

Draconian Procedure  
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IG I<sup>2</sup>.115 (I<sup>3</sup>.104) lines 11-14

καὶ ἔὰμ μὲ 'κ [π]ρονοί[α]ς [κ]τ[ένει τίς τινα. φευγ]ε[ν. δι]-  
κάζεν δὲ τοὺς βασιλέας αἴτιο[ν] φόν[ο] εἶναι τὸν ἐργασάμενον] ἔ [β]ολ-  
ευσαντα. τὸς δὲ ἐφέτας διαγν[ῶ]ν[α]ι. [αἰδέσασθαι δ' ἔὰμ μὲν πατέ]ρ ε-  
ἶ ἔ ἀδελφὸς] ἔ ἡυες, ἡάπαντ[α]ς. ἔ τὸν κολῶντα κρατεν.

Even if someone kills someone not from forethought, he flees, and the Kings judge to be causative of murder the agent or planner, and the Ephetai decide, and all reconcile, if there is a father or brother or sons, or the opposer prevails.

In these first lines of the first partially extant Athenian law code, Draco makes a confusing beginning, elliptically prescribing the same procedures for both intentional and unintentional homicide – at least that seems a cogent understanding based on the limited evidence available.<sup>1</sup> But in the rest of the sentence, he may actually be more straightforward, although there has been much less scholarly clarity about his procedural instructions here than there might have been. Draco says that the killer “flees”, and the Kings “judge”, and the Ephetai “decide”, and the family of the deceased “reconciles” – each procedure indicated by a jussive infinitive verb conjoined by the particle δὲ<sup>2</sup> – yet few scholars have accepted that he is actually prescribing this sequence as a procedural order. It seems plausible that he is prescribing such a step by step order, however, which leads to further considerations about the roles to be played by these various groups and the determinations to be made by them at each of the stages of the procedure. The six following lines of the code dwell on the two last steps in the procedure, the decision of the Ephetai and reconciliation with the family members. Draco seems to want to move beyond judgement, δικάζειν, and its assignation of causality (αἰτία: the “etiology” of the homicide). In this complex, elliptical, and fragmentary first sentence, Draco seems to point the way from causality toward reconciliation. Within what appears to be a single sentence, Draco takes homicide procedure from the killing itself to reconciliation, its last stage.

The preliminary lines of the inscription record the circumstances in 409 BC of the re-inscription of Draco’s law (νόμος) concerning homicide (φόνος). It has been in the keeping of the Basileus (6) and is to be inscribed on a stone stele (7-8), which is to be set in front of the Stoa Basileios. Then begins the law itself, which refers to itself using the archaic term θεσμός (19-20). It had formerly been inscribed on at least two *axones* (10, 56), though only about thirty of the perhaps 110 lines available on the two *axones* are legible.<sup>3</sup> After the four steps described in the first three lines, the next six are devoted to identifying which family members are to be included in decisions about reconciliation and the procedures to be

<sup>1</sup> In his lucid and comprehensive discussion, M. Gagarin, *Drakon and Early Athenian Homicide Law* (New Haven 1981), has championed this interpretation, which I find the most plausible. Against, see the bibliography of E. Carawan, *Rhetoric and the Law of Draco* (Oxford 1998) 35 n. 4.

Like all other recent scholars, Gagarin bases his discussion on the text published by R. Stroud, *Dracon’s Law on Homicide* (Berkeley 1968). There are many gaps in the text, but Stroud’s restorations have received widespread acceptance, and I accept them for the purposes of this paper. Also for this paper, I am assuming a basic continuity in thought and procedure, if not in terminology, between the Draco text, Aeschylus’ *Eumenides*, and the forensic oratory of the fifth and fourth centuries.

<sup>2</sup> Note that in the last clause, αἰδέσασθαι δ’ ἔὰμ μὲν πατέ]ρ, there may be a bigger break, a new complete sentence with a new protasis, indicated by ἔὰμ μὲν, but there seems no interruption in the paratactic sequence. See Gagarin 146, who sketches how each procedure begins with an infinitive.

<sup>3</sup> Regarding the law’s authenticity and the circumstances of its re-inscription, see most recently J. Sickinger, *Public Records and Archives in Classical Athens* (Chapel Hill 1999) 14-24.

followed in the absence of family members (13-19). Then follows a provision regarding the law's retroactivity: those who have killed previously are also to be bound by the θεσμός (19-20). At that point, as the text's fragmentation starts to increase beyond reconstruction, the inscription seems to suggest more about the procedures only cursorily listed in the opening lines. In particular, it describes the role of the prosecution rather than that of the killer, about whom it has said only that he "flees" (φευγειν 11). In the case of these previous killers, *and so presumably also in the case of new killers*, relatives (of the deceased) are to make a proclamation (προειπεῖν 20) in the agora and to share in the prosecution (συνδιώκειν 21). After that, there is again mention of someone being "causative<sup>4</sup> of murder" (αἴτιον φόνου 23-24), which is presumably again, as in line 12, a reference to the "judgement," δικάζειν, of the Kings, although gaps in the text impede this conclusion. After another gap there is mention of the "Fifty-One", the Ephetai. Presumably they are again, as in line 13, to make a "decision" διαγνῶναι (24-25, cf. 29, 35-6). The next legible part of the inscription (26-9) deals with the possibility that someone kills an exiled, convicted killer, an *androphonos*, who keeps away from the proscribed areas, the border markets and so on. The exile is not referred to here as a φευγων, but he is afforded the protections of an innocent Athenian abroad. The last legible portion of the inscription (36-8) deals with killing in self-defense.<sup>5</sup>

With the inscription as a whole sketched out, closer analysis of the first, conditional sentence of Draco's law in context can reveal definite procedural steps. After the elliptical protasis, the first part of the apodosis prescribes "flight", φευγειν, for the killer. This word has been understood to refer to the punishment of exile,<sup>6</sup> but it seems entirely possible (and from my point of view preferable) that it refer only to the killer's becoming a defendant, a φευγων, in a judicial process.<sup>7</sup> That is, he must stand trial. The use of φευγειν as the idiom of forensic defense is common in Attic oratory.<sup>8</sup> In Dem. 23.66 φευγων ἀλοῦς is the idiom

<sup>4</sup> This translation of the adjective αἴτιος will seem awkward, but I have found none better. "Responsible" and other translations that suggest liability to further action seem to beg the question whether or not such liability is implied. Note that the noun αἰτία can refer either to a "cause" or to an attribution of cause, that is, an "accusation". In line 27 (cf. Dem. 23.38 ἐάν τις ἀποκτείνῃ τὸν ἀνδροφόνον [ ] ἢ αἴτιος ἢ φόνου). αἴτιος seems to stand in for [β]ολεύσαντα (12-13), denoting not the person who actually kills but the one who plans and thus causes a killing. Cf. Ant. 6.17 αἰτιῶνται δὲ οὗτοι μὲν ἐκ τούτων. ὡς αἴτιος ὅς ἐκέλευσε πιεῖν. and 1.20.

<sup>5</sup> The inscription does not give any indication of how it may have dealt with other cases of justifiable homicide, like that of Orestes in the *Eumenides*. *Eum.* 586-93 suggests that there was a preliminary process, like an *anakrasis*, in which the defendant (Orestes) had to answer questions, from the prosecution (the Chorus of Furies), regarding the three issues of fact, means, and motive: did he kill, how, and why. A. Sommerstein, *Eumenides* (Cambridge 1989) 192, argues that the Chorus "does not ask him why; that issue, crucial to his plea of justification, is raised by Orestes himself (600) ...". Strictly speaking, Sommerstein is right: the Chorus asks only by whose advice he killed his mother. But that question does address the issue of motive, of why he killed. It may, however, also touch on the issue of planning, of identifying who the βουλευων is, in this case Apollo (cf. Ant. 6.17; Lys. 13.87 and note 4 above). At any rate, these questions would need to be answered before a determination of the appropriate court could be made.

<sup>6</sup> Stroud (1968) 7, Gagarin (1981) xvi, Carawan (1998) 33.

<sup>7</sup> K. Tsantsanoglou, "Phonou pheugein (I.G. i2. 115. 11-13)," *Kernos* (Thessaloniki, 1972) 170-79, 173, cited by Gagarin (1981) 30 n. 1, reads the inscription somewhat differently but also with the understanding that φευγειν refers to the killer standing trial. H. J. Treiston, *Poine A Study in Ancient Greek Blood Vengeance* (London 1923) 195, supplies the translation "let him be put on trial," without comment.

<sup>8</sup> E.g. Ant. 5.9 πρῶτον μὲν γὰρ κακοῦργος ἐνδεδειγμένος φόνου δίκην φευγω *Although charged as a malfasant, I am fleeing an action for murder*. Cf. Dem. 23.69 τῷ δὲ φευγοντι τὰ μὲν τῆς διωμοσίας ταῦτά. τὸν πρότερον δ' ἔξεστιν εἰπόντα λόγον μεταστῆναι. καὶ οὔθ' ὁ διώκων οὔθ' οἱ δικάζοντες οὔτ' ἄλλος ἀνθρώπων οὐδεὶς κυριος κωλύσαι. *As for the defendant (fleeer), the rules for his oath are the same, but he is free to withdraw after making his first speech, and neither the prosecutor, nor the judges, nor any other man, has authority to stop him*; 23.53 ἐάν τις ἀποκτείνῃ ἐν ἄθλοισ ἄκων. ἢ ἐν ὁδῷ καθελῶν ἢ ἐν πολέμῳ

used for a convicted defendant. Dem. 23.45 cites the term ἐξεληλυθόντων for exiles for involuntary homicide and says specifically that they are different from φευγόντων.<sup>9</sup> Flight, of course, involves fleeing from something; in this case it is presumably from an accusation to come or from the self-help retribution of an aggrieved family. In Ant. 5.9 it is a δίκη, but in many passages there is no specification of what is being fled from.<sup>10</sup> In the later iteration of the procedure, the one directed against earlier killers (20-22), the family of the deceased is to make a proclamation in the *agora* and to unite in prosecution (cf. Dem. 47.70). This seems the sort of thing the killer “flees” from at this point. From other sources we know that once the proclamation is made, the defendant must keep away from the *agora* and from other proscribed places within the *polis* (Ant. 6.35-36, 40; Dem. 20.158), just as the convicted killer, a φευγων ἀλοῦς, in external exile must stay clear of the border markets, games, and Amphictyonic rites (27-8). The accused killer becomes then a sort of internal exile. His flight is from the proscribed places, but it is also to something, not yet necessarily to the safety of external exile but first to that of the judicial process, the intercession of the *polis* (cf. Aeschylus, *Eum.* 422 τὸ τέρμα τῆς φυγῆς). If we read the law as a chronological sequence, there has not yet been any judicial decision dictating (external) exile. A killer might of course spontaneously head for Athens’ borders, but he might not. Some obviously remained to stand trial. Dem. 38.22 suggests that reconciliation with an involuntary homicide could be achieved even before a killer went into exile.

It may be objected that without a reference to external exile, Draco’s law does not mention a penalty for homicide. After all, exile does seem the common punishment for homicide (see e.g. Aes., Ag. 1412 νῦν μὲν δικάζεις ἐκ πόλεως φυγὴν ἐμοί). But Demosthenes 23.25-6 provides important, though largely neglected,<sup>11</sup> evidence:

καὶ προσειπῶν ὁ θεὸς τὸν νόμον ἔαν ἀποκτείνῃ, κρίσιν πεποιήκεν ὅμως, οὐ πρότερον τί χρὴ πάσχειν τὸν δεδρακότ' εἴρηκεν, καλῶς. ὦ υνδρες Ἀθηναῖοι. τοῦθ' ὑπὲρ εὐσεβείας ὅλης τῆς πόλεως προΐδων. πῶς: οὐκ ἔνεστιν ἅπαντας ἡμᾶς εἰδέναι τίς ποτ' ἐστὶν ὁ ἀνδροφόνος. τὸ μὲν δὴ τὰ τοιαῦτ' οὐνεκ κρίσεως πιστεῦειν, οὐ τις ἐπαιτιάσθαι, δεῖν δ' ὑπελάμβανεν, ἐπειδὴ περ ἡμεῖς τιμωρήσομεν τῷ πεπονθότι, πεισθῆναι καὶ μαθεῖν ἡμᾶς διδασκομένους ὡς δέδρακεν· τῆνικαῦτα γὰρ εὐσεβὲς ἤδη κολάζειν εἰδόσιν εἶναι, πρότερον δ' οὐ.  
[26] καὶ ἔτι πρὸς τούτῳ διελογίζετο, ὅτι πάντα τὰ τοιαῦτ' ὀνόματα, οἷον ἔαν τις ἀποκτείνῃ, ἔαν τις ἱεροσυλήσῃ, ἔαν τις προδῶ, καὶ τὰ τοιαῦτα πάντα πρὸ μὲν τοῦ κρίσιν γενέσθαι αἰτιῶν ὀνόματ' ἐστίν, ἐπειδὴ δὲ κριθεὶς τις ἐξελεγχθῆ, τῆνικαῦτ' ἀδικήματα γίνεσθαι, οὐ δὲ δεῖν ὤετο τῷ τῆς αἰτίας

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ἀγνοήσας. ἢ ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπὶ ἀδελφῇ ἢ ἐπὶ θυγατρὶ. ἢ ἐπὶ παλλακῇ ἢ ἄν ἐπ' ἐλευθέροις παισὶν ἔχη. τούτων ἕνεκα μὴ φευγεῖν κτείναντα. *If someone kill involuntarily in an athletic contest, or overcoming him in a fight on a road, or unwittingly in battle, or in intercourse with his wife, or mother, or sister, or daughter, or concubine kept for procreation of free children, he does not flee* (or, he does not stand trial) *for having killed for these reasons.* Lys. 10.31 τῆ δ' αὐτῆ ψήφῳ φόνου φευγῶ τοῦ πατρός *In the same vote I am fleeing (an accusation) of murdering my father.*

<sup>9</sup> In Dem. 23.45 those in exile as a result of involuntary homicide are referred to in fact both as ἐξεληλυθόντων and μεθεστηκότων. However, the φευγόντων seem to be those exiled for more serious crimes, those whose property has been confiscated, so there seem to be at least two possible uses for the term. In 23.77, the exile is a πεφευγώς, one who has fled.

<sup>10</sup> Cf. Lys. 4.4 περὶ τῆς αἰτίας ἧς ἐγὼ φευγῶ; cf. Hdt. 7.214.2 φευγοντα Ἐπιάλτην ταύτην τὴν αἰτίην οἶδαμεν. Ant. 5.10 τοῖς τοῦ φόνου φευγουσι τὰς δίκας; cf. e.g. Dem. 21.91; 30.5, 9, 16; Aes., *Eum.* 753. In *Ath. Pol.* 57.3 there is the idiom ἔαν δὲ φεύγων φυγὴν ὧν αἰδεσίς ἐστιν, which refers to exile. Cf. Dem. 23.38 τὸν πεφευγόντ' ἐπὶ αἰτία φόνου καὶ ἐαλωκότα, ἔάνπερ ἅπαξ ἐκφυγῇ καὶ σωθῆ, φευγεῖν is certainly used of exile in Dem. 22.66; 23. 31, 38, 42, 51-2, 72-3, 85; 24.149, 153; 50.48.

<sup>11</sup> See, however, Tsantsanoglou 172.

ὄνόματι τιμωρίαν προσγράφειν. ἀλλὰ κρίσιν. καὶ διὰ ταῦτα, ὅς τις ἀποκτείνῃ τινά, τὴν βουλήν δικάζειν ἔγραψεν. καὶ οὐχ ἄπερ, ἂν ἀλῶ. παθεῖν εἶπεν.  
 The legislator (Solon?), while he adds the words ‘if he kills’, has nevertheless created a trial; he has not said what the doer must suffer before, and thereby has shown fine foresight, men of Athens, for the piety of the whole city. How so? It is impossible that all of us should know whoever the manslayer is. He thought it dangerous, if someone made an accusation, to give credence in such matters without a trial, but he conceived that, inasmuch as we are to avenge the sufferer, we ought to be persuaded and learn by instruction that he has done it, for then it is pious to penalize on the basis of knowledge, but not before. [26] Moreover he reasoned that before the trial occurs, such expressions as “if someone kills,” “if someone robs a temple,” “if someone commits treason,” and the like are all (merely) terms for accusations. But after someone’s trial and conviction, then they become acts of injustice. To a term for accusation he thought it proper to ascribe not punishment, but only trial. And therefore he wrote, “if someone kills someone, the Council judges,” and not what exactly he should suffer if convicted.

What Demosthenes objects to is that his opponent Aristocrates’ decree takes the form ἂν [ ] ἀποκτείνῃ τις Χαρίδημον [ ] ἀγώγιμον ἐκ τῶν συμμάχων εἶναι, where ἀγώγιμον εἶναι stands as punishment (τιμωρία) and not just arrest before trial (16, cf. 11). Demosthenes’ argument speaks for itself, strongly indicating that the legislation for homicide dictated judicial procedure (κρίσις), not punishment. It seems most unlikely that Demosthenes could have composed this argument if the homicide law of Draco, with all its prominence – Demosthenes mentions Draco and his legislation by name at 23.51 – had dictated the punishment of exile with the word φευγεῖν in line 11. Dem. 23.53 likewise has the passage ἔάν τις ἀποκτείνῃ ἐν ἄθλοις ἄκων. . . . μὴ φευγεῖν (see above, n. 8), where φευγεῖν also seems to refer only to standing trial as a defendant.<sup>12</sup> In the case described by that passage there might have been a trial over whether the killer acted involuntarily (ἄκων). But, as Demosthenes puts it, there would seem little for him to be a defendant about – let alone go into exile for – if all conceded that he had acted both involuntarily and in the context of an athletic contest. A point of the legislation seems to be that there are certain contexts in which accidental deaths occur, and no one is to be thought the cause of such deaths, except perhaps the victims themselves.<sup>13</sup>

In Dem. 20.158, Demosthenes comments on homicide procedure in a way that is also relevant. There, after a killer has been banned from the sacred places he goes through the judicial process, at the end of which he may be found to be innocent.<sup>14</sup> The process seems to

<sup>12</sup>A brief survey of passages using the phrase ἔάν τις shows that many in fact refer only to procedure and not to punishment. But the survey is not as decisive as Demosthenes would suggest. For procedure, see Dem. 20.156; 21.47; 23.22, 30, 36, 37, 51, 53, 66, 77, 83; 24.50; Lyc. 1.121; Lys. 10.9; 14.5; for punishment, see And. 1.96, 116; Dem. 20.40, 100; 21.47, 113; 23.44; 24.110, 212; 26.24; Lyc. 1.20; Lys. 1.32; 14.8. Dem. 21.47 can be counted in both lists. An analogous expression for φευγεῖν in these procedural contexts is ὑπόδικος (cf. Lys. 10.9).

<sup>13</sup>In the second of the Antiphon *Tetralogies*, the prosecution is aimed precisely at a boy who allegedly killed another involuntarily in the context of athletics (3.1.2). No mention is made there, however, of the exclusion of athletics in the law. Lysias 1 also involves a situation that might be covered by the legislation cited in Dem. 23.53. Certainly it would be from the speaker’s point of view. He is the defendant and argues, presumably in the Delphinion, that he had killed Eratosthenes “upon” his wife. But the prosecution seems to argue that the case was premeditated homicide, a case of entrapment (Lys. 1.37).

<sup>14</sup>Dem. 20.158 ἐν τοῖσιν τοῖς περὶ τούτων νόμοις ὁ Δράκων φοβερόν κατασκευάζων καὶ δεινὸν τό τιν’ αὐτόχειρ’ ἄλλον ἄλλου γίγνεσθαι. καὶ γράφων χέρνιβος εἴργεσθαι τὸν ἀνδροφόνον. σπονδῶν. κρατήρων. ἱερῶν. ἀγορᾶς. πάντα τᾶλλα διελθῶν οἷς μάλιστα’ ἂν τινὰς ᾤετ’ ἐπισχεῖν τοῦ τοιοῦτόν τι

concede that he is the killer and thus in a sense causative of the homicide. It even uses the term *androphonos* (“manslayer”). The judgement of the Kings concerning causation would thus be upheld. But the judicial process, presumably a trial before the Ephetai, may find the killer innocent (καθαρός) – the homicide having been allowable – and thus entails lifting the ban from the sacred places. The passage does not set out the punishment but only the conditions of the internal exile undertaken by a killer who has yet to undergo a judicial process.

The second part of the apodosi, referring to the Kings’ judgement, does not mention any prosecution, though later in the inscription prosecution is mentioned in the case of the earlier killers (20-22), where it is to be pursued by the family of the deceased. The Kings, presumably the Basileus and the *Phylobasileis*, are to make a judgement (δικάζειν) of causation (αἰτία).<sup>15</sup> Gerhard Thür has argued that the Homeric meaning of the verb δικάζειν is to prescribe the means of settling a dispute, not to settle it directly.<sup>16</sup> From a practical point of view this seems partly the role for the Kings here also. They make a (preliminary) judgement, which sets the terms for a later trial, if one is needed, before the Ephetai. In the classical period a vestige of this procedure seems to occur in the προδικασία (Ant. 6.42). There the prosecutors, under the supervision of the Basileus, make a claim about the αἰτία of the defendant three times over successive months.<sup>17</sup> At the beginning of the process, they also made a proclamation that the accused person be excluded from many important meeting points.<sup>18</sup> Throughout this process, if what I have argued earlier is correct, the defendant is a φευγων. One result of the Kings’ procedure is, of course, that the defendant, the flier, the φευγων, now takes on the accusation, the αἰτία, for the homicide. In fact, in Attic idioms the defendant is also referred to as “the one having the αἰτία”, ὁ τὴν αἰτίαν ἔχων (*Ath. Pol.* 57.4; Dem. 23.36; cf. 58.29; Aes., *Eum.* 579). Unlike in Canadian law, the defendant is thus in a sense presumed guilty when he goes before the larger court of Ephetai. He must “be released” from the αἰτία (Ant. 1.7, 2.2.11, 5.40, 6.15, 32; Lys. 7.8; cf. Aes., *Eum.* 83). The defendant in the *Third Tetralogy* plays on the notion of cause, saying that the man who died was more the cause of his death than the defendant himself and that the deceased was the cause not only of his own misfortune but also of the charge against the defendant (Ant. 4.2.1; cf. 4.4.5; 5.64)

If so, then, as well as setting out the means of settling the dispute by defining its terms, the Kings’ (preliminary) judgement also served as at least a tentative declaration by

ποιεῖν. ὅμως οὐκ ἀφείλετο τὴν τοῦ δικαίου τάξιν. ἀλλ’ ἔθηκεν ἐφ’ οἷς ἐξεῖναι ἀποκτιννυναί. κἄν οὕτω τις δράσῃ. καθαρὸν διώρισεν εἶναι. *Now Draco, in the laws about these things, marked being a (hands-on) killer as fearsome and terrible by banning the manslayer from the lustral water, the libations, the loving-cup, the sacrifices and the market-place; although he enumerated everything that he thought likely to deter from doing such a thing, he never robbed him of the process of justice; but he defined the circumstances that make homicide possible (licit) and defined the killer free from taint if he acts in these ways.*

<sup>15</sup> Carawan 33-34 puts in a period: “and the kings shall give judgement (δικάζειν). Guilty of homicide [is either the perpetrator] or the planner.” The passage is admittedly very fragmentary, but Carawan makes no claim that there is a missing δέ, which might indicate a new sentence.

<sup>16</sup> G. Thür, “Zum δικάζειν bei Homer,” *ZSS* 87 (1970) 426-44.

<sup>17</sup> There is actually very little evidence of what occurred at the προδικασία. But cf. Thür (1990) 151. Although the prosecution and defense had to swear oaths to their claims and to their relationship to the victim at the actual trial (Ant. 6.6; Dem. 23.67-8; 47.72), they may not have had to do so at the προδικασία. Likewise, their claims may not have used the actual language of attributing αἰτία, but they will have attributed it implicitly.

<sup>18</sup> MacDowell 24-5 points out that altogether three proclamations are made: one at the tomb of the killed person, though it had only religious and not legal force (Dem. 47.69), a second in the agora by the prosecution (Ant. 6.35), and a third by the basileus (*Ath. Pol.* 57.2). My suspicion is that the second and third are almost synonymous. The *Ath. Pol.* seems to make a point of saying that it is the Basileus who makes the proclamation: καὶ ὁ προαγορευῶν εἶργεσθαι τῶν νομίμων οὕτως ἔστιν. Cf. Lys. 6.9.

the *polis* about where the cause, the αἰτία, for the pollution of homicide lay, in order that the *polis* itself did not suffer its ill effects. Ilias Arnaoutoglou argues that the notion of pollution starts with the proclamation.<sup>19</sup> I would argue rather that with the proclamation the assignation of the pollution to a single individual begins. Until then, the entire *polis* is tainted. The *First Tetralogy* makes essentially this point and suggests that the assignation of pollution begins already with the initiation of the prosecution (2.1.3 πάσης τῆς πόλεως μιναινομένης ὑπ' αὐτοῦ. ἕως ἂν διωχθῆ).<sup>20</sup> That seems the reason why it is important for the Kings to make their judgement first, even to make it spontaneously – without a prosecution – against an unknown killer and even against an object or animal (*Ath. Pol.* 57.4; Dem. 23.76; Harp. s.v. ἐπὶ Πρυτανείῳ). The result of a delay in making such an assignation is illustrated forcefully by the plague in *Oedipus the King*: once he hears the reason for the plague, Oedipus as king immediately issues his edict against the as yet unknown killer (223-51).<sup>21</sup> Thus it seems that the public proclamation against the killer by the victim's family and the Kings' judgement occur at the same time, the Kings' "judgement" being perhaps only a formal consequence of the claim entailed in the family's proclamation. In Ant. 2.1.3, the speaker claims that the pollution redounds on the prosecution if their prosecution is unjust, the King who oversees the prosecution apparently having no responsibility.<sup>22</sup> In lines 26-9, where the code deals with someone who kills a person observing the terms of his exile, the Ephetai are again given their role of διαγιγνώσκειν, but the kings' δικάζειν almost disappears, perhaps being swept into the phrase "by the same (procedure)s" (ἐν τοῖς αὐτοῖς ἐνέχεσθαι διαγιγνώσκεν δὲ τὸς ἐφέτας 29). If that is true, the passage gives further evidence that it is now the function of the Ephetai that is paramount, the Kings' role becoming only a formality.

The *Athenaion politeia* makes clear that later terminology has changed. It says that it is the King's role to "introduce" the case (εἰσάγει), whereupon the Ephetai "judge" it (δικάζουσι).<sup>23</sup> Aeschylus seems to describe a mythological charter for this change in terminology. In response to Orestes' demand that she try his case (κρίνον δίκην), whether or not he acted (ἔρξαιμι) justly, Athena invokes an *a fortiori* argument: the matter is so great that it would not be right (θέμις) even for *her* to discern (διαίρειν) cases of murder; let alone that any single mortal judge (δικάζειν) them (*Eum.* 468-71). In the place of the "Kings", Athena passes the function of judging to a court of sworn *dikastai* (483-4). As Apollo says later, she is to "introduce" the case (εἰσαγε 581), but of course she retains a vote to break a tie (741, 754). Indeed, by the time of Solon, not long after Draco, the Areopagus Council is said to "judge" (δικάζειν Dem. 23.22). However, according to the *Ath. pol.*, when the King

<sup>19</sup>I. Arnaoutoglou, "Pollution in the Athenian Homicide Law," *RIDA* 40 (1993) 109-37, 129 argues against legal implications for the notion of pollution, arguing instead that the exclusionary protocols served rather as means of social exclusion and thus deterrence. The Draco inscription admittedly gives no explicit trace of the notion of pollution.

<sup>20</sup>*Eum.* 448-52 raises the issue of the killer being purified elsewhere. It is unclear what consequence that could have for an Athenian court or why Aeschylus makes such a point of it.

<sup>21</sup> See E. Carawan, "The Edict of Oedipus (*Oedipus Tyrannus* 223-51)" *AJP* 120 (1999) 187-222. Cf. Dem. 47.69.

<sup>22</sup> The Lawcode of Gortyn also makes of δικάζειν (δικαδδέεν, δικαδδέτο) a fairly formal process governed by the presence of witnesses (cols. 1.21, 9.30, 38, 50, 11.27-8). Cf. Carawan 1998 59.

<sup>23</sup>*Ath. Pol.* 57.4 δικάζουσι δ' οἱ λαχόντες ταῦτ' ἐφέται πλὴν τῶν ἐν Ἀρείῳ πάγῳ γιγνομένων. εἰσάγει δ' ὁ βασιλεύς. καὶ δικάζουσιν ἐν ἱερῷ καὶ ὑπαίθριοι. ἐφέται is the supplement of Kenyon. While his reading may not be correct, it seems certain that it is the Ephetai to whom the text is referring. In the next sentence, the Basileus is said to remove his crown when he "judges". The implication seems to be that he judges as one among the Ephetai. Cf. 3.5 referring to the Archons κυριοὶ δ' ἦσαν καὶ τὰς δίκας αὐτοτελεῖς [κρίν]ειν. καὶ οὐχ ὥσπερ νῦν προανακρίνειν. Cf. also Ant. 6.42.

does not know who did it, he and the tribal kings “judge” themselves (δικάζει).<sup>24</sup> So it seems that the Kings of the classical period still have some vestigial function as judges.<sup>25</sup>

The third part of the apodosis dictates the role of the Ephetai, who seem to appear now as an appeal court. Since their name seems associated with ἔφεσις, appeal/referral, it would seem entirely appropriate to refer to them as “Appellate Judges”, but the confusions this might cause make the use of the Greek term preferable.<sup>26</sup> Many judgements of the Kings would presumably not be appealed; the killer would simply head for the border, content to live as an exile if he could, and the matter would be finished. But it seems that the function of the Ephetai, if there was an appeal, was to evaluate or to decide the preliminary assignation of αἰτία by the Kings. The Ephetai do not judge, δικάζειν; the action Draco assigns them is rather “to decide,” διαγνῶναι.<sup>27</sup> In later Athenian law vestiges of this distinction occur in several passages. Public arbitrators, for instance, are said to render a γνῶσις.<sup>28</sup> As in the Draco law, if one of the parties objects to the decision, he prevails and the decision does not stand. That is, even if the Ephetai decide that the homicide was involuntary, a member of the victim’s family may block reconciliation. The implication of a decision that the homicide was involuntary seems to be that reconciliation is expected to take place (cf. Eur., *Hipp.* 1325, 1335, 1406). In democratic Athens, the *dikasterion*, the popular court, became the great appellate court; an appealed arbitrator’s decision went to it.<sup>29</sup> However, in Dem. 23.71, where the Palladion (which is staffed by the Ephetai and whose area was principally involuntary homicide) is referred to as a *dikasterion*, it is also said to render a decision, a γνῶσις.<sup>30</sup> Not only in Draco’s law, but also in other passages, decisions

<sup>24</sup>*Ath. Pol.* 57.4 ὅταν δὲ μὴ εἰδῆ τὸν ποιήσαντα. τῷ δράσαντι λαγχάνει. δικάζει δ’ ὁ βασιλεὺς καὶ οἱ φυλοβασιλεῖς. καὶ τὰς τῶν ἀψύχων καὶ τῶν ἄλλων ζῶων.

<sup>25</sup>Cf. Dem. 23.28 εἰσφέρειν δ’ ἕξ(ς) τοὺς ἄρχοντας. ὧν ἕκαστοι δικασταὶ εἰσι. τῷ βουλομένῳ. τὴν δ’ ἡλιαίαν διαγιγνώσκειν. *The Archons shall bring cases into court, of which each is severally a judge for the volunteer (prosecutor), and the Heliaea decides.*

<sup>26</sup>MacDowell 48 notes that although Harpocration and Pollux give similar explanations, some modern scholars have seen others. Like most scholars now, he himself is not committed. If the interpretation of this paper is correct, then the origin of the term may in fact lie in an appeal of the kings’ *dikazein*. Later changes in terminology and procedure take the emphasis off the notion of “appeal”.

<sup>27</sup>“Decide” seems the best translation for διαγνῶναι, but it is far from adequate. The verb seems to be used because the Ephetai must not simply follow that claims of the prosecution (and their witnesses), which formally dictate the kings’ judgment, but must also come to understand, and evaluate certain facts of the case. Their “understanding” of it at the same time entails a legally binding determination of, for instance, whether the killing actually was committed by the accused killer and whether his action was voluntary. This combination of “diagnosis” and “decision” is difficult to render in English.

<sup>28</sup>*Ath. Pol.* 53.1-2 καὶ τὰ μὲν μέχρι δέκα δραχμῶν αὐτοτελεῖς εἰσι δ[ικά]ζε[ι]ν. τὰ δ’ ὑπὲρ τοῦτο τὸ τίμημα τοῖς διαιτηταῖς παραδιδόασιν· οἱ δὲ παραλαβόντες. [2] ἔαν μὴ δυνωνται διαλυῖσαι. **γιγνώσκουσι.** κἂν μὲν ἀμφοτέροις ἀρέσκη τὰ γνωσθέντα καὶ ἐμμένωσιν. ἔχει τέλος ἡ δίκη. ἂν δ’ ὁ ἕτερος ἐφῆ τῶν ἀντιδίκων εἰς τὸ δικαστήριον. ἐμβαλόντες τὰς μαρτυρίας καὶ τὰς προκλήσεις καὶ τοὺς νόμους εἰς ἔχινους. χωρὶς μὲν τὰς τοῦ διώκοντος. χωρὶς δὲ τὰς τοῦ φευγοντος. καὶ τουτους κατασημνηάμενοι. καὶ τὴν **γνῶσιν** τοῦ διαιτητοῦ γεγραμμένην ἐν γραμματείῳ προσαρτήσαντες. παραδιδόασιν τοῖς δ’ τοῖς τὴν φυλὴν τοῦ φευγοντος δικάζουσιν. *They have independence to judge claims not exceeding ten drachmas, but suits above that value they pass on to the Arbitrators. These take over the cases, and if they are unable to effect a compromise, they give a decision, and if both parties are satisfied with their decisions and abide by them, that ends the suit. But if one of the two parties appeals to the popular court, they put the witnesses’ testimony and the challenges and the laws concerned into deed-boxes, those of the prosecutor and those of the defendant separately, and seal them up, and attach to them a copy of the Arbitrator’s decision written on a tablet, and hand them over to the four judges taking the cases of the defendant’s tribe.* G. Thür, “Die Todesstrafe im Blutprozess Athens,” *Journal of Juristic Papyrology* 20 (1990) 143-56, 150 suggests that διαγιγνώσκειν indicates a formal vote. While the arbitrators, acting individually, clearly did not vote, Thür must be right that the fifty-one *Ephetai*, with their large, uneven number, did.

<sup>29</sup>Admittedly, not all cases went to an arbitrator.

<sup>30</sup>In Dem. 23.71, the γνῶσις τοῦ δικαστηρίου follows oath swearing and arguments.

or determinations of motive seem to be referred to using the verb διαγιγνώσκειν (Lys. 3.43 cf. 3.28). Likewise, in their oath the *dikastai* swore that they would judge (δικάζειν) according to the laws, but on matters on which there were no laws, by their “most just decision” γνώμη τῆ δικαιοτάτῃ (cf. Aes., *Eum.* 674-5 ἀπὸ γνώμης φέρειν ψῆφον δικάϊαν).<sup>31</sup> The implication seems to be again that the γνώμη or γνώσις engages somehow a freer form of decision, one not bound by formal procedures or laws.<sup>32</sup>

A few lines later in the inscription (17), we learn that in the absence of surviving relatives of the deceased, the Ephetai decide whether or not the killing was unintentional and, if so, select members of the phratry to admit the killer (cf. Aes., *Eum.* 656 ποία δὲ χέρνιψ φρατέρων προσδέξεται).<sup>33</sup> Such a readmission seems to annul the proclamation debarring the killer from public places; it releases the defendant, the φευγῶν, from internal exile.

Given the importance for the Athenian democracy of Solon’s law of ἔφεσις to the *dikasterion* (*Ath. Pol.* 9.1), it should not be surprising that ἔφεσις already had precedent in Draco’s law, which itself seems to assume the office and function of the Ephetai. If we can posit a trajectory in Athens from the rule (and judicial authority) of the Kings to the rule of the demos and judgement of the popular court, then it seems that homicide procedure consistently maintains an aspect of archaism. In the 5<sup>th</sup> century Ephialtes stripped the once powerful Areopagus of many of its political functions, but left it with homicide jurisdiction (*Ath. pol.* 25.2; Philoch. fr. 64). In Draco’s law, the judgement of the presumably once powerful Kings, while maintaining a place in the judicial procedure, is checked by a mechanism for appeal and reversal.

The last part of the first sentence of Draco’s law deals with reconciliation (αἰδέσασθαι), which includes not only the *polis* but in particular the family of the deceased, the prosecution. In *Eumenides* 600-602, Orestes explains that Clytaemnestra faced two counts of pollution, the first because she killed her husband and the second because she killed Orestes’ father. Only the second count (προσβολή) actually involves Orestes, but a similar pattern may follow for Athenian homicide law in general, namely, that there is a twofold wrong, one from the perspective of the killer towards his victim and the other from the perspective of the family of the deceased. That is why they in particular take on the role of prosecution. The perspective of the killer dominates the first sentence of Draco’s law: he flees, is judged, and is finally “decided” upon. But his perspective then gives way to the perspective of the family of the deceased. Of course they have taken part in prosecuting the killer, but it seems likely that they may do so out of obligation.<sup>34</sup> Now, once the killer has been convicted, they must consider whether or not to reconcile.

Αἰδέσασθαι (lit. “to have αἰδῶς ‘modesty’, ‘respect’, with regard to someone”) is a challenging word and concept. It reflects on the part of the prosecution a need to have modesty, to set a limit to their demands against the killer. It seems akin to the notion of ἐπιείκεια (“fairmindedness”) outlined by Aristotle (*NE* 5.10), by which a prosecutor or court limits the demands to which the laws, if strictly interpreted, give a right in order to achieve a

<sup>31</sup> Dem. 20.118; 23.96; 39.40; 57.63; Aes. 3.6.

<sup>32</sup> The *Eumenides* offers several more passages that echo the idiom of deciding a case on the basis of γνώσις: καταγνωσθῆ δίκη 573; καὶ ψῆφον αἴρειν καὶ διαγῶναι δίκην αἰδουμένους τὸν ὄρκον 709-10; cf. διαίρειν 488.

<sup>33</sup> Both Podlecki and Sommerstein interpret this passage of the *Eumenides* to refer only to ongoing rites of the phratries rather than as a purificatory rite done in the absence of family members. To me the verb προσδέξεται suggests rather a one-time readmission rite. See Eur., *Phoen.* 1706 τίς σε πυργός Ἀτθίδος προσδέξεται; and Soph., *OT* 1428.

<sup>34</sup> The obligation was probably not legal. Cf. Gagarin 138-9. But if there was to be a prosecution, it seems that the family of the deceased was the party in a legal position to pursue it.



finer sense of justice. Ernst Heitsch notes the connection of αἰδέσασθαι to pity in Homer (*Il.* 21.74, 22.123-4, 419, 24.207; *Od.* 3.96, 22.312).<sup>35</sup> Demosthenes associates reconciliation with φιλανθρωπία (21.43). Reconciliation, however, also seems to have involved a consideration, a payment, which entailed a sort of binding contract preventing the prosecuting family from taking up their vendetta/prosecution again (Dem. 38.22).

If no member of the family of the deceased survives, either of the immediate family or of cousins, then there come into play first the decision of the Ephetai whether or not the killing was intentional and, second, admission of the killer by ten phratry members (16-18). These two acts must substitute for the reconciliation by the family. One thing that distinguishes the Ephetai and phratry members from the family is that they are in no position, as disinterested groups, to accept a payment (a ποινή or ἄποινα) to facilitate reconciliation. It seems to have been common practice for the families of the killer and deceased to make and receive such payments after the judicial process and presumably usually, but not always, a period of external exile. (To make or receive them before the process would have been a subversion of justice.) Although the circumstances are different, the advice given to Agamemnon to respect (αἰδεῖσθαι) the priest of Apollo and accept payment for the release of his daughter follows a similar pattern of respect for the person combined with acceptance of a consideration (Hom., *Il.* 1.33, 377 αἰδεῖσθαί θ' ἱερῆα καὶ ἀγλαὰ δέχθαι ὑποίνα. Cf. Aes., *Eum.* 475). Since in the absence of family members the readmission seems to follow as a matter of course after the decision regarding volition, it seems to follow that the payment to the family of the deceased would have been largely influenced by their view, and the Ephetai's, of the volition of the killing. If the Ephetai decide that the killing was not voluntary, readmission of the killer follows, apparently without concern for there being no payment, which in any case would presumably have been quite low, especially after a lapse of time in which the deceased's family members have died out. If the Ephetai decide (or have decided), however, that the killing was voluntary, then in the absence of the deceased's family members no one is in a position to decide what amount of payment would be sufficient, or to receive it. But there seems an implication that surviving members of the deceased's family would have been in such a position.<sup>36</sup>

The re-inscription in 409 BC of Draco's law reveals one of the first attempts to regulate homicide in Athens. Carawan has argued that the word "*aitios* . . . looks to the consequences of guilt – liability – rather than to the initial cause".<sup>37</sup> The results of this analysis suggest that there may indeed have been a time when αἰτία and liability, and so the suitability for punishment, were identified, that there was an automatic penalty attached to a judgement of αἰτία. But Draco's law in fact goes two steps beyond this judgement: first, a decision of the Ephetai determines both whether the judgement is correct and also, if it is, whether the αἰτία was voluntary or not; second, it formulates grounds for achieving not

<sup>35</sup> E. Heitsch, *Aidesis im attischen Strafrecht* (Mainz 1984) 9. Heitsch in the same place also notes the occurrence of a payment (*Il.* 9.632-6).

<sup>36</sup> Note that Demosthenes 21.43 points out that killing from forethought was punished with death, perpetual exile, and confiscation of goods. The passage would seem to rule out reconciliation by the family of the deceased (ἔπειθ' οἱ φονικοί τοὺς μὲν ἐκ προνοίας ἀποκτινυντας θανάτῳ καὶ ἀειφυγίᾳ καὶ δημεύσει τῶν ὑπαρχόντων ζημιούσι. τοὺς δ' ἀκουσίως αἰδέσεως καὶ φιλανθρωπίας πολλῆς ἠξίωσαν. *Again, the murder laws punish those killing from forethought with death, perpetual exile, and confiscation of goods, but (those killing) involuntarily they treat with reconciliation and much philanthropy.*) If these inferences are correct, then there seems a substantive difference between killing "from forethought" and killing "voluntarily". Only the former is punished with death, etc.; the latter leaves open the possibility of reconciliation by the family. But the passage may also be simply rhetorical exaggeration. Perhaps no such conclusions should be drawn from it.

<sup>37</sup> Carawan 1998 42.

punishment, but reconciliation. In some passages of Homer, likewise, it seems that there are some more primitive notions of justice at work, whereby the person who is the cause of some wrong should suffer for it, by a sort of fiction of judicial necessity (*Il.* 1.153-7, 2.87, 15.137, 21.370; *Od.* 22.49-50). Sometimes, however, the point is made that it is the gods who are the “cause” of human troubles (*Il.* 3.164, 13.222-7, 19.86-8, 410; *Od.* 11.559; at *Od.* 1.32-4 Zeus explicitly rejects the notion). There are also suggestions that good men ought to move beyond an assignation of cause (e.g. *Il.* 13.111-15).

Homer famously describes a scene from the shield of Hephaestus in which disputants in a homicide case come before a circle of elders in the agora (*Il.* 18.497-508). The starting point of the dispute is not an accusation, but rather simply strife (νεῖκος). With the crowds of the *demos* demonstrating partisan support for each side, the elders each propose a δίκη as a basis for ending the strife, for settling the dispute, for achieving reconciliation and ending the strife. Likewise, in the *Homeric Hymn to Hermes*, the babe Hermes protests that he is not the cause (αἴτιος 4.275, 383) for Apollo’s cattle being missing. But when the strife between him and Apollo is resolved by the arbitration of Zeus, the father avoids the issue of cause altogether and simply directs Hermes to help his brother find the missing animals. Zeus moves beyond αἴτια to a basis of reconciliation, to find resolution or, as the hymnist puts it, ὁμόφρονα θυμὸν (4.391).