "Le droit pénal de la Grèce ancienne," publié à titre posthume par les soins de Ricardo di Donato,[6] et dans le rapport

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1 Le texte qui suit a fait partie d'un rapport de synthèse à la XLIII[e] session de la Société internationale "Fernand De Visscher" pour l'histoire des droits de l'Antiquité, sur le thème de "La répression criminelle dans le monde antique," qui s'est tenue à Ferrare du 26 au 30 septembre 1989. Il a fourni ensuite la substance d'un exposé présenté au VIII[e] Colloque international d'histoire du droit grec et hellénistique, au Centre universitaire d'Asilomar, Californie, le 25 septembre 1990. J'ai repris encore le même sujet dans une conférence faite le 12 décembre 1990 au Centre de philosophie du droit de l'Université de Paris. J'ai modifié ici quelques tournures de l'exposé oral en vue de la présente publication, limitant les notes en bas de page à expliciter les allusions du texte et ne citant, en principe, que les travaux les plus récents. Cet essai, que je dédie à Pierre Lévêque au nom d'une vieille amitié à laquelle l'histoire du droit grec et hellénistique n'a pas été étrangère, paraît aussi dans les *Mélanges Lévêque*, t. 7: "Société et anthropologie" (Annales littéraires de l'Université de Besançon).

2 Parmi les travaux consacrés pendant les vingt dernières années à ce texte, citons E. Cantarella, "Lo scudo di Achille: Considerazioni sul processo in età omerica," *Riv. ital. sc. giur.*, 3[e] sér., 16, 1972, 247-67; E. Ruschenbusch, "Der Ursprung des gerichtlichen Rechtsstreites bei den Griechen," *Symposion 1977*, (Cologne et Vienne 1982) 1-8; N. Hammon, "The Scene in Iliad 18, 497-508 and the Albanian Blood-Feud," *BASP* 22 (1985) 79-86. J'ai eu l'occasion moi-même de souligner récemment l'intérêt d'une interprétation ordalique de cette scène: J. Mélèze-Modrzejewski, "Philiscos de Milet et le jugement de Salomon: la première référence grecque à la Bible," *BIDR* 91 (3[e] sér., 30) (1988) 571-97, particulièrement 582 sq. et note 41.

3 E. Cantarella, *Studi sul omicidio in diritto greco e romano* (Milan 1976), particulièrement 75 sq.: l'homicide dans les poèmes homériques.

4 E. Cantarella, *Norma e sanzione in Omero. Contributo alla protostoria di diritto greco* (Milan 1979), particulièrement 209 sq.: vengeance, *poiné*; 259: responsabilité pénale.

5 M. Gagarin, *Early Greek Law* (Berkeley et Los Angeles, 1986). A propos de ce livre, voir notamment E. Cantarella, "Fra diritto e prediritto: un problema aperto," *DHA* 13 (1987) 149-60, et A. Maffi, *RHD* 66 (1988) 96.

6 L. Gernet, "Le droit pénal de la Grèce ancienne," dans le volume *Du châtiment dans la cité. Supplices corporels et peine de mort dans le monde antique* (table ronde organisée par l'École française de Rome, novembre 1982), Rome 1984, 9-35.

sur "La peine dans l'Athènes classique" présenté par notre ami E. Karabélias en 1987 au congrès de la Société Jean Bodin à Barcelone.[7]

Ainsi nous pourrons entrer directement dans le vif du sujet: la sanction de l'homicide en droit grec classique et hellénistique. Nous essayerons de l'aborder dans la perspective d'une continuité qui va de Dracon aux Lagides. Cette approche nous conduira à faire ressortir une certaine permanence du droit grec en la matière, de la cité à la monarchie hellénistique. Le tableau que je me propose de dresser sera nécessairement sommaire, mais peut-être offrira-t-il un bilan plus équilibré des constantes et des contingences historiques que les études partielles dont nous disposions jusqu'ici.

I.

Voyons d'abord où en est actuellement la recherche concernant l'homicide en droit athénien. Le problème a suscité beaucoup de travaux au cours de ces dernières années. Le détail en est recensé avec soin dans la chronique de droit grec dont Alberto Maffi a bien voulu, à ma demande, se charger dans la *Revue historique de droit français et étranger*.[8] De son côté, Gerhard Thür a publié récemment deux articles pleins de substance qui résument de manière critique les progrès et les interrogations actuelles de la recherche dans ce domaine.[9] Nous y aurons recours en reprenant ici quelques points concernant l'interprétation, toujours animée par de vives controverses, de la vénérable loi de Dracon.

Elle nous est connue, on le sait, par une stèle de marbre trouvée en 1843 et aujourd'hui conservée au Musée National d'Athènes. Cette stèle porte le texte, transcrit en 409/8 av. n.è., de la "loi de Dracon sur l'homicide" (lignes 4-5) promulguée à la fin du VII^{e} siècle, 621/620 selon la tradition, et restée en vigueur après les réformes de Solon qui, nous dit Aristote, avait abrogé toutes les lois de Dracon sauf celles qui concernaient l'homicide (πλὴν τῶν φονικῶν).[10] C'est à ce texte que se réfèrent orateurs et philosophes, notamment Démosthène et Antiphon, auxquels on emprunte des éléments destinés à combler les lamentables lacunes de l'inscription. R.S. Stroud a relu la stèle il y a une vingtaine d'années et en a donné une édition nettement supérieure à celles dont on disposait jusqu'alors.[11] Cette édition fut reprise en 1981 par David Lewis dans *IG* I^{3}

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7 A paraître dans le volume 55 des *Recueils de la Société J. Bodin: La peine*, 1re partie. Pour une perspective plus large, je rappelle l'étude de J. Gaudemet, "Le problème de la responsabilité pénale dans l'Antiquité," *Studi E. Betti* II (Milan 1961) 483-508 = *Études de droit romain* III (Naples-Camerino 1979) 455-84.

8 A. Maffi, "Monde grec," *RHD* 66 (1988) 96-116, en particulier 111-15; voir aussi *RHD* 68 (1990) 125.

9 G. Thür, *ZSS*. 102 (1985) 508-14, à propos de l'ouvrage de M. Gagarin, *Drakon and the Early Athenian Homicide Law* (New Haven-Londres 1981), analyse qui par son ampleur déborde largement du cadre d'un compte rendu critique; Idem, "Die Todesstrafe im Blutprozess Athens. (Zum δικάζειν in *IG* I^{3} 104.11-13; Dem. 23.22; Aristot. AP 57.4)," *JJP* 20 (1990) 143-55, et déjà en serbo-croate, dans les *Annales de la Faculté de Droit de Belgrade* 36 (1988) 213-23, avec des résumés en anglais et en français.

10 Aristote, *Ath. Pol.* 7.1. Cf. P. J. Rhodes, *A Commentary of the Aristotelian Athenaion Politeia* (Oxford 1981) 130 sq.

11 R. S. Stroud, *Drakon's Law on Homicide* (Berkeley et Los Angeles 1968.)

104.[12]

Le fait que nous ayons devant nous une copie, dont l'original présumé remonte à plus de deux siècles, pose un premier problème: la copie est-elle fidèle à l'original? La distance dans le temps ne justifie pas à elle seule une réponse négative. Des cas de survie de textes normatifs, à l'abri de l'action corrosive du temps, sont connus dans l'Antiquité grecque. Je citerai seulement la loi successorale séleucide du IIIe siècle av. n.è. qui nous est parvenue, apparemment sans aucune altération, dans une copie sur parchemin faite à Doura-Europos à l'époque des Sévères, sinon plus tard (225-250 de n.è. selon les éditeurs).[13] Mais à la différence de Doura-Europos, cité où toute activité législative avait cessé durant de longs siècles, la législation de l'Athènes classique est en plein essor entre Dracon et le moment où, au lendemain de la chute des Quatre-Cents, on a décidé de publier à nouveau la vieille loi dans le cadre d'une opération de remise en ordre des lois athéniennes. Les *anagrapheis* de 409/8 ont-ils reproduit le texte primitif ou bien avons-nous affaire à une version qui intègre les modifications intervenues au cours des VIe et Ve siècles?[14]

II.

Cette question affecte d'abord le début de la loi. Le texte commence par une hypothèse—celle d'un cas d'homicide non intentionnel, μὴ ἐκ προνοίας: nous y reviendrons dans un instant—introduite par un καί que l'opinion commune des hellénistes considérait comme une conjonction de coordination ("et"). L'idée qui vient alors à l'esprit est que le texte a été amputé d'une première disposition à laquelle cette conjonction enchaînait la suite de la loi. Selon la doctrine quasi dominante, ce "premier article" de la loi de Dracon traitait du meurtre; la conjonction καί et la négation μή impliqueraient une proposition positive: "si quelqu'un a tué avec l'intention de donner la mort," ἐκ προνοίας, etc.

L'absence de cet article sur la stèle n'a pas cessé d'inquiéter les hellénistes. Elle leur parait cependant explicable pour diverses raisons et l'imagination des auteurs modernes nous en propose au choix un large éventail: cet article aurait été copié, mais à un autre endroit et le mauvais état de la pierre l'aurait rendu illisible pour nous; il aurait été copié sur une autre stèle, qui ne nous est pas parvenue; il aurait été réduit aux dimensions d'une allusion indirecte; il n'aurait pas été copié parce qu'il serait devenu obsolète; il n'aurait pas été copié parce qu'il n'aurait plus été en vigueur en 409, une loi postérieure à Solon l'ayant

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12 Voir le c.r. de G. Thür, *ZSS.* 102 (1985) 774-76, particulièrement 776.

13 Voir à ce propos mon article "La dévolution à l'État des successions en déshérence dans le droit hellénistique. (Note sur Doura-Welles 12)", *RIDA*, 3e sér., 8 (1961) 79-113.

14 A propos de ces doutes, voir, p. ex., D. M. MacDowell, *The Law in Classical Athens* (Londres 1978) 42 sq. Sur le travail des *anagrapheis*, voir à présent N. Robertson, "The Laws of Athens, 409-399 B.C. The Evidence for Review and Publication," *JHS* 110 (1990) 43-75 (pour la loi de Dracon, particulièrement 56 sq.). La question a été reprise sous une forme très nuancée par A. Maffi dans une conférence sur "La loi en Grèce" faite le 22 mars 1991 à l'Institut de Droit Romain de Paris (à paraître dans la *RHD*).

modifié entre temps.[15]

La dernière hypothèse, qui est la plus ancienne, est aussi la plus mauvaise. Postulant la fidélité de la copie à l'original, elle admet une curieuse désinvolture des *anagrapheis* à l'égard d'un élément essentiel de la loi. Les autres hypothèses qui viennent d'être mentionnées s'efforcent d'éviter ce paradoxe. Leur point faible, c'est qu'elles prennent toutes pour vérité acquise l'idée que Dracon devait légiférer et sur le meurtre et sur l'homicide involontaire, celui-là étant traité en priorité par rapport à celui-ci. En fait, rien n'est moins sûr et c'est faire preuve, selon le mot de Louis Gernet,[16] d'un "rationalisme superficiel" que d'exiger de Dracon, à l'égard du meurtre, l'attitude des rédacteurs du Code pénal de 1810.

En effet, il est parfaitement concevable que Dracon ait abordé directement le problème de l'homicide involontaire. L'occasion lui en a peut-être été fournie, comme le suggère Gerhard Thür, par un cas d'espèce: quelqu'un qui a tué un Athénien sans le vouloir (μή ἐκ προνοίας) propose le paiement d'une rançon; la famille de la victime refuse l'*aidesis*; le législateur confirme ce refus: même dans un tel cas, καὶ ἐὰμ μὲ 'κ [π]ρονοί[α]ς [κ]τ[ένει τίς τινα], si la famille de la victime reste intraitable, l'auteur de l'homicide doit prendre le chemin de l'exil, φεύγειν.[17] Il suffit de considérer que la conjonction de coordination καί a été employée en fonction de particule pour que disparaisse l'inquiétant fantôme de l'introuvable "article premier": il n'a jamais existé!

III.

Reste à savoir si Dracon n'a tout de même pas fait une référence au meurtre, au moins de manière incidente ou implicite. C'est ce qu'envisage Michael Gagarin, selon qui le meurtre aurait été traité dans la loi de manière "elliptique."[18] C'est également l'hypothèse esquissée par Dieter Nörr, indépendamment de notre collègue américain.[19] Mais Nörr va encore plus loin, en utilisant les inépuisables ressources de la lacune à la ligne 12 de la stèle dont les dix-sept lettres illisibles sont pour les historiens du droit grec une source d'inspiration presque aussi féconde[20] que le sont pour les papyrologues les 20 ou les 21 lettres (mais le calcul n'est pas sûr!) de la ligne 9 du fameux *P.Giss.* 40 col. 1, où l'on n'a pas fini de chercher la clé de l'énigme concernant la "clause de sauvegarde" dont était assortie, croit-on, la généralisation du droit de cité romaine par Caracalla en 212 de n.è.[21]

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15 Inventaire des hypothèses dans l'ouvrage de R. S. Stroud, *Drakon's Law* (*supra* n.11), 34 sq., et dans les articles de D. Nörr, "Zum Mordtatbestand bei Drakon," *Studi A. Biscardi* IV (Milan 1983) 631-53, particulièrement 633 sq., et G. Thür, *JJP* (*supra* n.9), 145 sq. Cf. *infra*, n.27.

16 Article précité (*supra* n.6), 17.

17 G. Thür, *ZSS* 102 (1985) (*supra* n.9), 509.

18 M. Gagarin, *Drakon* (*supra* n.9), 98 sq., 102 sq.

19 D. Nörr, "Mordtatbestand" (*supra* n.15), 635 sq., 644.

20 La liste des restitutions donnée dans l'apparat critique des *IG* I³ 104, 124, et reprise par D. Nörr, "Mordtatbestand," 632 n.3, est complétée par G. Thür, *ZSS*. 102 (1985) 776. Cf. *infra*, n.27.

21 Les conjectures sont inventoriées dans mon édition de ce texte, *Les lois des Romains* (Naples et Camerino 1977) 478-90, reprise dans mon recueil *Droit impérial et traditions locales dans l'Égypte romaine* (Londres 1990; Variorum Collected Studies 321), chap. V. Il faut y joindre A. Biscardi, "Polis,

Il suggère que Dracon aurait pu, à cet endroit, opposer incidemment ἄκοντα à βο(υ)λεύσαντα, ce qui reviendrait à dire qu'il avait retenu une distinction entre l'homicide involontaire et le meurtre.[22]

Sans nous engager dans une discussion sur la notion de *bouleusis*, qui s'applique aussi bien à la préméditation qu'à l'instigation au crime et à la complicité (βουλεύω veut dire en grec aussi bien "prendre une décision délibérée" que "donner un conseil"),[23] il suffirait cependant, avec Alberto Maffi, de placer la négation μή devant le participe βολεύσαντα—μ]ὲ βολεύσαντα (= μὴ βουλεύσαντα)—pour faire disparaître l'allusion au meurtre et obtenir un résultat tout à fait différent: Dracon tiendrait compte, non pas de la différence qu'il y a entre homicide volontaire et homicide involontaire, mais de la distinction qu'il y aurait à faire entre deux types d'homicide involontaire, l'un correspondant à l'homicide par imprudence (ἄκων, ἀκούσιος), l'autre à l'homicide non prémédité (μὴ βουλεύσας, μὴ ἐκ προνοίας).[24] Nous rejoignons ainsi la position des savants comme Eva Cantarella[25] et Arnaldo Biscardi,[26] favorables à l'idée d'une telle dualité dans le texte de la loi.

Cela dit, il est également possible que l'alternative envisagée dans la loi tendait seulement à aligner la responsabilité de celui qui incite à l'homicide, ou qui, d'une manière quelconque, sans donner lui-même la mort, la cause indirectement, sur celle de l'individu qui tue de sa propre main: αἴτιο[ν] φόν[ο] ἦ[ναι ἢ χειρὶ ἀράμενον] ἢ [β]ολεύσαντα.[27] Dans cette hypothèse, il ne s'agit pas de définir le rôle de l'intention comme élément constitutif de l'infraction, mais de dire que le même traitement est réservé à l'instigateur et à celui qui donne la mort lui-même, comme le fait le Code pénal français selon lequel les complices d'un crime ou d'un délit encourent, en principe, la même peine que l'auteur principal. Dès lors, l'homicide intentionnel n'est plus que la contrepartie logique de l'homicide involontaire (μὴ ἐκ προνοίας), auquel se réfère le législateur d'entrée de jeu. La notion existe, mais elle n'est pas prise en compte dans l'organisation de

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politeia, politeuma," *Atti XVII Congr. intern. di Papirologia* (Naples 1984) 1201-15 (qui reprend la conjecture de M. Meyer), et A. Lukaszewicz, "Zum Giss. 40 I 9," *JJP* 20 (1990) 93-101 (examen critique des principales conjectures, mais sans référence aux *Lois des Romains*).

22 D. Nörr, "Mordtatbestand" (*supra*, n.15), 648 sq., considérant βουλεύσας comme équivalent de ἑκούσιος. Approche plus nuancée dans le livre du même auteur *Causa mortis. Auf den Spuren einer Redewendung* (Munich 1986) 63-77, où il penche en faveur d'une formule mettant en parallèle l'homicide commis de la propre main de son auteur et le fait d'avoir causé la mort de manière indirecte (projet, incitation, complicité; cf. *infra*, n.27), hypothèse écartée dans le même article, 647 sq.

23 Voir à présent M. Gagarin, "*Bouleusis* in Athenian Homicide Law," *Symposion 1988* (Cologne et Vienne 1990) 81-100.

24 A. Maffi, *RHD* 66 (1988) 114.

25 E. Cantarella, "Φόνος μὴ ἐκ προνοίας. Contributo alla storia dell'elemento soggettivo nell'atto illecito," *Symposion 1971* (Cologne et Vienne 1975) 293-319; *Studi sull'omicidio* (*supra*, n.3) 79-127.

26 A. Biscardi, *Diritto greco antico*, Milan 1982, 289 sq.

27 G. Thür, *JJP* 20 (1990) (*supra*, n.9) 152, en utilisant le texte d'Antiphon 6.16. Dans ce sens, déjà, R. S. Stroud (*supra*, n.11) 47: εἴτε τὸν αὐτόχερα εἴτε βολεύσαντα, améliorant la conjecture de H. J. Wolff, *Beiträge zur Rechtsgeschichte Altgriechenlands und des hellenistisch-römischen Ägypten* (Weimar 1961) 70 (version allemande de l'article "The Origin of the Judicial Litigation among the Greeks," *Traditio* 4 [1956] 31-85; ici 73): ἢ τὸν αὐτόχερα ἢ τὸν βουλεύσαντα.

la loi. La typologie de l'homicide ne commande pas la démarche du législateur. La suite du texte s'applique indistinctement à l'homicide involontaire et au meurtre, à une exception près: le cas du banni qui peut réintégrer le territoire attique lorsqu'il n'existe plus aucun des parents de la victime pouvant accorder le pardon, à condition qu'il s'agisse d'une condamnation pour homicide involontaire (ἄκων; lignes 14-19).

Cette hypothèse me parait franchement préférable à toutes celles qui partent du postulat selon lequel le problème de l'homicide devait être traité par Dracon en rapport avec l'intention de donner la mort. Je ne prétends évidemment pas trancher ainsi la savante controverse. Elle révèle, et c'est cela qui nous intéresse ici, la distance qui sépare les historiens et les juristes modernes du législateur athénien à l'aube de la cité. La distinction entre l'homicide involontaire (non intentionnel) et l'homicide volontaire et prémédité, meurtre et assassinat selon nos catégories modernes, n'intéresse pas Dracon, soit qu'il n'en ait point parlé, soit qu'il n'en ait fait état que de manière incidente. Non pas, cela va de soi, qu'il ait voulu laisser courir les meurtriers, mais parce que la poursuite et la sanction de l'homicide, à son époque, n'appelaient pas une intervention normative dans leur principe même.[28] Que l'homicide ait été commis avec ou sans intention de donner la mort, la poursuite appartient toujours à la famille de la victime qui exerce la vengeance de sang et qui peut accorder le pardon moyennant, en règle générale, le paiement d'un "wergeld." L'intervention de la cité se limite à déclarer la culpabilité de l'accusé et à lui permettre éventuellement d'échapper à la vengeance en choisissant l'exil. Tout cela était aussi évident pour Dracon que l'était pour Solon la vocation successorale du fils, qui n'est même pas mentionné dans sa loi sur les successions ab intestat, alors qu'il est le premier parent successible appelé à prendre l'*oikos* de son père décédé.[29]

En d'autres termes, Dracon n'a fait d'abord que préciser un point flottant de l'antique coutume qui présidait à la répression de l'homicide. Laissant à la famille vengeresse l'initiative de la poursuite, δίκη φόνου, et la décision en ce qui concerne le pardon à accorder éventuellement au coupable, il a fait savoir qu'un individu prétendant avoir causé la mort d'un Athénien sans le vouloir ou sans en avoir conçu le projet, ne pouvait pas forcer les parents de la victime à accepter la composition; en cas de refus, il ne lui restait que le chemin de l'exil.[30]

Ce fut l'occasion de préciser d'autres éléments encore: les compétences respectives des "rois" (l'archonte-roi et les *phylobasileis*, pense-t-on) et des éphètes; les modalités de la transaction (*aidesis*), tant pour celui qui tue lui-même que pour celui qui se rend coupable

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28 Pour la thèse selon laquelle l'introduction dans le droit athénien de la notion d'acte non intentionnel en matière d'homicide serait due à Dracon, voir surtout E. Ruschenbusch, "Φόνος: Zum Recht Drakons und seiner Bedeutung für das Werden des athenischen Staates," *Historia* 9 (1960) 129-54.

29 Démosthène 43.51. Voir, en dernier lieu, E. Karabélias, "La succession ab intestat en droit attique," *Symposion 1982* (Valencia 1985 et Cologne-Vienne 1989) 41-63. Je rappelle, à ce propos, les fines remarques de D. Daube, "Das Selbstverständliche in der Rechtsgeschichte," *ZSS* 90 (1973) 1-13.

30 Ce qui ne veut pas dire nécessairement, comme le suggère D. Nörr ("Mordtatbestand," 636), que Dracon ait voulu "privilégier" l'auteur de l'homicide involontaire. Cf. G. Thür, *ZSS* 102 (1985) (*supra* n.9), 509.

indirectement de la mort d'autrui; l'effet rétroactif de ces dispositions (peut-être seulement pour le cas spécifique de l'auteur de l'homicide involontaire qui réintègre le territoire attique dans les conditions prévues par la loi); l'interdiction prononcée contre le meurtrier de paraître dans les lieux publics (*prorrhêsis*) et la qualité des personnes appelées à poursuivre; la protection du banni qui respecte la loi de l'exil et la sanction de celui qui la transgresse; l'impunité en cas de légitime défense.[31] La mise à mort n'apparaît dans cet ensemble qu'à l'encontre du banni en rupture de ban. Elle n'est pas la sanction du meurtre.

On ne saurait nier l'ampleur de la loi. Mais il faut rejeter catégoriquement, à propos de ce travail, l'idée d'un "code pénal." Comme tous les législateurs archaïques, Dracon ne fait que fixer la coutume ancienne sur des points qui peuvent éventuellement soulever des doutes dans la pratique. C'est pourquoi Aristote a pu noter que "Dracon avait établi ses lois conformément à la constitution existante."[32] Autant dire qu'il n'a édicté contre l'homicide aucune sanction publique de nature à modifier les principes du régime en vigueur, celui de la vengeance modérée par l'exil. Moyen d'éviter la vengeance de sang sous le contrôle de l'État, l'exil apparaît ainsi, à l'époque de Dracon, comme la seule sanction publique de l'homicide, qu'il s'agisse d'un meurtre ou d'un acte commis de manière non intentionnelle. Sur ce point, les conclusions de Michael Gagarin paraissent solidement acquises.[33]

IV.

Reste à expliquer comment, de ce système vindicatoire mitigé on est passé à un régime bien plus draconien que celui de Dracon lui-même, et plus moderne à nos yeux, qui en différenciant la sanction selon l'intention—peine de mort pour meurtre, exil (probablement limité dans le temps) pour homicide involontaire—ne laissait au meurtrier qu'une possibilité limitée d'expatriation volontaire entre sa première plaidoirie, en réponse à l'accusation, et la réplique de l'accusation suivie du vote des juges.[34] Ce changement, attesté par les orateurs, est de taille, car il fait intervenir une pénalité publique nouvelle dans le système traditionnellement fondé sur les idées de solidarité familiale, de vengeance et de pardon. Désormais, l'accusé est placé devant un choix redoutable: plaider et risquer, soit l'acquittement soit l'exécution, ou fuir, en évitant l'issue aléatoire du procès, mais rester à jamais banni d'Athènes. A qui faut-il imputer la responsabilité de cette rigueur?

Une première réponse consisterait à soupçonner une intervention du législateur athénien. Cela ne revient pas nécessairement à ressusciter le fantôme du pénible "article

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31 Pour l'analyse de toutes ces dispositions, voir M. Gagarin, *Drakon* (*supra*, n.9), 30-64. Quant à la clause de rétroactivité, elle porterait selon G. Thür (*ZSS* 102 [1985] 511 et *JJP* 20 [1990] 146 n.15), non pas sur l'*aidesis* dans son ensemble (lignes 13-19), mais seulement sur le cas prévu aux lignes 14-19.

32 Aristote, *Politique* 1274b.

33 M. Gagarin, *Drakon*, 111 sq., suivi par G. Thür, *ZSS* 102 (1985) 509, et *JJP* 20 (1990) 146 sq. J'ai marqué mon adhésion à la thèse de Gagarin dans *RHD* 63 (1985) 413.

34 Démosthène 21.43 et 23.72 pour la dualité de la sanction; Antiphon 5.13 et Démosthène 23.69 pour l'exil facultatif du meurtrier. Cf. D. M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester 1963) 111 sq.

premier" dont nous nous sommes déjà heureusement débarrassés. On peut penser avec Gerhard Thür que le législateur a utilisé les ressources de la loi sans rien changer formellement à sa teneur.[35] La loi de Dracon prévoit en effet, pour le malfaiteur banni qui revient en Attique, l'alternative "tuer ou emmener" (ἀποκτένεν ἢ ἀπάγεν).[36] Si "emmener" dans ce contexte signifie "conduire devant l'autorité compétente pour qu'elle mette à mort le banni en rupture de ban," nous aurions là une référence à l'exécution du coupable, non pas comme sanction du meurtre, mais comme réaction de la cité contre la transgression de la loi de l'exil à la suite d'un meurtre ayant été sanctionné par le bannissement. A partir de là, il faudrait imaginer une sorte de "télescopage" de deux situations successives: le meurtrier qui ne choisit pas l'exil avant le vote des juges est assimilé à l'exilé en rupture de ban et mis à mort; il n'est pas nécessaire de l'"emmener" puisqu'il se trouve déjà devant l'archonte-roi. En même temps, on refuserait à la famille de la victime le droit à l'*aidesis*. En partageant entre l'Aréopage et les éphètes la compétence que ceux-ci exerçaient jusqu'alors conjointement avec l'archonte-roi et les *phylobasileis*, Solon aurait ainsi soustrait le meurtre intentionnel au régime de la vengeance en le rendant passible de la peine de mort, du moins dans le cas du malfaiteur qui n'aurait pas eu la prudence de fuir avant qu'il ne fût trop tard.

L'intérêt de cette hypothèse, c'est qu'elle situe la solution du problème dans le domaine de la procédure, permettant d'éviter l'inconvénient qui consiste à postuler une manipulation législative suspecte. Mais il n'est pas indispensable de remonter à Solon pour admettre qu'un tel mécanisme procédural ait pu se mettre progressivement en place dans la jurisprudence de l'Aréopage dès la fin du VI^{e} siècle et au cours du V^{e}, en aboutissant à la situation que nous restituent les textes des orateurs: peine de mort ou exil à vie comme sanction du meurtre. N'oublions pas que l'Aréopage n'est pas seulement une cour de justice; c'est aussi et d'abord un organe de gouvernement qui, même après les réformes d'Éphialte, garde d'importantes prérogatives dans ce domaine. Aristote nous informe à ce propos que l'Aréopage "châtiait souverainement de peines afflictives et d'amendes tous les délinquants."[37] Sans doute exil et peine de mort ont-ils coïncidé pendant un certain temps à l'encontre de meurtriers au choix des juges, celle-ci ayant finalement prévalu aux dépens de celui-là.

Les détails de ce processus nous échappent. Nous ne savons pas quand exactement est intervenu le partage des procès de sang entre l'Aréopage et les éphètes, et comment s'opérait dans la pratique l'attribution de compétences selon le caractère intentionnel ou non intentionnel de l'acte.[38] Aucune description de l'exécution d'un meurtrier n'étant conservée par nos sources, nous n'en connaissons même pas le mode: était-il supplicié, précipité dans

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35 G. Thür, *JJP* 20 (1990) (*supra*, n.9) 155-56.

36 Lignes 30-31, restituées d'après Démosthène 23.38.

37 Aristote, *Ath. Pol.* 3.6; cf. 8.4. Pour une analyse de ces deux textes, voir R. W. Wallace, *The Areopagos Council, to 307 B.C.* (Baltimore et Londres 1985) 94 sq.

38 Voir à ce propos, en dernier lieu, E. Heitsch, "Der Archon Basileus und die attischen Gerichtshöfe für Tötungsgerichte," *Symposion 1985* (Cologne et Vienne 1989) 71-87.

le Barathron ou invité à boire la ciguë?[39] Tout ce qu'on peut dire, c'est que, par rapport à Dracon, cet apparent progrès marque en fait un pas en arrière. Se substituant à la famille vengeresse, la cité radicale entend faire du meurtre une affaire publique. Mais elle brouille le mécanisme de l'exil et du pardon qui assurait l'équilibre du système antérieur. Interdisant le pardon à l'égard de l'accusé qui choisirait l'exil avant la procédure, tout en laissant subsister le principe de l'initiative du groupe familial pour déclencher celle-ci, elle ouvre la voie aux abus et ne satisfait probablement que les avocats qui y trouvent une source de profit.

En définitive, l'étude de la répression de l'homicide à Athènes nous laisse sentir l'épaisseur de la barrière que la permanence des idées au sujet des rapports entre l'individu, la famille et l'État dresse devant l'intervention de la cité dans les affaires qui mettent en jeu la vie des citoyens. Dans sa substance, la poursuite de l'homicide reste une affaire privée. L'exil, puis la peine de mort pour homicide volontaire, ne sont en fin de compte que des modalités de la vengeance de sang, incrustées dans un système qui demeure toujours profondément vindicatoire. Conclusion que confirmera à présent un coup d'œil sur l'histoire postérieure de la sanction de l'homicide dans le monde grec après les conquêtes d'Alexandre, telle que nous la connaissons dans le cadre de l'Égypte hellénistique grâce au témoignage des papyrus.

V.

Que les papyrus d'Égypte offrent à l'étude du droit pénal un vaste champ de recherche est une banalité dont personne ne contestera l'évidence. Curieusement, l'exploration de ce champ n'a suscité de la part des spécialistes qu'un intérêt limité. Dès 1916 un travail pionnier de Raphaël Taubenschlag ouvrait la voie.[40] Mais il a fallu attendre plus d'un demi siècle pour que son exemple soit suivi. Je pense au mémoire de Frédéric Bluche sur la peine de mort[41] et, plus près de nous, à la thèse d'Andréas Helmis sur le thème

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39 Les dix-sept squelettes de suppliciés découverts en 1915 dans un tombeau d'époque présolonienne sur le site de l'ancien Phalère (A. D. Keramopoulos, *Ὁ ἀποτυμπανισμός* [Athènes 1923] et les remarques de L. Gernet, "Sur l'exécution capitale," *REG* 37 [1924] 261-93 = *Anthropologie de la Grèce ancienne* [Paris 1968] 302-29; plus récemment, J. Vélissaropoulos, *Archaiologia* 11 [1984] 42-44, avec planches) sont-ils des meurtiers ayant subi la peine de mort par ἀποτυμπανισμός? C'est l'hypothèse d'E. Cantarella, "Per una preistoria del castigio," dans le volume cité plus haut (n.6), *Du châtiment dans la cité*, 37-73, selon qui (72) il pourrait s'agir là de l'exécution d'une sentence capitale par les anciens agissant comme agents "socialement autorisés" de la collectivité. Malgré les réserves qu'inspire cette idée pour l'époque de Dracon, et que je partage avec D. Nörr, "Mordtatbestand" (*supra*, n.15) 640 n.21, et G. Thür, *JJP* 20 (1990) (*supra*, n.9), 147 sq., il n'est pas exclu que l'*apotympanismos* soit devenu par la suite, comme l'admet notamment D. M. MacDowell (*Athenian Homicide Law*, cité *supra*, n.33), le mode courant d'exécution de la peine de mort pour meurtre à l'époque classique, les meurtriers étant ainsi assimilés aux κακοῦργοι à qui cette pénalité s'appliquait normalement. Peut-être y avait-on recours concurremment avec la ciguë (κώνειον), plus conforme aux tendances humanisantes de cette époque. Voir, à ce propos, la thèse de J. J. Farsédakis, *Θανάτῳ ζημιοῦν. Contribution à l'étude du droit criminel athénien à l'époque classique* (Strasbourg 1978) 199 sq., 208 sq.

40 R. Taubenschlag, *Das Strafrecht im Rechte der Papyri* (Leipzig et Berlin 1916) incorporé dans le manuel du même auteur *The Law of Greco-Roman Egypt in the Light of the Papyri*, 2e éd. (Varsovie 1955) (réimpr. Milan 1972), 429-78.

41 F. Bluche, "La peine de mort dans l'Égypte ptolémaïque," *RIDA*, 3e sér., 22 (1975) 143-75.

"Crime et châtiment dans l'Égypte ptolémaïque."[42]

Sous ce titre évocateur, dont j'assume volontiers la responsabilité pour l'avoir suggéré à l'auteur, on lit les résultats d'une passionnante enquête aboutissant à tracer les contours d'un modèle pénal autonome. L'autonomie du modèle ptolémaïque réside dans la concomitance de deux sphères distinctes entre lesquelles se répartissent les modalités de la répression pénale dans la monarchie lagide. D'une part, une répression sévère, édictée par une législation rigoureuse, frappe toutes sortes d'atteinte aux intérêts du souverain. Revenus du trésor, règles qui organisent les rapports de la monarchie avec le clergé indigène, sécurité des voies de communication, protection des sujets du roi contre les abus des fonctionnaires—voilà les principales facettes d'une sphère de pénalité "publique" ou, plus exactement, monarchique. D'autre part, une vaste aire de comportements délictuels et de réactions à ces comportements reste en dehors de toute intervention étatique. La monarchie s'abstient de légiférer ou d'organiser la poursuite. Tout au plus propose-t-elle un cadre judiciaire dans lequel les conflits qui surgissent dans cette aire peuvent trouver un dénouement.[43]

Face à la sphère de pénalité "publique," relativement homogène, le domaine pénal que l'État laisse évoluer librement est loin de former un bloc uniforme. Il englobe aussi bien la loi et la justice dans les trois cités grecques—Alexandrie, Ptolémaïs, Naucratis—que le règlement des différends entre individus dans la *chôra*: une minorité d'immigrants hellénophones, qui suivent les règles d'une *koiné* juridique essentiellement coutumière, et une majorité d'indigènes qui restent fidèles, avec la complicité de la monarchie lagide, aux traditions de leur droit national. A cela s'ajoutent des groupes, plus ou moins autonomes sur le plan de leur vie juridique, comme les Perses ou les Juifs, ces derniers ayant à leur disposition une loi ancestrale traduite en grec et élevée au rang de loi royale à leur usage par le biais de l'organisation judiciaire.[44] Le terme "sphère de pénalité privée" ne peut s'appliquer à cet ensemble que de manière conventionnelle, par opposition au domaine dont le roi se réserve l'exclusivité. En somme, cette dualité qui marque le domaine pénal dans l'Égypte lagide reproduit celle qui caractérise la structure du droit ptolémaïque lui-même: au partage qui oppose la loi royale, incarnée par les *diagrammata* et les *prostagmata* des Lagides, aux *nomoi* grecs, dans les cités et dans la *chôra*, et aux *nomoi* égyptiens, "le droit du pays," correspond au niveau de la répression pénale le dualisme de deux sphères de pénalité, l'une fortement étatisée, l'autre dont l'État se désintéresse.

La ligne de séparation entre ces deux sphères n'est pas toujours très nette; des interférences et des transferts réciproques sont possibles. De même, il n'est pas toujours

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42 A. Helmis, *Crime et châtiment dans l'Égypte ptolémaïque. Recherches sur l'autonomie d'un modèle pénal* (thèse de doctorat d'État en droit, Université de Paris X-Nanterre, Paris 1986) 409p. (polyc.).

43 J'ai résumé l'état de la question dans mon article "Droit et justice dans le monde hellénistique au IIIe siècle av. n.è.: expérience lagide," *Mnêmê G. A. Petropoulou*, I (Athènes 1984) 53-77.

44 Sur ce dernier point, voir mon article "'Livres sacrés' et justice lagide," *Acta Univ. Lodziensis, Folia Iuridica* 21 (Mélanges C. Kunderewicz 1986) 11-44; je reviens sur ce sujet dans mon livre *Les Juifs d'Égypte, de Ramsès II à Hadrien* (Paris 1991).

facile de dire quels sont les modèles dont s'inspire la politique législative des Lagides en matière pénale. Dans certains cas, elle perpétue les traditions locales (par exemple l'interdiction, sous peine de mort, de pêcher certains poissons sacrés).[45] Ailleurs, elle apparaît comme héritière, non pas de telle ou telle cité grecque, mais de ces procédures disciplinaires anciennes dont Louis Gernet soulignait l'importance dans l'organisation du droit pénal classique.[46] Souvent le droit pénal ptolémaïque n'est qu'un prolongement du droit militaire macédonien qui à son tour évoquait des traditions archaïques attestées par Homère. La continuité est incontestable, bien qu'elle passe par des chemins obliques. Il en va de même pour la séparation entre le "privé" et le "public." Le problème de la répression de l'homicide est, à cet égard, particulièrement symptomatique.

VI.

Aucune loi royale actuellement connue n'énonce la sanction de l'homicide. Il est difficile d'attribuer ce silence au seul hasard des trouvailles.[47] Au contraire, plusieurs indices montrent qu'il s'agit d'un désintérêt voulu. Le roi ne s'intéresse pas à la vie privée des habitants du royaume—union conjugale, famille, héritages. En l'absence d'une norme législative, le contrat écrit et la coutume matrimoniale fixent les conditions de validité du mariage.[48] Il arrivait sans doute qu'un mari jaloux trouvant sa femme dans les bras d'un voisin tuât le rival: pourquoi les maris trompés seraient-ils sur les bords du Nil plus indulgents qu'ailleurs? Mais aucune loi n'excusait son geste à l'instar de celle qui, à Athènes, rendait légitime la mise à mort du *moichos*.[49] L'infidélité de l'épouse n'est qu'une cause de divorce éventuel aux torts de celle-ci, prévue par le contrat de mariage. Celle de l'époux également, y compris le cas d'une relation amoureuse avec un jeune homme.[50] Ici non plus, aucune loi comparable à celle qui, à Athènes, protégeait un mineur contre les agissements indignes d'individus dépravés ou la lubricité d'un esclave ne pouvait être invoquée.[51] Il en va de même, par exemple, pour le vol et les violences entre particuliers;

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45 *P. Yale* I 56 (100 av. n.è). Cf. mon compte rendu *RHD* 47 (1969) 90-91; A. Helmis, *Crime et châtiment* (*supra*, n.42), 36 sq.

46 L. Gernet, article précité (*supra*, n.6) 18 sq.

47 On ne peut pas non plus l'expliquer en affirmant que, la pénalité publique étant "évidente," elle se passait d'une disposition législative (*sic* Fr. Bluche, mémoire précité, 170). Nous avons vu plus haut que, pour Dracon, cette "évidence" n'impliquait nullement, contrairement à ce qu'avait cru longtemps la doctrine dominante, une sanction capitale pour le meurtre. Je corrigerais volontiers aujourd'hui dans ce sens le raccourci que j'ai employé dans mon article "Droits de l'individu et justice lagide," *RHD* 65 (1987) 345-56, particulièrement 349, où la mort infligée intentionnellement est présentée comme "un acte punissable."

48 Voir mon article "La structure juridique du mariage grec," *Scritti O. Montevecchi* (Bologne 1981) 231-68, et *Symposion 1979* (Athènes 1981 et Cologne-Vienne 1983) 39-71.

49 Voir D. Cohen, "The Athenian Law of Adultery," *RIDA* 3e sér., 31 (1984) 147-65. Je rappelle le mémoire inédit de J. Farsédakis, *La "moicheia" en droit grec classique* (Strasbourg 1970; cf. *RHD* 51 [1973] 498).

50 *P. Giss.* I 2 (173 av. n.è.), ligne 21. On peut se demander s'il y a un rapport entre cette clause, unique dans les papyrus, et le fait que ce contrat atteste par ailleurs, pour l'Égypte ptolémaïque, le droit de la femme de se donner elle-même en mariage (*auto-ekdosis*): voir mon article précité *Symposion 1979* (n.48) 57 sq., à compléter à présent, pour l'Égypte romaine, par le *P. Oxy.* XLIX 3500 (IIIe s. de n.è.); cf. *RHD* 61 (1983) 161.

51 Eschine, *C. Timarque*, 139. Cf. E. Cantarella, "L'omosessualità maschile nel diritto

l'État lagide abandonne la sanction de ces comportements délictuels à la pratique contractuelle, aux statuts des associations, aux lois poliades d'Alexandrie.[52] L'homicide fait partie de cet ensemble de relations individuelles et familiales qui sont laissées à l'initiative des particuliers et des familles sans qu'une sanction étatique préétablie indique d'avance les conséquences légales.

On a pensé pouvoir invoquer en sens inverse les mesures d'amnistie que nous connaissons par le recueil d'ordonnances royales de 118 av. n. è. qui marquent la fin des guerres fratricides entre Ptolémée VIII, le "Ventru," et sa sœur (et épouse) Cléopâtre II. Les souverains décident, lisons-nous dans la première de ces ordonnances, d'amnistier les habitants du royaume de toutes sortes d'infractions, à l'exception de gens accusés de meurtres volontaires et de sacrilèges.[53] On pensait que c'était là l'expression d'une politique pénale rigoureuse réservant aux meurtres et sacrilèges un traitement particulièrement sévère en les privant du bénéfice de l'amnistie. Mais si l'on suit l'argumentation d'Andréas Helmis une autre conclusion s'impose: le roi s'abstient d'intervenir dans ces deux domaines qui se situent en dehors de la sphère de pénalité publique ou à la lisière de celle-ci.[54] Comme le sacré, la vie humaine échappe à son autorité. Il n'y a pas d'amnistie, car il n'y a pas de sanction publique à lever. L'État se refuse à déclarer l'impunité des offenses dont le châtiment ne lui appartient pas.

L'argument éventuellement tiré de l' "étatisme" ou du "despotisme" des Lagides est sans valeur à ce propos. L'étatisme n'implique pas l'idée d'une répression pénale généralisée des crimes et délits contre les biens et les personnes. Tout au plus, la pression de l'État fera que, en ce qui concerne l'homicide, la vengeance de sang devra systématiquement céder la place à la compensation pécuniaire. L'État lagide, on l'a dit, se limite à protéger les intérêts du roi et le bon fonctionnement de l'économie royale. Pour peu que soient remplis les devoirs fiscaux qu'il impose aux habitants du royaume, ceux-ci sont sûrs de pouvoir vivre sous le régime de leurs coutumes nationales que le roi place sous la protection des organes de la justice et de l'administration. En comparaison avec l'Athènes des orateurs, la monarchie des Lagides apparaît à cet égard plus "libérale" que ne l'était la cité grecque.

Cela ne signifie pas que l'État hellénistique soit tout à fait indifférent à la sécurité de l'existence de ses sujets. Le règlement d'un conflit qui surgit à la suite d'un homicide emprunte normalement la voie d'une procédure judiciaire devant les organes de la justice institués par la monarchie. Aux plaintes pour coups et blessures pouvant entraîner la mort de la victime, dont on disposait jusqu'ici, s'ajoute à présent un papyrus de Cologne édité en 1987, plainte pour homicide volontaire adressée au chef de la police locale par le fils de la

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ateniese," dans Dimakis, éd., *Eros et droit en Grèce classique* (Paris 1988) 13-41.

52 Détails et analyse: A. Helmis, "Despotisme et répression: les limites du pouvoir ptolémaïque," *Symposion 1988* (Cologne et Vienne 1990) 311-18.

53 *P. Tebt.* I 55 = *C.Ord.Ptol.* 53 bis (118 av. n.è.), lignes 1-5.

54 A. Helmis, *Crime et châtiment* (*supra*, n.42), 149 sq.; 164 sq.

victime, une femme décédée à la suite d'une agression; il demande que l'agresseur soit traduit devant la justice pour être reconnu coupable d'homicide: ὅπως ἔνοχος γένηται περὶ τοῦ φόνου.[55] En l'occurrence, nous avons affaire à un Égyptien, qui signe en démotique; mais il est certain qu'un Grec n'aurait pas agi autrement.

Un texte comme celui-ci montre bien que dans l'Égypte lagide, tout comme dans l'Athènes de Dracon et des orateurs, l'initiative de la poursuite du meurtrier appartient à la famille de la victime; il montre aussi que la famille accusatrice peut compter sur la coopération de la police et de la justice royales pour la mise en œuvre de cette poursuite. En revanche il n'apporte aucune modification aux conclusions concernant l'absence d'une sanction publique de l'homicide. La justice pourra proclamer la culpabilité de l'accusé, mais elle ne pourra prononcer à son encontre aucune peine afflictive. Tout au plus reconnaîtra-t-elle aux proches parents le droit à la *praxis* pour la réparation du dommage subi. Celle-ci prendra la forme du paiement d'une somme d'argent, sorte de "wergeld" détaché des rituels qui caractérisaient les procédures archaïques en matière de composition.[56] Que de tels règlements aient été courants dans la pratique encore sous l'empire romain, une lettre privée du IIe s. de n. è., où l'on voit proposer une rançon de 1200 drachmes pour la réparation d'un homicide involontaire, peut en témoigner. Je lui ai consacré un commentaire dans un travail de jeunesse.[57]

Au terme de cet essai, je limiterai mes conclusions à deux observations d'ordre général. La première tient à l'indéniable permanence des solutions juridiques qui, de la cité classique à la monarchie hellénistique, singularisent la répression pénale en matière d'homicide. Bien entendu, on souhaiterait pouvoir dépasser l'axe "Athènes-Égypte" que nous avons retenu ici en raison de l'abondance relative des sources. Mais cela n'aurait probablement pas modifié le tableau qui vient d'être dressé.[58] Tout au long de cette période, la répression de l'homicide conserve, on le voit, son caractère propre, imprégné d'éléments vindicatoires, tant pour l'action, qui n'est jamais publique, que pour la sanction, qui ne connaît qu'une étatisation partielle et passagère. Dans la perspective historique qui tient compte de toute l'expérience étatique grecque, de la cité classique à la monarchie hellénistique, les pénalités publiques introduites par la jurisprudence de l'Aréopage

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55 *P. Köln.* VI 272 (IIIe siècle av. n. è.), éd. K. Maresch. Cf. *RHD* 67 (1989) 533, et 68 (1990) 271.

56 Comme le note à ce propos A. Helmis, *Crime et châtiment* (*supra* n.42) 166, le système ptolémaïque, qui exclut la contre-violence comme réponse à la violence ne laissant la place qu'à la compensation, diffère du régime vindicatoire primitif qui laisse subsister le choix entre la vengeance et la compensation. On voit par conséquent que "l'État ptolémaïque ne s'éclipse pas, mais reconnaît par son abstention l'existence d'espaces juridiques à moindre pression" (*ibid.*).

57 J. Modrzejewski, "Quelques remarques à propos de l'homicide involontaire et de la rançon dans l'Égypte romaine," *Iura* 8 (1957) 93-101 (et en polonais, *Meander* 12 [1957] 294-302).

58 On connaît mal la sanction de l'homicide dans le monde grec en dehors d'Athènes. On se demande, par exemple, quelle pouvait être la sanction de l'homicide dans les lois d'Androdamas de Rhégium, législateur des Chalcidiens de Thrace, seul parmi les nomothètes anciens cités par Aristote (*Politique* 1274a-b) à qui le Stagirite attribue des "lois sur le meurtre." La peine de mort pour meurtre paraît bien être une particularité du droit athénien. Voir K. Latte, "Todesstrafe," *RE* Suppl. 7 (1940) col. 1599-619.

apparaissent, non pas comme l'aboutissement d'une évolution, mais comme un accident de parcours, assez malheureux sinon aberrant.[59] L'homicide en droit grec reste une affaire essentiellement privée.

Que les Grecs ne soient pas parvenus, dans ce domaine, à des solutions plus "modernes," selon nos catégories actuelles, n'est pas, et ce sera ma deuxième remarque finale, une question de droit mais de mentalité. Ce qui est en jeu, c'est la conception même qu'ils ont eu de la vie humaine et du prix qui s'y attache. L'homme a beau être la "mesure de toutes choses" (πάντων χρημάτων μέτρον), il n'en demeure pas moins, dans l'échelle des êtres, qu'un élément intermédiaire entre les dieux et les bêtes. Selon qu'il s'éloigne ou qu'il s'approche de l'une ou de l'autre limite, le prix de sa vie varie: la vie d'un citoyen n'a pas la même valeur que celle d'un étranger ou celle d'un esclave. La mort d'un homme est une souillure pour la cité, mais il n'y a rien dans les cadres mentaux grecs qui rappelle la sainteté de la vie humaine érigée à la hauteur d'un principe universel par la tradition biblique et, à sa suite, par l'Occident chrétien. Le rationalisme grec trouverait extravagante l'affirmation qu'une seule vie humaine puisse avoir le même prix que l'humanité tout entière. La vie des citoyens intéresse la cité, celle des sujets du royaume n'est pas indifférente au roi, mais elle reste d'abord une affaire privée des individus et des familles. Il ne faut pas mesurer l'attitude de l'État grec à l'aune de notre éthique judéo-chrétienne et lui reprocher de n'avoir pas fait ce qui n'a jamais été sa vocation: se constituer gardien du tabou qui sanctifie la vie de l'homme quel qu'il soit.[60]

Ainsi l'étude de la sanction de l'homicide dans le monde grec et hellénistique débouche sur une réflexion à propos de la contradiction entre deux conceptions de la condition humaine, inhérentes à notre civilisation: la conception grecque, qui inscrit l'homme dans l'univers, entre les dieux et les bêtes, comme une valeur, certes importante, mais somme toute relative, et la conception juive, ou judéo-chrétienne, qui, avec une totale rigueur, assigne à l'homme une place à part dans l'œuvre de la création. Nous sommes loin de Dracon et des papyrus grecs. Du moins personne ne pourra nous reprocher de nous enfermer égoïstement dans l'enclos étroit d'un débat de spécialistes.

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59 Un "corps étranger" selon G. Thür, *JJP* 20 (1990) 144 (*supra*, n.9).

60 Il est significatif à cet égard que, dans un milieu oriental où persistent de nombreux éléments d'un système pénal admettant la composition pécuniaire en remplacement de la vengeance de sang, la loi biblique interdit expressément le rachat du meurtre: *Nombres* 35.31-33; cf. Z. W. Falk, *Hebrew Law in Biblical Times* (Jérusalem 1964) 80 sq.

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A Historical Approach to Drakon's Law on Homicide

Our earliest evidence for law in Attika—probably also in most other parts of Greece, but we are less well informed about their history—comes from situations of crisis and itself tends to generate change. Law in practice, in societies that have not acquired the idea of judging by reference to a written code, is flexible and situational. Principles may be indirectly expressed (Bourdieu 1977, 16), reference may be made to well-known precedents, but only as part of a discussion focused essentially on the particular case at issue, in its contemporary social context. To write law down is—inevitably though not deliberately—to abstract norms from the contexts in which they are selectively cited, and to generalize about the proper solutions for legal problems without regard to wider social circumstances. Written law does not require new linguistic forms, but it uses language in a new way, by detaching it from speakers and context. It conceals its own character as historically situated speech, as a part of socio-political practice, and claims to exist outside history and time, as a guide to practice. Solon explains the historical circumstances and aims of his legislation in his poems, but does not seem to have referred to them in the text of his laws. The distinction between decrees as regulations intended to deal with specific current problems and laws designed to have permanent validity, which the Athenians formulated in 403 B.C., proved impossible to observe consistently in practice. All legislation takes place in a historical context and is influenced by it; it is a contradiction inherent in all dispute-settlement that resolution of a crisis in social order has to be legitimated by reference to the supposedly timeless order whose imperfections the crisis has revealed. To put the point another way, the ideology underlying civil law implies that disputes are unnecessary, since law aims to provide an unambiguous solution to every problem; but if that were possible, would we need law?[1]

In looking at early Attic law, then, we should pay careful attention to the historical circumstances in which laws were written down, so far as we can reconstruct them, and try to distinguish provisions designed specifically to deal with current problems from more general maxims that set the solution of these problems in a legitimizing framework as part of the restoration of a timeless social order; we must also ask how written formulation would have simplified practice, suppressed some contradictions and generated others, and

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1 This is the problem posed at the beginning of Plato's *Republic*. Plato rejects the view that competing models of social order are produced by groups with conflicting interests (cf. Jhering), and instead maintains that law is needed to control man's baser nature, which implies that all law is at base penal (cf. Humphreys 1985, 352; 1988, 477). Weber appears to me to follow Jhering, though without mentioning him; he is of course also influenced by Marx. Maine and Durkheim seem to think that legal problems arise from the complexity of modern society rather than from any inevitable conflict in interests. Recent philosophers of law tend to start from a transactionalist base, attributing conflicts of interest to the variety of individual aims and life-chances rather than analysing social structure; they admit that law implies utopian ideals (e.g. Dworkin, ch. 6).

thereby changed subsequent behavior.

In the case of Drakon, it appears to me to be the consensus of opinion among students of early Greek law that he did not formulate a comprehensive "code," but only regulations on homicide. I deduce this not from explicit statements, which can be found on both sides of the argument, but from the complete absence of any serious attempt to construct a plausible historical account of the circumstances that could have led Solon, perhaps as little as twenty-seven years after Drakon's legislation, to promulgate a new code in which nothing was retained from the Drakonian laws except the regulations on homicide.

Nevertheless, it may be advisable to explain briefly why we do not need to take the evidence for a Drakonian code, such as it is, seriously.

General statements that Drakon formulated a comprehensive code clearly project back onto him a concept of the activities of the lawgiver derived from Solon and perhaps from monumental collections of inscribed laws such as the Gortyn code. We need only consider quotations from Drakon's laws, or specific statements about their content, that do not obviously come from the law on homicide.[2]

It is already significant that no preserved quotation from Solon's poems or laws mentions Drakon. The view that Solon replaced a whole earlier code with significantly different provisions would surely imply that dissatisfaction with Drakon's laws was a salient feature of the Solonian crisis; but there is no trace of this in our evidence on Solon, or in the Atthidographic tradition. Oligarchs of the late fifth century who recommended return to the "ancestral constitution" of Drakon clearly knew almost nothing about him and were not interested in research.[3]

References to an oath prescribed by Drakon, and to a payment of twenty oxen (*eikosaboion*), may have come from the homicide law.[4] Twenty oxen was the price of the slave-girl Eurykleia (*Odyssey* 1.429-31), and the *axones* containing laws on homicide may well have included provisions for payment of compensation when a slave was killed. The preserved text of Drakon's law (*IG* I^3 104, *SEG* 32.14) may have contained a reference to oath-taking in l.43, and we would expect the provisions concerning the oath to be taken by both parties reported by Demosthenes (23.67-9) to appear on the *axones*. There may also have been provision for an oath to be sworn by the *ephetai*.

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2 The law quoted in *Ath. Pol.* 16.10 is better left out of the question, since a law prescribing *atimia* for those who aim at tyranny or aid would-be tyrants need not belong to a comprehensive code. The preamble θέσμια τάδε Ἀθηναίων καὶ πάτρια need not imply re-statement of a law that has previously been written (I am not persuaded by Gagarin 1981a), and *patrios* as meaning "ancestral" in a collective sense seems to be first used in opposition to *xenos* (cf. Hdt. 1.172), before it comes to mean "traditional." I am inclined to agree with Davies (1973) that this law should belong to the late 5th c.

3 Cf. Rhodes on *Ath. Pol.* 4.2-4.

4 Oaths: Schol. *Il.* Venet. B 15.36; Lucian *de Cal.* 8. [Dem.] 47.72 gives further information on the prosecutor's oath. On Thür's view that δικάζειν τὸς βασιλέας refers to formulation of the oaths to be sworn by both parties (1987, 1990) see below, nn.15, 39. It is not clear to me whether Thür thinks that explicit regulations concerning the *diômosia* were ever incorporated into Athenian homicide law or, if so, when. 20 oxen, Pollux 9.61, apparently deriving from an Atthidographer's discussion of early coinage, perhaps Androtion (cf. Jacoby on *FGH* 328 F 200). Cf. Ruschenbusch 1960, 137; Stroud, 81 n.64. The reference to a law of Drakon in Aisch. 1.6 is a valueless late insertion into the text.

The statement that Drakon punished theft by death may well derive from the inclusion of some types of aggravated theft (Cohen 1983, 52-61, 67-83; cf. Stroud 78) in the list of flagrant offences for which the offender caught in the act may be killed with impunity, traces of which are preserved in *IG* I^3 104.33-8. The provision that a man caught in sexual interference with a woman in another man's *oikos* could be killed with impunity comes into the same category.[5] There may have been, as I shall argue below, some revision to the procedure for dealing with those who killed offenders caught *in flagrante* at a date later than Drakon's legislation, but all laws concerning homicide were popularly attributed to him, and these provisions will certainly have contributed to his reputation for extreme severity, which probably existed already by the fifth century.[6] The speaker of Lysias 1, who claimed that in killing an adulterer caught in his house he was acting according to law, was aware that jurors would consider the law archaic and barbarous. The rule that even a man who killed non-intentionally had to leave Attika will also have seemed severe to fifth-century Athenians, who construed exile as a penalty. It is likely also that the penalty of *apotympanismos*, a form of crucifixion to which underclass criminals of various types (*kakourgoi*) were condemned, was attributed to Drakon on the basis of its archaic appearance.[7]

The only other thing we are told about Drakon's laws is that he punished *argia* with death, whereas Solon changed the penalty to one hundred drachmas for the first offense and *atimia* for the third. Part of this information—we cannot tell how much—came from Lysias. The law on *argia* was a favorite stamping-ground for ancient moralists; it probably originally penalized landowners who left their land uncultivated, but was already by Herodotus' time (2.177) interpreted as a measure designed to deal with vagrants. The idea of lighter penalties for first offenders is not attested before the fourth century, and altogether it would be unwise to attach weight to this text as evidence of Drakon's activities.[8]

Recognition that Drakon need not be credited with a comprehensive code clearly has

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5 Dem. 24.113-4 attributes the regulations on flagrant theft to Solon. Sexual interference, Dem. 23.53; see below on cases tried at the Delphinion. Lys. 1.30 cites this law from "the stele on the Areiopagos." Sealey 1984 argues that the protection accorded to *pallakai* (concubines) kept for the purpose of producing free children (or rather, with an agreement that their children are to be free) should be pre-Solonian, but the children are not said to be *gnêsioi*. On the relation between *moicheia* and other sexual offences see Cohen 1984; the term *moicheia* is not used in the law cited by Demosthenes, but I am inclined to think that in the time of Drakon and Solon *moicheia* was not restricted to adultery.

6 Ar. *Rhet.* 1400b19, if Herodikos is emended to Prodikos (cf. Stroud 66 n.5).

7 Keramopoulos 106-8; Gernet 1968, 306 n.18 (1924).

8 *Lex. Rhet. Cantab.* s.v. *nomos argias* = Lys. F. XVIII/10 Th., XI G. Theophrastos attributed the law to Peisistratos (Plut. *Sol.* 31.5), Herodotus thought Solon got it from Egypt. Wilamowitz I 255, n.146, followed by Lipsius 340, associated the law with Solon's provisions on *paranoia*, leaving land untilled being proof that a man was not fit to control his property, but I wonder whether it is not related to the economic crisis of Solon's day; on this view a landowner who failed to work arable land would be penalized, perhaps by *atimia* in the early sense as discussed below. Hdt. 5.28.9 possibly provides some tangential support for this view. Wilamowitz thought speculation on this point might come from the milieu of Demetrios of Phaleron, but Phanodemos (*FGH* 325 F 10) may also be a possibility. Plato has progressive penalties in e.g. *Laws* 868a.

a bearing on the question of the scope of his legislation on homicide. Stroud (37-8, 40) and Gagarin (1981 ch. 6) have cogently argued that Drakon's law began with the pronouncement, "Even if a man kills another non-intentionally, he is to go away" (καὶ ἐ ἀμ μὲ 'κ [π]ρονοί[α]ς [κ]τ[ένει τίς τινα, φεύγ]ε[ν), and that this implies *a fortiori* the obligation to leave in the case of intentional homicide. Nörr and Thür (1990) have gone on to draw what seems to me too the obvious conclusion, namely that Drakon's text did not contain everything we would expect to find covered in a law on homicide. We have to ask why Athens needed written regulations concerning homicide in the late seventh century and relate Drakon's provisions to the historical situation in which he found himself. What was written was, on any interpretation, only part of the ongoing discourse on legal matters in archaic Athens. Instead of imposing on the evidence later conceptions of what Drakon's law must have contained, I prefer to take his apparent silences as part of our evidence about his historical situation. Plutarch's statement that Drakon's law did not mention the Areiopagos (*Solon* 19.3) provides support for the view that he did not legislate on deliberate homicide.

Perhaps about fifteen years before Drakon's legislation,[9] the Athenian Olympic victor Kylon had attempted to seize the Akropolis and make himself tyrant. After fighting, a number of his supporters had taken sanctuary and had eventually surrendered in return for a promise that their lives would be spared (ὑπεγγύους πλὴν θανάτου, Herodotus 5.71). They had nevertheless been put to death. This will have aroused vivid resentment among their kin and friends; and the whole affair raised numerous questions about the proper procedures for dealing with homicide. When fellow-members of the same community killed each other in civil war, could the sons or other kin of the dead claim compensation or exact vengeance? If the magistrates of the city gave orders in questionable circumstances for an execution to be carried out, could the kin of the victims later proceed against them as having planned the killing (*bouleusis*)?[10] Could those who actually carried out the execution claim that they were blameless, having only acted under orders? Had some of the killers, while fighting was still going on, taken advantage of the melée to settle old scores or pursue private interests? Or were those who brought accusations doing the same, without any solid evidence that the accused had acted as they alleged?

The situation on the one hand resembled that depicted in *Odyssey* 24.420-60, where the kin of the suitors slain by Odysseus and Telemachos gather in the agora on Ithaca and try to rouse support for a retaliatory attack on the palace. It is particularly noteworthy that in this passage both sides in the debate put forward a mixture of not

9 Kylon's coup perhaps 636, Drakon 621/0: Stroud 66-74, Rhodes 79-84. A recent discussion of the details in Rosivach 247-8.

10 Responsibility for killing the suppliants was laid either on the archon Megakles or on the *prytaneis* of the *naukrariai*; I agree with Lambert that the latter were representatives of the 48 Attic districts (probably one per tribe for each month) who served on 24-hour duty in the Agora, like the presiding trittys of Kleisthenic tribes later. His interpretation of *tote* seems to me unnecessary. Figueira 1986 does not explain why the *prytaneis tôn naukrarôn* should be involved in the Kylon affair. On the oral traditions concerning it see R. Thomas 272-80.

entirely consistent arguments; Odysseus is accused of responsibility for the death of the Ithacans who followed him to Troy as well as that of the suitors, Medon's speech in defense of Odysseus claims both that he acted legitimately against men who had destroyed his property and dishonored his wife (458-60), and that what he did was the will of the gods (443-6).[11] On the other hand, the circumstances in Drakon's day resemble the better documented situation in 403, when attempts were made to take revenge on the Thirty and their supporters under the provisions of the homicide law. It was expressly stated at that time, in the agreement between Athens and the oligarchs in Eleusis (*Ath. Pol.* 39.5), that only those who killed with their own hands could be prosecuted; accusations of *bouleusis* against those who had ordered killings were not to be countenanced, except in the case of principal power-holders who had not undergone *euthynai*. But the speaker of Lysias 13 tried to circumvent this ruling, and he claims to be able to quote a precedent.[12]

Questions about responsibility for death must have arisen frequently in Greece after civil wars or the end of regimes whose legitimacy was questionable.[13] *Inschriften von Ilion* 25 (Frisch; *OGIS* 280) rules that any juror who has voted for the death penalty in a trial held under a tyrant or oligarchy can be prosecuted for homicide if the defendant was put to death; even if (*kai ean*!) there is an acquittal, anyone who voted for the death penalty is to be condemned to perpetual *atimia* and hereditary exile. *Bouleusis* will have been a prominent issue in such situations either because those who carry out executions put the blame on the magistrates who gave them their orders or because magistrates claim not to be liable to homicide charges, since they have not physically caused death, and the victim's kin counter with charges of *bouleusis*. The accusation of *bouleusis* is still used against a defendant in an official position (*chorêgos*) in the late fifth century in Antiphon 6.[14] In classical times the procedural association of *bouleusis* with non-intentional killing (in the Palladion court) will have seemed plausible because a defendant accused of *bouleusis* when acting in a private capacity (as in Antiphon 1) might well claim not to have intended the consequences of his orders. This, however, was a later development.

It seems likely enough that many of the questions with which Drakon was concerned would be raised with particular insistence at some interval after the defeat and massacre, when sons of the slain had grown to manhood, when those who had

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11 Orestes too, in the *Eumenides*, claims to have acted justifiably because he is carrying out the wishes of Apollo. A mixture of different claims that homicide is non-culpable such as we find in Medon's speech occurs in later homicide defenses also.

12 Precedent, 13.56; Lys. 10.31 refers to another homicide case from the same period. The requirement that the speaker of Lys. 13 should add the words *ep' autophôrôi* to his indictment seems to be a compromise; he could not say that the accused had killed with his own hand (13.85-7). It is not in my view a general rule for *apagôgê* (contra, MacDowell 132-3). Other attacks on oligarchs in the same period in Lys. 7, 12, 18.

13 They are currently being raised in the (ex) DDR (Dec. 1, 1990).

14 My understanding of Antiph. 6.16 and Andok. 1.94 is that Drakon made no distinction in procedure or outcome between killing with one's own hand and *bouleusis* (indeed, he probably did not envisage more than one homicide court). Cf. Gagarin 1988, who argues convincingly that *bouleusis phonou* is not a technical term for a class of accusation

sympathized with Kylon or were related to his supporters gathered confidence to voice their claims in public, perhaps when some of the killers who had initially left Attika began to explore the possibility of return.

Drakon, then, is preoccupied in the first place with killers who claim to have acted defensibly. His phrase μὲ 'κ προνοίας, non-intentionally, is well chosen to cover the variety of claims that will have been made: that the killer acted in self-defense, that he had no personal animosity against his victim, that he was acting under orders. Nevertheless, Drakon rules, the accused must stay away from Attika until he has persuaded the kin of the victim to agree to accept compensation and pardon him (*aidesis*). Anyone who has been proclaimed a killer by the *basileis*[15] is bound by this rule, whether accused of killing in person or of *bouleusis*. The specification that all those accused are to leave Attika is not a penalty but a precaution; provided they stay away from places where they might reasonably expect to meet kin of their victims—border markets, games, Amphiktyonic festivals—their lives are to be protected. The victim's kin are not entitled to seek out the killer beyond the borders of Attika in order to take vengeance.[16]

Since all killers are to leave Attika, whether they have a defense to advance or not, the question arises whether they were expected to leave before or after trial—or, to put it another way, whether a homicide case could be heard in the absence of the defendant (cf. Nörr). The specification that Drakon's regulations concerning *aidesis* are to apply retrospectively seems to me to indicate at least the possibility of hearings in which the defendant's case was made by kin or friends; the later arrangements for trial of intentional killers who left before the end of the court hearing may point in the same direction. On the other hand, the location of the court of the *ephetai* near the Palladion shrine at Phaleron[17]

15 I am in general sympathy with the arguments of Thür and others that *dikazein* in Homer and other early texts means to propose a way of settling a case rather than to judge (and thus may denote formulation of the issue on which a court was to decide; I hope Thür will explain his understanding of the resemblances between early Greek and early Roman procedure). However, I do not agree with Thür's contention (1990) that in Drakon's law *dikazein* refers solely to the formulation by the *basileis* of oaths to be sworn by the parties. Whatever the precise content of the *basileis*' announcement, it must have constituted official recognition that the plaintiff's case was to be taken seriously. I am inclined to think that *basileis* here is used in the Homeric sense, to include all members of the political elite who were found regularly in the *agora*, but it may refer to successive holders of the office of *basileus* (cf. Dem. 23.28, 43.71, *IG* II² 1174.3 with Whitehead 59 n.85), and may have been interpreted later in Athens as referring to the *basileus* and *phylobasileis*. (In Dem. 23.28 the MS reading εἰσφέρειν δὲ τοὺς ἄρχοντας should be kept, cf. Wolff 1946, 77 n.209; the law modifies Drakon's provisions and may perhaps postdate the introduction of the δικασταὶ κατὰ δήμους, since it is hard to see why Solon would need to specify that suits were to be heard by *archontes*.)

16 *IG* I³ 104. 26-9. The reference to border markets does not imply that Attika already has formally demarcated frontiers, nor does the provision that the man who takes vengeance on a killer who avoids common meeting-places is to be treated "as if he has killed an Athenian" imply any sophisticated concept of citizenship (judicious discussion in Manville 1990, 80-2).

17 Kleidemos (*FGH* 232 F 20) and Phanodemos (*FGH* 325 F 16) unmistakably locate the Palladion court at Phaleron, and not east of the city where modern scholars put it (Travlos 1971, 289-92, 1974). Kleidemos (F 18) knows the Palladion east of the city also; it became prominent in Roman times (*IG* II² 3177, Meritt 86), when a member of the *genos* Gephyraioi combined the offices of Bouzyges and priest of Zeus Palladios. Polyainos *Strat.* 1-5 has a version of the Palladion myth in which Demophon receives the Palladion from Diomedes and gives it to an Athenian called Bouzyges to take to the city, but clearly we have to respect the local knowledge of the 4th c. sources for the location of the court in the classical period. Burkert's attempt to harmonize the sources by assuming that the Palladion was carried

may well have been chosen because defendants could easily be protected as they moved from the court to the harbour, to take ship and leave Attic territory.

Provisions for *aidesis* follow, and it is probably presupposed, though not explicitly stated, that *aidesis* will only be considered if the *ephetai* decide that the defendant's plea is justified.[18] Besides ensuring that all those accused of homicide left Attika, so that vengeance killings could not escalate, Drakon's provisions also made it clear that flight was not to be taken as evidence of guilt, and thus encouraged those already in exile to start negotiations for *aidesis*. His law states explicitly that it applies to those accused of earlier killings.[19]

So far, Drakon's provisions fit well into a common pattern in early law, in which legal process arises from appeal to the public by a defendant who claims to have acted defensibly and therefore not to be subject to sanctions.[20] His concern with *aidesis* is part of the same pattern, and again fits the historical circumstances in which he was legislating.

We already see *aidesis* treated as a matter of public concern in *Iliad* 18.497-500, where I follow the view that the first speaker was claiming the right to pay full compensation for a death (and then be quit of all claims), and the second is refusing to accept the payment.[21] In Athens too compensation must have been paid, except in the cases specified in Drakon's law as *nêpoine*, exempt from compensation.[22]

Drakon takes great care over specifying who is to agree to *aidesis*. If the victim has

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annually from the sanctuary east of the city to Phaleron for a bath in the sea provides no basis for locating the court inland. Whether the sanctuary of Athena *epi Palladiôi Dêrioniôi* was at Phaleron, east of the city, or in yet a third place, we cannot tell (*IG* I³ 369. 73, 90; it is hard to see any geographical order in this text). Palladia (small wooden figures of armed goddesses, cf. Lippold, and *LIMC* II. 965-9) are not a suitable subject for Occam's razor. (Note that Orestes in *Eum.* 80, 242, 439 has taken sanctuary with a *bretas* of Athena, which could be the Palladion at Phaleron, even though it suits Aeschylus to hold the trial on the Areiopagos). The building identified by Travlos 1974 as the Palladion court may not be a court; *druphaktoi* are found in buildings of other types (Salviat 259-63).

18 The question has been raised whether the *ephetai* here are the same as the 51 *ephetai* who appear later in the text, and perhaps we should not rule out the possibility that *c.* 620 Marathon or Eleusis or Thorikos or Peiraieus still had its own *basileis*, *agora* and *ephetai*. I do not think the variation betrays a combination of laws enacted at different periods. On *ephetai* see below, n.43.

19 Thür (1990) holds that only the provision for *aidesis* by *phratores* is valid retrospectively. I take it that the whole of this first section of the law is to cover all killers still in exile who hope to achieve *aidesis*. I also assume that kin did not normally agree to *aidesis* in cases of deliberate, own-hand, inexcusable homicide. In this sense we may say that lines 11-20 of the text deal with the killer who has a defense, while the rest of the text covers all killers; but we must remember that Drakon had no reason to concern himself with non-defensible homicide, and therefore probably did not think in these terms.

20 Wolff 1946, cf. Thür 1984, 485. This is not the only source of legal process, since a plaintiff with a cast-iron case may also mobilize public opinion and appeal to the public authorities in order to give his exaction of penalties added legitimation (cf. Humphreys 1983, 1988). On Just's attempt to derive *ephesis* from the defendant's appeal to public opinion see Wolff 1967, Humphreys 1983.

21 Compensation payments would have been made with maximum publicity, in order to ensure the killer's safety, so the dispute cannot concern the fact of payment. I agree with Gagarin 1981, 15-16 that the second speaker is in the same position as the *koluôn* of Drakon's law, but I do not think we should assume that other kin have accepted a compensation payment.

22 That *nêpoine* means "without paying compensation" rather than "without penalty" seems solidly supported by the use of *poinê* in Homer, by lexicographic entries on *poinan* and *apoinan*, etc.; the fact that *nêpoine* in Andok. I.96 means "with impunity" (cf. Ruschenbusch 1960, 136) proves nothing about the meaning of the word in Drakon's day (cf. "Afterthoughts" below). Sealey's attempt (1987, 74-5) to separate *poinê* from *apoina* is unconvincing. The law quoted in Dem. 23.28 may be Solonian (cf. below, n. 67).

a father, brothers, or sons, the decision is left to them and must be unanimous. If he has no kin in these degrees, all those descended from the same grandfathers (i.e. uncles and first cousins, see below) may decide on *aidesis*; again the vote must be unanimous. If no kin can be found in this category, and the 51 *ephetai* have decided that the killing was involuntary (*akôn*), then ten of the victim's *phratores*, if they so wish, may allow the killer to return.[23] The 51 are to choose these ten by status. These provisions apply to all killers, past as well as future. Drakon is concerned both to allow close kin to agree to *aidesis* without interference from more distant kin (the larger the number of persons concerned, the more likely it is that someone will vote against *aidesis* because of some personal interest or grudge), and to ensure that every killer entitled to *aidesis* has a fair chance of getting it. The provision that the decision must be unanimous is a safeguard for the returning killer.

The next part of the text at first sight might appear to be a more general procedural provision but, though Drakon probably was not asking himself whether all his provisions applied only to non-intentional killers or to all killers, his regulations on accusation can still be seen as arising from the historical circumstances in which the law was formulated. Again careful distinctions are made between different categories of kin. The right to bring an accusation of homicide is restricted to kin up to and including the victim's parents' siblings and his first cousins.[24] Once an accusation has been made, however, others related to the victim are obliged to come out in support of it: all first cousins, second cousins, wife-takers (husbands of sisters and daughters), wife-givers (father and brothers of the victim's wife),[25] and members of his phratry.

The effect of these provisions is on the one hand to narrow the range of those who can bring accusations, and thus minimize the danger that homicide cases will be used as a cover for paying off other scores, and on the other hand to ensure that accusations are only brought by those who can secure solid backing. The provision that kin, affines, and phratry members must all turn out to support an accuser is not unlike Solon's law penalizing any Athenian who did not take sides in a situation of *stasis*;[26] by forcing those

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[23] *Ar[i]st[indên]*, line 19. The situation envisaged is hard to reconstruct; why is the killer seeking public legitimation for his return after non-intentionally killing an Athenian who had no kin (but has *phratores*)? The verb used of the decision of the *ephetai* is *gnônai* and not *diagnônai*; apparently there is no plaintiff. Are we to suppose that the victim is a recent immigrant, the uxorilocal son-in-law or client of a powerful man who has introduced him to a phratry and who is threatening to take vengeance for his death, though not entitled to prosecute? *Pace* Gagarin 1981, 52 I see no reason why *phratores* should not be entitled to a compensation payment; they certainly are not debarred from asking for it.

[24] A right not a duty: Drakon is not interested in encouraging prosecutions. Plato *Laws* 866b-c innovates here, introducing sanctions for kin who fail to prosecute and allowing anyone to prosecute the killer of a non-citizen; there is no trace of this in Drakon's law.

[25] *Anepsioi* (see below) have an obligation to support accusations as well as a right to accuse because they will seldom act in the latter capacity, being called on only where there are no closer kin, and need not all be involved in accusation. *Gambroi* may include husbands of other female kin of the victim, and *pentheroi* may include affines of his male kin. In classical Attic the two terms were replaced by a single term for affines, *kêdestês*, and the distinction in meaning between *gambros* and *pentheros* was forgotten; Sophokles and Euripides use them interchangeably (Soph. F. 305 Radt, *OT* 70; Eur. *El.* 1286, *Hipp.* 634-7, *Andr.* 641). The distinction is maintained elsewhere; Sappho, Pindar and Theokritos have *gambros* for bridegroom, and Theokr. 18.49 has *pentheros* for WF.

[26] See Rhodes on *Ath. Pol.* 8.5; Loraux. Sealey 1983a pertinently quotes Xen. *Hell.* 6.5.6-9—

who might prefer neutrality to take a position, the legislator both ensured that lack of support for a really weak contender would be patent, and put pressure on those with a legitimate case to act moderately in order to gain maximum support. Kin, affines, and *phratores*, in the case of a homicide accusation, could of course make lack of sympathy for the accuser's case plain by their demeanor even if formally cast in the role of supporters. Drakon's provisions were not entirely new—Theoklymenos was pursued by the *kasignêtoi* and *etai* of his victim, *Odyssey* 15.223-78, and the suitors' kin in *Odyssey* 24.420-62 try to whip up public support—but written rules introduced a new rigour into the definition of rights and obligations.[27]

My argument for interpreting the phrase μέχρ' ἀνεψιότητος καὶ ἀνεψιοῦ[28] as referring to uncles and first cousins rests partly on the sense of the passage—the victim's uncles should certainly appear in one of the kin classes distinguished by the law—and partly on the forms of the two words.

Anepsios must in origin be an adjective, formed like *adelphos* and similarly used to modify some more general noun denoting a kinsman; *a-delphoi* are those who come from the same womb (*delphus*),[29] and *a-neptioi* should be persons descended from a common grandparent.[30] Like *anepsiôn paides*, the term for persons who share a common great-grandparent (second cousins), these terms are in origin intended for plural use with a descent focus rather than as singular terms to be used of position in relation to *ego*. Their function is to describe genealogical relations from a viewpoint outside the genealogy rather than within it.[31]

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when two factions engaged in *stasis* in Tegea take up arms, their relative strength can be seen—but decides that the law cannot be genuine because if *theinai ta hopla* is to be taken literally it implies an assembly in arms (why not, in civil war?), and a metaphorical usage would be out of place in a legal text. But early legal texts certainly use metaphor (σῖτον μετρεῖν τῇ μητρί in Solon F 53 Ruschenbusch, Dem. 46.20, is one of the clearer examples; *syndiôkein* in Drakon's law is also metaphorical), though it is conceivable that Solon's feelings about neutrality occurred in a poem rather than a legal text. His remark on *isotês* or *to ison* as a remedy for *stasis* (Plut. *Sol.* 14.4, *Mor.* 484b) presumably comes from a poem, and may possibly refer to numerical equality rather than fair treatment, though this is not how Plutarch understood it in the former passage.

27 The reference to a father or brother accepting compensation in *Il.* 9.632 f., and the single litigant in 18.500, may suggest that *aidesis* commonly involved a relatively small group. It is interesting that affines play a very minor role, if any, in such affairs both in Homer and in Drakon's law, whereas in the classical period Athenians turn readily and frequently to affines for support (Humphreys 1986).

28 *Mechri* is certainly inclusive; cf. [Dem.] 43.51, Plat. *Laws* 925a, and the use of the term in fixing levels of fines (*IG* I^3 82.26, 105.32). *Entos*, used in [Dem.] 43.7, is of course a synonym. On the meaning of *entos* in *Ath. Pol.* 22.8 (wrongly emended by some editors) see Goossens, Rhodes *ad loc.* (Figueira 1987, 288-9 understands *entos* correctly but still emends the text). In D.S. 12.4.5 the Persians are not to sail *entos*, i.e. on the Athenian side of, Phaselis and Kyaneai; Athenian territory runs up to and includes Phaselis. Kyaneai will be the conspicuous city on the hills above the Kakava roads, not far west of the Gelidonia islands (also mentioned in some texts concerning the peace of Kallias), or possibly the Kakava group of islands, made of dark grey rock.

29 Terms for full siblings that refer etymologically to the mother are commonly found in polygynous patrilineal systems and are not evidence of concern with matrilineal descent.

30 This will account for the distribution of kin terms derived from the root *nept* in various Indo-European languages, as terms for grandchild, sibling's child or cousin.

31 Similarly, "triplet" and analogous terms are used primarily by outsiders and not by members of a multiple-birth sibling set; we are used to "she is my twin," but "she is my triplet" has an odd sound. For the Greek propensity to look at relationships in this way cf. Is. 11.8. On *anepsiôn paides* see W. Thompson 1970.

Anepsiotes did not establish itself in common usage,[32] and may even have been coined by Drakon. He faced several problems in describing the range of relationships originally covered by *anepsios*. Abstract nouns in *-tes* were normally formed from adjectives in early Greek,[33] and consciousness of the adjectival origins of *anepsios* must have been in process of disappearing. Terms for parents' brothers were also changing. The classical *theios*, originally a respectful term of address, had not yet become established, yet *patrôios* and *mêtrôios* tended to be extended to cover all patrikin and matrikin rather than being restricted to the father's and mother's brother. In adding *anepsiotês* to *anepsios* Drakon seems to be trying to stress that all kin within the degree of first cousin are included in this category.

The usual explanation of the phrase μέχρ' ἀνεψιότητος καὶ ἀνεψιοῦ, that *anepsiotês* refers to first cousins once removed or to second cousins, is problematic in the sense it attributes to the abstract noun, which is given a wider and looser meaning than the term from which it derives (it would denote quasi-*anepsioi*), and in word order; if *anepsiotês* denoted kin further removed from the homicide victim than *anepsioi* one would expect *anepsioi* to be mentioned first.[34]

Drakon, then, is not merely recording traditional norms concerning the participation of kin in *aidesis* and the pursuit of killers. Unwritten law would have been more flexible. On the other hand, we are not observing the first encounter between the state and a vendetta system. Kin play their roles within a system of trial by public opinion and local knowledge, in which *basileis* and *ephetai* apparently already have their functions before Drakon's commission to write down the law.

Trial by public opinion and local knowledge is the most a litigant can hope for in a small-scale, face-to-face society.[35] It works better for disputes between commoners conducted in the presence of the *basileis* (*Iliad* 18.503-5) than for disputes between the *basileis* themselves. In *Odyssey* 24.413-548 Athena has to intervene to prevent the kin of the slain suitors from taking vengeance on Odysseus and Telemachos, and it took the authority of the Cretan holy man Epimenides, probably in the 590s,[36] to impose a final settlement of the disputes in Attika arising from the Kylonian massacre.

In deciding what was involved in the *dikasia* of the *basileis*, we must look at it in relation to the three *prodikasiai* conducted by the *archôn basileus* at monthly intervals in the

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32 Plat. *Laws* 871 uses it in a legal context.

33 The only possible case of an early abstract noun in *-tês* derived from a noun is *androtês*, the vulgate reading in *Il.* 16.857 = 22.363 and 24.6, where the emendation *hadrotês* has been suggested for metrical reasons. *Androtês* is defended by Latacz 1965 as an invention of the poet of the *Iliad*, and by Heubeck 1972, 74-6 as part of the traditional epic vocabulary, originally *an-ǧ-tes*.

34 [Dem.] 47.72 paraphrases Drakon's expression as *mechri anepsiadôn*, and W. Thompson 1970 thinks *anepsiotês* refers to children of first cousins, but it seems to me more likely that the author of the speech assumed that Drakon's category had the same boundary as the Solonian kindred and was using *anepsiadoi* as a synonym for *anepsiôn paides*. Drakon's category *anepsiotês* would in my view include first cousins once removed, but this is not what the term means.

35 Humphreys 1983, 239-40, 1985, 1985a.

36 On the date of Epimenides' visit see Rhodes 1981, 81-4.

classical period; there must surely have been some connection between the two. It seems to be generally accepted that the Drakonian *dikasia* was the response of the *basileis* to the public accusation (*proeipein*) made by the victim's kin in the *agora*. In the classical period the *basileus* responds to the accusation with his own ritual *prorrhêsis* banning the accused from public places. This constituted his formal acceptance of the case, and probably concluded the first *prodikasia*. Two further *prodikasiai* followed at monthly intervals, and in the fourth month the case was heard.[37]

The emphasis in all these procedures is on publicity. We may compare the provision in the Twelve Tables that in early Rome a debtor is to be brought to market for three *nundinae* (ten day "market weeks") before he is surrendered entirely into the power of his creditors. The delay, in Attic law, allows tempers to cool and public opinion to crystallize.

It seems to me therefore that the *dikasia* by the *basileis* in Drakon's law must have included formal acknowledgement that the accusation of having caused death, directly or indirectly, was valid. It follows that they could also pronounce that the killer was unknown, or that death had been caused by an animal or inanimate object (such pronouncements will have formed the basis for the later "trials" in the Prytaneion).[38] They might also be called on to proclaim formally that a killer who had fled would be exposed to attack if he returned. It was, however, particularly important that the arguments for both accusation and defense should be aired in public, and collective legal wisdom should be brought to bear on the pleas, in cases where *aidesis* was permissible.[39]

Drakon's law, on the stele (*IG* I^3 104) continues with provisions for the protection of killers in exile, which have already been mentioned (n.16), and with some specific categories of pardonable homicide. One of these is killing a man who starts a fight (ἄρχοντα χειρῶν ἀδίκων). This is not restricted to cases of killing in self-defense; a man who strikes an insulting blow, even if he does his opponent no physical harm, can be

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[37] In Antiph. 6.38-42 a *basileus* whose term of office has only two months to run avoided making a *prorrêhsis* by refusing to accept (*apographesthai*) a homicide accusation. He read laws to the accusers to justify his decision. In *Eum.* 480-1 Athena seems to contemplate dismissing the suit of the Eumenides (*pempein*; I owe this point to David Van Amburg). When different courts are set up to specialize in different types of homicide case, the choice of court will also have been decided on the basis of the *prodikasia* (cf. Gagarin 1978, 111, Heitsch 1989, and further discussion below), but a four-month interval between accusation and trial is not needed for this purpose. Photius and the Suda *s.v. prodikasia* say that the accused was held in the prytaneion during this four-month period, which seems most unlikely; perhaps someone has misunderstood a statement that the *basileus* continues to deal with the case in the prytaneion during the *prodikasiai*, before passing it to the *ephetai* for trial.

[38] Wallace (1989) argues that legal proceedings conducted by the *archôn basileus* in the Prytaneion (rather than the Boukoleion) must go back to a period when Athens was still ruled by a king. I am sceptical of the traditions about early monarchy in Athens and the term Prytaneion may imply a connection with elective office. The Prytaneion may well have served for all judicial hearings by magistrates in early Athens; the main function of the Boukoleion, for which the *archôn basileus* had special responsibility, was presumably to house cattle used in sacrifice and/or ploughing rites. It is possible that the Dionysus who unites with the *basileus*' wife in this building (*Ath. Pol.* 3.5) is thought of as a bull (Plut. *QG* 36, Eur. *Bacch.* 618-21; cf. Miller 1970, 227-31).

[39] These discussions will have influenced the arguments later put forward before the *ephetai* if both parties were determined to pursue the case; a *Beweisurteil* may have been formulated at this stage, at least in some instances, but this is not in my opinion what δικάζειν αἴτιον φόνου means.

killed in retaliation (Demosthenes 21.70-76). It is not certain how Drakon dealt with such cases, but a robber killed on the spot, if the householder was acting in defense of his property, could be killed *nêpoine*, without liability to pay compensation (lines 37-8).[40] After this it becomes hard to reconstruct the sense of the fragmentary remains of text on the stone.[41]

It used to be thought that the law cited in Demosthenes 23.82, "If anyone dies a violent death, his kin can seize men on his behalf until they submit to trial or hand over the killers. The seizure may go up to three men but no further," came from Drakon's law and reflected a stage of social development in which kin groups were much stronger than the state and the kin of a murdered man could only obtain vengeance by seizing hostages from the killer's kin group. However, there is nothing like this in Homer, and Bravo has recently argued that this is a fifth-century law regulating relations between Athens and her allies. Nothing obliges us to believe that the hostages have to be kin of the killer. Demosthenes takes the law as referring to relations between states, although Plato (*Laws* 871e) seems to draw on it in defining the procedure for trial of a citizen who wishes to defend himself on a homicide charge; he is to provide three sureties or else submit to imprisonment until he comes up for trial. By the fourth century the law was probably obsolete, and the circumstances for which it had been designed were forgotten. The concern that all killers should be brought to trial certainly seems post-Drakonian, and the law may well belong to the early years of the Athenian empire.[42]

It appears that *ephetai* existed already in Drakon's day,[43] and he is concerned to

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[40] When the Delphinion court came into existence it heard both cases of accidental death in games and war and cases of justifiable homicide in which the defendant had caught the victim in the act of *moicheia* or (probably) theft, or the victim had started a fight, or the killing was an act of self-defense against a robber or highwayman. Drakon may not have made specific provision for killing in games or war. Plato, interestingly, does not recognize a category of justifiable homicide in the *Laws* (866d-867c), but seems to class such cases as acts of passion, intentional but less reprehensible than cold-blooded premeditated murder.

[41] *Apostasis* in l.39-40 may refer to the killer's departure for exile, or possibly to a time-interval, and *dekatê* in l.40 should be a date, but it is hard to find a way of restoring either reference to the *prodikasiai* or the provision mentioned by Demosthenes (23.72) that a condemned killer after his trial had to leave by a prescribed route and within a fixed time; in any case it is not certain that killers stayed in Attika to stand trial in Drakon's day, and ten days might seem too long an interval for this purpose, although the victim of ostracism was allowed ten days in which to leave (*FGH* 328 F 30).

[42] From *c.* 450 Athens was imposing heavy fines on any city in the empire where an Athenian or *proxenos* was killed (*IG* I^3 19). Hostages are mentioned in *IG* I^3 40, M/L 52 (regulations for Chalkis, 446/5), and the use of hostage-taking as a means of political control might have arisen from the regulations on *androlêpsia*. Plato's use of the law suggests that the men seized were to serve as hostages or sureties rather than (as Bravo suggests) compensation, though presumably (at least in theory) if the seizure did not lead to surrender of the killer the men seized could eventually be enslaved.

[43] The name of the *ephetai* is puzzling, and cannot be connected in any simple way with the term *ephesis*, since *ephesis* means "referral" (Humphreys 1983, 238; Sealey 1987, 62-6) and cases are not referred *by* the *ephetai*, but *to* them. Aeschylus (*Persai* 79) uses the term of Persian leaders, in a herding metaphor—the commanders of the Persian army are "drivers of men"—and may have thought that the Athenian *ephetai* were so called because they sent killers into exile, which would be a reasonable explanation for his own day but not for that of Drakon. Kleidemos (*FGH* 323 F 20) derived the term from *ephesis* (cf. Schol. Patm. Dem. 23-7, Sakkelion 137, cited by Jacoby *ad loc.*). *Ephiemi* can also mean to let in, but the term for allowing a killer to return in Drakon's law is *esiemai*. Possibly the *ephetai* are so called because, if they decide that a killing was non-intentional, they refer the question whether the killer may return to Attika to the victim's kin, for decision whether they will agree to *aidesis*. We do not know

define the division of responsibility in homicide cases between them and the *basileus* or *basileis*. The *ephetai* only take decisions about killers who claim to have killed with a legitimate excuse. After the preliminary proceedings in the *agora*,[44] in the presence of the *basileis*, with full publicity, the issue is passed to this select and perhaps representative body of men, who presumably sit in a more secluded place,[45] for a formal decision. They decide whether a killing was non-intentional, whether a killer whose victim had no kin can benefit from *aidesis* (if representatives of his phratry agree), and whether a man who has taken vengeance on a killer in exile is entitled to claim that he did so legitimately.

Drakon does not seem to have legislated for the case of a man accused of homicide who denied all involvement in the act and claimed that someone else must have been the killer; surreptitious killings may have been rare in seventh-century Attika, and it may also have been risky to make accusations based only on suspicion. And in my view there is no need to suppose that Drakon was concerned with killers who had no defense. They would presumably leave the country,[46] and it appears that kin were not expected to agree to *aidesis* in such conditions. If a powerful man deliberately killed a weaker one and remained in Attika, trusting that no one would dare move against him, only the full authority of the Athenian Council could handle the situation. The jurisdiction of the Areiopagos over cases of deliberate homicide in my view derives from situations of this

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how the *ephetai* were appointed. It has been suggested that they are the 48 *prytaneis* of the *naukrariai* plus the three senior archons; another possibility is that they consisted of one representative from each of 36 phratries (Humphreys 1978, 195) with the 9 archons and the 6 paredroi of the senior archons. A difficulty with these figures is that in them the *basileus* is counted as one of the *ephetai*, whereas Aeschylus seems to imply in the *Eumenides* that Athena's vote made the number of ballots even. It is likely enough, however, that the basis of appointment of the *ephetai* had changed by the 5th c., and their hearings had become assimilated to other types of *ephesis* in which the referring magistrate presided over the court to which he referred the case. The view that the *basileus* voted among the *ephetai* (rejected by Thür 1990) is in my view strengthened by the statement in *Ath. Pol.* 57.4 that the *basileus* takes off his garland when he *dikazei* (i.e., in the classical period, votes). He votes as an ordinary member of the court, and not as its president, in order to avoid becoming a target for the resentment of the losing party. (Aeschylus uses Athena's vote in a somewhat different way, but the same motivation is present).

44 Whether *agora* here denotes the public space or the gathering of citizens in it is an academic question; an accusation of homicide in the central public space of the city will generate a public meeting if there is any substance in it (cf. the scene in *Od.* 24). The *basileis* perform their functions either in the agora or in the *prytaneion*, which may well have fronted onto the old agora (Dontas).

45 Wallace argues that the *ephetai* were originally the nine archons, or some of them, and from Drakon's time were the Areiopagos, which was originally only a court of 51 jurors sitting by the sanctuary of the Semnai Theai on the slopes of the Areiopagos. I continue to assume that Athens, like Sparta (and Rome) had a council of elders from early days, though I recognize that it may well have met on the Areiopagos only for homicide trials, and probably acquired the name "Areiopagos Council" rather late (it is *hê boulê* in Dem. 23.24). I am not sure that Thucydides (1.126.11) was right in believing that the shrine of the Semnai already existed at the date of the Kylonian massacre. In any case its significance must have been changed and enhanced by this sacrilege; Epimenides may have prescribed new rites (D.L. 1.110). The cult responsibilities of the aptly-named *genos* Hesychidai may date to this period, the exclusion of members of the Eupatrid order from their rituals (Polemon *ap.* schol. Soph. *OC* 489, Wade-Gery) being accounted for by their heavy involvement in the fighting. The choice of the area near the Semnai for homicide trials will not be due to the accused seeking sanctuary at their altar (that would surely be jumping from the frying-pan into the fire), but will have rested on a feeling that the sacrifice and *diômosia* with which homicide trials began would be most powerful and effective in this sinister spot. The question whether the *ephetai* sat here for a time before moving their hearings to Phaleron must be left open.

46 In the Homeric poems it is normal for a killer to flee even if he can claim some justification; in *Od.* 24.430-1 it is suggested that Odysseus and Telemachos may be about to flee to escape the wrath of the suitors' kin. Cf. *Il.* 23.85-8.

type, which must have been very rare.

Sealey (1983) has convincingly argued that the types of case tried by the *ephetai* sitting in the Palladion court represent the residue of the functions of the original ephetic court, after various sub-sets of homicide cases had been handed over to other courts. More can, I think, be said about the reasons for this reform. Drakon's law, by regularizing the procedure for deciding disputed homicide cases and by encouraging the killers and kin of Kylon's supporters to come to settlement, will have encouraged the view that homicide disputes should be settled by legal process. Some will probably have interpreted Drakon's insistence that all killers should leave Attika, even if they claimed to have acted defensibly, as a concession to pollution beliefs, although there is no sign in Drakon's law of any concern with pollution. As homicide trials became a more regular and familiar feature of city life, homicide disputes would present less of a threat to social order and the precautionary character of Drakon's provisions that killers awaiting trial should leave Attika would be less clear. At some point it came to seem unreasonable that those who killed *nêpoine*, in circumstances where no compensation was due, should be obliged to undergo even temporary exile; Delphi was consulted, and a new procedure for trying "clean" killers was set up, in which the *ephetai* sat in the Delphinion, east of the city.[47] The law about these cases, quoted in Demosthenes 23.53, specifies that "If anyone kills unintentionally (*akôn*) in games, or coming on a man while travelling, or not knowing his identity in war, or catching a man with his wife or mother or sister or daughter or a concubine whom he is keeping under an agreement that her children will be free, the killer need not go into exile." This seems to be a clear revision of Drakon's law.

The priests at Delphi of course did not invent the idea that an unavenged homicide might be a source of supernatural danger. Belief that the ghosts of murdered men returned to haunt the living and supplicate that their deaths should be avenged is attested in several sources, and the Attic ritual of carrying a spear at the funeral of a homicide victim, planting it on his tomb, and naming the killer, may already have existed in Drakon's day.[48] Drakon's prescription that homicide accusations had to be made in the agora ignores the ritual, understandably; but his introduction of controls on the secular procedure for handling homicide disputes gave those who could not get satisfaction from the *ephetai* a motive for stirring up fears of supernatural danger. It was claimed that the archon Megakles had incurred a hereditary curse by killing the supplicant Kylonians; his descendants were expelled from Attika, and Epimenides was called in to purify the city. Interest in questions of pollution was aroused, and a new college of ritual experts, the *exêgêtai Pythochrestoi*, selected by the Delphic oracle, was introduced. Delphi was the

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47 On the location of the Delphinion see Travlos 1971, 83-90. Graf argues that Apollo Delphinios was not originally connected with Delphi, but admits that Delphi appropriated the cult.

48 Ghosts: *LSS* 115 (cf. Parker, Appendix II), Antiph. 4.1.3, Plat. *Laws* 865 d-e; perhaps *FGH* 356 F 1; Macleod 140, Parker 366, Lloyd-Jones. The ritual of the spear is prescribed by the *exêgêtai* in [Dem.] 47.69; the man who performs it is to keep vigil at the tomb for three days. It also appears in *FGH* 334 F 14, but in 323a F 1 it is the defendant, Ares, who carries the spear.

source of authority on questions of ritual.[49] The oracle and its clients gradually came, in their interaction with each other, to make a tacit distinction between what we might be tempted to call secular questions, about which the oracle could only be asked to predict, and ritual questions on which it gave authoritative rulings. Predictions were frequently enigmatic, leaving the recipients to argue out their own interpretation, whereas rulings on ritual questions were accepted without argument. The appointment of the *exêgêtai Pythochrestoi* represented a compromise between Delphi's claim to authority in religious matters and the professional pride of local ritual experts.

The creation of a separate court in Phreatto to try those accused of homicide who had already been exiled for a former offense must belong to a period when it is taken for granted that all defendants appear in person, and should even perhaps be ascribed to the early fifth century; Phreatto was in or near the harbour of Zea on the Peiraieus peninsula (Passalimani), and must have been chosen at a period when harbour activities were shifting from Phaleron to Peiraieus.[50] The defendant pleaded his case from a boat (Demosthenes 23.77-8); the procedure smells of legal/ritual pedantry.

The same may be said of the trial of inanimate objects that have caused death by the *basileis* in the Prytaneion, another innovation which cannot be precisely dated. This innovation is somewhat more interesting, however, because it became linked to the ritual of sacrifice at the Dipolieia (Durand). The axe used in the sacrifice, which supposedly commemorated the first sacrificial killing of a plough-ox, was condemned by the *basileis* in the Prytaneion and solemnly cast into the sea. The *basileis* in this context are undoubtedly the *archôn basileus* and the four *phylobasileis*, leaders of the tribes, and we are in a period where the term *basileus*, and the office, had become specialized in the sense of ritual presidency.[51] By this time the political elite of Attika were calling themselves Eupatridai rather than *basileis*, and those formally elected to office were becoming jealous of their prerogatives, developments that had clearly taken place by the time of Solon.

If *basileis* was used in its Homeric sense in Drakon's law, there can have been little

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[49] Although the *basileus*' role in homicide cases is part of his role as head of the state in ritual contexts, he has nothing to do with the ritual cleansing of killers. It is left to the *exêgêtai* to advise on this, and practice seems to have remained variable (Parker 386-8). The expulsion of the Alkmeonidai, the date of Epimenides' visit and Athenian relations with Delphi in the 590s are all highly controversial questions. Jacoby (37-41) attributes the *exêgêtai Pythochrestoi* to Solon and connects their creation with the aftermath of the Kylonian affair. Robertson casts doubt on the evidence for Athenian participation in a "sacred war" over control of the oracle in the 590s. I have no answer to the question why "pure" killers were tried in the Delphinion and not in the Pythion; we know little about the two sanctuaries except that they were close together. Dyer and Parker 138-43 discuss Delphi's role as an authority on questions of pollution. D.L. 1.110 and Plat. *Laws* 642d associate Epimenides with Delphi, but neither account appears reliable.

[50] Boegehold thinks there were two courts, one at Phreatto and one at Zea, but the entries in *Lex. Rhet.* Bekker 1.311.17-22 probably result from confusion of two notices about the same court.

[51] This process (not peculiar to Athens) needs reconsideration now that some of us no longer believe in a period of solidly established monarchy in the early Greek city (Drews). The evolution of *wanax*, though not exactly parallel, may be illuminating; in both cases we seem to have a term that denotes an office-like status in Mycenaean times, degenerates into an honorific term of address and is finally restricted to use in ritual contexts, where it acquires a new and more specialized meaning.

if any difference between this group and the Council, which will gradually have come to consist mainly or only of ex-archons, as election to office came to be recognized as certifying a man's worth and right to a permanent voice in public affairs.[52] The *basileis*, in Drakon's day, will thus have been in a position to retain control of any dispute too explosive to be entrusted to the *ephetai*. As the term *basileus* came to be restricted to the *archôn basileus* and the *phylobasileis*, the *archôn basileus* may well have retained discretionary power to refer cases to the Council rather than to the *ephetai* when he thought it prudent.[53] It would not be until the end of the fifth century, if then, that a defendant in a homicide case would have the chutzpah to claim that he was being tried in the wrong court.

The Areiopagos was certainly recognized by Solon's time as a court that tried homicide cases and pronounced sentences of exile;[54] but the feeling that its functions were defined by the status of the defendants rather than the basis of their defense (or rather their lack of a defense) is shown both by its role in aetiological myths about the origins of Attic expertise in deciding homicide cases and by an indicative though no doubt apocryphal story that the tyrant Peisistratos was summoned to appear before the Areiopagos on a homicide charge and showed his respect for the law by doing so.[55]

Drakon's law and the refinements subsequently added to it gave the Athenians, at least in their own eyes, a reputation for expertise in handling difficult homicide disputes. Mythical tales of homicide acquired a new legal coloring; some were perhaps retold by defendants in court, and Aeschylus' *Eumenides* may have inspired other tragic poets to stage scenes of mythical trial. Orestes in a pre-Aeschylean version of his story came to Athens for a legal ruling on his case and provided the *aition* for the ritual of the Choes (*FGH* 325 F 11); Ares was judged to have acted justifiably in killing Poseidon's son Halirrhothios when he caught the young man with Alkippe, his daughter by the Athenian

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52 The connection between office and Council membership may have been formalized by Solon, who had to ensure that non-Eupatridai were admitted.

53 If, as is generally assumed, homicide were normally assigned to courts on the basis of the defendant's plea, the *basileus* may still have had discretionary power to refer cases to the Areiopagos if the crime seemed particularly shocking or the parties were of very high rank. Though the term *dikazein* in the law defining the Areiopagos' competence (Dem. 23.24) may suggest that few defendants pleaded their case to the end in this court (Thür 1990 has another explanation), its hearings can hardly all have been purely formal. The *basileus* also faced some problems in interpreting the law: for example, was the Areiopagos to try all cases of poisoning, or did the Palladion deal with cases in which the defendant claimed not to have intended to kill? (Ar. *Eth. Meg.* 1188 b 29-38 may be a reference to Antiphon 1).

54 The "stele on the Areiopagos" which contained regulations concerning homicide (Dem. 23.22, Lys. 1.30, 6.15) was in my view probably set up at the time of Ephialtes. It was placed there not because Areiopagites needed to consult it (see Humphreys 1988, R. Thomas in press) but because it stated the terms of an agreement between the city and the council (cf. the rather similar text stating the privileges and duties of the Praxiergidai, of about the same date, *IG* I^3 7). There is no reason to think that Demosthenes followed it consistently in his speech against Aristocrates (23); he made his own selection and rearrangement of texts, and the instructions to the clerk to "read the next law," "read the law below that," refer to the texts the clerk has in front of him and tell us nothing about Demosthenes' sources. However, the entrenchment clause quoted in Dem. 23.62, which cannot be fitted into any suitable position on *IG* I^3 104, may come from the Areiopagos stele; it purported to reproduce the provisions of Drakon's law and might well refer to itself as a *thesmos* (cf. Humphreys 1987, 214-8).

55 *Ath. Pol.* 16.8. The story acquires added piquancy, and becomes less of a testimony to Peisistratos' respect for law, if we remember that men accused before the Areiopagos usually fled the country before the trial.

princess Agraulos (*FGH* 323a F 1); Kephalos, a local hero from south-east Attika, was exonerated from killing his wife Prokris accidentally (i.e. non-intentionally) while hunting (*FGH* 323a F 22, 334 F 14). Though they have mythical protagonists, these stories come to us in versions which, like the legends of the seven sages and tales about colonization and tyrants, are shaped by the developing institutions of the archaic polis.[56]

In trying to trace the development of Athenian homicide law after Drakon we have a fixed point in Solon's amnesty law (Plutarch *Solon* 19.4), but it requires interpretation. It read: "Concerning *atimoi*. Those who were *atimoi* before Solon took office, are to be *epitimoi*, except those who were in exile when this thesmos was published because they had been condemned in a trial on the Areiopagos or by the *basileis* sitting with the ephetai or in the prytaneion, for homicide or slaughter or tyranny." It implies, though it does not quite say it *expressis verbis*, that those in exile for homicide could in some sense be considered *atimoi*. This did not worry scholars who based their notions of early Attic law on nineteenth-century ideal types based on medieval evidence; to them the *atimos* was an outlaw, a man who could be killed with impunity if he returned to the land from which he had been banished. But the applicability of this model to early Greece has rightly been criticized (Maffi 1983); *atimos* in origin must mean "without honor," and homicide is hardly considered dishonorable in archaic societies. Attic sources are rather careful to use the phrases *atimos tethnatô* or *atimos kai polemios* when describing someone who has been proclaimed a public enemy liable to summary execution if caught.[57]

The evolution of *atimia* needs reconsideration. Originally, I suggest, the *atimos* was like the Spartan *tresas* (coward); he had lost all honor, he was socially dead. The position was not necessarily dangerous, but it was psychologically intolerable.[58] The *atimos* would be insulted by adolescents (the *charivari* is a more useful parallel than outlawry); he could be slapped in the face, or his property could be appropriated or damaged, and he would be unable to retaliate or exact retribution (Plato *Gorgias* 486b-c, cf. 508cd). A woman known to be an adulteress lost her honor and became *atimê*; if she

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56 Jacoby's commentary on these myths and their relation to the homicide courts (*FGH* III B suppl.) is fundamental, but he makes rather too sharp a distinction between Aeschylean innovation and earlier "myth." Aeschylus' *Eumenides* is the only version of a homicide myth we have that brings in Delphi; there may have been discussion at the time of Ephialtes' reforms about the relation between Delphi and the Delphinion (the Areiopagos stele may have expressly prohibited the Areiopagos council from trying a defendant who pleaded that he had killed an intruder found with one of the women of his *oikos*, Lys. 1.30). The introduction of Delphi makes the story into more of a theological and less of a juridical problem; Aeschylus' Areiopagos represents traditional solemnity rather than legal expertise, and his idea of *prédroit* is based on aspects and beliefs that in his own day were left outside the law, under the supervision of the *exêgêtai*. Hellanikos corrects Aeschylus and has Orestes prosecuted by Klytaimnestra's kin (*FGH* 323a F 22) before an Areiopagos that has already handled earlier trials. Kephalos appears, dressed as a hunter, with Artemis and a herm, on a late 5th c. lekythos in Tübingen (Metzger 78-9 with pl. 29.1).

57 *Atimos tethnato*, Dem. 9.44; cf. Plat. *Laws* 865d. πολέμιος . . . καὶ νηποινεὶ τεθνάτω, Andok. 1.96 (tyrants). Andok. 1.106 thinks some of the supporters of the tyrants stayed in Attika as *atimoi* (but he may be reasoning from analogy with the situation of supporters of the Thirty in his own day, cf. R. Thomas). In Solon's law on *stasis*, *atimos* should not be taken as a synonym of μὴ μετέχειν τῆς πόλεως.

58 Hdt. 7.231, using the term *atimia*; Plut. *Ages.* 30; Tyrt. 11.14. Cf. Hdt. 6.72, exile and destruction of houses.

appeared in a public place or at a public occasion anything could be done to her short of death or mutilation (Aischines 1.183, cf. [Dem.] 59.87). If the *atimos* had aroused extreme hostility, and had fled, his house might be razed to the ground (Connor 1985).[59] Early states had a variety of terms for the situation of the man who had lost his claim to honor. Argos said *treto*, "let him tremble"; as in Sparta, the man who had once lost his nerve was condemned to a life of perpetual shrinking. Elis said *werren*, "let him be accursed"; *werre* could be said to taunt a warrior in battle who was turning to retreat (*Iliad* 8.163-6).[60]

In origin these were informal sanctions, imposed by public opinion. *Atimos* was a marked term, and the *atimos* was a marked man, who had forfeited the respect normally accorded to members of the community (the author of the *Odyssey* is prepared to use *atimazein* of improper behavior to a beggar). But those in power in early Greek cities appropriated the sanction and began to proclaim men *atimos* by decree; their power to control public opinion may be questioned, but they were able at least to deprive the *atimos* of the protection of the law. The term *epitimos* came into use to denote those who were entitled to legal protection and, as has recently been pointed out, contributed to the development of the concept of citizenship.[61] A man in exile clearly was not entirely *epitimos*,[62] and it is therefore understandable that Solon should have specified that his amnesty for *atimoi* did not include exiles in lifelong banishment as a consequence of condemnation for homicide.[63]

Surprisingly little attempt has been made to identify the *atimoi* who were to benefit from Solon's amnesty. I suggest that Attic magistrates had been using *atimia* too freely as a penalty in arbitrary judgments that did not have the support of public opinion; indebted small farmers may have been declared *atimoi* by their creditors (*atimia* was later used as a sanction against debtors to the state), as may debtors who had fled into exile. A measure

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59 Razing houses associated with *atimia*, Krateros *FGH* 342 F 5, Antiphon and Archeptolemos. The extension of *atimia* to the offenders' illegitimate as well as their legitimate descendants cannot be taken to imply that *nothoi* normally had citizenship. These men are being publicly and comprehensively cursed.

60 Argos: *IG* 4. 554 (*c.* 480, *LSAG* 169 no. 20; *SEG* 11.315). Elis: M/L 13, late 6th c. *Werren*, confiscation of property, and house razed to ground, "as in the law on homicide"; this might be merely a repetition of the entrenchment clause of the law on homicide, but it is more likely to be a reference to well-known conditions imposed on the homicide who fails to go into, or stay in, exile (cf. Plat. *Laws* 871d). One of the conditions would presumably be that the returned exile could be killed with impunity. "Exile under the conditions prescribed for homicides" seems to refer to standard procedure also in M/L 43 (Miletus, 470-440), though Piérart 1969 thinks the exiles here have actually been condemned for homicide. The opposite of *werren* in Elis is *tharren*, to have confidence ("hold one's head high"): *GDI* 1152, Buck 61, Patrias. *Eparatos kai atimos* in *IG* 12. 2.645 (*SEG* 27.4).

61 Sealey 1983a, Manville 1980, 1990.

62 Cf. the reference in Dem. 23.44 to exiles whose property is *epitimos*, perhaps those in process of negotiating *aidesis*. A house whose head was absent was always in some danger; the suitors are said to *atimazein* the *oikos* of Odysseus (*Od.* 16.431).

63 Lifelong banishment was the consequence of a homicide for which no successful plea of non-intentionality or other mitigating circumstances could be made. Some of these exiles have appeared before the *ephetai* and lost their case. Those condemned by the *basileis* in the Prytaneion include nameless killers and, presumably, killers who went into exile without offering a defense. It is not clear whether a killer who went into exile without appearing to defend himself even at the *prodikasia* would in classical times be formally banned by the Prytaneion court or the Areiopagos.

that allowed the victims of such judgments to recover their rights would surely be regarded by Solon as part of the *dêmos*' legitimate dues. Solon will thus have discouraged the use of *atimia* as a penalty, though he may have thought its use legitimate against those who attempted to make themselves tyrants or tried to overthrow the laws (F 37, 93a Ruschenbusch). His amnesty law does represent a turning point in the history of *atimia*, but not quite in the way pictured by Swoboda.[64] *Atimia* is henceforth appropriated by the state as a penalty for offences against the state; as the community grows larger, imposition of *atimia* as an informal sanction by popular agreement becomes rarer and less effective, and it becomes possible for the prudent *atimos*, even if his *atimia* has been formally decreed, to lead an almost normal life unless someone chooses to prosecute him for exercising rights he has lost. Two changes proceed side by side, but independently; *atimos* acquires the sense of deprivation of specific civic rights, by opposition to *epitimos*, as the concept of citizenship develops, and *atimia* in the old sense of public infamy becomes difficult to impose in a larger community where the offender is less immediately and universally recognizable. Those who are in exile come to be thought of as *atimoi* because they are clearly prevented from exercising their citizen rights, because serious offences against the state come to be punished by a combination of *atimia*, exile and confiscation of property, and because in early times those who lost their honor were often forced to flee in order to be able to lead a tolerable life. But the concepts of *atimia* and exile do not perfectly coincide in Solon's amnesty law, any more than they did in classical times.

My argument, then, is that we should see Drakon's law, and subsequent Athenian legislation on homicide, as moves in historically developing situations of political conflict and competition, and as responses to problems defined and perceived in terms of a historical experience reconfigured by each new legal institution as it was put into practice, rather than as stages in a progressive evolution towards some ideal solution of the legal problems posed by homicide.

Drakon's law was formulated in the atmosphere of resentment generated by a recent episode of civil war, and has to be understood in that context rather than as a step in the development from the vendetta system assumed to characterize the stage of *prédroit* to written codification. His law dealt only with pardonable homicide. His aims were (1) to ensure that all those accused of killing or of *bouleusis* left Attika until settlements with the victim's kin could be arranged (if the killer's defense was such as to justify *aidesis*), and to protect the killer awaiting *aidesis* while he was in exile; (2) to bring some public pressure to bear on kin to agree to *aidesis* in cases of excusable homicide; (3) to authorize arrangements for *aidesis* in cases where the killer had an acceptable defense and the victim had no kin;[65] (4) to encourage killers in exile, if they had a legitimate defense, to start negotiations for

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64 For the history of previous views see Hansen 1973, 1976; Maffi. Rainer has a useful collection of epigraphic material.

65 It is unclear whether this provision should be taken as evidence of the number of immigrants in late 7th c. Attika or of Drakon's anxiety to cover all possible cases, however improbable.

aidesis; (5) to limit future accusations by restricting the range of kin who could accuse and insisting that accusers should mobilize a wider range of kin and *phratores* to support the accusation.

IG I^3 104 may also contain the provision that a killer who returned to Attika without obtaining *aidesis* could be killed with impunity or arrested,[66] and it dealt with two types of case in which fighting led to death: the killing of a man who has begun a fight (ἄρχοντα χειρῶν ἀδίκων) and of a robber caught in the act. We do not know what else Drakon's law contained, and in my view we cannot even be sure that everything inscribed on *IG* I^3 104 came from Drakon, since it seems likely that further regulations on homicide, on additional *axones*, were added to his law during the late seventh or the sixth century. The law quoted in Demosthenes 23.28, which specifies that killers caught in Attika, though they may be killed or arrested, may not be scourged or held to ransom, quotes "the first *axôn*" and seems to be a modification of Drakon's law prompted by later experience.[67] New regulations published on *axones* would inevitably be ascribed to Drakon once the Athenians became used to thinking that all laws on homicide had been promulgated by Drakon and all other early laws by Solon.

In my view Drakon did not explicitly deal with intentional homicide.[68] From his point of view the killer who went into exile and did not qualify for *aidesis* presented no political or procedural problem.[69] Situations of intentional homicide in which the killer did not leave would arise only if the killing was intra-familial or if the killer was too powerful to fear vengeance from his victim's kin. Family killings, though story-tellers and tragic poets were fascinated by the religious and moral problems they created for the victim's next-of-kin, were not likely to threaten civil order.[70] The killer who relied on his superior power to save him from vengeance represented a threat to civil order of the most serious kind, but this was hardly the type of case for which the legislator could hope to provide a regular procedural solution. One might argue that Drakon had dealt with it by legislating against tyranny. If such a man was to be tried, certainly the full muster of Areiopagites would be required to deal with him.

Drakon, *ex hypothesi*, was dealing with a situation in which customary procedures

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66 Line 30 [ἐν] τεῖ ἐμεδ[απεῖ?]; conceivably this could apply to the killer who did not go into exile. I do not think we should expect Drakon to have tried to regulate the timing of the killer's flight or the accuser's pursuit in detail.

67 Reference to the Heliaia, prosecution by *ho boulomenos* and a fine of double the damages inflicted on the plaintiff, half of which probably went to the state, all suggest a Solonian or post-Solonian date.

68 By the 4th c. it was assumed that Drakon's regulations for the procedure of accusation were intended to apply to intentional as well as unintentional homicide. *Pace* Stroud (38-40) variations between *IG* I^3 104 and Demosthenes' paraphrase in 20.157-8 are not significant, and we certainly should not imagine that a second set of regulations for *prorrhêsis* appeared elsewhere in Drakon's text.

69 Plato (*Laws* 871a-d) still assumes that the intentional killer will normally leave either before or immediately after the formal proclamation requiring him to stay away from public places, without waiting to stand trial.

70 Plato deals with homicide committed by kin, in the *Laws*, but there is no evidence that Athenian law did so. Public reaction would presumably drive the killer to flight in most cases in a small-scale society.

for dealing with homicide had broken down after civil war; killers in exile who felt themselves entitled to *aidesis* had been unable to arrange it, while within the city kin of the dead were harboring grievances which they dared not voice in open accusation. Drakon's legislation is therefore likely to have been followed by an unusually high number of homicide accusations and cases before the *ephetai*. This in itself would transform social experience, generating new norms and expectations; by attempting to reconstruct these we may be able to understand the dynamics of the process that led to further regulations in which the procedure for dealing with homicide cases was diversified and new courts were set up.

Drakon's regulations, I suggest, are likely to have aroused dissatisfaction on two main counts. The first was his complete avoidance of the question of pollution. Even if some division in principle between sacred and secular law was already established,[71] there will have been men unhappy with the outcome of particular cases who turned to arguments about pollution to justify their claims, and others who felt that the Kylonian massacre called for more elaborate ritual treatment than the rites customarily included in *aidesis*. Epimenides had to be called in, and perhaps new *exêgêtai* were appointed, with authority derived from Delphi. Another problem may have arisen from the rule that all killers had to go into exile, whatever their defense.[72] Once the *ephetai* came to sit regularly on cases in which a defense of unintentional homicide was made, they would soon find it inconvenient not to have the defendant at hand. The choice of the sanctuary of the Palladion at Phaleron as the venue for their hearings may have been made to allow defendants to undergo trial in a place from which they could rapidly board ship.[73] Furthermore, defendants who were not obliged to pay compensation (having killed *nêpoinei*) could legitimately object that the procedure of flight followed by judgment and *aidesis* was not appropriate in their case. Debates over pollution, however, would have encouraged a tendency to see the killer's flight as a precaution against supernatural dangers rather than against the escalation of violence. Appeal was therefore made to Delphi, and a new category of homicide cases was created in which the defendant, if he won his case, was considered ritually clean and did not have to go into exile. Some types of case which Drakon had probably treated as unintentional homicide rather than homicide not subject to compensation were transferred to the Delphinion court also.[74] Trial at Phreatto may have been a later development, and we

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71 I would prefer to say that in the process of formulating homicide law in written form, with the associated creation of a new board of *exêgêtai*, a distinction between secular and sacred law began to crystallize.

72 Drakon's law implies that hitherto defendants negotiating *aidesis* on the grounds that the killing was excusable had not left Attika; it may therefore have been self-evident to his contemporaries that the defendant was allowed to appear at his trial.

73 The regulations in Dem. 23.72 may come in at this point. *Taktên hodon* may refer to the killer's mode of travel (e.g. that he had to go publicly with some kind of official escort) rather than his route. But all this is very conjectural.

74 Accidental death in games, mistaken identity (*Ath. Pol.* 57.3). Plato treats these with unintentional homicide in *Laws* 865a-b and requires the killer to purify himself, whereas the man who kills a robber or other aggressor (who pays no compensation in Drakon's law) is *katharos*, 874b-c; Plato seems

cannot trace in detail the elaboration of the ritual for dealing with inanimate objects in the Prytaneion. This was probably due to the initiatives of individual *basileis*, in historical circumstances that we have no hope of reconstructing. The solemn condemnation of the physical cause of death was a means both of defusing conflict and of building up the *charisma* attached to the office of *basileus*.

Experience of due process in homicide cases may also have generated a feeling that even in cases where the killer failed to leave Attika, or returned without obtaining *aidesis*, the victim's kin should appeal to state authorities rather than taking the law into their own hands. A post-Drakonian law (Dem. 23.28) clarified their rights: they could kill the offender, or arrest him and hand him over to a magistrate, but they could not physically maltreat him or extort a ransom. As Thür (1990) has argued, the arrest and execution by the state of the killer caught in Attika gave rise to the idea that a killer not entitled to *aidesis* was subject to the death penalty unless he escaped before the end of his trial. It also came to be felt that all killers should be sentenced in court, even those who fled without offering a defense. Perhaps in part because the Athenian political elite ceased to be referred to collectively as *basileis*, and the *archôn basileus* came to take responsibility individually for the *prodikasiai*, the (Areiopagos) Council acquired a more clearly defined role in homicide trials. The extent of their activity remains somewhat mysterious to us, and it may well be that at all periods trial by the Areiopagos for homicide remained more of a threat of the utmost rigor of the law than a regular occurrence. However, the prestige of the Council and the awesome associations of its meeting-place attracted to it jurisdiction over other particularly heinous crimes (arson) and offences in the religious sphere (cutting down sacred olive trees).[75]

Cases will also have arisen for which neither Drakon's law nor the rulings on cases tried at the Delphinion made adequate provision. At some point before Ephialtes' reforms it was decided that if a man died some time after a fight, as a result of his wounds, the other party to the fight could not plead that he had not intended to kill. Cases of intentional wounding that resulted in death were tried by the Areiopagos, like cases of intentional homicide, and the *ephetai* dealt only with cases where even the wounding was unintentional.[76]

Plato considered that the Athenian law of homicide as it existed in his own day still required considerable revision, and applied himself to the task in the *Laws* with enthusiasm. He, however, had no inhibitions against combining jurisprudence, ritual provisions for cleansing the polluted, and moral reform in his proposed code. Neither

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to be following Drakon rather than the law that defined the competence of the Delphinion.

75 I am tempted to suggest that only the types of case regarded by Ephialtes as falling within the original competence of the Areiopagos were heard in the court by the shrine of the Semnai, while the judicial functions that he regarded (wrongly, in my view) as *epitheta* were carried out elsewhere. I rather doubt whether the competence of the Areiopagos had been defined in writing before Ephialtes.

76 The case described in [Dem.] 47.69-73 would have been of this type if it had come to court. In the rather primitive state of Greek medicine, courts could hardly make fine distinctions between a wound that could reasonably be expected to heal and one likely to prove fatal.

Drakon's homicide law nor the revisions that followed it dealt directly with the question of pollution, and the boundary between the secular and sacred spheres of jurisdiction hardened as the state developed. This made it increasingly problematic for the Athenians to legislate on homicide; and the inhibition against legislation gave mythicizing tendencies a freer rein. The aura of antiquity and traditionalism with which the Athenians invested first Drakon's law and then the Areiopagos' functions as a homicide court gave Attic procedures for dealing with homicide an appropriate air of gloomy primeval severity, and at the same time effectively sheltered them from critical scrutiny.

Afterthoughts

In response to the discussion I would like to emphasize two points. First: writing down law implies a consciousness that law may undergo change. According to historical circumstances, change may be viewed either as corruption by unjust rulers, which must be eliminated, or as a positive response to new problems. Writing thus implies, as Peter Spahn has noted (117), a recognition of the political character of law. Drakon and Solon, in being concerned to fix the text of their laws, may have been thinking of threats in the immediate future rather than long-term preservation. As for the question why they used wood rather than stone, we must recognize that the texts of their laws were by archaic standards unusually lengthy. It seems likely that they were set up inside a building, either on the Acropolis (*FGH* 72 F 13) or in the Prytaneion. Revolving *axones* would take up less space than stone *stêlai*.

My second point concerns the role of Drakon in classical myth. I have tried to show not only that the legal text preserved (in part) on *IG* I^3 104 fits plausibly between the Homeric poems and Solon's laws in a developmental account of early Greek law, and also seems to fit with the story of the Kylonian conspiracy as told by Herodotus and Thucydides, but also that a history of the "mythicizing" of Drakon has to be much broader in scope than the usual speculations about the use made of Drakon by oligarchs in the late fifth century B.C. All the myths about famous homicide trials in Athens, in the versions we have, presuppose explicit provisions covering various forms of defensible homicide, and should therefore be post-Drakonian. The ritual of the Dipolieia also seems to have been modified after the introduction of "trials" of inanimate objects in the Prytaneion. Intertextual dialogue is going on between law, ritual, and myth. We need to rethink radically and critically our assumptions about what is "early" or "primitive" in Athenian homicide law[77] and what is "later." We can see traces, starting in all probability within a generation or two of Drakon, of a collaborative process of drift and convergence in which myths of homicide were modernized by the incorporation of references to contemporary law, while homicide procedure was given an aura of age-old sacral authority by its

77 The persistence of outdated models of legal evolution is of course a common problem in the study of Greek law. *Atimia*, discussed above, is a case in point.

associations with myth and with ritual (role of the *archôn basileus*, formal *prorrhêsis*, trials held in sanctuaries, link with the Dipolieia). Homicide loomed large in the popular imagination less as the supreme crime against life than as the subject of contradictory evaluations. It was a dreadful deed, but often committed in excusable circumstances and for the best of motives. This contradiction was also a problem for law. How could society combine due provision for lenient treatment of excusable homicide with maintaining an attitude of the utmost severity towards homicide viewed in the abstract? Although it was in my view a historical accident that the first written law in Athens dealt with homicide, the Athenians were able to turn this accident to good account. It made "Thou shalt not kill" the first written commandment of Attic law. The untidy coexistence in Athenian homicide procedure of threats of private violence, public legal process, and ritual excommunication was sacralized and sheltered from criticism and reform by the construction of Drakon as a mythical figure. This development was clearly well under way by the time of Ephialtes' reforms and Aeschylus' *Eumenides*. By 411-403 it had progressed far enough for Drakon to be scarcely plausible as a figure in oligarchic ideology. The artificiality of the Drakonian *politeia* in *Ath. Pol.* 4 is obvious not only from its historical anachronisms, but also from its complete lack of connection with Drakon even as a mythical figure.

It became clearer to me during the course of our discussions, especially after Julie Velissaropoulos' paper, that the intertextual dialogue and mutual reinforcement which can be traced in the relations between myth, ritual and homicide law can also be seen at work in the relation between public and private law, in the construction of concepts of particularly serious offences. Just as the city, I have argued, appropriated *atimia* to stigmatize and excommunicate enemies of the state, it also appropriated and conferred a penal character on reactions that had originated in the private sphere as measures of self-help or acts by which the offender could escape private vengeance. The public enemy could be slain with impunity, like a *moichos* caught in the act, or had to leave the country, like a killer pursued by his victim's kin. Any citizen was empowered to take self-help measures against the man who had violated the central norms of the public sphere, as he could against an invader in his own *oikos*; Solon makes the parallel explicit (4.26 West). But this cooptation of private reactions in the service of public interest also worked to criminalize private offences and to confer a penal character on self-help killings and on exile. The archaic state acquires its legal functions not only by legitimizing or limiting self-help but also by appropriating it.

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Response to Sally Humphreys

The task of the respondent is partly to offer a critique of the paper, and partly to open up issues for possible discussion. Since I am not a specialist on archaic law, I shall not attempt the first of these tasks. Humphreys' statement of her own thesis is admirably lucid, and she has herself clearly highlighted the areas in which her views are contentious, from the nicely provocative title of her paper (ever so quietly suggesting that alternative approaches have been in some sense anti-historical) to the broad model of legal development which is being advanced: that legal change in archaic Athens did not occur through evolution towards some dimly perceived ideal of what the law could or should be, but was instead the on-the-hoof response to perceived emergencies. It would be interesting to consider further the general applicability of this model, and not just its value as a reading of Drakon: for instance, can it help explain classical as well as archaic legal change? or indeed, legal change in those other societies (outside the Greek world) where jurisprudence has played no rôle?

There are however two further issues which the paper has made me think about, and I should like to develop these briefly, with the aim of provoking further debate. One is a question (or series of questions) about the relationship between writing and the law; the second is a problem about historical knowledge.

Drakon is in some sense a historical figure: at the least, he (or it)[1] has a name, to which later Athenian tradition was able to attribute a personality. What distinguishes him from any hypothetical and anonymous predecessors is that he was apparently the first to put any part of Athenian law into written form. The effects of this step are clearly revolutionary. Gagarin[2] has indeed argued that it is the action of writing that causes you to select which of society's norms are to become legal norms: in effect, therefore, that the invention of law is the product of writing. But what about the motives: why does Drakon choose to write his law?

Traditional explanations have taken two forms. The first suggests that the aim was publicity and/or open government; the second stresses the idea of permanence. The two are often (but perhaps not necessarily) connected: Drakon, we are told, was ensuring that everybody knew their rights, and preventing the aristocratic judges from capriciously inventing new regulations.[3] But the first of these explanations involves making some

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1 I am not convinced by the arguments of J. Beloch *Griechische Geschichte*, 2nd ed. (Berlin & Leipzig 1926) 258-262 that Drakon was the name not of a man but of a sacred snake.

2 M. Gagarin *Early Greek Law* (California 1986) 8-9.

3 "It was at all events an enormous gain for the poor that <the> interests <of the rich> should be defined in writing": a particularly striking example of the traditional conflation of the two ideas, precisely because the source of the quotation (J. B. Bury & R. Meiggs *A History of Greece*, 4th ed. [London 1975] 121) is not a specialist work but one of general history.

highly questionable assumptions not only about the spread of literacy in the seventh century (which is unknowable), but more importantly about its function.[4] It would indeed be possible to construct an alternative and wholly contradictory agenda for Drakonian politics: one in which writing is an exclusive skill, designed to humiliate and neutralise those who cannot operate the system; but I am by no means sure that I myself would want to go that far.

The second traditional explanation poses a further problem. If the aim is one of permanence, why are the laws of Drakon (and also, incidentally, of Solon) written on wood, and that at a date when the use of stone for legal texts is already beginning to be attested in other parts of the Greek world?[5] Or are we to assume that the fact that wood is perishable simply did not occur to the legislator? It is striking, incidentally, that that we hear nothing of the text being produced in portable form, on parchment or whatever.[6]

It would of course be possible to develop alternative explanations. Thomas, working on Athenian literacy, suggests that part at least of the motive may have been the existence of new technology: once you have invented writing, it becomes necessary to find things to do with it. She adds that writing the law may have had the effect (if not also the aim) of bolstering the text with an authority that would otherwise have been diminished.[7]

We should not pretend to know why Drakon wrote his law; but the question is important, because the answer that we give (or assume) will affect how we interpret the whole of his work. Who was the law aimed at: potential litigants, wanting to know their rights? Or was it for judges? and if so was it to guide them or to limit their powers? This question may be insoluble: outside our text itself, the only evidence comes from comparison with later Athenian practice, and here we need to be very careful. In the fourth century, to quote the law was the litigant's privilege, not the court's task; and despite the arguments of Meyer-Laurin, I am not convinced that statute was a major source of law in the classical period, at least in the courts.[8] But the situation may well have been different at the *anakrisis*, let alone in the seventh century.

We tend to assume that legal change occurs either through case-law (as it does in common-law countries) or through jurisprudence (as in civil-law systems). But Athens is a jurisdiction without case-law or jurisprudence, and this rules out many of our familiar

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4 This remains a problem even if we accept, as I am inclined to do, that it was Solon who gave the name *graphê* to his new form of prosecution: or in other words, that within a generation of the work of Drakon, for whom a prosecution was apparently initiated orally by means of an oath (*diômosia*), an Athenian legislator could conceive of the action of indictment in written terms rather than as a spoken oath.

5 A law-text from Dreros is dated by Meiggs & Lewis (no. 2) to the period 650-600.

6 There is no good reason to accept the *a priori* insistence of R. J. Bonner & G. Smith *The Administration of Justice from Homer to Aristotle* I (Chicago 1930) 76 that "there must have been documentary <ie., portable> copies" at this date.

7 R. Thomas "Written in stone: liberty, equality, orality and the codification of law" in L. Foxhall & A. Lewis, eds. Papers on Greek Law (Oxford, forthcoming).

8 H. Meyer-Laurin *Gesetz und Billigkeit im attischen Prozess* (Weimar 1965): see my comments in P. A. Cartledge, P. C. Millett & S. C. Todd, eds., *Nomos: essays in Athenian law, politics and society* (Cambridge 1990) 14.

assumptions. Legal change at Athens can only have occurred in two ways: first as the unconscious aftermath of social change, where courts begin to apply the law in a new and consistent way because of a change in language or popular attitudes;[9] or secondly as the conscious result of legislation. But by the classical period, the rhetoric of legislation is characteristically conservative: it should not be necessary to pass laws, except to restore the *status quo*.[10] This brings us back to the burden of Humphreys' paper, which is also my final question about Drakon and written law. The effect of Drakon's work was, we must assume, revolutionary: writing changed the way in which Athenians used and viewed the law. But what, once again, of his intention: to what extent did he lay down rules which were themselves original, and (given that rhetoric and actuality are very different things) would he have described or perceived his own work in such revolutionary terms?

My second issue concerns the problem of historical knowledge. I am the sort of Greek historian who believes that Greek history begins in 431 B.C., and for whom Drakon and Solon are primarily figures of classical Athenian myth rather than of archaic reality. It has therefore been a curiously dislocating experience to be invited to respond to a paper on archaic law; I have found myself repeatedly thinking, "This is wonderful: is there any possibility that it might be true?"

It must of course be admitted that certainty on its own is a barren criterion for the writing of history, and especially for writing the history of law. One of the most exciting features of ancient history, indeed, is the tension between knowledge and speculation: where we can be certain, we very often have nothing particularly interesting to say; the most interesting ideas in ancient history are never more than probable. But where to resolve that tension is a matter for the individual, and here I find myself parting company both with the speaker and (I suspect) with many other contributors to this volume.

This is one of those issues on which our conclusions will tend to be implicit in our premises, or at any rate will depend on the training we have received and the persepectives with which we approach the text. On the whole, if it is legitimate to generalise wildly, the most conservative positions here are taken by epigraphists (with what might be described as their innate reverence for the inscribed text) and also by constitutional historians (who tend to have a very similar attitude towards the validity of seventh- and sixth-century history). Those who work on the orators, and particularly those who studied at Cambridge

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9 It is a striking characteristic of the orators when quoting laws to interpret them on the assumption that the text was originally designed to achieve its perceived contemporary effects, as if words can only mean what they now mean; this frequently involves attributing grossly anachronistic aims to ancient legislation (e.g. Lys. 26.9, attributing to the *dokimasia* law a purpose which can only have applied since 411). I hope to consider further the significance of this phenomenon, in a paper entitled "Lysias *Against Nikomakhos*: the fate of the expert in Athenian law" (in Foxhall & Lewis, cf. n.7 above, forthcoming), where I shall also discuss the apparent exception to this rule, the antiquarian discussion of obsolete laws in Lys. 10.15-21.

10 The practice of legislation is of course not the same as the rhetoric (cf. below). Indeed the reverse: the continual complaints of the fourth-century orators about the frequency of legislative change are themselves made in trials which focus on new legislation proposed by the opponent (Dem. 20.102; 22.25; 24.103, 113, 142; Aiskh. 3.35-37).

during the lingering after-glow of Moses Finley, will tend like myself to talk about rhetoric and ideological propaganda, and take a much more sceptical line. But I must confess that on this issue the conservative position, of which Stroud[11] is the most distinguished exponent, does at times seem to me to come perilously close to the fundamentalist demand that we need a fixed starting-point in order to have a fixed point from which to start. Stroud himself, it must be admitted, puts forward a much more important justification for his views: that on this issue, the onus of proof rests with the sceptic; his argument both deserves and will receive further consideration below.

Conservatism and scepticism are poles of a continuum rather than exclusive alternatives. Humphreys herself emphasises towards the end of her paper that "in my view we cannot . . . be sure that everything inscribed on *IG* I^3 104 came from Drakon": this is the position of the critical analyst, midway between those of the conservative and of the sceptic. But how is the critical analyst to distinguish here between genuine and spurious elements? The most theoretically sophisticated treatment of this problem is given by Ruschenbusch, in his magisterial discussion of the laws of Solon: he distinguishes between unreliable rhetorical evidence, and the reliable products of ancient scholarship.[12] But whereas we possess the former and can to some extent appreciate the speakers' agenda, for the latter we rely on lost texts and fragmentary citations without context, so that we have no way of assessing their validity. This problem becomes all the more pressing once we accept, as we surely must, that Ruschenbusch's underlying distinction between rhetoric and scholarship is ultimately a false one. The orators are not simply lying when they quote inaccurately; they are treating texts in a way that was widespread[13] and socially acceptable in a predominantly oral society.

For Drakon, on the other hand, the evidence is even more restricted: we have the text of *IG* I^3 104 itself, and what appear to be a series of Demosthenic quotations from it.[14]Here the genuine elements are presumably those pieces of the jigsaw that happen to fit the picture that we believe to have been represented on the missing cover of the box; but how then can we avoid circularity of argument?

This brings us back finally to Stroud's argument about the burden of proof: whatever the value of such an argument in general, however, the background to this particular inscription leaves me deeply sceptical in this case. The revolution of the Four Hundred in 411 B.C. was at least in part an ideological propaganda-war, in which the rival combatants fought over the question, who are the legitimate heirs of the founding fathers,

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11 R. S. Stroud *Drakon's Law on Homicide* (Berkeley & Los Angeles 1968): for his argument (below) about the burden of proof, see e.g. 64.

12 E. Ruschenbusch *Solonos Nomoi* (Wiesbaden 1966 = *Historia Einzelschrift* 9): for the distinction between rhetorical and scholarly sources, see 53-58.

13 This point was well made by A. L. Boegehold in his review of Stroud (*CPh* 68 (1973) 152-3 at 153).

14 Dem. 23.37 seems to be a quotation of lines 26-29 of *IG* I^3 104, and Dem. 23.60 of lines 37-38: indeed, any of the series of laws quoted in Dem. 23.22-62 may come from our inscription, much of which is defaced and illegible; and so may at least some parts of the law(s) quoted at Dem. 43.57-58.

Solon and Drakon?[15] This indeed is the reason why our text was inscribed in the first place. It is characteristic of Athenian legislative inscriptions that they are without context, and that they do not make explicit why the text which is inscribed has been enacted as legislation. At first sight, the ten-line prescript to our decree is a striking exception to this rule, but this exception is no more than superficial. We do not know the proposer's name, and what (if any) his political affiliations; we do not know why he proposed his bill, why he nominated the specific officials to undertake the task (and indeed the identities of any of the individuals concerned), or what he or they expected to find. Nor do we know whether the proposal was met by unsuccessful opposition; and if so, on what grounds. Of course the proposal implies that there was a text ready waiting and that they were to copy rather than to emend it: what else could be said?[16] And I have no doubt that what the officials proceeded to inscribe was, at least in substance, a very ancient text which could legitimately be represented as Drakonian, and which indeed they may themselves have believed to be such. But how in 409 B.C. did anybody know? And why, after 411 B.C., should they care? Whatever else we think about this text, it is (despite the efforts of certain scholars)[17] an inscription of the late fifth century; and that, I would maintain, makes it important evidence indeed, but important as a piece of evidence for late fifth-century history.

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15 The most detailed treatment of this issue (touched on by Humphreys) is still that of M. I. Finley in his inaugural lecture, "The ancestral constitution," reprinted in *The Use and Abuse of History* (London 1986[2]) 34-59.

16 It might indeed be suggested that the function of such an elaborate prescript may have been precisely to bolster the otherwise shaky credibility of the text which was eventually inscribed.

17 See, eg., C. W. Fornara *Archaic times to the end of the Peloponnesian War* (Cambridge 1983), who misleadingly catalogues this as a seventh-century text, rather than (as Meiggs & Lewis) a fifth-century one.

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The Jurisdiction of the Areopagos in Homicide Cases*

I.

One of the most significant discoveries in legal history during recent years is to be credited to Michael Gagarin. His thesis, amazingly simple, states that at the time of Drakon, scarcely any distinction between "premeditated" and "unpremeditated" homicide had been made.[1] Also quite plausible seems his view that the structure of Athenian homicide law had remained largely unchanged since the days of Drakon.[2] In view of the important role oaths played in archaic procedure,[3] it may furthermore be supposed that the five different homicide courts originated from early oath-places.[4] On these assumptions, however, it is hard to believe that the competence of the Areopagos in the age of the orators should have been based on whether the defendant is accused of "premeditated" killing. This would require a substantial alteration of Athenian homicide law. Such a reform may have taken place, yet we have no direct knowledge of it. Presuming, however, the greatest possible continuity, the question arises whether our sources from the time of the orators have been interpreted correctly so far: in other words, is φόνος ἐκ προνοίας really the criterion for the judicial competence of the Areopagos? I doubt it.

On the issue of the judicial competence of the Athenian courts for homicide there are authentic statements from the most distinguished authors of Greek classical literature: Demosthenes and Aristotle. In my opinion, Plato has also commented, indirectly, upon that matter. Modern studies[5] have paid appropriate attention only to the first two authors mentioned—not to Plato. My rather hypothetical contribution to the subject tries to separate the rules on the competence of Athenian homicide courts from those determining the sanctions to be imposed there. Or, more precisely: in determining the competence of the Areopagos, it could have been relevant whether the perpetrator had

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* A preliminary German version, entitled "Die Zuständigkeit des antiken Areopags als Blutgerichtshof" (from 1987) will be published at Athens in a commemorative volume for the 150th anniversary of the (modern) Areios Pagos—hopefully without further delay. My paper at the Symposion for the most part complied with that German version. The discussion, however, has produced some new aspects, which I have partially included in the text, partially summarized in my Additional Note (below). In first place, I have to thank my respondent, Prof. Wallace. I am also indebted to Mr. M. Barth for his assistance in preparing the English text version and to my colleagues, Prof. Wallace and Prof. Gagarin, for revising my translation. All responsibility, of course, is mine.

1 Gagarin (1981) 60 and 111ff, followed by Thür (1985) 510-514 and (1990) 146f, rejected by Wallace 16f (more critical remarks are listed there in n.61; see also Maffi 112-115). The sophisticated differences between "premeditated" and "intentional" will turn out to be insignificant to my investigation, cf. on this matter recently Wallace 98-100.

2 Gagarin (1981) 22-29; however Sealey 291-294.

3 Thür (1989) 57 and (1990) 151f.

4 On the other hand, Sealey 290 assumes a gradual historical development in three stages.

5 Lipsius 121ff, Busolt-Swoboda 530ff and 811ff, MacDowell (1963) 44, Sealey 276f, Nörr (1983) 645-649, Wallace 97f.

killed by his own hand; the sanctions to be inflicted in a homicide trial, however, could have been dependent on whether the killing was premeditated or unpremeditated.

At first sight, the ancient testimonia seem to show a somewhat different picture. Let us begin with the report on the five Athenian homicide courts given by Demosthenes in his speech delivered against Aristokrates in 352 B.C. (23.65-79). Only the council convening on the Areios Pagos and the court meeting at the temple of Pallas Athene, the Palladion, are of interest for us here (65-70, 71-73).[6] Only the competence of the Palladion, viz. to hear cases of unpremeditated homicide, is reported by the orator (71): Δεύτερον δ' ἕτερον δικαστήριον τὸ τῶν ἀκουσίων φόνων . . . , τοὐπὶ Παλλαδίῳ . . . Any corresponding statement, e.g. concerning φόνος ἐκ προνοίας, is missing in 65-70 which deal with the Areopagos; by this description, however, the reader almost inevitably gets the impression that charges of premeditated killing fell within the jurisdiction of the Areopagos. To be exact, however, 23.73 merely tells us in rather general terms that a lesser degree of guilt causes less severe punishment.[7]

Only one single court speech links the words ἐκ προνοίας φόνος with the Areopagos: Deinarchos, *Against Demosthenes* (1.6; 323 B.C.).[8] Yet this passage also mentions "killing by violence," indicating direct killing by one's own hands. Whether the first term was pertinent to the sanction, i.e. the death penalty, and the other one to the competence of the court, certainly cannot be decided on the basis of this text alone. Anyway, in the context of his speech the orator had no reason for giving more precise details.

On the other hand, premeditation as a criterion for judicial competence of the Areopagos is clearly expressed in Aristotle's *Athenaion Politeia* (57.3; about 325 B.C.): εἰσὶ δὲ φόνου δίκαι καὶ τραύματος, ἂν μὲν ἐκ προνοίας ἀποκτείνῃ ἢ τρώσῃ, ἐν Ἀρείῳ πάγῳ, . . . τῶν δ' ἀκουσίων καὶ βουλεύσεως κἂν οἰκέτην ἀποκτείνῃ τις ἢ μέτοικον ἢ ξένον, οἱ ἐπὶ Παλλαδίῳ. What Demosthenes describes with conclusive clearness becomes blurred by the material empirically gathered. The Palladion is said to be competent for cases of 1) unpremeditated killing, 2) indirect killing,[9] and 3) killing a non-citizen. Remarkably, the latter two crimes may be committed either with or without premeditation. On the other hand, Demosthenes (23.71) is logically consistent in

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6 In the following, I will argue *e silentio* so that reading both passages in context would be advisable.

7 Dem. 23.73: καὶ γὰρ τὸ τῶν ἀκουσίων ἐλάττω τὴν τιμωρίαν ἢ τῶν ἑκουσίων τάξαι δίκαιον . . .

8 Dein. 1.6: καὶ ἡ τῶν ἐκ προνοίας φόνων ἀξιόπιστος οὖσα βουλὴ τὸ δίκαιον καὶ τἀληθὲς εὑρεῖν, καὶ κυρία δικάσαι περί τε τοῦ σώματος καὶ τῆς ψυχῆς ἑκάστου τῶν πολιτῶν, καὶ τοῖς μὲν βιαίῳ θανάτῳ τετελευτηκόσι βοηθῆσαι, τοὺς δὲ παράνομόν τι τῶν ἐν τῇ πόλει διαπεπραγμένους ἐκβαλεῖν ἢ θανάτῳ ζημιῶσαι . . . Wallace 98 draws from the term ἐκ προνοίας rather one-sided conclusions.

9 The term βουλεύειν comprises more than "planning"; even "planning or instigating," Gagarin (1990) 82, is an interpretation too narrow (see below notes 13 and 14). Gagarin (1990) 97f quite properly shows—against MacDowell (1963) 61-69—that it is not correct to infer a δίκη βουλεύσεως in Athenian homicide law from the ambiguous term βούλευσις, as used by Aristotle; βουλεύειν τὸν θάνατον always led to a δίκη φόνου.

referring solely to cases lacking premeditation. But logical stringency is a somewhat weak argument against apparently good evidence. More emphasis therefore should be placed on an inconsistency regarding the Areopagos. Aristotle, in the passage quoted above, varies the wording of a law cited by Demosthenes on a different occasion (23.22): Δικάζειν δὲ τὴν βουλὴν τὴν ἐν 'Αρείῳ πάγῳ φόνου καὶ τραύματος ἐκ προνοίας. A fairly literal paraphrase of this provision is presented by Pollux.[10] At first glance—possibly influenced by a preconception raised by the *Athenaion Politeia*—ἐκ προνοίας in this law seems to refer to both τραύματος and φόνου. But it is equally possible to interpret πρόνοια as applying only to the second word, meaning "wounding with intent to kill." With regard to *phonos*, then, πρόνοια would not necessarily be the relevant criterion for the competence of the court. Both offenses, *phonos* as well as *trauma*, could have one element in common: the direct use of one's own hands. *Phonos*, originally, means killing by violence and bloodshed;[11] charges of that kind of *phonos* may fall within the competence of the Areopagos, regardless of the perpetrator's intent. If the victim survives physical assault, he as plaintiff must additionally claim the perpetrator's intent to kill in order to try the case on the Areopagos. Even in classical times the plaintiff proves πρόνοια to the court by the evidence of external circumstances: had the perpetrator, for example, brought along a knife or did he merely use a clay pot, incidentally grasped, to hurt his victim (Lys. 4.6).

So the meaning of the law cited in Dem. 23.22 remains ambiguous. Anyway, it is certain that the *Athenaion Politeia* by paraphrasing verbally (ἄν μὲν ἐκ προνοίας ἀποκτείνῃ ἢ τρώσῃ) interprets the text in a sense according to which premeditation was the decisive criterion for the competence of the Areopagos. Correspondingly, Aristotle also lists—fairly confusingly—the term ἀκουσίων on top of the competences of the Palladion. Modern scholars unanimously agree on the view conveyed by Aristotle: cases of premeditated homicide were to be tried on the Areopagos, those of unpremeditated killing at the Palladion.[12]

II.

Plato's *Nomoi* (written about 350 B.C.) will lead us on a different track. This work in fact does not describe the positive law of Athens, but one may suppose that the philosopher has not left the frame of certain fundamental principles and ideas of the law of his native city. Therefore, a closer look at the structure of his chapter on homicide offenses could be instructive. There, a basic classification for the proposed legal

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10 Pollux 8.117: "Αρειος πάγος· ἐδίκαζε δὲ φόνου καὶ τραύματος ἐκ προνοίας . . . , see Wallace 97.

11 MacDowell (1963) 45, Wallace 106.

12 Lipsius 123, Cantarella 111, Rhodes 641, Nörr (1983) 642, Wallace 98, Heitsch (1989) 71, Gagarin (1990) 82. Not quite logically, MacDowell (1963) 45, 66, 68f finds πρόνοια and βουλεύειν as the criteria. Though Sealey sticks to the conventional view on 277, on 290 he comes quite close to my hypothesis with his phrase "killing an Athenian citizen intentionally with one's own hands."

regulations distinguishes between "killing by one's own hand" and "killing not by one's own hand": ἐὰν δὲ αὐτόχειρ μέν, ἄκων δὲ ἀποκτείνῃ . . . (865b; cf. also 866d, 867c)[13] or ὃς ἐκ προνοίας . . . αὐτόχειρ κτείνῃ, . . . (871a) and ἐὰν δὲ αὐτόχειρ μὲν μή, βουλεύσῃ δὲ θάνατόν τις ἄλλος ἑτέρῳ καὶ τῇ βούλησει τε καὶ ἐπιβουλεύσει ἀποκτείνας αἴτιος ὤν, καὶ μὴ κάθαρος τὴν ψυχὴν τοῦ φόνου ἐν πόλει ἐνοικῇ (871e-872a).[14] Although appearing antiquated, this scheme which is so easy to apply in court sets up the framework within which the philosopher develops his highly sophisticated theory of guilt (which I will not deal with here). Consequently, for Plato the degree of penalty in both cases is dependent upon the degree of guilt and not upon external circumstances of the deed. Any logically compelling reason for classifying homicide offenses according to exterior facts cannot be perceived. Plato only permits the premeditating perpetrator who has not used his own hands to kill (as opposed to the one who did) to be buried in his home land (872a); but this cannot have been the reason for extending the opposition αὐτόχειρ / βουλεύειν over the entire chapter (cf. also 872b-c).

Using this distinction Plato apparently follows a differentiation well-known from Athenian legal practice. The philosopher, on the one hand, refines the system of sanctions in comparison with Athenian law. On the other hand, he widely simplifies the sophisticated rules on the competence of the homicide courts. One can make a good argument that this differentiation, completely insignificant to him in substance, has been derived from Athenian regulations on jurisdiction. The *Nomoi* therefore should encourage us to reconsider the confusing provisions on competence the *Athenaion Politeia* provides for killing an Athenian citizen: possibly not lack of premeditation (ἄκων), but solely indirect action (βουλεύειν) was the criterion crucial for assigning a case to the Palladion. In consequence, the Areopagos should be regarded as competent for cases of "killing by one's own hand" (αὐτόχειρ or similar terms).

III.

Consequently, we have to examine the evidence for the opposition χείρ / βουλεύειν in Athens' legal practice: Ant. 6.16 and *IG* I^3 104.12; Arist. *Ath. Pol.* 39.5 and Andok. 1.94. All four texts will turn out to be connected with the competence of the homicide courts.

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13 For quite plausible reasons the opposite, killing not by one's own hands, is missing in Plato's passages on killing unintentionally or in the heat of passion; theoretically, such a situation may look somewhat far-fetched. Antiphon (6.19), however, gives evidence of a strange case of a βουλεύειν without πρόνοια. Indeed, real life seems to offer much more than philosophers or jurists commonly are able to conceive. For βουλεύειν in Ant. 6, see Maschke 92ff, MacDowell (1963) 63f, Nörr (1983) 646; insufficiently Gagarin (1981) 42, on which see Heitsch (1984) 17, Thür (1985) 510; cf also Maffi 113f who takes βούλευσις as "préméditation."

14 In using the terms χείρ, βουλεύειν and αἴτιος, this passage obviously follows the law of Drakon (as restored, see below, n.19). The schematic opposition reveals that the principal classification is based on direct and indirect killing. Yet literally taken, as Ant. 6 shows, the term βουλεύειν (to plan, to devise) does not cover each and every case of killing "without using one's own hands" (see Heitsch [1984] 20, Nörr [1986] 76f); but this is due to Drakon, not to Plato. With his paraphrase βούλησις (purpose) and ἐπιβούλευσις (plotting) the philosopher particularly emphasizes the interior facts of the deed.

1) In his speech *On the Choreutes* (412 B.C.) Antiphon quotes a passage from the wording of the *diômosiai*, the oaths to be sworn by both parties at the preliminary proceedings (6.16): διωμόσαντο δὲ οὗτοι μὲν ἀποκτεῖναί με Διόδοτον βουλεύσαντα τὸν θάνατον, ἐγὼ δὲ μὴ ἀποκτεῖναι, μήτε χειρὶ ἀράμενος μήτε βουλεύσας. The plaintiff and his witnesses charged the speaker with killing by βουλεύειν, but admitted that the accused had not acted ἐκ προνοίας (19). Following Aristotle (*Ath. Pol.* 57.3), the competence of the Palladion—the speech doubtless was held there—would have been determined by either of these two reasons. Remarkably enough, only the exterior aspect of committing the crime is affirmed by oath, but not the issue of guilt. Because of the absence of premeditation, the accused is not facing the death penalty, but only banishment (6.4, 7; cf. Dem. 23.72). What sense could the plaintiff's *diômosia* have made under those circumstances? It is reasonable to assume that the plaintiff's pre-procedural oath determined the competence of the court.[15] Accordingly, βουλεύειν and not lack of premeditation (ἄκων) may have been crucial for the jurisdiction of the Palladion.

Like the accuser, the accused in his *diômosia* did not remark upon the issue of guilt. He denies killing "mit der Hand, die er darum geregt"[16] as well as indirect homicide. The alternative cannot refer to any difference in punishment;[17] in Athenian law, there is no indication of any different penalties to be imposed for killing by one's own hand and for killing not by one's own hand. Whether homicide was to be punished with death or exile was solely dependent on whether the crime had been committed with or without πρόνοια (Dem. 21.43). The alternative "with one's own hand or not" seems to refer to the competence, just like the plaintiff's *diômosia* does. With the jurisdiction of the Palladion already determined by the term βουλεύειν, the fact of killing "by one's own hand" seems to be the appropriate criterion for the competence of the Areopagos.

But for what reason does the speaker in his oath deny both types of committing homicide, despite being accused of only one? As the defendant he is urgently interested in getting rid of the homicide charge once and for all. If acquitted, the comprehensive words of his oath protected him against any further judicial challenge, no matter if it should take place at the Palladion or on the Areopagos. Besides, he is following the law of Drakon, as will be shown below.

Realizing the central role the *diômosia* played in initiating homicide trials, the brief remarks in Antiphon's sixth speech offer good reason to conclude as follows about the competency of the courts for charges of killing an Athenian citizen: for cases of βουλεύειν the Palladion, for cases of killing by one's own hand the Areopagos; πρόνοια

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15 Thür (1990) 151f.

16 This is how Wilamowitz (1900) has translated the strange term ἀράμενος. Harmonizing this term with Andok. 1.94 (χειρὶ ἐργασάμενος, Dobree) is inappropriate for the antiquated wording of the oath; see however Heitsch (1980) 52 n.38, with doubts Gagarin (1990) 95.

17 MacDowell (1963) 66, Gagarin (1990) 95.

was pertinent only to sentencing.

2) Also referring to the formulation of *diômosiai* is, in my opinion, a passage from Drakon's law on homicide, of which I have suggested the following restoration[18] (*IG* I³ 104.11-13): [. . . Δ]ικάζεν δὲ τὸς βασιλέας αἴτιο[ν] φόν[ο] ἐ[ναι ἢ χειρὶ ἀράμενον] ἢ [β]ολευσαντα.[19] The term δικάζειν here must not be interpreted as a court decision or "pronouncing judgment." It means the act of authoritatively formulating the oaths that lead to a final verdict.[20] In accordance with the charge the plaintiff had put forward, the *basileis* imposed on him to swear that the accused was guilty[21] of homicide either by killing with his own hands or by participating. The plaintiff, of course, had to decide on one of the alternative charges; in his oath, the accused was to deny the accuser's allegations.[22] As already at the time of Drakon direct and indirect killing had led to different oaths, so too the existence of different oath-places might be suggested accordingly. Thus already the seventh century might have known different court-places, long before the council of the Areopagos became engaged in trying homicide cases, and even before the introduction of an "element of guilt" into the homicide law.[23] The issue of πρόνοια, already at the time of Drakon, had been mentioned only in connection with sanctions.[24]

But those were the early days. It is certain that the law of Drakon, of the inscription—unfortunately preserved only in poor condition—provides no answer to questions on the competence of certain courts. Looking for those reports would be in vain anyway. However, combining the text with Ant. 6 allows us to infer that χείρ and βουλεύειν as criteria for the competence may, in accordance with the traditional character of Athenian homicide law, be traced back to the earliest times.

3) It will also help us get a better understanding of the two remaining texts if we interpret them as jurisdictional clauses. Excluded from the amnesty of 403/2 B.C. were homicide offenders (and those officials who were most incriminated), see Arist. *Ath. Pol.* 39.5: Τὰς δὲ δίκας τοῦ φόνου εἶναι κατὰ τὰ πάτρια, εἴ τίς τινα αὐτόχειρ ἀπέκτεινεν ἢ

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18 Thür (1990) 152.

19 Former restoration attempts are listed by Lewis (*IG* I³); see also Thür, *ZSS* 102 (1985) 776.

20 Thür (1989) 56f and (1990) 152.

21 As shown by Ant. 6.17, also the term αἴτιος supposedly was included in the wording of the *diômosia*.

22 Verdict was rendered simply by a vote of the court on the two parties' opposite procedural allegations (cf. Ant. 6.3, 16); see Thür (1987) 478.

23 In my opinion, (1990) 149, 156, the factor of guilt, combined with the death penalty, became relevant only from Solon on. As for the early history of the Areopagos see Wallace 8-22. He seems to be right in pointing out that in Drakon's time not the entire "council meeting on the Areios Pagos" (founded by Solon), but only 51 *ephetai* judged homicide trials on the "solid rock" (as he [213f] explains the etymology of Areios Pagos). Misinterpreting the evidence (see the following note), however, Wallace links up the jurisdictional competence of this archaic court with πρόνοια.

24 At least this is clearly expressed in the first sentence of the law of Drakon (*IG* I³ 104.11): καὶ ἐὰμ μὲ 'κ [π]ρονοί[α]ς [κ]τ[ένει τίς τινα φεύγ]ε[ν· . . .]. Further problems cannot be dealt with here; see Wallace 16ff, Thür (1990) 145f. Also the term ἄκων (l.17) refers to sanctions (the exile), not to competences; see Thür (1990) 146 n.15.

ἔτρωσεν.[25] Why is premeditation not referred to in this case? The fact that the law covers a group of homicide offenders who had used their own hands suggests the existence of such a category already in homicide law. Obviously, the perpetrator who had used "his own hands" appeared to be more significant than the one who had acted ἐκ προνοίας: those were the cases belonging to the Areopagos.[26] As the combination of killing and wounding plainly shows, the clause refers to this court; the word ἔτρωσεν will certainly correspond to the term τραῦμα ἐκ προνοίας we have already met in Dem. 23.22. Remarkably, the text of the official document reported by Aristotle omits the phrase ἐκ προνοίας, while the term "by one's own hand," characterizing both offenses, precedes. The words εἴ τίς τινα αὐτόχειρ . . . therefore are to be regarded as an authentic interpretation of the law on jurisdiction reported by Demosthenes (23.22): offenses carried out with one's own hands fall within the competence of the Areopagos. Reference to "ancestral tradition" suggests the same results, as from the time of Drakon killing by one's own hand had been linked with certain particular oath- and court-places. So Aristotle, in placing the term ἐκ προνοίας instead of αὐτόχειρ in front of the two verbs "killing" and "wounding" (*Ath. Pol.* 57.3), presents an incorrect report on Athenian law.

Completely different words are used in an amnesty decree proposed by Patrokleides in 405/4 B.C. (Andok. 1.78) to show an idea quite similar to the reconciliation act reported in *Ath. Pol.* 39.5. Whoever has been punished with exile for committing homicide by the Areopagos, the Ephetai, the Prytaneion or the Delphinion, shall be excluded from permission to return to Athens.[27] In this list the Palladion (disregarding the insignificant Phreatto) is missing—properly, as we will see. Indicated by the term σφαγεῦσιν, offenders who had killed by their own hands shall be excluded from amnesty. These offenders are to be tried on the Areopagos, or, if pleading lawful killing, at the Delphinion (the Prytaneion may be ignored here). So the Palladion would be competent only for cases of indirect killing. Any idea that jurisdiction of the different courts had been dependent on the issue of premeditation can certainly be ruled out here.

Possibly both provisions on amnesty express a certain feeling of religious aversion against the social reintegration of a citizen with "unclean" hands (cf. Ant. 5.11). One who had not raised his own hand against the victim, who is "unclean" only "in his soul" (Plat. *Nom.* 872a; see above sec. II), apparently could be accepted more easily. Plato even allows him to be buried in home soil. It is well known how deeply Athenian homicide law is rooted in the religious sphere. So the above distinction should offer

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25 For the problems with the text, see Rhodes 468, Chambers 318.

26 Clearly recognized by Loening 40; yet his argument in n.61 is still based on "premeditated murder."

27 Andok. 1.78: . . . πλὴν ὅποσα ἐν στήλαις γέγραπται τῶν μὴ ἐνθάδε μεινάντων, ἢ ⟨οἷς, ἢ⟩ ἐξ Ἀρείου πάγου ἢ τῶν ἐφετῶν ἢ ἐκ πρυτανείου ἢ Δελφινίου δικασθεῖσιν ὑπὸ τῶν βασιλέων, ἢ ἐπὶ φόνῳ τίς ἐστι φυγή, ἢ θάνατος κατεγνώσθη ἢ σφαγεῦσιν ἢ τυράννοις . . . Text according to MacDowell (1962), who in his commentary (118) points out the parallels with Solon's amnesty decree (Plut. *Sol.* 19.4).

sufficient reasons for accusing offenders who had acted directly and those otherwise involved before different courts of justice.

4) Consequently, the amnesty did apply to indirect offenders—whose cases, to my mind, belonged to the Palladion. This is proved by the last of the passages to be reviewed, the case of Meletos in Andokides' speech *On the Mysteries* (1.94), held in the autumn of 400 B.C. By order of the Thirty (Tyrants), Meletos had a certain Leon executed by a procedure of *apagôgê*, but, as we are told, at the time he could not be prosecuted for homicide, in spite of a law ordaining the same treatment for planning and committing homicide by one's own hand: τὸν βουλεύσαντα ἐν τῷ αὐτῷ ἐνέχεσθαι καὶ τὸν τῇ χειρὶ ἐργασάμενον. Obviously, Andokides does not dare to claim that this clause is directly applicable to Meletos; explicitly, he only says that Meletos at the time could not be prosecuted any more by way of a δίκη φόνου, due to the amnesty for offenses committed before the year 403/2 B.C. Therefore, to determine the scope of application of that law, one has to rely on assumptions. Nowhere in homicide law does killing with or without one's own hands result in different sanctions. Penalties being imposed in homicide trials depend on the perpetrator's guilt. The recently proposed view that the law quoted had ordained the same punishment for indirect killing and for killing by one's own hands,[28] is without any foundation. It would be much more reasonable to regard this provision, too, as a jurisdiction clause:[29] The indirect offender is to be tried before the same court as the one who has committed homicide with his own hands—on the Areopagos, in my opinion.

This provision, however, by no means could be applied generally. It would have virtually deprived the Palladion of its judicial competence at all. Most probably, it was confined to a certain category of cases. Without such a restriction the law quoted by Andokides would contradict the amnesty regulations of *Ath. Pol.* 39.5. If offenders who acted indirectly in general had faced the same legal consequences as those who committed homicide with their own hands, I see no reason why they should not have been excluded from the amnesty. Yet Meletos, according to Andokides' evidence, doubtless did benefit from the amnesty regulations. This observation, regardless of any discussion of the judicial competence of the criminal courts, also leads to the result that the law quoted by Andokides might not have been generally applicable to each and every case of indirect offense.[30] Carrying out a killing not by one's own hands, but by βουλεύειν, above all pertains to a special group of persons, the magistrates of the polis.[31]

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28 So explicitly MacDowell (1963) 66, Wallace 101.

29 Already Lipsius 125 has related the law to "the same forum"; similarily Gagarin (1980) 93-98: "according to a rule as old as Draco, the legal procedure, including the court and the penalty, was the same for the planner as for the actual killer." What Gagarin fails to realize is that Andokides is quoting the law in close connection with the amnesty; we shall come back to this matter immediately.

30 MacDowell (1962) 133, though pondering how to combine the law cited by Andokides with the amnesty, is not aware of the basic contradiction: Why should Andokides in this context quote a law that was not even in the least applicable?

31 Loening 72 is right in pointing out that after 403/2 the main perpetrators hardly could be

A jurisdiction clause ordaining the same treatment for them and for those who committed homicide by their own hands would make good sense. Restricted to those cases the law, consequently, provided that magistrates who had ordered the killing of a citizen were to be accused before the Areopagos, even though they had not raised their own hands against the victim. Cases of indirect killing under official authority were to be tried at the most qualified and best reputed court of justice.[32] This special jurisdiction clause inferred from the amnesty regulations and from Andok. 1.94 probably could have been the reason why, after 403/2 B.C., several cases were tried on the Areopagos that otherwise should have been sent to the Palladion because of the factor βουλεύειν of the deed.[33] Also Harpokration's inconclusiveness on which court was competent to deal with cases of βουλεύειν,[34] may easily be explained by a transfer of jurisdiction established especially for magistrates.

In any case, Meletos as a private person was not directly affected by this provision. For the killing of Leon, those magistrates, even after 403/2 B.C., were liable who had ordered his arrest and execution; only they—but not Meletos—could be held responsible as βουλεύσαντες regardless of the amnesty. In 1.94 Andokides points out that it was solely the amnesty that protected Meletos from homicide charges, yet Meletos' act is called reprehensible[35] and might, under certain circumstances, be prosecuted (as every Athenian citizen was able to gather from the *nomos* even incompletely quoted). In the passage cited, Andokides chiefly deals with the scope of the amnesty regulations, that is with the admissibility of certain law suits. He focuses on the

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prosecuted for "killing with one's own hands," because "few of the oligarchs are likely to have committed homicide directly."

32 The clause of Aristot. *Ath. Pol.* 39.5 provided that all offenders with "blood-stained hands" were to be excluded from the amnesty; so the relatives of the killed could later on prosecute the perpetrators by a private δίκη φόνου. The following provision (*Ath. Pol.* 39.6) especially excluded from the amnesty the most incriminated oligarchic magistrates (the Thirty, the Ten, the Eleven, and the archons of Piraeus). As they had committed their political killings not with their own hands, the law cited in Andok. 1.94 was necessary to enable the relatives of the executed to prosecute the βουλεύσαντες by a δίκη φόνου despite the amnesty. The political importance of these cases justified a deviation from the conventional distribution of competence and assigned the decision to the Areopagos.

33 The texts have been thoroughly discussed by Lipsius 125-127 and MacDowell (1963) 65-69. Three cases remain problematic. The first two deal with trials against oligarchic magistrates. The speaker of Lysias 10 (held in 384/3 B.C.), whose father had been put to death by the Thirty (10.10), says he had "proceeded against the Thirty on the Areopagos" (31). In Lys. 26 (delivered 382 B.C.), Euandros, who had been selected for appointment as *basileus*, is attacked, because he had held office under the Thirty and deserved to be charged before the Areopagos himself (26.12). The third case also regards a magistrate, however one of later times. According to Harpokration, s.v. βουλεύσεως, a (lost) speech of Deinarchos against Pistias was held on the Areopagos because of βούλευσις. From Dein. 1.53 Pistias is known as an Areopagite, viz. as a former magistrate (see Kirchner *PA* 11823). Loening 69-84, though recognizing the problem connected with αὐτόχειρ, only gives the explanation that "presiding magistrates and dikasteries were willing to contemplate a less rigid interpretation of direct homicide" (84). This is not quite convincing.

34 Harpokration, s.v. βουλεύσεως, contrasts two lost speeches: the one of Isaios against Eukleides, said to be held before the Palladion, and one of Deinarchos against Pistias, before the Areopagos (on the latter see above n.33). If the competence of the court was not contested, the speakers had no reason to refer to this matter in their pleadings.

35 Andokides fails to notice that Meletos would have risked his own life if he had not obeyed the order of the Thirty. Together with Meletos and another three citizens Sokrates had been delegated to arrest Leon. Only Sokrates dared to withstand the Thirty (Plato. *Apol.* 32c-d; see Loening 81f).

matter of judicial competence, not on the possibly different sanctions for direct and indirect killing.

Following this outcome, the assumption that a jurisdictional reform, as postulated by Lipsius, took place in the fourth century is rendered dispensable. Lipsius suggests that almost up to the time when the *Athenaion Politeia* was composed all cases of intentional homicide were tried on the Areopagos, including all those of *bouleusis* of intentional homicide; then cases of βουλεύειν, as *Ath. Pol.* 57.3 showed, were assigned exclusively to the Palladion.[36] MacDowell, however, regards all those cases tried on the Areopagos as cases of killing by one's own hand.[37] For that reason, he states, those perpetrators had been excluded from amnesty, with the judicial competence of the Areopagos being based on the offender's πρόνοια; there was no evidence for a jurisdictional reform. This latter argument is doubtless true. Yet the homicide offenses should, in accordance with Lipsius, rather be interpreted as acts of βουλεύειν. Since the accused were magistrates, they fell within the scope of the law quoted in Andok. 1.94. The killings they had inflicted were to be treated as if "committed by their own hands." For this reason—and not for the πρόνοια also implied—the Areopagos was the competent court.

IV.

If my interpretation of the five passages just reviewed is correct, a combination of the various aspects will produce a relatively simple and unsophisticated scheme: the Areopagos was the court for cases of killing a citizen with one's own hand, the Palladion for cases of indirect killing. The only exceptions to this rule were the cases of magistrates who had a citizen put to death under official authority, i.e. who had acted indirectly: they fell, like cases of killing by one's own hand, within the jurisdiction of the Areopagos. For cases of killing a non-citizen, whether committed with one's own hand or not, the Palladion alone was competent. This simple principle that judicial competence is allocated in accordance with the external facts of committing the deed apparently is determined by a religious aversion against "unclean," blood-stained hands. This religious attitude required, as far as blood of a member of the sacred community was concerned, specific oath-places, and this led to specific court-sites accordingly.

In legal practice this criterion was an extremely simple and convenient one to apply. The plaintiff's charge indicated in which way the killing was perpetrated and determined decisively whether the case was to be remitted to the Areopagos or to the Palladion. The external facts of committing the crime—by one's own hand or in an

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36 Lipsius 126f.

37 MacDowell (1963) 66-68. Lys. 10.4, 31 provides no indication for killing with one's own hands; the "unclean hands" of Lys. 26.8, for which Euandros as magistrate under the Thirty would deserve to be tried by the Areopagos (26.12), could also be meant in a figurative sense (cf. Ant. 5.11, where all homicide offenders are designated in this way). Improperly, MacDowell puts the case of Pistias aside (see above n.33).

indirect way—made up an essential part of the plaintiff's *diômosia.*[38] The *basileus* formulated the oath according to the allegations submitted by the plaintiff; in doing so he assigned the decision to one of the two courts. The defendant had no need to protest against his case being allocated to one of the two courts. If charged with killing by his own hand, the defendant could only make a plea of lawful killing (in this case the Delphinion was competent), but he could not claim that he had acted indirectly. With punishment in both cases depending on πρόνοια, judgment by the Palladion and by the Areopagos resulted, as we shall see, in identical consequences anyway. In this situation, the accused could only deny having committed the deed at all. He had to swear his *diômosia* contrary to the plaintiff's and stand trial. Whether the decision was passed by the Areopagos or by the Palladion was of little significance to him.

If, however, the competence had been dependent on whether the plaintiff submitted charges of premeditated killing or not, an essential point in dispute which only the court could decide would have been raised in the preliminary stage. In this case, one would have to grant the *basileus* the competence of deciding upon guilt already in preliminary proceedings.[39] Yet we have no evidence of the *basileus'* authority reaching this far; in fact, his tasks were to fix the date of the trial and to formulate the *diômosiai* in accordance with the parties' allegations. There is no room for substantive decision. The second alternative, that the *basileus* determined the court according to the plaintiff's allegation, with the jury, if appropriate, having to disclaim its competence during the trial, would be by no means practicable.[40] The application of the law in court-practice provides a strong argument against the view that judicial competence of homicide courts should have been dependent on the issue of guilt. Assigning a case to a certain court was rather determined by the uncomplicated criterion of whether the deed had been committed "with one's own hand," "with one's own hand but lawfully," or "not with one's own hand."

In homicide trials the act of killing seems to have been consistently classified into two different categories: the first aspect separated killing by one's own hand from indirect acting; this issue, as shown above, determined the competent court, either the

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38 See Ant. 6.16 (above III.1). Even prosecution for killing a non-citizen, which was to be tried solely by the Palladion, did not fail to mention a perpetration by one's own hand (Dem. 59.10), probably for religious reasons. Only brief details are reported in Lys. 10.11 on the contents of the *diômosia.*

39 Indeed, this conclusion is drawn by Heitsch (1989) 86f, but on the basis of what I think is a wrong assumption: jurisdiction of homicide courts was, in his view, dependent on the issue of guilt.

40 A case related by Aristotle (*Eth. Megal.* 1188b) is usually referred to in this context: The accused woman was charged with δοῦναι of poison ἐκ προνοίας. She denied any intention to kill and declared she only wanted to administer a love-philtre. She was acquitted on the Areopagos. This court, in my opinion, was competent solely because of δοῦναι (Dem. 23.22). To reach a verdict of guilty—with exile as sanction—it would have been necessary for the plaintiff to classify his deed as μὴ ἐκ προνοίας, just like the plaintiff in Ant. 6.19 did. As the court could only vote by "yes" or "no," a homicide trial being a δίκη ἀτίμητος (see below n.42), the Areopagitai automatically had to acquit the accused woman, if they denied her πρόνοια. In doing so, the Areopagos by no means denied its competence—it rather rendered a decision on the merits. On this passage see Maschke 100f, MacDowell (1963) 46f, Nörr (1983) 659 n.53, Sealey 282, Heitsch (1989) 71f.

Areopagos or the Palladion. Secondly, the plaintiff had to state whether the accused had killed with or without πρόνοια; this issue was pertinent to sentencing, either death or temporary exile. This latter is to be inferred from Dem. 21.43;[41] Demosthenes reports no difference in regard of sentencing, whether the Areopagos or the Palladion is competent to render judgment.

As far as we have knowledge of the mechanisms leading to judgment in Athenian legal procedures, the plaintiff had to summarize his *petitio* in one single phrase. By voting, the jury was only able to affirm or deny this phrase, leading directly to either condemnation or acquittal.[42] In homicide law both the plaintiff's charge and the defendant's denial were expressed in the *diômosiai*. As shown by Ant. 6 (3, 16), the court decided simply by voting on the two contradictory oaths. Also from Ant. 6 (16, 19) it may be inferred with virtual certainty that the issue of πρόνοια was not included in the wording of the *diômosia*, unless the plaintiff reproached the accused with this particular item. If he did, however, charge the accused with πρόνοια, the claimant and his witnesses, most probably, had to take an oath on it—after all, the death penalty would be dependent on this special issue.[43]

V.

Reviewing all sources, it should be possible to find two proper examples of extremely situated cases in order to verify the double classification of homicide offenses, first according to χειρί or βουλεύσας, and subsequently (if required) according to πρόνοια. A case of unpremeditated killing committed with one's own hands being tried on the Areopagos, on the one hand, and a case of indirect yet premeditated killing of a citizen being tried at the Palladion, on the other, would provide corroborative support for the thesis just presented. Both cases would contradict the allocation of jurisdiction as reported by Aristotle in his *Athenaion Politeia* (57.3). Moreover, the second case would require the Palladion to have been competent to impose the death penalty.

1) The first case, the Areopagos trying an unpremeditated killing committed with one's own hands, may be inferred only indirectly from Dem. 54.25, 28.[44] The speaker,

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41 Dem. 21.43: ... ἔπειθ' οἱ φόνικοι (νόμοι) τοὺς μὲν ἐκ προνοίας ἀποκτιννύντας θανάτῳ καὶ ἀειφυγίᾳ καὶ δημεύσει τῶν ὑπαρχόντων ζημιοῦσι, τοὺς δ' ἀκουσίως αἰδέσεως καὶ φιλανθρωπίας πολλῆς ἠξίωσαν. Similar ideas are expressed in Dem. 23.49-50 (see below n.55). If in addition only the Areopagos had been competent in cases of killing ἐκ προνοίας this certainly would have been mentioned as a further argument.

42 Thür (1987) 475f.

43 Although not expressed in Aristotle's report, I would suggest that the plaintiff's *diômosia* in the case of the "love-philtre killing" (see above n.40) did include the term ἐκ προνοίας; perhaps the plaintiff swore the woman was "guilty of homicide by giving poison with the intent to kill." Completely uncertain is how the accused woman may have formulated her *diômosia*: Did she deny the allegation in general, or only the intention to kill? Her fate may have been dependent on this formulation. Did she face the possibility of another trial before the Areopagos, or did the acquittal prevent any further charges? Or did the acquittal mean banishment for her?

44 Dem. 54.25: καὶ μὴν εἰ παθεῖν τί μοι συνέβη, φόνου καὶ τῶν δεινοτάτων ἂν ἦν ὑπόδικος. 54.28: εἰ γὰρ ἀπέθανον, παρ' ἐκείνοις (the Areopagitai) ἂν ἦν ἡ δίκη.

Ariston, had been beaten by Konon. Ariston, however, does not charge Konon with "wounding with the intent to kill," but sues him only for "violent assault," by means of a δίκη αἰκείας (54.1). Had he died from the injuries, Konon says, the case would have been tried on the Areopagos (28). These words exclude πρόνοια as a criterion for the judicial competence of the Areopagos. To my mind, it seems inadmissible in any way to infer from this passage "that homicide was intentional whenever death resulted from an act which was intended to cause harm."[45] Interpreted this way, the passage certainly cannot be brought into accord with what we are told in *Ath. Pol.* 57.3. A solution to this problem rather would be to acknowledge that the competence of the Areopagos is already based on the fact of killing with one's own hands. Premeditation was not relevant to this question. Unfortunately, the speaker fails to mention the penalties Konon would have faced in case of being found guilty.[46]

2) The second example to prove my hypothesis should be a case of indirect but premeditated killing. This leads to the discussion before which court the first speech of Antiphon (*Against the Stepmother*) might have been delivered. The accused woman is charged with poisoning her husband with the help of an—unaware—third person. The charge is one of βουλεύειν (1.26), committed ἐκ προνοίας (6, 22, 25); the punishment is death (27). The court, however, is not addressed βουλή as the council on the Areopagos would be entitled,[47] but merely ὦ ἄνδρες (3, 19, 30). Formerly, scholars concluded from the factors of premeditation and the death penalty that the speech had been held before the Areopagos.[48] Recent studies, however, favour the Palladion as the appropriate court.[49] They are quite right in emphasizing βουλεύειν as the criterion crucial for the judicial competence. Yet they comment neither on the question of πρόνοια nor on the sanction, the death penalty.[50] In view of the further evidence, a clear indication on the double classification emerges: βουλεύειν was pertinent to the competence of the Palladion, premeditation (as elsewhere; cf. Dem. 21.43) solely to sentencing, the death penalty. Therefore, contrary to the impression gained from Dem. 23.71-73, the death

45 MacDowell (1963) 60.

46 In all probability, Konon would have risked banishment—the fate the "father of the priestess from Brauron" had suffered. This case reported in 54.25 cannot be classified without assuming several facts omitted in the text. Without raising his own hand, the man had instigated someone else to beat a victim who afterwards died. Death was the penalty for premeditated killing. Sealey 280—without evidence—assumes the plaintiff to have enforced the trial before an incompetent court. According to Gagarin (1990) 97 and others, the defendant voluntarily went into exile; yet the term ἐξέβαλεν is inconsistent with this view. Wallace 102 believes that it was indeed the Areopagos that imposed exile instead of death; in homicide proceedings, however, there is no *timêsis*. Entirely wrong is MacDowell (1963) 68 when interpreting the charge as a δίκη τραύματος ἐκ προνοίας. Is it really certain that we are dealing with a homicide trial? The relatives, for example, could have directed the δίκη φόνου against the actual offender; the priestess' father, however, could have been tried on the Areopagos for religious sacrilege. But for this assumption, too, substantial evidence is missing. Anyway, this case should be excluded from our further discussion.

47 See Wallace 101 and 104.

48 Lipsius 126, L. Gernet, Antiphon (1965) 33f, Heitsch (1984) 24 n.55, Gagarin (1990) 94.

49 MacDowell (1963) 62-64 and 66, Wallace 101 and 103f.

50 MacDowell (1963) 45f omits Ant. 1 from evidence for the allegedly crucial for the Areopagos.

penalty could well be imposed by the Palladion.

VI.

At this point a general objection may be expected: a double classification of the homicide act would be an unnecessary juristic complication of what had seemed to be a clear and simple matter so far. What should have led Athenians to create such a sophisticated system for their homicide trials? Two arguments provide some reasons to reject such an objection. First of all, a "double classification" resolves all those problems caused by taking πρόνοια as criterion for the competence of the courts. Athenian homicide proceedings became unnecessarily sophisticated only if the council of the Areopagos appointed by the *basileus* had to decide by a single vote both the issue of fact and the question of πρόνοια, the latter being the crucial factor for determining its own competence. Apart from that, the double classification fits excellently the picture given by the outlines of historical development—with all due caution in respect to certain details:[51]

Presumably, Drakon did not ordain different consequences for premeditated and unpremeditated killing; exile was the only one. Yet different oath- and court-places for cases of killing by one's own hand and not by one's own hand may have existed on the Areios Pagos[52] and at the Palladion, the sanctuary of Pallas Athene. At first, the panels for both sites supposedly were made up by 51 Ephetai. By a later reform jurisdiction over cases of killing by one's own hand was shifted to the entire council meeting on the Areios Pagos and (probably simultaneously) the death penalty as a sanction to be executed by official authorities was introduced into Athenian homicide law: he who has killed ἐκ προνοίας is to be executed if convicted by the court; exile, however, remained the punishment for unpremeditated killing.

Considering the allocation of competence to the various homicide courts rooted in a religious attitude towards "unclean hands" as a former stage, and recognizing the death penalty dependent on πρόνοια as a result of later judicial reform, would provide a historical explanation for the double classification proved by the classical sources: an archaic, sacred system of jurisdiction found unalterable and indispensable was updated by adding a more "modern" system of sanctions onto the "old-fashioned" framework.

VII.

The subject of this study, however, is not the history of Athenian homicide law in a diachronic view, but the legal order as it emerges from the sources of the time of the orators. Our reasoning so far raises the question of what value a single source may have for studying Athenian law. How far may we trust general statements? Any general

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51 On the following see Thür (1990) 155f.

52 See above n.23.

statement contradicting certain known relevant details and causing results inconsistent with the set of procedural institutions must be regarded with suspicion. In such cases we should try to correct a principle inconsistent with legal practice by combining numerous details of information. This is the approach I have tried to pursue. The conclusion drawn from Dem. 23.65-73 and Arist. *Ath. Pol.* 57.3 stating the competence of the Areopagos as dependent on πρόνοια, surely cannot be maintained. The criterion is rather based on the way the deed was committed, i.e. on the fact of killing χειρί.

Looking back to the results gathered so far calls for another serious investigation into the value of general statements. Their alleged general scope is either to be restricted by their specific context, or—as *ultima ratio*—we must admit that even a seemingly well-informed author may, to some extent, report incorrectly on Athenian law.

1) The information Demosthenes supplies in his speech *Against Aristokrates* (23) may be misleading, albeit certainly not wrong. Properly viewed, the report of sections 65-73 may, without further difficulties, be found to be consistent with the results presented above. The speech was delivered by a certain Euthykles in a γραφὴ παρανόμων.[53] Euthykles is accusing Aristokrates for a public decree that the latter had proposed in favour of the mercenary commander Charidemos (91): whoever kills Charidemos shall be ἀγώγιμος (subject to *apagôgê*). In 19-87 the speaker tries to show that the decree contravened any provisions of the existing homicide law (which makes the text important evidence for our subject yet by no means being free from tendentiousness); above all, neither the different sanctions normally provided for homicide nor certain guarantees for a fair trial were ensured.[54] Remarkably, the speaker in 49-50 does mention ἐκ προνοίας but not in context with the competence of the Areopagos, only in connection with certain further regulations that link premeditation with a more severe punishment.[55]

Demosthenes, describing the five Athenian homicide courts (65-79), focused on procedural guaranties. Since the preconditions required for this purpose (*diômosia*, pleadings, voting) do not differ between the Areopagos and the Palladion (70), Demosthenes especially emphasizes the different sanctions he alleges the two courts would impose. In a somewhat delicate formulation he assigns the death penalty to the Areopagos (69) and banishment to the Palladion (72). In doing so he alludes to the opposition ἐκ προνοίας / ἄκων mentioned already in 50, now adding some further explanations. As we have seen, however, either of the two courts was capable of imposing both sanctions.[56] Demosthenes, therefore, must have assigned the sanctions arbitrarily in order to present a most vivid picture of both the procedural warranties and the different sanctions.

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53 Wolff 50ff; Nörr (1986) 65f.
54 Koch 554f makes clear that Demosthenes' arguments are not always compelling.
55 Cf. Dem. 21.43 (above n.41).
56 See above V.2.

As the only legal criterion for separating the two courts φόνος ἀκούσιος (71, 72) is mentioned. The criterion βουλεύειν, which is definitely pertinent to the competence of the Palladion, is completely concealed. Understandably, he also fails to indicate "commission by one's own hand" as relevant to the Areopagos—the entire passage (65-70) does not mention φόνος ἐκ προνοίας even once, certainly not without intent. For reasons of rhetorical composing Demosthenes ranked the matter of sanctions higher than the issue of competence. Any thought of a double classification required by homicide proceedings would only have complicated unnecessarily his line of reasoning. In order to praise the prevailing provisions there was no need to list every detail of jurisdiction on homicide scrupulously. Demosthenes has chosen deliberately, but without explicitly forging. The passage on homicide courts is a piece of "Weltliteratur," yet not of the juristic one.

2) The sober book on the "Athenian State" is, from its beginning, confined to an account of the competence of the Archons and the courts. What Demosthenes suggests for rhetorical purpose now appears as a report on Athenian jurisdictional organization. Apparently, Aristotle had used Demosthenes' speech—as far as basic ideas are concerned—as a guideline for the truly sophisticated Athenian homicide law which was sometimes even confusing for the Athenians themselves; a special board of *exêgêtai* was necessary to supply information on certain cases of doubt (Dem. 47.68). It is understandable that the philosopher was more attracted by the issue of will than by any questions of archaic criteria for committing a crime "with one's own hands." In legal practice, however, the system of court procedures could never have worked in the way that Aristotle (*Ath. Pol.* 57.3) has distributed jurisdiction to the Areopagos and the Palladion respectively. Perhaps unintentionally, Aristotle himself, in *Ath. Pol.* 35.5, presents the key to a workable system of allocating competence when he quotes the amnesty regulations. Not ἂν μὲν ἐκ προνοίας ἀποκτείνῃ ἢ τρώσῃ (*Ath. Pol.* 57.3), but εἰ τίς τινα αὐτοχειρίᾳ ἔκτεινεν ἢ ἔτρωσεν (*Ath. Pol.* 33.5) is what properly determines the competence of the Areopagos. Supported by numerous further indications the official document from 403 B.C. may be regarded as an authentic interpretation of a law possibly derived from the time of Solon:[57] δικάζειν . . . φόνου καὶ τραύματος ἐκ προνοίας (Dem. 23.22).

VIII.

Finally, the following conclusions on the positive law of Athens at the time of the orators are to be drawn. Regarding the killing of an Athenian citizen, the Areopagos is competent for cases of homicide committed by one's own hand, the Palladion for those of indirect killing. In both cases the criterion of premeditation is pertinent only to the sanctions inflicted by a verdict of guilty.

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57 Thür (1990) 153.

ADDITIONAL NOTE[58]

It is not surprising to find an outstanding expert in Athenian homicide law keeping to a view taken over from preceding scholars without further questions. Methodologically, two approaches to this subject situated between juristic and historic scholarship are competing. The one—in a positivistic way—sticks strictly to philological terms: ancient evidence is confined to its direct literal wording, with its range kept as narrow as possible and its deeper meaning not disputed. As far as real-historic problems are concerned, this method seems to work; once, however, juristic issues are involved, it comes to its limits very soon. The other method is trying to understand ancient testimonia within their entire juristic circumstances: actually, the same texts are studied, but they are brought into context with further material that may appear not even related at first glance. Sometimes, supporters of this way of approach seem to come into conflict with certain firm statements of classical authors.

The crucial question of our present matter is to explain the meaning of the opposition αὐτόχειρ / βουλεύειν. Taking this distinction as a "recognized aspect" of Athenian homicide law, as my respondent Wallace suggests, is not satisfying at all. Not a single author has reported any concrete consequences this division had on Athens' legal practice. Strangely enough, no scholar has found it necessary so far to admit that the positive evidence is by no means sufficient for gathering the proper sense of this explicit division.

For that reason, either of the objections against my four passages on "killing by one's own hand" may have, by itself, a certain measure of probability. But such objections fade in an overall view. The composition of Plato's *Nomoi* provides a splendid opportunity for vivid dispute: as for killing, we find several degrees of guilt and two different ways of commitment; which one is a fundamental division, which one a subdivision? Wallace corrects me by proposing not to start off with 865b, but 865a. If we, however, begin with 864b, we will find five εἴδη of homicide offenders, each of which fall into two γένη: τὸ μὲν διὰ βιαίων . . . τὸ δὲ . . . λαθραίως (864c). This could easily be tantamount to αὐτόχειρ and βουλεύειν. Inferred from this phrase, the external way of committing homicide seems to be the fundamental criterion.

In juristic discussions, usually the most compelling arguments may be drawn from borderline cases. They allow to test how far a principle sustains. Wallace has enriched my modest but nevertheless significant collection by two more examples: Dem. 21.71-75 and Aristoph. Fr. 585. Actually, neither of the two counts in his favour.

1) According to the account of Demosthenes (21.71) Euaion had killed his drinking-mate Boiotos in "self-defense." He was convicted, however by a majority of

58 In reply to Wallace's **Response**, which follows.

only one vote. Before which court? Gagarin suggests[59] before the Areopagos due to "intentional homicide." The jurors being called δικασταί leads Wallace to assuming the Palladion; πρόνοια certainly is not involved in this case. Two reasons, however, make it more probable to presume it was the Areopagos. The jurors here are not addressed directly, but only described in pursuit of their duty. Therefore, we may not expect βουλή or, more precisely, οἱ βουλεῦται, but, as in Ant. 5.11, rather the term δικασταί. Even more important, however, is another observation. Euaion gained this narrow vote without crying or begging (21.75). In fact, this does not indicate a noble self-restraint on Euaion's side; particularly on the Areopagos such digressions of a defendant were generally prohibited (Lys. 3.46; cf. also Lyk. 1.12f., Arist. *Rhet.* 1.1.5, 1354a), contrary to the Palladion (cf. MacDowell [1963] 93).

2) However tempting the fragment from Aristophanes (fr. 585) quoted by MacDowell ([1963] 59) may appear, no proper conclusion can be inferred from it anyway. It is derived from Eustathios' *Commentary on the Odyssey* (ed. Weigel). Eustathios remarks on the *lemma* ὄρνις (a320), referring to (Pallas) Athene (1419.55): Ἀριστοφάνης. ἄκων κτενῶ σε τέκνον. ὅ δ' ὑπεκρίνατο. ἐπὶ παλλαδίῳ, παρ' ᾧ πάτερ δώσεις δίκην (*app.*: ὑπεκρίνετο. τἄρ', ὦ πάτερ). As shown by the insertion ὑποκρίνειν the words have been torn out of their immediate context. We cannot reconstruct from this Byzantine source what the point of the joke was. Announcing an "unintended killing" may have caused further nonsense. It cannot be ruled out that only the authority of the *Athenaion Politeia* has led to direct linking of the two verses.

After all, a sound and solid case contradicting my hypothesis has not been found yet: *nil obstat.*

59 Gagarin (1978), 112, 120.

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Response to Gerhard Thür

Thür's thesis is a dramatic one and if he is right about it, quite important. Thür argues that the fundamental and also the earliest criterion for assigning homicide cases to the Areopagos and Palladion courts was whether the killer had killed by his or her own hand, αὐτόχειρ. The Areopagos heard cases of killing carried out by the killer, while the Palladion heard cases of killing not carried out but planned by the killer (*bouleuein*). The issue of premeditation—φόνος ἐκ προνοίας as opposed to φόνος ἀκούσιος—was a later development, arising from a greater sense of judicial morality. Premeditation was pertinent to sentencing. It was not pertinent, however, to the judicial competence of the Areopagos and Palladion courts, each of which might hear cases of premeditated or unintentional homicide.[1]

This is a dramatic hypothesis and at the same time a bold one, in the first place because as Thür knows, the ancient testimonia for the competence of these courts are inconsistent with it. First, in Demosthenes' detailed discussion of Athens' homicide courts in his twenty-third speech, the orator states, simply, that the Palladion court heard cases of unintentional homicide (23.71-73, with three separate mentions). He does not say that the Palladion court heard only those cases where the killer did not kill by his or her own hand, and he does not mention *bouleuein* at all. Conversely, concerning the Areopagos court Demosthenes does not state that the Areopagos heard only those homicide cases in which the killer actually did the killing (23.65-70). He implies, as Thür notes, that the Areopagos heard cases of premeditated homicide (see in particular 23.73).

As a second source, *Ath. Pol.* 57.3 states that the Areopagos heard cases of premeditated homicide and wounding (that the killer must be αὐτόχειρ is not mentioned), and the Palladion court heard cases of unintentional homicide, *bouleuein*, and killing a non-citizen. We should note in particular that φόνος ἀκούσιος is not qualified by any restriction, *viz.* that the killing must not have been carried out by the killer. So again, as Thür states, this source is inconsistent with his hypothesis.[2]

Thür has sought to devalue the testimony of these two sources by the argument that Demosthenes' discussion of the courts need not be juridically accurate—it is merely "Weltliteratur"—and that Aristotle may have used Demosthenes' speech as his source. (Thür suggests that, as a philosopher, Aristotle will have been attracted by the idea of morality, and not the archaic concept of the αὐτόχειρ, as juridical determinant.)

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1 For the translations of ἐκ προνοίας (= premeditated) and ἀκούσιος (= unintentional) see the discussion in R. W. Wallace, *The Areopagos Council to 307 B.C.* Baltimore and London 1989, 98-100 (hereafter = Wallace).

2 The explanation of the complex homicide competence of the Palladion court is a problem that I hope to address elsewhere.

However, the idea that Aristotle used Demosthenes in this passage is problematic, especially since Demosthenes' discussion of Athens' homicide courts contains much material not in the *Ath. Pol.*, and vice versa. In particular, Aristotle specifies in detail the competence of the Areopagos court, which Demosthenes does not do.

In addition to Demosthenes and the *Ath. Pol.*, Deinarchos 1.6 calls the Areopagos a court "trusted to find the truth in cases of φόνος ἐκ προνοίας." Since the case in Deinarchos 1 is not one of premeditated homicide, the orator had no specific reason to mention this particular competence. Therefore, φόνος ἐκ προνοίας must have been recognized as the Areopagos' homicide competence. That Deinarchos later mentions "violent death" signifies nothing. He does not define either φόνος ἐκ προνοίας or the Areopagos' homicide competence by means of this term, and I cannot accept Thür's contention that the term "violent death" "indicates direct killing by one's own hands."

As a last point on the question of sources, Thür seeks support for his thesis from the ambiguous wording of the law at Demosthenes 23.22, according to which the Areopagos heard cases of φόνος καὶ τραῦμα ἐκ προνοίας.[3] That is to say, might ἐκ προνοίας be taken only with τραῦμα? I myself do not think so, and others too have not.[4] First, if ἐκ προνοίας does not also qualify φόνος, the law in Demosthenes 23.22 would not restrict *at all* the types of homicide which the Areopagos was qualified to hear. Among other objections, this would be inconsistent with the establishment of criteria for homicide trials in the other courts. If, as Thür now mentions, φόνος originally meant killing by violence and bloodshed, this might equally apply to killings heard at the Palladion, which were also called φόνοι.[5] The term need not imply that the accused must have killed by his own hand. Second, if premeditation was the primary criterion used to assign cases of wounding to the Areopagos court, this same criterion could just as well have applied in cases of homicide. Third and finally, Demosthenes' text is quite simply ambiguous, we may read it either way; and both the *Ath. Pol.* (whose wording may in fact have been intended to clarify the law) and also Deinarchos 1.6 show how that must be. Accordingly, ἐκ προνοίας should be taken with both φόνος and τραῦμα.

Thus, at least three distinct fourth-century sources define the Areopagos' homicide competence as φόνος ἐκ προνοίας, while none assign to it jurisdiction over a killer who was αὐτόχειρ.

Moving now from direct source statements which remain difficult for Thür's hypothesis, we may consider the positive evidence for it—the evidence that αὐτόχειρ and βουλεύειν, direct and indirect killing, were central and fundamental categories in Athenian

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3 Given the uncertain status of the laws inserted in the text of Demosthenes, it is better to cite this law from 23.24 (where Demosthenes himself quotes it) and Pollux 8.117, which repeats its terms.

4 See Wallace 98 with references to other scholarship.

5 Later in his text, Thür suggests that killing by one's own hand was called σφαγή (although this claim is I think unjustified: see Wallace 8 and 230 n.14). Also, at n.9 Thür notes that a charge of βουλεύειν τὸν θάνατον "always led to a δίκη φόνου."

law, used to assign homicide cases to the different courts. Thür considers six texts. First, he contends that the opposition αὐτόχειρ / βουλεύειν is fundamental to Plato's organization of homicide legislation in the *Laws*. Indeed, Plato does mention these concepts (865b, 872a) and could well have derived them from Athenian legal practice. Yet regardless of the extent to which Plato's philosophical work reflects the legal code of Athens,[6] Plato in fact organizes his discussion of homicide in accordance with the categories lack of premeditation (865a-869e, with a lengthy discussion of killing in sudden passion, 866d-869e), and premeditation (869e-874c). His mentions of αὐτόχειρ and βουλεύειν are subsections of the discussions of unpremeditated and premeditated homicide. These concepts are certainly not fundamental or organizational principles. Plato's text cannot be used to show that they functioned as such in Athens' legal code.[7]

Second, Thür considers a judicial oath reported in Antiphon 6.16, where the defendant swears he did not do the killing μήτε χειρὶ ἀράμενος μήτε βουλεύσας, whereas the prosecutor accused him of planning it (βουλεύειν). Two issues are raised in connection with this oath. First, Thür argues that because both plaintiff and defendant say nothing about intention, this indicates that intention was irrelevant for the competence of the Palladion court. This point is not cogent. We can hardly expect that in an accusation of planning a homicide (as in this speech), either party would swear that the defendant did (or did not) kill unintentionally. Second, Antiphon 6.16 does establish the opposition (αὐτό)χειρ and βουλεύειν. But is this correlated with specific courts? To the contrary. Scholars agree that the trial of Antiphon 6 was held at the Palladion court, and as MacDowell and others have demonstrated, oaths were sworn at the specific courts where homicide trials were to take place.[8] Therefore, if the Palladion court was employed for defendants who were not accused of homicide αὐτόχειρ, why should the defendant swear that he had not killed αὐτόχειρ—something he was not accused of doing? There are no grounds for believing that once acquitted in the Palladion, he could later be tried for the same killing on the Areopagos, and therefore the Palladion oath was designed for this later possibility. The Areopagos had its own oath; also, the Athenians had a provision against double jeopardy.[9] The Palladion oath supports the interpretation that defendants accused of homicide αὐτόχειρ could be tried in that court.

Third, according to standard restorations including Thür's own quite possible one, Drakon's homicide law (*IG* I^3 104.11-13) drew a distinction between [χειρὶ ἀράμενον]

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6 In a draft article entitled "Processo ed istituzioni giudiziarie nelle *Leggi* di Platone" (for the VI Seminario internazionale sull'educazione giuridica, Perugia 1989), L. Rossetti demonstrates that many of Plato's juridical institutions in the *Laws* were a reaction *against* Athenian practice.

7 In his "Additional Note" Thür's association of Plato's homicide provisions with the five general *eide* of offenses mentioned in 864b-c is supported neither by that text nor by Plato's discussion of homicide.

8 See D. M. MacDowell, *Athenian Homicide Law in the Age of the Orators*, Manchester 1963, 92-93, and for the oaths taken on the Areopagos, see Dem. 23.67-8 and Lys. 10.11.

9 See Wallace 125-26 and 258 n.116.

(*vel sim.*) and [β]ολεύσαντα. I grant that Drakon's law may well have done this, but we cannot infer that different venues were employed for these offenses.

Fourth, from a clause of the amnesty law of 403/2 excluding anyone who killed or wounded αὐτόχειρ (*Ath. Pol.* 39.5-6), Thür infers that this existed as a distinct category of offense in Attic homicide law, and was more important than homicide ἐκ προνοίας. Neither inference need follow. Clearly, in the tense post-revolutionary period Athenian legal measures need not have been typical of normal practices. Although Antiphon 6.16 does—uniquely, among extant texts—establish that the αὐτόχειρ existed as a concept in Attic law, it does not follow from either that passage or the *Ath. Pol.* that this concept constituted an organizational principle, used to assign homicides to the different courts. To "correct" the text of an Attic homicide law as reported by Demosthenes and the *Ath. Pol.* on the basis of a different and specific amnesty law of 403/2 seems to me ill-judged. And as to the relative importance of homicides αὐτόχειρ and ἐκ προνοίας, the amnesty law shows simply that in 403/2 the Athenians wanted to find and condemn actual killers, not those who might more vaguely be accused of planning or conspiring to kill. This was after all an amnesty: as far as possible the Athenians clearly wanted to begin again, with a clean slate. If the courts in 403/2 decided that a homicide αὐτόχειρ was also ἐκ προνοίας, this does not mean that the category ἐκ προνοίας was in any way less significant than that of the αὐτόχειρ, or that the court competent to hear these cases was necessarily the Areopagos.

Fifth, Thür seeks support for his hypothesis from Patrokleides' amnesty provision of 405/4 B.C. (Andok. 1.78). This measure excluded from the amnesty a variety of killers, but it does not mention those condemned by the Palladion. Hence Thür infers that the Athenians wished to exclude those who killed by their own hand, but allowed mere planners, those without blood on their hands, to return. This argument does offer an explanation for a puzzling omission in Patrokleides' measure. It nonetheless fails to compel. First, Patrokleides' measure expressly excludes from amnesty those who had been exiled by the ephetai, as Solon's earlier measure had also done. Thür must then demonstrate that the ephetai no longer sat in the Palladion court. More importantly, even if the mention of ephetai in Patrokleides' text is regarded as an inappropriate borrowing from Solon's amnesty law (and ephetai no longer sat in the Palladion court), an alternative and (I think) more plausible explanation for Patrokleides' omitting the Palladion court may be found in the question of direct guilt (rather than homicide αὐτόχειρ). Those condemned by the Areopagos and the Delphinion were judged to have killed and to have meant to kill. By contrast, those condemned by the Palladion had either not killed themselves (βουλεύειν), or else were judged to have killed unintentionally. Again, we must remember that this measure was an amnesty.

Finally, sixth, concerning a legal provision mentioned in Andokides 1.94 that the planner ἐν τῷ αὐτῷ ἐνέχεσθαι as one who acted with his own hand, I myself have followed the view that according to this provision planners were liable to the same penalties

as actual killers—I might add, in cases where both killings were premeditated.[10] In Thür's view it means that planners were tried by the same court as actual doers—that is, by the Areopagos. But since, if applied generally, on Thür's own hypothesis this provision would have deprived the Palladion of any function at all (as he admits), and might also (he believes) contradict the terms of the amnesty law, the original provision must have been restricted (Thür contends) to officials at the end of the Peloponnesian war who used their offices for murderous purposes. And since these officials were of course in most cases protected by the amnesty, in Thür's view Andokides must not only have distorted the nature of this provision but mentioned it in an inappropriate context. For Meletos, the individual in question in Andokides, was not an official. All of this seems to me impossibly complicated. Thür's hypothesis is based on the supposition that this measure was instituted in 403/2 B.C. against officials of the preceding year. But Andokides states clearly that this was a general measure, which "existed earlier," and which the Athenians still used in 399. This is the decisive refutation.

So, to sum up this part of my discussion, the positive evidence for the distinction between αὐτόχειρ and βουλεύειν in Athenian law does not support the view that this constituted a fundamental or organizational principle of the legal system. Certainly, the evidence we have considered seems insufficient to overturn the express testimony of our sources, that the concepts ἐκ προνοίας and ἀκούσιος were both fundamental and organizational.[11]

Finally, we may turn to the case evidence. Thür discusses three cases, that of Antiphon 1 and two cases reported in Demosthenes 54. On Antiphon 1 he will get no argument. This case did involve the charge of *bouleuein* of premeditated homicide, and it was heard at the Palladion. This is consistent with the traditional view of the homicide competence of the Palladion court.[12] The criterion for Areopagite jurisdiction was whether an actual killer acted with premeditation.

In Demosthenes 54 the defendant Ariston prosecutes Konon for violent assault; he nowhere states that Konon intended to kill him. Ariston contends that had he died from his injuries, Konon would have been tried on the Areopagos (54.28). This hypothetical contention is cited by Thür as an indication that the Areopagos heard cases of unpremeditated killing by the αὐτόχειρ. However, Ariston makes clear (54.7-8, cf. 3-6) that the assault on him was deliberate and planned (a fact not mentioned by Thür). Now it is quite conceivable that someone who premeditated an attack against another person and killed him could be charged with premeditated homicide. (This is perfectly consistent with

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10 See MacDowell (above n.8) 66, Wallace 101, and G. Dalmeyda, *Andocide Discours*, Paris 1930, *ad loc.* ("passible du même châtiment").

11 As regards Thür's opening remarks, I see no reason to retract the view, held by others as well, that both of these concepts were at least as old as Drakon (and in his text [at n.24] Thür may agree with this). See the opening of Drakon's homicide law, καὶ ἐὰμ μὲ 'κ [π]ρονοί[α]ς . . .

12 See e.g. MacDowell 62-4.

Ath. Pol. 57.3, despite Thür's assertion to the contrary.) But in any case it might certainly be reasonable for Ariston to suggest that if he had died the Areopagos would have heard the case, since trial by that court was so serious.[13] In a similar rhetorical ploy, he had earlier argued (54.1) that he could have prosecuted Konon for *hybris* but chose not to do so.

Third, a case mentioned in Demosthenes 54.25-8 is briefly discussed by Thür. The case involves the father of a priestess at Brauron: "although it was admitted that he had not touched the deceased but had urged the one who dealt the blow to keep on striking, the Areopagos banished him." This case presents a notorious difficulty, in that the father precisely was *not* a killer αὐτόχειρ. As far as we can determine, he should have been charged with *bouleuein*. (We also cannot tell if the charge was premeditated homicide.) It is therefore unclear, and on Thür's hypothesis it remains unclear, why this case was heard by the Areopagos at all.[14] In any event, it certainly cannot be cited as a case of homicide αὐτόχειρ and not premeditated.

In addition to these, we also need to cite a case mentioned by Demosthenes in speech 21—the case of Euaion and Boiotos, in which Boiotos, drunk, struck Euaion and Euaion retaliated with fatal results (21.71-75). Thür has now discussed this case in his "Reply." Here it is patently clear that Euaion was a killer αὐτόχειρ and that he did not act with premeditation. According to Thür's analysis he should have been tried on the Areopagos. But twice Demosthenes says that he was tried before *dikastai*, a term never used of the Areopagites.[15] In his "Reply" Thür confuses two issues: reports of the prohibition before the Areopagos of both appeals to pity and also digressions. Demosthenes expressly states that Euaion avoided appeals to pity, but the tradition that such appeals were forbidden on the Areopagos is both late and contradicted by evidence from Lysias.[16] The (by contrast) well-attested prohibition of digressions was specifically aimed against attributing other crimes to the defendant, and was forbidden in other courts

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13 See Isok. 7.38, Lykourg. 1.12, and Wallace 126-27.

14 See the (inconclusive) discussion of this case in Wallace 101-102. Thür's inspiration that this prosecution may have been connected with the Areopagos' religious competence is not supported by what is known of that competence: see Wallace, 106-12. An alternative explanation has been proposed by C. Cary and R. A. Reid, *Demosthenes Selected Private Speeches*, Cambridge 1985, 93 (and recommended by D. Lewis, *CR* 40 [1990] 358). That is, Ariston may not be "telling the whole truth. The priestess's father was charged with intentional homicide; it was only the defendant and his friends who 'admitted' that he did not touch the dead man; . . . ἐξέβαλεν is a succinct way of saying that the defendant fled after his first speech."

15 See Wallace 100 for a discussion of this case, and 101 and 104 for a discussion of terminology. In the light of several conversations about this issue, I add that in my view we must distinguish between labeling the Areopagos a *dikastêrion* (Dem. 23.65-66, 70), and calling contemporary Areopagite jurors *dikastai*. The evidence of Aesch. *Eum.* 684 (*dikastôn bouleutêrion*) is ambiguous and also poetic; Antiph. 5.11, alluded to in Thür's "Additional Note," refers to all homicide jurors, not just Areopagites. It is true that the only speeches known to have been delivered before the Areopagos are all by Lysias, but there is no reason why Lysias's repeated and consistent usage, addressing the Council as *boulê* (Lys. 3, twelve times; Lys. 4, three times; Lys. 7, ten times) should be idiosyncratic. In his "Additional Note" Thür suggests that because the Areopagites are not actually addressed in Demosthenes 21, no opportunity arose to address them properly, as *boulê* or *bouleutai*. This is not cogent. There is no reason why Demosthenes could not have said that "the Areopagites" (and not "the *dikastai*") condemned Euaion.

16 See Wallace 258 n.112, with references.

as well.[17] This case, as reported, is inconsistent with Thür's hypothesis.

Finally, I quote, in MacDowell's translation, a fragment (F585) of Aristophanes, reporting a dialogue between a father and son. "I shall kill you, my lad, without meaning to (ἄκων)." The boy replies, "in that case, father, you'll be punished for it at the Palladion." Albeit from a comedy, without context, and obscure in its point, this exchange *prima facie* reflects a case of unpremeditated homicide by a killer αὐτόχειρ. On Thür's hypothesis it should have been tried on the Areopagos. The speaker says it would have been heard at the Palladion. To suggest that this passage may have been "constructed"—i.e., that two unrelated verses were linked together—because in the light of the *Ath. Pol.* someone associated killing ἄκων and the Palladion court, seems again an argument of ill-judged desperation.

To sum up, Thür has called attention to what was clearly a recognized aspect of homicide classification in Attic law, the concept of the αὐτόχειρ. The literary sources and extant case histories, however, will not support his hypothesis that this was a fundamental principle of homicide law, used to assign cases to the various homicide courts. Accordingly, *antiqua malo*. The implications of the traditional view in particular for the *basileus*'s role in assigning jurisdiction in the different types of homicide will be explored on another occasion. Although in his "Reply" Thür claims to use a "juristic" rather than "historical," "positivistic," or "philological" method, I prefer to be guided by the evidence and then seek to understand what is reported. I am unhappy with any methodology that reconstructs what is thought to be either possible or feasible, and then accepts or seeks to explain away the evidence in accordance with this. In fact, however, I think our methods are largely identical.

17 See Wallace 124.

Part Two

CRIME

Henri van Effenterre (Paris)

Criminal Law in Archaic Crete

Criminal law does not represent a major part of what archaic epigraphy tells us for ancient Crete, but it deserves attention because it represents four times the total number of Greek archaic inscriptions bearing on this theme which have been discovered outside Crete.

For our "Recueil des inscriptions politiques et juridiques de l'archaïsme grec," on which we have been working for many years, we made an approximate evaluation of these inscriptions. We call "archaic" all documents dated prior to 480 for Attica and prior to 450 for the rest of Greece. You know that a fairly good division between archaic and classical texts may be the lettering: generally speaking, epichoric letters mean archaic and Ionian letters classical. But there are some discrepancies. Calendar dates look perhaps more convenient. As for the texts themselves, we purposely put aside all the sacred laws, dedications, accounts, tomb-stones, carmina, etc. We only consider laws, regulations, and agreements. The total number of our items is about 240. The balance between Crete and Greece is as follows: one hundred for Crete, one hundred for the remainder of Greece (and thirty more for the various paragraphs of the Gortyn Law Codes, which we separated in logical pieces).

On the island, documents come from ten sites all over mid-Crete, from Eleutherna in the West, to Dreros in the East, and of course from Gortyna too, which is twice as productive as the rest of Crete. In the Greek world, the Peloponnese enjoys first place with about fifty percent of the documents. Among them, twenty came from Olympia and as many from the Argolid. Attica is poorly represented, as are Ionia and the Archipelago. South Italy and Sicily seem fairly interesting and are still productive today for the archaeological record.

Evidently any such statistical approach may be questioned. Some people would say "ought to be." My team and I are personally responsible for the chosen inscriptions, for the neglected ones, for the meaning of some and the dating of many of them, and finally, for classifying them in accordance with their contents.

Nevertheless we may now have a look at the juridical contents. Half of the documents deal with political affairs. They belong to what we usually call constitutional and international law. Of these, the balance is roughly one-third for Crete and two-thirds for Greece, which may seem quite normal. As regards civil affairs, the balance is just the reverse: 15% for Greece, 40% for Crete, and this time we must add 45% more for the various topics of the Gortynian Codes. Crete also remains three or four times above the rest of the Greek world for administrative and procedural law, and for criminal law too, which will now be the theme of this contribution.

Two preliminary remarks: I would first remind you that we are dealing with pure penal or criminal law. We leave aside all political or religious affairs such as high treason, sedition, war, desertion, and sacrilege. Our concern exclusively points towards offenses and crimes—the distinction between the two was not always evident in ancient Greece—let us say towards more or less private offenses and crimes.

Second, I must stress some of the historical implications of our provisional statistics. Crete definitely appears not only as an archaic center of written laws, but as the "lieu par excellence" in archaic Greece for the writing of laws. Writing was known throughout the Greek world many years before the first written laws. Many people do not look to Crete as a cradle for the Greek alphabet. We may ask in that case why did the Cretans write so many legal inscriptions? The finding of these all around the island cannot be accidental. Greece was also largely investigated and excavated. The blanks on our map—Delos, Delphi, Boeotia—cannot be ill luck, nor the desiderata which appear in Attica or Ionia. Still today we know of archaic documents being brought to light—often in Crete but rarely in the rest of Greece, except the Argolid and Olympia. It looks as if the ancient Greeks were not so wrong when they remembered King Minos and his laws.

Let us now focus our attention on the offenses or crimes to which penalties are attached in the Cretan legislation. They cover the entire sphere of what we actually call today criminal law—meaning murder, wounding and maiming, rape, theft, violence and, generally speaking, liability. Surely there was neither a systematic, nor complete, handling of such subjects; we get only surviving fragments and details. The more recent documents of the period, the law of Eltynia and the Gortynian Codes, look like an irrational account of a criminal law chapter. So the question arises: does that kind of account represent a progress in legal thinking by the Cretan people, or does it only register a series of particular cases in a more or less traditional order or even a simple listing? The choice may depend on the date you give to the same progress in Attica. Who is the πρῶτος εὑρετής? Draco or Solon in Athens? Or the anonymous composer of the most ancient fragments written on the walls of the Gortynian Pythion? My opinion favours Crete, not because of any Cretan chauvinism, but because Crete shows a kind of religious and social conservatism from Minoan times till the classical period, and because, during these ancient centuries, Crete was under the influence of, or at least acquainted with, the Near Eastern civilizations, i.e., with detailed and advanced juridical rules and codifications.

Let us now consider the texts themselves: about a dozen or two documents, which we will call by the numbers Margherita Guarducci gave them under the various localities of her *Inscriptiones Creticae*. Unfortunately, they are rather bits of texts, disparate fragments, upon which we must often offer only mere guesses. Mainly for Gortyna, it is possible to study entire, or nearly complete, inscriptions. Nevertheless it is worthwhile working and trying to put forward some historical observations. Tentatively of course!

Unlike the Cretan civic laws, which are generally enacted by political bodies,

councils, or assemblies in the various cities and are introduced by such opening formulas as τάδ' ἔϝαδε πόλι or ἔϝαδε τοῖς Λυκτίοισιν, the criminal laws do not seem related to any particular city. Only one of them, Eltynia 2, might be issued by the citizens of this rather unimportant polis: the second line of this text, which probably was the first to be engraved, begins with τοῖς Ἐλτυνιοῦσι. But the complement before, τάδ' ἔϝαδε, was a restoration suggested by Comparetti and Crönert, but dismissed in the *Corpus*.

So we may advance a first provisional conclusion: there is no definite proof of a direct intervening of any city authorities in criminal law; we may suppose that Cretans, when they thought it useful or necessary to write down and publish such regulations, only had to transcribe existing rules, common law, which needed no special voting or deliberation. This feature points to a fairly long juridical tradition in the island.

The same conclusion is to be inferred from another kind of evidence. On the Cretan inscriptions bearing on offenses and crimes, we read more provisions for exceptions than for normal cases. These dispositions may be expressed through the same wording in the different city-states. For example, terms like ἀβλοπία (Axos 2.10, 4.2; Gortyna 81.12), dialectal equivalent to Attic ἀβλαβεῖα, like ἀνατός (Eltynia 2.4, etc.) or ἀπατός (Eleutherna 3.5, 11.5; Gortyna 72.II.1, IV.17), like the notion of ἀνάγκα, positively or negatively, μὴ ὑπ' ἀνάνκας (Axos 9.5), all mean various situations of impunity. Consideration of the time of office for a *cosmos*, during which the magistrate was freed or excluded from legal procedures, although quite understandable and confirmed by other laws, notably the Roman law, are evidently in archaic Crete the result of sad experiences of bribery. It was expressed in the same words about the rape of a serf (Lyttos 2.3; Gortyna 72.I.51-55; cf. also Gortyna 41.IV.10-14): ἢ κοσμίων ἀγῆι ἢ κοσμίοντος ἄλλος. In the above mentioned law from Eltynia (Eltynia 2) we find very minute provisions for cases of wounding and maiming children. Exceptions are made for tardy complaints or for lawful self-defense. Moreover, a list is offered of the various spots or occasions where the offenses might take place. The text is not complete, but it looks as if the law wanted to specify a ground where such affrays were all but normal, and opposed this ground of training and exercise or sports to the current life.

It would be easy to list more examples. When exceptions outnumber rules, you may suppose that the legislation is an old one, tempered through a good many experiments in the past. Such seems to have been the criminal law in Crete.

Our third and last point will be the rather curious suspicion the criminal law clearly shows towards the judges. You would stress that it is the same for all archaic laws in Crete. Right. But in political matters you may understand that, among the Greeks, such a distrust is sound and looks like mere prudence. For criminal affairs, it should be the reverse: when you are not, ever so little, trustful in the judge, it may be questionable to enact any law!

We get documents forecasting penalties on top of penalties, if the judge was

procrastinating or defaulting, and if, in their turn, the civic authorities who had to exert control over the judge were defaulting too (Gortyna 14). That clause is not very surprising in Crete. But we also have instances where the law gives the choice to the defender either to appear in the court or to make terms with the plaintiff directly. That is written for liability after offenses from domestic animals (Gortyna 41.I.1-12). More surprisingly, in a very ancient but incomplete document (Gortyna 9), it seems the case for murder ἢ δίκας δ[ι]κάζε[ν] ἢ ἀϝτὸ[ς] κατα[στασαι ---. In another instance the choice is explicitly given to the judge himself (Gortyna 13): ἐδίκαζε | ἢ μὴ ἐλε͂ν | ἢ μ[---. Rather astonishing in a matter not of appreciation, κρίνειν, but of a compulsory legal pronouncement, δικάζειν.

In conclusion, from the seventh till the beginning of the fifth century, we cannot say we know much about Cretan criminal law. Right is still invested in rather primitive and, if I dare say so, not very convenient juridical expressions. But it appears as a kind of ancient treasury of common law, expanded throughout the island. Nobody can tell why so many legal fragments were written. Nobody can tell why the Gortyn Great Law Code was inscribed at the end of the period. Nobody can say why afterwards the Cretan legislation remained nearly non-existent in the record, unless it became a source for Plato's thought! Cretan criminal law is really a singular theme to speak about.

Michael Gagarin (University of Texas, Austin)

Response to Henri van Effenterre

I must admit that I was initially quite skeptical about the whole subject of "Criminal Law in Archaic Crete." Only a small number of the many Cretan legal inscriptions from the archaic period deal with matters normally considered criminal, and many of these are too fragmentary for us to be certain of the subject matter. To draw any significant conclusions about "criminal law" in Crete seemed an impossible task. Well, I have been most pleasantly surprised. Using a rather ordinary definition of "criminal law," Professor van Effenterre notes three interesting features of the surviving laws: (1) unlike civic laws criminal laws were not the result of specific actions of the authorities of a particular polis; (2) criminal laws in Crete contain a large number of exclusions or exceptions; and (3) although it may be understandable that Cretans showed suspicion toward judicial magistrates in their civic laws, a similar suspicion found in their criminal laws is more surprising and needs a different explanation. All three features, he suggests, indicate that criminal law in Crete was the product of a long process of historical development, a process he compares to the English common law tradition.

In reaching these conclusions, van Effenterre raises some of the most interesting and important questions concerning the extraordinary phenomenon of archaic Cretan legal inscriptions. Why did people all over the island in many different poleis write down laws at this particular time, whereas Cretan legislation of this sort virtually disappears by about 400 B.C.? Why did they inscribe these particular legal texts and why did they collect certain laws, most notably the Great Code at Gortyn, together on one inscription? And finally, what status or authority did these inscribed texts have in the community? Only a scholar of van Effenterre's vast learning and long and thorough acquaintance with all aspects of ancient Cretan civilization could raise these issues with such force.

In response, let me say first that although I find the suggestion of a kind of common law legal tradition in Crete very attractive,[1] I am not persuaded that criminal laws are so different from other laws in the specific ways van Effenterre claims. Before I examine these more specific features, however, let me say a word about the classification of certain Cretan laws as criminal. Van Effenterre's definition of "criminal" is entirely reasonable, but I question how applicable it is to the Cretan material, or indeed whether any definition of criminal law is relevant to these laws.[2] How, for example, do we apply the

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1 It will become clear that I am not adhering strictly to the view I developed in *Early Greek Law* (Berkeley 1976) 2-12 that in most societies (including ancient Greece) true law requires writing. I have not abandoned this view, but in this paper I use the word "law" more loosely.

2 It is worth recalling the fact, first noted by Sir Henry Sumner Maine in *Ancient Law* (London 1861), that in speaking of ancient codes we use the expression "criminal law" simply for convenience. "The penal law of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of Torts" (Everyman Library Edition, London 1917, 217).

definition "private offenses and crimes" and the accompanying list of specific examples—"murder, wounding and maiming, rape, theft, violence and, generally speaking, liability"—to the laws collected on the Great Code? The only laws in the Code that would today be considered criminal are those dealing with sexual offenses (II.2-45) and perhaps the section on the seizure of persons (I.2-II.2), and yet all its provisions concern relations between individuals involving actual or potential liability, except for the provision at XI.26-31 concerning judicial procedure, which with several other laws was added after the original inscription. All other procedural regulations are incorporated into the regulations concerning private relations.

We can therefore conclude that the Great Code at Gortyn consists of a mixture of a few criminal laws, many family laws and a few commercial laws (broadly speaking), all inscribed together at one time. Since they are all on the same inscription, it hardly seems possible to distinguish between criminal laws and other laws with respect to their sources, their authority, or the motives for their inscription. In the rest of the archaic laws at Gortyn,[3] moreover, the only clearly civic laws are a fragment regulating the term and the conduct of the *kosmos* (*IC* 4.14) and one or two on judicial procedure (*IC* 4.42, 51). All the others appear to be private law, with the same general mixture of criminal law (injury and liability), family law and commercial law. (I exclude treaties and honorary decrees.)

For the Cretan poleis other than Gortyn we have even fewer archaic inscriptions in which more than isolated words can be determined. This makes it even more difficult to generalize about criminal law or any other distinct category, and it may, therefore, be more useful to think in terms of Cretan laws as a whole rather than of modern (or Roman) subcategories such as criminal law or public law. I suggest that van Effenterre's observations about criminal law may validly be applied to archaic Cretan law as a whole.

(1) Consider first the conclusion that criminal laws, as distinct from civic laws, are not related to any particular city. It is not so easy, in my opinion, to dismiss the evidence of Eltynia 2, which van Effenterre reasonably classifies as a criminal law. The preserved letters at the beginning of line 2 read τοῖς Ελτυνιοῦσι. This line, like line 1, begins from the right, indicating the beginning of a new paragraph. It is also separated from line 1 by the shape of the stone's surface.[4] Thus line 2 may have originally been inscribed as the beginning of the law. Van Effenterre rejects Comparetti's suggested supplement at the beginning of line 2, τάδ' ἔϝαδε, but even without some such expression, the reference to the citizens of this polis surely indicates that this law derives some sort of authority from these citizens.

On the other hand, the presence of such a reference at the beginning of the law does not necessarily rule out the possibility that these regulations are taken from, or based on, already existing, common rules. If we compare the most famous example of a polis-

3 In the category "archaic" I include all the inscriptions up to about 450 B.C., or *IC* 4.1-72.
4 See the photograph and note on line 1 in *IC* 1, p.91.

authorized law, the public law from Dreros,[5] we may wish to reconsider the relationship between publicly authorized law and "common law." The Dreros law is authorized by one specific polis, but there is a similar provision limiting the term of a *kosmos* on the second line of Gortyn 14. The specific limitation is different in the two laws—once in in ten years versus once in three years—but essentially these are the same law in two different poleis. Thus, the polis-authorized law from Dreros may be based on or derived from a wider Cretan tradition concerning the terms of officials. The specific details may have differed from polis to polis, but the basic principle of a non-renewable term of office was perhaps widespread.

All inscribed laws, moreover, including criminal laws, must have been authorized in some way, whether or not the authorization was explicit. Van Effenterre suggests that when the Cretans "thought it useful or necessary to write down and publish [criminal] regulations, [they] only had to transcribe existing rules, common law, which needed no special voting or deliberation." But we must ask who "transcribed" these laws, from what source, with what authority, and for what purpose? Most archaic laws seem to have been inscribed on public buildings, often religious buildings. The scribes must have had the approval of some public or religious authority. These laws are not private graffiti. And surely the inscribing of the Great Code at Gortyn and the other free-standing legal monuments must have been publicly authorized actions, though we can only guess what legislative or executive process led to their inscription.

There is no significant difference, in other words, between inscriptions that begin with an explicit reference to enactment by a specific city, those that begin with θιοί or some such reference to the gods, and those with no initial expression. Cretan laws of all kinds may have been the product of a long juridical tradition, but the inscription of specific laws or sets of laws must nonetheless have been authorized by some official or public body.

(2) Van Effenterre rightly notes the large number of exceptions found in criminal laws, though it would require a more rigorous examination of the evidence to demonstrate that "exceptions outnumber rules." Here too, however, I question whether there is a significant distinction between criminal laws and what he calls "normal cases." Some of the words for impunity he cites (e.g. Axos 2.10 and 4.2) are in fragments where we have very little clue to the context. Others (Eleutherna 3.5, Axos 9.5) seem to be in civic or religious laws. Moreover, we would only expect to find the word "impunity" (ἀβλοπία, etc.) in criminal laws where a punishment is stated for normal cases. Similarly the *kosmos* may be given a special exclusion at Gortyn,[6] but the exclusion is just as likely to have been motivated not by "sad experiences with bribery" but by a legitimate need to keep this official free from litigation while in office. Finally, the suggestion about a special place or time where offenses at Eltynia would not be punished is very attractive, but this provision

5 *BCH* 61 (1937) 333-48; Meiggs-Lewis 2.

6 The third line of Lyttos 2 contains only the word *kosmos* preceded by an η, so that we cannot tell whether this law granted a special exclusion.

is unique in the surviving inscriptions and cannot support a generalization about criminal law.

Even granting all of van Effenterre's examples, however, we would do better to consider these two kinds of exceptions as part of a larger pattern evident in all Cretan laws, especially the Great Code and other long inscriptions, namely the elaboration of categories and subcategories for offenses. The long catalogue of possible husbands for a *patrôiôkos*, for example, or the possible means of non-compliance in cases of seizure indicate a general fondness for detailed elaboration. This tendency to elaboration may plausibly be seen as the result of a long history of legal experience during which regulations were modified and refined, but there is no good reason to differentiate criminal laws from others in this regard.

(3) In arguing that criminal laws show an unexpected suspicion of judges, I think van Effenterre has misinterpreted or gone beyond the evidence. Of the inscriptions he cites, the fragmentary Gortyn 14 speaks of a fine not being paid but gives no indication what the fine was for. Fines were common in various contexts at Gortyn, not only for criminal violations. Gortyn 41.I.1-12 does not give the choice to the defendant but to the injured party (τῶι ἀδικηθέντι), i.e. the plaintiff, who can quite reasonably choose whether he wants to receive an animal from the offender in exchange for his wounded animal or receive a simple fine. Presumably in either case the issue might go to trial if the defendant disputed the charge or the penalty. In Gortyn 9, even if we accept the proposed reconstruction (which is by no means certain), we know nothing of the precise circumstances this regulation is addressing. At best we can only say that in some circumstance relating to homicide a judge could either give judgment or pay something himself. Similarly in Gortyn 13 we know nothing of the circumstances in which a choice is apparently given to a judge to pronounce one of two judgments. These examples reveal a certain flexibility of procedure at Gortyn, which indicates, if anything, confidence in rather than suspicion of judicial officials.

Despite all these doubts about the three features noted by van Effenterre, I find his suggestion of a long tradition of legal development in Crete, rather like the English tradition of common law, very attractive. Such a tradition would help explain why legal inscriptions are found in such quantity all over Crete during the archaic age and may perhaps also help answer larger questions about the purpose of Cretan legal inscriptions.

The English common law came to be written down in the opinions and treatises of judges and jurists, but for a long time it did not have the same public authority as the official pronouncements of King or Parliament. Blackstone called the common law "unwritten law." Since Cretan judges in the archaic period almost certainly did not give their judgments in written form, this unwritten part of the legal tradition could have coexisted with the inscribed laws.[7] The "common law" tradition here suggested for

[7] During the discussion of Professor van Effenterre's paper, Sally Humphreys suggested that a tradition of unwritten law at Gortyn would contradict the fact that references to existing law at Gortyn regularly uses expressions referring to writing, such as "what is written" (τὰ ἐγραμμένα, IV.10-11, etc.).

archaic Crete would thus have resided primarily in the opinions of judges and other legal officials, including the *mnamones*, but not in the form of an official, memorized set of oral laws such as may have existed in preliterate Iceland.[8] But why then did the Cretans want written laws, if these merely recorded the common law tradition?

Most, if not all archaic laws in Crete were inscribed on temples and other sacred or public buildings, usually after these were constructed. Even the wall containing the Great Code at Gortyn was apparently not intended to be a separate, free-standing legal document but part of a building used for some other purpose, since a legal inscription displayed for its own sake would not have had a window in it. This suggests that legal inscriptions may have had a public function, perhaps a ritual affirmation of public participation in this aspect of the life of the polis. Inscribing laws, even laws drawn from a common Cretan tradition, would have given the citizens of each polis a sense of civic identity, distinguishing them from other Cretans.

If so, then the change around 400 B.C. from private laws to treaties and other sorts of international documents (often free standing) may indicate a basic change in the citizens' political sense of identity. Cretans were beginning to see themselves as part of a larger "international" community extending throughout the whole island rather than as members of individual, autonomous poleis. But in the archaic age the emphasis was on allegiance to individual poleis, and the inscription of laws was an important force strengthening this sense of political identity.

But this would only indicate that some laws at Gortyn were already written down by ca. 450. There may still have been a long tradition of "unwritten laws" preceding these inscriptions.

8 See *Early Greek Law* (above n.1) 10.

Julie Velissaropoulos-Karakostas (Athens)

Νηποινεὶ τεθνάναι

Il y a plus de vingt ans, que R. Stroud, rapprochant les lignes 37-38 de la loi draconienne (*IG* I^3 104) de celle qui est rapportée par Démosthène dans le *Contre Aristocrate* 60, proposa la restitution ν[ηποινεὶ τεθνάναι].[1] Bien que l'inscription attique ait suscité de nombreuses études et commentaires, la clause νηποινεὶ τεθνάναι n'a attiré l'attention ni des philologues ni des historiens qui se contentent de la traduire par "mourir sans vengeance," "mourir impunément" ou encore "mourir sans composition." Le but de cette étude est précisément de démontrer que, loin d'être marginale, la clause en question constitue la preuve d'un changement profond réalisé en matière de sanctions pénales. L'introduction de la clause νηποινεὶ τεθνάναι se situe à un moment crucial de l'évolution du droit pénal: à savoir la capacité du pouvoir étatique d'interdire les poursuites privées contre l'auteur d'un acte criminel et l'assentiment de la collectivité à se soumettre à cette prohibition.

La locution νηποινεὶ τεθνάναι est absente de la poésie épique. Dans les textes homériques on trouve seulement l'adjectif νήποινος qui revient huit fois dans l'*Odyssée* et pas une seule dans l'*Iliade*. Dans son étude sur la solidarité de la famille en droit pénal, G. Glotz estimait[2] que le mot νήποινος signifie tantôt une composition sanglante,[3] tantôt une composition matérielle,[4] alors que dans d'autres passages de l'*Odyssée* la distinction entre les deux modes de composition lui paraissait moins nette.[5]

Cependant, si l'on examine ces textes de plus près, on constate qu'il est extrêmement difficile d'attribuer au terme νήποινος un sens technique et, à plus forte raison, de distinguer les deux modes de composition dont parle Glotz. Reprenons les passages en question: a) Glotz voyait une composition sanglante dans la phrase νήποινοί κεν ἔπειτα δόμων ἔντοσθεν ὅλοισθε,[6] adressée par Télémaque aux prétendants de sa mère. Le sens de "composition sanglante" ne me paraît pas être évident. b) Quant à la notion de "composition matérielle," celle-ci n'en est pas moins incertaine. Il me parait fragile de voir une composition matérielle dans la phrase ἐπεὶ ἀλλότριον βίοτον νήποινον ἔδουσιν ἀνέρος[7] ou dans l'expression (ἀλλότριον) βίοτον (ou κάματον) νήποινον ἔδοντες.[8] Dans ces trois passages, comme dans les deux précédents, le sens

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1 R. Stroud, *Drakon's Law on Homicide* (Berkeley 1968) 57.
2 G. Glotz, *La solidarité de la famille dans le droit criminel en Grèce* (Paris 1904) 110, n.1.
3 *Odyssée*, 1.380; 2.145.
4 *Odyssée*, 1.160; 1.377; 2.142; 14.377; 14.417; 18.280.
5 *Odyssée*, 1.377; 1.380; 2.142; 2.145.
6 *Odyssée*, 1.380 (répété dans 2.145): "puissiez-vous sans vengeurs tomber en ce manoir."
7 *Odyssée*, 1.160: "Ils vivaient chez autrui, mangeant impunément les vivres d'un héros."
8 *Odyssée*, 14.377 (14.417; 18.280): "ils (les prétendants) dévorent, sans conséquences, les biens d'autrui."

qui correspondrait le mieux au terme νήποινος me semble être "sans conséquences." c) Plus signifiant du point de vue juridique est le passage 1.377 de l'*Odyssée*. S'adressant aux prétendants de sa mère, Télémaque envisage deux moyens pour faire cesser le tort qu'il a subi et continue à subir. Dans le cadre de la première procédure, il invite ses adversaires à venir siéger à l'agora le jour qui vient.[9] Une fois rassemblés là, il exigera de leur part de vider son foyer, de regagner leurs propres maisons et de vivre de leurs revenus et non pas aux dépens de son père.[10]

Si cette première procédure échoue, soit parce que ses adversaires ne répondent pas à son invitation à se réunir à l'agora soit parce qu'ils ne se conforment pas à sa conclusion, Télémaque envisage la deuxième possibilité qui lui est offerte, l'appel à la justice divine: ". . . ou si vous estimez meilleur de venir tous, sans conséquences, ruiner un seul homme, pillez ses vivres! Moi j'éleverai mon cri aux dieux toujours vivants et nous verrons si Zeus vous paiera de vos oeuvres: puissiez sans vengeurs (sans conséquences) tomber en ce manoir."[11]

Le passage 1.372 suiv. nous fournit quelques indices pour résoudre les questions juridiques posées par le terme νήποινος et, dans les textes postérieurs, par l'expression νηποινεὶ τεθνάναι ετ νηποινεὶ ἀποκτείνειν. Opposé à la procédure qui se déroulerait à l'agora, à la sanction proposée par le demandeur et acceptée par l'assemblée, opposé, en d'autres termes, à la soumission du coupable à la justice d'État, le terme νήποινος surgit lorsque la collectivité ne doit ou ne peut pas intervenir. Dans le passage de l'*Odyssée*, Télémaque ne possède pas de moyens pour obliger ses adversaires à se présenter devant l'agora, comme il n'en a pas non plus pour les soumettre à la décision s'ils s'y présentent. Afin que le comportement de ses adversaires ne demeure pas νήποινον, il fait appel aux dieux pour leur rendre le mal qu'ils causent (Ζεὺς δῶσι παλίντιτα ἔργα γενέσθαι). Tout mal qui arrivera alors à ceux qui refusent de se soumettre à la justice rendue par la collectivité, est considéré comme résultant de l'application de la justice divine, de sorte que nul ne peut nuire à autrui νήποινος.

Cela dit, il me paraît important de retenir ici le fait que le terme νήποινος comme plus tard la locution νηποινεὶ τεθνάναι, n'intervient que lorsque, pour une raison ou autre, la sanction publique est impossible.

Alors que le mot composé νήποινος ou νήποινον est fréquemment employé dans l'*Odyssée*, il n'en va pas de même pour le mot ποινή. Celui-ci est employé dix fois dans l'*Iliade*, tandis que dans l'*Odyssée* il n'apparaît qu'une seule fois[12] et désigne le châtiment consistant en une lésion corporelle. Dans l'*Iliade*, ποινή a une fois le sens général de

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9 *Odyssée*, 1.372-73: ἠῶθεν δ' ἀγορήνδε καθεζώμεσθα κιόντες πάντες.

10 *Odyssée*, 1.374-75: ἐξιέναι μεγάρων· ἄλλας δ' ἀλεγύνετε δαῖτας ὑμὰ κτήματ' ἔδοντες, ἀμειβόμενοι κατὰ οἶκους.

11 *Odyssée*, 1.376-79: εἰ δ' ὔμιν δοκέει τόδε λωίτερον καὶ ἄμεινον ἔμμεναι, ἀνδρὸς ἑνὸς βίοτον νήποινον ὀλέσσαι, κείρετ'· ἐγὼ δὲ θεοὺς ἐπιβώσομαι αἰὲν ἐόντας, αἴ κέ ποθι Ζεὺς δῶσι παλίντιτα ἔργα γενέσθαι. νήποινοί κεν ἔπειτα δόμων ἔντοσθεν ὄλοισθε.

12 *Odyssée*, 23.312.

compensation,[13] quatre fois le sens de vengeance meurtrière,[14] cinq fois le sens de dédommagement matériel.[15] "En ces temps," écrit Glotz,[16] "où les institutions demandent du sang pour du sang, où les moeurs exigent qu'un homicide soit une réponse à un homicide, la ποινή, loin de désigner la composition, désigne tout juste le contraire . . . une vengeance. Fournir une ποινή, c'est mourir. Si par exception, on parvient à éviter la ποινή, c'est qu'on paie de quoi échapper à la ποινή, τὰ ἀπὸ ποινῆς, τὰ ἄποινα. Considérant dans ἄποινα le α privatif, Glotz rapproche ce terme au mot ἄποινα,[17] démarche qui me paraît injustifiée. En tout état de cause, poursuit-il, le mot ἄποινα a été créé par opposition à ποινή: il fallait distinguer la compensation-rançon de la compensation-vengeance, de sorte que la composition apparut d'abord comme la rançon de l'offenseur. Ainsi, les historiens se sont mis d'accord pour voir dans la ποινή une alternative, juridiquement admise, pour éviter la vengeance, alternative qui consiste dans le versement d'une somme ou de biens au groupe de celui qui vient d'être tué. L'autre alternative offerte à l'auteur de l'acte pour éviter la vengeance est l'exil volontaire, φυγή. Cette dernière apparaît fréquemment chez Homère mais, pour reprendre les conclusions de Eva Cantarella,[18] la φυγή homérique n'est pas une peine comme la ποινή dont le versement met fin aux poursuites. En fait, l'exil apparaît quand les *sui* de la victime refusent la ποινή ou lorsque l'auteur de l'acte n'a pas les moyens d'en offrir une. On doit alors appliquer la τιμή, la vengeance. Le nombre des ayants droit chez Homère étant très étendu, allant jusqu' aux parents éloignés (*etai*), l'auteur de l'acte à en réalité peu de chances d'échapper à l'exercice de la vendetta. Pour accroître ses chances on lui accorde le droit de s'exiler, le droit à la φυγή. Celui-ci n'écarte pas le droit des *sui* à la vengeance; il rend simplement son exercice plus difficile. Ποινή et φυγή constituent les deux alternatives par lesquelles le meurtrier peut ou non éviter la vengeance. Et comme souligne Cantarella, ces deux moyens se différencient par le fait que la ποινή est un moyen légal dont le versement permet d'éviter l'exercice de la vengeance, tandis que l'exil ne peut pas assurer l'impunité.

Le droit à l'exil reconnu à l'auteur d'un acte criminel serait, me semble-t-il, une des premières manifestations de la pénalité publique qui aurait précédé la "publicisation" de la ποινή en tant qu'alternative pour éviter la vengeance. Le caractère public de la pénalité apparaît non pour satisfaire la victime ou ses ayant droit, mais pour protéger l'auteur du crime. Cette idée a dicté, comme je tacherai de le démontrer plus loin, l'introduction de la clause νηποινεὶ τεθνάναι dans le domaine de droit pénal de l'époque archaïque.

Quant aux linguistes, ils estiment que, contrairement au terme τιμή qui se rattache à

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13 *Iliade*, 17.207.
14 *Iliade*, 13.659; 21.28; 14.483; 16.398.
15 *Iliade*, 3.290 (pour rapt); 9.633; 9.636; 18.498 (pour homicide).
16 *Solidarité*, 109.
17 Ibid., 9, n. 3.
18 *Studi sull omicidio in diritto greco e romano* (Milan 1976) 13 ff.; cf. *I supplizi capitali in Grecia e a Roma* (Milan 1991).

la justice nobiliaire, la ποινή, étant "le châtiment et la réparation dus pour la violation du serment,"[19] caractérise une justice étrangère à toute idée d'honneur et de considération, liée à la punition.

Après avoir passé en revue les passages homériques et les principaux termes du droit pénal qui pourraient nous aider à saisir le sens juridique de la locution νηποινεὶ τεθνάναι, il nous faut voir de près les textes dans lesquels figure cette expression afin de pouvoir, par la suite, la placer dans le cadre du droit pénal de l'époque classique.

I. Les textes

1. Xénophon, *Hiéron* 3.3 : μόνους γοῦν τοὺς μοιχοὺς νομίζουσι πολλαὶ τῶν πόλεων νηποινεὶ ἀποκτείνειν, δῆλον ὅτι διὰ ταῦτα ὅτι λυμαντῆρας αὐτοὺς νομίζουσι τῆς τῶν γυναικῶν φιλίας πρὸς τοὺς ἄνδρας εἶναι.

2. Platon, *Lois* IX, 874c : καὶ ἐὰν ἐλευθέραν γυναῖκα βιάζηταί τις ἢ παῖδα περὶ τὰ ἀφροδίσια, νηποινὶ τεθνάτω ὑπό τε τοῦ ὑβρισθέντος βίᾳ καὶ ὑπὸ πατρὸς ἢ ἀδελφῶν ἢ υἱέων· ἐάν τε ἀνὴρ ἐπιτύχῃ γαμετῇ γυναικὶ βιαζομένῃ, κτείνας τὸν βιαζόμενον ἔστω καθαρὸς ἐν τῷ νόμῳ· καὶ ἐάν τις πατρὶ βοηθῶν θάνατον, μηδὲν ἀνόσιον δρῶντι, κτείνῃ τινά, ἢ μητρὶ ἢ τέκνοις ἢ ἀδελφοῖς ἢ συγγεννήτορι τέκνων, πάντως καθαρὸς ἔστω.

3. Démosthène 59.87: (ΝΟΜΟΣ ΜΟΙΧΕΙΑΣ) Ἐπειδὰν δὲ ἕλῃ τὸν μοιχόν, μὴ ἐξέστω τῷ ἑλόντι συνοικεῖν τῇ γυναικί· ἐὰν δὲ συνοικῇ, ἄτιμος ἔστω. μηδὲ τῇ γυναικὶ ἐξέστω εἰσιέναι εἰς τὰ ἱερὰ τὰ δημοτελῆ, ἐφ' ἢ ἂν μοιχὸς ἁλῷ· ἐὰν δ' εἰσίῃ, νηποινεὶ πασχέτω ὅ τι ἂν πάσχῃ, πλὴν θανάτου. Cf. 86: . . . διὰ τοῦτο δ' ἐποίησεν ὁ νόμος, πλὴν θανάτου, τἄλλα ὑβρισθεῖσαν αὐτὴν μηδαμοῦ λαβεῖν δίκην, ἵνα μὴ μιάσματα μηδ' ἀσεβήματα γίγνηται ἐν τοῖς ἱεροῖς.

4. Démosthène 23.60: (ΝΟΜΟΣ) Καὶ ἐὰν φέροντα ἢ ἄγοντα βίᾳ ἀδίκως εὐθὺς ἀμυνόμενος κτείνῃ, νηποινεὶ τεθνάναι. Cf. loi de Dracon, lignes 37-39: κα[ὶ ἐὰν ἀγοντα ἢ φέροντα βίαι ἀδίκως εὐθὺς] ἀμυνόμενο/ς κτέ[ν]ει ν[εποινὲ τεθνάναι].

5. Andocide 1.96-98: Ἐάν τις δημοκρατίαν καταλύῃ τὴν Ἀθήνησιν, ἢ ἀρχὴν τινα ἄρχῃ καταλελυμένης τῆς δημοκρατίας, πολέμιος ἔστω Ἀθηναίων καὶ νηποινεὶ τεθνάτω, καὶ τὰ χρήματα αὐτοῦ δημόσια ἔστω, καὶ τῆς θεοῦ τὸ ἐπιδέκατον· ὁ δὲ ἀποκτείνας τὸν ταῦτα ποιήσαντα καὶ ὁ συμβουλεύσας ὅσιος ἔστω καὶ εὐαγής.

6. Décret d'Amphipolis, Syll.[3] 194 (Tod 150): ἔδοξεν τῶι δήμωι. Φί/λωνα καὶ Στρατοκλέ/α φεύγειν Ἀμφίπολι/ν καὶ τὴν γῆν τὴν Ἀμφ/ιπολιτέων ἀειφυγί/ην καὶ αὐτοὺς καὶ τοὺς / παῖδας, καὶ ἤμ που ἁλί/σκωνται, πάσχειν αὐτοὺς ὡς πολεμίους καὶ // νηποινεὶ τεθνάναι, / τὰ δὲ χρήματ' αὐτῶν δ/ημόσια εἶναι, τὸ δ' ἐπ/ιδέκατον ἱερὸν τοῦ Ἀ/πόλλωνος καὶ τοῦ Στρυ//μόνος. τοὺς δὲ προστ/άτας ἀναγράψαι αὐ/τοὺς ἐ'στήλην λιθίνην./ ἢν δέ τις τὸ ψήφισμα / ἀναψηφίζηι ἢ κατ/έχηται τούτους τέχν/ηι ἢ μηχανῆι ὁτεωιο/ῦν, τὰ χρήματ' αὐτοῦ δημ/όσια ἔστω καὶ αὐτὸς / φεογέτω Ἀμφίπολιν // ἀειφυγίην.

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19 E. Benveniste, *Le vocabulaire des institutions indoeuropéennes* (Paris 1969) vol. 2, 50 sq.

Lors de la prise d'Amphipolis par Philippe II, en 357, les deux philo-athéniens, Philon et Stratoclès, ainsi que leurs enfants, ont été exilés à vie. Jusqu'ici le texte n'a rien d'inhabituel. Cependant, la suite de ce décret du peuple pourrait surprendre. Après avoir prononcé la condamnation des deux personnages et de leurs enfants à l'ἀειφυγία, le décret prescrit que "s'ils sont arrêtés quelque part (ἥμ που ἁλίσκωνται), ils seront considérés comme ennemis et mourront impunément" (πάσχειν αὐτοὺς ὡς πολεμίους καὶ νηποινεὶ τεθνάναι.)

Selon l'interprétation proposée par P. Usteri[20] et suivie par H. Swoboda,[21] la clause νηποινεὶ τεθνάναι sera appliquée si Philon et Stratoclès ne quittent pas le territoire d'Amphipolis dans le délai prescrit (lequel cependant ne figure nulle part dans le décret), ou bien, comme ajoute Swoboda, dans le cas où, sans bénéficier d'amnistie, ils reviennent à Amphipolis. Cette interprétation se heurte aux termes ἥμ που ἁλίσκωνται qui peuvent être appliqués non seulement au territoire amphipolitain, mais à tout autre lieu où seront éventuellement saisis les deux ennemis du peuple. L'emploi de l' expression aoriste ἥμ που ἁλίσκωνται, indique que les rédacteurs du texte voulaient envisager, non seulement le cas d'un éventuel retour des bannis dans le territoire d'Amphipolis, mais la saisie de ces personnages par un citoyen n'importe où ailleurs. Notons que la peine d'exil à vie et la confiscation des biens, sans la clause νηποινεὶ τεθνάναι, menace aussi les citoyens qui tenteront d' abroger le présent décret où qui accueilleront les hors-la-loi.

Bien que, de prime abord, pareille disposition—frapper quelqu'un de la peine d'exil et, en même temps, proclamer son meurtre impuni—puisse paraître contradictoire, elle n'est pas sans parallèle. Dans l'inscription milésienne contre les tyrans,[22] datant de 470-440 av.n.è., deux hommes, Alkimos et Cresphontes, sont condamnés à la peine d' "exil du sang" (je traduis littéralement les termes φεύγειν τὴν ἐπ' αἵματι φυγήν). L'inscription à été reprise et commentée par Glotz.[23] Voici le texte (d'après Meiggs-Lewis) et la traduction de Glotz:

. . . . . [τ]ὸ[ν Ν]υμφαρήτο καὶ Ἄλκι[μον]
[καὶ Κ]ρεσφόντην [τὸ]ς Στρατώνακτος φεύγεν τὴν ἐπ' αἵμ[ατι]
[φυγὴν] καὶ αὐτὸς [κα]ὶ ἐκγόνος, καὶ ὃς ἄν τινα τούτωγ κατ[α]-
[κτείνε]ι, ἑκατὸν [στ]ατῆρας αὐτῶι γενέσθαι ἀπὸ τῶν
χρημά]των τῶν Νυμ[φαρή]το. τὸς δ' ἐπιμηνίος, ἐπ' ὧν ἂν ἔλθωσιν
[οἱ κατα]κτείναντες, ἀποδοῦναι τὸ ἀργύριον· ἢν δὲ μή, αὐτὸ[ς]
[ὀφε]ίλεν. ἢν δὲ ἡ πόλι[ς ἐ]γκρατὴς γένηται, κατακτεῖναι
[αὐτ]ὸς τὸς ἐπιμηνίος [ἐ]π' ὧν ἂν λαφθέωσιν· ἢν δὲ μὴ κατα-

20 *Ächtung und Verbannung im griechischen Rechte* (Berlin 1903) 35-36.
21 "Beiträge zur griechischen Rechtsgeschichte," *ZSS* 24 (1905) 157.
22 Syll.[3] 58. Milet 1.6, 100-104 (Meiggs-Lewis 43).
23 *CRAI* (1906) 511-29.

[κτ]είνοσιν, ὀφείλεν ἔ[κ]αστον πεντήκοντα στατῆρας.
τὸν δ' ἐπιμήνιον, ἢν μὴ προθῆι, ἑκατὸν στατῆρας ὀφείλε[ν]
καὶ τὴν ἐσιῶσαν ἐπιμηνίην αἰὶ ποιῆν κατὰ τὸ ψήφισμα·
ἢν δὲ μή, τὴν αὐτὴν θωιὴν ὀφείλεν.

Traduction: ". . . fils de Nympharetos, Alki[mos] et Cresphontes, fils de Stratonax, sont frappés du bannissement infligé à l'homicide, eux et leurs descendants. Quiconque tuera l'un d'eux recevra cent statères, pris sur les biens de Nympharetos. Les épimènes en charge auxquels se présenteront les meurtriers leur remettront l'argent; faute de quoi, ils le devront de leurs fonds. Si la cité les tient en son pouvoir, les épimènetes en charge au moment de leur capture les feront mettre à mort. S'ils ne les font pas mettre à mort, ils devront chacun cinquante statères. L'épimènete-président, s'il ne met pas l'affaire en délibéré, devra cent statères. Les collèges d'épimènetes qui entreront successivement en fonction se conformeront au décret perpétuellement; faute de quoi, ils devront la même amende."

Partant du fait que la peine infligée par les Milésiens est une peine collective et héréditaire et du fait que les peines collectives et transmissibles n'ont jamais existé en Grèce pour des crimes d'homicide, Glotz conclut, avec raison, que les Milésiens en question étaient coupables de crime contre l'État. Si Athènes supprime, dès la première moitié du V^e^ s., à la peine de bannissement le caractère collectif, ce n'est pas le cas des autres cités grecques où les traîtres et les sacrilèges "lient à leur destinée, par une solidarité perpétuelle, tous ceux qui sont sortis ou sortiront du même sang."[24]

Le deuxième argument qui renforce l'hypothèse de crime politique est fourni par la promulgation même du décret de proscription. L'autorité publique n'ordonne pas de poursuites et, à plus forte raison, ne met pas à prix la tête de meurtriers de droit commun. Elle le fait pour ceux qui ont trahit l'État et, dans ce dernier cas, "c'est déjà un mode d'exécution quasi juridique."

Du fait que le prix versé au meurtrier devra être pris sur la fortune d'un certain Nympharetos, on conclut que ce dernier est déjà mort, peut être lors d'une révolte qui opposa à Milet démocrates et oligarques.

Revenons cependant aux termes φεύγειν τὴν ἐπ' αἵματι φυγήν. Une expression analogue est employée dans une inscription d'Elis, du IV^e^ s. av.n.è., dans laquelle la personne condamnée devra partir en "exil sanglant."[25] Il s'agit d'un décret d'amnistie qui rappelle les bannis et interdit à leurs familles de les rejoindre. Le texte précise que quiconque agira contre ces dispositions, "sera poursuivi par Zeus Olympien de l'exil sanglant."[26]

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24 Ibid., 515.

25 Cauer-Schwyzer, 424: φευγέτω αἵματορ. Cf. K. Latte, *Kleine Schriften* (München 1968) 279.

26 G. Glotz, *op. cit.* (n.23) 514: "du chef d'homicide." Cf. Démosthène, *Contre Midias* (21)

L'exil à vie infligé pour un crime contre l'État assimilé à l'homicide est encore prévu dans une inscription locrienne de 525-500 av.n.e.,[27] comportant une "loi relative à la terre" (τεθμὸς περὶ τᾶς γᾶς). Faisant allusion à une loi préexistante sur le meurtre (lignes 13-14: ἀνδρεφονικὸν τετθμόν), dont celle-ci reprend les sanctions, la loi prévoit à l'égard de celui qui proposerait une nouvelle division de la terre ou soumettrait au vote du conseil des anciens ou de la cité ou d'un autre conseil une telle proposition, ou s'il fait une révolte dans le but d'obtenir une redistribution de la terre, ainsi qu' à l'égard de sa famille, l'exil à vie, la confiscation des biens et la démolition de sa maison.

7. D'après une restitution plausible le mot νηποινεί serait compris dans le décret athénien concernant Phaselis, datant de 453 av.n.e. Selon A. Wilhelm,[28] le passage en question fait partie du serment décrété par la boulè érythréenne.

IG I^3 14 (=*IG* I^2 10). Meiggs-Lewis 40, lignes 29-34:

ἐὰν δέ τ[ι]ς ἀποκτ[ε]ίνε[ι Ἐρυθρα]-
[ῖ]ος *h*έτερον Ἐρυθρ[αῖ]ον, τεθ[ν]άτο ἐὰν [γν]οσθει [————————————
[γν]οσθει φευγέτο *h*άπασ[αν] τὲ[ν] Ἀθεναίον χσυνμαχί[. . κ]-
[αὶ τ]ὰ χρέματα δεμόσ[ια ἔσ]το Ἐρυθραίον· ἐὰν δέ [τ]ις ————
————το[ῖ]ς τυράννοις———— Ἐρυθραί[ο]ν καὶ [————————
————] τεθνάτο [————] παῖδε[ς] *h*οι ἐχς [ἐ]κέν[ο] [————————

La clause νηποινεὶ τεθνάναι porte, ici aussi, sur la répression des crimes politiques. Elle suit les dispositions sur le meurtre d'un citoyen par un autre Milésien où les sanctions prévues sont la peine de mort, quand l'homicide est γνωσθῆι, sinon l'exil et la confiscation des biens.

8. Écrivant dans la seconde moitié du IV^e s. de n.é. et ayant probablement reçu, dans sa ville natale Antioche, une éducation grecque, Ammien Marcellin rapporte un oracle dans lequel le mot νήποινος est associé à l'homicide.

Ammien Marcellin 29.1.33:

οὐ μὰν νηποινί γε σὸν ἔσσεται αἷμα καὶ αὐτοῖς
Τισιφόνη βαρύμηνις ἐφοπλίσσει κακὸν οἶτον
ἐν πεδίοιοι Μίμαντος ἀγαιομένοιο Ἄρηος

9. Enfin, à la locution νηποινεὶ τεθνάναι nous devons rapprocher l'expression

105: ἐφ' αἵματι φεύγειν, traduit correctement par J. Humbert "traduit devant le tribunal de sang." En revanche, la traduction donnée dans Liddell-Scott, "to avoid trial for murder by going into exile," est erronée étant donné que l'exil (ἐξόριστον) est mentionné dans la phrase qui précéde. Cf. Euripide, *Suppliantes* 148: αἷμα συγγενὲς φεύγων; Aeschyle, *Choéphores* 66, 650. L'expression est fréquente chez Euripide mais n'apparaît pas chez Sophocle.

27 Meiggs-Lewis 13.

28 *Gött. Gel. Anz.* (1903) 772.

νηποινεὶ πάσχειν comprise dans le contrat conclu entre la cité d'Érétrie et Chairéphanes.[29] Cette sanction est prévue, en même temps que l'atimie et la confiscation des biens, contre celui, magistrat ou particulier, qui déclarerait la caducité du contrat, ainsi que contre ses descendants. La phrase ὃ ἂν πάθει [ν]ηπ[οι]νεὶ πασχέτω (lignes 29 sq. et 56 sq.) a manifestement un contenu plus vaste que les termes νηποινεὶ τεθνάναι. Mais le résultat est pratiquement le même. Contrairement à la loi sur l'adultère du *Contre Nééra*, où la femme adultère qui pénètre dans les lieux sacrés peut subir impunément tout supplice à l'exception du meurtre, dans le contrat d'Érétrie toute tentative de rendre le contrat nul ou d'essayer de le modifier est érigée au niveau de crime contre l'État et implique les mêmes sanctions que celui-ci.

II. Νηποινεὶ τεθνάναι dans le cadre du droit pénal grec

Conformément à la thèse de Swoboda,[30] à l'époque archaïque, νηποινεὶ τεθνάναι équivaudrait à ἄτιμος τεθνάτω et ce dernier serait identique à ἄτιμος ἔστω. Toutefois, comme il a été démontré,[31] déjà à l'époque de Solon, le terme ἄτιμος cesse de désigner exclusivement le hors-la-loi et s'emploie aussi pour indiquer une personne "privée d'honneurs" ou un homme "privé de droits." Afin de distinguer entre les deux significations du mot, d'autres expressions ont été introduites, de sorte que, graduellement, le mot ἄτιμος a cessé de designer le hors-la-loi et a été dans ce sens remplacé par d'autres termes comme πολέμιος ou ἀγώγιμος.

La thèse de Swoboda a été favorablement accueillie et l'identification entre la clause νηποινεὶ τεθνάναι et l'atimie ou du moins une de ses formes,[32] a été largement admise. Cependant, M. H. Hansen a émis des doutes à l'égard de cette identification. Après un examen minutieux des textes, il est arrivé à la conclusion que l'atimie n'équivaut pas à l'exécution capitale et que, de ce fait, nous ne pouvons pas l'assimiler à la locution νηποινεὶ τεθνάναι,[33] pas plus qu'a la peine d'exil à vie. Un ἄτιμος n'est pas par définition un hors-la-loi que l'on peut tuer sans conséquences.

Pour illustrer cette conclusion on peut citer une inscription de Kymè, du III[e] s. av.n.è., publiée par A. Plassart et Ch. Picard.[34] Il s'agit d'un fragment d'une loi sur les δικασκόποι. La législation de Kymè a été étudiée par Aristote qui, parmi les lois anciennes, trop simples et même barbares, cite celles de Kymè περὶ τὰ φονικά.[35] La loi en question accorde un délai de trente jours pour le paiement de l'amende. Dans le cas où

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29 *IG* XII.9, 191. Tsatsos, *Der Chairephanes Vertrag. SB Heid.* 1963. (tiré-à-part).

30 *Op. cit.* (n.21) 160 ff.

31 M. H. Hansen, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes. A Study of the Athenian Administration of Justice in the Fourth Century B.C.* (1976) 75 sq.

32 Voir à titre d'exemple la "atimia proscrittiva" opposée à l'"atimia normale" de U. E. Paoli, *Studi di diritto attico*, 307, suivi par Harrison, *The Law of Athens* vol. 2 (Oxford 1971) 169-70.

33 *Op. cit.* (n.31) 75 sq.

34 "Inscriptions d' Éolide et d'Ionie," *BCH* 37 (1913), 155 ff. H. Engelmann, *Die Inschriften von Kyme* (1976) nr. 11.

35 *Politique* 2.5 1269a1. Cf. Plutarque, *Quest. Gr.* 291e.

le condamné ne s'exécute pas, on le condamne à mourir ἄτιμος et le premier venu peut le tuer sans risquer la souillure.[36] Comme soulignent les premiers éditeurs,[37] "la rigueur de la sanction peut surprendre, dans cette loi qui n'est pas fort ancienne. Mais il n'est guère douteux que nous ayons là une survivance des dispositions législatives antérieures. . . (Ici), il est évident que nous avons un adoucissement au premier état des choses dans le fait qu'il peut y avoir rachat du délit par le paiement d'une amende. C'est seulement s'il n'a pu user de cette faculté dans le temps prescrit que le coupable tombe sous le coup de la loi primitive. Dans le droit de Gortyne, une disposition analogue s'applique au complice de l'adultère."

Cela dit, si ἄτιμος θνασκέτω était conçu comme identique à νηποινεὶ τεθνάναι, les termes κτεινέτω αὐτὸν ὁ θέλων constitueraient une tautologie.

Nous avons vu plus haut le passage de Démosthène (23.60) où la locution νηποινεὶ τεθνάναι se rapporte au meurtre en légitime défense du φέρων ἢ ἄγων βίᾳ ἀδίκως. La traduction des termes ἄγων καὶ φέρων n'est pas aussi simple. Gernet traduit le passage ainsi: "si on tue sur-le-champ et en se défendant l'auteur d'une dépossession violente et commise sans droit, le meurtre ne donnera pas lieu à vengeance." Il me paraît préférable d'accepter l'interprétation proposée par B. Bravo[38] qui voit dans le terme φέρων une saisie de biens et dans ἄγων une prise de corps.[39] Il faut donc conclure que la loi laisse impuni le meurtre de l'auteur de prises violentes de biens ou de personnes, pris en flagrant délit et agissant sans droit.

Parmi les dispositions pénales rapportées dans le *Contre Aristocrate* que Démosthène fait remonter à la législation draconienne, il y en a une qui intéresse directement notre sujet. Renvoyant à un axon, la loi du IV^{e} siècle prescrit que les auteurs de meurtre devront être mis à mort exclusivement sur le sol attique après avoir été emmenés devant les autorités compétentes (ἀπάγειν), ne pouvant, sous peine d'une amende du double du dommage, être objet de sévices ni soumis à rançon.[40] À la suite de Glotz,[41] Gernet estime que seule la première partie de cette loi, celle qui prononce la mise hors-la-loi, formulée également sous une forme un peu modernisée dans les *Lois* de Platon (IX, 871d), remonte à Dracon. En revanche, les prohibitions qui figurent ensuite seraient postérieures, peut-être soloniennes. Tout en admettant que le vocabulaire n'en est pas moins archaïque, ils estiment que l'adjonction ὡς ἐν τῷ ἄξονι ἀγορεύει doit faire référence au texte de Dracon pour ce qui précède, alors que la suite, c'est-à-dire les

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36 D'après Engelmann, lignes 10-11: ἀι δ[ὲ (μὴ) / [ἄτιμος θνασ]κέτω, κτεινέτω δὲ αὐτὸν ὁ θέλων. ὁ δὲ ἀ[ποκτείνας εὐαγὴς ἔστω κ]αὶ καθαρός.

37 *Op. cit.* (n.34) 162.

38 B. Bravo, "Sylan. Représailles et justice privée contre les étrangers dans les cités grecques (étude du vocabulaire et des institutions)," *Annali della Sc. Normale Sup. di Pisa* (1980) 799.

39 Cf. Démosthène 51.13: πάντας ἀνθρώπους ἄγει καὶ φέρει. Bravo, "Sulan," 802-3. Euripide, *Troyennes* 1310: ἀγόμεθα, φερόμεθα.

40 23.28: Τοὺς δ' ἀνδροφόνους ἐξεῖναι ἀποκτείνειν ἐν τῇ ἡμεδαπῇ καὶ ἀπάγειν, ὡς ἐν τῷ ⟨α'⟩ ἄξονι ἀγορεύει, λυμαίνεσθαι δὲ μή, μηδὲ ἀποινᾶν, ἢ διπλοῦν ὀφείλειν ὅσον ἂν καταβλάψῃ.

41 *Solidarité*, 319 ff.

prohibitions, représente l'amendement.

Dans la partie archaïque de la loi, sont compris deux termes qui nous renvoient à la justice pénale des temps reculés. Il s'agit des verbes λυμαίνομαι et ἀποινᾶν. Un peu plus loin, Démosthène même éprouve le besoin d'interpréter ces mots dont le sens ne devait plus être évident au IVe siècle: "Λυμαίνεσθαι δὲ" φησὶ "μή, μηδὲ ἀποινᾶν." ταῦτα δ' ἐστὶν τί; τὸ μὲν δὴ μὴ λυμαίνεσθαι γνώριμον οἶδ' ὅτι πᾶσιν μὴ μαστιγοῦν, μὴ δεῖν, μὴ τὰ τοιαῦτα ποιεῖν λέγει, τὸ δὲ μηδ' ἀποινᾶν μὴ χρήματα πράττεσθαι. τὰ γὰρ χρήματ' ἄποιν' ὠνόμαζον οἱ παλαιοί. (23.33). En ce qui concerne le deuxième des deux termes, ἄποινα, il en ressort, aussi bien du passage de Démosthène que d'autres textes contemporains, qu'il n'était plus en usage au IVe siècle. Il n'en est pas de même du premier, du verbe λυμαίνεσθαι. Toutefois, si celui-ci n'a pas disparu du langage courant, il a été banni de l'apanage de l'exécution légale, à l'exception des cas explicitement prévus par une disposition légale. Une telle disposition me semble être la loi du 23.60 qui permet de tuer l'agresseur dans les conditions submentionnées (βίᾳ, ἀδίκως et εὐθύς). Prescrivant que l'auteur de φέρειν καὶ ἄγειν peut être tué νηποινεί, la loi s'appliquerait aussi à des réactions moins graves de la victime de l'agression, comme par exemple des "coups de fouet, l'enchaînement et autres choses semblables," autrement dit des comportements considérés comme manifestations de λυμαίνεσθαι.

Cette dernière remarque doit être valable dans tous les cas où, au sujet d'un criminel, la loi ordonne que celui-ci peut νηποινεὶ τεθνάναι, et, plus particulièrement, lorsqu'il s'agit de traîtres considérés comme ennemis du peuple et mis hors-la-loi ou encore dans les cas de personnes frappées apparemment de la peine d'exil à vie, mais dont la tête est, en même temps, mise à prix, situation que nous avons rencontrée à Milet, à Amphipolis et peut-être aussi ailleurs.

Associé au meurtre impuni (νηποινεὶ ἀποκτείνειν), le mot λυμαντήρ, dérivé du verbe λυμαίνεσθαι, apparaît chez Xénophon,[42] par rapport aux μοιχοί, considérés comme λυμαντῆρες de l'amitié des femmes envers les hommes et tués impunément de ce fait dans grand nombre de cités.

Du rapprochement des passages du *Contre Aristocrate* et du passage de *Hiéron*, on déduit que λυμαίνεσθαι et νηποινεὶ τεθνάναι, termes ressortissant au domaine de la justice dite privée, ont dû, à un moment donné, être réglementés par le pouvoir étatique. Mais, même à l'époque classique, aucun des deux n'a été supprimé. Ainsi, arrivons-nous à la question de savoir dans quels cas il était possible de "tuer" ou de "mourir impunément" et à quel moment l'État intervient pour réglementer ces modes d'exécution et les élever au niveau de moyens d'exécution quasi légale.

III. Domaine d'application

Commençons par les cas où la loi autorise à νηποινεὶ τεθνάναι ou νηποινεὶ

42 Hiéron 3.3.

ἀποκτείνειν. Notons, tout d'abord, que cette clause n'est pas employée en cas d'homicide involontaire. Elle présuppose le comportement intentionnel du premier agresseur qui a commis un crime pouvant entraîner sa mise à mort en toute impunité.

a) Lorsque Platon, dans le IXe livre de ses *Lois*, énumère les cas dans lesquels un homicide demeure impuni, il n'emploie les termes νηποινεὶ τεθνάναι qu'à propos de la mise à mort de l'auteur d'actes de violence contre une femme ou un jeune garçon. De même, reste impuni celui qui tue quelqu'un pour secourir menacés de mort sans être aucunement coupables, son père, sa mère, ses enfants, ses frères ou la mère de ses enfants. Mais entre ce dernier cas et ceux dans lesquels la loi autorise, de façon générale et impersonnelle, à νηποινεὶ ἀποκτείνειν ou τεθνάναι, il y a une différence fondamentale. Dans les derniers cas, la loi dispense de sanctions seulement les proches parents et le mari de la victime, et ne permet pas, qui veut et peut, d' exécuter l'agresseur de ses propres mains. Cette constatation est, me semble-t-il, valable pour tous les autres cas ou le meurtrier "demeure pur" (ὁ κτείνας ἐφ' οἷς τε ὀρθῶς ἂν καθαρὸς εἴη), mentionnés par Platon dans le même passage, c'est-à-dire celui du voleur qui s'introduit de nuit pour dérober des biens (ἐλὼν κτείνῃ) et du meurtre en légitime défense d'un pillard (sur lequel nous reviendrons ci-après).

b) Dans le passage restitué de la loi draconienne qui correspond à la loi du Dem. 23.60, on prévoit le cas de légitime défense dans les conditions βίᾳ, ἀδίκως et εὐθύς. La question est de savoir si ce cas de légitime défense coïncide avec celui de la loi platonicienne, car, dans ce cas, nous devons admettre de deux choses l'une: ou bien que les effets bénéfiques de la loi archaïque s'étendent exclusivement à la victime de l'agression ou du vol, ou bien que l'exemption de crime de la loi platonicienne bénéficie, outre la victime du vol ou de l'agression, à tout tiers qui interviendrait à son secours. La deuxième hypothèse est à écarter par le fait que, pour des crimes plus graves, comme le viol et la tentative d'assassinat, le texte platonicien limite l'exemption du crime au mari et aux proches parents de la victime. Dans les cas où un tiers interviendrait pour secourir des personnes avec lesquelles il n'est pas lié par des liens de parenté ou de mariage, sa "pureté" n'est pas sous-entendue, mais doit être proclamée par les autorités compétentes.

c) À l'aube de l'époque classique, la cité de Milet frappait déjà les coupables de haute trahison de la peine de bannissement et en même temps mettait leur tête à prix. Cette apparente contradiction entre la peine d'exil à vie et la proscription disparaît si, comme il a déjà été dit, nous admettons que les personnages en question sont tout simplement frappés de νηποινεὶ τεθνάναι.

La question qui surgit alors est de savoir pour quelle raison les rédacteurs du texte ont opté pour cette formule quelque peu aberrante? En fait, la proclamation simultanée du bannissement et de la proscription ou de νηποινεὶ τεθνάναι paraît nécessaire lorsque les auteurs de l'acte sont parvenus à s'enfuir. On inflige alors au criminel la peine d'exil à vie, non seulement pour sauver la face en imposant une sanction à effet immédiat (comme par

exemple l'inscription des bannis sur les stèles des arrêts et de sentences de bannissement perpétuel),[43] mais aussi pour pouvoir procéder aux mesures qui accompagnent, en règle générale, le bannissement à vie, telles que la confiscation des biens, la destruction de la maison du coupable ou des mesures d'ordre religieux. Cela dit, le caractère licite de νηποινεὶ ἀποκτείνειν doit dépendre, tout au moins à l'époque classique, de la possibilité ou non de saisir le coupable (traître ou agresseur) et de l'emmener devant les magistrats compétents (ἀπάγειν). Seulement si cela n'est pas possible ou si, à cause des risques de fuite du coupable, il est aléatoire, la loi permet de le tuer impunément, sans que le meurtrier passe en jugement. Ainsi, la clause νηποινεὶ τεθνάναι ou νηποινεὶ ἀποκτείνειν peut être considérée comme un mode d'exécution légale, accordé sans jugement préalable et reconnu, du moins pour la haute trahison et les agressions qualifiées de φέρειν καὶ ἄγειν, de manière impersonnelle.

Ces conclusions sont confirmées par la description du meurtre de Phrynichos rapportée par Lycurgue dans son discours contre Leocrate.[44] En 411, Apollodoros et Thrasybule assassinent, νύκτωρ παρὰ τὴν κρήνην τὴν ἐν τοῖς οἰσύοις, Phrynichos, un des chefs des Quatre-Cents. Les amis de la victime arrêtent les auteurs du meurtre et les jettent en prison. Toutefois, informé de l'incident, le peuple les relâche et ordonne une instruction au moyen de la torture. L'enquête révèle que Phrynichos avait trahi la cité et que par conséquent ses meurtriers ont été injustement emprisonnés. Le premier élément à retenir de cet incident c'est les conditions dans lesquelles eut lieu l'assassinat de Phrynichos: "de nuit, près de la fontaine des osiers." Cette fontaine n'a pas été, d'après ma connaissance, localisée, et il paraît peu probable qu'elle se trouva à l'intérieur du centre civique de la ville. En précisant que les auteurs de l'homicide ont agi en pleine nuit et près de la fontaine des osiers, Lycurgue voulait souligner le fait que si les deux auteurs n'agissaient pas de la sorte, la victime aurait pu s'enfuir. Autrement dit, le seul moyen pour punir le traître était de proclamer sa mort impunie. Compte tenu des circonstances cela n'avait pu être fait avant le meurtre, mais a été réalisé après coup par la libération des auteurs de l'homicide et par la promulgation du décret de Critias.

IV. Chronologie

Dans des époques reculées, "mourir sans vengeance," "mourir impunément" ou "mourir sans compensation" aurait été chose inimaginable. Faire couler du sang, quels qu'en soient le motif et les circonstances, entraîne des sanctions, profanes (privées ou à caractère étatique) ou divines, contre l'auteur de l'homicide. L'ancienneté, par conséquent, de νηποινεὶ τεθνάναι ne paraît pas pouvoir remonter à la nuit des temps, lorsqu' un homicide devait nécessairement avoir une suite, fût-ce l'écoulement d'un autre sang, l'offre d'une composition matérielle ou l'appel à la justice surnaturelle. Nul ne peut imposer

43 Sur la στηλήτευσις, voir Glotz, *CRAI* (1909) 519.

44 Lycurgue, *Contre Leocrate* 112-13. D. M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester 1963) 138.

qu'un homicide, même lorsqu'il survient pendant la guerre, demeure sans conséquences pour son auteur. Pareille contrainte présuppose un pouvoir politique bien installé et efficace pour être à même de proclamer, d'une part, l'illégalité d'un mode d'exécution admis par la coutume et, d'autre part, définir les cas où celui-ci serait exceptionnellement autorisé. Cela dit, il serait tentant d'attribuer la clause νηποινεὶ τεθνάναι à un législateur comme Dracon et de la faire insérer parmi ses lois sur le meurtre.

En fait, établir la paix entre deux familles opposées par la guerre du sang n'aurait-il pas été le souci majeur du législateur archaïque, plutôt que de réglementer simplement l'homicide non prémédité que nous rapporte l'inscription attique? Limiter l'application de νηποινεὶ τεθνάναι signifie obliger les parties, en l'occurrence la famille de la victime et l'auteur de l'homicide, de faire régler leur affaire sinon par un tribunal, du moins par l'intermédiaire d'un tel organe. En délimitant les cas où un homicide n'entraîne pas de sanctions et n'ouvre pas la voie à des poursuites privées ou judiciaires, autrement dit en élevant la clause νηποινεὶ τεθνάναι au rang de disposition légale, le législateur, Dracon ou un autre, obligea les parties à soumettre leur litige à la justice d'État. Étant, lors de son apparition, une mesure visant à limiter la justice privée, la clause νηποινεὶ τεθνάναι deviendra, dès l'aube de l'époque classique, le moyen d'exécution par excellence lorsque la cité n'est pas en mesure de faire comparaître l'auteur d'un crime capital devant ses tribunaux. On accorde alors, à qui le veut (s'il s'agit de crime politique), le droit de νηποινεὶ ἀποκτείνειν le coupable.

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Response to Julie Velissaropoulos

Among the laws that Demosthenes attributes to Drakon, and one that is also restored in the extant fragment of Drakon's Law, is the provision, "if a man kill, acting in immediate defense against violent and unlawful seizure or abduction, [the wrongdoer] shall be slain with impunity."[1] This puzzling remedy—νηποινεὶ τεθνάναι—is often treated as an equivalent or clarification for other, more familiar provisions of "justifiable homicide"—"let the wrongdoer be outlawed" (ἄτιμος ἔστω),[2] "let the killer be free of blame and taint," (καθαρός, ἀθῷος, κτλ.); let there be no claims or penalties against him (δίκας μὴ εἶναι, or μὴ φεύγειν).[3] It seems generally supposed that νηποινεὶ τεθνάναι is a missing link between these later legal remedies and the primitive justice of blood-price and blood-vengeance, ποινή. Now, rejecting much of received opinion, Prof. Velissaropoulos has given us a new and provocative interpretation: in Homeric usage she finds no clear connection of thought between νήποινον and the principle of compensation and retribution in ποινή; rather, the term νήποινον already conveys a broader sense, "sans conséquences." In the fifth and fourth centuries, "to slay with impunity" amounts to an absolute license to kill and "treat as one will" without restriction, especially in those cases where official authority cannot intervene. In origin, Velissaropoulos supposes, the remedy was introduced by Drakon to categorize certain cases where private retribution was unrestricted, as opposed to other homicides where the lawgiver sought to restrain the disruptive force of vendetta—before the rise of statute law in the polis there was no recognized authority to abrogate private claims of vengeance. This view is persuasive and suggestive on many points; but the argument that νήποινον has no sense of "payment denied," is not (to my mind) necessary or convincing. Without the principle of compensation, the rules of settlement that Drakon adapted from common law would have had no effective mechanism. As Glotz so eloquently put it,[4] the one sentiment that was

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1 Dem. 23.60 (= *IG* I³ 104. 37-8; R. Stroud, *Drakon's Law on Homicide* [Berkeley 1968], 57). Cf. Dem. 23.61, εἴ γε μηδὲ τοῦτον τὸν τρόπον ἐξέσται Χαρίδημον ἀποκτεῖναι, ἀλλά, ἐὰν ἀδικῶν ἄγῃ καὶ φέρῃ βίᾳ τά τινος λῃζόμενος, ἀγώγιμος ὁ κτείνας ἔσται, τοῦ νόμου διδόντος, ἐὰν ἐπὶ τούτοις, ἀθῷον εἶναι; [Modern works cited by Velissaropoulos are here cited by short title and some Greek texts she cites are here omitted.]

2 Thus the addition of νηποινεὶ τεθνάναι in sentences of banishment was once thought to derive from the era when *atimia* alone no longer entailed outlawry but had come to mean loss of citizen rights; so reasoned Usteri, *Ächtung u. Verbannung* 35-6; cf. Swoboda, *Beiträge* 162 n.1. For the common view that νηποινεί is a later equivalent for *atimos*, cf. Martin Ostwald, "The Athenian Legislation Against Tyranny and Subversion," *TAPA* 86 (1955) 114f. n.59; E. Ruschenbusch, "ΦΟΝΟΣ," *Historia* 9 (1960) 136-7, and *Untersuchungen zur Geschichte des athenischen Strafrechts* (Cologne 1968) 16-17.

3 Dem. 23.51, φόνου δὲ δίκας μὴ εἶναι μηδαμοῦ κατὰ τῶν τοὺς φεύγοντας ἐνδεικνύντων, ἐάν τις κατίῃ ὅποι μὴ ἔξεστιν: (53) ἐάν τις ἀποκτείνῃ ἐν ἄθλοις ἄκων, ἢ ἐν ὁδῷ καθελὼν ἢ ἐν πολέμῳ ἀγνοήσας, ἢ ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπ' ἀδελφῇ ἢ ἐπὶ θυγατρί, ἢ ἐπὶ παλλακῇ ἣν ἂν ἐπ' ἐλευθέροις παισὶν ἔχῃ, τούτων ἕνεκα μὴ φεύγειν κτείναντα.

4 Glotz, *Solidarité* 103-4: ". . . se sentait peut-être le coeur troublé dans l'oeuvre des

powerful enough to still the avenger's fury was greed—*la cupidité*! With that reservation, I offer some second thoughts on Velissaropoulos' findings—first, on the laws of assault and sexual violation; next, the decrees against public enemies; lastly, we turn to the Law of Drakon and its antecedents.

I.

Against seduction and sexual assault, we know, primitive remedies are singularly persistent. Xenophon tells us that adultery was the one crime for which many Greek states still allowed "slaying with impunity"; and Plato's lawgiver prescribes that one who sexually assaults a woman or boy is "to be slain with impunity" by the victim himself or by his blood kin.[5] It is the clear implication of both passages that "to slay with impunity" is a singular remedy, in some way distinct from simple self-help or summary execution which was allowed in other acts of violence by *kakourgoi*,[6] and in which the killer was "free of guilt" (καθαρός in Plato's account). The two passages together strongly suggest that the right of victims or plaintiffs "to slay with impunity" was an extreme remedy of common law for this most heinous violation of the *oikos*, and there was thus a significant distinction between νηποινεὶ τεθνάναι and other forms of license to kill.

To account for this distinction, Velissaropoulos suggests that νηποινεὶ τεθνάναι amounted to an unrestricted right of self-help, allowing any method of apprehension and retribution. Such would appear to be the substance of common law in practice, but that is not to say that νηποινεί had no more specific meaning in terms of penalty or payment. In fact, the further consequences of those situations where an offender is to be slain for sexual violation suggest rather the contrary: if the injured parties may put an offender to death without suffering any consequences, however brutal their methods, they may also hold the offender captive and extort ransom (ἄποινα) by threat of death or brutality—as though, in the balance of equity, the death and suffering of the offender is payment owed to the plaintiffs. Without liability they may exact compensation or execute their claim upon the person of their captive. If such were the practical implications of νηποινεὶ τεθνάναι, it is highly unlikely that the meaning of *poinê* was altogether lost.

There can be little doubt that this was the actual predicament of an adulterer caught

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représailles par des velléités de clémence. Mais allait-il oublier qu' entre ce suppliant et lui il y avait du sang? Il fallait autre chose qu' un accès de commisération pour faire déposer les armes à l'homme qui tenait enfin sa vengeance. Un seul sentiment avait assez de puissance pour étouffer la voix de la haine, pour réprimer une fureur homicide: *la cupidité*!" (my emphasis).

5 Xen. *Hier.* 3.3; Plat. *Laws* 874b-c: ὧν δὲ ὁ κτείνας ἐφ' οἷς τε ὀρθῶς ἂν καθαρὸς εἴη, τάδε ἔστω· Νύκτωρ φῶρα εἰς οἰκίαν εἰσιόντα ἐπὶ κλοπῇ χρημάτων ἐὰν ἑλὼν κτείνῃ, καθαρὸς ἔστω: On the Athenian law of adultery, see D. Cohen in *RIDA* 31 (1984) 147-65.

6 Hansen supposed (*Apagoge*, 16-18 and passim) that execution without trial in *apagôgê* and *endeixis* was a familiar and accepted remedy even in the fourth century. My objections in *GRBS* 25 (1984) 113-23 were, I think, formally correct; but I am now convinced that Hansen is substantially right, that summary execution was *not* a dead letter of the law. Lys. 1.36, for instance, assumes that a thief, apprehended ἐπ' αὐτοφώρῳ, would ordinarily be executed without trial.

in the act—just as in Homer's tale Ares, when caught in adultery, was at the mercy of Hephestus until Poseidon guaranteed his price. At Athens the captor may do with the adulterer as he will (ὅ τι ἂν βούληται).[7] Now Lysias insists that the law provided for summary execution (as in the arrest of other *kakourgoi*), and that ransom was not countenanced in the law; but he obviously anticipates the charge that adulterers should be held for ransom. Together with other references, Lysias' argumentative response suggests that by common law or custom (if not by statute), the life and person of the offender was forfeit to his captor, to hold for payment or dispose of, without liability.

The law of Gortyn apparently developed from a similar remedy:[8] an adulterer caught in the act, will pay damages to the family. The plaintiff (kinsman or husband) in the presence of witnesses will make proclamation of his claim to the kinsmen of his captive; and if he is not ransomed in five days, the plaintiffs "may do with him as they will."

Thus in redress of what are perceived as private wrongs, compensation is the operative principle: payment is offered to the men of the *oikos* to set aside their claim of retribution; without payment they will exercise their claim upon the offender, owing no liability to his family. Such was probably the remedy that Xenophon and Plato had in mind.

Against the woman guilty of adultery there is a different sanction but a similar mechanism: if she trespasses at public sacrifices, she is to suffer, short of death, any injury whatever "with impunity" (νηποινεί, [Dem.] 59.87). Here the law must rely upon third parties, rather than plaintiffs or injured parties. Perhaps from simple piety, anyone aware of a "tainted" woman taking part in religious services would speak against her. But harsh treatment, "whatever she may suffer," is also to be inflicted by any citizen willing. Now the threat of brutality serves as deterrent more than punishment, and the deterrent is more credible if there is an incentive for "concerned citizens" to intervene. There is probably no sufficient incentive for a third party to risk violent intervention unless he is to have ransom or other advantage, without penalty or liability.

If this was the nature of the ancient remedies νηποινεί, savage as it seems, they probably facilitated the transition from the primitive justice of private claims, initiated by injured parties in their own right, to the system of public actions by anyone willing. Even in the classical era the lure of *cupidité* appears to be an essential element in decrees against public enemies whom any concerned citizen should slay "with impunity."

II.

In the fifth and fourth centuries νηποινεὶ τεθνάναι and related penalties are found in the archaizing language of decrees against enemies of the state. Here, Velissaropoulos

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7 Lys. 1.29; cf. 1.4, 1.49. See also Plut. *Sol.* 23; Paus. 9.36.8; and, for extortion of ransom [Dem.] 59.65.

8 *IC* 4. 72, col. II.20ff.

argues, the warrant "to slay with impunity" takes on the broadest possible latitude; and this unrestricted license derives in some way from the law on homicide. In the Amphipolis decree (357) against Athenian sympathizers, Philon and Stratocles,[9] the exiles may be put to death by anyone willing, by any method, and, it is argued, *wherever they can be apprehended* (ἤμ που ἁλίσκωνται). The corresponding warrant in a decree of Miletus (mid fifth c.), against public enemies (who were apparently involved in insurrection) Cresphontes and Alkimos and their descendants,[10] puts a bounty of 100 staters on the outlaws' heads; and here, evidently, the banishment of public enemies is defined in terms of exile for homicide—φεύγειν τὴν ἐπ' αἵματι φυγήν.

We find similar language in a decree of Locris from the late sixth century:[11] here the extreme penalties—hereditary exile, confiscation, etc.—are imposed against any attempt to divide or privatize public land; and this measure is somehow connected with the statute law of homicide, κὰτ τὸν ἀνδρεφονικὸν τετθμόν. Are we to suppose that such penalties derive from the treatment of homicide? We know that at Athens the ordinary consequence of a homicide was exile: execution and confiscation are only contemplated in convictions for intentional murder; hereditary outlawry is unheard of; and on no occasion are the killer's pursuers to track him down in exile and put him to death wherever he can be found—on the contrary, the law safeguards the exiled killer who abides by his banishment.[12]

For the law of Locris (above n.11) we must either assume that homicide was treated much more severely elsewhere than at Athens, or conclude that the crucial clause, κὰτ τὸν ἀνδρεφονικὸν τετθμόν, has nothing to do with penalties for homicide but with the *abridgement of sacrosanct laws*—anyone attempting to *abridge or abrogate the law on public land* will be subject to exile, confiscation, etc., on the same terms as anyone attempting to *abrogate the law on homicide*. We find a similar seal upon "the laws of Drakon" (Dem. 23.62): any public official or citizen attempting to alter the laws was outlawed—*atimos*—himself, his descendants and property. This is not the penalty for homicide.

Now in the laws of Miletus and Amphipolis (above nn.9-10) we seem to have a connection between absolute outlawry, allowing no refuge, and the ordinary terms of exile that govern homicides. "Death with impunity, anywhere they are apprehended," is found in the decree of Amphipolis; a *bounty* for killing or capture, apparently without restriction, is found in the earlier statute from Miletus, where the banishment is somehow equivalent to

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9 *SIG* 194; Tod, 150.

10 *SIG* 58; Glotz, *CRAI* 1906, 511-29; *ML* 43.

11 *ML* 13: *h*όστις δὲ δαιθμὸν ἐνφέροι ἒ ψᾶφον διαφέροι ἐν πρείγαι ἒ 'ν πόλι ἒ | 'ν ἀποκλεσίαι ἒ στάσιν ποιέοι περὶ γαδαισίας, αὐτὸς μὲν ϝερρέτο καὶ γενεὰ ἄματα πάντα, χρέματα δὲ δαμευόσθον | καὶ ϝοικία κατασκαπτέσθο κὰτ τὸν ἀνδρεφονικὸν τετθμόν. ὁ δὲ τετθμὸς ἰαρὸς ἔστο τῶ 'Απόλλονος (κτλ.).

12 Dem. 23.37 (= *IG* I³ 104. 26-29); cf. 23.44.

"exile for homicide." Does "death with impunity" ordinarily mean that the outlaw is to be pursued and put to death wherever he can be found, and was this also the penalty for homicide? Velissaropoulos is perhaps right to argue that these two decrees authorize capture and execution even to some extent beyond the borders of the polis; but that is not to say that the warrant extends beyond all boundaries. The warrant probably extends to religious centers, festivals and border markets, just as Athenian law prohibited exiles and protected justifiable homicide at these sites.[13] But the evidence hardly supports the conclusion that the extreme penalties of these decrees derive from "homicide exile, ἡ ἐφ' αἵματι φυγή.[14]

The common aim of the two decrees is to deter the outlaws from ever attempting to return and renew political insurrection. This is especially clear in the law of Amphipolis where the statute concludes with the threat of banishment against any who would attempt to restore the exiles. Similarly this would appear to be the aim of the promised reward to bounty-hunters at Miletus, in order to assure that the outlaw will be putting himself in peril if he attempts to make any contact with sympathizers. Now in this case the bounty is an incentive for private citizens to intervene, where otherwise there would be great risk and no advantage. At Miletus evidently the property and family fortune of the outlaws has already been seized—the bounty is to be paid from the estate of Nympharetus; without a special bounty from the state, there may be no effective incentive for concerned citizens to intervene. At Amphipolis, on the other hand, there seems to be no need of such a bounty, and that is probably because anyone willing will have licence to seize the offenders for ransom (or other advantage) without liability, anywhere within the prohibited areas. If this is the meaning of νηποινεὶ τεθνάναι we are no longer faced with the obvious contradiction between a sentence of exile for life and the warrant that offenders be put to death "wherever they are apprehended."

These decrees guarantee that he who acts in the public interest shall have indemnity against any charges or claims by kinsmen of the man he kills; and that indemnity allows for

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13 See Dem. 23.37 and 51 (the law of *endeixis*), where the protection of "justifiable homicide," φόνου δὲ δικὰς μὴ εἶναι μηδαμοῦ, probably applies to the prohibited areas (Amphictyonic centers, etc.).

14 The mere coincidence that we have two decrees against public enemies mentioning homicide law and homicide exile (respectively) is hardly of any value as evidence that the extreme penalties for crimes against the state—hereditary exile, execution on capture, confiscation, and so on—derive from ἡ ἐφ' αἵματι φυγή (pace Humphreys). In the Locris decree, that the clause κὰτ τὸν ἀνδρεφονικὸν τεθμόν refers not to the penalties for homicide but to the "seal" against abridgement of sacred laws, is shown by the aim of the legislation itself (i.e. preservation of existing code) and by the clause immediately following, that *this law be sacrosanct to Apollo*. In the decree against Miletus we have apparently one instance where a political offense is remedied by a set of sanctions including ἡ ἐφ' αἵματι φυγή, but the language certainly does not allow us to conclude that the extreme penalties are equivalent to "homicide exile," especially considering that the public enemies in this instance were probably implicated in political bloodshed and subject to the ordinary penalties for homicide on that count. Such is also the clear or most likely implication of all other instances of this or similar phrasing (see the examples cited by Velissaropoulos in regard to the decree of Miletus). Thus, though νηποινεὶ τεθνάναι does indeed appear to be a private remedy adapted to public wrongs, we have no basis whatever for the conclusion that the extreme penalties against public enemies derived from "exile for homicide." On the contrary (as I shall further argue elsewhere) the remedies for political crimes, including hereditary outlawry, had a quite separate evolution.

financial incentive. Such is also the implication of the two Athenian decrees where public enemies are to be slain νηποινεὶ, the decree regarding Erythrae, and the decree of Demophantus.[15] In both cases the offender's property is confiscated; such measures might not altogether exhaust the resources of a wealthy and well-connected person abroad, but it would seem to limit the prospects for ransom. In both laws then, to assure execution, the sentence νηποινεὶ τεθνάναι is qualified by the guarantee that one who kills or causes the downfall of a tyrant shall receive half the property in bounty.

Thus in decrees of state against public enemies, as in self-help retribution against violation of the *oikos*, the primitive justice of ποινή and ἄποινα is still a meaningful part of the remedy; ransom and other compensation are validated by the warrant νηποινεί τεθνάναι. The person of the wrongdoer is forfeit to his captor—unless acceptable payment is made, the offender may be injured without liability. This meaning is also consistent with archaic usage, to which we now turn.

III.

In the *Odyssey* all of the examples reflect upon the offense of the suitors: they have come to woo a bride without the proper offerings. Thus Penelope complains that they should bring offerings of cattle and other costly gifts, "and not devour another man's livelihood *without recompense*."[16] This is also the immediate implication of the threat of Telemachus (1.376-80) that if the suitors continue to destroy his property, he will call upon Zeus for retribution νήποινοι . . . ὄλοισθε. Telemachus is threatening the offenders with the most ignominious of ends—a death without blood-price or blood-vengeance. He has no means at hand to effect such an outcome, but that in no way contradicts the meaning of his vow.

This sense of νήποινοι in Telemachus' plea is all the more evident in the second book, where he calls the assembly to hear his complaint: the suitors consume his goods wantonly (without gift-giving); he therefore appeals to the elders whose sons are among the suitors. They should fear the gods for the injustice of their kin; and he beseeches them by Zeus and by Themis to put a stop to it,[17]

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15 The Erythrae decree (*IG* I³ 14 = *IG* I² 10.29-34; Tod 24; Meiggs-Lewis 40) is a highly problematic text—not one letter of the reading νηποινεί is certain—but given the parallel to Demophantus' decree, the restoration is probable. Cf. Andoc. 1.96-8: ἐάν τις δημοκρατίαν καταλύῃ . . . πολέμιος ἔστω Ἀθηναίων καὶ νηποινεὶ τεθνάτω, καὶ τὰ χρήματα αὐτοῦ δημόσια ἔστω . . . ὀμόσαι δ' Ἀθηναίους ἅπαντας . . . "καὶ ἐάν τις ἄλλος ἀποκτείνῃ, ὅσιον αὐτὸν νομιῶ εἶναι καὶ πρὸς θεῶν καὶ δαιμόνων, ὡς πολέμιον κτείναντα . . . καὶ τὰ κτήματα τοῦ ἀποθανόντος πάντα ἀποδόμενος ἀποδώσω τὰ ἡμίσεα τῷ ἀποκτείναντι, καὶ οὐκ ἀποστερήσω οὐδέν." In the decree for Erythrae: the sons of a usurper retain half the property "if they prove loyal to Erythrae and Athens" (see Tod on line 31).

16 Penelope's reproach, *Od.* 18.275-80: ἀλλ' οὐκ ἀλλότριον βίοτον νήποινον ἔδουσιν. For the meaning of Telemachus' threat, cf. *Il.* 13.650-59, where Harpalion dies in battle in particularly disgraceful circumstances, his body is abandoned by his comrades; "no payment (ποινή) would come for the son slain."

17 *Od.* 2.71-78: εἰ μή πού τι πατὴρ ἐμὸς ἐσθλὸς Ὀδυσσεὺς | δυσμενέων κάκ' ἔρεξεν ἐϋκνήμιδας Ἀχαιούς, | τῶν μ' ἀποτεινύμενοι κακὰ ῥέζετε δυσμενέοντες, | τούτους ὀτρύνοντες. ἐμοὶ δέ κε κέρδιον εἴη | ὑμέας ἐσθέμεναι κειμήλιά τε πρόβασίν τε· | εἴ χ' ὑμεῖς γε φάγοιτε, τάχ' ἄν ποτε καὶ τίσις εἴη· | τόφρα γὰρ ἂν κατὰ ἄστυ ποτιπτυσσοίμεθα μύθῳ | χρήματ' ἀπαιτίζοντες, ἔως

> " . . . unless my father noble Odysseus maliciously wronged the Achaeans, and you are now doing me wrong in return, maliciously urging the suitors on. Indeed it would be better for me if you yourselves were to devour my stock; then if *you* were eating my goods, there would soon be a settlement (τίσις), for we would plead our case . . ., demanding payment until all were repaid."

Now here on two counts Telemachus clearly indicates that the conduct of the suitors is shameful as νήποινον precisely in terms of equity in compensation: if Odysseus had done them wrong, then the damage might be a deserved injury in repayment; if the elders themselves were responsible, Telemachus would get compensation from them.

Telemachus is answered, however, by Antinous, and the assembly ends up serving only to witness the complaint. So, again he demands, "Get out of my house, and entertain one another. . . each in exchange (ἀμειβόμενοι). But if you think it better to destroy the livelihood of one man *without compensation*, then eat your fill!" And then he repeats the curse he had threatened in the first book: he will call upon the gods; may Zeus give retribution (παλίντιτα ἔργα); "may ye perish in my house without compensation" (νήποινοι . . . ὄλοισθε). The plea of Telemachus before the assembly, invoking the gods to validate his claim, is parallel to the remedy at Gortyn in cases of sexual violation: the plaintiff, in the presence of witnesses, will make his demand to the kinsmen of the offender; he may have to defend the validity of his claim under oath; but if no payment is made, the life of the wrongdoer is forfeit.

In the end the suitors will perish in the house of Odysseus, in retribution for their wrongs and with no liability paid for their death—though Eurymachus pleads in vain to pay ransom for his life. In that denouement the equity of the outcome is clearly asserted; though there is no talk of νήποινοι, few among the audience would have failed to recognize that Telemachus' claim was fulfilled. This outcome is at least indirect confirmation that νήποινοι...ὄλοισθε means essentially, "may ye be slain without compensation or retribution," without ποινή.

Some customary remedy of this kind was an antecedent of Drakon's Law. Even without an official authority powerful enough to enforce its sanctions, there were customary rules, binding in effect, that sought a balance of equity by compensation or retribution. The lawgiver relied upon a mechanism of self-help and private settlement to enforce the judgments of *basileis* and *ephetai*—a mechanism much like the customary rules that governed the settlement of disputes in the epics.

Such was the law of Drakon with which we began our inquiry—the law that an assailant who violently attempts to seize property or abduct persons may be put to death

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κ' ἀπὸ πάντα δοθείη.

νηποινεί. In these cases, by the nature of the remedy, the offender could not be subjected to a prolonged ordeal to extort ransom; but if the killer acts in immediate defense—εὐθὺς ἀμυνόμενος—then he is absolved of any liability. The family of the man slain could make no claim upon the killer. This law was to stand unaltered down to the time of Demosthenes, and the wording νηποινεὶ τεθνάναι was retained, ironically, because the further consequences of that penalty, which later law sought to restrict, were already automatically excluded: the protection of law only applies to an act of "immediate defense." In that fateful moment, the wrongdoer may promise ransom and perhaps be spared; but "immediate defense" cannot justify holding the offender captive and prolonging his agony against his will.

It is reasonable to conclude that νηποινεὶ τεθνάναι was also Drakon's sentence for those cases where an exiled homicide dared to trespass where prohibited, without reconciling with the family of his victim. The lawgiver probably anticipated that in many such cases the illegal returnee might yet be spared if he could promise ransom, that he would be held captive, subject to brutality, until acceptable ransom was paid. The evidence, which Velissaropoulos has well noted, is indirect but I think quite compelling. The law cited by Demosthenes begins with a cross-reference to the Drakonian law—"it is lawful to kill homicides if apprehended in the homeland, or to arrest them, as on the <first> *axôn*" (Dem. 23.28). The later provisions then proceed to limit the power of one who seizes an illegal returnee: he is *not* to abuse or hold him for ransom—λυμαίνεσθαι δὲ μή, μήδ' ἀποινᾶν; should he do so, the law now prescribes a penalty and provides for anyone willing to bring charges before the competent archon, for trial before a court of the people. This Solonian revision, a generation or so after Drakon, was intended to restrict precisely the kind of remedy that we have reconstructed as νηποινεὶ τεθνάναι. In origin it was probably a remedy recognized by customary rules such as Telemachus invoked, long before Drakon adapted it into statute law. In almost all instances it was later superseded by other safeguards of justifiable self-help; but in those few sentences where νηποινεὶ τεθνάναι was still valid, by statute or common law, the ancient justice of ποινή was not forgotten.

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Penal Law and Family Law in Plato's Magnesia[1]

It is tempting to claim that the ancient Greeks had laws but not jurisprudence. Tempting, but false—if only because any system of law must be based on *some* jurisprudential assumptions, however deep-seated, unconscious and unchallenged they may be. But the assumptions on which Athenian law was based were certainly not unrecognised and unchallenged; on the contrary, the speeches of the orators, to say nothing of the rest of Greek literature, are full of open arguments about the proper assessment of damage and compensation, about responsibility, equity, procedure, execution, penal policy and punishment, and a whole host of other issues which we would nowadays call jurisprudential. Yet because such issues were discussed, or rather fought over, only piecemeal, for highly partisan purposes in the everyday operation of the legal system, they have gone to a large extent unrecognised. The corpus of the Attic orators is in fact a vast quarry, still not fully exploited, for the study of ancient jurisprudence.[2]

What is true, however, is that Athenian law was not subject to systematic and principled analysis and criticism from outside itself. The speech-writers were themselves part of the system: they could deploy one argument one day and its opposite the next if it suited their book. Legislators[3] could no doubt take a relatively independent viewpoint; but they too were subject to social, economic and political constraints. So far as we know, there was no independent body of persons concerned comprehensively to scrutinise, assess and criticise the workings of Athenian law, and the often conflicting jurisprudential assumptions on which it was based.

To these airy generalities I know of only one exception: Plato.[4] For Plato, in his *Laws*, subjects Athenian law to a comprehensive critique. Of course, he does not proceed drily and tidily, point by point in systematic order; for he is not a lawyer's lawyer, but a creative political and legal craftsman. He equips his practical utopia, Magnesia, with a new model penal code based on principles of jurisprudence sometimes adopted from those of Attic law, sometimes adapted from them, and sometimes in outright opposition to them. He encases the detailed (and sometimes very complex) provisions of his code with what is

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1 Starting from certain scattered material in my *Plato's Penal Code* (Clarendon Press 1991), I attempt in this paper to present a *synoptic* view of the relationship between these two topics in Plato's legal thought. References to the *Laws* are given bare of title, e.g. 847e. References to modern works are given by author alone, with a distinguishing date where necessary, e.g. MacDowell (1963); full details will be found in the bibliography.

2 Dover's *Greek Popular Morality* has shown what can be made of the orators as a source of information about moral belief and practice; but it does not have a primarily legal focus.

3 The mechanics of law-making are described by MacDowell (1975).

4 Some may wish to add Aristotle. To be sure, certain passages of the *Politics*, *Rhetoric* and *Nicomachean Ethics* deal with certain jurisprudential topics relevant to the themes of those works; but his treatment is far from comprehensive or systematic.

in effect[5] a jurisprudential commentary and justification. Further, he charges the "Nocturnal Council" of his new state with the duty to undertake legal study.[6] Here, then, if anywhere in our sources, we find scrutiny and assessment *and reform* of Athenian law, carried out from an entirely independent standpoint.

My subject, therefore, concerns families that never existed, a penal code that was never established, and a penology that was never put into practice. Nevertheless, my enquiry is by no means remote from real life. For Plato the political craftsman is working with historical material. He bases his social structure in the *Laws* on a family system broadly inspired by historical practice; he underpins his legal code with a penology which, though radical, is based on principles in part derived from historical ideas; and the result is a revealing tension between real and ideal, between social and religious conservatism and legal reform.

I. The family in Plato's Magnesia

Good accounts exist elsewhere,[7] and it is not necessary to enter into deep detail. The salient points are as follows.[8] The territory of Magnesia is divided into 12 parts; each part belongs to one of 12 tribes, and is in turn divided into 420 portions of land. Each portion constitutes one "lot" or "estate" (*klêros*); and each lot belongs to one of the 5040 adult male citizens who enjoy full political rights. Each full citizen farms half his estate, the half which is nearer to the central town; his favourite son, who is of citizen status but without full political rights, farms the other half, which is located near the border of the state. When the father dies, the son transfers to the vacant half. Every lot is inalienable by sale or gift, and save in the case of dire necessity remains permanently in the possession of its family, together with a certain minimum of essential resources. In academic terms, these 5040 families, or 10,080 households, enjoy virtually absolute "tenure," and the entire economic life of the state is very firmly based upon them.

The families are also the basis of all social and religious life, and for such purposes there is an elaborate programme of festivals. Marriage and other inter-familial ties encourage a high degree of communal solidarity and good-will. The family, particularly in the early years of a citizen's life, is crucial to the intensive education to which he is exposed at every turn. The social and economic health of the families is a major responsibility of the state's most important officials, the Guardians of the Laws. For certain limited purposes, the families are part of the legal apparatus, in that they may convene courts from among their members. The family has extension and continuity, not only in space but in time: each head has responsibilities to its ancestors, present members, and those yet to be born.[9]

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5 The technical *form* of this material is "preambles," designed to convince the citizens of the merits of the laws they have to obey.

6 951e ff.

7 Becker, Morrow (1960), s.v. "Family" in General Index; cf. Bisinger.

8 736c-738a, 739e-741a, 744a-745e, and in general 842b-850d.

9 This paragraph is based on 717b, 729c, 738a-740c, 771a-776b, 783b-785b, 788a-794d, 828a-

Important though the family is to the structure of Magnesia, it is not *all*-important: Plato is well aware of the possibility that the very privacy of family life can cloak the development of bad habits, and he takes measures to prevent it;[10] and other groupings too have a certain role to play: deme, phratry, tribe, and of course the state itself.[11]

II. Plato's penology and penal code

Side by side with this strong family system Plato sets up in Magnesia an elaborate penal code. Its general structure, operation and detailed provisions are obviously based on Athenian practice, but are crucially modified by certain characteristic Platonic preoccupations. Chief among them is a radical new penology, whose implications for the Magnesian penal system I attempt to explore in *Plato's Penal Code*. Both there and elsewhere[12] I describe his theory of punishment very fully, so that here a mere summary will suffice.

The central tenet is that punishment must never be inflicted because of the past, but only for the sake of the future. Just as good medical practice cures a sick body, so punishment must be so contrived as to "cure" an "ailing" soul. It is true that an injured party has an absolute claim to recompense; but to recompense Plato denies the name of punishment. For the purpose of recompense is to restore offender and victim to friendship; it is not a *penal* measure. Punishment proper is that *additional* measure of suffering imposed for the purpose of the cure of the "unjust" soul of the offender; and an unjust soul is one under the control of pleasures, emotions, desires, and false moral opinions. The offender is to be cured not by mere *timôria*, retributive vengeance, but by *dikê*, justice, i.e. measures rationally calculated to make him love (or at least not hate) "true justice." No limit is placed on these measures: *anything* will do, provided it is effective (honours, disgrace; fines, gifts; pleasures, pains). *Dikê* must be calculated to fit the precise diagnosis of the mental and affective state of the individual offender. *It need not consist of the infliction of suffering:* it may in whole or part take the form of incentives, persuasion, social pressure, and re-education in general. To the extent that the measures taken do consist of the infliction of suffering, they have two purposes: (i) to break up forcibly the vicious patterns of motion existing in the (physical) soul, in readiness for the imposition of virtuous ones;[13] (ii) to deter, by fear of future suffering, both the offender and others; but

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e, 841c-842a, 923a ff. Family court: 878de.

10 779d ff, 788a-c, cf. 909d ff.

11 746d, 875a.

12 Saunders (1968), (1981). The main sources are: 728bc, 731b-d, 853b-855a, 866d-867c, 880d-881b, 907e-909b, 933e-934c, 941c-942a, 957d-958a, and above all the long penological excursus from 857a to 864c. Cf. *Gorgias* 478a-480d, 505ab.

13 I believe that in some quite literal, not only metaphorical, sense Plato's penology is indeed medical, in that it is based on a certain view of the physical relationship between soul and body; but into these psychological and physiological matters I cannot enter here. One may start with *Timaeus* 44d, 69c ff, 86b-90d.

Plato regards (ii) as a low-grade operation,[14] always inferior to retraining in virtuous habits underpinned by correct moral conviction.

In sum, in Plato's view punishment has a "compelling" and a "teaching" element. The pain inflicted *compels* the irrational, vicious soul-patterns to break up; then "teaching" reinforces or imposes better *and rational* patterns. The damage or injury the offender has inflicted is not that "for" which he is punished; it is that "in return for" which he pays recompense; and its only penological relevance is as a *prima facie* indicator of psychic state (Plato recognises that very serious damage or injury does not necessarily indicate a very serious psychic disposition). The injured party is to be satisfied with his recompense; and it is obviously incompatible with the growth or restoration of friendship between him and the offender that he should gloat over or take pleasure in the suffering, if any, imposed on the latter by way of punishment; neither side should regard that suffering as *retributive*. Hence "he deserves to suffer" and "deserved penalty" are not retributive expressions: they indicate only that the offender's soul needs this or that measure of "curative" suffering. Hence no one is to be punished for the offence of his ancestor; it is the ancestor's soul that is (or was) unjust, not his descendant's. Finally, the death penalty is to be inflicted only on offenders deemed to be beyond cure.

Now obviously this theory has points of contact and coincidence with the penological orthodoxy of the Athenian courts. Both stress the payment of recompense, and the orators' (professed) wish to inflict punishment as a means of moral reform (to make an offender "better," as they commonly put it) is crudely similar to Plato's own reformative intent. But the orators, no doubt reflecting their clients' vindictive interest, make it clear that their concern is strongly retributive. That is, they believe that it is in some sense right that offenders should suffer "for" their offence, and that justice consists in *reciprocal suffering*, even if the only benefit accruing from it to anyone at all is the pleasure felt by the injured party. In the orators' view, punishment *ought* to be inflicted "for the sake of the past." Plato flatly denies it. For him, punishment is a utilitarian device: it is reformative or it is nothing. His penology is sharply askew to the assumptions of the man in the Athenian street. The man in the Magnesian street also is likely, at least in the early years of the new colony, to feel hostile to what Plato ask him to accept. Hence the large amount of space Plato denotes to explaining his new penology; for he intends that eventually the Magnesian jurors will think as he does.

But that is not the level of conflict I wish to explore. It seems to me that in some respects the exceptionally entrenched position Plato accords the family in Magnesia, and the demands of his penology, collide. They can be seen reacting on each other: sometimes the one is modified or elaborated, sometimes the other.

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14 *Phaedo* 68d-69c, *Republic* 554c-e, 619c-e.

III. Pollution

It is not clear how far the obligation of a killer to undergo purification rituals was a formal part of Attic law of homicide;[15] but in Platonic homicide law it plays a conspicuous and central role. Pollution, in the shape of the anger of the dead person and his power deleteriously to affect the life of his killer, and indeed that of others, is to be part of the canon of religious belief of the Magnesians;[16] and it is in implicit or explicit deference to this anger (sometimes described in decidedly lurid terms) that several of the procedures and penalties are prescribed.[17] As in Athens, homicide law is firmly based on the family: it is the duty of a relative of the dead person to undertake the prosecution of the killer; and Plato is insistent that a relative in dereliction of this duty can expect the anger of the dead to arrive at his own door, and himself to become liable to prosecution (866b, 871b). The killer's fear that he will be pursued not merely by the relative but in some more mysterious and possibly more dangerous manner by his victim himself is a fear of family solidarity and hostility extended beyond its living members in this world into the world of what we may call the living dead. Inculcation of this fear is Plato's attempt not only to curb the frequency of murders, but to enlist the family in the punishing of them by conferring upon it enhanced weight and authority.[18]

Now the presence of pollution in such a strong and all-pervasive form in a penal code based on the advanced reformative penology espoused by Plato raises problems. First, the dead man's anger is essentially vindictive: what he wants to achieve is as much retributive suffering as he can (865e); and he expects his living representative to help bring that about. This is in fact the only form of satisfaction he can get; there is no question of his being restored to amity with his killer, or being persuaded that the latter deserves anything but pain of some kind. In effect, Plato seems prepared to permit a *dead* injured party, a mysterious and essentially hostile chthonic power, what he would not allow a living one: the right to cause the offender to *suffer*, "because of the past," and to demand that living persons (the relatives) should help him in that endeavour. Second, if he should succeed, it will be utterly without regard to the "cure" of the murderer. What matters to a dead man is that he is *dead*: why should he be concerned with the psychic state of his killer? Again, Plato is apparently ready to let loose, and indeed encourage, in his penal system a force which would negate the professed objectives of his penology: to nuance

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15 MacDowell (1963) ch. 14; Parker ch. 4 in general, e.g. 116 ff on pollution as a "spiritual *Doppelgänger* of the law," justifying practices (e.g. exile) which historically had other origins.

16 865de, 926e ff, 932a; cf. the anger of the entire *sungeneia* that has to be appeased in the myth at 872e-873a. On anger as pollution, see Parker 107.

17 865e (exile), 871a, 871d, cf. 872bc, where the dead person may be supposed to watch the execution of his killer. Note that fear of the dead is not only fear of his retaliation, but is itself a kind of punishment; so too the "suffering" at 867c seems to be or include the obligation to undertake the purifying rituals.

18 Parker 126-8 suggests that in the 4th century belief in the power of the dead was diminishing.

penalties in accordance with the state of the offender's soul, in order to cure it.

That the anger of the dead person is vindictive and essentially backward-looking is not a point that Plato confronts; and this in itself suggests that he is making some assumption we have not yet isolated. I suggest that it is perfectly simple, yet in a way unexpected. The key lies in the penology, in the fundamental dichotomy between recompense and cure (862b5 ff). The lawgiver has to pay attention not only to injustice (i.e. the unjust state of the offender's soul), but to the injury actually inflicted. What has been harmed must be made whole; losses have to be restored; what has fallen must be put back upright; what has been killed or wounded must be replaced by something sound; and finally "the relationship between doer and sufferer of each injury must be soothed/appeased by recompense" (*apoinois exilasthen*). Now clearly in these last two words something other than mechanical or concrete recompense is meant: Plato is referring to the *feelings* of the two parties, the victim's resentment against the offender, and the offender's fear of reprisal. The soothing or propitiating or atoning must be basis of the reconciliation of the two sides.

The upshot seems to be that the soothing satisfaction of *feelings* is a legitimate species of recompense. It is of course a species peculiarly appropriate in homicide; for the only recompense the victim can get is the feeling of pleasure at seeing his killer suffer in some way, by bearing the expenses of purification rituals, or by going on trial, or into exile, or executed, or whatever. That homicide is particularly in Plato's mind in the passage I have just summarised is confirmed by two further passages. (i) When the killer of one of his parents is killed, this second killing appeases (*aphilaskomai*) the anger of the deceased's entire line—which includes, presumably, at least the deceased himself, possibly other dead members of the *sungeneia*, and certainly the living members (872d-873b). (ii) A rapist may be killed *nêpoini*, without requital.[19] The implication is that normally a killed person *is* entitled to requital, *poinê*; and how can one requite a murdered person except by soothing his fury? The recherché vocabulary[20] marks out a network of thought designed to suggest that satisfaction of furiously vindictive feelings is a special but acceptable form of recompense.[21]

Now that really does sound like a squalid manoeuvre. In order to legitimise the strengthening of the family response to the killing of one of its members, Plato insists on an active role for the deceased. That active role can only be vindictive and backward-looking delight in the infliction of harm for harm; and in order to accommodate this in a penology that ostensibly discourages it, Plato baptises it with the name of recompense, which *is* allowed and indeed enjoined. But two considerations should give us pause, one

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19 874c; similarly the killers of other offenders killed justifiably are "pure."

20 *Exilaskomai, aphilaskomai, nêpoini, apoina*: these words occur nowhere else in Plato, except *apoina* at *Rep.* 393e.

21 *Apoina* is a well-chosen word: it can refer either to recompense in concrete form, or to mere suffering "paid" to injured parties in return for an offence; e.g. Aeschylus *Pers.* 808.

minor and one major.

First, anger, which the dead person feels, is to Plato a not disreputable emotion; it can indeed be of some practical value. It is typically felt in respect of some perceived injustice.[22] To have been killed unjustly *justifies* anger in the deceased. He has a legitimate claim for recompense; and if it is not met by permitting him *Schadenfreude*, it cannot be met at all. In a penology which insists on recompense, a murdered person is in a strong position to *demand* his *Schadenfreude*.

More crucially, what the dead man wishes to achieve is not *Schadenfreude* only; indeed, that is something which simply supervenes upon his real aim. Here we have to remember some of the basic dynamics of aggression and retaliation among the Greeks. Successful retaliation by X against Y's aggression enhances X's *timê* to its original level or even beyond. This is a result in which X rejoices; and part of his rejoicing will be pleasure at the discomfiture of Y. But his *primary* aim will be to restore his own position by damaging Y's. It is therefore at least worth asking whether the compensation Plato offers a murdered man is less the pleasure of seeing the killer suffer, than the knowledge that he himself (the dead man) has helped, with the assistance of the appropriate relative, to diminish the killer's *timê*, and so to enhance his own and that of his family.

This interpretation is supported by an extended passage about involuntary homicide, in which Plato describes the feelings and *modus operandi* of the dead man (865de). Nothing is said of his pleasure, except by implication. By visiting his own anguish on his killer, he in effect drives him into exile, where he will be beyond the deceased's malign attentions. The deceased is left so to speak holding the field; the killer suffers loss to his *timê* by the *atimia* of exile; and the *timê* of the dead man, and of course of his family, is restored thereby. In that sense, Plato offers the dead man perfectly normal recompense. If he were alive, he could receive concrete recompense of (say) a pig for the theft of a pig; that would decrease the *timê* of the thief back to its original level in relation to that of his victim. So too is the killer damaged, by being made to go into exile.

The difficulty remains, of course, that whereas two living persons may be restored to a (wary or watery?) "friendship" when one has paid recompense to the other, a living person and a dead one can hardly be "friends" in any meaningful sense; at most there will be an absence of enmity.

Two points need to be stressed. (i) The year's exile imposed on the offender in the passage mentioned (865d-866a) is not a punishment. It is imposed for *involuntary* homicide, so the killer has by definition no injustice in his soul for which he could be punished/cured.[23] It is therefore strictly recompense to the dead man and his family—though of course it is in the offender's interests also to be absent while their anger wears off. (ii) The family interest is strong. The killer's exile will entail his absence from the

22 *Rep.* 439e ff, *Laws* 731b-d, 866de.
23 Cf. 944d, "it is useless to punish the unlucky."

"places customarily frequented" formerly by the dead man, and therefore by his family; he must also, if the dead man is a foreigner, stay away for a year from the deceased's land too,[24] obviously to avoid the deceased's family. Further, it is the relative who is to grant pardon (*sungnômê*) to the offender at the expiry of the year.

The family is therefore given a strong interest, in homicide law, in one of the two planks of Plato's penology, recompense. As we shall see, it is also given a role in the calculation of the other, punishment/cure. But in both cases Plato delimits the family's discretion with great care. At this point, we need a brief analysis of the main categories of his homicide law, with their penalties.

1. Involuntary homicide: Recompense only, since offenders are morally innocent.
2. Homicide in anger (a Platonic innovation): Recompense *and* cure.
3. Voluntary homicide: Recompense only, since offenders are deemed incurable and are normally executed.

Throughout the extensive and complex regulations there are references to the crucial role of the family in prosecuting, and in calculating and enforcing verdicts. Now the second of the two major difficulties which I identified in giving such a prominent place to the animosity of the deceased in a penology dedicated to cure, namely that the demands of animosity and requirements for cure can cut in different directions, obviously raises its head in (2), murder in anger; for here there *is* a moral fault, a failure in self-control, to correct. Plato's regulations are pointed.

He distinguishes, very elaborately, between the spur-of-the-moment killer in anger, who is "like" an involuntary killer, and the premeditating killer who, having nursed his anger over a long period, is "like" a voluntary killer (866d ff). The former is to go into exile for two years, the latter for three. The former's two years is sharply distinguished from the one year of the involuntary killer: the longer period is to serve by way of his "chastisement" (*kolazô*) of his anger. The latter's three years are imposed because of the (greater) "scale" of his passion (867cd). The starting point is thus the basic one year for involuntary killing, i.e. the one year of recompense; the two extra periods are for the purpose of psychic cure. In both cases the dead person and his family receive their due recompense; but in the calculation of the genuinely curative penalty, the extra one year or two, they play no part whatever. Furthermore, when the timê comes for the exiles' return, it is not the responsibility of the family, but of 12 Guardians of the Laws, the body of officials with special responsibility for the family interests, to decide, in the light of their enquiries into the exiles' conduct, whether they may be readmitted (867de).

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24 I take 865e7-866a1, and 866a7 *apoxenoumenos*, to amount to full exile *from Magnesia*, not just parts of it: note *kai* in e9; cf. also exile from the fatherland at 866b6.

A comparison with the practice prescribed by Plato for return in the case of *involuntary* murder is instructive. There, the person granting pardon and peace with the family at the end of the year's exile was the appropriate relative (866a). Two points are significant. (i) The relative's discretion to grant or withhold pardon seems, provided the exile has done what is required of him, virtually non-existent: *echetô sungnômên* looks like a third person imperative conveying legal obligation, or at least expectation. In Attic law, by contrast, the family could, it seems, deny pardon indefinitely.[25] If in fact Plato has tightened the procedure so that the relative's acquiescence is pretty well a compulsory formality, then the reason is fairly obvious: he wishes to have the exile reabsorbed into his own family and the life of the state at large; Plato is as concerned for the families of offenders as he is for the families of victims; he is not prepared to have his re-entry into society delayed or prevented by vengeful relatives of the deceased. (ii) The relative's role is in connection with the payment of recompense only, which he cannot increase: Plato seems to prescribe that exile of a bare year suffices. But when calculation of terms of exile, and conditions of return, affect exile imposed (i.e. for murder in anger) as psychic cure, he treats it as a matter of high state policy: the dead man and his relatives play no part whatever. The regulations are shaped and administered to suit Plato's penological purposes, not the hostility of aggrieved injured parties.

The same policy of *graduating* the scope allowed to the anger of the dead in the interests of penology is visible at many points in the code.

First, Plato distinguishes three categories of involuntary homicide,[26] the third of which we have looked at already.

(i) When a patient dies as an unintended result of medical treatment, the doctor is not polluted.

(ii) When a person is killed accidentally in the course of contests, games, military practice etc., pollution *is* incurred—but that is all.

(iii) In all other types of involuntary killing, the pollution incurred is greater than in (ii), and exile of one year is imposed.

Now it is perfectly natural to suppose that, however unintentional his killing, and whatever the context and circumstances, the dead man feels resentful at his loss of *timê*, and inclined to vent his rage on his killer.[27] But doctors, clearly, cannot function on that understanding; so Plato denies the dead man any claim at all. The social necessity of games etc. puts deaths in those circumstances in an intermediate position: the dead man can demand purifications, but is *not* entitled to drive the killer into exile. Only when the killers are mere private individuals, with no special function or status, is the dead man allowed to exact substantial purification, and exile.

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25 *IG* I³ 104 11 ff., Demosthenes 23.44-5, 71-3 ("until"), MacDowell (1963) 117-25, Goetz 80-82.

26 865a-866d; cf., for (ii), 831a.

27 Antiphon *Tetr.* II c 7, cf. Parker 116-8.

This is a notably nuanced control over the anger of the dead man and his claim, a claim on which Plato has himself insisted. A comparison with Attic law is not easy; so far as one can see, no purifications were required by law in any of these cases,[28] though of course the scrupulous might have undertaken them anyway. Plato's control is not only nuanced, but a formal part of his law. He both strengthens and restricts the family interest.

Second, (i) a foreigner who involuntarily kills a free man is to perform purifications and be sent into exile.[29] If he returns voluntarily, he is executed; and any property he possesses is presented to the victim's relatives; if he returns involuntarily, he is simply sent away again unharmed. Thus any fury felt by the dead man and his relatives by his presence is given full rein in the one case, with concrete compensation to boot, but totally checked in the other; and the reason must presumably lie in penology: the offender's state of mind is malign in the one case, but not in the other.

However, (ii) if a *citizen* voluntarily returns prematurely from exile, he is to be prosecuted for *murder* by the deceased's next of kin, and if convicted is to suffer a doubling of all his penalties, i.e. length of exile.[30] Here a different principle seems to apply. The exiled citizen wants, after all, only to return home, and to resume working of the lot; that is a *good* wish; but the foreigner has no such respectable motivation. So the interests of the offender and his family serve to check those of the victim and his; for had the offender not been a Magnesian, the victim and his family would have been allowed to vent their fury in full, by killing the offender.

All this represents two significant adjustments to the (in practice probable) Attic penalty, death.[31] (a) Plato's desire not to eliminate a head of house just because he returns improperly from exile imposed for mere involuntary homicide has stimulated a radical modification of penalty. (b) He distinguishes between the *motives* of returning aliens. In (a) the interests or wishes of the victim and his family are curbed in the interests of wider social policy; in (b) they are curbed in the interest of a penology whose central consideration in the psychology of the offender.

Third, the *status* of offender and victim can lead to significant differentiations of the penalty the dead person is permitted to claim.

(i) An involuntarily murdered slave is certainly permitted to demand that the killer purify himself: thus far an angry dead slave is allowed the same as a free man. But the dead free man is *in addition* allowed to drive his killer into exile for a year (865c-e). The same principle applies to murder in anger.[32] In the case of *voluntary* murder of a slave, however, the position is not clear. Plato mentions only the killing of an innocent slave whose killer has acted out of fear that the slave will inform against some disgraceful

28 Doctors: Antiphon *Tetr.* III c 5. Others: Demosthenes 23.53 ff, Aristotle *Ath. Pol.* 57.3.

29 866b7-d4: 1 year for a metic, permanent for an itinerant foreigner.

30 866a5-b2. Presumably the second year of exile counts as cure rather than recompense.

31 Whatever the social status of the offender, I take it. See Demosthenes 23.28, 31, 51, MacDowell (1963) 121-2, 140; Stroud 54-6 on *IG* I^3 104 (= I^2 115) lines 30-1.

32 867c6 *kathaper*.

conduct of his own (872c); in this case the killer is put on trial, and is presumably liable to the death penalty, just as if he had killed a citizen. The implication is probably that a voluntary killer of a slave in other circumstances is *not* to be tried for his life,[33] but would be subject to some lesser penalty. But *a fortiori*, if purifications were demanded in the two other cases of murder of a slave, involuntary and in anger, then so too would they for voluntary murder. At any rate, only when a slave is killed in these special circumstances, in the fear that he may inform, is his fury allowed to demand the death of his killer. An innocent slave killed in other circumstances is apparently not allowed it, equally furious though he presumably is. The reasons are obvious: (a) the slave, though a member of the *oikos*, is not a member of the family; he is a lesser being, socially of little account; he has not lived "in the full proud spirit of freedom" (865d7;), and his "ghost" is not entitled to much anger; (b) the freeman who is prepared to kill in fear of being informed against is "incurable." This point, I suspect, is primary: considerations of the psychology of the killer override any account Plato might have taken of the anger of the dead slave.[34]

(ii) Conversely, the slave *killer* is treated with exceptional harshness. When he kills a free man in anger, he is to be executed *by the relatives of the deceased themselves*, with (apparently) embellishments of ill-treatment, perhaps torture, when the deceased was the offender's master. Even when the victim is not the master, the relatives are to kill the offender "in whatever way they like" (868bc). Presumably killing a mere slave does not do much to restore *timê*, so the personal satisfaction of the dead man and the relatives has to be achieved in these nasty ways. In Athens, slaves seem to have been executed, without such personal accentuations, by the public executioner.[35] That the slave's action was less than fully voluntary counts in Plato's eyes for nothing. Considerations of family and status override everything.

Worse is to come. A slave who kills a free man voluntarily is to be taken to a point from which he can see the tomb of his victim, and given by the public executioner as many lashes of the whip as the successful prosecutor (i.e. a relative of the victim) instructs, and if he survives that treatment, he is to be killed (872bc). Presumably the sight of the tomb is to "bring home" to him whom he has killed; and there is probably also the implication that the proximity of the execution to the deceased will enable him to see it or know of it that much the better; perhaps also his knowledge that the offender knows he is watching adds to his satisfaction. No such embellishments to the death penalty for a slave are known in Athens.[36] In short, family fury is given the fullest scope; and the public executioner

33 Note the exclusion of this case from 872a7-b1. As for the penalty for killing a slave in Attic law, much is uncertain. It was certainly actionable at law: Aristotle *Ath. Pol.* 57.3, Antiphon 5.48. The penalty was almost certainly less than death, *a fortiori*, since the penalty for killing a free foreigner was itself less than death: *Ath. Pol.* 57.3, cf. Harrison 1.196-8, Gernet n.159, confirmed by Lycurgus *Leoc.* 65, Demosthenes 59.10. On the whole question, see Morrow (1937), and (1939) 47ff.

34 Similarly, the evil psychic state of a *killed* person deprives him of licence to enforce his anger: 874bc.

35 Antiphon 5.48.

36 Antiphon 1.20 may be relevant, but the torture may have been not a penalty as such but an

represents the communal interest also. But when a slave kills a *slave* voluntarily, the death penalty is apparently not embellished, except that (as indeed applies also to a free killer of a free man) the body of the killer is not to be buried in Magnesia (872ab).

(iii) But to speak of "the family interest" is too blunt a tool of analysis: for there are subtle graduations *within* the family also. The section of the homicide law on murder in anger develops towards its end into regulations for killing in self-defence, i.e. special circumstances in which killing in anger can occur, and exhibits this revealing sequence (869b ff):

	Killing in self-defence	**Penalty**
1.	Of parent by offspring	Death
2.	Of brother by brother, or of any free citizen or free foreign person by any free citizen or free foreign person	Nil (not even pollution)
3.	Of free person by slave	Death

The first and third cases involve relationships of superior and inferior status; the second does not. (Yet, when the killing is not in self-defence but voluntary, (1) and (2) attract the *same* penalty: death without burial in Magnesia, and with grisly embellishments at that.[37]) Evidently it is the *aggression*, springing of course from psychic *adikia* in the brother killed in self-defence, that robs him of his special status of blood-relationship, which is perhaps a less important blood-relationship in any case than that between parent and child, which is also one of age (see below under assault). That *blood* is important in these complexities emerges from the law of wounding also.[38] When one person wounds another with intent to kill, the penalty is permanent exile; but this is increased to death when the victim is the parent, sibling, or master of the killer. Spouses, who are not related to each other by blood, do not receive this enhanced protection.

(iv) When however the wounding was committed in anger, and the victim is a relative of the wounder, there are other intricacies, which I cannot explore here in full.[39] A family court is to be convened.[40] The chief points of combined familial and penological

attempt to gain information.

37 873a ff., preceded by a spectacular talionic myth.

38 876e ff. Here, of course, there is no question of pollution. Knox's discussion (76ff) of blood in the *Antigone* may suggest that Plato is deliberately archaising. Cf. Gernet n.165: spouses are "parmi les victimes du second rang."

39 878d6 ff. There may be the restriction that the wounding must have been severe enough to have incapacitated the victim for military service: see "this" (d6-7) and "such" (e5). If this is so, offenders, if not executed, will have to serve the incapacitated person's military service on his behalf.

40 Its composition, if I understand the text aright, are the male members of the *oikos* of the father and of the *oikos* of the mother, probably of both victim and aggressor, plus other male and female relatives on both sides as far as cousins.

interest are:

(a) Wounding of relative by relative attracts as the penalty only the payment of damages; but wounding of a parent may attract either death, or something more severe, or something a little less severe. It is hard to know what "less severe" means; more severe may mean non-burial in Magnesia. At any rate, parents again have enhanced status.

(b) That a *family* court is to try offences by family member against family member suggests that calm impartiality is not high among Plato's concerns, for feelings may run high; on the other hand the court would have intimate knowledge of all the circumstances, and the assessment of the penalty is in case of challenge ultimately appellable to the Guardians of the Laws. But if death (or more, or less) is to be the penalty, the qualifications to be a judge are more stringent (age of 60 years, possession of natural and not adopted children), and the relatives (*sungeneis*) of the culprit are disqualified; but the sentence seems inappellable.

(c) In deciding whether death (or more, or less) is to be imposed, these courts have presumably a function within the guidelines of Plato's penology. At any rate they seem to have to decide whether the wounder of a parent is heinously incurable, merely incurable, or not quite incurable; and the damages paid in the wounding of other relatives may be intended to have *inter alia* a curative effect. At any rate, great though the discretion of these courts is, it seems to have to be exercised with a sense of penological responsibility.

(v) There are several other provisions in the small print of the homicide regulations that are designed to enhance in some manner the special status of the family. For instance, on pain of a charge of impiety, the killer in anger of a member of his family (other than his parents, for which the penalty is death) is obliged on return from exile to keep clear of the family and its social and religious occasions (868c5-869a2). No such restrictions are placed on the killer in anger of someone who is *not* a member of his own family.

Two other points need to be emphasised. First, the "tenure," as I have called it, of the lot by its family is extended significantly into the area of penology. A lot-holder may be sent into exile, but his property is in no circumstances to be confiscated; and he is not to be fined beyond a point at which he would have insufficient resources to work his lot (855a-c). The stability and continuity of the family on its ancestral estate are paramount. When a lot-holder suffers permanent exile or the death penalty, the lot simply passes to his heir (877c ff.); and except in one extreme case penalties are not to be inherited (856c-e). Second, to the extent that Plato's new category of homicide, i.e. killing in anger, embraces killings which in Attic law would have been treated as voluntary, there will *ceteris paribus* be *fewer* death sentences in Magnesia than in Athens, and so less disruption to families and their estates. This result I assume he foresaw and intended; at any rate, we have already noted two other points in his code which suggest a concern to restore the normal working of estates with all due speed.[41]

41 Cf. pp. 123-24 above.

There is one self-contained issue in which Plato can be observed nicely compromising between the demands of the dead man and his family on the one hand, and the demands of penology on the other. In Attic law, if the victim before death voluntarily absolved (*aphesis*) his killer, no prosecution could take place;[42] and so far as one can tell the rule applied to voluntary and involuntary killing alike, though obviously it is more likely to have occurred in cases of the latter. However that may be, Plato mentions the practice only in his intermediate category, murder in anger;[43] he may or may not have wished to allow it in the other two. If however he wished to exclude it from voluntary murder, his reason is presumably that a voluntary killer is in a state of psychic incurability and deserves death as his penalty irrespective of the wishes of his victim, which the moral and social desirability of that penalty override. In murder in anger, however, flexibility is reasonable. The offender is not let off completely: he is to be treated as though guilty of involuntary murder, and after the appropriate purifications sent into exile for one year, as opposed to the two or three years he would spend in exile were he being sentenced in the normal way for murder in anger. What does this one year represent? Not recompense, one is tempted to think, in view of the acquittal given by the victim. If it is cure, offenders are treated *invariably* as if they resemble the less serious category of killers in anger more closely than they resemble the more serious, a procedure which ignores the careful psychological distinction Plato makes between the two (866d ff). It is hard to know how to interpret the regulation, but on the whole it seems best to assume that Plato is prepared to accept the victim's judgement that the killing was *involuntary,*[44] even if it was not in fact. In that case, the killer does not *need* cure, and the one year of exile is recompense only, intended for the family, even if the victim is prepared to waive it on his own behalf. If this reconstruction of his reasoning is correct, Plato is not prepared to see the family deprived of their due, whatever the victim may himself be prepared to forgo. Much is allowed the discretion of the victim, but not everything, and probably not as much as in Athens.

Assault

In the law of homicide, family interests and new penology react on each other in various ways that were crucially influenced by belief in the fury of the dead. In the law of assault, from which this factor is of course absent, family interests and penology react in rather different ways. In homicide, the family was sharply distinguished from the rest of society; in assault, Plato makes an attempt to *extend* certain patterns of behaviour enjoined within the family to society at large, and to some degree the distinction between the two becomes blurred. His law of assault, *aikia*, is in consequence of almost unbelievable

42 Demosthenes 37.59.

43 869a, de; the rule applies even if the victim is the parent or sibling of the offender.

44 869e2. Cf. Plato's deference to the *daimôn* that has prevented the killing intended by the "wounder with intent to kill," who is treated as a wounder *only*, not as a killer (876e-877a). Again, the *plotter* of a murder is treated slightly less harshly than the actual killer (872a ff). In both these cases considerations of the psychology of the offender give way to other concerns.

complexity. Here I can only summarise savagely, and isolate some salient details, without attempting a full analysis.

Assault is less serious than wounding: it is mere rough treatment of the body by blows, punches, beating etc. The Attic *dikê aikias* was thus of restricted range; the penalty was a simple payment to the victim.[45] Plato enriches the content of *aikia,* by injecting into it (i) one element of his law of *kakôsis goneôn*, ill-treatment of parents, and also (ii) elements of *hubris*, arrogant ill-treatment of persons in a weak position. (i) In Athens, hitting parents was one form of harming them;[46] the penalty in the suit was complete *atimia*.[47] Plato's law on harming parents provides that *any* penalty may be imposed (930e-932d); and so far as blows are concerned he tells us what penalties he has in mind not as part of that law but under the heading of *aikia*. (ii) In Attic law the penalty in the *graphê hubreôs* was a fine payable to the state; the death penalty was also possible.[48] Plato has no specific *law* of *hubris*, but in many places in the code he obviously has the *concept* in mind;[49] and he makes it clear that he regards assaults on parents as indeed hubristic.[50] In effect, he provides a consolidated law of *aikia*, with many differentiations of victims and aggressors, and with a complex range of penalties, some of a severity which is consistent with treating *aikia*, or at least some varieties of it, as a form of *hubris*.

The law of *aikia* in Plato (879b6-882c4) has seven divisions:

1. Assault on someone of the same age, or older but without children. Resistance is allowed, but there is no formal penalty.[51]
2. Persons over the age of 40 who brawl, either as aggressor or in self-defence, are to be punished by a reputation for boorishness.
3. Assault on any person more than 20 years older is punished by imprisonment (citizen, one year; non-resident alien, two years; metic, three years).
4. Assault on one's parents or grandparents is punished by permanent rustication and exclusion from sacred and social activities.
5. Foreigners must never be struck, not even in self-defence; but if one of them commits *aikia* against a free man he may be haled before the City-Wardens, and if found guilty he is to receive strokes of the lash to the number of blows he inflicted. (Citizen seniors who commit *aikia* are also not to be resisted *at all*, even by this degree of restraint).

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45 Isocrates 20.1, 19; Demosthenes 49.35, 45-8.

46 Lysias 13.91, Aeschines 1.28; Rhodes 629 on *Ath. Pol.* 56.6 gives full sources; cf. MacDowell (1978) 92.

47 Demosthenes 24.103, 105, Aeschines 1.28, MacDowell (1978) 73-5, Harrison 1.77-8.

48 Demosthenes 21.45, 47, 49; 54.23, Dinarchus *Dem.* 23.

49 E.g. 761e, 777de, 874c, 885b.

50 884a ff. The implication is in 885a2, "acts of *hubris* apart from those already mentioned," i.e. those already mentioned in the law of *aikia*, which has preceded immediately, to say nothing of murder and wounding. His discussion of *aikia* does not mention *hubris* as such.

51 Cf. Socrates' provocative (whimsical?) insouciance at *Republic* 425d, 464e-465b; cf. Xen. *Con. Lac.* 4.6.

6. A slave who assaults a free man may be whipped *ad lib.* by the victim, but not so as to impair his value to his master, who must then keep him chained till he deserves to be released.
7. Elaborate back-up provisions regarding the duty of bystanders to help victims and part the combatants, and penalties for non-observance of rustication etc.

The contrast with the Athenian law of *aikia* is sharp. At no point is there mention of recompense in money: presumably a victim has to be content with the sight of the offender's punishment. But the most striking thing is the vast increase in complexity. Parentage (cf. 717d, 869bc), age and foreign status are privileged. A foreigner and a senior citizen are not to be resisted; the latter, if 20 years older than a potential attacker, is to be regarded by him *as though* he were his parent; and if a by-stander notices that someone of the same age as himself, or older, is being attacked, he must go to his rescue *as though* his own brother etc. were being wronged.[52] Persons who are rusticated for attacks on parents or grandparents and who return to the city are punished by death, and those who associate with them are polluted (a startling re-emergence of this concept, though presumably in an attenuated form, since dead persons are not involved). The general thrust of these rules is to assimilate the statuses of parentage and age,[53] and to extend the reverence which is the due of both to foreigners.[54] The status considerations enforced within the family spread outwards, as it were, to society at large. It is almost as if society were conceived as a super-family.

The various penalties of the law of *aikia* are presumably intended to be as curative as those of the rest of the code. The elaborate analysis of anger developed in the homicide law, and used to some extent in the law of wounding, disappears completely. Some of the penalties are very severe, and may owe something to the severity of the Attic law of *kakôsis goneôn* and *hubris*. It is impossible to pursue the fascinating detail here. Perhaps the most striking feature is the reliance on a mass of inhibition and a network of social pressure.[55]

Conclusion

The history of the tension between the family and the growing system of civic law has been studied ever since the publication of Glotz's celebrated book. We can observe the development; we watch as if it were a film. Plato comes at a late stage in that process, and in his case we study not a moving image but a still one: the relationship between the family and civic law as he conceived it in concrete terms for a practical utopia in the middle of the

52 Cf. *Rep.* 461de, Aristophanes *Eccl.* 635 ff.
53 Note how in (1) the lack of penalty would apply only if the (older) victim is not a parent.
54 And, up to a point, to slaves also: 777b-778a.
55 On possible Spartan influence, see Fisher.

fourth century. The relationship is dominated by his desire to establish the family as the bed-rock of the stability and health of the polis, and by the demands of a radical new penology. In a great variety of specific ways, his family law is shaped and modified by his penal policy. And as if this were not complex enough, we have to feed into the equation an elaborately hierarchical view of society, in which gods rule (or should rule) men, men rule animals, parents children, the old the young, free slaves, officials laymen, and so forth. I hope to have shown that the jurisprudential principles that conflict in his system, and which he sought to balance and reconcile by exercising the skill of a political demiurge, are no less important than those which conflicted historically. That I have been able only to open up the subject in this sketchy manner is due to its sheer size and complexity; the thickets of the *Laws* are very thick indeed, and this paper could easily have been many times its length.

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Response to Trevor Saunders

Asking me to respond to a talk by Professor Saunders on Plato's *Laws* is a bit like asking a student to comment on a paper by one of his teachers. Professor Saunders has produced much distinguished work on Plato and has provided us with an excellent translation of the *Laws*. His book on the penal code of Plato's *Laws*, due to appear soon, will no doubt add significantly to his already significant contributions to our understanding of that work. I, on the other hand, like the Athenian litigant, must preface my response by citing my relative inexperience in this field. My interests in Athenian law have been neither Platonic nor homicidal, but concerned rather with non-violent, unphilosophical activities like loans, real security, and the testimony of minors.

Since I am in broad agreement with Saunders' general thesis, I will comment primarily on a few individual points. The first is Saunders' view that Plato's *Laws* is a work of jurisprudence and, as such, forms an exception to the rule that the Greeks in general and the Athenians in particular did not produce works of jurisprudence. In fact, he goes so far as to claim that the *Laws* includes "a jurisprudential commentary" on the provisions contained in it.

The jurisprudential commentary is a genre familiar to students of Roman law, but almost nothing in Plato's *Laws* resembles the kinds of discussion found in that genre. Plato's concern is with formulating laws (see the program laid out at 631b-632d), not with the details of their interpretation and administration. Its contents are consistently addressed to the *nomothetês*, the man entrusted with the task of drawing up the laws, in this case, both institutional and private. None of the speakers in the dialogue ever lays down principles for judges to follow in dealing with hard cases.[1]

By contrast, the jurisprudential commentaries of Roman Law, the works of men like Publius Juventius Celsus, Gaius Cassius Longinus, and Quintus Mucius Scaevola, were written for the use of magistrates, judges, and orators, that is, the men who actually ran the system of justice in Rome. The jurists did not legislate in their works. Their main interest was to interpret and explain the law that had been handed down by the political authorities for the legal system to implement.[2] In the process of interpreting the law, the jurists did contribute to the creation of law. They did this mainly by advising the praetors, aediles, and other magistrates when drawing up their edicts. But the *ius honorarium* that was thereby created was created with the parameters set out by the *leges*, *senatus consulta*, and, later, the various pronouncements of the Emperors.[3] As Papinian (*Dig* 1.1.7.1)

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1 For a distinction made between *nomothetikê* and *dikastikê*, see Pl. *Grg*. 520b.

2 For the sources of law at Rome, see B. Nicholas, *An Introduction to Roman Law* (Oxford 1962) 14-19; Cicero, *Topica* 28; Gaius, *Inst*. 1.2.

3 On the extent to which the *responsa* of the jurists constituted a source of law, see J. A.

succinctly phrased it, the *ius praetorium* had the objective of "aiding or supplementing or correcting the *ius civile*." The *iuris prudentes* took the law as it was handed down to them and advised magistrates how to implement it. They might advise the politician who was drawing up a piece of legislation, as Mucius Scaevola did for Tiberius Gracchus (Plutarch, *TG* 9). Yet, in the main, the Roman jurisprudents did not legislate.[4]

There is a very good reason why there were no jurisprudential commentaries *stricto sensu* in Classical Athens: there were no *iuris prudentes*. That is not to say that the Athenians were not aware of issues which we today would call jurisprudential. My point is rather that the Athenian legal system never attained that degree of specialization at which there emerged a professional or semi-professional group whose distinct expertise was the interpretation of law and whose duty it was to advise judges and litigants about legal questions. The absence of "precautionary" specialists in Classical Athens is especially noteworthy. Whenever we read a description of a person drawing up a will or several parties drawing up a contract, we never find an expert called in to advise about the specific wording or the provisions to be included in the document. For instance, when Nicobulus and Euergus work out their agreement with Pantaenetus and his other creditors (Dem. 37.11-17), they do not summon a legal expert to help frame its exact terms.[5] During the dispute between Dareius and Dionysodorus about the interest to be paid on a maritime loan, it is a group of bystanders who propose a temporary way out of the dispute ([Dem.] 56.13-14). True, the trierarch who prosecuted Euergus and Mnesibulus does consult the *Exêgêtai* about the proper way to proceed in order to avenge the death of his freedwoman. But it is significant that he then goes and looks up the relevant law on his own and makes up his mind after discussing the matter with his relatives (Dem. 47.68-73). Furthermore, when a defendant brought a legal objection against the type of procedure his accuser was employing, it was not the magistrate who ruled on the issue in most cases. In *paragraphê* cases at least, it was the citizen dikasts who passed judgment on the issue.[6]

The reasons for the absence of a set of experts similar to the Roman jurisconsults are several. First, the law code was easily accessible to all and written in language that was relatively simple and easy to comprehend. The trierarch in Dem. 47 had no trouble finding the laws that applied to his predicament. Though some of the words in Athenian statutes were obsolete, for the most part their laws were not written in a specialized language which only experts could decipher.[7] Second, widespread literacy ensured that most Athenians who had legal business were able to read the law code for themselves and did not have to

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Crook, *Law and Life of Rome* (Ithaca 1967) 25-27.

4 On the role of the jurists, see Nicholas, above n.2, 28-38.

5 For an analysis of the dispute and the settlement, see E. M. Harris, "When is a Sale Not a Sale?" *CQ* 38 (1988) 370-78.

6 On the *paragraphê*, see H. J. Wolff, *Die attische Paragraphe* (Weimar 1966).

7 On the question of legal definitions in Athenian law, see D. Cohen, *Theft in Athenian Law* (Munich 1983) 6-7. Use of archaic language in Athenian statutes: Lys. 10.15-21.

rely on a literate minority.[8] Third, the average citizen gained a certain amount of knowledge and expertise by sitting on the *dikastêria*. The large courts of Classical Athens schooled great numbers of male citizens in legal matters. The provision of pay for *dikastai* enabled even the poorer members of the community to gain a rudimentary legal education.[9] As a result, the average Athenian, by the time he reached age fifty-nine, was well prepared to serve his duty as one of the *diaitêtai* (*Ath. Pol.* 53.2-6). Obviously the sophists, *logographoi*, and the *Exêgêtai* acquired a certain amount of expertise beyond that of the average citizen, but for them the law was merely a subset of their general interests, not a full-time pursuit. Fifth, the magistrates who supervised the courts served only for a year, not enough time to develop any professional competence.[10] And they never had a role in formulating the law by issuing edicts, as the Praetor did in Rome. The process of legislation, *nomothesia*, was initiated by the Assembly, not by a set of professional legislators or judges. Nor was the Assembly dominated by a few experts who were responsible for most of the *nomoi* and *psêphismata*. As Hansen has demonstrated, the number of citizens who moved proposals in the Assembly was remarkably large.[11]

The Athenians did, of course, discuss issues which we would call jurisprudential. In fact, we find many subtle arguments based on general principles of juristic interpretation in Athenian literature. One immediately thinks of Aeschines' arguments in his speech against Ctesiphon (3.9-48) about the proper interpretation of the apparently conflicting laws regarding the awarding of crowns.[12] And in the *Clouds* (1178-1200) Aristophanes puts into the mouth of Pheidippides an ingenious interpretation of Solon's law of debt, which is based on an argument from original intent. The argument bears an ironic similarity to those employed by the American legal scholar Robert Bork about the Bill of Rights. But the discussion of these issues never became the specialized province of one clearly defined group of experts. Instead of being concentrated in one group, knowledge of the law was diffused throughout the citizen body, and legal expertise was dispersed among several distinct groups—the sophists and philosophers, the *Exêgêtai*, and the *logographoi*. For instance, D. Cohen has drawn attention to Aristotle's perceptive remarks about the mental element in wrongdoing in the *Rhetoric* (1374a).[13] The scattered comments about juristic

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8 On widespread literacy in Classical Athens, see F. D. Harvey, "Literacy in the Athenian Democracy," *REG* 79 (1966) 585-635., and W. V. Harris, *Ancient Literacy* (Cambridge MA 1989) 65-115.

9 On the social composition of the Athenian *dikasts*, see the important article of S. Todd, "*Lady Chatterley's Lover* and the Attic Orators: The Social Composition of the Athenian Jury," *JHS* 110 (1990) 146-73. For evidence of an "oral tradition" of jurisprudence see Dem. 58.24.

10 For the magistrates who supervised the courts, see A. R. W. Harrison, *The Law of Athens*, vol. 2 (Oxford 1971) 4-36. The only exception was for the Arapagos.

11 On the *nomothesia*, see M. H. Hansen, "Did the Athenian *Ecclesia* Legislate after 403/2 B.C.?" *GRBS* 20 (1979) 27-53. On the absence of legal experts see H. J. Wolff, "Rechtsexperten in der griechische Antike," in *Opuscula dispersa* (Amsterdam 1974) 81-102. On the number of citizens who moved proposals in the Assembly, see M. H. Hansen, "The Number of *Rhetores* in the Athenian *Ecclesia*, 355-322 B.C.," *GRBS* 25 (1984) 123-55.

12 For an analysis of Aeschines' arguments, see W. E. Gwatkin, "The Legal Arguments in Aischines' *Against Ktesiphon* and Demosthenes' *On The Crown*," *Hesperia* 26 (1957) 129-41.

13 D. Cohen, above n.7, 88-91.

issues in various works never form part of a systematic treatise, but they do reveal an awareness of jurisprudential issues.

Plato in the *Laws* (918a, 934b-c) understands that the laws cannot possibly address every possible situation a judge will encounter, but he lays down no guidelines for the interpretation or application of laws. The preamble he insists on placing at the beginning of each statute only helps to explain the rationale behind the statute. The preamble that introduces the law on impiety does not so much as touch upon legal matters (903c-e). Rather, it contains a discussion of the nature of the soul and the existence of the gods. The preamble to the law about fraud in the marketplace is no more than a homily on the evils of dishonest business deals (916d-917b). The preamble to the regulations for retail trade analyzes the reasons for the stigma attached to its practitioners (918a-919c). In the preamble to the laws about the protection of orphans, Plato warns guardians to respect the rights and welfare of their wards. The preamble to the law of inheritance (922b-923c) lays down the general principle that the wishes of the deceased must take second place to the interests of the community, but there is no general discussion of the problems of determining precisely what those interests are and how they affect individual cases. On the other hand, Plato never presents hypothetical cases to illustrate how the laws of Magnesia should be applied in practice or to instruct judges about the methods to follow when seeking to resolve a hard case. In short, none of the topics we would expect to find in a work of jurisprudence have a place in Plato's *Laws*. That is because the work is concerned with legislation, not jurisprudence.

My disagreement with Saunders on this topic does not affect his main argument, to which I will now turn. Saunders sees several influences at work in the statutes concerning homicide in Plato's *Laws*, the predominant one being his radically new penology. What I find especially attractive in his analysis is his awareness of other concerns and influences which at times come into conflict with the demands of this new penology. Saunders' main contribution is to trace these influences and conflicts and to show how they shape the specific provisions of the homicide law of Magnesia.

In the section on murder law, as well as throughout the *Laws*, Saunders discerns a concern for the family. He even declares that "the families are . . . the basis of all social and religious life." My main reservation here is with the word "family." The term may be anachronistic when applied to the social life of Athens and is certainly incorrect as a translation of the Greek word *oikos*, at least in legal contexts, where, as MacDowell has recently pointed out, it means a person's possessions.[14] I would replace Saunders' statement with something along the lines of "Plato shows an interest in fostering the ties among close kin." The community of the Magnesians is not based on the *oikos*; it is bound together by a multiplicity of bonds: kinship, common education, religious beliefs, political obligation, social hierarchy, and a host of other ties. Plato himself uses the image of the

14 D. M. MacDowell, "The *Oikos* in Athenian Law," *CQ* 39 (1989) 10-21.

ship which is held together by stays, undergirders, and bracing ropes (945c). Instead of saying the community is based on the *oikos*, an element whose importance is often exaggerated at the expense of other institutions in recent accounts of Greek society, I would say that the community is a tightly woven fabric, and one of the strands binding its members together are kinship ties. Ties created by communal meals (783b-c), choral festivals (654a-b), and the social relations of production (921c-d; cf. *Rep.* 369a-370c) are also part of the fabric. Plato mercifully leaves out ideology, a very vague and unhelpful concept anyway. Kinship ties are important, but they exist side by side with other ties and can potentially conflict with them. Nor should we say that the community is a collection of *oikoi* represented by their male *kyrioi*. Women can participate directly in civic life (780e-781d) and thus contribute another strand to the all-embracing fabric of the community. While ties among close kin are important, Plato does not privilege them above other types of bonds.

Saunders' main contribution is his careful discussion of Plato's new penology. For Plato, punishment should look toward the future, not the past. All punishments should aim at curing the soul of the criminal, provided, of course, that he is not beyond redemption. Vengefulness is discouraged since it is not conducive to education, the goal of rehabilitating the criminal and restoring him to civic health. Plato does grant recompense to the victim of crime or his kin, but the objective is not retribution but the restoration of friendly relations. This is evident in the provision which compels the victim's family to grant pardon to those who have committed certain types of homicide, as Saunders points out. Saunders further draws attention to the influence of beliefs about pollution on the law of murder. Plato, though in many regards an innovator, has still incorporated traditional beliefs about the anger of the deceased and the modes of appeasing it. Saunders rightly observes that this stands at odds with his new penology since there is no reconciliation in this case where the punishment is inflicted solely to allay the wrath of the deceased.

Saunders places less emphasis on Plato's attempt to use the law as a way of articulating and reinforcing the social hierarchy. In both the law of homicide and the law of assault, there is a great deal of emphasis on status distinctions. The penalties for murder are often differentiated in terms of the status of the perpetrator and the victim: old vs. young, free vs. slave, citizen vs. metic and foreigner, parent vs. child. The different penalties show less an interest in the restoration of the soul than in upholding the social hierarchy. That is not to say the two concerns are incompatible. Plato would no doubt have argued that the person who killed his father or mother had a soul that was far more unhealthy than the man who killed a slave (869a-c). We should also note that the code attempts to promote solidarity among close kin: the failure to prosecute by relatives is punished by a penalty of exile for five years (866b). This is several years more than the penalty for killing in anger (867c-d)!

Another factor influencing the Magnesian laws about homicide is Athenian legal

tradition.[15] Though Plato departs from Athenian homicide law in several ways, especially his elaborate differentiation of penalties according to status, the basic framework is Athenian. There is the same fundamental three-fold division of φόνος ἐκ προνοίας, φόνος ἀκούσιος, and a category of killings that are legally permissible.[16] Plato's main innovation is his introduction of two new categories between φόνος ἐκ προνοίας and φόνος ἀκούσιος (866d-868c). Plato's treatment of these two categories is obviously influenced by his new penology, but that is only part of the story. The need for these new categories arose as a result of the shortcomings of the Athenian method of classifying types of homicide. But that is the subject of another paper.

[15] On the importance of the legal tradition, see A. Watson, *The Evolution of Law* (Baltimore, 1985). Watson may, however, overstate its importance; see B. Frier, *Columbia Law Review* 86 (1988) 888-900.

[16] For the classification, see *Ath. Pol.* 57.3

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Straftaten und Rechtschutz nach den griechischen Papyri der ptolemäischen Zeit.

I.

Das Deliktsrecht der Papyri ist seit R. Taubenschlags *Das Strafrecht im Rechte der Papyri* (1916) keiner umfassenden Neubearbeitung mehr unterzogen worden; seine Darstellung im *Law of greco-roman Egypt in the light of the papyri* (1955) basiert ganz auf dem *Strafrecht*. Auch hier soll kein Versuch einer umfassenden Neubearbeitung unternommen werden. Das von Herrn Modrzejewski gerade genannte Werk von Andreas Helmis[1] konnte ich nicht mehr heranziehen. Es erscheint reizvoll einem Teilaspekt nachzugehen, nämlich der Frage, inwieweit bei Straftaten gegen den Einzelnen die Strafverfolgung dem Einzelnen oblag. Ich spare also insbesondere aus die Delikte gegen den Staat. Unter diesem Gesichtspunkt sind folgende Einzelmomente zu betrachten: Inwieweit hat der Verletzte oder seine Familie die Strafverfolgung zu betreiben oder zu initiieren, inwieweit sind staatliche Organe eingeschaltet, welche Sanktionen werden beantragt bzw. verhängt und schließlich an wen fallen allenfallsige Geldbußen.[2] Wegen der Vielzahl der Quellen beschränke ich mich hier auf einige wenige Delikte, nämlich: Tötung, Körperverletzung, Hybris, Raub und Diebstahl—außer Acht lasse ich Beleidigung, Betrug, Gewalttat, Hausfriedensbruch, Urkundenfälschung u.ä. Ich glaube damit einen einigermaßen unstreitigen Kernbereich der Delikte[3] erfaßt zu haben.

Die ältere Literatur befaßte sich überwiegend mit der Frage der Zuständigkeit—Gerichte oder Beamte—und der Unterscheidung zwischen öffentlichen und privaten Delikten. Im neueren juristischen Schrifttum wurde einerseits das Problem des Privatdelikts im griechischen Mutterland[4] und andererseits die Frage der Zuständigkeit für die Strafjustiz allgemein behandelt. Außerhalb des Kreises der Juristen wurden die einschlägigen Quellen allgemein—über die genannten Delikte hinaus—auf die formularmäßige Fassung von Anzeigen oder auf das Vorkommen und Ausmaß der Kriminalität generell untersucht oder auch Aufstellungen zu den einzelnen Delikten gemacht, eine Diskussion für die römische Zeit mehr unter wirtschafts—und sozialhistorischen Aspekten.[5] Aus dieser Gruppe sind für

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1 *Crime et châtiment dans l'Égypte ptolémaique—Recherches sur l'autonomie d'un modèle pénal*, (Thèse, Paris 1986)

2 Hier ist nicht einzugehen auf die Grundfragen des klassischen griechischen Strafrechts; zu diesen s. nur K. Latte, "Beiträge zum griechischen Strafrecht," *Hermes* 66 (1931) 30ff, 129ff = *Kleine Schriften* (München 1968) 252ff, bes. 143ff, 280ff; und L. Gernet, "Le droit pénal de la Grèce ancienne," in *Du châtiment dans la cité* (Coll. de l'école franc. de Rome 79 [Rom 1984]) 9ff.

3 Zur Terminologie s. den Nachtrag.

4 Gernet, "Note sur la notion de délit privé en droit grec," *Mélanges Lévy-Bruhl* (Paris 1958) 393ff.

5 S. nur z.B. H. J. Drexhage, "Eigentumsdelikte im röm. Ägypten," *ANRW* II 10, 1.901ff; und "Einbruch, Diebstahl und Straßenraub im röm. Ägypten unter bes. Berücksichtigung der Verhältnisse in den ersten beiden Jhh.," *Symposion Soziale Randgruppen und antike Sozialpolitik* 1987 (Graz 1988) 313ff.

unsere Fragestellung allenfalls von Interesse die Untersuchungen zu den Formularen des προσάγγελμα, des Hypomnema und anderer Eingaben.[6] Die Diskussion wurde seinerzeit insbesondere angeregt durch die Dikaiomata des *P. Hal.* 1 und die Magdolapapyri. Im Prinzip legte man eine Trennung zwischen öffentlichem und privatem Strafrecht i.S. von Delikten gegen die Öffentlichkeit und gegen den Einzelnen zugrunde.[7] Diskutiert wurde weiterhin die materielle Trennung zwischen Strafunrecht und Zivilunrecht,[8] wobei die häufige Verbindung von Anträgen auf Bestrafung und Schadensersatz bzw. die zuweilen anzutreffende Trennung zwischen beiden Anträgen auffiel und eine strikte verfahrensmäßige Trennung zweifelhaft erscheinen ließ.

Hinsichtlich der Zuständigkeit ist die ältere Literatur unterschiedlicher Auffassung für die einzelnen Gerichte, z.T.[9] wird eine Zuständigkeit nur angenommen soweit es sich um die Verhängung von Geldbußen handelt, die Strafgewalt sei Sache des Strategen gewesen, z.T. wird gerade diese angezweifelt.[10] In einer neueren Untersuchung kommt H.J. Wolff[11] zu dem Ergebnis, daß die Kompetenz zur Verhängung amtlicher—d.h. staatlicher—Strafen i.d.R. Sache des Funktionärs war, er sah keinen Beleg für eine ordentliche Straf- gerichtsbarkeit, die Verhängung der privaten Strafe im Sinne einer Deliktsbuße falle dagegen grundsätzlich in die Zuständigkeit der Gerichte. Zu prüfen ist nun jeweils wer betreibt das Verfahren, wer ist zuständig, welcher Spruchkörper wird eingeschaltet, worauf geht der Antrag, Strafe und/oder Schadensersatz, die Art der Strafe und letztlich die Entscheidung.[12]

Der im folgenden zu gebende Überblick über die tatsächliche Delinquenz kann sich nur auf Material aus der Chora stützen. Die in *P. Hal.* 1 überlieferte gesetzliche Regelung Alexandrias findet keine Ergänzung durch Belege über Einzelfälle aus Alexandria selbst.

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6 S. Hombert-Préaux, "Recherches sur le prosangelma à l'époque ptol.," *Chron. d'Eg.* 17 (1942) 259ff. und M. Parca, "Prosangelmata ptol.: une mise a jour," *Chron. d'Eg.* 60 (1985) 240ff. Zu den Formularen allgem. s. A. di Bitonto, "Le petizioni al re," *Aeg.* 47 (1967) 5ff; "Le petizioni ai funzionari nel periodo tolemaico, *Aeg.* 48 (1968) 53ff; "Frammenti di petizioni del periodo tolemaico," *Aeg.* 56 (1976) 109ff.

7 Semeka, *Ptol. Prozeßrecht* (München 1913) 143. Taubenschlag, *Strafrecht* 6. Hier kann die Streitfrage offenbleiben, inwieweit den Quellen eine systematische Trennung zu entnehmen ist, insbesondere ob aus dem Terminus ἴδιον ἀδίκημα Folgerungen zu ziehen sind. Vgl. hierzu L. Wenger, *Arch.* 2 (1903) 483ff; Taubenschlag, *Strafrecht* 6; Kreller, *RE* s.v. λαοκρίται 741. Sehr vorsichtig auch San Nicolò, *Groß'Archiv für Kriminalanthropologie und Kriminalistik* 57 (1914) 334 Anm. 1. S. auch A. Passoni dell'Acqua, "La terminologia dei reati nei prostagmata dei Tolemei e nelle versione dei LXX," *Proc. XVIII C. Pap.* (Athen 1988) II 335ff. Weitere Lit. s. bei M.Th. Lenger, *COrdPtol.* vor Nr. 53.

8 Semeka, *Prozeßrecht* 67ff; Kreller, *RE* s.v. λαοκρίται 740f; Waszynski, *Arch.* 5 (1913) 21ff.

9 Semeka, *Prozeßrecht* 69ff. Zu den Laokriten Semeka 145, Waszynski (*supra* n.8) 21f.

10 Mitteis, *Grundzüge* 21f.

11 *Das Justizwesen der Ptolemäer*, 2. Aufl. (München 1970) 115ff, 123ff.

12 Für die weitere Behandlung ist weitgehend auf die Anträge und Eingaben der Parteien abzustellen. Inwieweit diese materiell und verfahrensmäßig der Rechtslage entsprochen haben, muß offenbleiben; angesichts der Gleichförmigkeit vieler Texte spricht aber eine gewisse Wahrscheinlichkeit dafür.

II.

Zu den aufgeworfenen Fragen nun im Zusammenhang der einzelnen Delikte. Hier ist allerdings zu betonen, daß die Papyri zwar Berichte über die Alltagsdelinquenz überliefern, aber weder Gesetze noch Gerichtsreden noch rechtsphilosophische Modelle, das Material ist also grundlegend verschieden von den auf diesem Symposion bislang erörterten Quellen.

1. Tötungsdelikte. Bekanntermaßen haben wir wenige Belege über Tötungsdelikte: *P. Köln* VI 272 (III a.), eine Eingabe über den Tod der Mutter in Folge heftiger Schläge eines bekannten Täters, und *SB* XVI 12671 (211 a.), eine wiederholte Anzeige über die Tötung des Sohnes. Der Antrag in der ersten Urkunde geht auf Fahndung nach dem Täter, Haft und Bestrafung: ὅπως ἔνοχος γένηται περὶ τοῦ φόνου.[13] Offensichtlich eigenständiges Verwaltungshandeln wird in Verwaltungsschreiben über Fahndung[14] und die Haft Verdächtiger,[15] wie auch in Polizeiberichten deutlich.[16] Die Konfiskation des Vermögens bei Verurteilung ist möglich.[17] Spezifizierte Anträge Privater hinsichtlich des Strafmasses begegnen nicht. Das Verfahren scheint ganz in öffentlicher Hand gelegen zu haben.[18] Die Amnestieregelungen in den königlichen Prostagmata, die den φόνος ἑκούσιος von der Amnestie ausnehmen, deuten gleichfalls in diese Richtung.[19] Ich bin damit also anderer Ansicht als Herr Modrzejewski eben. Zwar gestehe ich gerne zu, daß wir kein Gesetz über die Strafe bei Tötungsdelikten haben, daß die genannte Formulierung des *P. Köln* VI 272 indifferent ist und damit kein Argument für eine staatliche Strafverfolgung bietet—allerdings auch nicht dagegen. Von einem τίμημα ist in diesen Fällen gleichfalls nicht die Rede. Von einer Nichtregelung einer Amnestie in den Philanthropa mangels selbständiger Strafgewalt des Königs bei φόνος ἑκούσιος könnte m.E. aus systematischen Grunden nur ausgegangen werden, wenn gleiches auch für die ἱεροσυλία angenommen werden könnte, was ich im Moment nicht beantworten kann. Ein allgemeines Argument gegen eine rein private Strafverfolgung könnte noch auf die absolutistische, ganz auf die Ausbeutung des Landes und seiner Bewohner abgestellte Herrschaftstruktur gestützt werden.

2. Körperverletzung. Verständlicherweise sehr viel häufiger belegt sind Fälle

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13 *Köln* VI 272 (III a.): ἔνοχος περὶ τοῦ φόνου. *SB* XVI 12671 (211 a.). Vorsorgliche Anzeigen wie z.B. in *Tebt.* III 2, 960 s.u. Anm. 38. Nur Erwähnung findet ein Todesfall in *BGU* VI 1244 (II a.) und VIII 1796 (51 a.), ohne daß nähere Einzelheiten im Kontext interessieren.

14 *BGU* VIII 1857 (I a.)

15 *Tebt.* I 43 (118 a.): Erwähnung einer amtlichen Untersuchung durch den ἐπιστάτης φυλακιτῶν auf Anzeige hin und Einstellung der Untersuchung.

16 *Tebt.* III 1, 730 (178 a.).

17 Vgl. die Inventaraufnahme in *Tebt.* I 14 (114 a.).

18 Die Anzeigen der Verwandtschaft dienen wohl nur der Einleitung eines Verfahrens. Mir schiene die Annahme unzutreffend, daß mangels Anzeige ein Strafverfahren nicht durchgeführt werden konnte, von einem Wergeld oder τίμημα ist in diesem Zusammenhang nicht die Rede—zu *Mich.* VIII 473 aus römischer Zeit vgl. Modrzejewski, *IURA* 8 (1957) 93ff. Die Wendung ὅπως ἔνοχος γένηται περὶ τοῦ φόνου deutet mehr auf eine öffentliche Strafe hin.

19 S. nur *Tebt.* I 5, Z. 1ff (121-118 a.) = *COrdPtol.* 53, *SB* VIII 9899 (II a.) und *SB* XVI 12540 (186 a.).

der Körperverletzung. Die Verletzungshandlung besteht in aller Regel in Schlägen, zumeist mit Fäusten,[20] zuweilen auch mit Stöcken[21] oder Fußtritten, nur zuweilen werden andere Modalitäten geschildert, sei es in *Ent.* 82—Verbrühen mit heißem Wasser durch den ungeschickten Badewärter im Bad—und in *Mich.* XV 688 Verletzung durch Einsturz einer Mauer. Bei der Schilderung wird hin und wieder hervorgehoben, daß der Gegner nicht provoziert wurde und seinerseits angefangen hat.[22] Hier wie eben wird auf den Unterschied nicht so entscheidend abgehoben, wie man nach *P. Hal.* 1, Z. 186, 203 ff vermuten möchte.[23] Verletzung allein durch einen Schlag begegnet nicht. Körperverletzungen im Zusammenhang mit anderen Delikten sind häufig.[24] Zur Frage Hybris—Körperverletzung s. sogleich. Soviel sei jedoch schon bemerkt: Ein Unterschied hinsichtlich der Sachverhaltsschilderung ist dabei jedenfalls nicht festzustellen.

Auf eine Unterscheidung im subjektiven Bereich nach Vorsatz oder Fahrlässigkeit wird nicht abgestellt; allenfalls aus dem Ablauf des Geschehens kann gelegentlich auf bloße Fahrlässigkeit geschlossen werden.[25] Das Verfahren wird betrieben vom Verletzten selbst, gegebenenfalls vertritt der Mann seine gleichfalls verletzte Frau mit.[26] Was die Anträge angeht wird nur in *Ent.* 72 (219 a.), einer Enteuxis an den König, die πρᾶξις eines τίμημα, einer Strafsumme verlangt, ev. auch in *UPZ* II 151 (259 a.), wobei in *Ent.* 72 der Stratege entscheiden soll (διακριθησόμενον). Die Anträge in der Sache sonst stellen ab auf die zukommende Strafe,[27] auf das Gebührende,[28] was der Stratege festsetzt,[29] oder es werden nur Maßnahmen gefordert, damit der Verletzte Gerechtigkeit erfährt.[30] Die Forderung in *BGU* VIII 1816 (60 a.) auf Todesstrafe zur Abschreckung fällt aus dem üblichen Rahmen. Ansonsten sind die Texte insoweit nicht erhalten.

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20 *BGU* VIII 1780, 1816, 1834, X 1908; *Ent.* 76, 77, 81, 83, 108 (?), 111; *Grenf.* I 38; *Gur.* 2; *Hels.* I 2; *Köln* III 140; *Lond.* VII 2039, 2180; *Mich.* XV 688; *PSI* III 167, 168, VII 816 (?); *Petr.* II 4/6, 18/1, III 28 e; *Ryl.* II 68; *SB* VI 9537, X 10271, XIV 11273; *Strasb.* VII 681; *Tebt.* I 39, 44, 48, 138 descr. (kein Fall der Hybris, entgegen Taubenschlag, *Law*[2] 439 Anm. 49), II 283, III 1, 798, 800, 802, III 2, 960; *UPZ* II 151; *P. Mich.* inv. 6961, 6979 (*ZPE* 76 [1989] 245ff).

21 *Ent.* 75, 81; *Grenf.* I 38; *PSI* III 168; *SB* VI 9537; *Strasb.* VII 681; *Tebt.* I 39, 44; UPZ I 12.

22 *BGU* VI 1247; *Ent.* 72, 74. Die Wendung ἄρχων εἴς με χερῶν ἀδίκων—vgl. *P. Hal.* 1, Z. 204—findet sich nur in *Ent.* 79 und 81.

23 Taubenschlag, *Strafrecht* 12ff hielt dieses Problem für die Chora für durchaus relevant, er neigte zur Annahme von Schreiberversehen. Das erscheint nun nicht mehr zutreffend.

24 Allein Körperverletzungen sind belegt in *BGU* VIII 1780, 1796, 1816, 1834, X 1908; *Eleph.* 12; *Ent.* 72, 76, 77, 82, 108, 111; *Grenf.* I 38; *Gur.* 9; *Mich.* XV 688; *PSI* III 167, VII 816; *Petr.* II 4/6, 18/1; *Ryl.* II 68; *SB* X 10271; *Strasb.* VII 681; *Tebt.* I 44, 48, 138 descr., II 283, III 1, 798, 800, III 2, 960.

25 S. die gerade genannten *Ent.* 82, *Mich.* XV 688.

26 *BGU* X 1908; *Ent.* 78; *Tebt.* I 39. Verletzung der schwangeren Frau: *Tebt.* III 1, 800; der Mutter: *Tebt.* II 283.

27 προσήκουσα τιμωρία: *Ent.* 77.

28 τῶν ἐξακολουθούντων: *PSI* III 168, VII 816 (?).

29 *Ent.* 76, 83. *P. Mich.* inv. 6979 (*ZPE* 76, 1989, 250ff.).

30 *Ent.* 82, *Grenf.* I 38, *Köln* III 140, *Ryl.* II 68, *SB* XIV 11273; ähnlich *SB* X 10271. Die Formulierungen sind im einzelnen durchaus unterschiedlich: *Köln* III 140: τύχω δικαίου παρὰ σοῦ (Stratege); ähnlich *Grenf.* I 39, *SB* XIV 11273. *Ryl.* II 68: λάβω (Opfer) παρ' αὐτῆς (Täterin) τὸ δίκαιον ὡς καθήκει; *SB* X 10271: ἐπανάγκασαι τὰ δίκαιά μοι ποιῆσαι. Es bleibt freilich zweifelhaft, ob auf diese Wendungen weitergehende Folgerungen gestützt werden können.

Verfahrensmäßig gehen die Anträge auf Ladung vor den angegangenen Beamten bzw. den Strategen, ausnahmsweise zu einem Verfahren vor dem Synhedrion[31] bzw. beim Dikasterion.[32] Erwähnenswert hinsichtlich der entscheidenden oder angegangenen Instanz ist auch die Ausgestaltung der Koppelung von—wenn auch nur vage—spezifizierten Sachanträgen mit Verfahrensanträgen: der Stratege soll entscheiden über das τίμημα,[33] über das δίκαιον,[34] die προσήκουσα τιμωρία[35] und auch über die gebührende Gerechtigkeit;[36] der ἐπιστάτης μερίδος wird in *Köln* III 140 und der Hipparch in *PSI* III 168 angegangen.[37] In einzelnen Anzeigen wird die Haft des Gegners bis zur Entscheidung verlangt, gegebenenfalls um beim Tod des Verletzten ein Verfahren wegen Mordes durchführen zu können.[38] Offen bleibt freilich, wie ernst das gemeint ist. Bloße Anzeigen sind selten.[39] Endgültige Entscheidungen sind nicht erhalten. Die verfahrensmäßigen Anordungen in den Enteuxeis gehen auf διάλυσις, Vorladung und auch einmal auf Verweisung an die Laokriten.[40] Eine Aufgliederung des Gesamtbereichs der Körperverletzung in verschiedene δίκαι, wie sie nach dem *P. Hal.* 1 vermutet wurde, ist nicht anzunehmen.[41]

3. Hybris. Für die Chora sind 16 Fälle der Hybris überliefert,[42] davon 4 ohne Verbindung mit einer Körperverletzung.[43] Eine tatbestandliche Abgrenzung zwischen den Fällen der Körperverletzung, die nicht als Hybris bezeichnet werden, und denen, die als solche genannt werden, ist anhand der Urkunden nicht möglich. Die Beschreibung der Vorfälle differiert nicht. Nur ausnahmsweise wird der Unterschied deutlich, so z. B. im Fall von *Ent.* 79, wo das Nachtgeschirr über den Petenten entleert wurde, die tatsächliche Situation ist der der *actio de effusis* vergleichbar. In den anderen Fällen wird die Ehrverletzung deutlich durch Beleidigung, Hausfriedensbruch (*BGU* VIII 1855) oder Anspucken, Packen am Mantel (*Gur.* 2 = *SP* II 256).

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31 *Tebt.* III 1, 798 (II a.); vgl. hierzu H. J. Wolff, *Justizwesen* 55, 113 Anm. 1.

32 *Ent.* 81; s. auch *Petr.* II 18,1 = *MChr* 6.

33 *Ent.* 72.

34 *Ent.* 73.

35 *Ent.* 77.

36 *Ent.* 82, *Grenf.* I 38, *SB* XIV 11273.

37 Wohl über das τίμημα soll ein nicht näher zu bestimmender Epistates in *UPZ* II 151 entscheiden.

38 *Ryl.* II 68; *Tebt.* II 283, III 1, 800, III 2, 960; ähnlich *Tebt.* I 44. S. auch *Eleph.* 12, *Hels.* I 2.

39 *SB* VI 9537; *Tebt.* I 138, III 1, 802. S. auch *Lond.* VII 2039. *BGU* VIII 1780, 1796 (?).

40 *Ent.* 83. S. auch Anm. 68.

41 Vgl. San Nicolò, *Groß'Archiv* 326ff.

42 S. noch Anm. 43. *BGU* VI 1247 mit 1248 und 1249; *BGU* X 1903, 1904; *Coll. Youtie* I 16; *Ent.* 73 (im Kontext nur Körperverletzung, Vo: περὶ ὕβρεως) 74, 75, 78, 79; *Fay.* 12; *UPZ* I 12, II 170. Kein Fall der Hybris ist entgegen Taubenschlag, *Law*^{2} 439, Anm. 49, *Tebt.* I 138 descr. Anders als A. di Bitonto, *Aeg.* 47 (1967) 22 rechne ich zur Hybris nicht Fälle der Körperverletzung, die nicht als Hybris bezeichnet sind. Zur Diskussion vgl. Partsch, *Arch.* 6 (1920) 54ff; San Nicolò, (*supra* n.7); Wilcken, UPZ II 151 Anm. Z. 28. S. auch H. J. Wolff, *SZ* 90 (1973) 85: ὕβρις bezeichne nicht mehr die Überheblichkeit, sondern den bloßen körperlichen Angriff—dies erscheint mir auch unter dem Gesichtspunkt der Sanktion zweifelhaft.

43 *BGU* VIII 1855 (I a.), *Gur.* 2 = *SP* II 256 (225 a.), *Hib.* I 32 (246 a.), *Petr.* II 17/1 (III a.)

Die Anträge gehen überwiegend auf Festsetzung eines τίμημα,[44] dessen Vollstreckung und—wie einmal deutlich gesagt wird—Auszahlung an den Petenten.[45] Andere Anträge begegnen seltener.[46]

Soweit das Verfahren zwei oder mehr Delikte betrifft, wird im Antrag keine unterschiedliche Zuständigkeit geltend gemacht.[47] Verfahrensmäßig wird regelmäßig die Ladung vor den Strategen beantragt, nur ausnahmweise vor die Chrematisten.[48] An Endentscheidungen liegen nur die Hinweise auf die genannten Versäumnisurteile vor.[49]

4. Raub. Fälle der Wegnahme von Gegenständen unter Anwendung von Gewalt gegen Personen begegnen ziemlich häufig. Soweit die Täter unbekannt sind, erfolgen Anzeigen[50] bzw. Eingaben[51] von Seiten der Geschädigten, die letztlich neben der Einleitung einer Fahndung nur das Ziel der Sicherung ihres Anspruchs auf Rückgabe verfolgt haben können. Soweit die Täter bekannt sind, wird z.T. nur eine Anzeige mit Angabe des geraubten Gutes erstattet,[52] meistens aber Antrag auf Rückerstattung[53] und Strafe gestellt[54] oder aber auch nur auf Ersatz[55]—dabei bleibt offen, ob hier ein Antrag auf Strafe noch nachfolgt oder sich sogar erübrigt hat. Verfahrensmäßig zielen die Anträge auf amtliche Untersuchung, Vorladung, Haft oder Vorführung der Täter.[56] Verwaltungshandeln wird deutlich, sei es wenn der Beschuldigte in Haft ist, sei es wenn

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44 *Ent.* 74 (221 a.), *BGU* X 1903 (III a.), *Fay.* 12 (103 a.). Der Vorfall in *BGU* VI 1247-1249 (149/4 a.) wird durch Vergleich mit τίμημα abgeschlossen. *Ent.* 73 s. u. Anm. 45. Versäumnisurteil über τίμημα in *Gur.* 2 (225 a.) = *SP* II 256; Zwangsvollstreckung erwähnt wegen eines entspr. Versäumnisurteils in *Hib.* I 32 (246 a.). Das τίμημα kann m.E. nicht mit dem allgem. Antrag bei der Körperverletzung gleichgesetzt werden (s.o. Anm. 27-31), wie es bei A. di Bitonto, *Aeg.* 47 (1967) 23 geschieht.

Ent. 73 (223 a.): im Kontext]γεινέσθαι μοι τὸ δίκαιον, auf Vo: περὶ ὕβρεως δραχμάς A; dahinter steht wohl auch das Verlangen eines τίμημα. Entspr. dürfte für den Antrag der ἐπιτίμησις in *Ent.* 78 gelten.

45 *Ent.* 74.

46 Indifferent sind gehalten: *Ent.* 75 (223 a.) διαγνῶναι, *Ent.* 79 (219 a.) ζημία, *UPZ* I 12 (158 a.) τύχω τῶν δικαίων. Unklar ist insofern *UPZ* II 170 und 171 (127 a.); für die Hybris wird eine zweite Enteuxis vorbehalten, in 170 Z. 45ff. von τίμημα gesprochen bezogen auf die Besitzstörung, während in 171 Z. 15f. dieses durchaus auf die Hybris bezogen werden kann.

47 *Ent.* 75: Schadensersatz für Viehfraß und Strafe für Hybris: Stratege. *Fay.* 12 = *MChr* 15: Auslösung eines verpfändeten Mantels, Hybris, Körperverletzung, Freiheitsberaubung: 3 (nicht als τίμημα bezeichnete) Geldbeträge: Chrematisten. *UPZ* II 170: Feststellung des Eigentums, Besitzstörung, Hybris: Klage auf Feststellung des Eigentums an die Chrematisten, 2. Klage wegen Hybris bleibt vorbehalten—sie wird letztlich wegen der vergleichsweisen Erledigung des Streits nicht erhoben.

48 *Fay.* 12, *UPZ* II 170.

49 Versäumnisurteil über τίμημα in *Gur.* 2 (225 a.) = *SP* II 256; Zwangsvollstreckung erwähnt wegen eines entspr. Versäumnisurteil in *Hib.* I 32 (246 a.).

50 *SB* VI 9068 (III a.), *Petr.* III 25 e (261 a.), *Tebt.* III 2, 959 (140 a.) (?).

51 *Hib.* II 202 (250 a.): Enteuxis mit Antrag auf Rückgabe oder Werterstattung.

52 *Gur.* 8 (III a.).

53 In *BGU* VIII 1824 (I a.) Antrag auf πρᾶξις des Schadensersatzes aber wohl nicht einer Bußsumme.

54 *Tebt.* III 1, 797 (II a.), *BGU* VIII 1858 (I a.), *SB* VIII 9792 (162 a.), *Tebt.* I 53 (110 a.). Auch hier wird die Strafe in allgemeinen Wendungen bezeichnet. Besonders gelagert ist wohl der Antrag auf κατοχή der Kleroi des Beschuldigten: *Tebt.* I 53 (110 a.).

55 Strasb. II 91 (87 a.). *Gur.* 10 (III a.) (?)

56 *Tebt.* I 230 (II a.), III 1, 797 (II a.); *BGU* VIII 1824 (I a.), 1858 (I a.); *SB* VIII 9792 (162 a.); *Tebt.* I 53 (110 a.); *Strasb.* II 91 (87 a.).

eine Erhebung über sein Vermögen erfolgt.[57]

5. Diebstahl. Ohne auf feinere dogmatische Unterscheidungen eingehen zu wollen verstehe ich unter Diebstahl nur die Wegnahme fremder Sachen unter Bruch fremden Gewahrsams. Damit ist nicht auf Fälle der Unterschlagung etc. einzugehen und auch keine nähere Untersuchung des griechischen Wortschatzes anzustellen.[58] Hier erfolgen gleichfalls Anzeigen von Seiten der Geschädigten, soweit die Täter unbekannt sind, mit dem Ziel einmal der Wahrung ihrer Ansprüche[59] zum anderen der Untersuchung und Fahndung.[60] Soweit Kenntnis von den Tätern gegeben ist, geht der Antrag materiell auf Rückgabe allein,[61] Rückgabe und Strafe[62] oder nur auf Strafe.[63] Hierbei soll z.T. die Rückgabe durch die Sicherheitskräfte, die Strafverfolgung durch den Strategen geschehen.[64] Die Sachverhaltsschilderungen erwähnen besondere Umstände, wie Einbruch, Tat zur Nachtzeit oder auch Ertappen auf frischer Tat—aus den Urkunden ist jedoch nicht ersichtlich, daß hieran besondere Konsequenzen geknüpft wurden. Spezifizierungen der Strafen, auch dem Betrage nach finden nicht statt.[65] Verfahrensmäßig sind die Anträge gerichtet auf Vorladung, Untersuchung,[66] bzw. Weiterleitung der Eingabe an die zuständige Behörde,[67] aber nicht an ein Gericht; die Entscheidung des Strategen sieht allerdings einmal nach fehlgeschlagener διάλυσις die Weiterleitung an die Laokriten vor.[68]

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57 *Lond.* VII 2045 (III a.), *Hib.* I 62 (245 a.), *Tebt.* III 1, 742 (157 a.). S. auch *Tebt.* III 1, 727 (184 a.). Fahndung: BGU VIII 1857 (I a.)

58 Vgl. D. Cohen, *Theft in athenian law* (München 1983) 10ff.

59 *Lille* I 6; *PSI* IV 393, 396; *Tebt.* III 1, 793 I/VII, III 2, 958.

60 *Köln* V 216; *Oxy* XII 1465; *PSI* XIII 1317; *Tebt.* III 1, 793 I, 802; *Würzb.* 5. Ungewiß: *Erasm.* I 4; *SB* XVIII 13160; *Tebt.* III 1, 795, 796, III 2, 804.

61 *Ent.* 28, 31, 83; *Gur.* 5; *Petr.* II 32,1; *PSI* XV 1514 mit Antrag auf Haft zur Erzwingung der Rückgabe.

62 *Ent.* 30; *Hamb.* I 91; *BGU* VIII 1832; *Rein.* I 17; *Tebt.* IV 1098. Außerdem die Fälle eines organisierten Bandendiebstahls: *Tebt.* I 45-47 und IV 1095, 1096.

63 *Tebt.* III 1, 784.

64 So wohl *Hamb.* I 91, *Oxy.* XII 1465.

65 Vgl. zum attischen Recht zuletzt D. Cohen (*supra* n.58) 92.

66 *PSI* III 172; *Tebt.* III 1, 784 (συνέδριον); *BGU* VIII 1832; *Cair. Zen.* 59350; *Ent.* 31, 83, 28, 30; *Gur.* 5; *Hamb.* I 91, *Köln* III 140; *Mon.* III 51; *Rein.* I 17; *Tebt.* III 1, 801, 802, IV 1098. *BGU* VIII 1174 (?)

67 *Tebt.* I 45-47, IV 1095, 1096. (Einheitliche Anzeigen nach einem organisierten Raubzug durch das Dorf!)

68 *Ent.* 83 (221 a.), s. schon o. Anm. 40. In der Lit. besteht Uneinigkeit, ob hier eine getrennte Zuständigkeit für die zivilrechtliche Rückgewähr des Mantels und für die strafrechtliche Verfolgung anzunehmen ist. Die Petentin wendet sich in ihrer Enteuxis an den Strategen mit der Bitte, den ἐπιστάτης anzuweisen, die Täter zu ihm zu schicken und die Rückgabe des Mantels oder die Erstattung seines Wertes zu veranlassen, sowie die Täter nach seinem Ermessen zu bestrafen. Die Entscheidung geht auf διάλυσις durch den Epistates, bei Mißlingen auf Verweisung an die Laokriten. Mitteis, *Grdz.* 3, Anm. 2, Wilcken, *Arch.* 4 (1908) 176 und Semeka, *Prozeßrecht* 145f nehmen an, daß nur der Streit um den Mantel verwiesen sei, die strafrechtliche Entscheidung sei beim Strategen geblieben. Ich sehe kein Indiz für eine solche Trennung, die Verweisung differenziert nicht--allenfalls allgemeine Erwägungen könnten dazu führen; in diese Richtung gehen auch die Überlegungen O. Gueraud's, *P. Ent.* S. LXXXIV. Zweifelnd Taubenschlag, *Strafrecht* 54.

III. Zusammenfassung

Um auf die eingangs gestellte Frage zurückzukommen, was läßt sich aus dieser doch recht ermüdenden Sammlung von Daten für das Problem Strafverfolgung durch den Einzelnen gewinnen? Zunächst ist vorweg zu betonen, daß schon aus entwicklungshistorischen Gründen nicht für alle Delikte ein einheitliches System der Strafverfolgung anzunehmen ist, daß vielmehr unterschiedliche Regelungen nicht von vornherein auszuschließen sind.

1. Tötungsdelikte: Hier wird eine öffentliche Strafverfolgung anzunehmen sein. Die genannten Anzeigen sind wohl nur als Veranlassung staatlichen Handelns anzusehen, aber nicht als notwendige Vorausetzung für staatliches Eingreifen.

2. Körperverletzung: Hier ist kein eigenständiges Vorgehen der Verwaltung festzustellen. Staatliches Eingreifen wird wohl nur auf Veranlassung des Einzelnen eingesetzt haben. Die Anträge sind nicht sehr deutlich, die Leistungen von Geldbußen an den Verletzten werden allenfalls zweimal gefordert, aber daneben auch unbestimmte Leistungen an ihn; von öffentlichen Strafen oder Zahlungen an die Staatskasse wird nichts deutlich. Staatliches Handeln wie Inhaftierung wird nur verlangt, wenn der Verletzte in Lebensgefahr schwebt, aber dann allein um den anschließenden Mordprozeß sicherzustellen.

3. Hybris: Ohne auf die Streitfrage der Abgrenzung oder Identität von Hybris und Körperverletzung einzugehen, kann festgestellt werden, daß Straffolge ganz überwiegend die Zahlung eines τίμημα, einer Bußsumme an den Verletzten sein soll. Auch hier ist kein eigenständiges öffentliches Handeln festzustellen.

4. Raub: Hier dagegen wird öffentliches Handeln deutlich, auch Anträge auf amtliche Untersuchung, Fahndung, Haft etc. sprechen eine deutliche Sprache. Die Anträge gehen auf Rückerstattung und häufig Strafe. Der Gesamtzusammenhang und das öffentliche Interesse—das insbesondere in römischer Zeit deutlich wird—lassen an ein im Grunde öffentliches Verfahren denken.

5. Diebstahl: Öffentliches Handeln wird initiiert durch Anzeigen, Anträge auf Untersuchung etc. Das Handeln des Einzelnen ist insofern—verständlicherweise—Anlaß, aber nicht Voraussetzung staatlichen Handelns. Die Anträge gehen auf Rückgabe des Diebesgutes und Strafe; für diese ist kein Anhaltspunkt gegeben, daß sie eine private Buße darstellt, insbesondere fehlt jede wertmäßige Anknüpfung an die Beute.

Zusammenfassend scheint mir wahrscheinlich, daß Tötungsdelikte und Raub wie auch Diebstahl zu einem staatlichen Strafverfahren führen mit dem Ziel einer öffentlichen Strafe neben gegebenfalls der Rückgabe gestohlenen Gutes. Der Grund dafür scheint in der Wahrung der öffentlichen Sicherheit zu liegen. Hybris und wohl auch Körperverletzung dagegen zielen auf eine an den Verletzten zu leistende—private—Buße ab. Was die Kompetenz angeht: Die Urkunden sprechen ganz überwiegend von der Zuständigkeit der

Funktionäre—in erster Linie des Strategen[69]—und nur vereinzelt von den Gerichten. Dies gilt auch für die Fälle der Körperverletzung und der Hybris. H. J. Wolff ist also nicht beizupflichten, wenn er von der grundsätzlichen Zuständigkeit der Gerichte zur Verhängung privater Geldbußen spricht.[70]

Auch ein kurzer Blick auf die Terminologie für die Strafe ergibt entsprechendes. Das τίμημα als geldmäßig bestimmtes Objekt der Zwangsvollstreckung und seine Zuweisung zum privaten Bereich stehen außer Zweifel. Die sonst begegnenden Begriffe wie ζημία, τιμωρία, ἐπίπληξις und κόλασις bezeichnen die Zufügung eines Nachteils, eines Übels, ohne aber den genauen Gehalt festzuschreiben, auch nicht den Charakter eines öffentlichen oder privaten Strafzwecks, oder überhaupt den Inhalt festzulegen. So kann ζημία die bloße Geldstrafe[71] wie auch die Todesstrafe[72] und die sonstige Vermögensstrafe[73] bezeichnen. Die anderen Begriffe sind gänzlich unspezifiziert.[74] Die offensichtl. Ermessensfreiheit der Funktionäre hat schon H. J. Wolff hinreichend deutlich gemacht,[75] sodaß der Mangel der Bestimmtheit in den einzelnen Anträgen letztlich kein Argument mehr ist.[76]

Die durchaus offenkundig werdende Unerheblichkeit einer deutlichen Kompetenzabgrenzung zwischen Zivil—und Strafsachen, noch dazu die offensichtliche Vernachlässigung der Gerichte überrascht letztlich nicht, wenn man sich einerseits die häufige Einschaltung der Beamten mit ihrer Koerzitionsgewalt bei der privaten Rechtsverfolgung und andererseits den grundsätzlich auch in ptolemäischer Zeit deliktischen Charakter der Klagen aus vertraglichen Verhältnissen ins Gedächtnis zurückruft.

Nachtrag:

a) Zu dem in der Diskussion aufgegriffenen Problem der Amnestie für φόνος ἑκούσιος (s.o. II 1): Die Regelung in *Tebt.* I 5 Z.5 (= *C.Ord.Ptol.* 53) (121/0 a.) lautet: πλὴν τῶν φόνους (l. φόνοις) ἑκουσίοις καὶ ἱεροσυλίαις ἐνεχομένων. Dem Wortlaut nach werden φόνος ἑκούσιος und ἱεροσυλία gleichbehandelt. Es ist nicht ersichtlich, daß eine öffentliche Strafgewalt auch für Hierosylie gefehlt haben soll. Aus den Papyri ergeben sich keine Indizien in dieser Richtung.[77] Hierosylie wird in ptolemäischer. Zeit nur in den Philanthropa—Dekreten und in Asylie—Dekreten (*SB* III 6125 Z. 25 und 6153

69 Die Bedenken von Mitteis, *Grundzüge* 21f sind wohl zu sehr zeitgeprägt.

70 *Justizwesen* 115; vgl. auch *SZ* 90 (1973) 84.

71 S. z.B. *UPZ* II 191. Vgl. auch M. Wörrle, *Stadt und Fest im kaiserzeitlichen Kleinasien* (München 1988) 203ff.

72 Vgl. *BGU* VI 1250, *Hib.* II 198, *Tebt.* III 699. Diese Belege konnten Taubenschlag, *Strafrecht* 74 noch nicht bekannt sein, zw. allerdings *Law*^{2} 557.

73 *P. Oxy.* XLII 3014.

74 Die von Helmis, *Crime et châtiment* 201ff (s.u.) in Erwägung gezogene Charakterisierung der ἐπίπληξις als Prügelstrafe erscheint wenig wahrscheinlich.

75 *Justizwesen* 124ff.

76 Vgl. Taubenschlag, *Law*^{2} 557.

77 Vgl. auch Taubenschlag, *Strafrecht* 52.

Z. 28, 93 a.) erwähnt, in den letzteren ist aufgrund der Verleihung durch königliches Prostagma ein staatliches Strafverfahren bei Verstoß anzunehmen. Ansonsten begegnet sie nur in einer Regelung aus Kyrene (*SB* VIII 9949, Jhh. a.), wo nichts gegen eine Strafgewalt der Polis spricht. Die Regelung in Athen entspricht dem.[78] Auf die mehr soziologisch geprägte Arbeit von A. Helmis[79] kann hier nicht näher eingegangen werden. Die sehr anregende Darstellung verdient eine eingehendere Auseinandersetzung anhand der Quellen als dies hier geschehen kann. Es sei nur bemerkt, daß das generelle Abstellen auf die Gerichtsbarkeit auch bei den privaten Delikten (s.S. 191 ff, 316 ff) die tatsächliche Lage wohl verkennt (vgl.o. III); die Fälle des Tätigwerdens von Funktionären überwiegen wenigstens bei den hier behandelten Delikten die der Gerichte bei weitem (s.o. II).

b) Die Erwiderung Bagnalls machte größere Differenzen in der Terminologie deutlich als erwartet. Wenn hier von Delikt gesprochen wird dann im Sinne eines übergreifenden Begriffs, der sowohl die strafrechtlich relevante Straftat umfaßt wie auch die zivilrechtlich relevante unerlaubte Handlung. Eine Einengung auf das römische delictum ist nicht beabsichtigt, auch wird nicht abgestellt auf den römischrechtlichen Gegensatz zwischen delictum und crimen[80].

c) Zur Terminologie generell ist zu sagen, daß die Verwendung moderner Termini ohne Bedenken zulässig ist, wenn sie nur zur Bezeichnung übereinstimmender wirtschaftlicher—oder hier tatsächlicher—Positionen oder Handlungen verwendet werden und zugleich bewußt ist, daß andere moderne oder antike Begriffsinhalte damit nicht ausgedrückt werden sollen.[81]

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78 Vgl. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig 1905) 442f; s. auch D. Cohen, *Theft in Athenian Law* 93ff.

79 *Supra* n.1.

80 Vgl. hierzu L. Vacca, *ANRW* II 14, 682ff.

81 Vgl. nur H. J. Wolf, "Der Rechtshistoriker und die Privatrechtsdogmatik," *FSchr Fritz von Hippel*, (Tübingen 1967) 687ff (= *Opuscula dispersa* 41ff.)

Roger S. Bagnall (Columbia University)

Response to Hans-Albert Rupprecht

A brief enumeration of the main editions of papyri cited by Professor Rupprecht and published since Taubenschlag's treatment of criminal law in the papyri will show clearly how welcome a new discussion of this subject is: *BGU* VI, VIII and X, *P. Lond.* VII, several volumes of *P. Köln*, *P. Tebt.* III 1 and 2, *P. Tebt.* IV, *P. Hamb.* I, many texts published in journals and reprinted in the *Sammelbuch*, and above all, *P. Enteux.* In sum, most of the pertinent evidence known today was not available to Taubenschlag in 1916. Much of it was known by the time Taubenschlag treated the subject in his *Law of Graeco-Roman Egypt*, the second edition of which appeared in 1955, but there his discussion was much more summary. Equally welcome is the focus on the Ptolemaic period, for one of the weaknesses of Taubenschlag's work is his belief in such a phenomenon as the law of Graeco-Roman Egypt and his failure to distinguish sufficiently between Ptolemaic and Roman institutions and behavior. Rupprecht's presentation of the Ptolemaic evidence helps preserve the specific character of the administration of justice during that period. Moreover, the undogmatic approach—and fidelity to the evidence—exemplified by his insistence that we cannot assume a uniform system of criminal justice give one good reason to take his conclusions seriously.

It may be just as well to confess that in serving as a respondent to this paper before this group I feel something of an imposter. I approach the matter as a social historian of Hellenistic and Roman Egypt, not as a specialist in law. This may be the source of my difficulties with terminology in this paper, as in much of the juristic literature about the offenses which are its subject. To me, however, the difficulties of terminology are closely related to the conceptual difficulty of the subject.

The first of these difficulties is the adoption from Roman law of the word delict, a term used both by Taubenschlag (writing in English in his *Law* but thinking in Polish and using a research assistant whose native language was German, as Professor Modrzejewski kindly informs me) and by Rupprecht (in German). More for my own sake than the reader's, let me quote Bruce Frier's formulation in his recent *Casebook on the Roman Law of Delict* (1), "we may define a delict in Roman law as a misdeed that is prosecuted through a private lawsuit brought by the individual and punished by a money penalty that the defendant must pay to the plaintiff." The degree to which such a description is applicable to the treatment of the offenses under consideration here is, as Rupprecht indicates at the outset, among the major questions at stake. The use of the term delict therefore begs the question. It may well be that the use of it here in German was not intended to have such technical meaning, but the appearance of the adjectival form *deliktischen* in the concluding sentence of the paper suggests that the word does carry some technical freight in this

discussion.

Are we then to use instead the vocabulary of criminal law, of crime and punishment? Here again there is a serious risk of begging the question. Rupprecht's set of questions, after all, ask us to consider whether we are looking principally at a state-run system of criminal justice or at a system of private procedure against wrongdoers who have brought harm to the plaintiffs. The vocabulary of criminality prejudices us toward the former answer just as much as delictal terminology does toward the latter. Moreover, we have no basis for approaching the entire problem on the assumption that either of these will describe accurately the way in which the administrators or population of Ptolemaic Egypt conceived of the matter. I do not have a new and neutral vocabulary for this subject to offer today, but the problem posed by our Latin-derived language of discourse seems to me substantial.

What do we learn from the painstaking collection of material and the acute and detailed analysis to which Rupprecht has subjected these texts? First, as he says, there is a great imprecision of terminology in the papyri. There are few technical terms, and they do not seem to be used consistently. That is characteristic of the Greeks generally, of course, from classical times down at least to Procopius, and does not of itself force us to conclude that there was no consistent structure in these proceedings. But it does not help us to discover that structure, and the readiness with which Rupprecht abandons any attempt to define closely the Greek terminology for theft points clearly to the difficulties we face.

Secondly, we are dealing mainly with administrative justice. The courts appear only infrequently, and those instances are all relatively early. I believe that Rupprecht is correct to reject Wolff's assignment to the courts of "private delicts." As Rupprecht points out, we have enough evidence to draw conclusions about the competence of functionaries, but not of courts. Distinguishing administrative and judicial aspects of the competence of Ptolemaic officials themselves is extremely difficult and probably imposes a distinction the ancients themselves would not have recognized.

The five offenses studied exhibit a unified procedure, as far as we can see. The injured party (in which I include the husband in the case of a woman, or a surviving relative in the case of murder) petitions the king or a royal official to have the case investigated. (There is evidence for a third party, serving in a surveillance role, reporting evidence of an offense in one instance which could concern either murder or wounding. The document, *P. Tebt.* III 730, is a guard's report of finding blood in a field; I see no reason to assume that murder is the only possibility.) From the point of notification on, the entire procedure is in the hands of royal officials, who carry out whatever investigation is necessary, try where appropriate to reconcile the two parties, and if that is unsuccessful, hear the case and impose judgment.

Though procedurally there is only scanty evidence for any distinctions among these offenses, Rupprecht has argued that there is a difference in the sanctions to be imposed,

with punishment and return of lost goods in the cases of robbery and theft (punishment only in the case of murder), but compensatory fines in the cases of wounding and hybris. This is in my view a distinction with no significant difference; as I shall argue below, both compensation and restitution are simply means of restoring the situation of the injured party in society. Punishment, on the other hand, is described so vaguely as to escape altogether any exact knowledge, as Rupprecht clearly indicates.

Rupprecht has pointed out that there is no mention of different *dikai* into which one could sort cases, such as one might encounter in city laws and such as occur in *P. Halensis*. (The term *dikê* does occur, but only in the records of a decision by a court in Crocodilopolis, in *P. Gurob* 2 = *Sel. Pap.* II 256.) Nor do the courts play any significant role, as he notes. The *laokritai* are mentioned only in *P. Enteux.* 83, where the *stratêgos* orders them to try the case if the parties (both with Egyptian names) cannot be reconciled. The *chrêmatistai* occur twice, in *P. Fay.* 12 and *UPZ* II 170. Otherwise, it is administrative officials who hear all cases and make all decisions. The fact that the entire process is in official hands, that unaffected official persons might notify superiors of offenses, that courts are largely absent, and that there is some element of punishment mentioned all argue against seeing these cases—except perhaps for those few which do come before courts—as civil suits. They cannot reasonably be categorized as part of private law, in the sense that Roman delicts are.

On the other hand, it seems to me difficult to see here a tendency toward the development of a royal criminal law. For one thing, the overwhelming body of evidence points to restitution, to recovery of the complainant's position before the act, as the goal of the case. In the case of murder, regrettably, none of the texts indicates the penalty expected or actually levied. Rupprecht has argued that *P. Tebt.* I 14 indicates confiscation of the murderer's property as a penalty, but there is nothing in the text to support that interpretation. The order is to freeze (θεῖναι ἐν πίστει) the defendant's assets (which turn out to be rather meager). All that is accomplished is to guarantee that what assets there are will not be dissipated or otherwise unavailable to pay whatever penalty is levied. General confiscation is nowhere suggested.

What little evidence there is about penalties certainly all indicates an assessment (*timêma*) levied against the defendant and going to the plaintiff. In some cases of wounding and of hybris, amounts are actually mentioned; the figure 200 drachmas appears in two texts, 1000 in another one. It seems likely that an estimate of the actual damage was involved, although we cannot tell if it was then multiplied as a punitive measure. In general, the plaintiffs want to be made whole, to receive their due, as Rupprecht rightly emphasizes in the case of robbery. Anything else is secondary, and Rupprecht points out (again, while speaking of robbery) that we do not know if requests for punishment were really pursued.

There are, however, some instances in which the plaintiffs ask for an unspecified

punishment for the malefactor in addition to compensation. These are, not, I think, paralleled in the Roman period and are thus of considerable interest. Their salient feature, however, is the lack of specificity. "So that he may not get off unpunished" or "so that they may receive what is appropriate" and such phrasings appear in a fair number of texts—oddly enough, in more texts concerning theft than any other offense. The only text cited by Rupprecht as requesting only punishment (*P. Tebt.* III 784) is vague about what that punishment might be.

Are we then to see this as criminal law? I think not. Despite the involvement of royal officials throughout the procedure and the possibility of punishments, restitution remains the key element of what the plaintiff is seeking. Moreover, there is not one piece of evidence that the "appropriate penalty" was ever imposed in any case known to us, that is, that "criminal" punishment beyond restitution was inflicted. And the official preference for resolution of cases via reconciliation does not point to "criminal" as the appropriate category for these actions.

Much of our difficulty, I think, lies not in the evidence or in the ancient situation at all, but in our approach to the question. I can see no evidence that what we call criminal action was distinguished by these Greeks and Egyptians from any other dispute, and in most cases they tried to settle problems locally first and went to the authorities, if they did at all, for reestablishment of their property and social position. This remains true in the Roman period, perhaps even more true than under the Ptolemies. Criminal punishment in our sense, in this understanding, was a negligible matter, because so little "crime" was actually prosecuted as such. When a complaint is filed, it aims at restoration of social equilibrium and the honor and material position of the complainant, not at punishing the misdeed itself, which is not seen as "crime" but as ancillary to the disruption of the social fabric. One might, in fact, go so far as to say that "criminal" and "penal" are simply inappropriate vocabulary, borrowed from modern views but inapplicable in Ptolemaic Egypt. They refer not to any inherent quality of behavior, but to the view that societal authorities take of it. And there is no evidence that the Ptolemaic authorities made any such distinction.[1]

Finally, Rupprecht's conclusion that the presence of Ptolemaic officials, with power of coercion, was a decisive element in the insignificance of careful distinctions between judicial and official powers seems to me eminently correct. Even the kinds of distinctions made in Athenian law are not to be expected in a countryside where the social and political milieu was not that of the Greek city, but that of a monarchy. As Rupprecht points out, the evidence we have is not, except for *P. Halensis*, about the Greek cities of Egypt but about the villages and towns of the countryside.

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1 Cf. for the Roman period my remarks in *BASP* 26 (1989) 201-16.

Part Three

PROCEDURE

David Cohen (University of California, Berkeley)

Demosthenes' *Against Meidias* and Athenian Litigation

Standard accounts of the development of Athenian institutions portray a process by which the polis gradually manages to establish the rule of law as a curb upon the kind of feud, vengeance, and self-help portrayed in Aeschylus' *Oresteia*. Private vengeance is forced to yield to the civic administration of justice, embodied (in principle) in the impartial verdict of the democratic courts. Rather than contest the historical accuracy of such accounts, I would like to raise some more general questions about the theoretical assumptions on which they rest. More specifically, my aim is to question the functionalist and positivist presuppositions implicit in such accounts of the Athenian legal system by suggesting that they may lead us to misapprehend its relation to the larger social framework of which it is a part. In particular, functionalist accounts of the Athenian legal system (and of legal systems in general) view conflict as the anomaly which the administration of justice is designed to suppress.[1] Such accounts thus tend to assume that the system of justice is driven by a larger purpose, namely, the preservation of order, of a legal order whose function is to resolve disputes, eliminate private violence, and minimize conflict by providing a just and binding resolution of disputes. It follows that social cohesion depends upon the imposition of order through the coercive force of central legal institutions.[2]

The ensuing analysis will suggest that the relations of violence, conflict, dispute resolution, and social control to the Athenian legal and social order are far more complex than the functionalist account would suggest. Since a full description of these relations is inappropriate here, I will instead focus upon a microcosm of dispute and conflict in Athens: Demosthenes' attempts to recover his inheritance.[3] In general, the argument will suggest some of the ways in which the legal order, rather than resolving disputes, instead sometimes serves as a means through which relations of conflict are expressed and intensified in patterns of behavior strongly reminiscent of those found in feuding societies. Further, it will also indicate that some of the Athenian legal practices which many modern scholars regard as a deplorable failing of Athenian administration of justice (e.g.,

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1 As Comaroff and Roberts (*Rules and Processes* [Chicago 1981] 5) point out, such a view of social order views social life as rule-governed and "normal behavior as the product of compliance with normative precepts. Consequently, dispute acquires a pathological character; it signals a deviance, a malfunction, that the control institutions of society are essentially designed to put right."

2 See Comaroff and Roberts *loc cit*: "Associated with this view of order is the contingent assumption . . . that societies do not cohere effectively in the absence of centralized authorities, which formulate rules and ensure conformity with them." For an example of the kind of account of Athenian institutions that I have described, see A. Lintott, *Violence, Civil Strife and Revolution in the Classical City* (New York 1987) 174-75. Lintott's discussion of the legal regulation of violence betrays the typical positivist assumption that the law is the primary, or only important, source of social control.

3 For a more comprehensive account, see D. Cohen, *Law, Violence and Community in Classical Athens* (forthcoming, Cambridge University Press 1992).

litigiousness, inattention to issues of legal doctrine, emphasis on appeals to reputation and character, etc.) are not "dysfunctional" or "abuses" of legal process when viewed according to the social logic of dispute.

Modern studies of feuding societies furnish a useful example of such an alternative model of dispute. A feud involves an institutionalized relationship of hostility between two individuals or groups. Once begun, feud follows its peculiar social logic through a series of aggressive acts which may or may not end in some kind of settlement.[4] If achieved, such a settlement usually comes through the mediation of the community or its representatives. Anthropologists have often noted that "feuds resemble games,"[5] because feuding typically follows a prescribed course of move and counter-move according to a complex set of rules which participants generally take pains to follow (or at least take pains to appear to follow). If feuding is like a game, the principal objective of the game is honor.[6] Thus, in the highly agonistic societies of the Mediterranean and the Middle East, the honor and prestige gained through the feud provide the basis for claims to leadership in the community. Feuding behavior thus serves to establish, clarify, and put into context social and political hierarchies.[7]

Feud, of course, is normally taken to involve a series of killings, one in response to the other. However, the game-like dynamic of feuding behavior as a rule-oriented competition for honor is not limited to such cases. Indeed, Bourdieu's discussion of insult relationships in Kabylia indicates that such relationships very much follow the patterns associated with feud.[8] Similarly, I would argue, some kinds of social conflicts at Athens are informed by the same dynamic, and one of the principal arenas where such conflicts are played out is the court.

In Kabylia, insulting behavior is considered as a challenge which requires a response. This response, in turn, serves as a new challenge, and the process continues either until one of the parties is no longer able to respond or until mediation brings the conflict or dispute to an end. In other words, Bourdieu argues, a challenge to someone's honor initiates a game played in conformity with rules. To choose not to reply to the insult may have different meanings: "The man who from pusillanimity or weakness, evades or renounces the possibility of riposting, chooses to some extent to be the author of his own

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4 There is considerable dispute about whether feuds are always resolved, never resolved, or only sometimes resolved. See, e.g., C. Boehm, *Blood Revenge* (Philadelphia 1984) 205.

5 J. Black-Michaud, *Cohesive Force: Feud in the Mediterranean and the Middle East* (Oxford 1975) 26. See also Boehm (above n.4, 156ff.).

6 Black-Michaud (above n.5, 178-207), and Boehm (above n.4, 171-73).

7 Above n.5, 26-7. As in Athens, the Mediterranean and Middle Eastern feuding societies described by Black-Michaud and Boehm are fiercely egalitarian in their ideology. Feud, then, represents a tension between hierarchical and egalitarian values. On the one hand, feud is a game played by equals, on the other hand, it aims at establishing a relationship of domination by increasing the honor, prestige, and power of one of the parties.

8 P. Bourdieu, "The Sentiment of Honour in Kabyle Society," in J. Peristiany, ed., *Honour and Shame: The Values of Mediterranean Society* (Chicago 1966) 193-241. See also W. Miller's brilliant account of Icelandic feuding behavior in *Bloodtaking and Peacemaking* (Chicago 1990).

dishonor and shame, which are then irremediable. He confesses himself defeated in the game, which he should have played in spite of everything."[9] However, non-reply may also be a deliberate refusal to reply because one does not recognize the challenger as a person of honor with whom one can engage in such a conflict. Such a non-reply, of course, relies upon community acceptance of the act as such. Inevitably, then, "victory" involves persuading the community that one is, in fact, the party who has played better the game of honor. Such persuasion relies upon the interpretation and manipulation of the "normative repertoire" of values, beliefs, and expectations which collectively constitute the "rules" informing the game of honor.[10] In Athens, the highly developed techniques of legal rhetoric aim precisely at the manipulation of the community's normative repertoire according to the exigencies of particular cases.

The first case to be examined is the lawsuit which Demosthenes brought against Meidias for slapping him during a festival. The modern predisposition is to regard such a suit as a single transaction, a dispute which it is the task of the courts to resolve. As will become apparent, however, this suit can only be understood as one part of a much larger pattern of transactions, a pattern strongly resembling the feuding behavior discussed above. Thus, rather than beginning with the suit against Meidias itself, it is appropriate to go back to the origin of the conflict within which this suit figures as one further instance of, to use Bourdieu's term, challenge and riposte. Rather than examining the particular conduct of Demosthenes and Meidias which is the ostensible subject of the suit in an effort to determine who was in the "right" or who was in the "wrong," one should instead attempt to uncover the dynamic of competitive conflict of which both of their behaviors are an expression. In short, rather than thinking in terms of a "just resolution" of the dispute one should think instead of how the game of honor is being played.

The dispute between Demosthenes and Meidias begins with Demosthenes' efforts to recover his patrimony, efforts which led, in a manner typical of feuding behavior, to a series of actions and responses which drew a larger group of kin and friends into the expanding web of conflict. Whether Demosthenes was unjustly deprived of his inheritance or not is impossible to say, but what matters here is that Demosthenes, in the initial litigation against Aphobus, managed to persuade the court that such was the case. This success, however, did not lead either to a resolution of the dispute, or to Demosthenes' receipt of the money due him. To our sense of justice and legal process this may seem scandalous. In the agonistic society of classical Athens, however, the chain of conflict and litigation which it initiated may have seemed entirely natural.

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9 Bourdieu (above n.8, 205)

10 Comaroff and Roberts (above n.1, 247) define the normative repertoire as, "a symbolic grammar in terms of which reality is continually constructed and managed in the course of everyday interaction and confrontation. Far from constituting an 'ideal' order, as distinct from the 'real' world, the culturally inscribed normative repertoire is constantly appropriated by Tswana in the contrivance of social activity, just as the latter provides the context in which the value of specific *mekgwa* [norms] may be realized or transformed."

Thus, even before the suit had come to trial, Demosthenes' opponents responded with a countermove. According to Demosthenes, they had a third party, Thrasylochus, bring an *antidosis* against him as a way of deflecting his suit against them (Dem. 28.17-18). Demosthenes claims that though poorer than Thrasylochus he accepted the trierarchy out of fear that in transferring his estate he would lose his right of legal action on which the lawsuit was based. The countermove was thus quite effective for it imposed upon Demosthenes a considerable financial burden which, he claims, made it much more difficult for him to pursue his attempts to recover his inheritance. Thus, the public legal process of the *antidosis*, presumably designed to mediate conflict about sharing public burdens, is here used for personal ends as a riposte to Demosthenes' challenge.

Demosthenes received a favorable judgment in his suit, but this was by no means the end of the larger *agôn*. Judgment having been rendered against him, Aphobus replies again, and on two fronts. First, he brings a lawsuit for false testimony against one of the witnesses who had given evidence on Demosthenes' behalf. This, of course, is an indirect way of attacking the adverse judgment (Dem. 29.2-3). Further, it is also a way to retry the main issue, since all the issues which had been adjudicated in the first suit are raised again. Second, according to Demosthenes, Aphobus takes steps to avoid the judgment rendered against him. He transfers property to two third parties (Aesius and Onetor), strips the house recovered by Demosthenes of all its contents (ruining it in the process), and takes up residence outside of Athens.

In the next round of the struggle Demosthenes responds to Aphobus' two pronged countermove. First he tries to take possession of a farm Aphobus had transferred to his brother-in-law, Onetor. Onetor violently drives him off, so Demosthenes sues to eject him. As usual, the court is confronted with conflicting factual allegations which it has little means of resolving: Onetor claims that he is the rightful owner because the land had been mortgaged to him as security for the dowry of his sister (Aphobus' wife). When his sister had been divorced and the dowry not returned, he legally took possession of the farm. Demosthenes argues that the divorce was contrived, and that the whole scheme had been cooked up to make it impossible for him to enforce his judgment.

We do not know the outcome of this suit, nor, with one major exception, the further progression of the feud-like conflict of which it is a part. Tradition has it that Demosthenes succeeded in recovering very little of his patrimony, but this is hardly relevant. Instead, five points deserve underscoring: First, Demosthenes' decision to seek to recover his patrimony leads to a series of challenges and ripostes which operates according to a dynamic much like the feuding behavior described above. Second, in this "feud" legal judgment by no means operates to terminate or resolve the conflict. Third, both parties to the dispute employ the legal process as a weapon by which to pursue their conflict. This tactic only serves to intensify the enmity between the parties. Fourth, as in feuding societies, there is a tendency for the conflict to broaden as the principle of solidarity

draws in third parties. At Athens litigation serves as an important means by which this process operates. Fifth, in arguing their cases, litigants employ the techniques described by Bourdieu to bring public judgment on their side. That is, they manipulate the normative expectations of the community to convince the public (the Athenian court) that they "deserve," as *persons*, to prevail. Thus, forensic orations inevitably tend to focus upon the reputation and general conduct of the parties rather than upon the legal issues technically germane to the matter at hand. Though the modern predisposition is to dismiss such claims as irrelevant and misleading, in the Athenian context they are as relevant as the factual conflict on which the suit is technically based, especially since the courts have little means of accurately establishing the facts of the case.

When Thrasylochus challenged Demosthenes to an exchange of property, Thrasylochus' brother, Meidias, assisted him in this attempt. According to the social logic of feud, Demosthenes also initiated litigation against Meidias, giving rise to another feuding relationship which lasted for many years and whose history is memorialized in Demosthenes oration, *Against Meidias*. Though this speech presents only one side of this conflict, it depicts clearly enough the agonistic social framework within which the legal process operated. Further, *Against Meidias* is particularly interesting, because it makes manifest the tension typical of feuding societies, according to Bourdieu, between a fiercely egalitarian ideology, on the one hand, and an agonistic social logic, on the other hand, which judges individuals and social relations in terms of hierarchies of honor, domination, and submission.

According to Demosthenes, while he was serving as a chorus leader in the competition (*agôn*[11]) of choruses in the festival of the Dionysia, Meidias, waging a kind of guerrilla warfare against him, did everything he could to sabotage Demosthenes' efforts to win. The alleged acts included bribery, harassment of various kinds, destroying the gold paraphernalia used in the festival, coercion, and physical violence. This course of action culminated in Meidias publicly striking Demosthenes during the actual procession. Demosthenes' oration was written to be delivered in the prosecution for this blow. A short discussion of this long and complex oration cannot do justice to the wealth of material it contains.[12] There are, however, a number of striking aspects of Demosthenes' rhetorical strategies which merit particular attention. Indeed, these strategies anticipate reactions by the court to certain aspects of the case and, as such, they reveal Demosthenes' view of the normative expectations of the community which would judge him.

First, Demosthenes, beginning with the first sentence, sounds the note of hubris, the humiliating insult to honor to which he claims he has been subjected.[13] In claiming to

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11 21.8, *agones*. See also 61, and the frequent use of *philonikein* to describe the "love of strife" or "lust for victory" of the competitors (e.g. 59).

12 See now D. MacDowell's comprehensive commentary in his new edition of the text (Oxford 1990) and E. Harris, "Demosthenes' Speech Against Meidias," *HSCP* 92 (1989) 117-36.

13 Hubris encompassed any conduct which deliberately humiliates or insults another. Striking

be a victim of hubris, however, he tacitly admits that he has been dishonored. If the trial were merely an adjudication of the facts so as to determine whether or not Meidias struck Demosthenes during the festival this tacit admission would only strengthen Demosthenes position. However, since this, to our minds, central issue takes up only a small part of the oration, and since another social logic, that of honor and revenge, is operative here, such an admission is not without its hazards. Accordingly, Demosthenes, at the very outset acknowledges just this dilemma when he tells the court that *he* is now the defendant, since to obtain no redress for an act of hubris is the real misfortune.[14] The nature of this claim becomes more fully apparent later, when Demosthenes anticipates an argument which reveals a good deal about the values implicit in this agonistic context.

In particular, Demosthenes argues that although he did not take vengeance for this dishonor by direct retaliation this failure should not be held against him. This argument anticipates two points: first, if he did not retaliate the insult could not have been so bad; second, if the insult was as outrageous as he claims, what kind of man would not have retaliated? That is, if Demosthenes did not respond to such a humiliating provocation he is a man without honor and does not deserve to win. This logic appears from his discussion of provocation (21.72f.), where he says that the tone, look, or gesture with which the blow is struck is what makes the insult unbearable for one unused to such treatment. That is, the man who is not provoked is the man who is used to being treated like a slave, a man without honor. Accordingly, Demosthenes must walk a thin line. Thus, he argues that he sympathizes with those who take immediate vengeance themselves (he cannot deny this ethic of honor), but he claims that he was fortunately *sôphrôn* (self-restrained) enough to master this impulse. He thus portrays himself as a man of honor who keenly felt the insult, but whose high regard for the rule of law led him to restrain himself (21.74). He concludes that the victim should not "punish" the offender in hot blood, but should leave this to the court. This argument, however, leaves another question unanswered. In a society in which concern and competition for honor is so prominent, why should the courts interfere in such competition? Demosthenes' attempt to answer this question is one of the major themes of the oration.

This theme is also introduced in the opening passage, where Demosthenes portrays Meidias' act of hubris as an offense against the whole citizenry. Public interest, he claims, requires that men like Meidias not be permitted to act with such impunity (21.7ff.). Later in his speech, he returns to this theme, and the argument of Meidias which he thinks it necessary to anticipate at great length indicates which expectations of his audience he fears.

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another and damaging one's sexual honor are two of the most prominent categories of such behavior. Medias' behavior seems to match closely Aristotle's definition of hubris as inflicting a harm which causes disgrace for the pleasure of doing so, not for one's advantage (*Rhetoric* 1378b20ff. See also 1149b23 on pleasure connected to hubris). According to *Rhetoric* 1374a13, a blow is only hubris if struck for the pleasure of doing so or to dishonor the victim. The motivation is affirmation of one's superiority.

[14] Cf. 21.46, where Demosthenes claims that to a free person there is absolutely nothing more unbearable than an act of hubris.

Meidias, claims Demosthenes, will argue that the two of them are "at war" and that for this reason the court should not deliver him into the hands of his enemy (21.29). Demosthenes emphasizes over and over again that to punish a transgressor of public order is not to deliver that transgressor over to his enemy. Clearly, the implicit argument which this long passage is designed to counter is that since the litigants are "at war," Demosthenes' public suit is part of a private feud and, thus, any penalty would be inflicted on behalf of one party. The amount of time he devotes to countering this argument seems to indicate the resonance he feared it might find with the values and expectations of his audience.

Demosthenes' main response is, as indicated above, that this wrong is a public, and not a purely private, matter. Accordingly, he argues that the fact that the act took place during this important public festival supports this view, and, further, that any offense involving violence is an offense against the polis as a whole and not merely against the wronged individual. However, Demosthenes also fears that Meidias will argue that the frequency of such conduct indicates that it is a routine part of social life (21.36ff.). That is, Meidias might persuade the court that in an agonistic society competition for honor naturally involves such disputes and entails such risks. Therefore, Demosthenes' lawsuit would just represent another move in this game. Since Demosthenes himself has stated that he must win this suit or be covered with shame for not avenging an insult, in a sense he has left himself open to such an argument. This is another of the tensions which underlie his position.

Moreover, not only could Meidias assert that such acts are part of Athenian social life, he could also maintain that they are particularly associated with overtly competitive contexts like the *agôn* of choral competition. Accordingly, Demosthenes again devotes a substantial section of the oration to countering this possible claim. In a long section he concedes that the competition of chorus masters is particularly keen. They struggle with one another (21.61), and these struggles are driven by a "love of strife" (*philoneikein*, 21.59). He admits that rivalry and hostility are to be expected and in the past have often led to hostile behavior and harassment. This is somewhat excusable, he allows, when a chorus master is overwhelmed by his "desire to prevail" (*philoneikia*, 21.66). It is eloquent testimony to the strength of agonistic values at Athens that Demosthenes feels compelled to concede so much. All that is left for him is to argue that no one ever went so far as Meidias, who deserves to be punished for going beyond the bounds of "acceptable" rivalry. He mentions that in an earlier period Alcibiades had struck another chorus master, but argues that this was only permissible because the present law regulating hostility between chorus masters had not yet been passed.[15] But, he concludes, it would be unjust to allow such extreme behavior as that practiced by Meidias, especially because this would

15 21.147. The very fact of the perceived need to regulate this competitive violence seems to support the assertion of the frequency of such conduct in the choral competitions.

allow the rich and powerful to take advantage of their position.[16]

This comment is one of Demosthenes' many appeals to the egalitarian ideology with which he seeks to gain the support of the court. Demosthenes, of course, presents himself as innocent as a lamb in all of this, but presumably Meidias' oration would have portrayed the other side of the dynamic of provocation and retaliation which produced these events. More importantly, this entire passage (21.58-77) details the rivalries of Athenian social life, informed by an agonistic ethic and the competition for honor, prestige, leadership, and, ultimately, power. Nothing Demosthenes says denies the predominance of this ethic and the rivalry it produces; he can only argue that Meidias did not play according to the rules of the game when he transgressed what Demosthenes claims were the prescribed limits of competitive hostility. Accordingly, aggression is viewed as a natural and acceptable means for establishing social hierarchies, though social institutions seek to mediate that aggression in ways that limit the kinds of violence aggression and competition inevitably produce.

A final element contributes to the rhetorical strategy sketched above. Demosthenes explicitly acknowledges that of crucial importance to the case is the character and reputation of the parties. As Bourdieu explained for Kabylia, honor depends upon the community's assessment of one's character and upon the way in which one's actions are interpreted and justified before the court of public opinion. Similarly, Demosthenes acknowledges that defendants typically ask the court, "Does anyone of you know me to be capable of this? Who among you has seen me do such things?" On the other hand, he claims, Meidias is known by all for his wrongdoing and violence. In addition to such explicit statements, Demosthenes' whole speech testifies to the fact that the reputation of each of them is at least as important as the factual question of whether or not Meidias slapped Demosthenes at a festival. Accordingly, a good deal of the speech goes to painting Meidias' reputation as darkly as possible and portraying himself as a man of superior standing. Such appeals should not be dismissed as attempts to "mislead" the court through irrelevant arguments, for they involve essential aspects of social conflict, hierarchy, and legal process at Athens.

Accordingly, the middle part of the oration is taken up by a history of Demosthenes' feud with Meidias and a catalogue of Meidias' crimes against other Athenians (21.78ff.). This catalogue operates to besmirch Meidias' character, though from a different perspective it also serves to support the argument that the present lawsuit is but one move in a long series of hostile encounters (Demosthenes, of course, mentions only Meidias' misdeeds).[17] Appropriately, Demosthenes begins with his inheritance. He recounts how Meidias and his brother, Thrasylochus, burst into his house and challenge him to accept the trierarchy. They force their way into the presence of Demosthenes female

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16 Meidias, claims Demosthenes, should have "put himself on equal terms" (Bourdieu's ideal equality of honor) and competed with a rival chorus by spending money and not by using actual physical violence.

17 Implicit in this narrative is the argument that the conflict before the court must be understood as part of a much larger series of feuding transactions.

relatives, use vile language, and insult both Demosthenes and his mother (paradigmatic hubris).[18] Demosthenes responds by bringing a lawsuit for slander against Meidias. Meidias does not appear, but Demosthenes is neither able to enforce his judgment nor to win a suit for ejectment, which Meidias is able, for eight years, to block by abusing the legal process.[19] Meidias retaliates by bribing a third party to bring a lawsuit for military desertion against Demosthenes.[20] Next, he tries to have Demosthenes prosecuted for a murder he did not commit, and denounces him during a political audit. Further, Meidias attacks others associated with Demosthenes, while he has a whole gang of supporters ready to fight or bear false witness for him (21.139). Finally, his own wealthy cronies aid him and will testify on his behalf before the court (21.205).

All this, argues Demosthenes, Meidias is able to do because the wealthy have great advantages in such feuds. He can hire others to subvert justice. His wealth is widely feared, because it enables him to intimidate, coerce, and harm innocent citizens with impunity (21.138). Such a state of affairs, Demosthenes concludes, violates the egalitarian ideology of Athens, for in a democracy one citizen should not be so powerful that his hubristic actions find support, while others equally guilty but with fewer resources are punished (21.207). Here, Demosthenes combines the attack on Meidias' character and reputation with his argument about the egalitarianism necessary for democracy to protect the many. Thus, his conclusion emphasizes that ordinary citizens will only be secure if the law protects them against the hubristic rich (21.221ff.). As Callicles argues in Plato's *Gorgias*, the laws are the bulwark of the weak, for they constrain the strong.[21] Here, the democratic ideologue uses the same argument to advance his case.

However, at the same time that Demosthenes embraces this egalitarian ideal, he also employs an argument that cuts against it. On the one hand, he has depicted himself as a fellow victim of the hubristic rich. He, like the other citizens, will only be secure if men like Meidias are treated as ordinary citizens. On the other hand, he explicitly appeals to Athenian normative expectations which embody anti-egalitarian values. Thus, he includes a long argument designed to establish that he, in fact, has used his wealth to provide more benefits for the state than Meidias has. In other words, he acknowledges his participation in the competition for honor, prestige, and leadership based upon wealth and public service, and claims that he has come out far ahead of Meidias.[22] Such public standing clearly does play a role in the judgment of the courts, and Demosthenes takes great care to enumerate every one of his public offices, benefactions, and services (21.151ff.). While

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18 The fact that the men insult and humiliate Demosthenes in his mother's presence heightens the outrage.

19 Among other things, Demosthenes claims, he has the arbitrator of the suit disenfranchised.

20 Demosthenes claims that Meidias himself had deserted his post three times.

21 Callicles, of course, regards this as the scandal of democracy, Demosthenes presents it as one of its chief virtues. On Callicles' view Meidias is living as man properly should.

22 The fact that this argument is cloaked as an anticipation of what Meidias' might argue in no way diminishes the force of the point.

he has taken pains to portray himself as one of the many victims of those whose wealth leads them to assert their superiority and domination over others (hubris), here again he emerges as a participant in the *agôn* of Athenian political life.

Demosthenes, according to other sources (Aeschines 3.52), never delivered this speech. Instead, he purportedly accepted a sum of money in exchange for dropping the suit. It would be idle to speculate why he decided not to prosecute, but, in any case, this result seems to support the suggestion made above that litigation at Athens has as much to due with pursuing conflict as it does with resolving disputes. Further, the Athenian legal system and the criteria by which its courts rendered judgment also express this agonistic social framework. One should not expect otherwise, for the law is not an autonomous entity which imposes order from above, but a product of the larger social system in which it is embedded. Thus, in Athenian courts, the social logic of competition and conflict operated together in an uneasy relationship with the political/judicial logic of the rule of law. The cases examined above portray Demosthenes engaged, for a significant portion of his adult life, in a series of feuding relationships. While the legal order may have served to pose certain limits upon such conflicts (principally involving the use of deadly force) it seems to have done little more. Each party in these battles used the legal system as one means of harassing, attacking, or intimidating his opponent in a series of challenges and responses whose dynamic is driven by an agonistic ethos which aims at the enhancement of honor, status, and power. It is not coincidental that it was during just these years that Demosthenes was establishing both his reputation as an orator and the social and political connections which together provided the basis for his rise to pre-eminence in Athenian politics. To attempt to view any one of these "legal disputes" as an isolated juridical event, whose purpose is to establish the truth, render justice, and mediate conflict, is surely to impose our modern conceptions of legality upon a world where they often played only a secondary role.

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Three Court Days

As a way of showing how court procedures changed over the course of a hundred and forty years or so, an account is offered here of the way a trial might have happened on three separate court days, each representing a set of circumstances that are somewhat different from those of the others. The first is a day sometime between ca. 460 and 410 B.C. The second represents a time between 410 and ca. 340, the third, a time between ca. 340 and 322.

The three segments of time which these dates bracket are not to be thought of as eras or as stages in the development of dikastic procedures at Athens. It happens we know of certain changes in procedure at or around these dates, and these changes are important enough to cite as markers, i.e. reference points that offer a place to stop and take a focused look before continuing on in what is finally a good long history. But the points of demarcation offered here do not show when *all* the changes of the preceding years were effected. The change in voting procedure, for instance, from one pebble to two specially designed ballots seems to have been made sometime after 405 but before the middle of the fourth century (*IG* II^2 1641, lines 25-33; 1646, line 8; Aeschines 1.79). What might be called the old style of voting, therefore, obtained throughout the first of my arbitrary (in some respects) segments, and during an undetermined part of the second.

A tripartite division such as this has an obvious affinity with learned arrangements by which certain prehistoric cultures are divided into Early, Middle, and Late. And in fact when so much is unknown, there is a natural order to this sort of segmenting. But the divisions are at the same time arbitrary in that judicial procedures existed at Athens before 460, and because the court system shows fluidity throughout the one hundred and forty years this account includes. Certain constant—we might say characterizing—features, namely large judging bodies, allotments, and secret balloting, remained essential, while Athenians modified ways by which they moved the judging bodies around, allotted courts and dikasts, and guarded the integrity of voting. But any particular change can have been occasioned by more than one sort of person or event. That is, perception of malpractice, or general constitutional upheaval or reform, or resentment at the outcome of a trial, or even just one man's notion of how the system could be improved—any of these could be a sufficient factor.

This account takes 460 (ca.) as a beginning because in 462 an Ephialtes is credited with initiating an important if not satisfactorily documented shift in responsibilities, whereby the *dikastêria* assumed powers that the Council of the Areopagus had had previously; and not long after that, we find evidence of secret balloting. The secret ballot is such an important discovery in constitutional and juridical determinations that in the

absence of reliable information about the conduct of earlier trials, Athenians' use of a secret ballot seems appropriate as a beginning for the first of these three schematized court days. Another distinctive Athenian practice, that of paying dikasts, also began in these years and may be connected with the institution of the secret ballot.

410 is the time of another important change, namely the procedure by which dikasts were assigned to courts and to seats in those courts. If we do not know exactly how these assignments were made, it is a likely inference that before 410 an Athenian citizen became a dikast or heliast by allotment and then was assigned (perhaps again by lot) to one particular court for a year at a time or more. Around or shortly after 410, however, dikasts were clearly allotted to courts each day and to seating places in the courts. They may have been sworn into the eligible body once a year; they were in any case no longer assigned to particular courts. Chance and the god (Apollo, presumably) would make it impossible for litigants to ascertain beforehand who the dikasts were going to be on their day in court.

340 (again, roughly) is the time when Athenians organized their court buildings in accordance with the procedure Aristotle describes in *Ath. Pol.* 63-69. Before then on a day when two or more courts functioned, all dikasts allotted to serve on that day were dispersed by panels to judge in separate buildings. These buildings, however, could be as far apart from each other as the Odeion (at the southeastern foot of the Acropolis) and the Stoa Poikile (on the northern boundary of the Agora). But once Athens had a single, contained complex of structures, dikasts were in a protected area when they walked to their courts. As a consequence, litigants and others who hoped to influence judgements beforehand could not easily make contact with dikasts and be sure they would be in the right place at the right time.

The year 322 is generally agreed to be the end of the Athenian democratic court procedures, at least in approximately the overall conformation they had during the preceding century. Some features and equipment may have been the same as before, but the authority of the courts, widely recognized in the fifth and fourth centuries as paramount, appears from the time of Demetrios of Phaleron and after to be modified or diluted.

In the presentation at hand, popular courts, as distinguished from homicide courts, provide the examples. Testimonia for homicide courts give information concerning sites, furnishings, and procedure at different times but not enough for a linear account in which changes or disruptions can be illustrated by circumstantial detail.

460 to 410 (roughly). A citizen by a law attributed to Solon can indict anyone he perceives as doing wrong. In cases where two parties disagree about money, informal arbitration is possible but there is no known formal, state-administered apparatus of arbitration. To initiate an action as prosecutor, a citizen notifies a defendant formally and with witnesses. He does this by sending a crier along with friends who will act as witnesses, or, since he knows the notification will be in a public place, he can hope to

enroll casual by-standers as witnesses. This act of formal notification, once executed, requires the defendant to appear before a magistrate. There he answers his prosecutor's charges. What magistrate to choose is the prosecutor's responsibility: he identifies a magistracy as appropriate for an initial hearing, and that same magistrate reserves him a place on the court calendar. A case that involved a foreigner or metic, for instance, would begin with a hearing before the polemarch, who would then himself decide whether or not responsibility for that sort of case fell within his competence.

Once a magistrate—let us say for the purposes of this reconstruction he is an archon—has acknowledged the case as one he is to administer, he fixes a day for prosecutor (or prosecutors) and defendant to appear and swear charges and denials or counter-charges. If at his hearing (called *anakrisis*, because there was questioning to determine when and where a trial should be held) the archon determines his office does not superintend the sort of trial that the charge entails, the prosecutor can withdraw and go find the right magistrate.

Suppose the archon accepts responsibility. He has a scribe write charges and denials on a wax tablet. He authorizes a public notification of the impending trial. This notice he has printed in charcoal or black paint on a whitened wooden tablet, and its form is as follows: "So-and-so, son of Q, from deme R in a sworn indictment has charged Such-and-such, son of X, from deme Y with committing the following crime(s)." One or more crimes are specified. After the crimes, a penalty, which may be a monetary fine or death or exile, can be written. It is signalled by the single word "penalty." The defendant's sworn denial may be subjoined in some form such as follows: "I, Such-and-such, son of X, from deme Y, did not commit (whatever crime has been specified)." The tablet (or board if it needs to be large enough to hold notices of other trials scheduled for the same day) will be displayed before the statues of the Eponymous Heroes, which stand near the southwestern corner of the Agora. A railed fence around the ten statues holds the notices on display.

Some litigants giving vent to their feelings or hoping to improve their chances used a curse. This bit of magic was directed against the principal antagonist and any of his friends or relations who might be thought to be coming to his aid. One form of curse was to scratch into a sheet of lead a formulaic prayer to Hermes or Demeter asking these gods to disarm so-and-so by freezing and stupefying his mind, his tongue, his arms, his legs, etc. If an average Athenian lacked savoir-faire, he could go to the Agora and find an amanuensis who knew exactly what to do, i.e., write out the proper words, commit them to the proper material, and explain how to post the message efficaciously. One way was to roll up the lead sheet on which the curse was scratched, drive a nail through it, and drop the package down a well, or into a grave, preferably that of someone who had died before his time.

A magistracy, we can suppose, is consistently associated with a certain court, the Eleven, for instance, with Parabyston (Harpokration, s.v. Parabysto), the archon with the

Odeion (Photios, s.v. Odeion). The archon's court is accordingly a long way around from the Agora, where other, contemporary courts like the Parabyston and Stoa Poikile were situated. On occasions when a trial seemed to require a larger judging body, two or three panels met in combination to form a heliaia of one thousand or fifteen hundred dikasts. A total of fifteen hundred dikasts could have met in the large square building (more or less regularly called Heliaia in modern studies) at the southwest corner of the Agora, or indeed in the Odeion or the Theater of Dionysos or the Pnyx, if an extraordinary heliaia of 6,000 heliasts were needed.

To return to the archon, he has a list of days on which he can schedule trials in the Odeion. For the case in question—let us say the month is Maimakterion and that the issue is alimony—he chooses the tenth day of Maimakterion. On that day, he, the prosecutor(s) and the defendant arrive at the Odeion early in the morning. About five hundred dikasts also arrive singly or in groups. All of them have gotten up early. Most reside in the city, which means they spend much of each day in the Agora whether judging or not. They accordingly have seen the notice posted by the Eponymous Heroes and so know well in advance what the court days will be. Men from outlying areas, however, could also participate. For a man with a farm near Sounion or up in Akharnai, Athens is a long trip, but farming in Attica allowed trips to the city. Grapes and olives require intensive work only at particular seasons, and on many days there needed only someone to feed and water the livestock.

A dikast (or heliast in the earlier terminology) had to be at least thirty years old and a citizen. These are what might be called generic qualifications for a dikast. If he was listed as a state-debtor he was not allowed to judge, for a man in that category was not fully a citizen. He had lost certain rights of citizenship. Dikasts as a group may have averaged considerably older than thirty. Their means are modest enough so that the obol or two or three that they earn for a day's judging is meaningful. They also enjoy their work. Every trial has its own drama, and it is exciting to be a participant in such dramas, many of which are literally life and death contests. It is the pay and the excitement that may have brought countrymen in from comparatively distant places like Sounion and Akharnai.

Dikasts who arrive late, i.e. after the archon has signalled that the gate is closed, will not judge that day. The gate in question (κιγκλίς) gives entrance through a wooden fence (δρύφακτοι) that runs around the whole court building. It is there to keep the world in general at a distance from the immediate area of the trial. Interested persons could nonetheless stand by this fence, no matter that it was outside the court proper, and still try to get the attention of approaching dikasts (Ar. *Wasps* 552-61).

Inasmuch as other magistracies were allotted at Athens starting well before the middle of the fifth century, it would be surprising if dikasts were not also allotted. At least as early as 422 B.C. dikasts depended on an allotment for work (and pay) in the courts: Aristophanes (*Wasps* 673-74) cites them as rabble living off the κηθάριον. Whatever the

exact form of this allotment, it seems to have entitled a citizen to serve as dikast for one year rather than for just one day. It is clear in any case that dikasts were not allotted to particular courts on particular days. If all hopeful candidates assembled at Ardettos Hill once a year and some from this number were chosen by an allotment, *kêtharion* could be a metaphorical way of referring to this allotment. On the other hand, citizens could have been assigned to panels by allotment the day they were to judge. There is no dependable contemporary account.

The number of dikasts is large enough to give substance to the legal fiction that a dikastic panel is the city of Athens sitting in judgement. (There can be therefore no higher tribunal to which one can appeal a verdict). The number five-hundred, however, to take one example, is not in itself absolute: it constitutes one critical mass. That is, for a certain class of offence, that of Socrates for instance, Athenians fixed the number of dikasts at five hundred rather than one thousand or four hundred or two hundred as the aggregation proper for an authentic verdict. But the absence of one or two dikasts was not crucial: a panel that did not furnish its full complement of votes could deliver a verdict that would stand. Dikasts, like citizens at a meeting of the ekklesia, were not accountable to any magistrate or any office for their judgements. They did not have to face *euthynai* at the end of their year. They did swear an oath, possibly on the occasion they were officially recognized as dikasts, possibly again on each court day, whereby they undertook to judge fairly.

Coming into the Odeion the dikasts sit wherever they like. The Odeion is big enough to seat easily five hundred and more, even allowing for the numerous columns that hold up its roof. Friends, cronies, people who have some interest in common, gather in clusters. Many carry cushions or reed mats for comfort. They sit together and keep up a running commentary on all developments as the trial goes on. And when they choose to approve, they make themselves heard. They likewise make themselves heard when they do not approve. On such occasions they might even order the speaker of the moment to step down from the *bêma*, a raised area where a speaker stood while addressing the court.

When the archon decides that the panel is full he signals that all is ready, and the opposing parties enter. There may be one prosecutor or several, so long as each has an arguable basis for complaint. Friends, relations, and witnesses may also be in attendance. A defendant likewise brings as many supporters as he can find or manage. There is no apparent official control over number and identity of supporters. He will try to include some character witnesses. Litigants who wanted their own relevant memoranda might use wax tablets and a stylus, as in Demosthenes 46.11, or papyrus, and ordinary stew pots (*echinos*, *chytra*, or *lopas*) to transport and safeguard them for the trial. There may have been separate *bêmata*, one for prosecution and one for defence. Now a herald or a priest swears the dikasts. They undertake by oath to judge without partiality, and they swear by Zeus, Demeter, and Apollo.

Someone now mans the *klepsydra*. This "water-thief" is a timekeeping device. It consists of a terra-cotta pot with an overflow hole near its rim and a short bronze outlet pipe at its base. The pot is filled with water, which runs out into a similar pot while litigants are speaking. Different sorts of trials and speeches are assigned differing but stipulated amounts of time, the units of which are expressed as liquid measures. Two *choes*, for instance, are given to the second speech in a trial where 2000-5000 drachmas are at issue. In our terms, that would be six to eight minutes. If the *klepsydra* is the property of a tribe, the operation of any given *klepsydra* surely remains in the hands of the tribe that owns it.

A secretary reads the formal charge. The prosecutor speaks first. He tries to establish himself as a person whom the defendant's wrongdoing has affected directly and personally. If he does not, five hundred Athenian dikasts might well judge him a busybody or a sycophant and discount his accusation accordingly. It does not matter that Solon long ago established the right of "anyone who wants" to initiate a prosecution. A litigant is expected to speak for himself in his own words. If a citizen in these circumstances did not have a script, he would be only prudent if he availed himself of expert advice. Courtroom speeches—those of the orators that we possess, at least—had a recognizable form. In addition, they contained formulaic turns of speech. The same ones can be found in orations almost a century apart. Consider, to take a single instance, the speaker who asks for the dikasts' forbearance. He declares he is not a trained or practiced speaker, has never in fact been in a courtroom before: the dikasts therefore must take him as he is, rough-hewn but sincere.

Form and formulae, we can imagine, are elements of presentation that the dikasts expect. Another consideration that tells against purely extemporaneous speaking in court is the *klepsydra*. When a speaker's time is limited this way, he must, if he wants to protect his life and property, reach middle and end of what he wants to say before his water runs out. And yet a man who had never had any instruction could hardly know what he needed to say or how long it would take him to enunciate it, nor how to ascertain degrees of irrelevance when time was measured and precious.

The defendant speaks second. In defending himself he invokes his whole life as testimony. Military service, liturgies, family friends, children, all could be presented to a dikastic panel as causes to find the defendant not culpable. Since he, like the plaintiff or prosecutor, is timed by the drip of water from a jar, he likewise wants urgently to reach the end of his plea or defense before all his water runs out. Defendant and prosecutor also work under another limitation. If either takes a line of argument that angers the dikasts, he can be made by hostile noise to step down from his *bêma* before using all of his time. Citizens—and the general public as well—could watch and listen to trials from outside. Speakers appeal to them regularly as περιεστηκότες and we can visualize them standing just outside whatever area or building has been delimited as the court area for the day. They too may have influenced the proceedings with their shouts.

After the two speakers finish, the dikasts vote. No official stands up to give an objective summation of what has been said; the dikasts' vote for innocent or guilty is an immediate response to speeches they have just heard. There were apparently two modes of voting, one of which was more general in its applications. In this mode, two urns are set up, touching each other but standing in such a way that one can be described as nearer and one as further from the dikasts. The nearer of the two takes the votes to condemn, the other, further away, the votes to acquit. A dikast drops his single pebble (or seashell) into one of the two urns, and when all the dikasts have done so, officials empty one urn onto a flat stone for counting. They count the ballots and award a verdict by simple majority. A tie favors the defendant. A herald announces the result. The trial is over, and defendant either exits free, or relevant functionaries under the direction of the Eleven exact the penalty immediately.

The vote was secret: each dikast could vote without anyone else knowing for whom he had voted. References to an apparatus or fixture called κημός may provide hints as to how secrecy was made possible. A *kêmos* (in some uses of the word) was a truncated cone of basket-work, open at both ends, and used as a trap for crabs and lobsters. A closely woven basketwork fixture of that shape could have kept the voting secret in the following way. The large, open end rests on the shoulders of two urns that stand side by side. The *kêmos* rises to a smaller opening, now at the top, which becomes in effect a single mouth for both urns. A heliast can approach the two urns, set up, it will be remembered, so that one is nearer, the other further away, put his hand with its pebble inside the mouth of the *kêmos*, and then drop his pebble into the urn he chooses. His hand is hidden so that no one can see which urn he has chosen. If a pebble, by rattling against the wall of an urn into which it had been dropped, could reveal a dikast's choice, a packing of straw could have deadened the noise. In any case, the method, whatever its shortcomings, was serviceable: it was in use until sometime after 405.

When a charge carried a penalty already stipulated by law, the penalty (as noted above) was exacted without delay. There were charges, however, that required a second balloting, because the same dikastic panel that had voted to convict had also to judge what a culprit must pay or suffer. In such cases, the prosecutor again spoke first, and within a stipulated time proposed a penalty and argued why exactly that penalty was appropriate. Next the defendant offered his own notion of a sufficient penalty, hoping to find one just severe enough to satisfy judges who had found him guilty less than an hour before, but at the same time milder than that proposed by the prosecutor.

Here a second mode of voting may have been used. Dikasts had wooden tablets covered with wax. A dikast, using a stylus (ἐγκεντρίς) or his fingernail, scratched a short line if he favored the defendant's proposed penalty, a long line for that proposed by the prosecutor. A dikast voted for one or the other. He had no other choice, except perhaps to abstain. Here as in the first balloting a simple majority ruled, with ties going to the

defendant. Aristophanes (*Wasps* 106-8, 166-67, with scholia to 106) seems to allude to such a mode of voting in 422. Since penalties were acted upon immediately, no need was felt for systematic record-keeping. What's done is done. A magistrate might include a notation in his own accounts, against the coming judicial review of his year in office, but publication of a trial's outcome was not a legal requirement.

A single panel judged as many cases in a day as daylight allowed. The *klepsydra* put foreseeable limits on the amount of time any given trial would take. A dikast was paid for a day's work, two obols at first, then—thanks to Kleon in the 420's—three. If it was not a grand sum, it was enough to make a difference in the way a man lived, and more than enough to sustain mere existence. Furthermore, even when in the fourth century other sorts of pay were raised, three obols remained the pay for dikasts.

To consider the magnitude of sums expended annually for dikasts, if the courts sat, let us say for the sake of example, two hundred days a year, and on each of those days two thousand dikasts judged, the total paid out was in the neighborhood of thirty-three talents.

409-340. So far as one can tell, Athenians as citizens of a democracy continued to initiate lawsuits as they had in the past. In the case of a homicide, a member of the decedent's family, as defined in Drakon's law, might initiate a prosecution, but not just any member of the community. In other kinds of wrongdoing, the injured person (or in the case of a woman, her *kyrios*) issued the summons (*prosklêsis*). But when the best interests of the state were involved, anyone who wanted could be prosecutor. The prosecutor hailed the defendant before a magistrate. The magistrate asked enough questions to determine whether the proposed litigation fell within the area of his responsibilities, and if he decided Yes, he had a public notice posted on the railings that ran around the statues of the Eponymous Heroes.

Notice of a trial started with some such form as the following, which we have preserved in a Demosthenic oration: "Apollodoros, son of Pasion, from Akharnai [in a sworn indictment charges] Stephanos, son of Menekles, from Akharnai with giving false witness. Penalty: one talent. Stephanos testified falsely against me when he attested the written documents in the container." "I, Stephanos, son of Menekles, from the deme Akharnai, testified truly when I attested the written documents in the container." (Dem. 45.8; cf. 21.103). The notice next told litigants when and where to be for their day in court. And the rest of town, always interested in some new thing, also wanted to know who was being tried, for what, and when. Spectators, kept outside of critical areas by *dryphaktoi* but still close enough to see what was happening and to hear arguments and verdicts, and indeed to make themselves heard, continued to participate even if only marginally in the conduct of trials.

Whether or not earlier in the fifth century the general body of dikasts was divided in any way—other, that is, than the formation of groups of other dikastic panels—is a matter for speculation. It is natural to suppose that any necessary administrative divisions would

have followed affiliations by tribe. Our single *klepsydra* is labelled property "of Antiochis." Other dikastic equipment (assuming that the *klepsydra* is dikastic) ought likewise to have been maintained and disposed as property of the tribe, and dikasts themselves may have been organized according to tribe as well. Now, however, perhaps as soon as ca. 410, the eligible men of each tribe were allotted letters (A to K) that identified them as belonging to one of ten dikastic sections. These sections cut across tribe lines so that each was made up of a roughly equal number of men from each of the ten tribes. An aim of this division was to prevent men from the same tribe from making combinations by which they could influence the outcome of a trial.

Assignment of section letters to dikasts could have been a simple procedure such as drawing lettered balls from a container. It might have gone somewhat as follows: the balls, lettered A to K, are shaken up in a wickerwork vessel called κηθίς or κήθιον or κηθάριον (Ar. *Wasps* 673-74, with scholia). If there are two vessels to a tribe, there were perhaps 300 balls to a vessel. Each citizen who is eligible to be a dikast draws one letter. That letter is forthwith his section letter, and it is duly stamped into his *pinakion*. These small tags, into which some dikasts pierced holes for string to hang around their necks, had stamped into them the dikast's name, his father's name, his demotic, and a section letter. The section letters (A to K) label the ten dikastic sections noted above. Bronze *pinakia* are attested in mid-fourth century, and about 150 examples are preserved. *Klêrôtêria* could have been set up at organization areas for tribes. These allotment machines were *stêlai* of wood or stone with columns of slots. Along one side a tube was affixed vertically. Suppose that as later there were two *klêrôtêria* for each tribe. Each *klêrôtêrion* in that case would have five columns of slots, making a total of ten columns, each with a letter from A to K at its top. Would-be dikasts plug their *pinakia* into appropriate columns. Balls marked with the names of courts are drawn in a chance order one at a time. Each ball in our example either assigns five dikasts to a court for the day or disqualifies five, depending on whether or not the ball is marked with the name of a court.

In the present illustration, i.e. a trial held sometime between 409 and ca. 340, trials continued to be held in buildings and localities widely separated from each other. On one and the same day, the Odeion and the Stoa Poikile could have been in use. The building in which the heliaia met can have been the same capacious structure in the southwest corner of the Agora, although by this time Building A, under the Stoa of Attalos, seems a better candidate. If a judging body of two thousand or more dikasts was needed, that is to say, an assembly larger than could be accommodated in the Heliaia, theoretically archons could convene such a body in the Theater of Dionysos immediately west of the Odeion; or in the Pnyx; or in the Agora, where a fence would serve to mark the venue.

But to return to days on which two or more widely separated *dikastêria* were working, suppose the allotment of dikasts to courts took place in the Agora. It is hard to see how the dikasts, after being allotted, could fail to pass through open areas in the Agora

in order to reach that court. Furthermore, if that court happened to be the Odeion, dikasts had to traverse parts of the town outside the Agora. Aristotle in his account of later procedure (that of ca. 325) describes the courts as being within an enclosed area. Athenians, we can infer, had come to acknowledge the possibilities of corruption at this critical point. There may have been scandals. Think of Anytos, who Aristotle says in 409 became known as the first man ever to corrupt a whole *dikastêrion* (Arist. *Ath. Pol.* 27.5). In the scheme under consideration here, when courts on any given day could be situated at good distances from each other, a staff was no protection. Colored or not, a staff in the hand of a dikast would make him a target for malefactors. That litigants could approach dikasts on their way to court and offer bribes or threats was an obvious vulnerability. This was surely a principal consideration when Athenians later planned an enclosed complex of courts (see below).

The allotment of dikasts to ten sections of the whole body of dikastai was one innovation of the late fifth century. Another was the assignment by lot of seats, or rather of sections of the seating. Dikasts upon entering the court to which they had been allotted drew lettered, bronze tokens. These tokens (*symbola*) were coin-like pieces, each with a letter of an alphabet that contained in addition to the canonical letters A through Ω, an extra imported letter, Ϡ, which had been added on to create a twenty-fifth label. Dikasts on entering draw a token, look at the letter, and sit in a section identified by that letter.

In allotting dikasts to courts and assigning seating areas by chance Athenians were guarding against two ways by which their aim of an even-handed administration of justice could be spoiled. First, interested persons could not approach dikasts beforehand, since neither the dikasts nor anyone else knew until the morning of their service where they would judge. (Unfortunately, however, dikasts could still be approached en route to their courts.) Secondly, dikasts could not sit where they liked and so form blocs of friends or relations with kindred interests.

As for the actual trial, it seems to have followed the earlier plan. A magistrate—let us say this time he is the Basileus—ascertains that the dikastic panel is full. Early in the fourth century 500 dikasts would make up a full panel, but by the 80's an odd man had been added. A panel now needed 501 dikasts to be full, ostensibly to make tie-votes impossible (Schol. Dem. 24.9). There was, however, no need for such a measure since the Athenians had long before established a principle that tie votes were in favor of the defendant. The addition of an odd man may consequently attest some formal consideration or look to tradition. The fifty-one ephetai, for instance, may have provided a model.

In any case the basileus gives a signal to the herald, who in turn brings in the prosecutor (with supporters) and the defendant (likewise with supporters). If the court in question is meeting in the Stoa Poikile, there will be *dryphaktoi*, that is railings between columns, and prosecutor and defendant will enter through a *kinklis* in those railings. The herald announces the charges and denials. A man is posted at the *klepsydra*, and the

prosecutor begins his address to the judging panel. He is standing on the *bêma*, and the herald stands next to him as he speaks (Aeschines 1.79). He has as much time as it takes a stipulated amount of water to run out of the *klepsydra*. The man in charge stops the flow whenever a prosecutor is having laws, oaths, or testimonies introduced. Anyone speaking on behalf of the prosecutor does so while the prosecution's water continues to run. There is apparently some constraint on all litigants to keep to the point while speaking, but we do not know what the sanctions were, nor can it be clear from preserved orations, which were surely edited and sometimes augmented after having been used in court, that the injunction was consistently effective.

The defendant follows, speaking under the same rules and with the same time limits. He tries to show how unlikely the accusation against him is. He does not cite precedents except as reminders. A precedent cited in court had no necessary force.

One new control is now available for plaintiff and defendant. If the disputants have come to this trial by way of an arbitration that failed, neither party to the action is allowed to use any law, testimony, witness, oath or the like that was not brought forward at the arbitration or *anakrisis*. This prohibition was meant to stop litigants from multiplying and changing documents and arguments which had not previously been considered, and thereby changing the actual question to be judged. This innovation also reflects a time when men had come to desire the fixity and precision of a written text, as compared with the fluidity of speech. They recognized, therefore, that there was such a thing as a true text. For if laws, oaths, etc. used in the trial must be the same as those cited at arbitration or *anakrisis*, two kinds of sameness are necessary. First, the documents must be of the same sort. That is to say, one testimony of X and one oath of Y cannot be replaced by an oath of Z or augmented by citation of a law. Second, the wording of those documents must also be the same. As a control, both parties have access to sealed copies of all the documents, for at the close of a failed arbitration, each contestant deposits copies of all documents in *echinoi*. These plain, unglazed cooking vessels had lids which could be tied on with string and sealed with wax. The *echinoi* were then entrusted to arbitrators of the litigant's own tribe and kept against the trial that was to follow. If at the trial one party heard cited some law, testimony, or oath that had not figured in the arbitration, he could challenge his opponent. And a response to that challenge might be for a litigant to demonstrate to the *dikastêrion* that the seal on his *echinos* was unbroken. Once he had done that, he had the *echinos* opened. The texts would be taken out, identified and read aloud, and the dikasts in their deliberations would weigh what they had heard. Such confrontations could establish a basis for a challenge at the end of a trial, an important capability in view of the paramount authority of the *dikastêrion*. There was no appeal from its judgement, although a successful challenge could lead to a trial in which false witness was charged, and that in turn could lead to a reversal. A second control is the whitened tablet (*pinakion*) on which a witness may write his deposition (at home, if he likes), and a

third is a wax tablet, which a witness might use to make (and erase) notes in responding to challenges. (Dem. 46.11)

When the defendant (and his supporters) has used up his water, i.e. said as much as his stipulated time allows, the panel of dikasts receive ballots and exiguous voting instructions. There is no charge to the jury. No time is given for conferring or deliberation.

The manner of voting is different from that described in the preceding period. Sometime after 405 but not later than 345, Athenians began to cast votes at trials using two official ballots, one of which signified "vote for the defendant," the other, "vote against the defendant." Both ballots are made of bronze and have the shape of a disk pierced at its center, by a short tube, in one form, and by a short peg in the other. Tube and peg constitute the essential difference between ballots, which in Greek are called accordingly "pierced" and "full." A pierced ballot represents a vote for the party who speaks first, i.e. the prosecutor or plaintiff. A full ballot is a vote for the defendant. A dikast receives two ballots, one of each sort, and holds them in either hand, thumb over one end of the axle, a finger over the other. When he holds his ballots this way, no one can see which ballot is which.

The herald's instructions amount to no more than a reminder of the unchanging convention that "pierced" is a vote for the prosecutor, "full," for the defendant. The dikasts take two ballots each, one of each sort, and walk to one of two amphoras, which stand near the *bêma* at the front of the court (Dem. 19.311). They drop one ballot into that amphora, and this is the ballot that counts. The other ballot, the one that is not meant to count, goes into the other amphora, which is designated for discards. When all the dikasts have voted, ballots from the validating amphora are emptied out and counted. A simple majority rules. Ties favor the defendant.

In the case of a second vote, as in Plato's representation of Socrates' trial (*Apology* 36-38b), when alternate penalties are proposed and determined, the voting is again by ballot, a change from the special assessing tablets of twenty years or so earlier. Penalties are exacted immediately after the vote, unless, as in the case of Socrates, special circumstances cause a delay. The Eleven have responsibility for the execution of verdicts, unless the verdict is of a sort that authorizes a plaintiff to employ self-help.

The same dikastic panel may hear a second or even third trial on the same day, so long as there is daylight. In some instances, one whole day was given to a single trial, and a regular formula for the division of such days is fragmentarily preserved by Aristotle (*Ath. Pol.* 67).

340 (roughly) to 322. Sometime around 340 the Athenians consolidated their court buildings. We may have references to these structures in Agora inscriptions I 1749, lines 12-13, 116-117, and I 5656, lines 12-21, where a First and a Middle "New Court" are named. To put out of the discussion for a moment the building remains under the Stoa

of Attalos, what would be the architectural requirements for such a complex? The essential organization is one of at least three buildings close enough together to be enclosed by a fence of some sort. The fence need not be high or strong. It merely defines an area where unauthorized persons are not supposed to be. In the fence there are ten entrances, one for each tribe, and just outside every entrance there stand two *klêrôtêria* and ten boxes, each box labelled with one of the letters of the alphabet from A to K. At or inside each entrance there stands a *hydria*, and somewhere nearby (just inside, it would seem) a different set of boxes. The number of this second set of boxes varies with the number of courts in session on any given day. Two or three will be a usual number. The entrance itself is controlled by a gate. Would-be-dikasts assemble by tribes, each tribe before two *klêrôtêria*, which stand outside the one gate that is reserved for that tribe. The dikasts introduce and validate themselves as candidates by producing their *pinakia*. These identification tags are now made of boxwood. The information they carry is nonetheless the same as that on the earlier ones of bronze, viz. section letter, name, father's name, and demotic. A prospective dikast, on approaching his tribal entrance, threw his *pinakion* into that one of ten boxes which was labelled with his section letter. At the magistrate's signal, a slave picked up the boxes, each containing some dozens of *pinakia*, and shook them well.

The responsible magistrate now picked a single pinakion at random out of each box and summoned its owner to step forward and act as an *empektês*, i.e. a dikast who inserts all *pinakia* bearing the same section letter as his own into appropriate slots in the *klêrôtêrion*. These slots are cut into the stele in vertical rows and each vertical row is identified by a section letter, A to K. Ten *empektai* consequently are chosen in this simple form of allotment, and they are assured thereby of a place on a dikastic panel for that day. When all *pinakia* have been plugged in, the archon shakes up black and white dice in a cup (*oxybaphos* or *kêtharion*) and pours them into a tube, which is affixed vertically to one side of the face of the *klêrôtêrion*. The end of the tube has been stopped, and so the dice are now held one on top of another in chance order. The archon releases dice one by one, and matches each as it comes out with a horizontal row of five *pinakia*. Each die thus validates or invalidates the applications of five would-be-dikasts at a time. If a white die comes out, five dikasts, i.e. one from each one of the five section letters on that *klêrôtêrion*, are allotted as dikasts for the day. A black die, on the other hand, means that five would-be-dikasts will not have work that day. No one touches the invalidated *pinakia*: they are left in their slots until the whole allotment is over. The archon takes out the valid *pinakia* one by one and by calling out the names written on them, summons the dikasts one by one to the next step in their progress toward a court for the day. This step is another allotment, one that assigns them to specific panels. The allotment is performed in the following simple way. Each dikast reaches into a jar (*hydria*) and withdraws what Aristotle calls an "acorn" (*balanos*). Whatever this piece might actually be, it bears one letter of the alphabet, beginning with *lambda*. Aristotle says from *lambda* on, but one may rationally doubt

whether on any given day there was need for letters beyond *nu*, for it seems otherwise likely that not more than three courts were normally in use on any one day.

An allotted dikast shows the letter on his acorn to the archon, and the archon throws the dikast's *pinakion* (marked, it will be remembered, with his section letter) into a box marked with the same letter as that on the acorn. This is one of the two or three letters, i.e. *lambda*, *mu*, *nu*, that identify it as one of the day's courts. The dikast then shows his acorn again to a functionary, enters the enclosure through the gate, and receives a staff whose color matches that of some easily visible part of the entrance to the court to which he has been assigned. The staff is an easily recognizable badge that will admit him to his allotted court and deny him entrance to any other court.

Each of the courts at the beginning of a court day receives a new allotted label, i.e. letter. But while letters change every day, the court colors remain constant. It is according to Aristotle the σφήκισκος of a court that carries the court's distinctive color, and modern students have more or less agreed to translate the Greek word as "lintel," but the usage is singular. Usually the word means "beam." A *thesmothetês*, himself chosen by allotment for this task, has already allotted letters to courts for that day. The procedure was simple, and Aristotle does not mention *klêrôtêria* or any other apparatus such as jars or boxes in connection with this allotment. We may suppose the way it was done was traditional and obvious to any Greek reader, and not worth discussing. Accordingly by the time an allotted dikast receives his staff, his court building has been suitably identified by an allotment that prevents any sort of foreknowledge of that aspect of the day's proceedings.

Once arrived in his court for the day, the dikast gives his acorn and staff to a functionary, receiving in turn a token picked at random that tells him where to sit. There were twenty-five seating areas, and so when a panel was composed of five-hundred dikasts, twenty tokens were needed for each of the twenty-five letters. The dikast in question proceeds, let us say, to area A.

An allotment of magistrates to courts is meanwhile being performed by means of two *klêrôtêria* that are set up in the first of the courts. Two sets of bronze dice come into play, one with names of offices painted on or incised, the other with colors of courts. Two *thesmothetai*, allotted to the task, shake up the dice, pour them into the tubes, release them one by one, and match the name of the office on one ball as it comes out with the color on the other, which comes out at the same time. As the magistrates in question are matched with colors, a herald announces the results, and they go off to their courts.

At about this time, the fence that surrounds the court complex is disassembled—or the gates in it are opened so that Athenians who want to watch and listen can approach the courts. Aischines (3.55-56, 207) refers to this audience. Most were citizens, but there were foreigners in it as well (Dem. 25.98).

Once at their courts, the magistrates allot dikasts to tend to ballots, *klepsydra*, and pay-out tokens. To do this they must have the boxes into which dikasts dropped their

pinakia just after entering the enclosure. These are the boxes labelled with letters that correspond to courts working that day. There are ten of them, one from each tribal entrance. Each now contains *pinakia* from all ten dikastic sections, i.e., *pinakia* stamped with section letters A to K. Functionaries have brought them to their courts. The archon has the ten boxes shaken and takes at random one *pinakion* out of each. He drops the ten *pinakia* collected this way into a single empty box, which is shaken in its turn. From this box the archon draws five *pinakia*. The owner of the first will tend the *klepsydra*, and the next four, distribution, counting, and collection of ballots. The five *pinakia* that remain in the box identify the dikasts who will supervise payment of dikasts at the end of the trial.

The four dikasts allotted to ballots will be responsible for 1002 bronze ballots, five hundred and one pierced and five hundred and one full. First they set them out—using what Aristotle calls a lampstand—and at the end they collect them. The man at the *klepsydra* stops and starts the water as required. At the end of the trial the men allotted to pay-out tokens organize the dikasts into proper groups and give tokens to those who vote. No vote, no token, no pay.

The trial is now ready to begin. It would be consistent with the seriousness of the undertaking for dikasts to swear their oath at the beginning of the trial, and for there to be an altar and a sacrifice, but these sacramental or ceremonial functions are not attested. The herald announces the names of the litigants and repeats the sworn charges and denials from the notice posted by the Eponymous Heroes. The prosecutor or plaintiff stands and gives the details of his accusation. His friends and relations, if he feels he needs them, also speak, although they do take up part of the time allowed him. He and they must decide how they can help him most. When he is through, the defendant must in his turn decide how much of the time given him he can use for his own speech, and how much to apportion to persuasive friends and relations.

When the defendant (and supporters) have finished speaking, the herald announces that any challenge of the testimony must be presented before voting begins. Such challenges continue to represent a litigant's best chance at a review of the judgement, for there was no appeal from a *dikastêrion*'s judgement otherwise. If a panel of dikasts could be thought of as the city, and if there could be no higher tribunal than the city, then it followed that no appeal to a higher authority was possible. If, on the other hand, testimony could be shown to be perjured or wrong, then a man who had been judged as culpable had access to a whole new set of legal manoeuvres. After the announcement concerning challenges, the herald enunciates a convention, venerable by now, that a pierced ballot represents a vote for the prosecutor or plaintiff, a full ballot, a vote for the defendant. There is no summation by a presiding officer nor is there any officially designated time for dikasts to confer among themselves. They stand up from their benches and walk to a "lampstand" (λυχνεῖον) to receive their two ballots, one of each sort, and then proceed to the voting urns. Note, however, that in the time it takes five-hundred men to do all of the

foregoing, there is time for talk.

In the course of receiving ballots they give up the bronze token that designated their seating area. They drop a single ballot into an urn that holds valid ballots, and the remaining ballot into an urn that takes discards. The one urn is bronze, can be disassembled, and has a fitting on the top that allows only one ballot to go through at a time. The other urn, the one that takes discards, is of wood. As each dikast votes, he receives a bronze token marked with a gamma or some other sign for three obols. This is his pay-token. When all the dikasts have voted, a functionary empties out the bronze urn, and all the ballots are displayed for counting. An abacus, a board with five-hundred holes in it, receives the ballots, whose axles, hollow or full, fit them to be plugged into the board. A magistrate counts them through, and a simple majority determines the outcome. A tie favors the defendant.

If the defendant was found innocent, he went free. If he was found guilty, and the charge was of a sort where the *dikastêrion* had to decide upon a penalty, then each dikast received his staff back again (presumably because the act of voting took him out of the court area and he needed a badge to return) and went back into the court to hear arguments about a penalty. Prosecutor (first) and defendant (second) propose their notions of a suitable punishment and justify their proposals as far as they can in the time it takes a half-chous of water to run out of the *klepsydra*. After hearing these arguments, the dikasts voted again, using the same ballots and amphoras as before. The pay-token, when a second balloting was in view, would not be handed out until there had been a vote on the penalty.

Again upon voting they receive pay-tokens, and this time they will be able to turn the token in for their day's pay. Those five dikasts who at the beginning of the day had been allotted to the task of paying now go to work: each takes charge of two boxes of *pinakia*. There were ten of these boxes in all, one from each tribal entrance, and they had been brought to the court at the beginning of the trial. The dikast in charge reaches in at random, picks out a *pinakion*, calls the owner's name, and the owner collects both *pinakion* and pay. This is in fact the last allotment of the day, for the random selection of *pinakia* from the boxes constitutes yet another allotment, that which determines the order in which the dikasts were paid.

Summary. The three foregoing sketches of court days show consistency in the principal elements that establish the identity of classical Athenian court procedure. For as far back as our evidence goes, the judging panels were composed of many citizens. All the dikasts who sat in judgement could therefore be thought to constitute an assembly that was in some sense the city itself. In having been chosen by allotment, they had been chosen by chance, possibly thought of as Pythian Apollo. Litigants were supposed to speak their own minds in their own words, but they had to know how to do so within a certain span of time measured out by the time-keeping device. A degree of expertise was therefore almost

a necessity whether one acquired it by training or had it made accessible by friends or political allies. The citizens, who acted as judge and jury alike, registered by means of a secret ballot judicial decisions each was considered to have reached essentially by himself.

The observable changes in procedure were technical refinements, better ways to protect the integrity of the characterizing principles. The ways by which secrecy in voting was first maintained needed improvement. Pebbles made a sound as they went into the voting urns, and despite the fact that sounds are hard to locate, some Athenians thought they were hearing which urn the pebble entered. And so someone designed two distinct bronze "pebbles" and a validating urn with a special cover. The waxed tablets on which a dikast scratched a line to signal his vote for one penalty or another seem not to have been in service for long. One reason for this may have been that such records could easily be altered after they had left a dikast's hands.

Allotment procedures showed need again and again to be refined, and Athenians may have found the study of such problems congenial. In any case a basic rearrangement of the topography of the courts was at last found practicable. At first, so far as we can tell, there was only an allotment by which a citizen gained the right to serve as heliast. In that capacity, he was assigned to a court and was thereby assured of work possibly half the days of the year. Since, however, his appearance at that court was predictable, litigants could identify him and try to influence him before their trial. Another thing that made this sort of manipulation easy was the known association between magistrates, the kinds of litigation they supervised, and certain courts. Furthermore, if assignment to courts was originally effected by tribe, members of the same tribe could arrange themselves in seating blocs of like-minded dikasts. This sort of abuse at least can be inferred from the nature of a reform, by which the whole body of Athenian dikasts was divided into ten sections. Dikasts thereafter were allotted to courts by section, and the sections were allotted to courts by the day on the very day they were to judge.

But not even these precautionary measures turned out to be fully effective. The Athenians next enclosed their courts within a fenced area and multiplied the number of allotments it took to get magistrate, dikastic panel, and litigants to a resolution of justice in a formal context. If we do not hear of any further important changes after the time Aristotle describes, it can be because the city had undergone a transformation. Some of the old forms, to be sure, survived, but Athenians did not use the courts for the same variety of business and with the same unrelenting passion.

Bibliographical Note

The preceding essay is substantially a chapter (without the footnotes) in A. L. Boegehold et. al. *Lawcourts at Athens. Sites, Buildings, Equipment, Procedure and Testimonia* (American School of Classical Studies publication, forthcoming 1992). Principal ancient sources of information include Aristophanes (with scholia), especially *Wasps*, Attic orators (and later rhetorical lexica), Aristotle's *Constitution of the Athenians*, and various monuments, structural remains and paraphernalia found in archaeological excavations of the Athenian Agora. For a larger context with references to ancient literature and thorough surveys of modern studies up to the time of publication, see J. R. Lipsius, *Das attische Recht und Rechtsverfahrung* (Leipzig 1905-1915); H. Hommel, *Heliaia*, *Philologus* Supplementband 19.2 (1927); R. J. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle*, vol. I (Chicago 1928); A. R. W. Harrison, *The Law of Athens. Procedure* (Oxford 1971); D. M. MacDowell, *The Law in Classical Athens* (London 1978); P. J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia* (Oxford 1981) especially the commentary to chapters 63-69; M. Ostwald, *From Popular Sovereignty to the Sovereignty of Law* (Berkeley, Los Angeles, London 1986); and now most recently Mortimer Chambers, *Aristoteles. Der Staat der Athener* (Berlin 1990). For the archaeological material, see H. A. Thompson and R. E. Wycherley, *The Agora of Athens. The History, Shape, and Uses of an Ancient City Center* (Princeton 1972); and J. McK. Camp II, *The Athenian Agora. Excavations in the Heart of Classical Athens* (London 1986). Some relevant particular studies are: A. L. Boegehold, "Aristotle's *Athenaion Politeia* 65.2: The 'Official Token'" *Hesperia* 29 (1960) 393-401; id. "Toward a Study of Athenian Voting Procedure," *Hesperia* 32 (1963) 366-374; id. "Many Letters: Aristophanes *Plutus* 1166-1167" *Studies Presented to Sterling Dow etc.*, Greek Roman and Byzantine Monograph 10 (Durham, N.C. 1984) 23-29; id. "A Lid with Dipinto" *Studies Presented to Eugene Vanderpool, Hesperia* Supplement 19 (1982) 1-6; S. Dow, "Aristotle, the Kleroteria, and the Courts" *HSCP* 50 (1939) 1-34; M. Gagarin, "The Vote of Athena," *AJP* 96 (1975) 121-127; M. H. Hansen, "The Athenian Heliaia from Homer to Aristotle," *Class. et Med.* 33 (1981-82) 9-47; J. H. Kroll, *Athenian Bronze Allotment Plates* (Cambridge, Mass. 1972).

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Response to Alan Boegehold

Alan Boegehold has given us a particularly vivid, new account of judicial procedure in classical Athens. His novel format of three typical court days helps bring to life the duties and responsibilities of litigants, magistrates and dikastai. He has made it easier for us to picture the physical settings of Athenian trials and how they were conducted. By taking us through the several steps of the judicial process in each of three different chronological periods he has also been able to highlight changes and emphasize continuities. We can see how in one period potential problems may have arisen in the selection of dikastai, in their assignment to specific courts, and in their seating arrangements. Changes introduced in the subsequent period often led to improvements. Boegehold also effectively demonstrates across all three periods increasing concern to refine the mechanics of voting in order to protect the secrecy of each juror's verdict. He shows important innovations in the theory and practice of allotment, as the Athenians apparently became more and more aware of ways in which their system was open to corruption. Increasingly complex methods of allotment extended even to the random selection of dikastai who served as paymasters for their fellow jurors at the end of a day in court. Another critical development, falling in Boegehold's second period, ca. 409-340, is the introduction of written documents sealed up in a special container, the *echinos*. One aim of this new practice was certainly increased fairness; both sides must have equal access to the same evidence. It was also essential to prevent litigants from changing the question to be judged in the interval between the preliminary hearing and the trial. We do not know when the Athenians adopted this practice. Could their desire for what Boegehold has called "the fixity and precision of a written text" have been contemporary with the massive program of revision and republication of the laws of Athens in the last decade of the fifth century?

Boegehold's format has the merit not only of revealing the significance of these and other innovations, but also of illustrating the continuity of certain underlying principles in the Athenian judicial process. These include required preliminary hearings before a magistrate who is responsible for framing the question to be decided by trial. Despite changes, it also remained the duty of the magistrate to designate the appropriate court where the trial was to be held. With the exception of trials for homicide, judging bodies remained—by our standards—large. The use of the lot and secret voting continued to represent the philosophy that verdicts were rendered on their peers by Athenian citizens who had no special legal expertise. All dikastai were equally qualified to judge. Each had the right and obligation to cast a secret ballot. Throughout the classical period the Athenians seem to have made few significant changes in the format and order of the time assigned to

litigants for speeches in court and in the provision that the length of each speech was measured equally by means of a water clock. These and other features of Athenian judicial procedure had clearly passed the test of time and experience.

Boegehold's analysis in each of his three periods is naturally grounded in the copious evidence from the Attic orators, Aristotle's *Constitution of the Athenians*, and the lexicographers. Inscriptions also provide helpful data. But he has effectively supplemented this kind of evidence with helpful references to many physical objects used in Athenian trials. Our understanding of the entire process, from the filing of a charge with the appropriate magistrate to the rendering of a verdict by the dikastai, is enhanced, I think, by Boegehold's graphic descriptions of how these physical objects were put to use. Surviving inscribed bronze *pinakia* help to show us how the identity and affiliation of dikastai could be verified. Large fragments of marble *klêrôtêria* found in Athens are especially valuable in elucidating the extremely complex—and sometimes obscure—final chapters of the *Ath. Pol.* These elaborate allotment machines with their orderly rows of slots and attached funnelled tubes were built to last. They were probably not inexpensive to produce. Athenians were prepared to expend considerable care and money to ensure a smoothly operating allotment process. Bronze coin-like tokens, each bearing a single letter, assigned dikastai at random to one of twenty-five seating sections in the court. Here again Athenians attempted to remove a potential threat to a fair trial for both litigants by preventing dikasts from sitting with their friends or relations in large, and possibly disruptive, blocs. An open clay vessel with a small hole at both its rim and its base and inscribed "Antiochidos XX" helps us to reconstruct the mechanics of timing speeches at a trial.

Several bronze ballots have been excavated in the Peiraieus and the Athenian Agora. With their official inscription, *psêphos dêmosia*, and their distinctive wheel-and-axle shape, these surviving objects vividly illustrate the meaning of the terms "full" and "pierced" votes in legal inscriptions. They are actually a very elaborate device for ensuring the secrecy of each dikast's vote. Since two bronze ballots had to be given to each dikast before he could vote at the end of the trial, we have to imagine large numbers of these little disks set out in order on the "lampstand" at the front of the court—over a thousand of them for a panel of five hundred and one dikastai. In recreating the physical setting and the mechanics of voting with these bronze *psêphoi*, Boegehold briefly touches on an important point. While it is true that the final speech of the defendant at a trial was followed immediately by the casting of ballots by the dikastai, without any magistrate's charge to the jury or time reserved for deliberation, the voting process for a panel of, for instance, five hundred and one judges was probably not swiftly dispatched. We do not know how orderly it might have been. Did the dikastai form a neat queue as they waited to pick up their two ballots or was there perhaps some noisy pushing and jostling? We know that dikastai frequently interrupted courtroom speeches with shouts (*thorybos*). It is difficult to imagine that

dikasts, who had just heard speeches from both litigants, meekly refrained from discussing among themselves how they were going to vote as they waited in line to receive their two ballots.

Another physical object, recently discovered in the Agora Excavations, brings us a step closer to appreciating Athenian concern for the integrity of written evidence. This is a clay lid for a simple stew pot bearing a painted inscription that lists the documents sealed up in the vessel at the time of the *anakrisis* or preliminary hearing. In first publishing it, Boegehold convincingly demonstrated the close correspondence between this pot and the *echinos* described in *Ath. Pol.* 53.

I close with two questions for discussion. First, what is the significance of the tribal inscription "Antiochidos" painted on the outer wall of the one surviving example of a *klepsydra*? As Boegehold observes, this inscription suggests that the tribe Antiochis in some sense owns the *klepsydra*. Can we also follow him in the inference that "the operation of any given *klepsydra* surely remains in the hands of the tribe that owns it?" If so, did each of the ten tribes own one or more *klepsydrai* and how were these tribal vessels distributed among the several Athenian law courts? Are we to conclude that certain tribes had some kind of jurisdiction over or some special connection with certain courts? The selection of dikastai through the use of the lot and some other features of Athenian judicial procedure seem on the other hand to be aimed at mixing up citizens and cutting across political divisions such as tribes and demes, rather than giving some of them special status. Is it possible, then, that our one surviving *klepsydra* was used to time speeches not in a dikasterion, but rather in an assembly attended exclusively by members of the tribe Antiochis?

Secondly, Boegehold is properly cautious in his use of the term "heliaia" and his application of it to the large square building at the southwest corner of the Athenian Agora. There is no literary or epigraphic evidence for the identification of this structure. While not advocating a return to previous theories that made it the sanctuary of Theseus or the Gymnasium of Ptolemy, I would like to ask what grounds we have for suggesting that it may have served as a law court? Can its early date shed any light on Athenian courts before the beginning of Boegehold's first period ca. 460?

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The Athenian Procedure of *Phasis*

The Athenian legal action which is known by the noun φάσις and by the verb φαίνειν is not the subject of any of the surviving forensic orations, though a few of them make passing references to cases of this type. Otherwise we have only a small number of references to it in inscriptions and in Aristophanes, together with short articles in Harpokration and other lexicons. Most of the scanty evidence is assembled by Lipsius,[1] whose account is largely followed by Harrison;[2] but they are not very successful in defining the distinguishing characteristics of the action. Lipsius (310) considers that the feature distinguishing it from other public actions is that half of the payment made by a convicted defendant (the fine, or the value of confiscated property) was handed over to the prosecutor. But, since there were also other actions in which a proportion of the payment made by the convicted defendant went to the prosecutor, notably *apographê* (Dem. 53.2) and *graphê* for a purported marriage between an Athenian and an alien (Dem. 59.16, 59.52), that seems by itself an inadequate reason for the existence of *phasis* as a separate action. Harrison (2.218) is even more unhelpful: he says that *phasis* may be described as "the denunciation of someone as having broken a law." That description would fit most other legal actions, both public and private, equally well, and so is really no use at all. A better attempt to characterize *phasis* is made by Ruschenbusch.[3] He sees it as essentially the showing to a magistrate of the *corpus delicti*. I believe that this is correct; but Ruschenbusch does not discuss all the evidence, and some difficulties need further consideration.

Most of the Athenian public actions were named from the means by which the action was initiated: *apagôgê* began with the arrest of the accused person, *graphê* began with a written statement, and so on. Thus we should expect the name *phasis* to indicate the means by which this action began. The word means "showing," "bringing to light," "revealing." But of course most kinds of prosecution involve showing that the defendant has done something wrong, and indeed there was another Athenian action which was named by another word meaning "showing": *endeixis*. In what way was *phasis* a different sort of showing? To answer this question Ruschenbusch rightly draws attention to two passages of Aristophanes' *Akharnians* in which we see the procedure actually being used. When a Megarian offers some piglets (actually his daughters in disguise) for sale in

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1 J. H. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig 1905-15) 309-16.

2 A. R. W. Harrison, *The Law of Athens*, vol. 2 (Oxford 1971) 218-21; see also vol. 1 (1968) 115-17. Brief accounts of *phasis*, adding nothing substantial, are given by U. E. Paoli, *Studi di diritto attico* (Florence 1930) 239; E. Berneker, *RE* 19.2 (1938) 1896-8; R. J. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle*, vol. 2 (Chicago 1938) 41; L. Gernet, *Démosthène: Plaidoyers civils*, vol. 4 (Paris 1960) 37; A. Biscardi, *Diritto greco antico* (Milan 1982) 260.

3 E. Ruschenbusch, *Untersuchungen zur Geschichte des athenischen Strafrechts* (Cologne 1968) 70-3.

Dikaiopolis' market, a sycophant challenges him and says:

> τὰ χοιρίδια τοίνυν ἐγὼ φανῶ ταδὶ
> πολέμια καὶ σέ.
>
> Then I shall reveal these piglets as belonging to the enemy,
> and you also.
> (Aristophanes, *Akharnians* 819-20)

In a later scene a Theban brings a variety of goods for sale, and another sycophant challenges him and says:

> ἐγὼ τοίνυν ὁδὶ
> φαίνω πολέμια ταῦτα. . . .
> καὶ σέ γε φανῶ πρὸς τοῖσδε.
>
> Then I, here present, reveal these goods as belonging to the enemy. . . .
> And I shall reveal you in addition.
> (Aristophanes, *Akharnians* 911-14)

The offence here is importing goods from an enemy state, which evidently was forbidden in wartime. Since the passages are from a comedy, we cannot assume that they necessarily follow the legal procedure of real life in every detail; Aristophanes, in order to avoid boring his audience, may have omitted some formalities which in real life would have been necessary. But the main point must be true to life, since otherwise the joke would be ineffective; and so we can safely infer that in real life a *phasis* was initiated by the prosecutor saying φαίνω or φανῶ and pointing to the goods as well as to the defendant. He reveals now to the bystanders (φαίνω) and will reveal to a magistrate or official (φανῶ) the goods which ought not to be there. Although the offender is also an object of the verb (σέ in both passages), the point which is rightly made by Ruschenbusch is that the goods are mentioned first.

In wartime it is even more important to stop exports to the enemy than imports from the enemy, but Harrison (2.219) is unwise to use these passages of Aristophanes to support his statement that *phasis* was used for "breaches of import and export regulations." In fact there is another passage of Aristophanes which contains an accusation of exporting goods to the enemy but does not mention *phasis*.

> τουτονὶ τὸν ἄνδρ' ἐγὼ 'νδείκνυμι, καί φημ' ἐξάγειν
> ταῖσι Πελοποννησίων τριήρεσι ζωμεύματα.

I point out this man, and I say that he has been exporting
soup to the Peloponnesian navy.
(Aristophanes, *Knights* 278-9)

That is a joke, but there is a similar real instance, also of the period of the Peloponnesian War, when Peisandros accused Andokides.

ἄνδρες βουλευταί, ἐγὼ τὸν ἄνδρα τοῦτον ἐνδεικνύω ὑμῖν σῖτόν τε
εἰς τοὺς πολεμίους εἰσαγαγόντα καὶ κωπέας.

Members of the Boule, I point out this man to you as having imported grain
and oars to the enemy.
(Andokides 2.14)

The accusation against Andokides differs from the comic accusation in one respect: the grain and oars, unlike the soup, came not from Athens but from elsewhere. But the essential point of both offences is the same, that goods were delivered to the enemy; and in both passages the procedure used is not *phasis* but *endeixis*. The reason is easy to see. You can show people goods which have been imported. You cannot show them goods which have been exported, since the goods are no longer there; you can only point out the person who exported them. We see here an important distinction between φαίνω and ἐνδείκνυμι. φαίνω is used for pointing out objects, goods or property, ἐνδείκνυμι for pointing out persons. In later texts we shall find that this distinction is not always observed, but probably this was originally the basic difference between *phasis* and *endeixis*. In *phasis* the denouncer points out some goods, which ought not to be there; so the goods are confiscated and shared out between the denouncer and the state. In *endeixis* there are no goods to be seen; the denouncer merely points out the offender, and the penalty has to take a different form.

The procedure of *phasis* was also used, in peace as well as in war, for smuggled goods, which had been imported without payment of customs duty. In an earlier scene of *Akharnians*, when Dikaiopolis makes his great speech arguing that there is no justification for the war,[4] he refers to sycophants who went around denouncing Megarian goods, which were forthwith confiscated and sold.

ἀλλ' ἀνδράρια μοχθηρά, παρακεκομμένα,
ἄτιμα καὶ παράσημα καὶ παράξενα,
ἐσυκοφάντει - "Μεγαρέων τὰ χλανίσκια"·
κεΐ που σίκυον ἴδοιεν ἢ λαγῴδιον

4 For discussion of this speech as a whole, see D. M. MacDowell, *G&R 30* (1983) 148-55.

ἢ χοιρίδιον ἢ σκόροδον ἢ χονδροὺς ἅλας,
ταῦτ' ἦν Μεγαρικὰ κἀπέπρατ' αὐθημερόν.

But some villainous fellows, mis-struck coins, disfranchised
and mis-minted and mis-foreign, were sycophants—"Those
shawls are from Megara!"; and wherever they saw a cucumber
or a hare or a piglet or garlic or some lumps of salt, those
were "Megarian" and were sold that day.
(Aristophanes, *Akharnians* 517-22)

This is a description of what happened before the war began, and before Perikles introduced his famous decree about Megara; the Megarians at that time were not formally enemies, and the pretext for denouncing their goods can only have been failure to pay customs duty. (Since the Megarians had a land frontier with Attika, it was probably easier for them to evade the collectors of customs duty than it was for other people who imported goods to Athens by sea through Peiraieus.) In these lines the verb φαίνω is not used, and the verb ἐσυκοφάντει does not by itself prove that the legal procedure was *phasis*; but that procedure is mentioned later in the speech when Dikaiopolis imagines the reverse situation.

φέρ', εἰ Λακεδαιμονίων τις ἐκπλεύσας σκάφει
ἀπέδοτο φήνας κυνίδιον Σεριφίων,
καθῆσθ' ἂν ἐν δόμοισιν;

Now, suppose a Spartan, "after a voyage in his bark,"[5]
had revealed and sold a puppy from Seriphos: would you
have sat quiet at home?
(Aristophanes, *Akharnians* 541-3)

This passage is intended as a mirror-image of the previous one, meaning "What would have happened if the roles of the Athenians and the Spartans had been exchanged?"; so the use of φήνας here shows that *phasis* was the procedure meant in lines 517-22, and that it was used for the pre-war confiscation of Megarian goods for non-payment of customs duty when they were imported into Attika.[6]

One other passage of Aristophanes is relevant, in a scene of *Knights* in which Paphlagon and the sausage-seller are threatening each other. One of Paphlagon's threats is:

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5 This phrase, like some others in the speech, is probably a quotation from Euripides' *Telephos*. As A. H. Sommerstein says in the note on this line in his edition of *Akharnians*, "in its new context it means nothing at all: Spartans could not have confiscated smuggled goods (cf. 517-22) except on their own soil."

6 Lines 541-3 imagine (fantastically) the Spartans following Athenian procedure. They are not evidence for the existence of a procedure called *phasis* in Sparta.

καὶ φανῶ σε[7] τοῖς πρυτάνεσιν
ἀδεκατεύτους τῶν θεῶν ἱε-
ρὰς ἔχοντα κοιλίας.

And I shall reveal you to the prytaneis as having sacred tripe belonging to the gods on which no tithe has been paid.

(Aristophanes, *Knights* 300-2)

This is another comic instance of *phasis* for goods on which a payment ought to have been made. The nature of the payment is not very clear. Lipsius (313) takes it as customs duty, Sommerstein (in his commentary on *Knights*) as a tithe due for war booty; but I think that ἱερᾶς (which qualifies the meat, not merely the tithe) shows that the reference is to meat from a sacrifice. It is known that payments were made to a sacred treasury for the hides from sacrificed animals;[8] probably the joke here is that a similar payment should be made for the tripe. But anyway the offence is very similar to a failure to pay customs duty. The object of the verb is σε . . . ἔχοντα κοιλίας. Paphlagon points both to the offender and to the offending goods which he visibly has. The denunciation is made to the prytaneis. Since the prytaneis are not themselves magistrates, the meaning must be that the case is to be considered by the Boule, over which they preside.

Now, turning away from these comic imaginary cases, I take the two earliest real cases of *phasis* that are known, both from Isokrates. In the speech *Against Kallimakhos* we have a vivid description of an incident which occurred in 403, during the regime of the Ten. The speaker relates how Patrokles met Kallimakhos in the street. Kallimakhos was carrying some money which Patrokles said had been left behind by a man of the democratic party, now occupying Peiraieus, and was therefore the property of the state. An argument developed and a crowd gathered.

καὶ κατὰ τύχην Ῥίνων εἷς τῶν δέκα γενόμενος προσῆλθεν. εὐθὺς οὖν πρὸς αὐτὸν τὴν φάσιν τῶν χρημάτων ὁ Πατροκλῆς ἐποιεῖτο· ὁ δ' ὡς τοὺς συνάρχοντας ἦγεν ἀμφοτέρους. ἐκεῖνοι δ' εἰς τὴν βουλὴν περὶ αὐτῶν ἀπέδοσαν· κρίσεως δὲ γενομένης ἔδοξε τὰ χρήματα δημόσι' εἶναι.

And by chance Rhinon, who had become one of the Ten, arrived. So immediately Patrokles made the *phasis* of the money to him, and Rhinon

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7 The manuscripts' reading σε φανῶ does not fit the metre. Alternative emendations are σε φαίνω (Bentley) and φανῶ σε (Porson). Since the prytaneis are not present on stage, the future tense is preferable.

8 *IG* II² 1496.68-151, Harp. s.v. δερματικόν.

took both men to his colleagues. They referred their case to the Boule; and when a trial was held, the verdict was that the money belonged to the state.
(Isokrates 18.6)

This is not very different from the instances in *Akharnians* of *phasis* of goods imported from an enemy; the democratic party, from whom the money came, was the enemy of the regime in Athens at this time. Again we see that the *phasis* was directed not just at the offender but at the object of the offence (τὴν φάσιν τῶν χρημάτων); and again, as in *Knights* 300-2, the case was referred to the Boule. However, since an oligarchic regime was in power, the proceedings may have been abnormal, and we should be cautious about using this passage as evidence of the correct legal procedure.

In the *Trapezitikos* we read of another case which occurred in the 390s. The speaker is a man from Bosporos, the kingdom north of the Black Sea, who has been doing business in Athens.

ὁλκάδα γάρ, ἐφ' ᾗ πολλὰ χρήματ' ἦν ἐγὼ δεδωκώς, ἔφηνέ τις ὡς οὖσαν ἀνδρὸς Δηλίου. ἀμφισβητοῦντος δ' ἐμοῦ καὶ καθέλκειν ἀξιοῦντος οὕτω τὴν βουλὴν διέθεσαν οἱ βουλόμενοι συκοφαντεῖν ὥστε τὸ μὲν πρῶτον παρὰ μικρὸν ἦλθον ἄκριτος ἀποθανεῖν, τελευτῶντες δ' ἐπείσθησαν ἐγγυητὰς παρ' ἐμοῦ δέξασθαι.

A merchant-ship, on which I had lent a large sum of money, was revealed by someone as belonging to a Delian man. When I protested and demanded that the ship should put to sea, the men who wanted to be sycophants put the Boule into such a state of mind that at first I was nearly put to death without trial, but in the end they were persuaded to accept sureties from me."
(Isokrates 17.42)

Once again an object, not merely an offending person, was pointed out, but this time the object was not the goods transported but the ship itself. The accusation was that the ship belonged to the enemy, because at this period (the 390s) Delos was under Spartan control. Again the Boule was involved, but the description of the legal proceedings is not very clear. The speaker of the speech we have was not the person accused by *phasis* and was not on trial (ἄκριτος). Perhaps he was a speaker in support of the ship's owner or captain who was on trial; or perhaps he made his intervention at an ordinary meeting of the Boule, claiming that he was raising a matter which urgently required action. This passage by itself does not prove that all *phasis* cases were tried by the Boule. Nevertheless it must be significant that, in the period down to the 390s, the Boule and the prytaneis are the only

officials mentioned in connection with *phasis* explicitly (Ar. *Knights* 300-2, And. 2.14, Isok. 17.42, 18.6), and it seems to be a possibility that they handled many or all *phasis* cases at this time.

But if so, that state of affairs did not continue, because later in the fourth century we find *phasis* cases going to a variety of different magistrates. I take next a number of fourth-century inscriptions which mention *phasis*,[9] and first the law of 375/4 about silver coinage. When there are disputes about the genuineness of silver coins offered in payment for goods in the market, the public tester (δοκιμαστής) is to test them; and if anyone does not accept coins approved by the tester, everything that he offers for sale on that day is to be confiscated.[10]

> φαίνειν δὲ τὰ μὲν ἐν [τ]ῶι σί[τωι πρὸς] τὸς σιτοφύλακας, τὰ δὲ ἐν τῆι ἀγορᾶι κ[α]ὶ [ἐν τῶι ἄλ]λωι ἄστει πρὸς τοὺς τῶ δήμο συλλογέ[ας], τὰ [δὲ ἐν τῶ]ι ἐμπορίωι καὶ τῶι Πει[ρ]αιεῖ πρὸς τοὺ[ς ἐπιμελητ]ὰς τοῦ ἐμπορίο πλὴν τὰ ἐν τῶι σίτωι, τὰ δὲ [ἐν τῶι σί]τωι πρὸς τοὺς σιτοφύλακας. τῶν δὲ φανθέ[ντων, ὁπό]σα μὲν ἂν ἦι ἐντὸς δέκα δραχμῶν, κύριοι ὅ[ντων οἱ ἄ]ρχοντες διαγιγνώσκειν, τὰ δὲ ὑπὲρ [δ]έ[κ]α [δραχμάς], ἐσαγόντων ἐς τὸ δικαστήριον. οἱ δὲ θε[σμ]οθ[έται π]αρεχόντων αὐτοῖς ἐπικληρῶντες δικα[στήριον ὅ]ταμ παραγγέλλωσιν ἢ εὐθυνέσθω[ν .] δραχ[μαῖς. τῶι] δὲ φήναντι μετέστω τὸ ἥμισυ, ἐ[ὰ]ν ἕλῃι.
>
> Let denunciations for offences in the grain-market be laid [before] the Sitophylakes, for those in the agora and in [the rest] of the city before the *Syllogeis tou dêmou*; those [in the] market and in Peiraieus before the [Epimeletai] of the market, except for offences in the grain-market; offences [in the] grain-market are to be laid before the Sitophylakes. For [all those] denunciations which are up to ten drachmai the magistrates [are to be] competent to give a verdict; for those over ten [drachmai] let them bring them into the law court and let the Thesmothetai assist them by allotting a court whenever they request one or let them be subject to a fine of [?] drachmai. Let [the one who] makes the denunciation receive a share of one-half, if he wins a conviction.
>
> (*Hesperia* 43 [1974] p.158, lines 18-29)

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9 I omit here one inscription of the fifth century, *IG* I³ 46.5-7 (Meiggs and Lewis 49.1-3), and one of the early fourth century, *IG* II² 30a6, which mention φαίνειν but are too fragmentary to add to our understanding of the procedure. In *IG* I³ 4B.24 the verb seems not to refer to prosecution.

10 The inscription is published and discussed by R. S. Stroud in *Hesperia* 43 (1974) 157-88. The text and translation which I give here are Stroud's. For a recent discussion of the inscription, with full bibliography, see G. Stumpf, *Jahrbuch für Numismatik und Geldgeschichte* 36 (1986) 23-40.

Here we see that the goods which the offender is offering for sale, and which are subject to confiscation, are to be pointed out, not to the prytaneis, but to the officials in charge of the particular market in which the offence is committed. This is obviously more practical, since those officials are likely to be close at hand when the offence is committed, whereas the prytaneis may not be. However, the involvement of the various market officials in *phasis* proceedings is not necessarily an innovation in this law; what is, presumably, new in this law is that it now becomes an offence to reject silver coins approved by the public tester. It has been decided to make this offence subject to the same procedure of *phasis* as has long been used for the offence of offering smuggled or contraband goods for sale. The law therefore states what that procedure is, but it may well be that the whole of that statement simply gives the legal procedure already existing for *phasis* for other offences in the market, and that the transfer of this function from the prytaneis and the Boule to the market officials had taken place some years earlier.

The law specifies that half of the confiscated goods is to be given to the accuser if he wins the case in court. That is certainly not an innovation in 375/4, for it is mentioned in another inscription which is of earlier date, though not strictly an Athenian law. It is the famous charter of the second Athenian league of the year 377. Among other clauses, it lays down that no Athenian may possess any house or land in the territories of the allies; if any Athenian does acquire any, anyone of the allies who wishes may reveal it (φῆναι) to the *synedroi* of the allies; the *synedroi* are to sell the house or land and give half the proceeds to the man who revealed it (τῷ φήναντι), while the other half is to belong to the allies.[11]

From a few years later there is another well known inscription awarding to Athens a monopoly of ruddle exported from the island of Keos. The inscription records decrees passed by the separate cities in Keos, and from the surviving fragments we can see that both the decree of Koresos and the decree of Ioulis mentioned the possibility of *phasis* or *endeixis* for the offence of exporting ruddle elsewhere than to Athens, with half of the proceeds going to the prosecutor.[12] Although we cannot assume that the law of either Koresos or Ioulis was identical with Athenian law, these particular decrees were certainly passed under Athenian influence and actually authorize appeals to Athens from verdicts given in Keos; so they probably reflect Athenian practice. Later again is a fragment of an Athenian law recently discussed by Hansen; the subject of the law is obscure, but one sentence clearly says that half of what is revealed (τῶν φανθέντων) is to belong to the revealer (τοῦ φήναντος).[13] So it is clear enough that a common feature of *phasis* was an equal division of the goods confiscated, or of the proceeds when they were sold, between the prosecutor and the public treasury, at least in the fourth century; in the fifth century it is not explicitly attested, but since the Aristophanic evidence shows that *phasis* was already

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11 *IG* II² 43 (Tod 123) 35-46.

12 *IG* II² 1128 (Tod 162) 18-21, 28-9, 37. I conjecture that *phasis* was used if the ruddle was still present and visible so that it could be confiscated, *endeixis* if it had already gone.

13 *IG* II² 412.7-8; cf. M. H. Hansen *Cl. et Med.* 33 (1981-2) 119-23.

attractive to sycophants, it is likely that the allocation of half the proceeds to the successful prosecutor was a feature of *phasis* then too.

But this raises a further question: can we then argue in the opposite direction, and say that any case in which the successful prosecutor got half the proceeds must have been a case of *phasis*? This question confronts us when we look at the law about olive trees quoted in the oration *Against Makartatos*.

> ἐάν τις ἐλάαν 'Αθήνησιν ἐξορύττῃ, ἐὰν μὴ εἰς ἱερὸν 'Αθηναίων δημόσιον ἢ δημοτικόν, ἢ ἑαυτῷ χρῆσθαι μέχρι δυοῖν ἐλάαιν τοῦ ἐνιαυτοῦ ἑκάστου, ἢ ἐπὶ ἀποθανόντα δέῃ χρήσασθαι, ὀφείλειν ἑκατὸν δραχμὰς τῷ δημοσίῳ τῆς ἐλάας ἑκάστης, τὸ δὲ ἐπιδέκατον τούτου τῆς θεοῦ εἶναι. ὀφειλέτω δὲ καὶ τῷ ἰδιώτῃ τῷ ἐπεξιόντι ἑκατὸν δραχμὰς καθ' ἑκάστην ἐλάαν. τὰς δὲ δίκας εἶναι περὶ τούτων πρὸς τοὺς ἄρχοντας, ὧν ἕκαστοι δικασταί εἰσι. πρυτανεῖα δὲ τιθέτω ὁ διώκων τοῦ αὐτοῦ μέρους.
>
> If anyone digs up an olive tree at Athens, unless it is for a sacred purpose of the Athenian people or of a deme, or not more than two trees a year for his own use, or for the requirements of a funeral, he is to pay to the public treasury 100 dr. for each tree, and one-tenth of this payment is to belong to the goddess. Let him also pay 100 dr. per tree to the individual who proceeded against him. The cases concerning these are to go to the magistrates according to their competence. Let the prosecutor deposit *prytaneia* for his share.
>
> (Law quoted in Demosthenes 43.71)

The law does not mention *phasis*; but because it specifies equal payments to the public treasury and to the prosecutor (100 dr. for each olive tree destroyed) most people, including Lipsius (313) and Harrison (2.218-19), conclude that the procedure here is *phasis*, and go on to draw general conclusions about *phasis* from this law—notably, that the deposit of money called *prytaneia* had to be paid by the prosecutor in all *phasis* cases (Lipsius 315, Harrison 2.220), for which there is no evidence except this law. But nothing in the text says that *phasis* is to be used, and the prosecutor is called τῷ ἐπεξιόντι and ὁ διώκων, not ὁ φαίνων. I do not believe that this law is about *phasis*, and no conclusion about *phasis* should be drawn from it.

Other evidence from the fourth century indicates a widening of the range of offences for which the *phasis* procedure could be used. It continued to be used for trading cases. Theokrines delivered to the supervisors of the market (ἐπιμεληταὶ τοῦ ἐμπορίου)

a *phasis* against Mikon's ship for not sailing to the right place;[14] that probably means that he used it to transport grain to some place other than Athens, which is known to have been an offence for an Athenian in the fourth century.[15] A law quoted in the oration *Against Lakritos* authorizes *phasis* for the offence of lending money for a ship which is not going to transport grain to Athens.[16] The inscribed naval records mention twice a trireme which was subjected to *phasis* by Aristonikos, we are not told why; a trireme was not a merchant-ship, but perhaps Aristonikos alleged that this trireme had in fact been used for illegal trade of some sort.[17] We also hear of a case in which a silver mine was subjected to *phasis*, because its lessee, Epikrates, was alleged to have extended it beyond the limits permitted by his lease.[18] All these uses of *phasis* were probably authorized by new laws in the fourth century; they are more or less natural extensions of the use of *phasis* for illegal trading in the fifth century.

A more difficult extension is the one which we find in the oration *Against Nausimakhos and Xenopeithes*.

> οὐκ ἐμίσθωσαν ἡμῶν τὸν οἶκον, ἴσως ἐροῦσιν. οὐ γὰρ ἐβούλεθ' ὁ θεῖος ὑμῶν Ξενοπείθης, ἀλλὰ φήναντος Νικίδου τοὺς δικαστὰς ἔπεισαν ἐᾶσαι αὐτὸν διοικεῖν.
>
> They did not lease our estate, perhaps it will be said. No, because your uncle Xenopeithes did not wish it, but, when Nikides revealed it, persuaded the jurors to let him manage it himself.
>
> (Demosthenes 38.23)

The reference is to an estate left to orphans. An estate belonging to an orphan could be managed by the guardian or guardians, or it could be leased until the orphan came of age, the payments made for the lease being used or kept for the orphan's benefit.[19] In the present case, the estate belonged to two young boys named Nausimakhos and Xenopeithes. Nikides (whoever he was) said that it ought to be leased until they came of age; but when the case came before a jury, the uncle of the two boys, also named Xenopeithes, who was evidently one of the guardians, successfully argued that he could

14 Dem. 58.5-13, especially 12: πλεύσαντα αὐτὸν δικαίως οἷ προσῆκεν. This case is the only one in which the *phasis* is known to have been delivered to the magistrates in writing. I conjecture that in the fifth century the denunciation may always have been oral.

15 Dem. 34.37, 35.50; Lyk. *Leo*. 27.

16 Dem. 35.51.

17 *IG* II² 1631.169, 1632.189-90.

18 Hyp. *Eux*. 35. For the sense of ἐντὸς τῶν μέτρων see R. J. Hopper, *BSA* 48 (1953) 220-1. I presume (though there is no evidence on the point) that, if the lessee lost the case, the lease was taken away from him and resold, with half of the proceeds of the resale going to the prosecutor in the *phasis*. Harpokration, s.v. φάσις, could be referring to this kind of case when he says that *phasis* is used against a man who holds some public property without having bought it.

19 On the procedure for leasing an orphan's estate see Harrison 1.105-7, 293-6. I have speculated about the wording of the law in *Symposion 1985* (1989) 257-62.

manage it and no lease was necessary. The procedure used by Nikides to make his accusation was *phasis* (φήναντος). It is easy to see why a public action, open to any volunteer prosecutor (ὁ βουλόμενος), was needed to protect the interests of orphans against their own guardians, since the orphans were too young to take legal action for themselves. But other kinds of wrong against orphans were subject to *eisangelia*:[20] why was *phasis* used instead for the particular offence of failing to lease an orphan's estate? I cannot give a satisfactory answer to this question. It is not enough to say that an estate was an object which could be pointed out to the magistrate: it was not an object which could be confiscated and sold for the benefit of the state and the prosecutor, which would have been grossly unjust to the innocent orphan, and it was therefore not comparable to the objects concerned in the other cases of *phasis* which we have considered. It is tempting to suppose that there is an error in the text, that φήναντος should be emended to φήσαντος, and thus that the case was not *phasis* at all. Yet Harpokration, in his article on *phasis*, refers to a lost speech of Lysias Πρὸς τὴν φάσιν τοῦ ὀρφανικοῦ οἴκου. So we must accept that the reading φήναντος is correct, and that *phasis* of an orphan's estate was possible. We should recall that there were distinct types of *eisangelia* (for maltreatment of an orphan or heiress; for treason and other serious offences; for misconduct by an arbitrator), and accept that there were likewise distinct types of *phasis*. The procedure and penalty for *phasis* of an orphan's estate may have been quite different from those for *phasis* of contraband goods or a ship or a silver mine. There may indeed have been no penalty at all for this kind of *phasis*: Wolff suggests that the jury merely decided whether the estate was to be managed by the guardian or to be leased,[21] and no evidence refutes that view, though Dem. 38.23 (describing a case which the prosecutor lost, not won) is insufficient to prove it.

The last type of *phasis*, even more difficult to explain, was for impiety. A well known passage of the oration *Against Androtion*, listing different kinds of prosecution, says that for ἀσέβεια one of the possibilities is φαίνειν πρὸς τὸν βασιλέα.[22] Nothing more was known about *phasis* for impiety until in 1980 an inscribed law of the mid fourth century about the Eleusinian Mysteries was published by Clinton.[23] The text is fragmentary and not all of Clinton's restorations are certain, but one clause of the law seems to authorize prosecution by *phasis* for the offence of usurping the right of the Eumolpidai and the Kerykes to conduct initiations.

> ἐὰν δέ τις μυῆ[ι Ε]ὐμολ[πιδῶν ἢ Κηρύκων οὐκ ὢν ε]ἰδώς, ἢ ἐὰν προσάγηι τις μυησόμε[νον - - - τοῖν] Θεοῖν, φαίνεν δὲ τὸμ βολόμενο[ν Ἀθηναίων, καὶ ὁ βασι]λεὺς εἰσαγέτω εἰς τὴν Ἡλιαίαν.

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20 Isaios 11.6, 11.15, Harp. s.v. εἰσαγγελία.

21 H. J. Wolff in *Festschrift Hans Lewald* (Basel 1953) 207.

22 Dem. 22.27. The word φαίνειν is an emendation by Weil, but a scholium on this passage (84 Dilts), referring to φάσις, shows that the scholiast had φαίνειν in his copy of the text.

23 K. Clinton, *Hesperia* 49 (1980) 258-88. On this inscription see also G. Stumpf, *Tyche* 3 (1988) 223-28.

> If anyone initiates in the knowledge that he does not belong to the Eumolpidai or the Kerykes, or if anyone brings someone to be initiated [- - -] to the Two Goddesses, and any Athenian who wishes is to reveal it, and let the *basileus* introduce it into the Eliaia.
>
> (*Hesperia* 49 [1980] p. 263, lines 27-9)

This bears no resemblance to the other kinds of *phasis* which we have been considering. Here there is no object or property which is pointed out to the magistrate, and no division of proceeds between the prosecutor and the state. The presiding magistrate is the *basileus*, who is not mentioned in connection with *phasis* for any other offence. We must conclude that this is another quite distinct type of *phasis*. What other impious acts it could be used for, besides wrongful initiation in the Mysteries, we do not know.

I now summarize my conclusions. I believe that, just as there were three distinct types of *eisangelia*, there were also three distinct types of *phasis*, having nothing in common except that they were all public actions, open to anyone who wished to prosecute (ὁ βουλόμενος).

1. An action initiated by pointing out some object or property with which an offence had been committed—perhaps originally contraband goods in the market, but subsequent laws widened the scope to include ships used for illegal trading, goods for which the seller refused to accept approved silver coins, mines dug beyond the permitted limits, and so on. In the fifth century the object was pointed out to the prytaneis, who referred the case to the Boule; but in the fourth century this responsibility was transferred to other appropriate officials, such as the supervisors of the market in which the goods were found, who were competent to decide minor cases themselves but referred more serious ones to an ordinary jury court. If the trial resulted in conviction, the object or property concerned was confiscated and sold; the proceeds were divided equally between the successful prosecutor and the public treasury.

2. An action initiated by pointing out to the *arkhôn* that an orphan's estate had not been leased. At the trial the jury decided whether the estate should be leased or not. Nothing else is known about this type.

3. An action for impiety, initiated by a charge to the *basileus*. Apart from usurping the right of the Eumolpidai and the Kerykes to introduce a person to the Mysteries, it is not known what other acts of impiety were subject to this legal action, nor how the procedure differed from *graphê* or *endeixis* for impiety, nor what penalty might be imposed.[24]

[24] I acknowledge here with thanks the contribution made by the British Academy to the cost of my travel to the conference at Asilomar.

Mogens H. Hansen (Institut for Klasisk Filologi, Copenhagen)

Response to Douglas MacDowell

In his paper Professor MacDowell emphasized the close relation between *phasis* and *endeixis*, and suggested, correctly in my opinion, that a *phasis* was aimed directly against a piece of property, and only indirectly against the person who owned the piece of property in question. An *endeixis*, on the other hand, was aimed directly at the person, and only indirectly against the property.

According to MacDowell—and again I agree—the reason for using an *endeixis* instead of a *phasis* was, in all probability, that the goods or piece of property in question were beyond the prosecutor's reach. He was simply prevented from standing beside the property, pointing at it, and saying: φαίνω.

MacDowell's exposition indicates that two different factors or dimensions were at stake: 1. Presence against absence. 2. A piece of property as against a person.

Now, *endeixis* appears not only in connection with *phasis*; it is far more often juxtaposed with *apagôgê*. Here the difference is that *endeixis* is the denunciation of a person in his absence whereas *apagôgê* is the arrest of the person. An *endeixis* may or may not be followed by an *apagôgê*. As I believe to have shown some 15 years ago, *endeixis* and *apagôgê* were not sharply differentiated types of public action.[1] They were closely related, and they could be combined as we know from Antiphon's speech *On the Murder of Herodes* where, in section 9, κακοῦργος ἐνδεδειγμένος is followed by ταύτην τὴν ἀπαγωγήν. And the principal difference between an *endeixis* and an *apagôgê* concerned the opening of the process. After that the procedure was essentially the same.

A *phasis* was opened with the pointing out of the *corpus delicti* and, if possible, confiscation of it. For the reporting of some goods without immediate confiscation the proper procedure seems to have been *apographê*, which has been described and discussed in great detail by Robin Osborne in his seminal article in *JHS* 1985.[2]

Again, our sources show that *phasis* and *apographê* were closely connected procedures and that a prospective prosecutor probably could choose one or the other according to circumstances. Take, for example, the law on loans in the grain trade quoted at Dem. 35.51: ἐὰν δέ τις ἐκδῷ παρὰ ταῦτα, εἶναι τὴν φάσιν καὶ τὴν ἀπογραφὴν τοῦ ἀργυρίου πρὸς τούς ἐπιμελητάς, καθάπερ τῆς νεὼς καὶ τοῦ σίτου εἴρηται, κατὰ ταὐτά. Also *phasis* is juxtaposed with *apographê* in Hyp. *Eux.* 34-5 and in *Hesperia* 40 (1971) no. 23, line 6. ἐὰν δέ τις . . . παρ]ὰ ταῦτα ἢ φαίνῃ ἢ ἀπάγῃ ἢ [. . .] ἀπογραφήν. Thus, we have some sources that connect *phasis* with *endeixis* and other

explicitly connects *phasis* with *apagôgê*, namely the inscription of 387/6 on the clerouchs in Lemnos. MacDowell dismisses it in a footnote: "*IG* II^2 30a6, which mention(s) φαίνειν, but [is] too fragmentary to add to our understanding of the procedure" (note 9). In my opinion, MacDowell's position is too pessimistic. First, MacDowell quotes the inscription as edited in the Corpus, but a new fragment was found in the 1960s and the whole inscription was republished by Stroud in *Hesperia* 40 (1971) 161-73 no. 23. Even with the new fragment the inscription is too fragmentary to allow a reconstruction of what is going on. But I find the juxtaposition of *phasis* and *apagôgê* as alternating procedures very interesting and, summing up, I would like to suggest the following model: Some actions concerning a piece of property could take either the form of a *phasis* if the piece of property could be pointed out and confiscated, or the form of an *apographê* if the property was listed and the list submitted to the magistrates instead of pointing directly to the property. In both cases the procedure was aimed directly at the piece of property, but indirectly, of course, against the person who possessed the piece of property.

An alternative procedure, however, was to take action directly against the person and only indirectly against the property in question. In this case the proper procedure was an *endeixis* if the person was denounced, but an *apagôgê* if he was arrested. The correlation between the four procedures can be illustrated by the following diagram:

	seizure/arrest	denunciation/report
person	*apagôgê*	*endeixis*
property	*phasis*	*apographê*

This model may well be too neat, but I have no doubt that reflections on these lines will help us to understand the nature of the *phasis* in relation to the other special types of public action.

Once more, it is worth noting that the focus is on the initial phase of the procedure. Following Ruschenbusch[3] and others, including myself,[4] MacDowell believes that the essential difference between the various public procedures is in the initial phase, and that, from the *anakrisis* on, the procedural differences were small or even minimal. I agree, and comparing *phasis* and *apographê* we must in every single attested case raise the two following questions.

Who carried out the confiscation: the prosecutor or some Board of Magistrates? Or both? And when was the confiscation of the goods carried out. Immediately after the actual *phasis* of the goods, or only after the hearing of the case and the verdict passed by the court? If we can answer these questions we may shed light on the relation between

First: as shown by Osborne, *apographê* means not just a specific public action but also a list of property drawn up for various purposes, including the bringing of a public action or the carrying out of a verdict.[5] Just as an *endeixis* could be followed by an *apagôgê*, it seems that an *apographê* could be followed by some other type of public action and, in the law on grain loans quoted in Dem. 35, it is arguable that τὴν φάσιν καὶ τὴν ἀπογραφήν are not necessarily alternative, but sometimes at least successive procedures.

Thus, a *phasis* of a piece of property could be followed by an *apographê* just as an *endeixis* against a person could be followed by an *apagôgê*.

Second: closely related to *apagôgê* and *endeixis* is the *ephêgêsis*, where the arrest is made by a magistrate and not by the prosecutor. In numerous lexicographical notes (e.g. *Suda* s.v. *ephêgêsis*, 3891 Adler) it is stated that *ephêgêsis* can be used both against an exile who returns to the country and "if somebody seems to conceal some property that belongs to the state." ἢ ὅταν τῶν δημοσίων τι κατέχειν δοκῇ τις κρύφα. The second part of the description certainly connects *ephêgêsis* with *phasis* and *apographê*. And, if the lexicographical notes can be trusted, the inference seems to be that *ephêgêsis* could be used in connection with *phasis* or *apographê*, if the confiscation was carried out by a magistrate.

Third, a rather unexpected extension of the use of the *phasis* is its application, attested in good sources (Dem. 38.23; Lys. fr. 209 Sauppe [105 Th]) in cases of κάκωσις ὀρφανοῦ. But similarly there is one attestation of *apagôgê* being used in a case of *kakôsis orphanou*, i.e. Aeschin. 1.158: τίς γὰρ ὑμῶν τὸν ὀρφανὸν καλούμενον Διόφαντον οὐκ οἶδεν, ὃς τὸν ξένον πρὸς τὸν ἄρχοντα ἀπήγαγεν . . . τοὺς νόμους λέγων, οἳ κελεύουσι τὸν ἄρχοντα τῶν ὀρφανῶν ἐπιμελεῖσθαι . . . In conclusion: Professor MacDowell's examination of *phasis* is seminal and provides a provides a sound basis for a reexamination of the relation between the five closely connected types of public action: *apagôgê*, *endeixis*, *ephêgêsis*, *phasis*, and *apographê* on the assumption that they are not always different types of public action, but different stages of the same type of public action that could be initiated in several different ways.

5 Osborne (*supra* n.2) 44-5.

Part Four

FAMILY

Alberto Maffi (Trieste)

Adozione e strategie successorie a Gortina e ad Atene

1. **Forme di adozione in diritto attico.** Gli oratori, nostra principale fonte di conoscenza dell'adozione attica (*eispoiêsis*), distinguono tre forme di adozione: tra vivi, testamentaria, postuma.

2. **Le tre forme di adozione, ideologicamente omologate, si differenziano sul piano giuridico?** Ci si chiede se le tre forme di adozione siano tre istituti giuridici distinti, unificati solo dalla funzione e dalla omologazione ideologica, oppure se si tratti di un unico istituto giuridico sottoposto a regole fondamentalmente simili nelle sue tre varianti.

3. **Rapporti fra adozione *inter vivos* e adozione "testamentaria."** Il diverso modo di accedere all'eredità (*embateusis* per l'adottato tra vivi, *epidikasia* per l'adottato "testamentario") testimonia che tra le due forme di adozione esiste almeno un'importante differenza sul piano giuridico (lasceremo qui da parte la c.d. adozione postuma). Si pensa in generale che l'adozione *inter vivos* abbia preceduto quella testamentaria.

4. **Utilità di un confronto con l'anpansis gortinia.** Il Codice di Gortina (coll. X-XI) fornisce un importante termine di confronto con Atene per quanto riguarda l'adozione tra vivi.

5. **GORTINA: La successione dell'anpantos.** Le disposizioni relative all'*anpansis* gortinia riguardano principalmente la successione ereditaria dell'*anpantos* (adottato) all'*anpanamenos* (adottante).

6. **Equiparazione dell'anpantos ai figli gnêsioi.** Si discute se l'adottato sia equiparato ai figli legittimi dell'adottante, così come sembra accadere ad Atene. Per quanto riguarda la quota ereditaria, l'*anpantos* è sfavorito rispetto ai figli legittimi maschi. Per quanto riguarda l'accesso al patrimonio ereditario, la legge mostra che l'*anpantos* è equiparato ai figli *gnêsioi*, ma non è chiaro se questi acquistino l'eredità in base a una procedura speciale (distinta da quella riservata ad altre categorie di eredi).

7. **Si pone il problema, con riferimento al diritto attico, se i figli gnêsioi siano *heredes necessarii* e se rispondano dei debiti ereditari anche *ultra vires hereditatis*.** Altre due questioni relative alla posizione ereditaria dei figli *gnêsioi* e/o adottivi: a) se nel diritto ereditario delle città greche i figli subentrino automaticamente al padre defunto alla pari dei *sui* romani; b) se i figli siano tenuti, alla pari di ogni altra categoria di eredi, al pagamento dei debiti ereditari anche col proprio patrimonio. Nonostante la mancanza di prove sicure, è probabile che in diritto attico i figli siano *heredes necessarii*. Resta invece incerto se gli eredi rispondano dei debiti anche *ultra vires*.

8. **Si esaminano gli stessi problemi con riferimento a Gortina. L'anpantos non è *heres necessarius*.** Sia quale unico successore sia in concorso con i *gnêsia tekna*, l'*anpantos* non è obbligato a essere erede. Ciò vale forse anche per Atene (Is. 2.41-43).

9. **A Gortina i figli gnêsioi sono *heredes necessarii*?** Analisi preliminare di XI 31. ss., che prevede la possibilità che i beni dell'eredità passiva passino ai creditori.

10. **Se i gnêsia tekna possano avvalersi della facoltà prevista in XI 31 ss.** La risposta resta incerta; non è escluso che essi rispondano *ultra vires*.

11. **"Manifestazione di volontà" e responsabilità per i debiti ereditari in coll. X-XI.** É il fatto di immettersi nel possesso dei beni ereditari che genera la responsabilità.

12. **ATENE: Individuazione dei punti che caratterizzano la disciplina giuridica dell'adozione tra vivi.** In base anche all'analogia con Gortina si possono individuare sei punti caratterizzanti:

1) *embateusis*; 2) l'adottato tra vivi non è obbligato a sposare una figlia dell'adottante che sia privo di figli *gnêsioi* (confutazione della c.d. teoria dell'epiclerato naturale di U.E. Paoli; 3) se l'adottato concorre con i figli *gnêsioi* dell'adottante, il

patrimonio ereditario sarà diviso in parti uguali; 4) l'adottato tra vivi può probabilmente rinunciare all'eredità; 5) se l'adottato muore senza lasciare figli legittimi, l'eredità dell'adottante ritorna ai suoi collaterali (Dem. 44.63); 6) l'adottato può tornare nella sua famiglia d'origine se lascia un figlio *gnêsios* nella casa dell'adottante (Dem. 44.64).

13. **Parallelo con Gortina.** Si sottolinea la corrispondenza fra gli elementi individuati per Atene e la normativa dell'*anpansis*: 1) le aspettative dei collaterali dell'adottante sono subordinate alla decisione dell'*anpantos* (X 31 ss.); 2) l'*anpantos* non è obbligato a sposare una figlia dell'adottante che muoia senza figli *gnêsioi*; 3) l'*anpantos* concorre con i figli *gnêsioi* dell'adottante, sia pure per una quota minore; 4) l'*anpantos* può rinunciare all'eredità (X 39 ss. e XI 1 ss.); 5) se l'*anpantos* muore senza lasciare figli *gnêsioi*, l'eredità dell'adottante ritorna ai suoi collaterali (XI 6-10); 6) è incerto se l'*anpantos* possa tornare nella famiglia d'origine.

14. **Ulteriori considerazioni sul "ritorno" dell'adottato nella famiglia d'origine.** A Gortina è prevista solo l'*aporrêsis* da parte dell'adottante. É molto probabile che anche ad Atene l'adottato tra vivi possa abbandonare la casa dell'adottante solo dopo la morte di questi (analogia con Roma).

15. **Disposizioni particolari riguardanti il magistrato in attesa di rendiconto.** Il divieto di adottare e di essere adottato riguarda probabilmente in origine solo l'adozione tra vivi.

16. **Applicabilità all'erede testamentario dei principi che regolano l'adozione tra vivi.** Si discute l'applicabilità all''adottato' testamentario dei sei elementi che caratterizzano l'adozione tra vivi: 1) *epidikasia*, non *embateusis*, per l'erede testamentario; 2) l'erede testamentario è obbligato a sposare la figlia unica discendente del testatore; 3) l'erede testamentario concorre in parti uguali con i figli *gnêsioi* nati dopo la redazione del testamento (apparente inesistenza in diritto attico di un principio analogo a quello romano del *testamentum ruptum*; di fatto, però, viene così violata la regola secondo cui può fare testamento solo chi non abbia figli *gnêsioi*); 4) l'erede testamentario può rinunciare all'eredità; 5) è incerto se l'eredità torni ai collaterali del testatore qualora l'erede testamentario muoia senza figli; 6) è incerto se l'erede testamentario sia sottoposto alla regola in base a cui l'adottato può tornare nella sua famiglia d'origine solo se lascia un figlio *gnêsios* nella casa del testatore. Certamente comuni all'adottato tra vivi e all'erede testamentario, *ma anche agli eredi legittimi*, sono i punti 3) e 4), che riguardano il funzionamento generale del meccanismo successorio.

17. **Applicabilità all'erede testamentario delle formalità richieste per la validità dell'adozione tra vivi.** Ad Atene si richiede che l'adottato tra vivi sia iscritto alla fratria e al demo dell'adottante: ciò vale anche per l'erede testamentario? Altro problema di incerta soluzione è il seguente: come viene segnalata l'adozione sul piano onomastico? c'è differenza sotto questo profilo fra adottato *inter vivos* e erede testamentario?

18. **Rapporti storici fra adozione *inter vivos* e designazione di un erede testamentario. Esegesi di Dem. 46.14. Critica della dottrina.** É esistita ad Atene già prima di Solone una legislazione relativa all'adozione tra vivi. Solone ha esteso alcune di queste norme alla disciplina del testamento; in particolare: a) l'assenza di figli *gnêsioi* è un requisito tanto per poter adottare tra vivi quanto per poter fare testamento; b) può adottare e può fare testamento solo chi a sua volta non sia stato adottato. Si ricerca una conferma di questa tesi nel testo di legge riportato in Dem. 46.14. Critica delle interpretazioni correnti.

19. **Nostra proposta di interpretazione di Dem. 46.14.**

20. **Contributo all'interpretazione della legge testamentaria di Solone. Critica delle posizioni di Gernet e di Ruschenbusch.** Non è convincente la tesi di Gernet secondo cui Solone avrebbe conferito efficacia successoria all'adozione tra vivi. Contro Ruschenbusch si può ritenere che esiste una normativa specifica all'adozione tra vivi e che questa normativa è precedente a Solone.

21. **Critica dell'opinione di Ruschenbusch secondo cui il testamento esisteva anche prima di Solone.** Prima di Solone esisteva solo l'adozione tra vivi.

1. I manuali di storia del diritto attico sono soliti distinguere la successione ereditaria in successione *kata genos* e successione *kata dosin*, distinzione che equivale a quella romanistica fra successione legittima e successione testamentaria.

Il fenomeno ereditario viene però preso in considerazione dalle fonti attiche anche da un punto di vista diverso: continuità dell'*oikos* o estinzione dell'*oikos*. Gli oratori attici riconducono alla categoria dell'adozione (*eispoiêsis*) tutte le strategie successorie attraverso cui viene garantita la continuità dell'*oikos*, il che significa che al titolare dell'*oikos* succede un discendente diretto e non un collaterale. Quando non esiste un discendente di sangue, è possibile crearlo artificialmente mediante tre forme di "adozione": 1) adozione *inter vivos*; 2) adozione testamentaria (mediante *diathêkê*); 3) adozione postuma (su richiesta del *de cuius* o per iniziativa degli eredi *kata genos* si provvede a creare *ex post* un discendente fittizio del defunto).

2. Abbiamo detto che le tre strategie sopra indicate sono presentate dagli oratori attici come *species* del *genus* adozione (*eispoiêsis*). Noi sappiamo però che quasi tutti gli aspetti del diritto di famiglia attico sono oggetto di una insistente manipolazione ideologica da parte degli oratori: si tratta in ogni causa di mostrare ai giudici che la situazione del proprio cliente è conforme al modello della "famiglia perfetta."

Esiste un dato certo che differenzia giuridicamente adozione *inter vivos* e adozione testamentaria. L'adottato *inter vivos* ha diritto di immettersi senz'altro nel possesso dei beni ereditari (e può bloccare mediante *diamartyria* eventuali rivendicazioni dei collaterali o degli eredi testamentari); l'adottato per testamento deve ottenere l'assegnazione dell'eredità mediante *epidikasia* alla pari degli eredi legittimi. Basta riflettere su questo dato per rendersi conto che l'erede testamentario, in quanto priva dell'eredità i collaterali eredi legittimi, come se fosse un figlio *gnêsios* o un adottato *inter vivos*, ha interesse ad essere presentato ai giudici come "figlio" del defunto. D'altra parte la terminologia che designa la successione testamentaria in contrapposizione alla successione legittima (terminologia che se non è di origine legislativa è comunque legalmente consolidata) contrappone la successione *kata dosin* alla successione *kata genos*, dove l'espressione *kata dosin* non contiene alcuna allusione ad una adozione (nè se ne trova traccia in un passo importante per la sua antichità come Ar. *Vesp.* 583-6.)

Si tratta dunque di vedere se, al di là della analogia di funzione, che legittima di per sè l'assimilazione a livello ideologico, le tre strategie successorie qualificate come "adozione" convergano sul piano giuridico in un istituto unitario, siano cioè regolate da identiche norme giuridiche. Nel condurre questa verifica lasceremo per il momento da parte l'adozione postuma e analizzeremo i rapporti fra adozione *inter vivos* e adozione testamentaria.

3. Il diverso modo di accedere all'eredità rende certo che, almeno fino alla fine

dell'età degli oratori, adozione *inter vivos* e "adozione" testamentaria restano distinte. Non solo; possiamo aggiungere che la *communis opinio* concorda nel ritenere che l'adozione *inter vivos* ha preceduto il testamento quale strumento per assicurare un continuatore diretto al titolare dell'*oikos*. L' "adozione" testamentaria sarebbe derivata dall'adozione *inter vivos*, in tempi e modi diversi nelle diverse zone del mondo greco, o per via consuetudinaria o per creazione legislativa. Nel Codice di Gortina (che rappresenta la nostra fonte più antica e più sicura in materia di adozione), datato alla prima metà del V sec. a.C., è attestata ancora solo l'adozione *inter vivos*. A Sparta (se accettiamo l'interpretazione abituale, ma oggi contestata, delle fonti antiche), mentre l'adozione *inter vivos* appare un istituto tradizionale posto sotto il controllo dei re (Hdt. 6.57.3), il testamento sarebbe stato introdotto solo con la *rhêtra* di Epitadeo, fra V e IV sec. Ad Atene, invece, l'introduzione del testamento risalirebbe a Solone, e sarebbe quindi un'innovazione particolarmente precoce. Tuttavia, come è noto, la dottrina è ancora lontana dall'aver raggiunto un accordo sull'esatta natura della riforma solonica in questa materia. Secondo l'opinione prevalente Solone avrebbe legalizzato l'adozione *inter vivos*, e da questa sarebbe derivata per via consuetudinaria l'adozione testamentaria (cfr. soprattutto Gernet). Secondo altri studiosi Solone intervenne a riformare la normativa riguardante il testamento, il quale però esisteva già prima (cfr. soprattutto Ruschenbusch). Prima di esprimere la mia opinione sui rapporti fra adozione *inter vivos* e "adozione" testamentaria ad Atene, vorrei osservare che entrambi i punti di vista testè riferiti, pur giungendo a risultati molto diversi, appaiono ugualmente influenzati dall'atteggiamento ideologico degli oratori attici, a cui accennavo prima.[1] Io ritengo che si possa e si debba uscire dal gioco di specchi deformanti, creato dagli oratori attici, mediante il confronto con la normativa gortinia in materia di *anpansis*.

4. Il Codice di Gortina ci fornisce infatti, come si sa, un'articolata disciplina legislativa dell'adozione *inter vivos* (coll. X-XI). Non mi sfugge naturalmente che la comparazione Atene/Gortina ci mette subito di fronte al problema unità/pluralità dei diritti greci, e non credo che in questo caso specifico tale problema possa essere più facilmente superato grazie alle generiche dichiarazioni degli oratori attici attestanti la panellenicità, anzi l'universalità delle norme in materia di adozione (Is. 2.24). E so anche che il parallelo fra le due normative è stato più volte istituito senza che ciò abbia portato a un decisivo miglioramento delle nostre conoscenze dell'adozione greca nel suo complesso.

Queste obiezioni, benchè rilevanti, non mi sembrano però tali da rendere inutile un riesame dei molti e importanti problemi lasciati aperti dalla dottrina in materia di adozione.

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[1] Per Gernet l'adozione testamentaria si sviluppa dall'adozione *inter vivos* legalizzata da Solone e per questo si uniforma alle stesse regole. Per Ruschenbusch non è addirittura mai esistita una legislazione attica in materia di adozione *inter vivos*; quest'ultima viene regolata per analogia sulla base della legge testamentaria soloniana.

Per quanto riguarda i rischi di una comparazione fra diritti diversi, ritengo che in questo caso essa si legittimi partendo dalla constatazione che *eispoiêsis* attica e *anpansis* gortinia rispondono a un'esigenza perfettamente simile, cioè quella di creare un continuatore dell'*oikos* senza annullare del tutto le aspettative dei successori legittimi. Per quanto riguarda i risultati fin qui raggiunti dalla dottrina, è tale la varietà dei punti di vista e delle soluzioni proposte da rendere comunque opportuno un tentativo di bilancio critico.[2]

5. Prendiamo quindi in esame la normativa gortinia contenuta nelle coll. X e XI del Codice, avvertendo che ci interessa soprattutto la situazione successoria dell'*anpantos*.

Prima di tutto è opportuno ribadire che l'*anpansis* va considerata una forma di adozione *inter vivos*. Tenendo conto dell'analogia, già rilevata più di una volta in dottrina, con le formalità del *testamentum calatis comitiis*, si potrebbe pensare che anche l'*anpansis* realizzi i suoi effetti solo dopo la morte dell'adottante.[3] Il sacrificio che l'adottante deve offrire alla sua eteria (X 37-39) dà luogo però a un'analogia cosi evidente con la presentazione dell'adottato *inter vivos* alla fratria ateniese da lasciare pochi dubbi sul fatto che l'*anpansis* realizzi un'adozione *inter vivos* (al punto che ci si può spingere, come Kohler-Ziebarth 71, fino ad affermare che l'adottato ha il dovere di mantenere il padre adottivo: cfr. *infra* §15).

Le disposizioni che stanno fra la norma relativa alla costituzione del rapporto (X 34-39) e quella relativa alla sua estinzione (XI 10-17) regolano la posizione ereditaria dell'*anpantos* distinguendo due ipotesi: 1) l'*anpantos* è l'unico successore; 2) l'*anpantos* concorre con i *gnêsia tekna*. Seguono la lapidaria sentenza: πλίυι δὲ τὸν ἀνπαντὸμ μὲ ἐπικορε′ν (XI 5-6) e la norma che dispone il ritorno del patrimonio ereditario ai collaterali dell'adottante in assenza di *gnêsia tekna* dell'*anpantos*. (Ci si può chiedere a questo proposito che cosa succede se l'*anpantos* lascia solo figlie femmine: è da supporre che la disciplina dell'epiclerato si applicherà pur sempre a favore dei collaterali dell'adottante; l'analogia con Atene induce infatti a ritenere che anche a Gortina l'*anpantos* perda ogni legame patrilineare con la famiglia d'origine, e d'altra parte sappiamo che hanno diritto di sposare la *patrôiôkos* solo i collaterali dalla parte di padre).

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2 Consideriamo ad esempio il confronto istituito da Gernet, *Loi de Solon* = *DS* 139-40. Poiché il suo scopo era quello di mettere in luce l'originalità della normativa ateniese in materia di adozione, egli sottolinea esclusivamente gli aspetti divergenti, senza nemmeno menzionare un evidente e importante elemento comune alle due normative: se l'adottato non lascia figli legittimi, il patrimonio dell'adottante ritornerà ai collaterali di questi (Cod. Gort. XI 6-10 e Dem. 44.63). Vi è poi chi, come Willetts, *LCG*, si interessa quasi esclusivamente di ricostruire un'evoluzione interna dell'adozione gortinia; o chi, come Karabelias, *Festschrift Kraenzlein*, ha trattato della successione ereditaria nel sistema del Codice senza tener conto delle norme sull'*anpansis*.

3 U. E. Paoli arrivava alla stessa conclusione in base al principio, da lui ritenuto panellenico, che "nominare un adottivo o fare testamento sono termini equivalenti" (*AS* 504), come se anche ad Atene non esistesse l'adozione *inter vivos*. Opportuna quindi su questo punto la rettifica di A. Biscardi, *D. gr. ant.*, 123.

possono verificarsi due ipotesi: 1) insieme con l'adottato l'adottante lascia dei figli legittimi; sono allora soltanto questi ultimi "che continuano la famiglia paterna"; 2) "l'adottante lascia solo il figlio adottato in forma imperfetta, con o senza figlie femmine" (*AS* 503); a succedere non è allora l'adottato ma il collaterale più vicino. L'adottato "in forma imperfetta" avrà diritto di ricevere soltanto la quota stabilita dalla legge o dai figli maschi *gnêsioi* dell'adottante o, qualora questi manchino, dal collaterale successore.

Tutta la costruzione di Paoli si basa, come si vede, sulla distinzione fra "adozione perfetta" e "adozione imperfetta," di cui non esiste alcun riscontro nel testo di legge.

La conclusione, a cui mette capo questa sia pur rapida disamina della dottrina, è che non siamo in grado di far corrispondere i diversi verbi che designano l'acquisto dell'eredità a eventuali modalità specifiche di acquisto oppure al subentrare di una particolare categoria di eredi (discendenti, collaterali, estranei ecc.). In particolare, per quanto riguarda il rapporto tra *anpantos* e figli *gnêsioi*, X 39-45 mostra che la legge prevede una specifica equiparazione tra essi anche per quanto riguarda le modalità di acquisto dell'eredità, ma non ci permette di stabilire che cosa contraddistingua tali modalità.

7. Dobbiamo ora porre in discussione altri due aspetti della posizione ereditaria dei figli: 1) se nel diritto ereditario delle città greche i figli siano da considerare *heredes necessarii* alla pari dei *sui* romani; 2) se siano tenuti (ma questo è un problema che investe tutti gli eredi, non solo i figli) anche *ultra vires hereditatis*, cioè se siano tenuti a soddisfare i creditori del defunto anche con il proprio patrimonio qualora i beni ereditari si rivelino insufficienti.

Per quanto riguarda il diritto attico dell'età degli oratori, sul primo punto la dottrina, come si sa, è divisa.[6] Per quanto riguarda la responsabilità anche *ultra vires* si registra una netta contrapposizione fra Partsch (seguito incidentalmente da H. J. Wolff, *Att. Par.* 76-77), che ritiene la responsabilità limitata al "Nachlass," ossia al patrimonio ereditario, e Demisch (seguito da Gernet e altri), secondo cui, invece, l'erede risponde senz'altro *ultra vires*. C'è anche chi, come Harrison, tenta una via di compromesso: piena responsabilità per i debiti pubblici, incerta per quelli privati (129).

Le poche fonti al centro della discussione restano secondo me ambigue.[7] Si può

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6 Ammettono la possibilità di rinuncia all'eredità anche da parte dei figli: Beauchet III.589 ss.; Partsch, *Gr. Bürg.* 236. La negano: Lipsius, 540 e n.6; Harrison, 129.

7 L'attenzione si concentra su due passi demostenici: Dem. 35.4 e Dem. 38.7. In Dem. 35.4, Lacrito, secondo me, afferma semplicemente di essere estraneo all'eredità di Artemone, forse negando di essere suo fratello (cfr. §16). L'esegesi di Wolff mi pare difficilmente sostenibile. Secondo il compianto studioso le parti sono d'accordo sul fatto che Lacrito ha posseduto e poi rilasciato i beni ereditari, e il problema giuridico che si pone è se il fatto di aver posseduto renda l'erede responsabile una volta per sempre, anche se in seguito ha effettuato l' "Entfernung des Nachlasses"; se infatti l'erede fosse responsabile dei debiti ereditari per il semplice fatto di essersi immesso nel possesso, tutto il processo sarebbe inutile perché Lacrito, avendo effettivamente posseduto per un certo tempo, non avrebbe alcuna possibilità di difendersi. A questa interpretazione mi pare si possa obiettare: a) che dall'orazione non risulta affatto che le parti concordino sul fatto che Lacrito ha posseduto per un certo tempo i beni ereditari; b) che di conseguenza è perfettamente verosimile che Lacrito basi, fra l'altro, la sua difesa sull'affermazione di non

dire quindi che non possediamo attestazioni esplicite nè di accettazione nè di rinuncia all'eredità da parte di figli *gnêsioi*. Io propendo comunque per la tesi che vede nei figli degli *heredes necessarii* (anche sulla base di un argomento che finora non mi pare sia stato valorizzato: nella *diamartyria*, con cui i discendenti possono respingere eventuali pretese dei collaterali, i testimoni si limitano a dichiarare che esistono dei discendenti, senza specificare che questi hanno compiuto l'*embateusis*).

Per quanto riguarda il diritto di Gortina non possiamo certo dire che possediamo elementi più precisi. Converrà comunque concentrare l'attenzione su alcuni dati che emergono dalla XI.

8. Consideriamo prima di tutto la singolare clausola che leggiamo in XI 1-5: καὶ μὲ ἐπάνανκον ἔμεν τέλλεν . . . καὶ ἀναιλῆθαι. L'interesse di questa disposizione non è certo stato sottovalutato dai commentatori del Codice; tuttavia i nessi logici che la legano al contesto possono essere forse meglio precisati.

Un primo problema riguarda l'ambito a cui tale disposizione va riferita. L'*anpantos* non è obbligato a subentrare all'adottante solo quando concorre con le figlie femmine di esso (come ritiene ad es. Guarducci, *comm. ad loc.*), oppure anche quando concorre con i figli maschi (come ritenevano Comparetti, *comm. ad loc.*, e, sia pure nella prospettiva non del tutto perspicua di cui sopra, anche Paoli)?

La questione non sembra risolvibile in base alla semplice analisi sintattica. É vero che la clausola sembra riferirsi direttamente solo all'ipotesi di concorso con le figlie; tuttavia non è impossibile considerare le due ipotesi di concorso strettamente collegate sul piano logico, specie tenendo conto dell'attacco del periodo: αἰ δέ κ' ἐι γνέσια τέκνα τῶι ἀνπαναμένοι (X 48-49), che sembra unificare le due sottoipotesi seguenti. Nello stesso senso va un'ulteriore considerazione, cioè che le disposizioni della legge relative alla successione dell'*anpantos* appaiono organizzate intorno ad un'alternativa: o l'*anpantos* è l'unico successore oppure concorre con i *gnêsia tekna* dell'adottante. E in ciascuna delle due ipotesi la legge prevede che l'*anpantos* possa tenere due comportamenti opposti: l'uno positivo, l'altro negativo.

Qualora l'*anpantos* sia l'unico successore, il comportamento positivo consiste nel τέλλεν τὰ θῖνα καὶ τὰ ἀντρόπινα e nell'*anailêthai* (X 42-45). Il comportamento negativo consiste nel "non voler *tellen*" (X 45-46), a cui consegue il passaggio dei beni ereditari (e quindi della qualità di eredi, come sembra comunque indicare l'espressione *ta krêmata eken*) ai collaterali dell'adottante.

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aver posseduto; c) che non vi è alcun elemento dell'orazione da cui risulti che il problema giuridico in discussione è quello suggerito da Wolff, che si presenta oltre tutto come giuridicamente piuttosto inverosimile: si sente qui, secondo me, l'influsso di Partsch, secondo il quale se un creditore del defunto si fa vivo tardivamente, cioè dopo che l'erede ha preso possesso dei beni ereditari, quest'ultimo potrà sempre liberarsi rilasciandogli uno o più beni ereditari (Partsch 243). Quanto a Dem. 38.7, penso che qui si dica semplicemente che gli eredi non rinunciano a ciò che esiste, cioè a ciò che va considerato come bene ereditario, e non che non rinunciano all'eredità.

Se sussiste realmente l'organizzazione dicotomica della previsione legislativa a cui abbiamo accennato, la clausola *mê epanankon êmên* deve logicamente riferirsi all'altra ipotesi prevista dalla legge, cioè all'ipotesi del concorso fra l'*anpantos* e i *gnêsia tekna* (sia maschi che femmine, anche perché altrimenti resterebbe scoperta l'ipotesi di rifiuto dell'*anpantos* in concorso con i figli maschi). Anche in questo caso sarebbero dunque previsti un comportamento positivo, che consiste sempre nel *tellen* e nell'*anailêthai*, e un comportamento negativo che si ricava implicitamente da XI 1-5: non *tellen* e non *anailêthai*. In questo caso, però, la legge non dice quali saranno le conseguenze di tale atteggiamento negativo (dato che non si può certo scorgere in πλίνι μὲ ἐπικορῆν, XI 5-6, tale conseguenza, anche se a mio parere il significato di quest'ultima disposizione rimane del tutto oscuro). La legge si limita a dire che l'*anpantos* non è obbligato a tenere il comportamento positivo (la conseguenza a cui viene spontaneo pensare è che la sua quota si accresca ai *gnêsia tekna*).

Arriviamo cosi al fulcro di tutto il mio ragionamento. Se in caso di concorso con i *gnêsia tekna* la legge dice che l'*anpantos* non è obbligato a *tellen* e ad *anailêthai*, c'è (o ci deve essere stato sotto una precedente normativa) qualcuno che invece è (o era) obbligato a succedere. Ci si aspetterebbe anzi che la precisazione μὲ ἐπάνανκον ἔμεν servisse a contrapporre la conseguenze che dal comportamento negativo dell'*anpantos* discendono a seconda che sia l'unico successore o che concorra con i *gnêsia tekna*. Più precisamente, se in caso di concorso non è tenuto a *tellen* e ad *anailêthai*, si dovrebbe pensare che quando è l'unico successore egli sia tenuto a entrambi i comportamenti. Nè sarebbe difficile trovare una motivazione convincente per spiegare queste opposte previsioni: se concorre con i *gnêsia tekna*, questi assicureranno comunque la continuità dell'*oikos*; se è l'unico successore diretto, il suo venir meno renderebbe *erêmos* l'*oikos* dell'adottante (per usare la terminologia attica).

In realtà le cose non stanno cosi. Colui che è obbligato a *tellen* e ad *anailêthai* non è l'*anpantos* che si trovi ad essere l'unico successore diretto dell'adottante (tanto è vero che la legge prevede che egli abbia la possibilità di rinunciare, con conseguente passaggio dell'eredità ai collaterali dell'adottante). Chi è allora colui che è (o è stato) obbligato a succedere (e che ci attesta la presenza a Gortina dell'idea di *heres necessarius*)? Si possono fare in teoria due ipotesi: a) i figli *gnêsioi* sono obbligati a succedere; poiché l'*anpantos*, se vale l'analogia con Atene, è equiparato ad essi, è o sarebbe anch'egli obbligato; per questo la legge deve espressamente esentarlo; b) l'*anpantos* è (o meglio era prima del Codice) obbligato a succedere a differenza di tutti gli altri successibili, ivi compresi i figli *gnêsioi*.

Resta comunque il fatto che, in base a X-XI, l'*anpantos* non è un *heres necessarius*.[8] L'ulteriore corollario che se ne può ricavare è che il legislatore gortinio non

[8] Mi pare interessante notare che anche nella documentazione attica sembra emergere un accenno alla possibilità per l'adottato, unico successore, di rinunciare all'eredità. Nonostante il parere contrario di Wyse (265), io ritengo infatti che in Is. 2.41-43 sia chiaramente adombrata la possibilità per

sembra particolarmente turbato dall'ipotesi che un *oikos* rimanga *erêmos* (ma ciò non significa necessariamente che la famiglia nucleare sia meno rilevante a Gortina che ad Atene, come riteneva Gernet *DS*, 140).

9. A questo punto dobbiamo chiederci se vi siano elementi da cui si possa desumere che a Gortina i figli *gnêsioi* sono *heredes necessarii*. La questione si intreccia strettamente con l'altra che abbiamo menzionato, cioè se gli eredi, tanto ad Atene quanto a Gortina, rispondano anche *ultra vires* dei debiti ereditari. Esaminiamo quindi il testo fondamentale in materia, che è XI 31-45.

Anche l'interpretazione di questa norma pone subito un problema terminologico a cui è molto difficile dare una soluzione sicura.

Se gli *epiballontes* non vogliono assumersi i debiti ereditari (e qui è ovvio pensare a un'eredità *hypochreôs* per usare il termine di Is. 10.16, anche se la legge non specifica che si tratta di debiti tali da superare l'attivo), i beni ereditari passeranno ai creditori attraverso una procedura che la legge non specifica, evidentemente perché ben nota (immissione diretta nel possesso? apertura di una procedura concursuale sotto l'eventuale controllo di un magistrato, come sembra probabile quando l'eredità sia passiva? Sembrerebbe da escludere un equivalente della *cessio bonorum* romana perché gli *epiballontes* dovrebbero essersi prima immessi nel possesso dei beni ereditari, cioè dovrebbero *eken ta krêmata*, il che sembra escluso *a contrario* dal tenore stesso della legge).

Ma quale è la conseguenza sul piano del diritto ereditario di questo passaggio dei beni ai creditori?

É interessante notare, a questo proposito, che XI 37-40 è formulata seguendo uno schema logico-sintattico analogo a quello di X 45-47. Soltanto con una differenza appunto terminologica: mentre nel caso in cui l'*anpantos* "non vuole *tellen*," agli *epiballontes* dell'adottante spetterà *eken ta krêmata*, nel caso in cui gli aventi diritto all'eredità "non vogliano" accollarsi i debiti ereditari, τὰ κρέματα ἐπὶ τοῖς νικάσανσι ἔμεν ἢ οἷς κ' ὀπέλει τὸ ἀργύριον. C'è da chiedersi quindi se la scelta di due verbi diversi indichi che il rapporto dei subentranti con i beni ereditari si configura in ciascuno dei due casi in maniera giuridicamente diversa. E precisamente: gli *epiballontes* che subentrano all'*anpantos* nolente sarebbero da considerare a tutti gli effetti eredi; i creditori, che subentrano ai successori nolenti, acquisterebbero la proprietà dei beni ereditari ma non diverrebbero eredi, restando quindi la qualifica di eredi agli aventi diritto nolenti.[9]

Se guardiamo ai numerosi passi del Codice in cui ricorre l'espressione *epi* . . .

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l'adottato *inter vivos* di astenersi dall'eredità, e proprio in un caso in cui l'asse ereditario appare ridotto a zero se non addirittura passivo.

9 A questo proposito sorge un ulteriore problema, e cioè se di fronte al rifiuto di pagare dei primi chiamati alla successione, siano questi stessi, in quanto eredi, a gestire il passaggio del patrimonio ai creditori, oppure se il rifiuto di pagare vada interpretato come rinuncia all'eredità, con conseguente delazione ai successivi chiamati.

êmên, dovremo concludere ancora una volta che non ci troviamo di fronte a un uso giuridicamente univoco.[10]

É difficile dunque stabilire se l'esclusione di ogni ulteriore *ata* a carico dei successibili (XI 40-42) includa anche le spese qualificabili come *thina*, il che significherebbe che la qualità di eredi passa ai creditori. D'altra parte dire che nessuna *ata* li può colpire sembra implicare che essi conservano la qualità di eredi; se avessero rinunciato, la questione non si porrebbe. Se cosi fosse, non solo i figli ma tutti i successori sarebbero da considerare *heredes necessarii*. É anche vero, però, che mantenere formalmente in vita un *oikos* economicamente nullo avrebbe poco senso. L'aspetto religioso si può considerare esaurito, a livello giuridico, con il seppellimento.[11]

In conclusione non ci sono elementi che consentano di stabilire con certezza se la procedura prevista in XI 31 ss. comporti tecnicamente una rinuncia all'eredità da parte degli aventi diritto a succedere.

10. Un problema che si innesta su quello testè discusso è se anche i figli *gnêsioi* possano avvalersi della facoltà riconosciuta genericamente ai successibili in XI 31 ss. Se la risposta fosse positiva, è evidente che i figli, siano o non siano automaticamente eredi, non sarebbero comunque tenuti *ultra vires*.

A parte l'uso del verbo *anailêthai* e della locuzione *ois k'epiballei*, che, per coloro che seguono l'opinione di Willetts, deporrebbero contro l'estensione di XI 31 ss. ai figli (ma si noti che in V 28-29, fra gli *epiballontes* interessati alla divisione ereditaria sono certamente da includere i figli), c'è un elemento a favore dell'estensione fortemente sottolineato dalla dottrina; cioè la norma secondo cui per i debiti del padre rispondono i *patrôia* e per quelli della madre i *matrôia* (per Zitelmann [148 e n. 54] la norma contenuta in XI 42-45 dimostra che, a differenza di ciò che accade ad Atene, i figli non sono *heredes necessarii*).

Si può tuttavia osservare che nemmeno questo argomento appare risolutivo, perché XI 42-45 si applica sicuramente anche al caso in cui i chiamati alla successione siano dei collaterali del defunto. É probabile dunque che *ta patrôia* e *ta matrôia* siano termini

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10 Si potrebbe tener conto di un elemento analogico tratto dalla normativa attica. La legge riportata in Dem. 43.58 impone al demarco di accollare a coloro che "hanno *ta chrêmata*" le spese funerarie. In ciò si potrebbe vedere un'allusione ad una norma analoga a XI 31 ss.: i creditori entrati in possesso dei beni ceduti devono accollarsi le spese funerarie. Tuttavia il fatto che, qualora non vi siano *chrêmata*, la norma attica imponga il pagamento delle spese funerarie ai *prosekontes* del morto, rende possibile un'interpretazione diversa. Se non ci sono *chrêmata*, è probabile che nessuno si presenterà a rivendicare l'eredità: non vi saranno nè *embateusis* nè *lêxis klêrou*. Per questo occorrerà individuare i responsabili in base al mero rapporto di parentela. E' probabile dunque che "coloro che hanno *ta chrêmata*" siano semplicemente gli eredi riconosciuti ufficialmente come tali (*contra* Partsch 241, che parla anche qui di "Haftung des Nachlasses").

11 E' interessante notare che a Gortina *tellen ta thina* (oltre che *ta antrôpina*) è un requisito giuridicamente vincolante per l'acquisto dell'eredità; ad Atene il compimento dei riti funebri sembra un dovere più sociale che giuridico (cfr. Is. 4.19 e Harrison 130 n.3). La questione andrebbe comunque approfondita.

convenzionali riferibili rispettivamente ai beni del marito e a quelli della moglie, anche se non abbiano avuto figli (cosi come a Roma si parla di *paterfamilias* anche riguardo a chi è *sui iuris* pur non avendo figli).

Il problema si complica ulteriormente se teniamo conto anche di un'altra norma del Codice. In IX 1 ss. (se accettiamo le integrazioni di Guarducci, che paiono incontrovertibili) si prevede che la *patrôiôkos* possa disporre con determinate cautele di beni—è da supporre—ereditari, per pagare i debiti gravanti l'eredità. Da questo passo risulta chiaramente che l'ereditiera possiede i beni ereditari (dunque *ekei*); altrimenti non potrebbe vincolarli (*katathemên*) o venderli (*apodothai*) (IX 5). Naturalmente questa norma non contraddice di per sè XI 31 ss. Può darsi che la *patrôiôkos*, o chi per lei o insieme a lei, abbia deciso di *anailêthai ta krêmata* benchè gravati da un passivo, e voglia quindi pagare i debiti ereditari. Ciò forse presuppone (anche se *opêlôn argyron*—IX 1-2—è generico) che i debiti non superino l'ammontare dell'attivo ereditario.

Tuttavia sarebbe possibile anche un'interpretazione diversa, cioè che la *patrôiôkos*, in quanto unica titolare del patrimonio paterno (anche se magari lo ha ereditato dal fratello) si trovi appunto nella condizione di discendente diretta, e come tale non possa "rinunciare" all'eredità. Trattandosi però di una *patrôiôkos*, sorge la necessità di procedere con particolari cautele alle alienazioni necessarie per il pagamento dei debiti ereditari (in quanto tali operazioni potrebbero ledere gli interessi di coloro che hanno diritto di sposarla).

Resta comunque il fatto, siano o non siano i figli compresi fra i successibili che hanno diritto di avvalersi della facoltà riconosciuta in XI 31 ss, che da questa norma risulta senza ombra di dubbio che gli eredi, qualora decidano di pagare i debiti ereditari, rispondono anche *ultra vires*; altrimenti non avrebbe senso dire che nessuna ulteriore *ata* colpirà coloro che rilasciano i beni ai creditori. Almeno per Gortina la tesi di Partsch si rivela insostenibile.

11. L'esegesi di XI 31 ss. ci consente di precisare meglio le modalità di acquisto dell'eredità.

Abbiamo visto sopra che tanto in X 45-48 quanto in XI 31 ss. si fa riferimento a una manifestazione di volontà dei successibili in ordine al soddisfacimento dei debiti ereditari. Io credo che questa manifestazione di volontà debba essere intesa in questo modo: immettersi nei beni ereditari significa "manifestare la volontà" di andare incontro a tutte le conseguenze positive o negative che l'acquisto dell'eredità comporta (si veda la clausola di *P. Eleph.* 2 citata da Partsch p. 242 n.5). Se quindi i chiamati all'eredità non vogliono subire le conseguenze negative, cioè non vogliono accollarsi il pagamento dei debiti ereditari, devono evitare di immettersi nel possesso dei beni ereditari. Credo dunque che il verbo "volere" non alluda qui a una dichiarazione espressa di volontà. (Ciò trova d'altronde conferma in Dem. 35.4 sopra cit.: *echein ta chrêmata* comporta l'obbligo di pagare i debiti ereditari).

Se la "manifestazione di volontà" va intesa nel modo che abbiamo detto, è possibile precisare meglio l'interpretazione di X 45-47. Non è che i beni ereditari vengano sottratti dai collaterali dell'adottante all'adottato che, dopo essersene impossessato, non adempia i relativi obblighi; la legge intende dire che, se l'*anpantos* si impossessa dei beni ereditari, allora è tenuto a τέλλεν τὰ θῖνα καὶ τὰ ἀντρόπινα. Se non vuole *tellen*, deve astenersi dalla presa di possesso.

12. Tenendo presente l'analisi della disciplina gortinia fin qui condotta, possiamo tentare di individuare alcuni degli elementi che caratterizzano l'adozione *inter vivos* ad Atene e la distinguono dalla "adozione" testamentaria. Vedremo così che vi sono indizi sufficienti per affermare che è esistita anche ad Atene una disciplina dell'adozione *inter vivos* distinta da quella dell' "adozione" testamentaria, e che tale disciplina è probabilmente di origine legislativa.

Si possono individuare almeno sei elementi che possiamo considerare caratteristici dell'adozione *inter vivos*.

1) Come abbiamo già visto, l'adottato *inter vivos* si immette mediante *embateusis* nel possesso dell'eredità dell'adottante; l'erede testamentario deve farsela assegnare mediante *epidikasia* (Harrison 95 n.1).

2) Il secondo punto concerne i rapporti fra l'adottato e le eventuali figlie dell'adottante. Se l'adozione è avvenuta *inter vivos*, l'adottato non è obbligato a sposare la figlia dell'adottante per non essere privato del patrimonio ereditario dai futuri discendenti di lei. Se invece "l'adottato" è nominato per testamento, il testatore deve designarlo come marito della figlia e "l'adottato" è obbligato a sposarla se vuole che la designazione produca la sua efficacia.[12]

3) Un terzo punto si ricava da Is. 6.63: la legge stabilisce che, se dopo l'adozione nascono dei figli all'adottante, alla morte di questi il patrimonio sarà diviso in parti uguali fra tutti i figli. In teoria questa regola è applicabile anche all' "adozione" testamentaria; ma, poiché il testamento suole essere redatto quando ci si sente vicini alla morte, è probabile che

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12 Che l'adottato *inter vivos* non sia obbligato a sposare la figlia dell'adottante lo conferma il caso di Cnemone e Gorgia nel *Dyskolos* di Menandro. Tra le clausole del c.d. testamento di Cnemone c'è infatti anche l'incarico a Gorgia di procurare un marito alla propria sorella adottiva (vv. 737-8). E' vero che in questo caso, essendo la ragazza sorella uterina di Gorgia, un matrimonio fra essi sarebbe stato vietato dalle regole del diritto matrimoniale attico, ma non è certo questo il presupposto che giustifica la raccomandazione rivolta da Cnemone a Gorgia. Viceversa la legge sull' "adozione" testamentaria, che ricaviamo da Dem. 43.51 e da Is. 3.68, impone al padre che abbia soltanto figlie femmine di assegnarle in moglie a coloro che designa come eredi. Non è il caso di discutere qui nei dettagli le varie posizioni della dottrina in proposito. Vorrei solo accennare a due opinioni che mi paiono da respingere. Prima di tutto mi pare opportuno ribadire che la c.d. teoria dell'epiclerato naturale, sviluppata da U. E. Paoli (cfr. in particolare *AS* 559 ss.), deve essere abbandonata. Secondo questa teoria l'adottato, non importa se *inter vivos* o per testamento, deve sempre e comunque sposare la sorella adottiva se vuole conservare l'eredità dell'adottante ai suoi discendenti. In secondo luogo vorrei ribadire che appare inutile macchinosa e priva di sostegno nelle fonti, la distinzione formulata da Beauchet, 2.71, secondo cui occorrerebbe distinguere il caso in cui il testatore abbia disposto della donna e dei beni da quello in cui abbia disposto soltanto della donna (*contra* già Harrison 85 n.2).

essa sia stata formulata con riferimento all'adozione *inter vivos*.

4) Un quarto punto lo abbiamo già ricordato discutendo la normativa gortinia (§ 8). Da Is. 2.41-43 si desume la possibilità per l'adottato *inter vivos* di rinunciare all'eredità.

5) Se l'adottato muore senza lasciare figli legittimi, l'eredità dell'adottante ritornerà ai collaterali di quest'ultimo (Dem. 44.63).

6) L'adottato può tornare nella famiglia d'origine se lascia un figlio *gnêsios* nella casa dell'adottante (Dem. 44.64).

13. É interessante notare che almeno i primi cinque elementi, che abbiamo considerato caratteristici dell'adozione *inter vivos* ad Atene, trovano il loro corrispondente nel Codice di Gortina.

1) Da X 39 ss. risulta che l'adottato ha il diritto prioritario di conseguire l'eredità dell'adottante (equiparato a quello che spetta ai figli *gnêsioi*). Le aspettative dei collaterali dell'adottante sono subordinate alla decisione che prenderà l'*anpantos*.

2) Per quanto riguarda i rapporti fra l'*anpantos* e le figlie dell'adottante, nulla fa pensare che l'*anpantos* debba sposare una figlia dell'adottante per realizzare i suoi diritti ereditari.

3) In presenza di figli dell'adottante, l'*anpantos* ha sempre diritto di concorrere, sia pure per una quota minore di quella che spetterebbe ai figli *gnêsioi*.

4) X 39 ss. prevede la possibilità che l'*anpantos* rinunci all'eredità.

5) XI 6-10 prevede che l'eredità dell'adottante ritorni ai suoi collaterali qualora l'*anpantos* muoia senza lasciare figli *gnêsioi*. Questa norma esclude evidentemente la possibilità per l'*anpantos* di adottare a sua volta.

6) Più difficile è stabilire se a Gortina era possibile per l'*anpantos* ritornare nella propria famiglia d'origine lasciando un figlio *gnêsios* nella famiglia dell'adottante. Per Atene è la legge a consentirlo (Dem. 44.63). Nelle coll. X e XI del Codice non vi è traccia di una simile possibilità, ma è probabile che esistessero altre norme relative all' *anpansis*, non richiamate e non abrogate dal Codice. Data la forma con cui si realizzava l'*anpansis*, è però difficile immaginare che una simile operazione potesse effettuarsi con la stessa facilità che ad Atene, dove il figlio dell'adottato viene fatto risultare presso la fratria come figlio dell'adottante (Dem. 44.55).

In relazione all'ultimo punto discusso, ci si può chiedere se anche a Gortina, così come ad Atene, l'adozione comportasse il distacco dell'adottivo dalla famiglia d'origine, con conseguente perdita di ogni aspettativa ereditaria. Mi pare che la questione non sia mai stata affrontata *ex professo*. Autorevoli commentatori del Codice traggono però spunto dai dieci stateri, che l'adottante è tenuto a versare all'*anpantos* in caso di revoca dell'adozione (XI 15), per dedurne che l'*anpantos* si sarebbe trovato privo di risorse (Willetts 31).

Io credo però che la possibilità di adottare ὀπο̂ κά τιλ λε̂ι (X 33-34) non escluda

affatto che l'*anpantos* potesse essere il figlio *gnêsios* di un cittadino (anche se forse si tratta di un requisito non vincolante, che anche ad Atene fu richiesto probabilmente solo dopo l'emanazione della legge di Pericle sulla cittadinanza). In tal caso non vedo perché, in seguito alla revoca dell'adozione, l'*anpantos* non potesse rientrare nella sua famiglia d'origine.

14. Soffermiamoci ancora sul "ritorno" dell'adottato nella sua famiglia d'origine. Una simile operazione, attestata con certezza solo per gli adottati *inter vivos* (Dem. 44.64) ha un senso soltanto se avviene dopo la morte dell'adottante; e tutti i casi che conosciamo lo confermano.

Tuttavia, a parte ogni considerazione di opportunità nel prendere una simile decisione da parte dell'adottato, ci si può chiedere se fosse giuridicamente consentito all'adottato abbandonare unilateralmente, di propria iniziativa, la casa dell'adottante mentre questi era ancora vivo; con la conseguenza di perdere la qualità di figlio adottivo.

Mentre infatti la revoca da parte dell'adottante è prevista e minuziosamente regolata a Gortina (ed è probabilmente attuabile anche ad Atene, per quanto si può capire da Dem. 41.4, senza ricorrere all'*apokêryxis*) né a Gortina né ad Atene è prevista la possibilità per l'adottato di interrompere unilateralmente il rapporto di adozione. Sembra dunque che la mobilità interfamiliare sia una prerogativa di chi si trova nella condizione di "padre."

15. C'è un'altra norma attica, sicuramente riferibile all'adozione *inter vivos*, che vale la pena di prendere brevemente in esame.

Secondo Aeschin. 3.21, il magistrato in attesa di rendere conto della sua amministrazione non poteva οὐδ' ἐκποίητον γενέσθαι, οὐδὲ διαθέσθαι τὰ ἑαυτοῦ. É evidente che *ekpoiêton genesthai* si riferisce al fatto di essere adottato *inter vivos*, mentre *diathesthai ta heautou*, data l'ambiguità del linguaggio degli oratori che abbiamo già rilevata, può riferirsi sia al fatto di adottare qualcuno *inter vivos* sia al fatto di redigere un testamento designando un erede.

Harrison ha dedicato particolare attenzione a questa norma. A proposito di *ekpoiêton genesthai* egli osserva: un uomo ricco che avesse un figlio magistrato sottoposto al rischio di essere condannato in sede di rendiconto, avrebbe potuto persuadere qualche poveraccio ad adottare suo figlio in modo da mettere al sicuro il patrimonio della famiglia (88). Quanto al *diathesthai ta heautou*, egli osserva: non si capisce come il fatto di adottare poteva procurare un vantaggio a chi temeva di essere condannato in sede di rendiconto, dato che il suo patrimonio sarebbe stato in ogni caso assoggettabile ad esecuzione da parte dello Stato; e d'altra parte non si vede chi avrebbe accettato di farsi adottare da una persona che correva un simile rischio.

Io ritengo che la norma citata da Eschine debba essere interpretata alla luce dei principi che regolano i rapporti patrimoniali tra padre e figli. Nel Codice di Gortina si

stabilisce che il padre non può disporre dei beni appartenenti ai figli e i figli non possono disporre dei beni del padre (VI 2-9).

Per Atene non abbiamo indicazioni altrettanto precise, ma possiamo supporre che fossero in vigore, almeno nell'età degli oratori, principi analoghi a quelli stabiliti dal legislatore gortinio.

Il figlio assoggettato a rendiconto, passando in un'altra famiglia per adozione, perdeva ogni aspettativa ereditaria nei confronti del padre naturale; dunque non aveva diritto nemmeno a quella liquidazione anticipata della sua quota ereditaria, che il Codice di Gortina prevede in caso di *ata* che colpisca il figlio (IV 29-31). Qualora fosse dunque scelto come adottante un uomo povero, la polis non avrebbe alcuna possibilità di rivalersi né sulla quota spettante al figlio sul patrimonio del padre naturale, né sul patrimonio inesistente del padre adottivo, né infine sul patrimonio personale dell'adottato stesso, perché se l'adottato è un giovane nella maggior parte dei casi non ha ancora avuto la possibilità di accumulare un consistente patrimonio (cfr. Is. 2.18; 7.41: in quest'ultimo passo l'adottato sottolinea la sua giovane età).

Il motivo per cui il magistrato soggetto a rendiconto non può a sua volta adottare, va probabilmente ricercato nel fatto che l'adottante suole trasferire all'adottato la titolarità del proprio patrimonio.

A parte il c.d. testamento di Cnemone (nel *Dyskolos* di Menandro), in forza del quale Gorgia diverrà titolare del patrimonio di Cnemone con l'obbligo di mantenerlo, abbiamo altri esempi negli oratori da cui appare evidente che l'adottivo amministra e dispone dei beni dell'adottante quale pieno ed esclusivo titolare del suo patrimonio (Is. 2.38-42; 7.27).

Il che fa pensare che, quando gli oratori fanno riferimento in termini tradizionali e convenzionali agli scopi dell'adozione, "trovare qualcuno che ti mantenga" (Is. 2.10) non implichi la ricerca di un adottato ricco che, trasferendosi nella famiglia dell'adottante porti con sè il proprio patrimonio, bensì la ricerca di un giovane della cui capacità e onestà ci si possa fidare, e a cui trasferire immediatamente il proprio patrimonio.[13] Ora, è vero che il patrimonio dell'adottante rimarrebbe comunque assoggettabile a esecuzione da parte della *polis* anche se trasferito al figlio adottivo, perché il figlio risponde almeno dei debiti

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13 Io ritengo quindi che l'interpretazione più convincente del "testamento" di Cnemone sia quella proposta da C. Préaux nel 1960 ("adoption + partage d'ascendant") (cfr. anche Karabelias, "L'épiclerat dans la Comédie," in *Symposion* I, 229 n.61). Ritengo probabile che una situazione del genere si realizzi anche in Dem. 41.3-4. Dopo il litigio con Leocrate e la revoca dell'adozione da parte di Poliuto, Leocrate agisce in giudizio contro Poliuto e Spudia, il nuovo marito della ex-moglie di Leocrate; dopo di che si giunge a una transazione, in base alla quale Leocrate recupera ὅπερ ἦν εἰς τὴν οὐσίαν εἰσενηνεγμένος. Io credo che non si tratti di ciò che Leocrate ha portato con sé al momento dell'adozione, ma di ciò che ha guadagnato gestendo il patrimonio di Poliuto, cioè dell'incremento di quel patrimonio (cfr. Mossé, *Symposion* VI). Qualcosa del genere potrebbero rappresentare anche i dieci stateri che l'adottante deve versare all'*anpantos* in caso di revoca dell'adozione (Cod. Gort. XI 14-17). Può rappresentare un'indicazione interessante il fatto che ad Alicarnasso, all'incirca nella stessa epoca del Codice di Gortina, dieci stateri è il patrimonio minimo per evitare la riduzione in schiavitù in sede di esecuzione: si veda la r. 38 della c.d. iscrizione di Ligdamis (su cui A. Maffi, *L'iscrizione di Ligdamis*, [Trieste 1988]).

pubblici del padre; però il figlio sarà riuscito senz'altro con maggiore facilità ad alienare i beni del padre adottivo, ostacolando e ritardando così il soddisfacimento del credito vantato dalla *polis* nei confronti dell'adottante condannato in sede di rendiconto.

Quanto alla designazione di un erede testamentario, ipotesi anch'essa ricompresa—stando alla lettera del testo—nel divieto di *diathesthai ta heautou*, valgono probabilmente le stesse motivazioni. É singolare però la diversità di trattamento fra chi è già stato riconosciuto come debitore pubblico, e ha come eredi almeno i discendenti legittimi (cfr. *IG* II^2 1627-28), e il magistrato in attesa di rendere conto. A meno che anche al debitore pubblico non sia vietato di fare testamento (oltre che di adottare *inter vivos*) e quindi che ad entrambi possano succedere come eredi soltanto i discendenti legittimi.

16. Si tratta ora di vedere quali delle disposizioni che disciplinano l'adozione tra vivi siano applicabili anche all'erede designato per testamento.

Per i primi due punti sopra individuati (acquisto dell'eredità e rapporto con la figlia unica discendente del disponente) la diversità di trattamento è legalmente certa (e probabilmente sancita per legge).

Consideriamo i punti 3) e 4).

3) Abbiamo già detto che tanto l'adottato tra vivi quanto l'erede designato per testamento concorrono in parti uguali (ad Atene) o disuguali (a Gortina) con i figli legittimi che nascono dopo l'adozione o—per Atene—dopo la redazione del testamento.[14] Si tratta di un'equiparazione perfettamente spiegabile, dato che anche l'adozione ha per scopo principale la creazione di un erede.

4) Lo stesso discorso vale per il quarto punto. Se quanto abbiamo osservato sopra (§8) trova conferma nelle fonti, anche l'adottato tra vivi, così come l'erede testamentario, può rinunciare all'eredità (benché ciò, come abbiamo visto anche per la disciplina gortinia, sembri contraddire il principio della equiparazione ai figli *gnêsioi*, se è vero che questi sono *heredes necessarii*).

I punti 5) e 6) appaiono invece molto più problematici.

5) Da dove risulta con certezza che, se l'erede testamentario muore senza figli, l'eredità ritornerà ai collaterali del testatore? (La questione è oltre tutto complicata dal fatto che l'adottivo, tra vivi o testamentario, appartiene molto spesso alla famiglia del disponente (cfr. Gernet, *DS* 129-31).

6) E ancora, per il sesto punto: da dove risulta con certezza che l'erede testamentario può ritornare nella propria famiglia d'origine se lascia un figlio legittimo nell'*oikos* del testatore? E da dove risulta, perché si possa parlare di "ritorno," che l'erede testamentario, avendo ottenuto l'eredità mediante *epidikasia*, perde i legami con la propria famiglia d'origine?

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[14] Io credo infatti che anche a Gortina l'*anpansis* sia consentita solo a chi non ha figli *gnêsioi*: è un punto che la legge non ha bisogno di richiamare perché resta immutato.

É evidente che l'applicazione all'erede testamentario di questi due ultimi principi, chiaramente dettati per l'adozione tra vivi, rafforzerebbe in maniera rilevante le aspettative dei collaterali del testatore, ma indebolirebbe in eguale misura la facoltà di disporre che la legge soloniana tende evidentemente a riconoscere al testatore.

Il risultato a cui si approda è che comune ad adottato tra vivi e a erede testamentario sembra soltanto ciò che attiene strettamente al meccanismo della successione. Infatti i punti 3) e 4) sono comuni anche agli eredi legittimi: concorso fra più aventi diritto di uguale grado e facoltà di rinunciare. A ciò va aggiunto un presupposto comune di legittimità: tanto l'adozione tra vivi quanto la nomina di un erede testamentario presuppongono l'assenza di figli legittimi dell'adottante o del testatore, in quanto entrambe realizzano un atto di disposizione dei beni (ciò tanto più se nell'adozione tra vivi si verifica abitualmente, come abbiamo osservato, un immediato trasferimento del patrimonio dell'adottante all'adottato).

17. C'è un altro aspetto della disciplina giuridica dell'adozione rispetto a cui l'equiparazione dell'adottato tra vivi all' "adottato" testamentario risulta problematica.

Mi riferisco alle formalità che devono essere adempiute affinché l'adozione sia considerata valida ed efficace. A Gortina tali formalità consistono nella presentazione all'assemblea e nel sacrificio offerto all'eteria. Ad Atene consistono nell'iscrizione dell'adottato alla fratria e al demo dell'adottante da parte di quest'ultimo.

La dottrina atticistica afferma concorde (Lipsius 515-16; Bruck 54 n.3; Beauchet, II.23) che anche l'erede testamentario doveva iscriversi (o meglio autoiscriversi) alla fratria e al demo del testatore defunto (a meno che non ne facesse già parte; benché anche in questo caso mi pare che avrebbe dovuto essere annotata sui registri della fratria e del demo l'acquisizione della qualità di "figlio"). In realtà non c'è nessuna fonte attica, a mia conoscenza, che lo confermi. E dal punto di vista dello stretto diritto ereditario l'*epidikasia* dovrebbe essere titolo insieme necessario e sufficiente a investire il designato della qualità di erede.

Altra questione strettamente collegata alla precedente è quella del nome. Come viene segnalata l'adozione sul piano onomastico? In età ellenistica sappiamo che al nome del padre naturale si aggiunge quello del padre adottivo. Ma per Atene, che io sappia, non abbiamo nessuna attestazione letteraria o epigrafica in proposito. (In un passo di Iseo—2.41—l'adottato tra vivi manifesta la sua gratitudine all'adottante che gli ha dato il suo nome. Ma come va intesa questa affermazione? L'adottato cambiava patronimico o addirittura mutava di nome? cfr. anche Is. 7.17).

La questione è resa ancora più oscura dal fatto che l'adozione non sembra una pratica molto diffusa, se dobbiamo giudicare non dagli oratori ma dalle fonti storico-

politiche.[15]

Non siamo dunque in grado di dire se sul piano onomastico adottato tra vivi ed erede testamentario erano equiparati, ma pare legittimo avanzare qualche dubbio.

18. In definitiva io credo che anche ad Atene sia esistita una legislazione concernente l'adozione tra vivi e che essa risalga ad un'età precedente Solone. Ritengo inoltre che la legge testamentaria di Solone abbia mutuato dalla legislazione riguardante l'adozione tra vivi alcune norme che Solone riteneva estensibili alla materia testamentaria. Questo fatto (e in particolare il presupposto comune della assenza di figli *gnêsioi* del disponente), unitamente all'analogia di funzione (atto di disposizione dell'intero patrimonio), ha fornito lo spunto agli oratori per unificare la figura dell'adottato tra vivi e quella dell'erede testamentario, peraltro rimaste sempre distinte anche a livello di disciplina giuridica, sotto l'idea di "creazione di un figlio."

Per trovare ulteriori argomenti a favore di questa opinione, vorrei terminare esaminando il testo della legge di Solone cosi come viene riportato in Dem. 46.14.

Per orientarci nell'intrico di interpretazioni che di questo celebre testo sono state proposte, possiamo fare riferimento alla chiara esposizione di Harrison (85-87).

Lasciando da parte l'interpretazione di Beauchet e di Lipsius (su cui cfr. Harrison 86 n.1 e Brindesi 42-3), tanto macchinosa e così poco aderente alla lettera del testo da poter essere tralasciata (come già proponeva Gernet, *DS* 128, n.3), restano in gioco due proposte di interpretazione: a) nessun adottivo può disporre per testamento; b) possono fare testamento solo quelli che sono stati adottati a loro volta per testamento, non gli adottati tra vivi.

L'interpretazione *sub* b) è stata sostenuta in particolare da Thalheim, il quale traduceva in questo modo: "Coloro che non sono stati adottati in modo tale da non poter rinunciare all'eredità e da non essere obbligati a far valere per via giudiziaria (*epidikasia*) i loro diritti ereditari, possono disporre come vogliono . . ." (80 n.). Sono infatti gli adottati *inter vivos* che non possono rinunciare all'eredità e non devono ricorrere all'*epidikasia* in quanto sono equiparati ai figli *gnêsioi*.

L'interpretazione di Thalheim è, se non proprio accolta senza riserve, considerata degna di grande attenzione da parte di Harrison (e, più di recente da parte di Cataudella). Quanto a Gernet, mentre in un primo tempo aveva preso nettamente posizione a favore dell'interpretazione *sub* a), sia pure adattandola alla sua concezione della legge soloniana (*DS* 128: "ceux qui sont eux-mêmes fils adoptifs ne pourront pas adopter à leur tour: voila tout"), in un secondo tempo si schiera invece con Thalheim. Nell'edizione delle orazioni

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15 A parte Hdt. 6.38, 103 (adozione di Stesagora da parte di Milziade il Vecchio: Gernet, *DS* 130 n.1), le fonti sono tarde: Plut. *Them.* 32.1-2; [Plut.] *Vita X Orat.* 834b; quest'ultimo caso (atimia comminata a chi adottasse i figli di due condannati) sembrerebbe attestare una certa diffusione della pratica dell'adozione come strumento politico.

demosteniche del 1957 egli propone infatti una traduzione del testo greco che sembra piuttosto una traduzione francese della traduzione tedesca di Thalheim: "Quiconque n'avait pas été adopté, au moment de l'entrée en charge de Solon, dans des conditions telles qu'il ne pût répudier la succession et qu'il n'eut pas à en demander l'attribution judiciaire, pourra disposer de ses biens à son gré . . ." (190 e n.1 per l'espressa adesione alla tesi di Thalheim).

Si schiera invece nettamente a favore dell'interpretazione *sub* a) il Brindesi, il quale rileva però che la precisazione introdotta da *oste* appare del tutto superflua. E ciò sia perché essa si limita a descrivere tautologicamente la condizione del figlio *gnêsios*, il quale ha il dovere di non rinunciare all'eredità (*mête apeipein*) e ha il diritto di immettersi nel possesso delle cose ereditarie senza doverne chiedere l'assegnazione mediante *epidikasia* (*mête epidikasasthai*); sia perché non si vede il motivo di richiamare "tale diritto e tale dovere, attuali se mai nel momento in cui il figlio subentrava nell'eredità paterna, in una legge che gli conferiva il diritto di disporre liberamente, sia pure con alcuni limiti, dei suoi beni" (44); sia, infine, perché l'inciso in questione compare solo in Dem. 46.18 e non in Dem. 44.68, dove la legge è nuovamente riportata quasi con le stesse parole. Pertanto Brindesi ritiene che l'inciso sia da considerare un'inserzione demostenica, onde richiamare alla memoria dei giudici il criterio di distinzione tra figli naturali e figli adottivi (44-5).

Se il testo riprodotto in Dem. 46.14 riproduce nella sostanza il contenuto della norma soloniana, mi pare che l'interpretazione di Thalheim sollevi non poche obiezioni.

Prima di tutto presuppone che il testamento esistesse già; altrimenti la legge non potrebbe eccettuare implicitamente dal divieto di *diathesthai* coloro che sono stati "adottati" per testamento. In secondo luogo presuppone che gli adottati *inter vivos* non possano rinunciare all'eredità, il che, come sopra si è visto, non è affatto sicuro.

In terzo luogo contraddice la tesi, corrente in dottrina e accolta anche dai fautori dell'interpretazione di Dem. 46.14 che stiamo criticando, secondo cui l'adozione *inter vivos* e quella testamentaria sono sottoposte a un'identica normativa. Harrison si è reso conto che occorre spiegare in qualche modo la discrepanza introdotta da questa norma, ma la sua spiegazione è ben lungi dal soddisfare. Secondo Harrison, infatti, in caso di adozione testamentaria, ai collaterali del testatore è concesso di attaccare la designazione dell'erede su di un piano di parità, in quanto che sia il designato sia i collaterali possono (e devono) rivendicare l'eredità mediante *lêxis klêrou*. Se l'adottivo vince la competizione giudiziaria e riesce a farsi assegnare l'eredità mediante *epidikasia*, è come se ripartisse da zero: diventa capo dell'*oikos* con pieni poteri, ivi compreso quello di fare testamento o di adottare *inter vivos*. Viceversa nei confronti dell'adottato *inter vivos* i collaterali dell'adottante sono disarmati; possono solo aspettare e sperare che muoia senza figli (86-7). Mi pare che nelle considerazioni di Harrison vi sia una notevole forzatura dei principi su cui si regge il diritto ereditario attico. L'*epidikasia* serve a stabilire se la designazione testamentaria è stata validamente espressa; non si capisce perché dovrebbe anche sottrarre il designato, vincitore

della competizione giudiziaria, alle regole in materia di adozione, se è vero, come anche Harrison ritiene, che esse sono identiche per adottato *inter vivos* e per adottato testamentario.

Ma l'obiezione che per me ha maggiore peso è quella che ho esposto per prima. Io ritengo infatti che Solone abbia creato il testamento, inteso nel senso di possibilità di scegliere un erede estraneo mediante una dichiarazione unilaterale di volontà destinata a valere dopo la morte del testatore. E d'altra parte non credo che prima di Solone esistessero tanto l'adozione *inter vivos* quanto l' "adozione" testamentaria, come sono costretti ad affermare coloro che interpretano Dem. 46.14 nel modo qui criticato; anche perché non si capisce allora che bisogno ci sarebbe stato della legge di Solone (ritengo infatti inaccettabili i motivi proposti da Ruschenbusch, come vedremo più avanti).

Prima di Solone, secondo me, esisteva solo l'adozione *inter vivos*, che era probabilmente regolata più o meno secondo il modello contenuto nel Codice di Gortina. Solone ha conferito la facoltà di *diathesthai ta heautou* a coloro che avevano già la facoltà di adottare tra vivi, cioè a tutti (i cittadini?) che non fossero stati a loro volta adottati (*hosoi mê epepoiênto*, come conferma Dem. 44.63 e 67-68).

Se dunque non c'erano due o più modi di adottare prima di Solone, l'inciso ὥστε μήτε ἀπειπεῖν μήτ' ἐπιδικάσασθαι non può riferirsi alle modalità con cui una particolare categoria di "adottivi" succedevano, perché sarebbe stato pleonastico e perché qui non si tratta, come ha giustamente osservato Brindesi (sopra cit.), del modo in cui gli interessati succedono all'adottante, ma del modo in cui altri succede a loro.

19. Vediamo quindi se è possibile proporre un'interpretazione di Dem. 46.14 che sia conforme ai rilievi fin qui svolti, pur essendo consapevoli che il testo è talmente ellittico da rendere pressoché impossibile un'interpretazione sicura. Consideriamo prima di tutto il verbo *apeipein.*

É vero, come ha notato Brindesi, che la citazione della nostra legge, contenuta in Dem. 44.68, non riporta l'inciso ὥστε μήτε ἀπειπεῖν μήτ' ἐπιδικάσασθαι. Però Brindesi non rileva che da Dem. 44.64 apprendiamo che il legislatore ha impedito all'adottivo di adottare a sua volta (*apeipen mê poieisthai*), regola che ben conosciamo e che il confronto con Gortina induce ad ascrivere al nucleo più antico della disciplina dell'adozione tra vivi.

A me pare quindi possibile, se non probabile, che nell'inciso di Dem. 46.14 il verbo *apeipein* sia usato nello stesso senso in cui lo è in Dem. 44.64. Soltanto con riferimento forse non tanto al legislatore quanto a coloro che sono interessati all'applicazione di quella norma, cioè ai collaterali dell'adottante. Se questa congettura è attendibile, tutto l'inciso viene ad assumere un significato corrispondente più o meno a questa traduzione italiana:

"A partire dall'arcontato di Solone, coloro che non sono stati adottati, cosicché non

si può impedire loro (di adottare) nè si può rivendicare in giudizio l'eredità (contro coloro che essi hanno adottato), possono disporre delle loro sostanze come vogliono mediante testamento."

La normativa concernente l'adozione tra vivi era talmente nota da non richiedere da parte di Solone più di un sintetico rinvio. Chi è stato adottato non può trasmettere il patrimonio ereditato dall'adottante se non ai propri figli *gnêsioi*; non può adottare, e se tenta di farlo, i collaterali di colui che lo ha adottato possono impedirglielo (il verbo, sottinteso, è ricavato *ad sensum* dall'*epepoiênto* iniziale), probabilmente intervenendo all'atto della presentazione alla fratria (arg. Is. 6.22).

Viceversa che è *gnêsios*, cioè non è stato adottato, può adottare, e i collaterali non possono impedirglielo.

Chi è stato adottato da uno *gnêsios* ha poi il diritto, alla pari di quest'ultimo, di immettersi nel possesso dei beni ereditari senza ricorrere all'*epidikasia*; perciò, se i collaterali dell'adottante rivendicano l'eredità di questi mediante *epidikasia*, l'adottato potrà bloccare la loro iniziativa mediante *diamartyria*. Viceversa, contro l'adottato da parte di un adottato i collaterali del primo adottante possono rivendicare in giudizio l'eredità (cfr. Dem. 44).

Se l'interpretazione da me proposta di Dem. 46.14 è corretta, essa conferma che prima di Solone all'adozione tra vivi si applicavano già due regole documentate per il V sec. a Gortina e per il IV ad Atene: 1) l'adottato non può adottare; 2) se l'adottato muore senza figli *gnêsioi*, l'eredità ritornerà ai collaterali dell'adottante (mediante *epidikasia*). Ulteriore conseguenza che ne deriva è che la norma soloniana, riferita in Dem. 46.14, non dice se l'erede testamentario possa o non possa adottare (tra vivi o per testamento).

20. Le considerazioni fin qui svolte ci permettono forse di apportare qualche contributo al dibattito sul contenuto della legge soloniana sul testamento, con particolare riferimento alla critica di Ruschenbusch a Gernet. Riassumiamo brevemente le posizioni dei due studiosi.

Gernet sostiene che prima di Solone l'adozione serviva a introdurre un estraneo nel gruppo familiare, ma non gli conferiva la qualifica di erede. É Solone che consente di attribuire il diritto di ereditare, a preferenza dei collaterali, mediante adozione tra vivi. Ciò si realizza in due modi: Solone "a permis à celui qui n'avait ni fils ni filles de se choisir un héritier, qu'il adoptait"; inoltre "il a permis à celui qui n'avait qu'une fille de choisir à cette fille un mari qu'il adoptait" (*DS* 136). Nel corso del tempo, poi, in via consuetudinaria l'adozione tra vivi si è trasformata in adozione testamentaria, che gli oratori attici del IV sec. assimilano appunto all'adozione tra vivi di origine soloniana.

Contro la tesi autorevolmente ribadita da Gernet è intervenuto nel 1962 E. Ruschenbusch, il quale ha sostenuto, con argomenti convincenti che non occorre qui riferire per esteso, che il *diathesthai* concesso da Solone è un atto *mortis causa*, un

testamento in senso proprio, e non un'adozione tra vivi. Ciò che non convince nelle considerazioni di Ruschenbusch è però il modo in cui egli intende il rapporto fra l'adozione tra vivi e il "testamento" soloniano.

Ruschenbusch critica (giustamente) la dottrina dominante, secondo la quale la legge sul testamento di Solone mira a scardinare il *genos* favorendo l'emancipazione del singolo dal gruppo familiare (a questa critica sfugge però Gernet: cfr. *DS* 124). Nello stesso tempo, però, Ruschenbusch sostiene che il testamento non è stato introdotto da Solone perché esso esisteva già; anzi, lo scopo della legge soloniana sarebbe stato quello di risolvere alcuni problemi che si erano manifestati nella pratica testamentaria: adottivi che, pur non avendo avuto figli, designavano come eredi del patrimonio dell'adottante membri della propria famiglia d'origine; figli diseredati perché il padre si era lasciato convincere dalla moglie a nominare erede un membro della famiglia di lei ecc. Per questo Solone vieta di fare testamento al padre che abbia dei figli e all'adottivo in ogni caso; inoltre riconosce validità solo alle disposizioni testamentarie assunte da chi è nel pieno possesso delle proprie facoltà mentali ed è libero da ogni coazione esterna.

Sembra dunque di capire che per Ruschenbusch tanto il testamento quanto l'adozione tra vivi preesistevano a Solone ed erano regolati dalla consuetudine. La legge di Solone intervenne a disciplinare il testamento, mentre l'adozione tra vivi continuò a non essere oggetto di previsione legislativa ancora nel IV sec. a.C. (Ruschenbusch 308, conferma "das Fehlen eines Gesetzes über die Adoption" in diritto attico). Che non esista una legge che regola l'adozione tra vivi in diritto attico, lo attesta per Ruschenbusch il fatto che, per stabilire quali siano i requisiti per poter adottare *inter vivos*, si fa riferimento alla legge soloniana sul testamento, e ciò in due modi: o si fa direttamente passare la legge testamentaria come legge sull'*adoptio inter vivos* (Is. 2.13), oppure si argomenta per analogia. Quest'ultimo procedimento è attestato da Dem. 44.63:[16] per dimostrare che l'adottato tra vivi non può a sua volta adottare, Demostene si basa su due argomenti: a) l'adottato non può tornare nella sua famiglia d'origine se non ha generato un figlio legittimo che continui l'*oikos* dell'adottante; dunque non può tornare lasciando un figlio adottivo; b) l'adottato non può adottare per testamento. Dall'insieme di a) e b) si deduce che l'adottato non può adottare in nessun caso. Se, per negare che l'adottivo possa a sua volta adottare, ci si appella, direttamente o per analogia, alla legge che vieta all'adottivo di testare, ciò significa che non esiste una legge sull'adozione tra vivi.

La conclusione testè riferita mi pare inaccettabile. Se davvero non fosse esistita una legge sul'adozione tra vivi, non si capirebbe da dove Demostene avrebbe ricavato che l'adottato non può abbandonare l'*oikos* dell'adottante se non vi lasci un figlio nato da lui. In secondo luogo non mi pare che da Dem. 44.63 non si possa desumere l'esistenza di una norma sui requisiti per adottare *inter vivos*. La regola è semplicemente espressa in forma

16 Ruschenbusch "Dikasterion panton kyrion," *Historia* 6 (1957) 257-74 (= *ZGR* 368-9).

negativa. Ce lo conferma una norma del Codice di Gortina molto simile a quella citata da Demostene. In XI 6-10; leggiamo infatti che se l'adottato muore senza aver generato figli (γνέσια τέκνα μὲ καταλιπόν), il patrimonio dell'adottante passerà ai collaterali di quest'ultimo. Anche qui non si dice esplicitamente che l'adottato non può a sua volta adottare, ma è ovviamente implicito, cosi come è implicito per il diritto attico che chi non può abbandonare la casa dell'adottante senza lasciarvi un figlio da lui generato, non può adottare a sua volta. Manca invece nel Codice la norma concernente il divieto per l'adottivo di testare perché, come sappiamo, nella Gortina di quel tempo non è in uso il testamento di tipo soloniano (anche se a mio parere non sono ignote le disposizioni *mortis causa*).

21. Non mi pare dunque che gli argomenti di Ruschenbusch siano sufficienti a dimostrare che ad Atene l'adozione *inter vivos* non è mai state disciplinata da una normativa specifica. Anzi, se l'interpretazione di Dem. 46.14 da me proposta è convincente, possiamo affermare che questa normativa preesiste a Solone, ciò che d'altronde è coerente con l'evoluzione del diritto greco in questa materia.

Non risultano convincenti, secondo me, nemmeno gli argomenti con cui Ruschenbusch tenta di dimostrare che la legge di Solone sarebbe intervenuta a risolvere alcuni inconvenienti che si erano manifestati nella prassi testamentaria a lui precedente.

Per quanto riguarda la possibilità per l'adottivo di istituire erede un estraneo, anche se ritenessimo che il testamento preesiste a Solone, essa comunque doveva risultare esclusa dal tenore di una norma concepita secondo il modello che ritroviano nel Codice di Gortina in XI 6-10.

Per quanto riguarda la diseredazione dei figli allo scopo di lasciare erede un estraneo, si può osservare quanto segue. Poiché la legge di Solone stabilisce che può fare testamento solo chi non ha figli, Ruschenbusch ne deduce che prima di Solone poteva fare testamento anche chi aveva figli, presumibilmente dopo averli appunto diseredati. A ciò si possono opporre almeno due obiezioni. Il fatto che possa fare testamento solo chi non ha figli non significa necessariamente che prima di Solone poteva fare testamento anche chi aveva figli; può significare che Solone stabilisce come requisito per fare testamento lo stesso requisito che costituiva già un presupposto per poter adottare *inter vivos*. In secondo luogo: se Solone avesse consentito di fare testamento solo a chi non aveva figli, dalle fonti dovrebbe risultare che non era consentito ricorrere all'*apokêryxis* di un figlio al solo scopo di poter fare testamento e che, in ogni caso, un simile testamento sarebbe stato invalido; viceversa, per quanto l'*apokêryxis* sia un istituto poco noto, non vi è alcun indizio che essa debba essere messa in relazione con la legge testamentaria di Solone.

Infine, quanto alla clausola che tende a garantire la libertà di formazione della volontà testamentaria (la c.d. "Willensklausel"), nulla fa pensare che anche in questo caso si tratti di una restrizione a una precedente situazione di arbitrio. Proprio perché il testamento, a differenza dell'adozione, è un atto che può essere redatto in segreto, o

comunque senza l'ampio controllo pubblico che accompagna l'adozione tra vivi, si giustifica che per la sua validità si richieda un accertamento delle circostanze in cui la volontà si è formata e manifestata.

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Response to Alberto Maffi

In his inspiring paper, Maffi was concerned with a dozen interesting questions. Some of them are most fundamental, so that his study will inevitably be a lecture on a number of controversial problems of Greek law, particularly for Solon's laws on the disposition of the estate in case of death. Although one may feel a temptation to comment on the many important conclusions and ideas reached by this paper, I would like to restrict my response mainly to one point: the *anpansis* in Gortyn.

Maffi asserts that *eispoiêsis* in Athens and *anpansis* in Gortyn had perfectly analogous purposes—to create the person who will continue the oikos (section 4). Nevertheless in Gortyn is a question about adoption *inter vivos*, he adds that "one may think that *anpansis* realized its effects only after the death of the *de cuius*, and that the Code is concerned only with what happens after the death of the adopter" (section 5).

He reminds us of two main arguments in favor of this attitude: first, the formal analogy between the Roman *testamentum calatis comitiis* and *anpansis* (sacrificial victim + vine) and second, the fact that the Code pays attention only to the question of what will happen after the death of the adopter, having no interest in the relations among adopter and adoptee during their lives. So the literature accepts without detailed argumentation the attitude that *anpansis* was an *inter vivos* act, but on the other hand, most scholars are concerned with its *mortis causa* effects or, as Maffi would say, with *anpansis* as one element of hereditary strategy in Gortyn.

My point is that in Gortyn *anpansis* was not used exclusively, or maybe not yet even primarily, to realize effects after the death of *anpanamenos*, and that it is questionable if the Code occupies itself only with the problem of what will happen after the death of the adopter. It is my impression that *anpansis* in Gortyn was still applied primarily in order to create effects before the death of the adopter (and that therefore it is an *inter vivos* act not only formally). The hereditary purpose of it may have been but a secondary and accessory consequence. Of course, it does not automatically mean that it was the same situation in Athens, nor that the consequences of *anpansis* in Gortyn after the death of *de cuius* were unimportant.

First, the argument that *anpansis* was formally analogous to the Roman *testamentum calatis comitiis* (stressed long ago by comparativists aiming to prove the identity of numerous Greek and Roman institutions) is not of huge value. Sacrificial victim and wine are such common formalities for important legal acts among Indo-European people that one is not able to conclude from analogous forms that legal consequences of both institutions were equal, analogous, or similar.

Secondly, the argument that the Code takes into account only what happens after

the death of the adopter is not completely convincing. I would like to draw attention to col. X and XI. The section on adoption in the Code begins with X 33-39 and the famous words ἄνπανσιν ἔμεν ὅπο κά τιλ λῆι—that it is allowed to adopt as one wishes. Then comes the description of the formalities needed to perform adoption (gather people at agora, victim, and wine). These regulations do not address the problem of *mortis causa* effects. They simply describe formalities of the act so that one cannot assert that they relate exclusively to posthumous effects.

Not until then do the regulations come about "what happens after the death of the adopter"—if the adopter has no children, if he has sons or daughters, if the adoptee has no children. This section covers the end of X (40-53) and the beginning of XI (1-10), but then follows again the regulation concerning formalities on renouncing adoption and a corrective clause prohibiting retroactive effects (XI 10-23). Again, all these rules evidently do not treat problems concerning what happens after the death of the adopter. Speaking in quantitative terms, rules about *mortis causa* effects of *anpansis* are given in 23 lines, while 19 lines are devoted to general elements of the adoption (its constitution and suspension). Accordingly, it is hardly possible to assert that the Code speaks only about what happens after the death of the adopter.

So much for the arguments in favor of the idea that *anpansis* realized its effects after death exclusively. On the other side, it seems possible to offer a few arguments in support of the attitude that in Gortyn *mortis causa* effects were not the only or primary aim of *anpansis*, or that the main or sole purpose of it was to create a person who will continue the oikos.

a) First, X 48 reads: αἰ δέ κ' ἐι γνέσια τέκνα τῶι ἀνπαναμένοι . . .—"if there should exist legitimate children of the adopter, the adopted son will receive . . ." This implies that the *anpansis* could be performed even if the adopter has children of his own! In that case, it is not correct to state that the purpose of adoption in Gortyn was only to save the oikos from becoming extant: legitimate children are naturally the first in charge to fulfill that important task.

A number of scholars interpret this to mean that perhaps the rule was applied to children born after the adoption. This may be so, particularly if one has in mind the Athenian pattern. Unfortunately, we do not have decisive proof favoring this thesis for Gortyn. Until then, we are obliged to take into account another solution as well—the one that linguistically derives from the source and is accepted by Dareste, Guarducci, etc. In these terms, it should become evident that the main aim of *anpansis* in Gortyn was not primarily to create a rescuer of the oikos.

b) According to X 45-48 the adoptee is allowed to refuse to fulfill all (legal and religious) obligations after the death of the adopter (in which case the property goes to *epiballontes*). There is no doubt about the meaning of the clause in this case (and the similar solution that was in effect in Athens in the time of orators—Isaeus 2.41-43, the case

of Menecles). So, if the main purpose of the institution was to create an heir who will ensure the salvation of the oikos, such a rule—which leaves the outcome completely dependant on the will of the adoptee (after the death of the adopter, who has no possibility to change the situation any more)—would be at least strange. If *anpansis* was primarily a means for such an important goal as the continuation of the oikos, one could scarcely tolerate giving the adoptee such freedom of choice after the death of the adopter. But if the meaning of *anpansis* was directed mostly to the relations between adopter and adoptee during their lifetimes, such a rule would be quite understandable.

c) Similar is the rule in X 53-XI 5 regulating the situation if the adopter left a daughter—an *epiklêros*, or several of them. In that case as well, the adoptee does not have to fulfill the obligations of the adopter and accept the property. Having this rule in mind Maffi himself, among others, arrived at a very important and convincing conclusion—that an *anpantos* was not a *heres neccessarius* and that the legislator in Gortyn was not particularly worried about the hypothesis that the oikos could remain *erêmos* (section 8). It can all, however, point to the conclusion that the target of *anpansis* was still not merely or primarily connected with the continuation of oikos.

d) The rules on revocation (XI 10-17) are also significant. Informal revocation of adoption is not completely in accord with the social importance of *anpansis*, if its primary purpose is to save the oikos. But, if it was aimed more toward the life of the adopter and adoptee, it would be more proper to have such an informal breaking of ties among adopted son and father in situations which do not favor common life any more. The society is, of course, not much concerned with those internal relations and affairs. Therefore we find the passive attitude of the collective (noticed already by Dareste, Guarducci, Willetts). The passive role of the assembled people both in the constitution and in the revocation of *anpansis* does not point to very important hereditary and religious functions of this act. (One must inevitably recall the much more active role of the assembly in early Rome, giving its consent to the act of nominating an heir.)

e) The final rules, containing a ban of retroactive effects (XI 19-23), provide that, "as regards matters of previous date, in whatever way one holds property, whether by adoption or from an adopted son, there shall be no liability." This is an example par excellence which reveals that the *anpansis* in Gortyn produced very important legal consequences, not only after the death of the adopter. It shows clearly the significance that *anpansis* had for both parties during their lives: the hope that the adoptee will receive the property and prolong the oikos of the adopter was not the only result expected from this legislation.

On the contrary, it is clear that it was possible and normal that the adopter could benefit during his own lifetime from the effects of an adoption he had performed: he might get important value from an adopted son during his life. Kohler rightly observed that the adoptee in Gortyn had an obligation towards the adopter as a son, including the obligation

to maintain the father (71: "das Adoptivkind hat die Kinderspflichten zu erfuhlen, . . . den Adoptivvater zu erhalten"). The fine of 10 Gortynean staters for the renouncing of an adoption by the adopter could be compensation for the contribution that the adoptee has made to the benefit of his adoptive father and his oikos. Again, this makes it doubtful that the *anpansis* realized its effects only after the death of *anpanamenos*.

f) A few words about *anailêthai*. Maffi has brilliantly shown all the controversies surrounding that term and has come to the conclusion that in this moment, we are not in a position to give a certain answer about its exact meaning or, more precisely, to discover the correspondence among different words (*anailêthai/eken*) with the eventual meaning of acquiring or entering into the inherited property.

Nevertheless I share his opinion, and I would like to take this opportunity just to note a possibility that I have already pointed to (in *ZSS* 107 [1990]) in speaking about the *epiballontes* as heirs. To be brief, the word *anailêthai* was used for the *epiballontes* as heirs in the fourth line of succession differently than for the children, brothers, and sisters of the *de cuius* and of their offspring (for whom, as for the first three lines, is applied the formulation, *toutos eken ta kremata*). I argue that *anailêthai* reflected the different legal and kinship position of the *epiballontes*. They do not inherit the capacity of cognates (who *eken ta kremata*), but they are given a certain authority as members of the oikos, who lived and worked with the *de cuius* until his death, no matter how distant their relationship may be. The use of *anailêthai* for the *epiballontes* reflects that they simply have to "take over" the property, to "wieder-nehmen" it, as they have already used it in the capacity of family community members. The death of the *de cuius* caused no dramatic change, as they will continue their life in the oikos without division, this being the last chance to save its existence.

I should say that the application of the same word (*anailêthai*) for the way of acquiring property by the adoptee as well is not a pure coincidence. It perhaps reflects the fact that the adoptee (who is an outsider or just a distant relative, in the same way as the *epiballontes* are), acquires legal and moral rights toward the property in consideration of his common life with the *de cuius* in the oikos and his contribution to its maintenance. This is a further indication that *anpansis* in Gortyn was not as a rule undertaken in order that its effects would be felt only after the death of the adopter.

g) In conclusion, one must keep in mind that Gortyn was still an undeveloped society. Private property was not yet important enough—certainly not as important as it was in Athens during the 4th c. B.C. It would not be surprising if an adoption *inter vivos* should differ in those two societies in its aims and effects. Although in Athens it is more obvious that *eispoiêsis* was primarily one element of an "inheritance strategy," as Maffi would say, there are not enough convincing proofs that in Gortyn it was also performed primarily with a view toward its effects after the death of the adopter. It can rather resemble the aims and effects of archaic adoption, such as those mentioned in Homer—the

adoption of Achilles by Phoenix (*Il.* 9.492) or the one that was made by Odysseus in regard to Eumaeus and Philoetius (*Od.* 21.216)—where Odysseus wants to make the two of them "friends and brothers to his son Telemachus." The motive of adoption was rather friendship, gratitude, sympathy and the need for help than hereditary consequences.

I find it interesting to mention at this point two curious explanations of Gortynean adoption motives. Soviet historian Kazamanova (in *VDI* for 1952) wrote that adoption in the Gortyn Code was "a specific form of dependent relationship—particularly if adopter had children of his own. The purpose of it was neither hereditary nor religious, but to obtain an extra working-hand." Although this statement reflects an ideological point of view, it is worth noticing the attitude that *anpansis* had no *mortis causa* effects at all! On the other side, Lacey suggests that adoption in Gortyn may have been "another means by which rich and noble men could augment their following for war" (*Family in Classical Greece* 214).

In any case, although these views are extreme, it seems that they all point to the conclusion that *anpansis* in Gortyn was still performed in order to create effects during the life of the adopter and adoptee. But, as it was a transitory period of deep social and economic change, such an adoption began to produce quarrels and disputes. These generally did not appear during their lives, since the procedure was very well regulated by custom, according to relations among father and son, and by the Code itself through the possibility of revocation. Rather, conflicts appeared with respect to its *mortis causa* consequences. Such a new situation was not solved by custom, so that the legislator had to intervene, and he did so on exactly those ground that usually gave birth to disputes, namely the matter of the proprietary effects of *anpansis* after the death of the adoptee. Therefore, one gets an impression that the legislator speaks only about "what happens after the death." The fact that the Code pays most attention to those problems, however, does not automatically mean that *anpansis* as an institution was devoted to this purpose exclusively.

My conclusion can be summarized in two sentences. There is no doubt that *anpansis* in Gortyn produced important *mortis causa* effects, but the impression one gets at first glance that it realized its effects only after the death of *anpanamenos* is misleading. *Anpansis* was a double-faced institution, whose *inter vivos* face and consequences were still its predominant feature.

Edward E. Cohen (Philadelphia)

Banking as a "Family Business": Legal Adaptations Affecting Wives and Slaves

The commercial skill and financial acumen of Athenian bankers is well-attested.[1] As a functioning business, however, fourth-century banking necessarily involved a daily multitude of mundane functions, time-consuming and routine. To handle these tasks the bankers could not employ free Athenians. Although individual citizens might undertake specific, limited assignments—representation in a particular commercial dispute, providing a guarantee to expedite a financing, and the like—societal values inhibited citizens from working on a continuing basis under another person's control; public maintenance allocations and remuneration for political and judicial activity permitted even the most hapless impoverished Athenian citizen to avoid "servile" (δουλικά) employment.

But slaves (*douloi*) and dependent family-members could not utilize philosophical and moral objections to avoid participation in banking operations. As a result, bankers' slaves obtained unusual opportunity for personal wealth and social acceptance, and bankers' wives, detailed knowledge of, and influence in, the functioning of the banks. By the mid-fourth century, or earlier, slaves are even found entering into leases with their masters providing for the slaves' independent operation—*while still unfree*—of their masters' banking business. On a proprietor's death control of banking businesses was routinely left not to male descendants but to male slaves and the proprietors' widows—who were joined in marriage at the testamentary direction of their masters (*kyrioi*). Although the pattern was somewhat surprising even to Athenian citizens (and has been largely ignored by modern scholarship), this combination of spouse and slave was a natural response to social and economic factors inherent in the structure of Athenian life.

Despite this familial coupling of banking wife and banking *doulos*, the law treated the two somewhat differently: to male slaves, it accorded an overt, if limited, legal standing, but to bankers' wives it conceded only a silent tolerance of their personal and property rights. As an ideological "discourse" prizing internal consistency (to paraphrase Sally Humphreys [1985]) Athenian law had been able only with difficulty to accommodate free males who were not Athenian citizens. Its recognition of slaves, not surprisingly, was limited to commercial matters, and even there somewhat indirect, taking the form of

1) acceptance of slaves' responsibility for their own business debts, but only through a negative ellipsis in the written law;

2) slaves' access to courts as parties and witnesses to litigation, but only in a

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1 Xenophon, for example, refers to bankers as οἱ γνώμῃ καὶ ἀργυρίῳ δυνάμενοι χρηματίζεσθαι (*Poroi* 5.3). Cf. Isok. 17.2; Dem. 45.71; Pollux 4.7, 22.

limited group of business transactions, including banking actions.

3) mercantile "agency" as a mechanism to resolve the remaining legal disabilities of slaves who were operating banks—a legal procedure which could be and was explicit because ideologically analogous to the slave's traditional dependence on male citizens.

Women's rights, however, were not overtly recognized. Athens was a society sharply and antithetically segmented between the public sphere of state, politics and law—where the male citizen held exclusive suzerainty—and the private domain of the "household" (οἶκος), where the leading role of the male citizen was sharply circumscribed by economic reality and social custom. The bank (*trapeza*), often operated by non-citizens, always functioning through household members and often utilizing as the "banking house" the banker's own residence, but still dealing of necessity in the public arena of law and business, belonged fully to neither domain. For economic and social reasons, women's personal and property rights could not be denied. For ideological reasons, women's personal and property rights could not be explicitly recognized. Here, as in many societies where social and economic realities are at variance with prevailing values, the law's adaptation took the form of a silent, but recognizable—and effective—tolerance.

A. Wives and Slaves in Business

The banker's male slaves routinely performed critical functions, independently handling substantial sums of money (Dem. 45.72). Slaves would receive and evaluate security for loans (Dem. 49.52). Deposits, in cash and in valuables, and in sizable amounts, might be received by *douloi* alone, who could freely dispose of such valuables without supervision (Dem. 49.31). Indeed, a slave functionary at Pasiôn's bank was "persuaded" by clients to disburse the substantial sum of 36,000 drachmas. (Isok. 17.12). Pursuant to formalized contractual arrangements, slaves actually conducted entire banking businesses. Pasiôn's bank, perhaps the largest Athenian trapezitic operation,[2] was operated initially by Pasiôn as successor to his own masters, and later by his former slave, Phormiôn. Even more strikingly, Phormiôn was succeeded at the bank by four individuals—Xenôn, Euphraios, Euphrôn and Kallistratos—who entered into a lease with their own masters, the bank's owners, and for ten years paid rent of a full talent per year conducting this major banking business (Dem. 36.13, 37)—while still slaves.[3]

But commercial contractual arrangements were not for *douloi* the only path to bank proprietorship: bankers frequently, on their deaths, entrusted both their banks and their

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2 Even Thompson, who sees banks as "insignificant" in the Athenian economy, recognizes the significance of "the lendable deposits (and) private resources of a tycoon like Pasion" (Thompson [1979] 240).

3 Only later did their owners καὶ ἐλευθέρους ἀφεῖσαν (Dem. 36.14) ("enfranchised them," see Harrison, *Law* I 175, n. 2.). See below C for an analysis of the legal bases supporting slaves' capacity to enter into business contracts juridically cognizable at Athens.

wives to slave-successors (see below). Although such arranged marriages might have been intended solely as property transfers—with the widow's personal attributes of no importance—the operation of the Athenian bank through the banker's household, especially when it was physically situated in the residence itself, would have encouraged the development of personal relationships between slave and non-slave members of the banker's retinue. Indeed, Phormiôn's involvement with Pasiôn's family, even before Pasiôn's death, was so close that he was accused of having fathered a child, Pasiklês, born during the banker's lifetime to Pasiôn's wife, Archippê [4] (Dem. 45.84). "Friendship" between male and female persons dependent on their master conforms to modern models for nonhierarchical relationships:[5] in striking confirmation of the perceived equivalence between slaves and wives, both newly-purchased *douloi* and newly-wed brides were welcomed into the Athenian household with the same ceremony (*katachysmata*).[6]

In any event, Archippê was intimately conversant with trapezitic business: she had access to the bank's records, and detailed knowledge of its complex operations. The extent to which Pasiôn's personal monies were utilized to fund loans, the existence at the bank of proprietor's "capital" (*aphormê*), the legal arrangements under which the bank was leased during Pasiôn's lifetime, the terms of lease to successor lessees after his death—"all this" Archippê was knowledgeable about, "with specificity."[7] Indeed, after her husband's death Archippê had such control over the bank's records that she was even accused of having destroyed them, allegedly to prevent development of legal claims against Pasiôn's successor, her second husband Phormiôn.[8] Even in the absence of quantifiable evidence as to the percentage of bankers' wives having access to such information or control of such records, the presentation of this charge in an Athenian court presupposes the jurors' anticipated acceptance of such access or control as reasonably likely in actual Athenian practice. And substantial independent evidence survives suggesting that women's knowledge of male relatives' business and lending practices was commonplace.

Although gender-derived differentiations created serious barriers to women's direct vindication of legal rights, and hence indirect obstacles to full business involvement, no social or legal barriers absolutely precluded wives' direct participation in banking activities outside the home. Husbands and wives are known to have worked together in retailing

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4 Archippê's background has defied meaningful elucidation. Even her nationality and ultimate receipt of Athenian citizenship present conundra unresolved in studies as recent as Whitehead (1986) and as early as Paley/Sandys (1896), whose suggestion (xxxviii and 144 n.) that she was non-Athenian is not supported by Dem. 46.23. See below **D1**.

5 Both Foucaultian descriptive and feminist ideological models anticipate such association: see Foucault's comments ([1984] 381-2) and Dreyfus & Rabinow, *Beyond Structuralism* 233. Cf. Ackelsberg (1983) and *Feminism & Foucault, passim.*

6 See below, n.27.

7 Dem. 36.14: ἡ πάντ' ἀκριβῶς ταῦτ' εἰδυῖα.

8 Dem. 36.18: τὰ γράμματθ' ἡ μήτηρ ἠφάνικε πεισθεῖσ' ὑπὸ τούτου, καὶ τούτων ἀπολωλότων οὐκ ἔχει τίνα χρὴ τρόπον ταῦτ' ἐξελέγχειν ἀκριβῶς.

activities.[9] Numerous types of goods were sold by women, especially in the *agora* where the bankers' "tables" were set.[10] In certain commodities, perfumes for example, female retailers actually dominated consumer trade.[11] Even the Eleusinian treasurers are recorded as having dealt with at least two women (*IG* II^2 1672.64, 71), purchasing from one of them, a certain Artemis of Piraeus, reeds for building materials having a value of at least 70 drachmas.[12] This commercial freedom necessarily reflected, as Aristotle recognized, the practical impossibility of keeping poor women from earning money in the public sphere of commerce.[13] Yet even relatively wealthy females are recorded as financially active. Women functioned as principals in extending credit.[14] Even independent of a familial role, women participated in bank-related matters. In one of the few instances in which information has survived as to the circumstances which generated a specific bank deposit, it is a woman, Antigona, who induces a would-be business purchaser to marshall the substantial funds, 40 mnai, deposited in a *trapeza* as an apparent "good-faith deposit." Even her adversary recognizes her leading role in this complex financial transaction.[15] While such examples are rare, it is not their frequency, but their possibility which is important.

Because of the widespread utilization of the Athenian banks to "hide" property and funds,[16] knowledge of bank transactions itself attested to the holder's critical position in the bank operation: possession of such information by slaves and wives—and more importantly, the power to act on it—joined them to the bank's proprietor in a centrally-pivotal economic function. In an environment not of institutionalized, but of personal banking businesses dependent on the skills of the owners' slaves, in a city whose legal and social structure permitted independent business activity by *douloi*, where bankers' spouses had detailed knowledge of bank activities and were potentially able to resolve business-related personal conflicts,[17] *trapezitai* not surprisingly sought to preserve their businesses

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9 *SIG*^{3} 1177= *IG* III App. 69 (Artemis the gilder working in a shop with Dionysios the helmet-maker); *IG* II^2 1561. 22-30 (two sesame-sellers: see Schaps, *Economic Rights* 61).

10 See Herfst, *Travail* 40-8 who enumerates, with source reference, the many goods retailed by women. Cf. Balabanoff, *Untersuchungen* and Lewy, *De civili condicione*, *passim*. Females were so active in the *agora* that they "seem to have had, if not a monopoly, at least a privileged position in the market-place" (Lacey, *Family* 171). There is, however, no basis for Becker's belief (*Charikles* II, 199-202) that a particular section of the *agora*, the *gynaikeia agora*, was reserved for female merchants, rather than for goods intended for women.

11 Pherekratês, fr. 64 Kock. But there were male perfume-sellers. See Athenaios 13.612a-e (= Lysias fr. 1 Thalheim), 15.687a.

12 But these same records (*IG* II^2 1672-3) reveal scores of transactions with men.

13 Aristotle, *Politics* 4.15, 1300a6-7: πῶς γάρ οἷόν τε κωλύειν ἐξιέναι τάς τῶν ἀπόρων; *Ibid.* 6.8, 1323a: τοῖς γάρ ἀπόροις ἀνάγκη χρῆσθαι καὶ γυναιξὶ καὶ παισὶν ὥσπερ ἀκολούθοις διὰ τήν ἀδουλίαν. Cf. D. Cohen (1989) 8.

14 See, for example, Aristophanes, *Thesmophoriazusai* 839-45; Dem. 41.7-9, 21; Fine, *Horoi* #28.

15 Hyper., *Against Athênogenês* 4-5.

16 Bogaert notes this prevailing practice matter-of-factly: ". . . im 4. Jahrhundert benutzte man die Banken, um einen Teil seiner Einkünfte vor dem Fiskus zu verbergen, auf griechisch ἀφανίζειν" (*Gründzüge* 16).

17 A striking example: although during Archippê's lifetime Apollodôros and Phormiôn avoided

by installing highly-regarded slaves as their successors—and frequently, upon the principals' deaths, by uniting their wives in marriage with their slave-successors. This succession by slaves through wives is clear and well-attested. The speaker at Dem. 36.29 calls upon the jurors' personal knowledge: "anyone could cite many examples" of slaves who had been freed by their owners, and entrusted with the master's bank and married at the owner's direction to his widow.[18] Indeed, the speaker insists that many of the jurors were personally aware that, just as in the case of Phormiôn's bank, Sôkratês, "that well-known banker" had provided for the marriage of his wife to his former slave, Satyros—in fact, Sôkratês himself had been freed by his masters and (the speaker implies) established as the head of their bank. Another example: the Athenian banker Sôklês similarly had given his wife to Timodêmos, formerly Sôklês' *doulos*.[19] The appropriateness of these arrangements was even explained in social and business context: citizens by birth ought not to choose "piles of cash" (πλῆθος χρημάτων) over pedigree; bankers fortunate enough to have obtained wealth through their trapezitic activities, and citizenship as a "gift," were obligated to protect their assets.[20]

B. The Banking Household

In arranging for the marriage of wives to slaves, in reality Athenian bankers were merely adapting the fundamental, free Athenian social organization of the *oikos* into a mechanism for perpetuating a business producing wealth for persons of largely servile and non-Athenian background.[21] The ancient sources identify this *oikos*—rather than the individual—as the basic constituent element of Athenian society,[22] and in recent years this

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legal disputes, immediately upon her death—allegedly because of the removal of her detailed knowledge of the bank's arrangements—litigation commenced. See Dem. 36. 14.

18 οὐδ' αὐτὸν λέληθεν, οὐδ' ὑμῶν πολλούς, ὅτι Σωκράτης ὁ τραπεζίτης ἐκεῖνος, παρὰ τῶν κυρίων ἀπαλλαγεὶς ὥσπερ ὁ τούτου πατήρ, ἔδωκε Σατύρῳ τὴν ἑαυτοῦ γυναῖκα, ἑαυτοῦ ποτὲ γενομένῳ. ἕτερος Σωκλῆς . . . καὶ οὐ μόνον ἐνθάδε ταῦτα ποιοῦσιν οἱ περὶ τὰς ἐργασίας ὄντες ταύτας . . . ἀλλ' ἐν Αἰγίνῃ . . . καὶ πολλοὺς ἂν ἔχοι τις εἰπεῖν τοιούτους. Dem. 36.28-9.

19 This trapezitic practice was not limited to Athens. In Aigina, for example, Strymodôros had married his wife to Hermaios, "his own slave," and---after she had died---the banker had again provided for the marriage of his own daughter to the former slave. Dem. 36.29: καὶ τελευτησάσης ἐκείνης ἔδωκε πάλιν τὴν θυγατέρα τὴν ἑαυτοῦ.

20 Dem. 36.30: τοῖς γένει πολίταις, οὐδὲ ἓν πλῆθος χρημάτων ἀντὶ τοῦ γένους καλόν ἐστιν ἐλέσθαι· τοῖς . . . τῇ τύχῃ δ' ἐξ ἀρχῆς ἀπὸ τοῦ χρηματίσασθαι καὶ ἑτέρων πλείω κτήσασθαι καὶ αὐτῶν τούτων ἀξιωθεῖσιν, ταῦτ' ἐστὶν φυλακτέα.

21 But native-born Athenian bankers were not unknown. Despite Bogaert's assertion that Aristolochos is the "only Athenian citizen known to have pursued the profession of banker" (*Banques* 73), a number of bankers are known to have received Athenian citizenship through naturalization (Osborne, *Naturalization* IV 196). Independent evidence confirms citizenship for others. For example, Archestratos provided surety for a non-Athenian (Isok. 17.43). Since such guarantees were accepted only from citizens, Archestratos must have been an Athenian. (There is no evidence that he did not hold citizenship by birth.) His associate Antisthênês also appears to have been an Athenian. Kirchner, *PA* 1187 and 2405. Antidôros of Phaleron, clearly an Athenian citizen (see *IG* II² 1612, 352ff.; 1622, 128ff.; 1609, 70) appears to have been engaged in the banking business with Aristolochos (cf. Davies, *APF* 35-6). The banker Blepaios is known to have attended the Assembly which was restricted to adult male citizens. See Dem. 21.215. For many, probably most, other bankers, no evidence at all survives as to their place of birth or citizenship.

22 See Aristotle, *Pol.* 1252a-b; Xenophon, *Oikonomikos*.

judgment has come to be accepted by scholars.[23] All individuals of every status were members of a household; adult men appear even to have been registered in demes, the ultimate unit of political life, as members of an *oikos*, not through their own independent persona.[24] Not surprisingly, then, the fundamental importance of the *oikos* is critical to the interaction of bankers, wives and slaves in operating and perpetuating the *trapeza*.

Classical Greek had no term for "family," in the modern sense of a nuclear or extended grouping of people living together.[25] Instead of "family," Greece knew only the *oikos*. Its members included all the persons living in a particular house, in Aristotle's words a "natural association for everyday purposes."[26] Slaves are explicitly included by Aristotle as members of the *oikos*, along with husband, wife and children (*Pol.* 1253b4-7). Indeed, in a ceremony analogous to that which greeted the entry of a bride, a newly-purchased slave was welcomed into the *oikos* with an outpouring of figs, dates and other delicacies intended to portend a "sweet and pleasant" future.[27]

Although its dominance as a societal element appears to have been greater in Attika than in other Greek areas,[28] throughout Hellas the *oikos* had long been a prominent institution.[29] Organization of their personal and business lives through the "household" was natural therefore even for those bankers who were not Athenian. But like many other Hellenic institutions and concepts, the *oikos* too reflected the Greek cultural predisposition to view the world antithetically.[30] Gender, the complementary contrast of male and

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23 See, for example, Foxhall (1989) 22; Fisher, *Social Values* 2, 5ff.; Jameson (1990) 179; Hunter (1981) 153; Hallett, *Fathers and Daughters* 72-6. In a constitutional sense, "the πόλις was an aggregation of οἶκοι" (Wolff [1944] 93). For the fullest discussion of the word, in its various attributes, see MacDowell (1989) 10-21. Cf. Karabêlias (1984) i.441-54.

24 Lacey, *Family* 129, 293-4, n. 21. For the role of the household in modern Greece, see du Boulay, *Portrait*, ch. 1; for its importance in other societies, see Netting, Wilk and Arnould, *Household* xxii.

25 In explaining the importance of the *oikos*, Aristotle specifically states that Greek lacks a descriptive term for the nuclear family (husband and wife): ἀνώνυμον γὰρ ἡ γυναικὸς καὶ ἀνδρὸς σύζευξις (*Pol.* 1253b9-10). Finley notes: "the necessity never made itself felt to provide a specific name for the restricted concept evoked by our word 'family' " (*Ancient Economy* 18-19). Cf. Humphreys, *Family* 67.

26 *Pol.* 1252b12-14: ἡ μὲν οὖν εἰς πᾶσαν ἡμέραν συνεστηκυῖα κοινωνία κατὰ φύσιν οἰκός ἐστιν. Cf. 1253b4: οἰκία δὲ τέλειος ἐκ δούλων καὶ ἐλευθέρων.

27 Lex. Seguer. (Bekker) 269.9: καταχύσματα ἰσχάδες καὶ φοίνικες καὶ κάρυα ἄλλα τοιαῦτα ἐδώδιμα κατέσχεον αἱ κύριαι τῶν οἴκων κατά τι ἔθος ἐπὶ τὰς κεφαλὰς τῶν ἄρτι ἐωνημένων δούλων παραδηλοῦσαι, ὅτι ἐπὶ γλυκέα καὶ ἡδέα πράγματα εἰσεληλύθασιν. Cf. Aristoph. *Plout.* 768 and schol.; Dem. 45.74; Pollux 3.77; Harpokration and Suidas, s.v. καταχύσματα.

28 See Schaps, *Economic Rights* with its numerous examples of greater individual rights of ownership in other Greek societies supporting his conclusion: "elsewhere in Greece, the *oikos* did not occupy the same position of importance" (p. 4).

29 It is attested not only by Homer but through the legendary "houses" who were the subjects of the tragedies presented at the great festivals. Aristotle in the *Politics* places it in the broadest possible context. In the *Republic*, Plato utilizes it as a fundamental standard of reference, and ultimately in the *Laws* offers it as the basis for all social organization (*Laws* 4.720e-721e). For the large extent to which Plato's precepts for the Cretan city of the *Laws* actually reflects contemporary Athenian practice, see Morrow, *Plato's Cretan City*, passim.

30 This characteristic has been much studied in recent years in a proliferation of "structuralist" studies: see especially Lévi-Strauss (1967); Vernant & Vidal-Naquet, *Mythe*; Segal (1986) 43-5. Such cognitive opposition has been identified as characteristic of Mediterranean cultures in general: see Bourdieu, *Outline* 87-95; Hertzfeld, *Poetics* 53 ff., 90-1 and (1986) 215 ff. For antithesis in financial

female, was for the Athenians a basic cognitive and social opposition, expressed through separation of physical areas:[31] the private world of the household, with women and slaves as significant members, cut off from the public world of the community, a contrasting political domain excluding all but the individual adult male citizen.[32]

Banking, however, necessarily partook of both worlds. A business functioning through the *oikos* with its membership of women and slaves, the *trapeza* was nonetheless legally and socially assimilated to the persona of its male operator. Since it dealt in monetary assets and their intangible legal resultants of debts and receivables, i.e. rights relating to "property" (an essential aspect of the very definition of the *oikos*),[33] the bank could not separate itself from the household. Yet these same rights to property necessarily brought the *trapeza* into contact with the laws and the courts, the officials and the rules located in the public sphere traditionally controlled exclusively by male citizens. Because of the conflicting demands of the two spheres, and because of the complementary contributions offered by wife and slave to the functioning and perpetuation of the *trapeza*, the bankers' joining of spouse and slave as a means of continuing the business and protecting the family property and wealth[34]—far from an anomaly impossible to explain—was probably in many cases the only economically viable solution to the divergent demands of public community and private household. To this bifurcated reality, the law brought a dichotomous response—a limited but overt recognition of slaves' commercial standing, a silent tolerance of women's personal and property rights.

C. Legal Adaptation to Slave Enterprise

Male slaves, like male citizens, could work in the public world of community and commerce without affronting social values. They might even function, for their own account, as independent entrepreneurs.[35] Banking slaves enjoyed a rarefied status—for

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conceptualization and practice, see Cohen (1989) 209-12.

31 It is, of course, an exaggeration to conceive of women as literally locked into their homes: separation and seclusion are not identical. But the ideal of separation, and its partial physical realization (see D. Cohen [1989]), presented an inherent barrier to the law's acceptance of women's direct exercise of economic rights.

32 For the fullest treatment of these factors, see Humphreys, *Family*, "Oikos and polis" (1-21) and "The family in classical Athens" (58-78). Cf. Foxhall (1989) 22-25.

33 Xenophon presents the most striking example: the property of the *oikos* is not restricted to the house itself—even goods owned in another city belong to the household. οἶκος δὲ δὴ τί δοκεῖ ἡμῖν εἶναι; ἆρα ὅπερ οἰκία, ἢ καὶ ὅσα τις ἔξω τῆς οἰκίας κέκτηται, πάντα τοῦ οἴκου ταῦτά ἐστιν; Ἐμοὶ γοῦν, ἔφη ὁ Κριτόβουλος, δοκεῖ, καὶ εἰ μηδ' ἐν τῇ αὐτῇ πόλει εἴη τῷ κεκτημένῳ, πάντα τοῦ οἴκου εἶναι ὅσα τις κέκτηται (*Oik.* 1.5).

34 This is precisely the justification for the practice offered by Demosthenes (36.30-1).

35 For example, a group of "nine or ten" slave leather-workers are reported (Aischines 1.97) to have operated a workshop: the slave in charge (ἡγεμὼν τοῦ ἐργαστηρίου) paid their master a fixed sum of three obols per day, and the other slaves, two. Similarly, Milyas, who was responsible (διῴκησεν) for the manufacturing businesses left by Demosthenes' father, is said to have been entitled to keep the profits from the operation of the businesses, while paying the heirs only a fixed fee. See Francotte, *L'industrie* 12; Bolkestein, *Economic Life* 63. (Demosthenes, many years later, refers to Milyas as "our freedman" [ὁ ἀπελεύθερος ὁ ἡμέτερος, Dem. 27.19], but there is no indication that Milyas was not still a slave when he was operating the workshops.) Slaves skilled in the production and working of pottery functioned on

economic, not humanitarian reasons. If *douloi* working at a *trapeza* felt compelled to defer to free customers, their employers' monetary interests would necessarily suffer. The author of [Xen.] *Ath. Pol.* (1.10-11) attributes it all to money (ἀπὸ χρημάτων): for persons receiving a share of the earnings of their slaves (ἀποφοράς) "it is not profitable" to have their slaves "fear" the free persons whom they encounter. Indeed, "if your slave fears me, there will be a danger that he will give you the money in his possession so as not himself to be at risk." Far from encouraging fear, the law during the fourth century came to recognize slaves' standing in a number of areas:

C1. Limitation on Masters' Liability for Slaves' Business Debt

The leasing of banking businesses to slaves made economic sense and would have had legal force only if the law recognized *douloi* operating their own businesses as solely liable for their own business debts. As a precondition to this result, however, the law first had to accept slave businessmen as persons individually capable of responsibility for debts, and then had to absolve their masters from liability for such business obligations. Athenian law by the late fourth century had made this accommodation.

Hypereidês' speech *Against Athênogenês* (delivered between 330 and 324)[36] deals with responsibility for business debts. A buyer purchased a slave who was engaged, with his two sons, in a retail perfume business. Although the legal dispute here focuses on the obligation of a purchaser who assumes responsibility for business debts incurred by slaves, the text actually provides explicit evidence that the *douloi*, and in particular the father, one Midas, were at least primarily liable for these commercial obligations: on several separate occasions Midas is explicitly characterized as personally obligated on the debts.[37] Such personal liability of slave businessmen for commercial obligations incurred in their business was a precondition for slaves' involvement in Athenian banks. The participation of *douloi* in banking—as lessees, managers, proprietors, or even as functionaries—required the law's recognition of a *doulos*' capacity to enter into commercial contractual arrangements, whether for his own account or that of his master. In turn, slaves' capacity to enter into business contracts is the necessary predicate to slaves' responsibility for business debts.

At Athens, however, under statute attributed to Solon, the slave's master was clearly liable for non-contractual wrongs ("torts") committed by a *doulos*. To resolve responsibility in cases where the slave was acquired by a new owner only after occurrence

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similar terms. (See Webster, *Potter in Athens*.) *Douloi* are known to have conducted retail businesses without supervision: Meidas and his two sons operated a perfumery; their master received an accounting only monthly (Hypereides, *Athênogenês* 9, 19).

36 For the date see § 31: Alexander's decree of 324, restoring Greek exiles to their native cities, had not yet been issued; the Troizênian cooperation with Athens in 480 is referred to as having occurred more than 150 years earlier.

37 § 6: ὅσον μέντοι ὀφείλουσιν ἀργύριον. §10: 'καὶ εἴ τῳ ἄλλῳ ὀφείλει τι Μίδας' (purportedly the actual language of the purchase agreement). § 20: ὀφείλοντα Μ[ίδαν].

of the delict, the law (cited in Hypereidês, *Against Athênogenês*) appears even to have specifically placed liability on the person owning the slave at the time that a wrong was committed.[38] But, as with other surviving evidence relating to owners' responsibility for slaves' wrong-doing,[39] this law is entirely silent as to masters' liability for contractual obligations incurred by slaves. Since the debts at issue in the *Athênogenês* case arose entirely from business commitments, Gernet has argued ([1950] 161-2) that owners' liability for such debts was not addressed by any specific statutory law: otherwise the litigant would have appealed to such legislation, instead of utilizing the early law dealing with slaves' wrongful "actions," at most applicable only by analogy to "contractual obligations."[40]

The law's silence is not surprising: independent operation of businesses by *douloi* represented a commercial reality of the fourth-century undoubtedly unforeseen by the sixth-century "law-giver." Where factually justified, this silence permitted the master, on a number of theoretical bases (characterization of the *doulos* as agent for his owner, joint liability for joint undertakings, apparent authority, etc.), to be held responsible for contractual obligations incurred by his slaves—even in the absence of an owner's explicit general liability for a *doulos*' contractual commitments. Master's liability thus would easily and clearly have arisen from conventional banking operations by a proprietor and his staff of slaves. Indeed, we know of several cases where slaves were in fact sued directly, as named defendants, but where masters insisted, at least partly for tactical reasons, that the suit should instead have been brought directly against the slave's owner (Dem. 37.52; 55.31-2). But where a slave was operating a business independently, with unequivocal indication thereof, the master might be free of legal responsibility.

This evolving law of masters' possible responsibility for, or possible freedom from liability for their slaves' contractual commitments may explain bankers' use of leases to "preserve" their banks.[41] Lease of a *trapeza* provided a fixed rental to the owner in return for the lessee's retention of income resulting from bank operation, including the collecting of loans and the repayment of deposits.[42] Of course, the owner would still have been

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38 *Athênogenês* 22: [Σόλων] εἰδὼς ὅτι πολλαὶ ὠναὶ [γίγνον]ται ἐν τῇ πόλει ἔθηκε νόμον δίκαιον . . . τὰς ζημίας ἃς ἂν ἐργάσωνται οἱ οἰκέται καὶ τὰ ἀ[----]ατα διαλύειν τὸν δεσπότην παρ' ᾧ [ἂν ἐργάσ]ωνται οἱ οἰκέται. For ζημίαν ἐργάζεσθαι as descriptive of a slave's tortious wrong, see Wyse, *Isaeus* 506.

39 Only tortious wrongs are referred to in Dem. 37.21-22 (specific tort described); 37.51; 53.20 (ὁπότε κακόν τι ἐργάσαιτο); 55.31-2 (master's insistence that his slave οὐδὲν ἀδικεῖ).

40 Cf. Pringsheim, *Law of Sale* 454ff.; Harrison, *Law* I.173-4; Meyer-Laurin (1974) 267; MacDowell, *Law* 81

41 Thus Pasiôn's arrangements for his bank, including its lease to Phormiôn, are described as "μόνην σωτηρίαν τοῖς ἑαυτοῦ πράγμασιν" (Dem. 36.30). For the financial and economic aspects of the μίσθωσις of Athenian banks, see Cohen, *Athenian Banking*, "Leasing a *Trapeza*."

42 Dem.36.13: τὰς παρακαταθήκας καὶ τὴν ἀπὸ τούτων ἐργασίαν αὐτὴν ἐμισθώσαντο. Cf. Dem. 36.6: μισθούμενος . . . τὴν ἐργασίαν αὐτὴν τῆς τραπέζης καὶ τὰς παρακαταθήκας λαμβάνων. See Thompson (1981) 92, n.18 for retention of λαμβάνων, eliminated without paleographical justification by editors following Blass.

liable for repayment of deposits left with him prior to effectiveness of the lease: Athenian law's non-recognition of businesses as juridical persons insured that liability. But a formal lease would have eliminated any inference that a slave was acting as agent for his master in entering into a banking commitment or that they were co-venturers. Legal recognition of slaves' contractual capacity in banking and other commercial contexts would have opened to creditors all assets under the slave's control, including all of the *trapeza*'s assets. But the bank owner would have been protected from loss of his other assets as a result of bank obligations incurred after commencement of the lease—and he still would have been able to anticipate continuing income from the bank.

In contrast, such lease arrangements between bank owners and their slaves would have lacked economic justification if the masters had remained liable for bank obligations incurred after the effectiveness of the arrangement: the slave-owner would then have limited his right to receive income, while retaining unlimited liability for losses. But the slaves of Apollodôros and Pasiklês paid their masters exactly the same rent as the free person who had previously leased the *trapeza* (Dem. 36.12), not the increased sum which might have been anticipated if their status as slaves had in fact increased the liability of their masters for contractual obligations incurred by the bank during the period of their lease.

C2. Acceptance of Slaves and Non-Citizens as Parties and Witnesses in Banking Litigation

Business arrangements which bound only slaves and not their masters had significance (and would be legally enforceable) only if slaves could be parties to commercial litigation. In fact there is substantial evidence that the Athenian courts—markedly departing from traditional and widespread Hellenic insistence on citizenship as a prerequisite to enforcement of legal rights—substantially disregarded personal status in mercantile matters, a unique liberality largely limited to business dealings.[43] In essence, the same Athenian courts which did not recognize the bank as an independent juridical entity were willing, in certain commercial areas, entirely to ignore personal status as a prerequisite to utilization of, and participation in, the judicial system.

Slaves appear to have had full access, as parties and as witnesses, in cases involving commercial matters. This is best attested in the important "commercial maritime" cases and courts (δίκαι ἐμπορικαί), where "standing" was accorded without regard to the personal status of litigants.[44] In the case of slaves, this represented a unique accommodation, for—with the exception of testimony in cases of murder, perhaps only against the alleged murderer of their master[45]—slaves were otherwise absolutely deprived

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43 Cohen, *Athenian Maritime Courts* 69-74, 121; Gernet (1950) 159-64.

44 Garlan, *Esclaves* 55, who goes even further in concluding as to the legal capacity of *douloi*, "Surtout à partir du IV^{e} siècle, il fallut enfin adapter empiriquement ses capacités aux fonctions économiques qui lui étaient confiées." Cf. Paoli, *SDA* 106-9.

45 See Gernet (1950) 151-5. Cf. Grace (1974) 34-56.

of the right even to be witnesses in legal proceedings.[46] "Commercial maritime" disputes, however, were not the only cases encompassed in the special procedural category of "monthly cases" (δίκαι ἔμμηνοι). "Banking cases" (δίκαι τραπεζιτικαί) are also denominated by Aristotle as among these "monthly cases" (*Ath. Pol.* 52.2). Although little is known with certainty as to the nature of "banking cases,"[47] there is no reason to assume criteria of standing or evidence substantially different from those of the "allied sphere" (Harrison, *Law* I.176) of commercial maritime cases. Likely similarity of procedure is further suggested by the similarly substantial involvement of slaves and foreigners in both Athenian sea trade and banking.[48] Strikingly, the clearest example of a slave having the right to testify and participate in an Athenian court, that of Lampis the *nauklêros* in Dem. 34, involves a *doulos* who provided credit to a borrower who was the recipient of a number of other loans—some of which may have been provided by bankers.[49] And Pankleôn, engaged in commercial pursuits in a fuller's shop, seeks to avoid a court action (Lysias 23) on the grounds that he is a Plataian, only to be met by the plaintiff's introduction of evidence that he is in fact a slave. Of course, the plaintiff's presentation of proofs of servitude would justify pendency of the case only if slaves actually could be parties to business-oriented law suits.[50]

There is independent evidence that certain slaves, the so-called *douloi* "living on their own" (χωρὶς οἰκοῦντες) or "self-supporting" (μισθοφοροῦντες),[51] were able, at least as to some matters, to participate as parties to litigation in the Athenian courts. Since slaves living outside the master's house appear to constitute essentially *douloi* engaged in commercial pursuits on their own,[52] this evidence of their right to litigate further confirms

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46 For slaves' general inability to bring lawsuits, see Plato, *Gorg.* 483b; Dem. 53.20. Their testimony could be utilized only to the extent extracted under formalized torture, a form of proof which indeed emphasized the normal evidentiary incapacity of the *doulos*. See Thür, *Beweisführung*; Soubie (1974) 127; Humphreys (1985a) 356, n.7. Isokrates 17, with its convoluted references to possible testimony under torture by the banking slave Kittos, is no guide to procedure in the δίκαι ἔμμηνοι: the speech relates events from the 390's; the δίκαι ἔμμηνοι arose only sometime after 355. See Harrison, *Law* I.21; Gernet (1938) 5-10; Cohen, *Athenian Maritime Courts* 189-90.

47 On the δίκαι τραπεζιτικαί, see Gernet (1938) 176-7.

48 For non-citizen involvement in maritime commerce see Cohen, *Athenian Banking*, Chapter 4.

49 For Lampis' advance of 1,000 drachmas, see Dem. 34.6 and Thompson (1980) 144-5. Lampis is termed at Dem. 34.5 the οἰκέτης of Diôn, at 34.10 παῖς of Diôn. For his clear testimonial capacity, see § 31. Ste. Croix has suggested (*Class Struggle* 563, n.9) that Lampis was a slave χωρὶς οἰκῶν, and Seager ([1966] 181, n.82) notes that although a slave, Lampis is rhetorically treated in Dem. 34 as though he were an "independent agent."

50 The speech is a late work of Lysias, probably delivered about 387 B.C. (Lamb, *Loeb Lysias*). The procedural confusion implicit in the argument may reflect the novelty of the recognition at Athens of slaves' procedural capacity.

51 Anec. Bekk. (*Lex Rhet.* 316 s.v. χωρὶς οἰκοῦντες) includes "δοῦλοι χωρὶς οἰκοῦντες τῶν δεσποτῶν" in the definition of χωρὶς οἰκοῦντες, and some scholars have equated the χωρὶς οἰκῶν with the δοῦλος μισθοφορῶν. See Partsch, *Bürgschaftsrecht* 136; Clerc, *Les métèques* 281. But Suda and Harpokration seem to limit to freedmen inclusion among τοὺς χωρὶς οἰκοῦντας. For various, ultimately unsuccessful efforts to resolve the issue, see Whitehead, *Metic* 25, n.87. For a general consideration of the two categories, see Perotti (1972) and (1976).

52 See Cohen, *Athenian Banking*, Chapter 4, 55 ff.

court standing for *douloi* in commercial matters. Although Harrison notes, somewhat expansively, that "Ps.-Xen. *Ath. Pol.* 1.11 implies that (these) slaves could sue in the courts,"[53] the comment by "Xenophon" is strictly in the context of the commercial activity and business value of Athenian slaves.[54] Similarly, Menander portrays a "self-supporting" slave as competent to protect his own rights through bringing suit—but the example again is limited to property rights.[55] The rights of the slaves at Theophrastos,*Charaktêres* 30 (§§ 9, 15), again are limited to their property, especially their earnings.

C3. Agency as Legal Mechanism

The operation of *trapezai* by slaves was facilitated by the legal system's liberality in allowing transactions to be effectuated by qualified agents acting for individuals who themselves lacked legal capacity to act directly. During his early years of banking activity, before obtaining citizenship, perhaps while still a slave,[56] Pasiôn utilized the citizen Pythodôros "to do and say all things" for him.[57] When Pasiôn used bank funds to provide a bond of seven talents for a client (Isok. 17.42-3), neither the bank (not a cognizable "person" for legal purposes) nor he himself (since not a citizen) could provide the bail directly.[58] But the problem was surmountable by agency: the banker utilized the citizen Archestratos to accomplish the pledge, and the court accepted this bond.[59]

The law's acceptance of agents permitted non-citizen or slave bankers to overcome varied barriers to their business activities. Despite the Athenian courts' preference for direct oral presentation by the parties to an action, Phormiôn, whose Greek was poor, utilized Demosthenes to speak for him in an important bank-related litigation.[60] Since land in Attika, in the absence of special legislation, could be owned only by citizens, agency

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53 *Law* I. 167, n.6. Sparseness of evidence precludes even hypotheses as to the precise date of the Athenian courts' initial recognition of slaves' standing in commercial matters. Since (Xen.) *Ath. Pol.*, however, seems to date from relatively late in the fifth century (see Moore, *Aristotle and Xenophon* 20; Gomme [1940]; Forrest [1970]), tendencies toward recognizing slaves' litigational capacity in business disputes must have been present in the Athenian system even before the flowering of banking activity in the fourth century.

54 ὅπου γὰρ ναυτικὴ δύναμίς ἐστιν, ἀπὸ χρημάτων ἀνάγκη τοῖς ἀνδραπόδοις δουλεύειν, ἵνα λαμβάνωμεν ⟨ὧν⟩ πράττῃ τὰς ἀποφοράς, καὶ ἐλευθέρους ἀφιέναι. ὅπου δ' εἰσὶ πλοῦσιοι δοῦλοι κτλ.

55 *Arbitr.* 203f K (δοῦλος μισθοφορῶν). Although Gernet suggests that δικάζεσθαι in this context is entirely humorous ([1950] 175, n.3), there had to be some factual context for the joke.

56 Pasiôn played an important role in the banking business of his masters (Dem. 36.43, 48): Jones (1956) 186 has even suggested that Pasiôn, while still a slave, was entirely responsible for the operation of the bank. Although it is always assumed that he was manumitted prior to the events described in Isok. 17 (cf. Davies, *APF* 429-30), in fact we do not know when he obtained his freedom.

57 Isok. 17.33: ὑπὲρ Πασίωνος ἅπαντα καὶ λέγει καὶ πράττει. This Pythodôros (ὁ σκηνίτης), whose shops situated near the Leôkoreion were well-known to Athenians (cf. Dem. 54.7), is not to be confused with Pythodôros (ὁ Φοίνιξ) who also was utilized by Pasiôn for the introduction of potential clients (cf. Isok. 17.4).

58 See Whitehead, *Metic* 93; Gauthier, *Symbola* 138-41, 145.

59 Isok. 17.43: Πασίων δ' Ἀρχέστρατόν μοι τὸν ἀπὸ τῆς τραπέζης ἑπτὰ ταλάντων ἐγγυητὴν παρέσχεν.

60 The orator opened his presentation by noting Phormiôn's ἀπειρίαν τοῦ λέγειν, καὶ ὡς ἀδυνάτως ἔχει Φορμίων (Dem. 36.1).

might also resolve the otherwise disabling incapacity of a slave banker (or any other non-Athenian) to foreclose on security for a loan provided in the form of Attic land.[61] When the non-citizen Phormiôn desired to be able to execute on those loans which the bank had extended "on land and multiple-dwellings" (ἐπὶ γῇ καὶ συνοικίαις), he arranged for the bank-owner, his former master, to retain nominal ownership of these receivables, in form as a debtor of the bank, so that "he might be able to execute" against such real-property.[62] This utilization of Athenian citizens as agents, through the mechanism of a formalistic intermediate loan to an Athenian, effectively permitted non-citizens operating banks to engage freely in real-estate lending.

This free use of representatives, permitting businessmen to accomplish through third parties undertakings otherwise prohibited, constituted a remarkable legal innovation. Other systems of law have had significant difficulty in developing a mechanism through which actions even otherwise permitted can be effectuated through third parties. Only with bewildering intricacy did the Roman law develop distinctions circumventing the absolute preclusion of agents for any purpose;[63] modern legal systems have been resistant in varying degrees to the binding of a third party by arrangements made through others.[64] But Athenian law, precisely because it had not developed rigorous systems of juridical requirements for the creation of obligations,[65] was able easily to give legal effect through representatives even to commitments which might not be undertaken directly by principals—provided that the representatives themselves had capacity to effectuate the undertaking. Without some concept of agency, banking as an ongoing business is impossible. Through its acceptance of slave bankers' representation by citizens, Athenian law satisfied both traditional forms and economic needs.

D. Family and Property: Women's Legal Situation

At Athens women's direct economic prerogatives were substantially inferior to female property rights in other male-dominated Greek communities—and any effort to alter this inequity directly challenged social values and perceptions mandating women's exclusion from the public world of the community.

D1. Wife's Personal Legal Status

Before the law could deal with a wife's property rights, it had to bring within its cognizance the woman herself. Here the institution of marriage provided a necessary point

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61 On this grant of ἔκτησις, see generally Pečirka, *Formula;* Steltzer, *Untersuchungen.*

62 Dem. 36.6: οἷός τ' ἔσοιτ' εἰσπράττειν ὅσα Πασίων ἐπὶ γῇ καὶ συνοικίαις δεδανεικὼς ἦν.

63 See Wenger, *Stellvertretung* 125; Nicholas, *Roman Law* 201-4.

64 For the inherent opposition to agency, and its partial resolution in modern Britain and the United States, see Buckland & McNair, *Law* 214-15.

65 See Wolff (1957); Jones, *Legal Theory* 224-5.

of intersection for the public and private spheres. Marriage, at the heart of the *oikos*, was also a critical concern for the Athenian state which rigorously limited citizenship, the sole source of all political privileges,[66] to individuals born within specified marital arrangements.[67] Yet aside from birth there was another—albeit highly restricted—path to citizenship, naturalization. At Athens this was no routinized procedure: naturalization required on an individual basis a specific resolution of the male citizen body in Assembly.[68] As Osborne has demonstrated,[69] bankers were unusually successful in obtaining Athenian citizenship. In thus bringing into the political system disproportionate numbers of *trapezitai*, the Athenians not only facilitated the creation of new great households, and their integration into prevailing society: they dealt with (or rather failed to deal with) wives' personal status in a way which has been baffling to modern scholars (above, n.4) but in fact reflects juridical adaptation to the needs of banking households.

The prominent banker Pasiôn had been naturalized as an Athenian citizen not long before his death in 370/69.[70] By then grants of citizenship were in general explicitly extended to descendants of the honorands,[71] and Pasiôn's children and grandchildren, male and female, are known to have been recognized as Athenian citizens.[72] Yet nothing is known as to the status of his wife-widow Archippê: in contrast to their explicit grant of citizenship to the descendants of male honorands, Athenian naturalization decrees ignore wives.[73] And unlike certain other Greek states of the fourth century,[74] Athens did not enfranchise women in their own right. As a result—despite preservation of a number of court cases in which Archippê's family situation, role in the banking household and disposition of property are discussed in detail—her own citizenship is never explicitly

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66 See Wolff (1944); Patterson, *Pericles' Citizenship Law*. Cf. Paoli, "Cittadinanza e nazionalità nell'antica Grecia," *Altri Studi* 197-9.

67 Persons could be enrolled as citizens only if born from marital unions in which both parents were Athenian citizens. For the triumph of this requirement of double endogamy over alternative criteria, see Davies (1977).

68 Mass grants are known to have occurred only in two exceptional wartime circumstances: to Athens' Plataian allies in 427 and in order to provide desperately-needed sailors for the Arginousai campaign in 406.

69 Osborne, *Naturalization* IV 204-6.

70 Dem. 46.13. He was not a citizen at the time that Isok. 17 was argued (late 390's): see 17.33 (use of Pythodôros the citizen as his agent), 17.41 (his inclusion among the ξένοι εἰσφέροντες). Davies (*APF* 430) reasonably infers that Pasiôn's receipt of citizenship resulted from his military and naval benefactions to the city (Dem. 45.85, 59.2). There would have been little opportunity for such benefactions during the tranquil period stretching from 386 to 377, when Athens was carefully avoiding actions which might endanger the Peace of 387/6. Cf., for example, the terms of renewal of Athens' alliance with Chios in 384/3 (*IG* II^2 34.6-16) intended to avoid disturbance of the Peace.

71 Sometime after 388 (but prior to 369/8) offspring began to be routinely included in grants of citizenship. Osborne, *Naturalization* IV 151-2.

72 His son Apollodôros, born in 395/4 (24 years old at the time of his father's death in 370/69: Dem. 36.22, 46.13), refers to himself as a naturalized citizen, κατὰ ψήφισμα πολίτης (Dem. 53.18), ποιητὸς πολίτης (Dem. 45.78). Pasiôn's granddaughter, married to the citizen Theomnêstos, clearly held Athenian citizenship. See Dem. 59.1-15.

73 Osborne (1972) 147, n. 75; *Naturalization* IV.150.

74 See, for example, *SEG* 15.384; 18.264; 19.425; 23.470.

referred to. This ellipsis in itself presented no ideological inconsistency or practical difficulty: the essence of an Athenian woman's citizenship lay in the capacity to give birth to Athenian citizens.[75] In making provision for the offspring of male honorands, therefore, the Assembly was fully meeting conventional family needs through legislation compatible with community social values. But for bankers this omission raised the likelihood that their typical testamentary arrangements would result in gross violation of Athenian law. Archippê's situation is graphic: whether she is considered a citizen or a foreigner, Pasiôn's arrangements are *prima facie* patently unlawful.

On his death in 370/69 (Dem. 46.12), Pasiôn in his will "gave" his wife Archippê to Phormiôn, to whom he had previously leased the bank.[76] Although Phormiôn did not obtain Athenian citizenship until 361/0,[77] he was married to Archippê in 368.[78] If Archippê were a citizen, this marriage blatantly violated the statutory prohibition of a non-citizen's cohabitation in marriage with an Athenian citizen: male non-citizens in such relationships were to be sold into slavery, and their goods confiscated.[79] But if Archippê were not an Athenian citizen, Phormiôn's parallel directions providing her with ownership of substantial real-estate (a multiple-dwelling apartment house, or *synoikia*) would have been clearly illegal: non-citizens were precluded from owning real-estate in Attika directly.[80] This dilemma would have affected all metic and slave bankers who obtained citizenship at Athens, and thereafter left their banks and their wives to their slaves: the wife, if a citizen, could not lawfully cohabit in marriage with the banker's non-citizen successor; if not a citizen, she could not own the house that was necessarily an integral part of the *oikos* which the banker was seeking to perpetuate.

Because institutions situated in the male world of the community sought to avoid all

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75 See Sealey, *Women and Law* 19; Just, *Women* 24. The right to motherhood was recognized as a moral claim of women: see Isaios 2.7-8; 8.36. For consideration of the peripheral aspects of female citizenship, see Patterson (1986); for the concept of "passive" citizens, see Mossé (1979); Lotze (1981); Walters (1984) 319.

76 Dem. 45.28: δίδωμι τὴν ἐμαυτοῦ γυναῖκα Ἀρχίππην Φορμίωνι, καὶ προῖκα ἐπιδίδωμι Ἀρχίππῃ, τάλαντον μὲν τὸ ἐκ Πεπαρήθου, τάλαντον δὲ τὸ αὐτόθεν, συνοικίαν ἑκατὸν μνῶν, θεραπαίνας καὶ τὰ χρυσία, καὶ τἄλλα ὅσα ἐστὶν αὐτῇ ἔνδον, ἅπαντα ταῦτα Ἀρχίππῃ δίδωμι. Cf. Dem. 36.8.

77 Dem. 46.13. Cf. Dem. 36.6 and 47.

78 Dem. 45.3; Dem. 46.20-1.

79 The text of the law is quoted at Dem. 59.16: Ἐὰν δὲ ξένος ἀστῇ συνοικῇ τέχνῃ ἢ μηχανῇ ἠτινιοῦν, γραφέσθω πρὸς τοὺς θεσμοθέτας Ἀθηναίων ὁ βουλόμενος . . . ἐὰν δὲ ἁλῷ, πεπράσθω καὶ αὐτὸς καὶ ἡ οὐσία αὐτοῦ, . . . ἔστω δὲ καὶ ἐὰν ἡ ξένη τῷ ἀστῷ συνοικῇ κατὰ ταὐτά. Under the earlier law prevailing from the mid-fifth century, offspring of citizen/non-citizen marriages would have been denied Athenian citizenship, but it is uncertain whether the relationship itself would have been invalid: cf., for example, Hignett, *History* 343 and MacDowell, *Law* 67, 87 (invalid) with Harrison, *Law* I.26 and Patterson, *Pericles' Citizenship Law* 29, n.3; 95, n.57; 99 (permitted but discouraged). By the 340's, and presumably earlier, such relationships were themselves illegal and subject to the harsh penalties reported at Dem. 59.16. Cf. Biscardi/Cantarella, *Profilo* 104.

80 Although the provisions of Pasiôn's will might be read as purporting to convey the property to Archippê only as her dowry, her husband Phormiôn (at this time a non-citizen) could not lawfully have held ownership of the real-estate as her *kyrios*.

contact with, and even mention of living women,[81] Athens could not easily avail herself of the modern response of including a spouse automatically in citizenship decrees or extending to a woman a separate right of naturalization (a step known to have been adopted by at least some other ancient Greek communities).[82] For the same reason, ignoring wives' status generally created no difficulty for the Athenians: citizenship rights—other than the privilege of procreating new citizens—were exclusively exercisable within the judicial and political systems, male institutions entirely outside the sphere of the *oikos* where wives functioned. But bankers' wives were involved with a family business which necessarily functioned in both public and private areas.

The solution: Archippê was neither exclusively an Athenian citizen nor exclusively an alien. As Whitehead has suggested, the law granted her both legal statuses as circumstance required, a position of "Janus-like duality" ([1986] 114). This equivocality is explicitly recognized by Apollodôros when he suggests that even if Pasiôn's will had "given" Archippê in marriage to Phormiôn, the latter should not have acted on his own in effectuating that testamentary direction. Instead, Apollodôros insists, "if Phormiôn wished to act properly," he should have sought through the formal legal system confirmation of the will's provision, bringing a declaratory action "before the archon if he claimed her as a citizen, and before the polemarch, if as a foreigner."[83] In actual practice, however, just as in this case, the issue of the wife's status was likely never to be raised, and her citizenship never resolved. Although an outsider might seek a determination in the courts as to an adversary's relationship with a woman, as in the famous case of Neaira (Dem. 59), family members were precluded from such litigation by the law's silence and by society's expressed values. It was, of course, the unvoiced law which had left Archippê's status ambiguous when her husband was explicitly raised from alien to citizen through naturalization. Far from bringing female family members into the "outside" court system,[84] male family members would normally struggle to protect their female relatives from the "dishonor" of being publicly discussed. During his mother's lifetime—despite his averred outrage—Apollodôros avoided court hearings which would have raised any of these issues.[85] Only after her death did he proceed against Phormiôn. And even then he

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81 In the courts, speakers consistently employed complex circumlocution to avoid even mentioning their own female relatives by name, but litigants freely named their opponents' female connections. Highly contorted periphrasis occurred when women were central to the issues in litigation or where presentation of the facts required reference to large numbers of females. For a demonstration of the consistency with which litigants adhered to these patterns, see Schaps (1971).

82 See above, n.74.

83 Dem. 46.23: οὐκοῦν αὐτόν, εἴπερ ἐβούλετο ὀρθῶς διαπράττεσθαι, λαχεῖν ἔδει τῆς ἐπικλήρου, εἴτε κατὰ δόσιν αὐτῷ προσῆκεν εἴτε κατὰ γένος, εἰ μὲν ὡς ὑπὲρ ἀστῆς, πρὸς τὸν ἄρχοντα, εἰ δὲ ὡς ὑπὲρ ξένης, πρὸς τὸν πολέμαρχον . . .

84 "Inside" (pertaining to the household) and "outside" (pertaining to the public sphere) are basic to the Athenian universe of complementary opposites. For the "inside" as the wife's area of management, see Xen. *Oik.* 7.3; Aristotle, *Oik.* 1.3-4. Pasiôn appropriately bequeaths to Archippê all the items "inside" (ὅσα ἐστὶν αὐτῇ ἔνδον, ἅπαντα ταῦτα Ἀρχίππῃ δίδωμι, Dem. 45.28).

85 Although the γραφὴ ξενίας presumably was available, he never brought an action to

makes only the most veiled suggestion that his mother's status might have invalidated the marriage,[86] a muted implication without effect, offered many years after her death in an action against the unrelated Stephanos.

D2. Wife's Property Rights

Archippê's case also suggests how the Athenian law tacitly came to recognize the right of banking wives to own property. The basic nature of property ownership at Athens has baffled modern scholarship which has asserted that in fact the Athenians never developed a true concept of "ownership," or even a term for it.[87] Nonetheless it has been uniformly agreed that in Athens women were unable to own property directly in their own name and right.[88] This legal incapacity—it is conceded—may have been vitiated in daily life by their exercise of practical control over certain goods, in particular their own clothing and jewelry, and perhaps a little money,[89] and it has even been suggested that in some ways property should be conceived of as held not as his own by the male head of the household, but in a representative capacity on behalf of the *oikos* as an entity.[90] But either approach equally dismisses direct female ownership: if property is conceived as owned through households, the male head of the family controlled it through his position as *kyrios* of the members of the family; if property is conceived as owned individually, women were unable to function as owners because of their dependence on masters who alone were capable of legally controlling assets.[91]

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clarify her marital situation and thereby his own claims. Nor did he bring a private suit (δίκη ἴδια); he withdrew before trial the γραφὴ ὕβρεως which he did present (Dem. 45.3-4).

86 In accord with Athenian values, Apollodôros in litigation never speaks with specificity about the circumstances surrounding his mother's marriage, asserting rather the inappropriateness of a son's speaking in detail in court about a mother, even one long deceased: οὐκ ἴσως καλὸν υἱεῖ περὶ μητρὸς ἀκριβῶς εἰπεῖν, Dem. 45.3.

87 Wolff (1944) 63; Harrison, *Law* I.201. MacDowell terms the Athenian property laws "primitive" (*Law* 133). Scholars (see, e.g., Jones, *Legal Theory* 198, but note Kränzlein, *Eigentum* 33, 51-2) have tended to cite Aristotle, *Rhet.* 1361a (1.5.7) as the sole known Greek definition of ownership. Here Aristotle focuses on the power to alienate (ἀπαλλοτριῶσαι) as the essence of ownership (τοῦ οἰκεῖα εἶναι). By this criterion alone, women's rights were severely restricted. Athenian law specifically prohibited women from engaging in any contractual dealings involving more than one *medimnos* of barley (συμβάλλειν μηδὲ γυναικὶ πέρα μεδίμνου κριθῶν [Isaios 10.10: cf. Aischin. 1.18]). On the practical significance of the limitation, see Kuenen-Janssens (1941) 212.

88 Even Foxhall, who demonstrates the economic importance of focusing on the right to use property rather than on the capacity to alienate, can argue only that "it is inappropriate to consider property solely as a function of individual ownership," while noting the *opinio communis* that "women in ancient Athens could not and did not own property." ([1989] 22, 23).

89 Sealey, *Women and Law* 45-9 equates this right of control to a "negative account of ownership" in which women's fundamental rights are not entirely eliminated by her *kyrios*' "authority to administer her property for the specific purpose of her upkeep and the protection of her interests" (p. 48).

90 This view has ancient support from Sositheos who, in the struggle for the estate of Hagnias (Dem. 43), maintains that the concept of ownership by household is fundamental to the Athenian law of property. See Thompson, *De Hagniae Hereditate*, passim. MacDowell dismisses this contention peremptorily: "Athenian law did not recognise rights of families, but rights of individual persons" ([1989] 21).

91 Schaps advances this premise at length and with vigor (*Economic Rights* 4-17), and his view has won general acceptance: see Powell, *Athens and Sparta*, ch. 8; Garner, *Law & Society* 83-7; Foxhall (1989) 22; Just, *Women* 29.

This analysis, however, cannot explain Archippê's position with respect to property attributed to her. She seems clearly to have had monetary assets fully recognized, in legal context, as her own: Apollodôros is accused in court of seeking 3,000 drachmas from her estate "in addition to the 2,000 drachmas which she had given to Phormiôn's children."[92] Pasiôn in his will "gives to Archippê as dowry one talent from Peparêthos, another talent here at Athens, a *synoikia* worth 100 mnas, female slaves, gold jewelry, and the other items of hers which are inside (the house), all these I give to Archippê."[93] Whether interpreted as merely confirming Archippê's ownership of property which is already hers, or as granting her new property, or as conveying assets to her new husband as her *kyrios*, the disposition is impossible under conventional interpretations of Athenian law. Since Archippê's new husband, Phormiôn, was not an Athenian citizen, he could not hold the real property as nominal or actual owner.[94] The only other possible owner, Archippê herself, could not own the *synoikia*: even those scholars willing to see Athenian women as possibly indirect beneficial owners of assets do not contemplate their direct ownership of property in their own right.[95]

The solution, however, here again appears to lie in the ambiguous duality of Archippê's civil status. As a citizen, she would have had the right to own real estate—vitiated only by modern scholarly insistence on female citizens' incapacity to own property directly in their own right. As a foreigner, however, her basic right of property ownership—albeit not of real estate—was recognized, not informally, but by specific notice of Athenian law. The fourth-century statute prohibiting marriage between Athenians and foreigners provided that a male foreigner, on conviction, forfeit all of his property and be sold into slavery: it then proceeds to provide "the same penalty," i.e. sale into slavery and loss of property, for female foreigners found in violation of the statute.[96] The text necessarily contemplates foreign women's direct ownership of property, a clear indication that whatever the limitations under Athenian law on Athenian women's rights of ownership, these were not applicable to foreign women.

Outside Athens women clearly had substantial rights to own property directly. In Gortyn, the only other polis for which we have knowledge comparable to that for Athens in the classical period,[97] women had full legal power to hold and deal with their own assets

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92 Dem. 36.14: . . . τρισχιλίας ἐγκαλέσας ἀργυρίου δραχμὰς πρὸς αἷς ἔδωκεν ἐκείνη δισχιλίαις τοῖς τούτου παιδίοις.

93 See the Greek text, above, n. 76.

94 See above, n. 80 and text thereto.

95 Harrison, for example, believes that denial of Athenian women's "ownership" of property is essentially an exercise in semantics ("largely a matter of definition," Harrison, *Law* I.236). But he still insists that "there can be no doubt that a woman remained under some sort of tutelage during the whole of her life," and that it was this *kyrios* who had to represent her except for "the most trifling contract." (*ibid.*, 108).

96 ἔστω δὲ καὶ ἐὰν ἡ ξένη τῷ ἀστῷ συνοικῇ κατὰ ταὐτά. . . . For fuller reference, see above n. 79.

97 In the Hellenistic and Roman periods, women are frequently identified as property owners. See Ste. Croix (1970) 273. Even at Athens, *IG* II^2 2776 (2nd cent. A.D.) discloses a number of women as

in their own name,[98] and even to inherit their own portion from their parent's estate (although only half a brother's interest).[99] They could deal with their property without the intervention of a *kyrios*,[100] and there is frequent mention of "maternal" assets separate from "paternal" property.[101] At Tegea, an inscription concerning the return of exiles makes provision for confiscated property, and recognizes "maternal assets" independent of "paternal."[102] Without recorded resistance or even special notice, Spartan women even entered their own teams in the pan-Hellenic Olympic chariot races—and won.[103] By the third century B.C., most of the wealth in Sparta was said to be under the control of women.[104]

Thus—as shown by the law quoted in Dem. 59.16 (see above n. 79)—Athenian legislation dealing with foreign women could not avoid recognizing their possible ownership of property under the laws of their own state. Archippê therefore as a foreigner, pursuant to her "Janus-like" duality of citizenship, could be, and apparently was, recognized under Athenian law as direct owner of her own assets. The right of banking wives, at least the large non-citizen portion, to own property directly provided the nexus for perpetuation of the banking *oikos*. In this context, disposition of the bank was inseparable from the marital disposition of the banker's wife. Separation of the widow from the bank's new proprietor would, at the least, have created enormous legal conundra, necessarily disturbing to the "confidence" (πίστις) critical to successful bank operation (Dem. 36.57). Athenian bankers had strong property incentive to prefer "a pile of money over pedigree"[105] by joining their wives and slaves in marriage. To this preference the law was accommodating.

It was an accommodation whose significance should not be underestimated. Athens was strongly committed to the uniform imposition wherever possible of Athenian law, especially on non-citizens resident in Attika, but also on all others having any juridical contact with the state. This is clear even in the fragmentary materials surviving from bilateral interstate treaties concluded during the fifth-century period of empire.[106] In the fourth century, all evidence "shows the exclusive application of Athenian law in the courts

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landowners. See Day, *Economic History* 232-3.

98 See Lex. Gort. 2.45-50; 3.17-37, 40-3; 4.23-7, 48-54; 5.1-9, 17-22; 6.52-8.30; 9.1-11. See Willetts, *Law Code of Gòrtyn* 20, 23. Cf. Thomson, *A & A* 204; DHR 1.457.

99 Lex Gort. 4.29-48.

100 Lex Gort. 8.47-51; 9.1-7.

101 Lex. Gort. 4.43-6; 6.31-46; 11.42-5.

102 *SIG*³ 306, lines 4-9, 48-57 = Tod 2.202: τὰ ματρῶια, τὰ πατρῶια.

103 Paus. 3.8.1; 6.1.6.

104 Plut. *Agis* 7.3-4; 4.1.

105 Dem. 36.30: above n.20.

106 For such treaties, see Gauthier, *Symbola*; Cataldi, *Symbolai*. The surviving texts of these agreements, too fragmentary to offer much substantive guidance (cf. MacDowell, *Law* 220-1), are generally analyzed in political rather than juridical terms. See Cataldi, *Symbolai* 345-6, n.108. On direct conflicts of law, the fullest treatment is Lewald (1946), whose continued viability—reprinted twice (including a German translation) during the 25 years following its initial publication—suggests the dearth of attention to the subject.

and observance of it by metics."[107] (These metics would include former slaves who even after obtaining their freedom did not receive Athenian citizenship, but were legally assimilated to other metics.)[108] According to Lysias, the Athenian metic was considered, by the very fact of residence in Attika, to have accepted the applicability of Athenian law.[109]

But this consistent insistence on Athenian substantive provisions occurred in the courts, in the public sphere of men. Since the *oikos* itself was alien to the world of law, in antithetical counterpoint to the male world of community, for Athenian law silent adaptation to women's rights, and acceptance of alien legal standards, was far easier in the context of the *oikos*. The *trapeza*, mediating between the universes of public and private life, could thus be allowed a legal solution which made both juridical and economic sense—albeit with a muted clarity explicable only by examination through Athenian, not alien, values.

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107 Whitehead, *Metic* 89. Maffi has argued that ethnic groups resident in Athens continued to utilize their own law ([1972] 177-9). Although Isokrates (19.12-4) does attest to the appeal by two Siphnians resident in Aigina to Siphnian-Kean law (19.13), Maffi was unable to offer a single actual Athenian example of such usage.

108 Harrison, *Law* I.188. Cf. Biezunska-Malowist (1966) 66-72.

109 22.5: ὡς πεισόμενος τοῖς νόμοις τοῖς τῆς πόλεως.

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Response to Edward Cohen

This paper exemplifies a valuable direction for the history of ancient Greek law. Cohen demonstrates a mastery of the legal issues, but he does not treat law as a separate realm that can or should be studied in and of itself. Rather, he views Athenian law as a factor in the broader context of "private" social relations, political power, and conflicting ideologies. The law, for Cohen, is not an independent entity, not a fixed set of rules "given" to the society by a lawmaker. Rather Cohen sees law as product of, and simultaneously an instrument of, ongoing social and political mediation. Cohen's paper reminds us that many diverse interests were represented among the populations of citizens and non-citizens that coexisted in the polis of Athens during the fourth century B.C. These interests often came into conflict; and Athenian law and legal practice evolved as various interests were successfully advanced or were overriden by other interests. The legal adaptations and "silences" that Cohen describes are quite remarkable, given the ideology of citizenship on which the democratic state was founded. And the implications of Athenian willingness to make these changes has considerable significance well outside the field of legal studies.

In the cases Cohen considers, the public realm of the law—the democratic realm of collective enactment and implementation by the *politai*—was used in part to facilitate relations within the supposedly private realm of the *oikos*, for example, property-holding and marriage. Moreover, the persons and *oikoi* involved in the cases under review were, in political terms, marginal. The law of Athens was, of course, made by the citizens: adult males, who were overwhelmingly native-born, most of whom were not particularly well-off, many (perhaps most) of whom were peasant agriculturalists. The key *dramatis personae* of the cases Cohen brings to our attention fit none of these categories; some are women, among the men a few were naturalized citizens, others were metics or slaves. All of the major parties to these legal disputes were members of Athens' wealthy elite.

A relatively coherent, if complex and not fully rational political ideology underlay Athenian processes of public decision making, including *nomothesia* and the judgments of *dikastai*. This ideology was very aware of social and political distinctions between classes of persons and (if the collected speeches of the Attic orators are any guide) Athenian ideology did not much favor the sort of people involved in the cases Cohen discusses. As is most clearly demonstrated by Demosthenes 21, rich people, even rich citizens, were regarded as potential objects of suspicion by ordinary Athenian citizens, as were all those residents of Athens who were not born of native Athenian stock. Slaves were popularly regarded as liars, cheaters, and natural enemies of the Athenian public order.[1] The position

1 Athenian ideology and the position of rich men: J. Ober, *Mass and Elite in Democratic*

of Athenian women is more complex, in that they participated in the maintenance of the citizen body in various ways. As Cohen points out, they were essential in the first instance for the biological reproduction of the citizenry, but they also educated young citizens and engaged in constant social intercourse (and discussed political matters) with husbands and relatives, and performed essential economic roles. Yet overtly public speech and decision-making, including speaking and serving as a *dikastês* in the lawcourt, was ordinarily the unique preserve and privilege of the male citizen.

The Athenian citizen clearly defined himself—at least in part—as a member of a political body, and his membership allowed him (perhaps encouraged him) to contrast himself to all those residents of Attica who were denied citizenship. In order to regulate tensions between status and wealth distinctions within the citizen body, it was necessary that the citizenry be able to view itself collectively as a homogeneous entity that held itself apart from (and above) all those residents of Attica who were not sharers in the political community.[2] This should mean that that any blurring of the legal boundaries which separated metic from citizen, free from slave, male from female, could potentially threaten the collective self-definition of the Athenian people—which would in turn entail a threat to the democratic political order as a whole. And thus we might expect that the ideological role of citizen-made and citizen-administered Athenian law would be to reinforce citizen solidarity against all "others." But, as Cohen shows, this was not invariably the case.

Why, we must ask, were the Athenians willing to accommodate the interests of metics, slaves, and women by making changes and allowing "silences" in their own beloved legal system? Why should the Athenians have engaged in the socially hazardous blurring of legal boundaries between citizens and all others? Why should law-making citizens care about legal privileges for people not regarded as worthy of political privileges? As Cohen shows quite clearly, some legal adaptations led to a certain lack of coherence in the discourse of Athenian law. What did the Athenian citizens expect to get in return for their sacrifice of both ideological and legal consistency? Cohen's answer seems to be that a degree of incoherence in the discourse of law was necessary in order to protect the private world of the individual *oikos* (and especially its female members) from culturally unacceptable forms of public exposure. But is that the whole story? Let us look more closely at the legal innovations discussed in Cohen's paper.

First: Cohen argues that the Athenians developed the legal concepts of agency and limited fiscal responsibility—the owner of a bank need no longer be personally responsible for debts contracted by his slave, if that slave contracted the debt in his capacity as lessor and manager of the bank. This obviously could have represented a serious inroad into the stability of the traditional meaning of the *kyria* relationship. Blurring status demarcations

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Athens (Princeton 1989) 192-247; autochthony ideal and suspicion of foreigners, *ibid.* 261-270; slaves as natural enemies to the polis: 270-272.

2 For Athenian citizenship, see especially P. B. Manville, *The Origins of Citizenship in Ancient Athens* (Princeton 1990).

and their attendant responsibilities could have significant social and legal ramifications; cf. the dispute detailed in Isocrates 17 (17.14-15, 17, 49, 51) over the legal status of Pasion's bank-employee, Kittos. According to the plaintiff Kittos was a slave and so could be (and should have been) tortured for evidence about the dispute; according to Pasion and Kittos himself, Kittos was a free metic and thus not liable to torture. It seems a reasonable inference that Kittos' responsible position as a bank slave (even though not a bank lessor contracting debts in his own name) helped to place his status into question. The unease generated among some Athenians by free/slave status ambivalence, even before the legal change described by Cohen, is attested by the complaints of pseudo-Xenophon (*Const. Athen.* 1.10-11).

A second change is quite closely related. According to Cohen's persuasive argument, certain categories of slaves and non-citizens were, in the course of the fourth century, allowed to serve as parties and witnesses in banking litigation. This is remarkable in that the Athenians normally preserved a linkage between formal political equality and personal responsibility for speech and action performed in the public sphere. The *politai*, as equals in the political realm, were also equally and individually accountable for what they did and said in their roles as citizens (e.g. subject to *euthunai* for actions performed as magistrates, to indictment by *graphê paranomôn* for proposals made in Assembly). Those residents of Attica who did not have access to political rights may have been wealthier, cleverer, and so on than ordinary citizens, but their superiority in any given social sphere was balanced (in Athenian ideology) by their exclusion from the world in which adult men stood together on an equal footing, as responsible political agents. Because of various sorts of *kyria* relationship, metics, women, and slaves remained in dependent positions vis a vis the *politai*—and were ordinarily represented, when necessary, in public by members of the political body. But if Cohen is right, the Athenians broached the equality-responsibility linkage by granting certain metics and slaves limited equality in legal standing.

Offering slaves the right to present legal testimony is especially surprising when one considers that Athenian slaves ordinarily were allowed (if one may use the term) to bear witness in court only when tortured. Torture of slave witnesses fits well enough with what I have characterized as normal Athenian ideology: since they were viewed as "natural" enemies of the Athenian political order, it could be supposed that slaves desired to harm that order by speech (as well as by action). Because no slave would voluntarily help a regime that kept him enslaved, physical coercion—application of torture—was the only way slaves could be forced to benefit the regime (i.e. by revealing the truth about events in a legal proceeding). The acceptance of uncoerced legal testimony of slaves threatens the entire Athenian ideology of the interrelationship between responsibility, group interest, coercion, and truthful speech.

Cohen's paper forces us to confront another issue of interpretation: What was an

Athenian bank, in the view of Athenian ideology and Athenian law? Two possible answers are intertwined in Cohen's paper. First, a bank may be seen simply as personal property—a liquid asset like any other form of moveable goods (e.g. furniture or coined money). As ordinary property the bank could be kept, sold, or broken up and redistributed for the good of an *oikos*, and/or for the good of the polis. In this first view, how the property was used remained primarily a matter for the personal judgment of the owner; although he might take into account how his use of his property would affect the view the Athenian citizenry held of him.[3]

The second view of a Bank is as a business corporation—an entity recognized by all concerned parties as having an operational existence in some sense independent of its current owner. In some cultures, a bank may be allowed to mimic the legal role of the person—in modern American law, for example, a business corporation can be treated in certain respects as the legal equivalent of an individual. Athenian law obviously never went that far. But might the Athenian bank nevertheless be viewed by all parties concerned—the owner, his relatives, the jurors (standing in the place of the *politai)*—as an entity that was expected to continue in existence and operation beyond the lifetime of its current owner? And might the jurors, to go one step further, consider the survival of the bank a political matter, an issue of public concern? If a bank is a business/entity, rather than just another form of disposable property, it is conceivable that the bank's interest transcends the narrow interest of the current owner and his *oikos*. And consequently, the *politai* might have a collective concern with how a bank was disposed of after its owner's death.

Cohen points out that Athenian law in the early fourth century "did not recognize businesses as autonomous juridical persons." But elsewhere he hints that Athenian banks might be regarded as business entities, stating that owners "sought to preserve their businesses by installing highly regarded slaves as their successors." Note: "preserve their businesses" not just "preserve the wealth of their *oikoi*." The question is this: did Athenian law (and Athenian ideology) tend to blur the simple-property perspective in the direction of the business/entity perspective? If so, why?

These complexities come to a point in Cohen's discussion of the marriages of widows of deceased bank owners. Athenian civic ideology seems starkly challenged, and the discourse of Athenian law thrown abruptly out of kilter, in the circumstance in which the free, naturalized, Athenian-citizen wife of a deceased banker marries the slave-manager of the bank and thus effectively turns over control of the bank to him. Cohen argues that this pattern was actually a norm, occurring "routinely" and "frequently."

There may be some question as to whether the surviving texts fully support routine, frequent transfers of this nature. The relevant evidence for the practice comes from Athenian legal rhetoric, a notoriously slippery source for reconstructing the realities of

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[3] As recent studies of the political function of the *charis* obligation have shown, the view of the citizenry could be of great relevance when an individual became involved in a legal proceeding. See Ober, *supra* n.1, 226-30, with literature cited.

social or legal practice. There is always a danger of conflating social reality and rhetoric based on ideological presuppositions. A case in point is the speaker's portrayal of Archippe's knowledge of the bank's affairs (Dem. 36.14). The jurors did not, in all probability, know whether or not Archippe actually possessed this sort of knowledge; the issue is whether they would be likely to assume, and whether they would be right in assuming, that bankers' wives generally knew a lot about bank workings. Was this sort of case common enough for the extent of bankers' wives' access to the details of their family businesses to become a matter of common knowledge in Athens? The comment (Dem. 36.29) that "anyone could cite many examples" of bank-slaves being freed and assigned control of bank and widow by the testamentary wishes of the owner, might be read as an example of what I have elsewhere called the "we all know" topos, a rhetorical ploy that attempts to shame ignorant jurors into silence. But on the whole, I think that Cohen's argument does hold together. At least it is safe to say that the arguments from probability made by Phormion's supporter in Dem. 36 did not hurt his case—which Phormion won, as we know (for once) from Dem. 45.[4]

If Cohen is correct, and it was relatively common for Athenian banker-widows—free women and the former wives of (naturalized) citizens—to marry slave-managers, this is another case of transgressing aspects of normal Athenian ideology. It would be a violent transgression indeed if the women involved were native-born "autochthonous" Athenians. Archippe was certainly not Athenian by birthright. Cohen suggests, following Whitehead, that the wives of naturalized citizens were accorded a sort of "Janus-like" status, on which the law was essentially silent, a status that combined features of both citizenship and non-citizenship. But this blurry status is, in itself, innovative. Athenian ideology and law were notoriously touchy about marriages of citizens and non-citizens. According to the law cited in Dem. 59.16, any non-citizen convicted of cohabiting with a citizen woman would forfeit both his property and his freedom. In the case of bankers' widows, insofar as they were even partially "citizens" (and we must keep in mind that Archippe was the mother of two sons who married, and produced children by, native Athenian women: see Davies, *APF* 11672—thus her bloodline was comingled with that of the *autochthones*) we have the very inverse of the legal norm: rather than losing property and being sold as a slave, the slave-foreigner in question, by marrying a citizen woman, gains a substantial property and the status of free man. One might assume that a naturalized family would develop and encourage amnesia about its servile origins—which must also, on some level have been embarrassing to the Athenian *autochthones* themselves. But the testamentary marriage of Archippe to Phormion the slave brought the issue of servile origins to the fore. We must assume, then, that there was a compelling reason for Pasion and his fellow Athenians to have countenanced the union of Phormion and Archippe.

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4 See now Cohen's defense of the argument from probability approach in *CPh* 85 (1990) 177-90.

The speaker of Dem. 36 is aware of the tension, and he deals with it explicitly at 36.30, in a passage Cohen quite rightly calls to our attention. The speaker claims that native-born citizens would never prefer wealth (*plêthos chrêmatôn*) to honorable descent, but points out that those who received citizenship as a reward for successful money-making and for "owning more than other people" must guard their sources of revenue by whatever means necessary. The passage implies that hyper-vigilant resource-guarding on the part of naturalized families was regarded as proper by the members of the families themselves—whose political status depended upon their wealth—and by the Athenian jurors. In the case before us, the logic of resource-guarding entailed Archippe's marriage to the slave Phormion. But this was not for the benefit of the *oikos* alone: the speaker underlines the material good that Phormion, as an astute bank manager, has been able to do for the heirs of Pasion (that is, for Pasion's *oikos*), for "many" individual Athenians, and for the Athenian state (36.49-59). Here, the public good of the polis and the private good of the individual *oikos* become completely intertwined.[5] While Athenians may have desired to keep public and private as distinct spheres, in fact their own economic and financial systems made this separation of public and private a practical impossibility.

The passages cited above from Dem. 36 point to a plausible explanation for why the interests of polis and *oikos* alike were supposed by the *politai* to lie in allowing what appears on the surface to be a series of affronts to normal Athenian socio-political norms and to the coherence of Athenian legal discourse. The existence of banks as stable, revenue-generating, business entities was thought to be good for Athens, and banks were run by metics, slaves, and women. The Athenians recognized that they gained materially (both in liturgies and taxes and in maintaining credit liquidity: Dem. 36.57) from the specialized banking knowledge owned—more or less uniquely—by legally marginalized persons. Faced with the choice between maintaining strict ideological and legal consistency and gaining individual and collective material advantages, the Athenians chose the latter; and their ideology and law were adjusted accordingly.

This may seem a sordid exchange when viewed from a strictly political perspective, but the results of Athenian ideological and legal flexibility were substantial in both material and social terms. Easing of socio-political mobility integrated the interests of natives, naturalized citizens, and the wealthy metics who were candidates for future naturalization. It allowed the society to benefit from the managerial talents and special knowledge of certain women. It encouraged displays of private charity and public generosity from the first-generation bankers themselves (e.g. Phormion), as well as from second-generation naturalized citizens like Apollodorus, whose feverish *philotimia* was fueled at least in part by the obligation of *charis* that he owed to the *politai* for including his father (and thus himself) among their ranks (e.g. Dem. 45.82, 85).

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5 Thus I cannot fully agree with Cohen's claim that "the household, as a focus of Athenian private living, took form and identity from its contrast with the public world of the community."

Cohen's exploration of the legal status of banking families helps to explain one aspect of the long-term viability of the democratic Athenian state. And it should contribute to the ongoing debate over whether studying the democratic polis can offer anything to modern theoretical discussions of law and democracy. If the Athenians (albeit for somewhat mercenary reasons) were willing to adjust their law to accommodate the interests of certain non-citizens, then the ideology of the polis cannot be fully explained in the terms of exclusion.

A key break in the facade of exclusivity may have been the rise of a concept of agency, which Cohen suggests developed relatively easily in Athenian law "precisely because it had not developed rigorous systems of judicial requirements for the creation of obligations." Athenian law remained a very flexible instrument in practice—it was applied according to mass juries' collective perceptions of the character and interests of the parties to disputes and the long-term interests of both *oikos* and polis. One might go so far as to suggest that Athenian law's long-term social utility lay in its non-universalistic character—in the fact that, at least in comparison to other legal systems, relatively few matters in Athens were so rigorously defined by legal enactment that they could not be liberally reinterpreted by the various residents of Attica (citizens and others) who made use of the law. Democratic Athens never developed (nor allowed there to develop) an arcane legal language, or a specialized and institutionalized elite whose unique right it was to make and to interpret the law. In Athens, the law (with its silences) remained a tool of social and political mediation—rather than the comprehensive "master discourse" that lawyers in other societies (e.g. Rome and the United States) have sought to make of it.

Claude Mossé (Paris)

La place de la *pallakê* dans la famille athénienne

Je partirai du texte bien connu du discours *Contre Nééra*: "Les courtisanes, nous les avons pour le plaisir, les concubines pour les soins de tous les jours, les épouses pour avoir une descendance légitime et une gardienne fidèle du foyer" ([Dem.] 59.122; trad. L. Gernet).

Dans cette affirmation, la première et la troisième fonction assignées aux femmes sont claires: donner du plaisir (*hêdonê*) est le propre de la courtisane, de l'hétaire, donner une descendance légitime (*paidopoieisthai gnêsiôs*) et assurer la garde de la maison, celui de la *gunê*, de l'épouse. Mais la part réservée à la *pallakê* est moins évidente. Quelle fonction recouvre cette *therapeia tou sômatos*?

Pour répondre à cette question, après bien d'autres qui ont tenté de définir le rôle de la *pallakê*,[1] je commencerai par reprendre les quelques textes susceptibles de fournir des éléments de réponses. Il y a d'abord la loi sur l'adultère citée par Lysias dans le discours *Sur le meurtre d'Eratosthène* et par Démosthène dans le *Contre Aristocratès*. Lysias (1.31) ne donne pas le texte de la loi qui autorise un mari surprenant un homme en flagrant délit d'adultère avec sa femme à le tuer, mais précise que le législateur l'a étendue aux *pallakai*, pourtant "de moindre dignité."[2] Démosthène en revanche (23.53-55) donne le texte de la loi qui s'applique non seulement à la femme, mais aussi à la mère, la soeur, la fille ou la concubine "qu'il a prise pour avoir des enfants libres" (*ep' eleutherois paisin*). C'est bien évidemment ce dernier point qui pose un problème. Car, prendre une concubine "pour avoir des enfants libres" suppose tout autre chose que prendre une concubine "pour les soins de tous les jours." Cela suppose que la *pallakê* est elle-même une femme libre, et qu'il est possible à un homme d'introduire dans sa maison, à côté de son épouse légitime une autre femme qui peut être soit une étrangère, soit même une *astê*, une athénienne, fille de citoyen. Un discours d'Isée, le discours *Sur la succession de Pyrrhos*, semble confirmer cette dernière possibilité. Il s'agit, comme souvent chez Isée, d'une succession disputée, et le plaideur s'efforce de démontrer que les prétentions de son adversaire ne sont pas légitimes: l'héritage qu'il revendique au nom de son épouse ne peut revenir à celle-ci, car l'union prétendue de sa mère avec Pyrrhos n'a pas été sanctionnée par la remise d'une dot. Et le plaideur ajoute: "Même ceux qui donnent à titre de concubine une femme soumise à leur autorité stipulent tous par avance une somme qui devra être donnée" (Isée 3.39).

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1 Voir en particulier A. R. W. Harrison, *The Law of Athens I: The Family and Property* (Oxford 1968) 13sqq.; W. K. Lacey, *The Family in Classical Greece* (Londres 1968) 100sqq.; D. M. MacDowell, *The Law in Classical Athens* (Londres 1978) 89sqq.; R. Sealey, "On Lawful Concubinage in Athens," *CA* 3 (1984) 111-133; *Women and Law in Classical Greece* (Chapel Hill 1990) 31sqq.

2 ταῖς ἐλαττόνος ἀξίαις.

A partir essentiellement de ces trois textes, les modernes ont élaboré sur la *pallakê* une théorie que l'on pourrait résumer schématiquement de la façon suivante: bien que la monogamie ait été de règle à Athènes, il était fréquent que des Athéniens aient, en plus de leur épouse légitime, une concubine. Celle-ci pouvait être une Athénienne pauvre qui, sans dot, n'aurait pas trouvé d'époux. On voit aussitôt surgir un problème: celui des enfants nés de cette union marginale et de leur statut par rapport aux enfants légitimes. Car, si l'on accepte la formule de la loi sur l'adultère, la procréation d'enfants "libres" était non seulement possible avec de telles épouses "en second," elle était même apparemment le but de telles unions. S'agissait-il seulement de cas exceptionnels, par exemple destinés à suppléer à la stérilité de l'épouse légitime qu'on ne tenait pourtant pas à répudier? ou encore, comme on l'a supposé à partir d'une indication de concernant Socrate, d'une disposition destinée à pallier une crise démographique et qui, dans des circonstances précises, aurait autorisé la bigamie?[3] Ou bien, allant encore plus loin, faut-il, avec R. Sealey, imaginer que le concubinage était répandu dans les milieux pauvres, la *pallakê* n'étant plus l'épouse "en second" mais bien la compagne dont on attendait la naissance d'enfants qui hériteraient à la fois du maigre bien paternel et de la citoyenneté athénienne, quand l'origine de la mère n'était pas douteuse?[4]

On le voit, le problème qui se pose alors est celui de ces enfants et de leur statut au sein de la famille. Pour la plupart des auteurs qui tiennent la *pallakê* pour l'épouse "en second," ces enfants ne pouvaient être que des *nothoi*.[5] Une définition de Pollux (3.21) semble le confirmer: est *nothos* celui qui est né d'une étrangère ou d'une *pallakê*.[6] La distinction entre l'étrangère et la *pallakê* impliquait-elle que, si cette dernière était athénienne, le *nothos* était également athénien, en vertu de la loi de Périclès, remise en vigueur sous l'archontat d'Euclide, et d'après laquelle tout enfant né de deux *astoi* était athénien (Aristote, *Ath. Pol.* 26.4)?

En fait, le problème des *nothoi* se situe sur un double plan: d'une part celui de leur place dans les cadres juridiques de la cité, d'autre part celui de leur situation matérielle au sein de la famille et de leur exclusion de l'*anchisteia*.[7] Sur le premier point, il y a divergence parmi les auteurs. Un bon nombre d'entre eux semblent se rallier à l'idée que le *nothos* né d'un père citoyen et d'une concubine elle-même fille de citoyen serait

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3 *Vie des Philosophes* 2.26: "Car il y aurait un décret, en raison du manque d'hommes, permettant à un citoyen d'épouser une athénienne et d'avoir des enfants d'une autre" (γαμεῖν μὲν ἀστὴν, παιδοποιεῖσθαι δὲ καὶ ἐξ ἑτέρας).

4 Op. cit. (*supra* n.1) Voir aussi *The Athenian Republic* (Penn. State Univ. Press 1987) 21-23; *Women and Law* 31-32.

5 Voir en particulier Harrison, *supra* n.1, 61-68; D. M. MacDowell, *supra* n.1, 91. En sens inverse Sealey, *supra* n.4, 22.

6 νόθος ὁ ἐκ ξένης ἢ παλλακίδος.

7 J. P.Vernant ("Le mariage," dans *Mythe et Société en Grèce ancienne* [Paris 1974] 57sqq.) remarque à ce propos que le terme de "libre" employé dans la loi citée par Démosthène peut renvoyer à une époque antérieure à la loi de Périclès, quand la définition du citoyen était moins rigoureuse, et suppose même que ces enfants "libres" nés d'une *pallakê* n'étaient pas exclus de l'*anchisteia*.

citoyen.[8] De solides arguments cependant ont été avancés contre cette interprétation d'une intégration, quasi automatique, des *nothoi* nés de deux *astoi* au groupe des citoyens.[9] Lors d'un précédent *Symposion*, Alberto Maffi a traité le cas de Philè dans le discours III d'Isée pour conclure que le *nothos* issu de deux Athéniens n'était pas pour autant citoyen.[10] J'ajouterai pour ma part un autre exemple qui me parait également probant: celui d'Euxitheos, dans le discours LVII de Démosthène, qui pour prouver sa citoyenneté—il a été rayé des registres de son dème lors de la révision des listes civiques en 346—insiste longuement sur la légitimité du mariage de ses parents (57.41; 69). La légitimité du mariage était donc une condition nécessaire à la transmission de la citoyenneté, et de ce fait, le *nothos* ne pouvait normalement y prétendre.[11]

Pour ce qui est de l'exclusion de l'*anchisteia*, les opinions des modernes sont dans l'ensemble convergentes. Il semble bien en effet que ce soit là ce qui distingue le plus nettement le *nothos* du *gnêsios*, de l'enfant légitime. Aristophane y fait allusion dans les *Oiseaux* (1650sqq.), quand Pisthetairos affirme à Héraclès que, du fait de sa naissance illégitime, il ne peut prétendre à l'héritage de son père Zeus. La loi est citée par Isée (6.47) et par Démosthène (43.51): "L'enfant illégitime, fille ou garçon, ne participe à la parenté, ni au point de vue religieux, ni relativement aux biens, à dater de l'archontat d'Euclide."[12] La chose parait claire: le *nothos* n'avait pas part à la succession du bien paternel, et c'était même une preuve de naissance légitime que d'entrer en possession de la succession paternelle sans qu'elle soit revendiquée par ailleurs: ainsi Euxitheos tire-t-il argument de ce que les biens de son père n'ont pas été revendiqués pour affirmer sa naissance légitime et, on l'a vu plus haut, sa qualité de citoyen.[13]

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8 Cf. Harrison, *Law*, 63-66; Lacey, *Family*, 104; MacDowell, "Bastards as Athenian Citizens," *CQ* 26 (1976) 89-91; *The Law in Classical Athens*, 68; Sealey, *Athenian Republic*, 22.

9 Cf. en particulier Wolff, "Marriage, Law and Family Organization in Ancient Athens," *Traditio* 2 (1944) 43-95; P. J. Rhodes, "Bastards as Athenian Citizens," *CQ* 28 (1978) 89-92; M. H. Hansen, *Demography and Democracy. The number of Athenian Citizens in the Fourth Century B.C.*. (Herning 1986) 73-76.

10 "Matrimonio, concubinato e filiazione illegitima nell'Atene degli oratori," *Symposion 1985*, herausgegeben von G. Thür (Cologne-Vienne 1989) 177-214.

11 Je n'avais pas lu, lorsque j'ai rédigé ce papier le récent article de Cynthia Patterson, "Those Athenian Bastards", *CA* 9 (1990) 40-73. Elle ne pense pas non plus que les *nothoi* nés de deux parents athéniens héritaient de la citoyenneté. Mais de sa démonstration, je retiens deux points qui me semblent importants. En premier lieu, que le *nothos* a un statut reconnu à l'intérieur du lignage paternel. Ce n'est pas ce que nous appelons "un enfant né de père inconnu." Ce qui le distingue du *gnêsios*, c'est le statut de sa mère, étrangère et/ou *pallakê*, un statut inférieur qui implique sa propre infériorité. En second lieu qu'il ne faut pas négliger les zones d'ombre qui existent dans toute société. Comme l'écrit Patterson (45): "Athenians may have been tolerant of a certain amount of informal ambiguity of status." D'où ces cas particuliers qui pourront toujours être opposés à l'une ou l'autre interprétation. Reste le problème de savoir quel était le statut des *nothoi* nés de deux parents athéniens, s'ils n'étaient pas comptés parmi les citoyens. Wolff (*supra* n.9) suggérait que s'ils n'étaient pas *politai*, ils étaient du moins *astoi*. Maffi (*supra* n.10, 194-195) rejette cette distinction. Sur ce problème voir aussi D. Lotze, "Zwischen Politen und metöken. Passivburger im klassischen Athen?," *Klio*, 63 (1981). Dans mon article "Citoyens actifs et citoyens passifs dans les cités grecques. Une approche théorique du problème," faisant référence aux analyses d'Aristote dans le livre III de la *Politique*, je les avais mises en relation avec les citoyens écartés de la *politeia* lors des révolutions oligarchiques, mais je n'avais pas envisagé le cas des *nothoi* (*REA* 81 [1979] 41-49). Voir à ce sujet les remarques de Patterson, *op.cit.* 45 et notes.

12 μὴ εἶναι ἀγχιστείαν μήθ' ἱερῶν μήθ' ὁσίων.

13 Demosthène 57.53.

On peut cependant se demander si sur ce plan les choses étaient toujours aussi simples. Certes, la plupart des commentateurs lient cette exclusion de l'*anchisteia* à la loi de Périclès, et l'on ne saurait donc évoquer l'exemple du faux Crétois de l'*Odyssée* qui, bien que *nothos* a reçu une partie de l'héritage paternel (11.203sqq.). Mais il y a cette notice d'Harpokration concernant la *notheia*, la part de l'héritage qui pouvait revenir au *nothos* et ne devait pas dépasser mille drachmes.[14] Le fait que le grammairien fasse référence à deux discours malheureusement perdus de Lysias et d'Isée tendrait à prouver que la *notheia* existait encore au IVème siècle.

On peut également me semble-t-il ajouter au dossier les deux discours *Contre Boeotos* du corpus démosthenien. Rappelons les faits: Mantias, le père du plaideur, avait deux fils d'une certaine Plangon, athénienne, qu'il reconnut en les présentant à sa phratrie, alors qu'ils avaient déjà atteint leur majorité (39.4). Quand Mantias mourut, le fils légitime et les deux fils naturels se partagèrent équitablement l'héritage (39.20, 34-35; 40.48). Remarquons en particulier l'expression employée par le plaideur et qui est celle-là même de la loi citée par Isée et par Démosthène: à savoir que Boeotos et son frère ont obtenu de participer aux *hiera* et aux *hosia*. Le procès intenté par Mantitheos ne porte pas sur l'attribution aux deux fils naturels de Mantias de leur part d'héritage, mais sur le fait que Boeotos, une fois légitimé, s'est fait inscrire sur les registres de son dème sous le nom de Mantitheos.[15] Il semble donc qu'il était possible de reconnaitre un *nothos*, même tardivement, et qu'il se trouvait ainsi placé sur le même plan que le fils légitime pour ce qui concernait les *hiera* et les *hosia*. Une comédie de Ménandre, la *Samienne*, confirme cette possibilité, la légitimation du *nothos* étant recommandée par le propre fils adoptif de Déméas.[16]

On est donc amené à penser que, si la loi sur l'absence de droit des *nothoi* à la succession du bien paternel était bien réelle et avait été réaffirmée sous l'archontat d'Euclide, dans la réalité cependant, par le biais de la reconnaissance ou de l'adoption en cas d'absence d'héritier légitime direct, des *nothoi* pouvaient se trouver en position d'hériter tout ou partie du bien paternel. Le fait que Mantitheos, qui ne cesse d'affirmer qu'entre Mantias et Plangon il n'y eut jamais d'union légitime, ne conteste pas en revanche le partage du patrimoine, atteste que de telles pratiques étaient admises. Mais, si les deux

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14 Cf. Harrison (*supra* n.1) 67 qui rappelle également une notice de la *Souda* où la somme indiquée est cinq cents drachmes.

15 Le procès intenté par Mantitheos à Boeotos a suscité une abondante littérature. De nombreux auteurs pensent que Boeotos serait né d'un premier mariage avec Plangon, que le plaideur a intérêt à dissimuler (cf. Davies, *Athenian Propertied Families* [Oxford 1971] 365). On comprend mal cependant pourquoi il lui aurait fallu attendre si longtemps pour être reconnu par son père. Dans l'article cité plus haut (n.11), Patterson se contente d'évoquer rapidement le cas de Boeotos et de son frère (61) en soulignant que Mantitheos n'emploie pas pour désigner son adversaire le terme de *nothos*. Mais alors quel est leur statut? Je signalerai pour finir l'interprétation de R. Sealey (*Women and Law*, 32): seul Pamphilos, le jeune frère de Boeotos, serait un *nothos*, né après le divorce de ses parents.

16 Ménandre, *Samienne* 135sqq., où l'on trouve l'affirmation que ce n'est pas la naissance, légitime ou non, qui fait le *gnêsios*, mais les qualités personnelles. Cf. mon article "Quelques remarques sur la famille à Athènes à la fin du IVème siècle. Le témoignage du théatre de Ménandre," *Symposion 1982*, (Valence 1985) 129sqq.

discours contre Boeotos révèlent que les situations de fait étaient plus complexes qu'il n'y parait à s'en tenir à la stricte définition de la loi, en revanche ils ne nous éclairent pas sur la condition de la *pallakê*, car Plangon ne saurait être tenue pour telle puisqu'elle ne vit pas avec Mantias, mais habite avec ses deux fils et ses servantes sa propre maison, où elle jouit apparemment de la plus grande aisance grâce aux largesses de Mantias. Plangon n'est ni une courtisane, bien que la passion amoureuse soit ce qui la lie à Mantias, avant comme après la mort de l'épouse légitime, ni une *pallakê*, ni une *gamêtê gunê*. Cette fille de citoyen athénien représente un cas assez exceptionnel, du moins dans nos sources, de femme vivant seule, entretenue par un riche amant.

Il faut donc tenter d'atteindre la condition de la *pallakê* par une autre voie, à savoir l'origine même du mot et ses emplois dans les sources autres que juridiques. Le mot *pallakê* dérive de *pallax* qui désigne toujours un être jeune, fille ou garçon.[17] Dans l'*Iliade*, *pallakis* est employé pour désigner la jeune maitresse, rivale de l'épouse légitime, et probablement de condition servile: ainsi, quand Phenix évoque ses démélés avec son père, parceque, à la requête de sa mère, il avait eu des relations avec la *pallakis* de celui-ci (9.449sqq.). Dans l'*Odyssée*, *pallakis* désigne l'esclave dont Ulysse, le faux Crétois, se prétendait le fils (11.203sqq.)

On a rappelé plus haut que, bien que *nothos*, il héritait d'une maison à la mort de son père. Chez Hérodote 1.135 *pallakai* désigne les concubines que le noble perse introduit dans son lit: ici aussi il s'agit d'esclaves, puisqu'elles sont achetées.[18] Dernier texte que je verserai au dossier: une disposition des *Lois* de Platon (8.841d) interdisant aux citoyens de la cité des Magnètes d'avoir des relations avec d'autres femmes que "celles qui entrent dans la maison par des mariages religieux et sacrés;" en particulier, il leur sera interdit de "semer une semence illégitime et bâtarde" (*athuta kai notha*) avec des *pallakai* "achetées ou acquises de quelque autre façon."[19]

Il me faut maintenant conclure. Je pense qu'à l'origine la *pallakê* était une jeune esclave qui partageait la couche du maitre et occupait de ce fait une position privilégiée. Il n'est pas étonnant que la loi sur l'adultère se soit appliquée à de telles *pallakai*. Son origine ancienne est attestée par l'emploi du terme *damar* pour désigner l'épouse légitime. Rappelons qu'Ulysse tire vengeance des servantes infidèles parcequ'elles ont partagé le lit des prétendants. Je crois que c'est à de telles *pallakai* que fait allusion Apollodore dans le texte dont je suis partie: ces servantes privilégiées préparaient le bain du maitre de maison et étaient en effet affectées à la *therapeia tou sômatos*. Le snobisme d'Apollodore, ce parvenu fils d'un *neopolitês*, peut expliquer cette référence implicite à une société aristocratique à laquelle il n'appartiendra jamais, mais qu'il rêve d'imiter.

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17 P. Chantraine, *Dictionnaire étymologique de la langue grecque* (Paris 1968) 853: "La seule notion qui permette de réunir tous ces mots sur un même champ sémantique est celle de 'jeunesse' qui convient à Athena, au jeune garçon et à la concubine qui est d'abord la jeune esclave que le mari prend en surplus de l'épouse."

18 πολλῷ δ' ἔτι πλέονας παλλακάς κτῶνται.

19 ὠνηταῖς εἴτε ἄλλῳ ὁτῳοῦν τρόπῳ κτηταῖς.

Mais se pose alors le problème des enfants "libres" évoqués dans la loi sur l'adultère. Il n'est pas douteux, si on se réfère encore à l'épopée, qu'à l'origine le fils d'un homme libre de condition élevée et d'une concubine esclave devait être reconnu comme "libre": pensons encore une fois au faux Crétois de l'*Odyssée* ou à Megapenthès, le fils naturel de Ménélas. Comme le remarque fort justement J.P.Vernant, dans la loi sur l'adultère il n'est pas question de *nothoi* mais d'*eleutheroi paides*.[20]

Au IVème siècle et à Athènes, il en allait évidemment différemment et le fils d'une esclave ne pouvait être "libre." La loi ne pouvait s'appliquer qu'aux *pallakai* de condition libre, étrangères ou athéniennes. On a déjà évoqué les raisons qui pouvaient inciter un citoyen athénien à se procurer une telle épouse "en second": la stérilité de l'épouse légitime, l'absence d'héritier mâle, voire l'attirance pour une compagne plus jeune. Mais celle-ci demeurait en retrait par rapport à l'épouse légitime, de "dignité inférieure" comme dit le client de Lysias, un peu au dessus des servantes de la maison.[21] Les enfants qu'il pouvait en avoir demeuraient des *nothoi*, exclus de la citoyenneté comme de l'*anchisteia*, sauf si, pour des raisons diverses leur père les présentait à sa phratrie comme des *gnêsioi*. On devine, à la lecture des plaidoyers, que de telles entorses à la loi n'étaient pas impossibles.

Reste le dernier problème, posé en particulier par l'article de R. Sealey, à savoir que la *pallakê* était l'épouse de fait de nombreux Athéniens. Est-il possible de se prononcer sur ce point de facon catégorique? Je ne le pense pas. Qu'il y ait eu à Athènes, chez les pauvres en particulier et à la campagne, des unions qui n'étaient pas précédées d'un engagement réciproque entre deux familles accompagné de la remise d'une dot, la chose est possible. Dans le *Contre Euboulidès*, auquel j'ai plusieurs fois fait référence, le plaideur qui insiste longuement sur la citoyenneté et le mariage légitime de ses parents, ne parle pas de dot, bien qu'il y ait eu *engyê* entre son père et le frère de sa mère.[22] Or il s'agit à l'évidence de gens de condition modeste. Par ailleurs, le verbe *sunoikein* qui désigne souvent l'état matrimonial, peut aussi, comme le remarque Louis Gernet, s'appliquer au simple fait d'habiter ensemble.[23] Parceque, encore à l'époque classique, le mariage n'est pas "une institution matrimoniale parfaitement définie,"[24] on peut en effet admettre que toutes les familles n'étaient pas nécessairement fondées sur ce "contrat" que représentait l'*engyè*. Mais cela n'impliquait pas que la femme dans ce cas était une *pallakê*. Dans le langage courant comme dans la loi, la *pallakê* demeurait une compagne de lit, esclave ou libre, attachée à l'*oikos*, jeune généralement et dont on pouvait,

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20 *Supra* n.7, 61.

21 Il ne faut pas cependant se dissimuler que la loi sur l'adultère était une survivance et que dans la pratique elle n'avait plus guère d'effet. La mise en accusation du client de Lysias en est une preuve comme aussi de nombreux exemples d'arrangements "à l'amiable." Voir en particulier [Démosthène] 59.65sqq.

22 Démosthène, 57.41 : καὶ ἐγγυᾶται ὁ πατὴρ τὴν μητέρα τὴν ἐμὴν παρὰ τοῦ ἀδελφοῦ αὐτῆς.

23 Démosthène, *Plaidoyers civils*, IV, 107 n.2.

24 J. P.Vernant, (*supra* n.7) 57.

exceptionnellement, reconnaitre les enfants. En revanche, qu'il y ait eu ou non remise d'une dot, était tenue pour *gamêtê gunê*, pour épouse légitime, celle qui avait été amenée dans la maison de son époux selon les rites sacrés auxquels Platon fait allusion, et qui comportaient aussi la présentation à la phratrie. Il ne faut pas en effet s'enfermer dans un juridisme étroit en ne tenant compte que des indications de nos plaidoyers qui mettent généralement en scène une petite frange de la société athénienne, les membres de ces "propertied families" qui tiraient vanité des dots qu'avaient reçues leur père ou qu'ils avaient remises à l'époux de leur fille. Pour tous les autres, qu'il y ait eu ou non remise de dot, le mariage restait essentiellement marqué par les rites religieux qui précédaient la cohabitation et donnaient à cette cohabitation son caractère légitime. Mais ce rituel du *gamos* ne concernait pas la *pallakê* qui, au sein de la famille athénienne demeurait un "luxe" réservé aux riches.

Annexe

Alors que mon propos était de montrer que la *pallakê* était dans la société athénienne du IVème siècle une personne de condition inférieure, souvent une esclave, et que seuls des hommes riches pouvaient entretenir dans leur maison aux côtés de leur épouse légitime, et non pas, comme certains le supposaient le terme qui désignait la femme dans une quelconque "union libre," la discussion a porté presque exclusivement sur la possibilité que j'évoquais, à la fin de mon exposé, de mariage sans "contrat" formel et sans dot, en particulier dans les familles pauvres. Il me faut donc apporter quelques précisions sur ce point. Sans exclure qu'il ait pu y avoir des unions qui échappaient à la sanction du mariage (Plangon?)—mais je les imagine plutôt le fait de gens en vue et riches (n'oublions pas Périclès)—je crois fermement que le mariage légitime qui assurait la légitimité des enfants, et donc la transmission de la citoyenneté, était l'un des fondements de la société athénienne. Il va de soi que ce mariage ne relevait pas du libre choix de la femme: c'est son père ou son tuteur qui décidait pour elle. Ce que j'ai voulu dire c'est que dans les milieux pauvres et singulièrement à la campagne, si le *gamos* et son rituel étaient nécessairement présents, les pratiques que nous font connaitre les plaidoyers et qui demeuraient des actes privés pouvaient peut-être manquer. Il faut encore une fois rappeler qu'il n'existe pas de terme grec pour désigner le mariage en tant qu'institution, mais seulement des expressions appliquées à l'épouse légitime (*gamêtê gunê, gunê enguêtê*) ou au fait pour un homme et une femme de vivre ensemble (*sunoikein*)

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Response to Claude Mossé

Professor Mossé begins with the well-known statement of Apollodorus in his speech against Neaira that "we have *hetairai* for pleasure, *pallakai* for the daily care of the body and *gunaikes* for the production of legitimate children" ([Dem.] 59.122)—a much over-used or abused bit of forensic rhetoric, matched in that way perhaps only by Pericles' advice to Athenian widows quoted by Josiah Ober earlier in this conference. Happily, however, Mossé considers this tripartite division of female social roles more problematic than authoritative; in particular, she wonders about the middle term: who was the "*pallakê* for the care of the body"? In order to answer this question Mossé is drawn to consider a nexus of interrelated statuses:

pallakê — *gunê/damar*
| |
nothos — *gnêsios*

She thus ends up encompassing in her brief paper as full a spectrum of Athenian society as is encompassed in Apollodorus' even briefer theory of the social utility of women. To consider in detail all the problems Mossé raises or touches upon—bastardy, adoption, marriage and dowry, as well as concubinage (more specifically *pallakia*)—would require a comment very much longer than her own paper. I shall therefore focus primarily on the central question of the identity of the *pallakê* and the nature of her relationship to the *oikos* and its "head," her bed-partner, but shall also need to say something about the status and identity of the *pallakê*'s children.

Mossé spends a considerable portion of her paper summarizing the state of current "wisdom" on these question, which she takes to be (in paraphrase) as follows: Athenians had one wife (i.e., were monogamous) but often might have a concubine in addition who could be a foreigner or even a citizen. Children of a concubine were *nothoi* and without inheritance rights, but if the concubine was Athenian, then the *nothos* was a citizen. This may in fact be the majority view, but there is hardly unanimity on this issue. Indeed, after delineating the "standard" position, Mossé takes issue with it, doubting that it would have been possible to split family and city participation by excluding the *nothos* citizen from *hiera* and *hosia* of the family, yet giving him/her citizen status. In an effort to solve this problem, Mossé suggests that in practice it was possible to legitimize a "natural" (*nothos*) child of two Athenians, as for example was done (she says) in the case of Boiotos in Demosthenes 39 and 40. It is not at all clear, however, that Boiotos was a *nothos*; there is good reason to think that his mother Plangon was in fact Mantias' wife (see, e.g., Davies *APF* 9667), an issue to which I shall return.

After thus suggesting that theory and practice may have differed, Mossé turns to a

brief consideration of etymology and usage to further illuminate the identity of the *pallakê*. She concludes that originally (i.e., in Homeric contexts) the *pallakê* was a slave who slept with her master, and also bathed him and generally cared for his body. She notes that Homeric *pallakai* might bear free children and that this seems to reflect the situation referred to in the Athenian law on "justifiable" homicide (i.e., among the women a man is entitled to protect with an act of "justifiable" homicide is the "*pallakê* kept for the purpose of free children," Dem. 23.53-55). However, in classical Athens, Mossé argues, the law just noted applied only to free or Athenian pallakai whose children, although *nothoi*, could be adopted by those in need of heirs.

I am in complete agreement with Mossé's description of the "original" (i.e. Homeric) status of the *pallakê*, but am not persuaded by her modified classical Athenian concubinage, or by the way some of the basic pieces of evidence have been used by Mossé and others on this issue. I suggest instead that the status of the *pallakê* remained a servile one even in the classical period, and that the evidence cited by Mossé, as well as further examples she does not cite, supports this view. The notion that there were a significant number of free Athenian *pallakai* bearing citizen *nothoi* is, it seems to me, an illusion—as is also the idea that "it did not offend the sense of propriety that a respectable woman should occupy that position [of *pallakê*]."[1] The concubine, whether free or slave, depended on the good will and favor of her master (or patron) and was vulnerable, in ways in which the Athenian wife or daughter was not, to the untrammeled use or abuse of his authority. If slave, she was therefore chattel, whatever romantic ideas we may entertain about the "cultivated Athenian courtesan."

Returning now to the evidence marshalled by Mossé: first, the so-called "definition" of *nothos* offered by Pollux in his *Onomastikon*, that a *nothos* is one born from either a stranger or a *pallakê*, cannot really offer any information on the Athenian status of the *pallakê* or for that matter her *nothos*. Mossé offers the argument that "the distinction between the foreigner and the *pallakê* implies that, if the latter was Athenian then the *nothos* was likewise Athenian" because of the citizenship law of Pericles. An assumption here seems to be that Pollux was simply interested in a positivist search for all persons properly called *nothoi*, and that by adding "or of a *pallakê*," he implies that there are *pallakai* who are Athenian since otherwise simply saying "of a foreigner" would cover the field. (A further assumption is that dual Athenian birth was sufficient for Athenian status.) However, if Pollux was interested not in the field of all *nothoi* but rather in the different uses of *nothos* i.e., in the different senses in which the word was actually used—then his statement implies nothing at all about the existence of Athenian *nothoi* or Athenian *pallakai*. It simply says that it could be used in two ways—for the child of a foreigner or of a *pallakê*. In my view, the former is an extension of the latter more traditional usage: in the Athenian polis "family" after 451/0, the foreigner is in the position of a *pallakê* and the child of the

1 A. W. Gomme and F. H. Sandbach, *Menander, a Commentary* (Oxford 1973) 31.

foreigner is, like the child of a *pallakê*, a *nothos*. Whether or not such a view is accepted, Pollux cannot be read as implying that *pallakai* might be free Athenians and *nothoi* could be Athenian citizens.

Second, in the phrase "*pallakê* kept for free children" in the law on justifiable homicide, the frame of reference is likewise an essential part of the interpretation of the law. The point is that the children are free not slave. *Contra* Vernant, they are *nothoi* as well, but the lawgiver is here concerned to distinguish these free children from the non-free offspring of (other) non-free members of the household, rather than from the *gnêsioi* offspring of the wife (*damar*). Examples of such free children of *pallakai* are Teucros, *nothos* of Telemon, and Hippolytus, *nothos* of Theseus. I have recently written extensively on the problem of *nothoi* in Athens[2] and intend to focus in this comment on the *pallakê*; but Mossé's reading of Demosthenes 39 and 40 merits a brief argument. In the specific case of Boiotos son of Mantias, the issue raised (implicitly) by the speaker is whether or not Boiotos is a *gnêsios* son of Mantias. By accepting the challenge and swearing the oath, his mother Plangon had established that he is in fact Mantias' *gnêsios* son and so Mantias is required to introduce that son to his phratry. This is not a case of "adopting" or "recognizing" a *nothos* son, but simply of recognizing a son. The term *nothos* is not used in this speech at all, and *nothos* status is not an issue. As Mossé points out, Plangon was not a *pallakê*. I think that she was at least at some point a wife who did have a dowry, but that is a complicated question involving, for example, the political and financial difficulties of her father.[3]

So, if Plangon was not a *pallakê*, who was? It seems to me that Mossé had not taken her search for the *pallakê* far enough, nor seen the implications of the results of the search as far as it has gone. In Herodotus and Plato, Mossé notes, as well as in Homer, the *pallakê* is a slave. The word is not a particularly common one (as one finds after an IBYCUS search of the TLG data bank), but there are a few additional instances of significance. Aspasia was called a *pallakê* by Cratinus (reported by Plut. *Per.* 24.6). Clearly that was supposed to be an insult, comparable perhaps to Aristophanes' (and others') branding of Athenian politicians as children of foreigners or slaves. Second, the *pallakê* of Philoneus in Antiphon 1 is subjected to servile treatment even if she is not in fact a slave—and that she was in fact a slave seems to me most likely. Third, in Menander's *Samia*, when Demeas thinking that his concubine Chrysis has born his own son a child, confides in his neighbor Nikeratos, Nikeratos responds by saying that if he were in Demeas' position he would "sell that *pallakê*" (509). Chrysis was apparently a free woman, but Nikeratos suggests that she be sold like a slave. These are strong indication, I think, that *pallakê* retained its servile connotation through the classical period, as is very clear in the stipulation from Plato's *Laws* not to "sow seed" in *pallakai* who are "bought or

2 *Classical Antiquity* 9 (1990) 40-73.
3 S. C. Humphreys, "Family Quarrels," *JHS* 109 (1989) 182-85.

acquired in some other manner" (841d). But what then, is the implication of the often quoted passage in Isaeus 3, where the speaker asserts that even those giving "*autas heautôn*" into *pallakia* make stipulations as to what the women will be paid (3.39)? This has been read as implying that Athenian men gave their own daughters into *pallakia*, if they were too poor to afford a dowry. But the speaker actually only refers to "women over whom a man has control," and given the strong connection attested elsewhere between *pallakia* and servile status, I would suggest that this refers to the slave women under his control. However, if a man did give a daughter into *pallakia*, he thereby deprived her of her citizenship status—and himself of claiming her children as his free, citizen grandchildren. Athenian families may have been pushed to this extreme by poverty, but it would have been indeed an extreme solution and, I think, a highly undesirable one.

The fact that *pallakê* is not a particularly common term in classical Greek may suggest that this sort of "Homeric" concubinage was not common or socially acceptable. I do not doubt that Athenian masters took sexual advantage of their female slaves (an occurrence well known in the American old South), but actually keeping a slave concubine in the house together with a citizen wife does not seem to be common practice in classical Athens. Certainly, Alcibiades incurred strong social disapproval (not only his wife's disapproval) by acting the "Homeric hero" and bringing home an enslaved Melian women and rearing her child within his house ([And.] 4.22; Plut. *Alc.* 16). When one looks carefully, the available examples of classical concubines do not live together with wives.[4]

It is interesting, however, that this "older" or "Homeric" form of concubinage or *pallakia* is quite frequently portrayed in Athenian tragedy. It is implied, for example, in *Agamemnon* and clearly presented in Euripides' *Andromache*. Again, I doubt that this reflects household arrangements familiar to the Athenian audience. What it does reflect, however, is the Athenian playwrights' interest in exploring the nature of marriage and the importance of the marriage bond to the community through the representation of situations threatening or challenging that bond. Particularly striking is Sophocles' use of marriage terminology in the *Trachiniai* (both in setting the festive mood of the return of Heracles and in designating Iole as *damar*, 406, 428). Deianeira can apparently tolerate Heracles' sowing wild oats outside the *oikos*, but cannot allow another "yoke-mate" (*ezeugmenê*, 540) for herself and Heracles. The play, it might be said, argues against *pallakia* (the word is not used) by equating it with—or reducing it to—bigamy. In general, Athenian tragedy represents the prospect of a household triangle (husband/wife/*pallakê*) only to point out its destructiveness to the well-being of the household. The *nothos* child of the the slave concubine—e.g., the child of Andromache and Neoptolemos (eventually Molossos) or Hippolytus the son of Hippolyta and Theseus—further complicate the triangulation.

While tragedy thus depicts an older form of *pallakia*, Attic new comedy (particularly

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4 E.g., in Antiphon 1 or Isaeus 5; cf. also the relationship of Pericles and Aspasia, but was Aspasia in fact a wife?

Menander), on the other hand, contains numerous concubines, generally called *hetairai*, whose positions may reflect social reality more directly. In the *Samia*, Chrysis is a free *hetaira* who lives with Demeas and his adopted son. When Demeas thinks Chrysis has born him a son, he responds by saying, "I though I had an *hetaira*, but now it seems I have a wife!" (130). That statement expresses very clearly the disjunction between the identities of concubine (or courtesan) and wife, as well as the separation of their spheres.[5]

Let me now add briefly to Mossé's critique of the views of Raphael Sealey.[6] The question that Sealey has raised is the relation of concubinage to marriage in classical Athens. The question is not new nor, for that matter, is Sealey's solution. Although Wyse thought that Buermann's theory of "legitimate concubinage" had "succumbed to time and common sense," as he put it nearly a century ago,[7] that is in essence that theory that Sealey has revived. In brief, the idea is that one Athenian might give a daughter or sister as a *pallakê* to another Athenian—perhaps with some agreement on terms but no dowry or *enguê* ceremony—and that the children of such a union were in fact *gnêsioi* (not *nothoi*) and citizens. As put forth by Sealey, the argument is based on the belief that in Athens a legal marriage was essentially created by the ceremony (or contract) of the *enguê* ("pledging") of the bride to bridegroom by her father (or other male relative); the bride was a passive participant and need not be in attendance. Such marriage was often accompanied by the arrangement or transferal of the dowry, but these arrangements would have only had relevance to those who had property and dowries worth talking about (and going to court about). Since, as Sealey puts it, "many Athenians were very poor" (117), many Athenians would have had no use for legal marriage and would be happy to settle for concubinage with another Athenian. This would have been entirely satisfactory since, on Sealey's idiosyncratic (and in my view unacceptable) argument, all children of two Athenian parents were *gnêsioi* and citizens, while *nothos* applied only to those whose parentage was disputed. Thus the distinction between concubinage and marriage in Athens was essentially a class distinction. The "poor" had no use for the married state.

This, in brief, is the theory to which Mossé presents two objections:

1) The habit of keeping a concubine is, on the available evidence, a habit of the wealthy, and the dictum of Apollodorus reveals that orator's aristocratic aspirations.

2) Marriage was marked not only by exchange of dowry but also by "religious rites which preceded marital cohabitation and gave that cohabitation its legitimate character."

Both of these points are important, and I would like in remainder of my comment to briefly expand upon both. First, to assert that "many Athenians were very poor" is essentially to take the polarizing social terminology of the Athenians at face value. I think

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5 The very different role these *hetairai* play in comedy, as compared with the concubines of tragedy, has been analyzed by Madeleine Henry, *Menander's Courtesans and the Greek Comic Tradition* (Frankfurt 1985).

6 "On Lawful Concubinage in Athens," *Classical Antiquity* 3 (1984) 111-33.

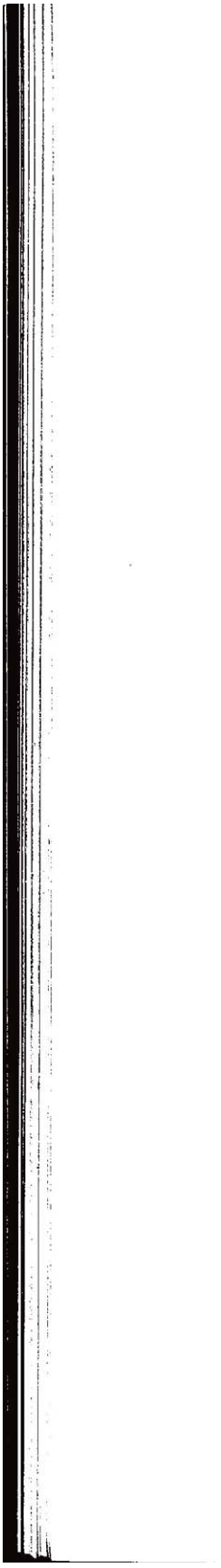
7 *The Speeches of Isaeus* (Cambridge 1904) 277.

that it is in fact a dangerous (if that is not too strong a term) notion to suppose that marriage only had legal meaning for the "upper classes" in Athens—whoever that actually is supposed to include—and that Athenian households did not did not rest on a common social and religious, as well as legal, foundation. The Athenians themselves were an elite, a highly privileged order and status group—and citizen marriage was a central feature of citizen privilege. Legitimacy was indeed connected to marriage. Although Sealey assumes that the giving of a dowry was essentially a luxury and part of the social or economic strategy of the wealthy, it is time we recognized that the dowry was the woman's inheritance[8] and that poorer families would have endowed their daughters according to their means, perhaps a cow or a small piece of land rather than a slave workshop or a simple "cash" outlay. While I am willing to believe that the formal ceremony of the *enguê* (by which the father of the bride pledged his daughter to the groom "for the cultivation of legitimate children") may have seemed superfluous to some Athenians, I do not think that the marriage process of which that ceremony was only one part—a process including the religious rites emphasized by Mossé along with the actual "setting up of a common household" and eventually the production of children—was superfluous to any Athenian household. Mossé rightly insists that the *pallakê* was a luxury of the rich. A wife, however, who produced legitimate heirs, contributed to (and managed) the common household property, and also took care of the physical needs of that household, would have been for most Athenians closer to a necessity.

Finally, despite Mosse's insistence that marriage is distinct from *pallakia*, she herself repeats that often heard idea that Athenian marriage was a vague and undefined relationship—and thus hard to distinguish from *pallakia*. Whether or not they could define it, Athenians, I submit, usually knew a marriage when they saw one. For being able to establish in a court of law that certain persons were actually married is a different thing from looking around one and recognizing marital relationships and conjugal households. Again, I think it is important to realize that marriage in Athens was not a single event but a process, including, but not always depending upon, elements such as the bestowal of dowry, celebration of the *gamos* and the production of children. Concubinage also occurred over time, but without the same socially recognizable, communally established signs. When the Athenians used the word *sunoikein* in household contexts, it did not mean simply "cohabit"—which as many have observed certainly can apply in English to concubinage as well as marriage— but more literally in fact, "to set up a common household." It is the creation of that common household, a productive and reproductive unit, which distinguishes marriage from concubinage. Apollodorus in fact had something to say on this score immediately before that more famous statement with which Mossé began. In pressing his charge that Neaira has acted as Stephanos's wife and violated the

8 See especially L. Foxhall, "Household, Gender and Property in Classical Athens," *CQ* 39 (1989) 22-44.

law which prohibits the "common household" (*sunoikein*) of an alien and an Athenian, he remarks: "for this after all is what *sunoikein* is—to have children and to introduce the sons into one's phratry and into one's deme, and to give out the daughters to men as being one's own" (59.122). I will let Apollodorus have the last word, for on this point, at least, he seems to be correct. An Athenian did not *sunoikein* with a *pallakê* or an *hetaira*.



Eva Cantarella (Milan)

Moicheia. Reconsidering a Problem.

As every Greek law scholar knows, traditionally the crime called *moicheia* is given the following definition: "*moicheia* is any sexual intercourse between an Athenian citizen and the wife, daughter, sister, mother or concubine of another citizen, unless this woman is a prostitute."[1]

This definition is based mainly on these considerations:

1) In the plea *Against Aristokrates* (23.53) Demosthenes quotes a statute: ἐάν τις ἀποκτείνῃ ἐν ἄθλοις ἄκων, ἢ ἐν ὁδῷ καθελὼν ἢ ἐν πολέμῳ ἀγνοήσας, ἢ ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπ' ἀδελφῇ ἢ ἐπὶ θυγατρί, ἢ ἐπὶ παλλακῇ ἣν ἂν ἐπ' ἐλευθέροις παισὶν ἔχῃ, τούτων ἕνεκα μὴ φεύγειν κτείναντα. ("if somebody killed during the games unintentionally, or if he killed having been assaulted in the street, or by mistake in war, or if he killed the man caught near his wife, his mother, his sister, his daughter or the concubine he keeps in order to have freeborn children, for these reasons the killer shall not go into exile").[2]

2) Even if this statute does not qualify as a *moichos* the man who can be killed with impunity, Aristotle, referring to the law quoted by Demosthenes, lists, among others, the case of the *moichos* caught in the act: ἐὰν δ' ἀποκτεῖναι μέν τις ὁμολογῇ, φῇ δὲ κατὰ τοὺς νόμους, οἷον μοιχὸν λαβών, ἢ ἐν πολέμῳ ἀγνοήσας, ἢ ἐν ἄθλῳ ἀγωνιζόμενος (*Ath. Pol.* 57.3).

3) The plea *Against Neaera* attributed to Demosthenes provides evidence for a charge of *moicheia* upon intercourse with an unmarried woman.

In an article published in 1984, and recently in his forthcoming book *Law, Society and Sexuality: the Enforcement of Morals in Classical Athens*, which I have seen thanks to the author's courtesy, David Cohen disputed such a broad definition of *moicheia*, stating that this crime was committed only in having intercourse with married women (or with the concubine of an Athenian citizen), and he proposed a new interpretation of the related laws.

Having in the past accepted the traditional definition of *moicheia*,[3] in this paper I

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1 Bibliography in D. Cohen, "The Athenian Law of Adultery," *RIDA* 31 (1984) 147ff; esp.148, nn.3-5. See also Susan Guettel Cole, "Greek Sanctions against Sexual Assault," *Cl.Ph.* 79 (1984) 97ff; esp. 98.

2 The last words of the statute μὴ φεύγειν κτείναντα can be translated in two different ways: *pheugein*, in fact, means both "prosecute at law" and "go into exile" (as Liddel-Scott states). The translation "the killer shall not go into exile" is accepted among others by Bizos, *Lysias, Discours*, (Paris, Belles Lettres, 1959), and D. M. MacDowell, *Athenian Homicide Law* (Manchester, 1963) 73. Even if this translation poses some problems, it seems nonetheless better than the translation "the killer shall not be prosecuted at law." As we know from Lysias' plea *In defense of Euphiletus* (Lys. 1), the person accused of having killed his wife's lover taken in the act had to prove the existence of the circumstances granting him impunity.

3 See my "L'omicidio legittimo e l'uccisione del moichos nel diritto attico," in *Studi sull'omicidio in diritto greco e romano* (Milano 1976) 129ff; *L'ambiguo malanno*[2] (Roma 1985); Eng.

will reconsider the entire problem in the light of Cohen's criticism and proposal, starting from his very stimulating analysis of Lysias' plea *In defense of Euphiletus*. I will leave to later consideration the problem of the legal meaning of the word *moicheia*.

Before asking the *grammateus* to read the statute on legitimate homicide, quoted in 1.30, Lysias appealed to another law, the text of which is not recorded in the plea, but is commented on in 1.29, where Euphiletus insists on the fact that Eratosthenes οὐκ ἠμφεσβήτει ἀλλ' ὡμολόγει ἀδικεῖν: he did not deny he had committed *moicheia* (in this case, *moicheia* in the strict, technical sense of adultery), but confessed his crime.

As Cohen acutely observes, in discussing the law of adultery it has been generally overlooked that this statute is read to the judges before the reading of the law on legitimate homicide. Why were two different statutes read, both concerning the killing of an adulterer? What was the content of the first law? The answer Cohen proposes is the following: Euphiletus, commenting the first law, insisted on the fact that Eratosthenes confessed his crime. The reason for this might have been the fact that the *moichoi* were included in the list of the *kakourgoi*,[4] and the law providing the special summary procedure for *kakourgoi* taken in the act (*ep' autophôrôi*) allowed them to be killed on the spot if they confessed to have committed crime. In other words, the first law to which Euphiletus refers was a law concerning the treatment of *moichoi* as *kakourgoi*. Euphiletus, in fact, seems to use the words of the statute on *kakourgoi* quoted by Aristotle (*Ath. Pol.* 52.1): ἂν μὲν ὁμολογῶσι, θανάτῳ ζημιώσοντας, ἂν δ' ἀμφισβητῶσιν, εἰσάξοντας εἰς τὸ δικαστήριον.

But if the law quoted in 1.29 had this content, why was Euphiletus not satisfied with it but immediately after went on also to quote the statute on legitimate homicide? Cohen suggests two possible explanations:

1) First, perhaps the law on *kakourgoi* set some limitation to the husband's right to kill the adulterer. This limitation could have been the same as that set in the statute quoted in [Demosthenes] 59.66-67. This statute provided that if a man claimed to have been wrongly held as an adulterer (with a *graphê adikôs heirchthênai hôs moichon*) and if the court stated that he was guilty, this man was turned back to the husband, who ἐπὶ δὲ τοῦ δικαστηρίου ἄνευ ἐγχειριδίου χρῆσθαι ὅ τι ἂν βουληθῇ, ὡς μοιχῷ ὄντι. In other words, the husband could do what he wanted, in front of the court, "without using a knife." It could have been, therefore, that the law concerning treating *moichoi* as *kakourgoi* "limited the husband's right to mistreatment and ransom: if the husband wanted the *moichos* put to death he would have to take him to the Eleven for summary execution, by *apagôgê*."[5] In this case, the reason why Euphiletus also quoted the older more general

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trans. *Pandora's Daughters, The Role and Status of Women in Greek and Roman Antiquity* (Baltimore 1987) 40ff; and "Donne di casa e donne sole in Grecia: sedotte e seduttrici," in *Atti II Convegno Nazionale di studi su La donna nel mondo antico* (Torino 18-20 aprile 1988), Torino 1989, 45ff.

4 As we read in Aesch. 3.91, and as demonstrated by M. H. Hansen, *Apagoge, endeixis and ephegesis against kakourgoi, etc.* (Odense 1976) 44-45.

5 Cohen (*supra*. n.1) 158.

statute allowing certain sexual offenders taken in the act to be killed would be easily understandable.

2) The second, less radical explanation is that perhaps there was confusion in the interpretation of the phrase *ho ti an bouletai chrêsthai*, quoted by Euphiletus in 1.49, considered to be by Cohen part of the law on the treatment of the *moichoi* as *kakourgoi*. Again, in this case, the reason why Euphiletus refers to the older law would be easily understandable.

In my opinion Cohen is absolutely right in observing that the two laws treated different subjects. The law quoted at 1.30 was not aimed at punishing *moicheia*. It was not *das Ehebruchsgesetz*, as it was called by Hans Julius Wolff, the greatest scholar in Greek law of this century. It was only part of the law on *phonos dikaios*, considering *moicheia* as just one of the circumstances granting impunity for a killing. Instead, the law quoted at 1.29 was the first Athenian law stating a penalty for the *moichos* taken in the act.

However, even if convinced by Cohen's hypothesis that the new law quoted at 1.29 might have been a law concerning the treating of *moichoi* as *kakourgoi*, I would like to propose a different interpretation of this law. In my opinion it might be that this new law did not limit the husband's rights, but rather extended them. The extension might have been this: the new law might have given the possibility of having the *moichos* executed also if he had not been taken "in the act" in the technical and specific sense given to this phrase by the statute on legitimate homicide, but also if taken "in the act" in a more general, broader sense.

In fact, the words used in the new law to indicate *flagrante delicto* (*ep' autophôrôi*) were different from the words used in the old law. In Lucian, *Eunuchus* 10, we read: εἰ δὲ μὴ ψεύδονται οἱ περὶ αὐτοῦ λέγοντες, καὶ μοιχὸς ἑάλω ποτέ, ὡς ὁ ἄξων φησίν, ἄρθρα ἐν ἄρθροις ἔχων (and if the persons speaking of this are reliable, also the *moichos*, as the *axôn* says, must be surprised in the very moment when he has his sexual member in the woman's). This is certainly a very strict technical sense of *flagrante delicto*, but far from impossible to be accepted in a legal system. With specific reference to illicit sexual intercourse, in Italy, for example, until 1968 (when adultery was punished as a crime, considered as such only if committed by women), the husband who wanted to prove his wife's infidelity had to find her in the exact moment when she had sexual intercourse, neither a moment earlier nor a moment later.

But let us go back to ancient word. The *lex Iulia de adulteriis*, enacted by Augustus in 18 B.C., allowed to kill with impunity under certain circumstances, the man who had illicit sexual intercourse with the wife or daughter of a Roman citizen.[6] One of these

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6 See my "Adulterio, omicidio legittimo e causa d' onore in diritto romano," in *Studi sull' omicidio in diritto greco e romano* (Milan 1976) 161ff; P. Csillag, *The Augustan Laws on Family Relations* (Budapest 1976); J. A. C. Thomas, "*Lex Iulia de adulteriis coercendis*," in *Etudes Maqueron* (Aix-en-Provence 1970) 641ff; and G. Rizzelli, "Alcuni aspetti dell' accusa privilegiata in materia di adulterio," *BIDR* 89 (1989) 411ff.

circumstances being the fact of having caught the lover *in ipsis rebus Veneris*, Ulpianus, commenting on the law, quotes Labeo and Pomponius, saying that *in ipsis rebus Veneris* has the same meaning of the words *en ergôi*, used by Drakon and Solon. (*Dig.* 48.5.24 (23), pr., Ulpianus, *libro primo de adulteriis*). And *in ipsis rebus Veneris*, for the Romans, meant exactly and strictly in the moment of the penetration.[7]

Turning back to Euphiletus affair, we must now recall that Eratosthenes had not been "taken in the act" in the technical sense considered by the old law. When Euphiletus entered the bedroom, bringing with him friends who could testify to his wife infidelity, the persons who first entered the room saw Eratosthenes κατακείμενον παρὰ τῇ γυναικί, (1.24) that is to say lying nearby Euphiletus' wife. The persons entering immediately after saw him ἐν τῇ κλίνῃ γυμνὸν ἑστηκότα, that is to say standing naked on the bed. Eratosthenes consequently, having no ἄρθρα ἐν ἄρθροις, had not been surprised *en ergôi*, as the *axôn* required.

In my opinion, therefore, the reason why Euphiletus appealed to both the laws might have been this: Eratosthenes had committed *moicheia* in his house, and the law on homicide considered this to be one of the circumstances granting impunity, as we shall see later. Nonetheless Euphiletus had not taken Eratosthenes *en ergôi*. As a result, to Euphiletus' claim to have committed a *phonos dikaios*, the judges could object the absence of one of the circumstances required by the law. In order to avoid such a risk, Euphiletus quoted the *moicheia-apagôgê* law, where *flagrante delicto* was defined with the words *ep' autophôrôi*. And *ep' autophôrôi*, as Hansen showed,[8] did not mean only "in the act of committing the crime." In the case of theft (the crime to which it was specially related) *ep' autophôrôi* referred also to the case of the thief caught during pursuit, and of a theft discovered during a house search. As Hansen points out, the Athenian law is equivalent to the Roman law on the *furtum manifestum*, including the case of the thief escaping with the stolen goods, and the case of the theft discovered during a *quaestio lance licioque*.[9] The possible interpretation of the term *ep' autophôrôi* being so wide, the term used by the *kakourgoi* law applied to *moicheia* could therefore include also Eratosthenes case.

Let us now confront the crucial problem of the legal meaning of the word *moicheia*. In fact, the view that *moicheia* is a crime that includes intercourse with unmarried women poses several problems. If any sexual intercourse with a woman who was not one's own wife or one's own concubine and who was not a prostitute was considered *moicheia*, we ought to be able to identify the unifying element of the sexual behavior criminalized under this term, and the masculine interest protected through this criminalization. Nonetheless, in my opinion, none of the several attempts to solve this problem are completely convincing.

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7 See E. Cantarella, "Homicide of honor: the Development of Italian Adultery Law over two millennia," in *The Family in Italy from Antiquity to the Present* (Yale Univ. Press 1991).

8 M. H. Hansen (*supra* n.4) 48ff.

9 On the problems connected with the punishment of *furtum manifestum* in Roman law see A.Corbino, in *Atti Convegno Cagliari* (Cagliari 1991).

The opinion that the protected interest was to avoid illegitimate offspring in the family, proposed years ago by U. E. Paoli,[10] is challenged by the fact that the law allowed also the concubine's lover to be killed with impunity. A concubine's offspring being by definition *nothos*, the protected interest could not be the legitimacy of procreation in the family. Nor can we accept the hypothesis that the protected interest was the *kyrios*'s interest in the decent sexual behavior of the women under his *kyrieia*, as recently stated by Susan Guettel Cole:[11] again, the *pallakê* was not under her concubine's *kyrieia*.

I think that in order to understand which was the masculine interest protected by the rule of the homicide law allowing a man to kill certain sexual offenders we must go back to the time when the homicide law was enacted. Aside from any discussion of the details, the purpose of the law was to keep self-help in check, by introducing the new principle that homicide was a crime to be punished by the family, but only under public control and after a trial.

When the law was enacted, the rising polis nonetheless stated that several exceptions were admitted. Among them is the one we are discussing. What was the reason for introducing this exception? I would suggest that the reason is related to the consideration of a matter of fact. The women listed in the legitimate homicide law, whose lovers could be killed with impunity, lived in the house of the man who was allowed to kill their lovers, whether or not these women where subject to his *kyrieia*.

In the time the law was enacted, this was a very relevant fact. The power of the head of an *oikos* over the persons living under his roof was unlimited, and any offence to one of these persons was an offence to his *timê*, legitimating and requiring his revenge. When the homicide law was enacted, therefore, the polis had to find a compromise with the old customs. Otherwise, the law would not have been respected. The rule which allowed the killing of the lover of the women living in the house and caught committing *moicheia* was the compromise. Inside the house, the head of the *oikos* could continue to exercise the powers he had exercised for centuries; but only inside the house, as Lysias' plea shows very clearly.

Throughout the plea Euphiletus insists that Eratosthenes committed *moicheia* inside his house. Eratosthenes, he repeats, ἐμοίχευεν τὴν γυναῖκα τὴν ἐμὴν . . . καὶ ἐμὲ αὐτὸν ὕβρισεν εἰς τὴν οἰκίαν τὴν ἐμὴν εἰσιών (1.4; cf. 11, 20, 22, 25). The word *oikia* is indeed very significant: as MacDowell recently pointed out, *oikia* means house in the material, physical sense of the word.[12]

Let us return to the definition of *moicheia*. The hypothesis I suggested is not sufficient to prove that the man having intercourses with free women living in an *oikos* was by definition a *moichos*. In fact the legitimate homicide law does not use this word.

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10 U. E. Paoli, "Il reato di adulterio (moicheia) in diritto attico," *SDHI* 16 (1950) 123ff. (= *Altri studi di diritto greco e romano* [Milano 1976] 252ff).

11 *Supra* n.1.

12 D. M. MacDowell, "The *Oikos* in Athenian Law," *CQ* 39 (1989) 10ff.

Nonetheless, I still believe in the existence of several elements in favor of the hypothesis that *moicheia* was any sexual relation outside marriage and concubinage, no matter if the woman was virgin, married or a widow.

Certainly, as Cohen observes, when other societies have legislated against illegitimate sexual intercourse on the part of women, this legislation "is usually cast in terms of the categories of intercourse with unmarried virgins and intercourse with married women," and certainly "both marital and virginal statuses are often invested, whether in Pagan, Jewish and Christian cultures, each with its own particular significance."[13] But if this is true, there are nonetheless significant exceptions.

Leaving apart the first feminine Christian saint (Mary, Virgin and mother), I would like to consider two pagan types, that is to say the Greek *arrêphoroi* and the Roman Vestal Priestesses.

As P. Brulé recently pointed out, there are interesting analogies between the young Greek girls from six to ten years old serving in the temple of Athena and the Roman priestesses serving in the temple of Vesta.[14] The *arrêphoroi* virgins were in charge of weaving the *peplos* for Athena, of grinding wheat for special biscuits and of cleaning the temple and the statue of the Goddess.[15] The Vestal Priestesses, originally serving in the temple of the Goddess for four and later for thirty years[16] and obliged to maintain chastity (subject to being buried alive if they lost it), were in charge of preparing a special food called *mola salsa* as well as cleaning the temple during a ceremony called *stecoratio*.[17] Both *arrêphoroi* virgins and Vestal virgins were, therefore, in charge of ritual duties corresponding to married women's daily duties.[18]

Moreover, Vestal virgins combed their hair in the same manner as girls did on their wedding day,[19] and they wore a *stola*, like married women. In fact, their image unified virginity and marital statuses. They were at the same time the daughters and the wives of Roman citizens, so that the significance of their duty of chastity represented both the virginal duty to ignore sex and the marital feminine duty to ignore sex outside marriage.[20]

As far as the usual distinction between the criminalization of intercourse with married and unmarried women is concerned, we can consider that, in fact, the Romans

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13 Cohen (*supra* n.1) 149-50.

14 P. Brulé, *La fille d'Athènes* (Paris 1978) 118ff.

15 On the *arrêphoroi* see Aristoph., *Lys.* 641-45. On their duties see A. Brelich, *Paides e Parthenoi* (Roma 1900).

16 See Dion.Hal. 1.76.3.

17 On the Vestal Priestesses' duties see.F. Guizzi, *Aspetti giuridici del sacerdozio romano. Il sacerdozio di Vesta* (Napoli 1964); and more recently P. Giunti, *Adulterio e leggi regie. Un reato fra storia e propaganda* (Milano 1990) 66ff.

18 Brulé (*supra* n.14) and Giunti (*supra* n.17) 66ff.

19 Fest., s.v. *senis crinibus*, 454 L.

20 The presence in the Vestal priesthood of both virginal and marital significance explains why some scholars consider the Vestals as having the status of virgins (e.g. H. J. Rose, "De Virginibus Vestalibus," *Mnemosyne* 56 [1928] 79; W. Warde Fowler, *The Roman Festivals* [London 1899]; and M. Beard, "The Sexual Status of Vestal Virgins," *JRS* 70 [1980] 12ff), whereas other scholars consider them as having the status of *uxores* (e.g. Guizzi [*supra* n.17] 113 and Giunti [*supra* n.17] 74-82).

used to distinguish sexual intercourse with married and with unmarried women, calling the first ones *stuprum*, and the second ones *adulterium*.[21] Nonetheless, the *lex Iulia de adulteriis* criminalized under the same name—*adulterium*—and punished with the same penalty any sexual intercourse outside marriage and concubinage with a woman not a prostitute, whether she was virgin, married or widowed.[22]

Furthermore, in Greece the Law Code of Gortyn considered *moicheia* to be a crime encompassing relations with unmarried women. In column II 20-28, we read: "if somebody is taken as he commits *moicheia* on a free woman in the house of her father, her brother or her husband, he will pay 100 *statêres*. If in another person's house, 50. If on the woman of an *apetairos*, 10.[23] But if a slave on a free woman, he will pay double. And if a slave on a slave, 5."[24]

In the doric city, therefore, there existed a unique crime, including under the name of *moicheia* illicit sexual intercourse with both married and unmarried women.

Finally as far as Athens is concerned, I shall briefly list some considerations in favor of the hypothesis that *moicheia* was not restricted to deception of marital trust.

1) The law quoted in (Dem. 59.87) providing that the husband had to divorce his wife, if she were caught with a *moichos*, does not imply that *moicheia* was a crime committed only by married women. In Rome the *lex Iulia de adulteriis* obliged the husband to divorce his unfaithful wife. Nonetheless, as we know, in the same law *adulterium* also indicated intercourse with virgins.

2) It is certainly true that when Aristotle lists the case of the *moichos* taken in the act between the cases of *phonos dikaios* he is not quoting the entire law (in fact, as Cohen notes, he does not mention the case of self-defense). Nonetheless, he refers to the case of illicit sexual intercourse defining it as *moicheia*. If *moicheia* had meant only adultery in its strict and technical sense, he would have given an erroneous report of the law, the content of which was broader than his *resumé* would suggest.

3) The plea *Against Neaera* (Dem. 59) provides evidence for a charge of *moicheia* upon intercourse with an unmarried woman, Phano. This plea is considered to be unreliable as a source. In fact, we must admit that the stories of Neaera and her daughter Phano do have the appearance of a soap opera. The scandals provoked by the two women are certainly exaggerated by the logographer, author of the plea against Neaera. But it seems to me highly improbable that he could define as *moicheia* the sexual intercourse of an unmarried women (such as Phano), if *moicheia* was committed only with married women.

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21 See *Dig*. 48.5.6, 48.5.35.

22 Again *Dig*. 48.5.6.

23 The word *apetairos* is sometimes translated "belonging to another *etaireia*" (U. E. Paoli, *La legislazione sull' adulterio*. . ., 143), sometimes "belonging to no *etaireia*" (R. F. Willets, *Aristocratic Society in ancient Crete* [London 1955] 37ff and *Ancient Crete. A social History* [London 1965] 103ff.).

24 Analogies between Athenian and Gortynian legislation on sexual offences in A. Maffi, "L' aveu, Antiquité et Moyen Age," *Table ronde Rome, 28-30 mars 1984 (Collection, Ecole Francaise de Rome* 88) 7ff.

Attempting to trick the judges, the logographers could certainly quote laws inappropriate to the case, and we know very well that, in fact, they often did just this. But the success of their tricks depended on the ignorance of the law on the part of the judges. In the above case, while it is plausible that the judges were ignorant of the details of the legislation on sexual offences, not a single judge could have possibly have been ignorant of the meaning of a word such as *moicheia*. If it meant adultery, in the strict sense of the word, and if the speaker would have defined as such the intercourse experienced by Phano, who was not married, her entire story would have become unbelievable.

4) Finally, if moicheia was committed only with married women, how was the crime consisting in having intercourse with virgins defined? In the Greek language we do not have a special word for these category of intercourses. Shall we imagine that they were not illicit? Considering that the man taken in the act of having intercourse with an unmarried woman could be killed with impunity, it is self evident that intercourse with unmarried women was not allowed. If so, a different word should have defined this. If the name was not *moicheia*, then what was it?

In conclusion, Cohen's hypotheses concerning the reconstruction and the legal regulation of *moicheia* are such as to require us to reconsider the entire problem. Thanks to his arguments I have had the opportunity to revise some of my own opinions on the subject. But as far as the definition of *moicheia* is concerned, I must confess that I am still bound to the older, traditional opinion.

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Response to Eva Cantarella

WIFE AND LOVER
An Italian truck driver trying out his local brothel outside Teramo near the Adriatic coast for the first time the other night was somewhat taken aback when the door was opened by its scantily-dressed manager. She turned out to be his wife. (*The Independent*, 21.9.90)

Professor Cantarella's rich and wide-ranging paper has further stirred up the waters muddied so adroitly by David Cohen. But, to extend Cohen's metaphor, the fact that so many issues seem to be lurking in the sludge at the bottom, ready to emerge when the subject of *moikheia* is prodded, suggests that as a legal phenomenon it cannot be separated from the social construction of gender in classical Athens. Cohen's paper and Cantarella's response to it here have attempted to pin down and define *moikheia*, and then to explain its function within Athenian law and society. In contrast, I think that to set *moikheia* in its context of the relations of sexual power and authority, not separating it from related offenses like seduction and rape, is probably a more realistic way of understanding its meaning in classical Athens.

One of the major sources of cloudiness in understanding *moikheia* is (as both Cohen and Cantarella have pointed out) that the nature of the evidence on *moikheia* entangles it with laws on justifiable homicide and *kakourgia* with which it is not identical, though to which it is certainly related. Lysias 1, on which many of the arguments hinge, is more about whether the homicide was justified—did Eratosthenes jump (into bed) or was he pushed?—than about what constitutes *moikheia*. The legal question at the centre of this case does not, of course, help us with the "definition" of *moikheia*, and indeed, I doubt whether such a clear-cut definition as modern legal scholars seek ever existed in Athenian legal and social ideology (or even practice).

Cohen's arguments, which Cantarella now contests, emphasise that the existence and nature of *moikheia* as a legal offence indicated the specialness of the marriage bond, and hence the social and political concern over the legitimacy of offspring of the marital relationship. Bolstering his arguments about the "sanctity" of marriage with comparative data from other societies, he takes the expressions of concern by Athenian orators and philosophers about the value of marriage and the importance of knowing where your children came from more or less at face value. Hence, he maintains that *moikheia* only makes sense as an offence against marital/procreative relations, and that the term does not apply to illicit sexual intercourse with a man's other female relatives. Although this is certainly part of the story, it doesn't seem to me to explain everything. As Cohen himself well understands, the distinction between (in our terms) adultery, seduction and rape is not

at all clear, nor yet is the relationship of any of these categories of behaviour to the Athenian usage of *moikheia*. Could we expect, then, that the categories of relationships to which *moikheia* was applied would be any more sharply or strictly defined? Indeed, the marriage bond itself strengthens, develops and changes over time in classical Athens (as Cynthia Patterson will demonstrate in her forthcoming article on the subject). Thus who might be vulnerable to *moikheia* and how vulnerable they might be may also not be firmly fixed. I cannot agree that the case for limiting the "definition" of *moikheia* to the marital relationship is as strong as Cohen makes out, even though it may mostly have operated in practice in relation to marriage. His argument based on Aristotle (*Eud. Ethics* 1221b; Cohen: 164) that a man admitting to sexual intercourse but not *moikheia* on the grounds that the offence was committed in ignorance need not mean that the offender could only be ignorant of her marriage (as Cohen suggests). The offender could simply have claimed ignorance of her status as a free woman under the *kyreia* of a free man (i.e., he could have maintained he thought she was a slave or a prostitute).

Professor Cantarella rejects (I think correctly) that private concern over the legitimacy of children and the maintenance of good sexual behaviour of the women of a house provide sufficient explanations for what *moikheia* was all about. If, as has been argued by Todd (forthcoming), and to a lesser extent Cohen, *moikheia* was harshly viewed in Athens because legitimacy was so crucial to citizenship, then why could men take action only on behalf of their own close female relatives (i.e., the possible legal actions remained essentially private)? Instead she favours an historical/evolutionary explanation that it was in the interests of the early polis to control the offspring of women whose children might be citizens. Allowing the justified killing of *moikhoi* caught in the act was a "planned" compromise between the authority of the city and that of the household. Hence she also accepts that *moikheia* could cover more illicit sexual relationships than those with other men's wives. As she points out, what would you call a man who slept with your daughter but a *moikhos*? Her point that *moikheia* as construed in Gortyn (Gortyn Code II.20-28) clearly did include illicit sexual relationships with women other than a man's wife is suggestive and, I think, convincing. And although, of course, the term need not have meant the same in 4th c. Athens as in 5th c. Gortyn, it ought to make us wonder given the (admittedly shaky) evidence of Demosthenes 59 whether sisters and mothers and so forth were entirely excluded from *moikheia*, even if (as Cohen persuasively argues) the term was usually applied vis-à-vis marriage.

I see two major difficulties with the main thrust of Professor Cantarella's argument. The first is what constituted legitimate descent for a citizen in the 7th c. (or even well into the 6th c.) in Athens? The answer is not at all clear, but it was certainly not the case that the strictly bilateral descent basis for citizenship characteristic of Athens from the mid 5th c. was in effect so early. Hence, the concern of the polis in the sexual activities of women who might give birth to citizens is not so obvious. The second difficulty is a concomitant

problem of logic: can we really judge the original intention of a law by its (much later) effects, as it seems to me this historical argument in essence does? By the 5th and 4th c. legitimacy, citizen descent and so forth certainly were important social and political concerns. But I doubt whether the offence of *moikheia* or the motivation for considering the killing of a *moikhos* as a legally justifiable homicide can be explained in this way.

I am also a little dubious about the idea that in either archaic or classical Athens the interpretation of "in the act," whether expressed as *ep' autophôrôi* or as ἄρθρα ἐν ἄρθροις, in relation to *moikheia* would ever have been strictly legally construed to refer to a specific moment of sexual intercourse (indeed it seems to me to be even less likely in earlier than in later periods). Cantarella's main source for this suggestion (Lucian) is late, unsure of his own sources and possibly ambiguous, since ἄρθρα ἐν ἄρθροις ἔχων is rather vague, and there is no evidence to support its use as a technical term with a highly specialised meaning in this early period.

Where I strongly agree with Cantarella is in her insistence in looking for unifying elements in the total pattern of *moikheia*. But to do this it seems to me essential to start with the social construction of sexual relations between men and women.

The ideology of sexual control in Athens, and other Greek societies, was complex to say the least. Professor Cantarella's statement that the female relationships mentioned in the justifiable homicide law (Dem. 23.51) are all within the household is significant. A very important source of men's power and authority as heads of households was that (ideally, at least) they could control the sexual activities of other household members (including animals and slaves), but that they themselves were autonomous and no one else could dictate their sexual activities. In the case of children, sisters and so forth, this largely entailed forbidding sexual activity altogether. But in the case of wives (and concubines and slaves) the man in authority not only forbade sexual acts with others but also initiated sexual acts with them himself, with which they were compelled (again, ideally at least) to comply. Similarly, it is eminently clear from many ancient sources (and has been frequently noted in many recent works on gender; cf. Foucault 1984: 143-151; Winkler) that within one of the prevalent ideologies of Athenian social life, men were considered to possess the capacity for self-control over their own sexual desire, whereas women were seen as mastered by their own sexual drives, and thus "needed" external control by responsible men.

Within the logic of this construct of sexual control, then, an assault on, attack on, abduction of, or liaison with a woman outside one's own household 1) nearly always implied sexual activity to some degree and, more importantly, 2) was construed as an attack on the authority and power of another man. Rape, seduction and *moikheia* are therefore not so much offenses against women or "the husband-wife relation" (Cohen 1983: 155) or even the household itself (Paoli) as they are offenses against men's authority over their households and against their power to control the sexual activities of household members

(cf. Foucault 1984: 146-147). This partially explains why these offenses are sometimes not easily distinguished, a point to which I shall return.

Frequently *moikheia* (and rape) are glossed by hubris and derivatives of that loaded word (cf Todd forthcoming; Harris 1990: 373; Cole). This is surely no accident. The classic passage, in reference to *moikheia*, must be Lysias 1.4, quoted by Professor Cantarella: ἐμοίχευεν τὴν γυναῖκα τὴν ἐμὴν . . . καὶ ἐμὲ αὐτὸν ὕβρισεν εἰς τὴν οἰκίαν τὴν ἐμὴν εἰσιών. *Moikheia* is committed with the wife and this is hubris against the husband. Also relevant is Demosthenes' exposition on the law of justifiable homicide (23.55-56), much discussed in the literature on *moikheia*. What has not been noted though is that it changes sex in the middle, exploiting the gender ambiguity of the Greek genitive plural.

> "ἢ ἐπὶ δάμαρτι" φησὶν "ἢ ἐπὶ μητρὶ ἢ ἐπ' ἀδελφῇ ἢ θυγατρί, ἢ ἐπὶ παλλακῇ ἣν ἂν ἐπ' ἐλευθέροις παισὶν ἔχῃ," καὶ τὸν ἐπὶ τούτων τῳ κτείναντ' ἀθῷον ποιεῖ, πάντων γ' ὀρθότατ', ὦ ἄνδρες 'Αθηναῖοι, τοῦτον ἀφιείς. τί δήποτε; ὅτι ὑπὲρ ὧν τοῖς πολεμίοις μαχόμεθα, ἵνα μὴ πάσχωσιν ὑβριστικὸν μηδ' ἀσελγὲς μηδέν, ὑπὲρ τούτων καὶ τοὺς φιλίους, ἐὰν παρὰ τὸν νόμον εἰς αὐτοὺς ὑβρίζωσι καὶ διαφθείρωσιν, ἔδωκεν ἀποκτεῖναι.

Although it is the women "for whose sake we fight enemies," when friends attack it is not the women but τοὺς αὐτούς, the men themselves, who are most hurt.

The hubris of *moikheia* is not simply an attack on another man's authority and power, it could also be an appropriation of it, especially when significant socio-economic differences existed between the *moikhos* and his cuckolded victim, as Stephen Todd (forthcoming) has pointed out. It might have been very difficult for a husband (or a wife) to resist the advances of a wealthy and powerful *moikhos*. Yet the infringement of another man's fundamental source of control over his female relatives created an uncomfortable tension between the egalitarian political ideology and the stratified and hierarchical socio-economic reality of classical Athens.

In outlining the logic of sexual control I have stressed that it was an ideology, for I believe the lived reality of that ideology was often fragile. The shadowy relationship between constituting ideologies and lived realities is another factor responsible for the "confusion" in our sources over the moral views and legal consequences of rape, seduction and *moikheia*. The modern debate over whether the Athenians considered *moikheia* worse than rape and assault (Cohen 1984: 152-3; Cole 1984; Foucault 1984: 146; Harris 1990) has, I think, been fundamentally misdirected, perhaps because the reasons for the apparent unclarity have been misunderstood. The relative position of these offences, at the level of both individual persons and households and at the level of institutions and communal moral

values, changes with context and perspective.

On the first level, that of the individual and household, classical Athenian law provided several different procedures for the pursuit of *moikhoi* and rapists. Not only do these overlap (e.g., the *graphê hubreôs* is applicable to both offences), but also which procedure is used depends on the interested individual's structural relationship to both the criminal and the object of criminal attack (cf. Osborne 1985 on the question of who uses what procedure when). So, a husband who caught a *moikhos* with his own wife could claim he was entitled to take the law into his own hands (as in Lysias 1); whereas this "procedure" would not be open to someone who accused an unrelated couple of having an adulterous relationship. On an institutional plane, we can distinguish between the perspectives and contexts of legal structures on the one hand and general moral disapprobation on the other. In classical Athens both *moikhoi* and rapists caught in the act could be killed with impunity (i.e., if the killer was a close male relative he was not considered a murderer). Those convicted in court were probably punished less severely, and with Harris (1990: 374-375), I expect this was probably by fines in most cases (Harris 1990; contra Cole 1984; Foucault 1984: 146). But for reasons I shall detail below I think that very few *moikhoi*, compared to rapists, were ever tried in court.

In the Great Code of Gortyn, where the penalties for both crimes are explicitly laid out, the legal principle that rape and *moikheia* were equivalent is even more obvious (Sealey 1990: 69, 72-4; Harris 1990: 375). In fact Gortyn is probably even more similar to classical Athens than Harris and others have realised. It should be noted that a man who catches a *moikhos* with a close female relative is allowed to hold him for ransom. If no ransom is paid within five days, the captor can do what he pleases with the offender. There is no reason to think this does not include killing or castrating him. The real effect of this provision is to provide the same kinds of outlets for vengeance and self-help at Gortyn as are provided by the unintentional homicide law and the *apagôgê* procedure in Athens. Many circumstances can be envisaged in which such ransom might not be paid: if the parties could not agree; if the woman's family (being wealthier and/or more powerful than the offender's) refused "reasonable" compensation; or if the family of the offender refused to support him, either to avoid a long-term feud or for some other reason. At Gortyn, as at Athens, the outcome of discovered *moikheia* might be determined by the relative socio-economic power of the moikhos and the woman and her family (even within the "class" of free citizens). So, as at Athens, although rapists and *moikhoi* might be punished by fines if they were tried in court, they might suffer injury or death in extreme circumstances. I think the reason these offences are treated virtually the same way in the laws is that from the point of view of the law and the courts, which are part of the world of adult male citizens, the victim of both crimes is not the person who was the object of the attack but the man in whose household she dwells.

When we turn to the "public" (but still male) moral assessment of rape and

moikheia a different picture emerges. Despite the fact that *moikheia* and rape are treated almost identically under the laws, the reasons for considering them morally repellent acts are different. As Cole (1984: 111-113) makes clear, women as objects of rape were pitied, and gratuitous violence against free women was despised. Women could be moral, if not legal, victims. But in *moikheia* both parties were considered despicable (though for different reasons). Hence Harris is left with the question of why Euphiletos' argument (that *moikheia* is worse than rape) might have been thought credible, despite the fact that it was not legally correct. I think his answer, that *moikheia* threatens male authority (Harris 1990: 375), is only partially right.

The difference in moral attitude between *moikheia* and rape has as much to do with the reality of women's behaviour as with the ideologies of male superiority. Forcible attack or even a one-time seduction can be rationalised with the excuse that women are physically and morally weak creatures who cannot be expected to be responsible for their own actions. Although such actions may constitute hubris of one man against another—an affront to a man's authority, honour and consequently power by another man—there is still no need to perceive women as any more than passive pawns. Hence they can be pitied as victims, even if legally they are objects.

But in *moikheia*, it is harder to pretend that women's will to control their own sexual destiny plays no part. *Moikheia*, at least in the the case of Lysias 1 and the others where we have some (admittedly probably spurious) details, implies a longer term, larger scale relationship, with a more active role played by women (this is also implicit in the comic references, for which see Cohen 154). For men, this is a much more serious matter. The ideal of the autonomous man is under attack from both within and without, and it is much harder to maintain the illusion that women are passive creatures with no responsibility for their own sexual behaviour. A woman with a *moikhos* has taken control of her own sexuality, and has taken that control away from the man who purports to dictate her sexual activity. No wonder her husband is required to divorce her, for she is effectively removed from the community of obedient women. And this consequence could have been financially awkward for the husband, especially if the wife was rich in her own right. It is less the specialness of the marriage bond than the image of the husband's autonomy as manifest in his power over his wife's sexuality and that diaphanous myth of masculine ideology, the passive woman, that is most threatened.

This contesting of sexual control at the heart of the meaning of *moikheia*, may be the most significant factor in explaining the fuzzy use of the term (fuzzy to us at least) in our Attic sources. The context in which one would most often expect to meet conflict over control of sexual behaviour would be within marriage, hence in this relationship *moikheia* would become a threat (or reality) most often. Wives are mature, sexually active, and managed to wrest a certain amount of "autonomy" of their own, often living lives quite separate from their husbands. They are also often not related by blood to their husbands

like sisters or daughters (since wives come from different natal households than their husbands). This absence of close kinship could shake male authority until the union is cemented by time and children. But though the marital relationship is the most common scenario for *moikheia*, this does not mean that the term was not applicable in other relationships where a man's authority in dictating the sexual activity of a related female was contravened.

Finally, there is also an uncomfortable subtext for the man whose authority and power was penetrated by a *moikhos*. A public accusation of *moikheia* must have elicited the communal question of whether the control exerted by the accuser was ineffectual. A man whose wife takes a *moikhos* is a cuckold. Was the accuser then, considered to be as much at fault in a social sense, as the accused might have been at fault legally? It is hard to know the answer to this. But, this aspect of *moikheia* allows for a slightly different interpretation of the interesting penalty problematically referred to by Demosthenes (59.66-7) and Aristotle (*Ath. Pol.* 51.2), permitting the wronged husband to have a go at the guilty *moikhos* and "to use him however he wished without a knife." If it wasn't a field day for two metre tall sumo-wrestling *moikhoi*, was this not a chance for a cuckolded husband to publicly re-exert his sexual authority and his autonomy via his own physical strength and personal courage, as well as having the more obvious aim of taking revenge for the hubris committed against him? The unflattering implication that a man might not be looking after his authority very well, the potential messiness of divorce, and in perhaps a number of cases, status differences between the offended party and the *moikhos* all provide reasons why real cases involving *moikheia* are thinly represented in our sources. This is certainly implied in Aiskhines 1.107 where he suggests that the cuckolded husbands of Andros would not be willing to expose themselves to testify to Timarkhos' iniquities with their wives. Whether or not this is a spurious excuse on Aeschines' part to account for lack of witnesses, it was meant to sound plausible to jurors. It is probably significant that the one victim of *moikheia* of whom we can be certain, Euphiletos, had to choose between representing himself as a cuckold and the possibility of execution for murder.

The valuable work of Professors Eva Cantarella and David Cohen have done much to make palatable the muddy waters of *moikheia*. I could not improve on their efforts in that direction. Instead I have tried to take soundings on the riverbed in order to expand the scope for further discussion.

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