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Drakonian Procedure

DAVID MIRHADY

IG¹ 115 (i³ 104) lines 11-14:

καὶ ἐὰν μὲ κ[τ]ρωνοί[α]ς [κ]λένει τις τινα, φεύγει[ν] δικάζειν δὲ τὸς βασιλέας αἰτιό[ν] φόν[ο] εἴτε τὸν αὐόχρηπα εἴτε [β]λολεύοντα· τὸς δὲ ἐφέτας διαγγ[ό]ν[α]ι, [α]ιδέσασθαι δ' ἐὰν μὲν πατέ[ρ] εἴ ἢ ἀδελφός[ε] ἢ υἱός, ἡδυνά[ν]τ[ι]α[ς], ἢ τὸν κο[λ]ύοντα κρατέ[ν].¹

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, Drakon 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.² 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. Drakon says that the killer ‘flees,’ and the Kings ‘judge,’ and the *Ephetai* ‘decide,’ and the family of the deceased ‘reconciles’ – each procedure indicated by an infinitive verb conjoined to the sequence by the particle *δέ*³ – 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 such a procedural order. 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. Drakon seems to want to move beyond judgment, δικάζειν, and its assignation of causality (αἰτία), the 'etiology' of the homicide. In this complex, elliptical, and fragmentary first sentence, Drakon seems to point the way from causality towards reconciliation.

The preliminary lines of the inscription record the circumstances in 409 BC of the re-inscription of Drakon's law (νόμος) concerning homicide (φόνος). It has been in the keeping of the *Basileus* (line 6) and is to be inscribed on a stone stele (lines 7-8), which is to be set in front of the Stoa Basileios. Then begins the actual law, which refers to itself using the archaic term θεσμός (lines 19-20). It had formerly been inscribed on at least two axones (lines 10, 56), though only about thirty of the perhaps 110 lines available on the two axones are legible.⁴ After the four procedural 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 followed in the absence of family members (lines 13-19). Then follows a provision regarding the law's retroactivity: those who have killed previously are also to be bound by the θεσμός (lines 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 prosecutor rather than that of the killer, about whom it has said only that he flees' (φεύγειν, 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 (προσκήρυξεν, 20) in the Agora and to share in the prosecution (συνοδοῦκεν, 21). After that, there is again mention of someone being 'causative' of murder' (αἰτίας φόνου, 23-4), which is presumably again, as in line 12, a reference to the 'judgment' (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' (διαρπάσσει, 24-5; cf. lines 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 markers, and so on. The exile is not referred to here as a φεύγων, but he is afforded the protections of an innocent Athenian abroad. The last legible portion of the inscription (lines 36-8) deals with killing in self-defence.⁶

With the inscription as a whole sketched out, closer analysis of the first, conditional sentence of Drakon's law in context can reveal definite procedural steps. After the elliptical protasis, the first part of the apodosis prescribes 'flight,' φεύγειν, for the killer. This word has been understood to

refer to the punishment of exile,⁷ but it seems entirely possible (and from my point of view more intelligible) that it refers primarily to the killer's becoming a defendant, a φεύγων in a judicial process.⁸ That is, he must stand trial. The use of φεύγειν as the idiom of forensic defence is common in Attic oratory.⁹ In Demosthenes 23.66, φεύγων δαυός is the idiom used for a convicted defendant. Demosthenes 23.45 cites the term ἐξελανθούτων for exiles for involuntary homicide and says specifically that they are different from φεύγωντων.¹⁰ Flight, of course, involves fleeing from something: in this case it seems to be from an accusation to come or from the self-help retribution of an aggrieved family. In Antiphon 5.9 it is a δίκη, but in many passages there is no specification of what is being fled from.¹¹ In the later iteration of the procedure in Drakon's law, the one directed against earlier killers (lines 20-2), 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. 6.35-6, 40; Dem. 20.158), just as the convicted killer, a φεύγων δαυός in external exile must stay clear of the border markets, games, and Amphiktyonic rites (lines 27-8). The accused killer then becomes 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. Aes. *Emn.* 422: τὸ τέμα τῆς φωνῆς). 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 (accused) killers obviously remained to stand trial. Demosthenes 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, Drakon's law does not include a penalty for homicide. After all, exile does seem the common punishment for homicide (see for example Aes. *Ag.* 1412: νόμ μὲν δικάζειν ἐκ πόλεως φύγην ἔμοι). But Demosthenes 23.25-6 provides important, though largely neglected,¹² evidence:

καὶ προσεφύγων ὁ θεὸς τὸν νόμον "ἐὰν ἀποκρεῖνη," κρίσιν πεποιήκειν ὅμως, οὐ πρότερον τί γρη πάσχειν τὸν δεδρακότ' εἰρηκεν, καλῶς, ὃ ἀνδρες Ἀθηναίων, τοῦθ' ὑπερ εὐσεβείας ὄλην τῆς πόλεως προτῶν. πῶς; οὐκ ἔνεστιν ἄναρτας ἡμῶς εἰδέναι τίς ποτ' ἔστιν ὁ ἀποροφόνος, τὸ μὲν δὴ τὰ τοιαῦτ' ἀνευ κρίσεως μισεῖσθαι, ἂν τις ἐπαινούσθαι, δεῖν ἠγείτο, δεῖν δ' ὑπελάμβανεν, ἐπειδὴ περ ἡμεῖς τιμηθήσομεν τῷ περνοθῶτι, πεισθήναι καὶ

μαθῆν ἤμας διδασκόμενους ὡς θεόρακεν· τῆνικαὐτὰ γὰρ εὐσεβὲς ἦδη κολλάειν εἰδῶσιν εἶναι, πρότερον δ' οὐ. [26] καὶ ἔτι πρὸς τοὺν δισυλο- γίτην, ὅτι πάντα τὰ τοιαῦτ' ὀνόματα, οἷον ἔάν τις ἀποκτείνῃ, ἔάν τις ἱερο- συλῆται, ἔάν τις προδοῖ, καὶ τὰ τοιαῦτα πάντα πρὸ μὲν τοῦ κρίσιν γενέσθαι αἰτιῶν ὀνόματ' ἔστιν, ἐπειδὴν δὲ κριθεὶς τις ἐξελεγθῆ τῆνικαὐτ' ἀδική- ματα γίνεσθαι. οὐ δὴ δεῖν ᾤετο τῆς αἰτίας ὀνόματα τιμωρίαν ποο- γράφειν, ἀλλὰ κρίσιν. καὶ διὰ ταῦτα, ἂν τις ἀποκτείνῃ τινα, τὴν βουλήν δικάζειν ἔργουεν, καὶ οὐχ ἄνεο, ἂν ἀλά, παθεῖν εἴεν.

The legislator, while he adds the words 'if he kills,' has nevertheless created a trial he has not said before what the doer must suffer, 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 knowl- edge, 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 Aristokrates' decree takes the form ἂν ἀποκτείνῃ τις Χαριδῆμον ... ἀγώγιμον ἐκ 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, a trial (κρίσις), not punishment. It seems most unlikely that Demosthenes could have composed this argument if the homicide law of Drakon, with all its prominence – Demosthenes mentions Drakon and his legislation by name at 23.51 – had dictated the punishment of exile with the word in line 11. Demosthenes 23.53 likewise has the passage ἔάν τις ἀποκτείνῃ ἐν ἄθροις ἄκων ... μὴ φεύγειν (see above, n. 8), where φεύγειν also seems to refer only to standing trial as a defendant.¹³ 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 defen- dant 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 legis- lation 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.¹⁴

In Demosthenes 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.¹⁵ The process seems to concede that he is the killer and thus in a sense causative of the homicide. It even uses the term *androphoros* ('manslayer'). The judgment of the Kings concerning causa- tion 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 foregoing discussion probably sets out too great a dichotomy between φεύγειν as 'go into exile' and 'stand trial.' The way the law expresses the pro- tasis, 'if someone kills someone not from forethought,' rather than 'if some- one is accused of killing someone not from forethought,' also allows that exile follows as the punishment. The starting point of the judicial process seems already an assumption that the individual did the killing, rather than simply an accusation, despite Demosthenes 23.25. The Greek conflates the punishment of exile and standing trial. Nevertheless, in the Drakon inscrip- tion, the emphasis is on the judicial procedure, in which the punishment of exile is regulated through further steps.

The second part of the apodosis, referring to the Kings' judgment, does not mention any prosecution, though later in the inscription prosecution is mentioned in the case of the earlier killers (lines 20–2), where it is to be pur- sued by the family of the deceased. The Kings, presumably the *Basileus* and the *Phylaxistai*, are to make a judgment (δικάζειν) of causation (αἰτία).¹⁶ Gerhard Thür has argued that the Homeric meaning of the verb is to pre- scribe the means of settling a dispute, not to settle it directly.¹⁷ From a prac- tical point of view this seems partly the role for the Kings here also. They make a (preliminary) judgment, which sets the terms for a later trial, if one is needed, before the *Ephetai*. In the classical period a vestige of this proce- dure seems to occur in the *ποδοικασταί* (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.¹⁸ At the beginning of the process, they also make a proclamation that the accused person be excluded from many important meeting points.¹⁹ Throughout this process, if what I have argued earlier is correct, the defendant is a φεύγων. One result of the Kings' part in the procedure is, of course, that the defendant, the flier, the

φeywv now takes on the accusation, the *aitia*, for the homicide. In fact, in Attic idioms the defendant is also referred to as 'the one having the *aitia*, 'o tny airtw egrwv (*Att. 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 *aitia* (*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).

As well as setting out the means of settling the dispute by defining its terms, the Kings' (preliminary) judgment also served as at least a tentative declaration on behalf of the polis about where the cause, the *aitia*, for the pollution of homicide lay, in order that the polis itself did not suffer its ill effects. Ilias Arnaoutoglu argues that the notion of pollution starts with the proclamation.²⁰ 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: $\rho\acute{\alpha}\sigma\tau\eta\varsigma\ \tau\eta\varsigma\ \rho\acute{\omega}\lambda\epsilon\omega\varsigma\ \mu\alpha\tau\upsilon\omega\mu\acute{\epsilon}\nu\eta\varsigma\ \upsilon\pi\alpha\ \alpha\upsilon\tau\omicron\upsilon\tau\omicron\upsilon,$ $\xi\acute{\omega}\varsigma\ \acute{\alpha}\nu\ \delta\upsilon\omega\gamma\theta\eta\iota$).²¹ That seems the reason why it is important for the Kings to make their judgment first, even to make it spontaneously – without a prosecution – against an unknown killer and even against an object or animal (*Att. Pol.* 57.4; *Dem.* 23.76; *Harp. s.v. ἐντὶ Πουρωταίων*). 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).²² Thus it seems that the public proclamation against the killer by the victim's family and the Kings' judgment occur at the same time, the Kings' judgment being perhaps only a formal consequence of the claim entailed in the family's proclamation. In Antiphon 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.²³ In lines 26–9 of the inscription, where the code deals with someone who kills a person who is observing the terms of his exile, the *Ephetai* are again given their role of $\delta\iota\alpha\gamma\gamma\upsilon\omega\sigma\kappa\epsilon\upsilon\upsilon$, but the Kings' $\delta\upsilon\kappa\acute{\alpha}\zeta\epsilon\upsilon\upsilon$ almost disappears, perhaps being swept into the phrase 'by the same (procedure)s' at line 29 ($\acute{\epsilon}\nu\ \tau\omicron\iota\varsigma\ \alpha\upsilon\text{-}\tau\omicron\iota\varsigma\ \acute{\epsilon}\nu\epsilon\gamma\epsilon\sigma\theta\epsilon\upsilon\alpha\ \delta\iota\alpha\gamma\gamma\upsilon\omega\sigma\kappa\epsilon\upsilon\iota\upsilon\ \delta\epsilon\ \tau\omicron\varsigma\ \acute{\epsilon}\phi\acute{\epsilon}\tau\alpha\iota\varsigma$; cf. *Dem.* 23.37). 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 ($\epsilon\iota\sigma\acute{\alpha}\gamma\epsilon\iota$), whereupon the *Ephetai* 'judge' it ($\delta\iota\kappa\acute{\alpha}\zeta\omicron\upsilon\sigma\iota$).²⁴ Aeschylus seems to describe a mythological charter for this change in terminology. In response to Orestes' demand that she try his case ($\kappa\pi\iota\upsilon\omega\upsilon\ \delta\iota\kappa\eta\upsilon$), whether or not he acted ($\acute{\epsilon}\rho\zeta\alpha\upsilon\mu\iota$) justly, Athena invokes an a fortiori argument: the matter is so great that it would not be right ($\theta\acute{\epsilon}\mu\iota\upsilon\varsigma$) even for her to discern ($\delta\iota\alpha\sigma\epsilon\iota\upsilon$) cases of murder. Let alone that any single mortal judge ($\delta\iota\kappa\acute{\alpha}\zeta\epsilon\iota\upsilon$) them (*Eum.* 468–71). In the place of the 'Kings', Athena passes the function of judging to a court of sworn *dikastai* (lines 483–4). As Apollo says later, she is to 'introduce' the case ($\epsilon\iota\sigma\acute{\alpha}\gamma\epsilon$, 581), but of course she retains a vote to break a tie (lines 741, 754). Indeed, by the time of Solon, not long after Drakon, the Areiopagos Council is said to 'judge' ($\delta\iota\kappa\acute{\alpha}\zeta\epsilon\iota\upsilon$, *Dem.* 23.22). However, according to the *Athenaion Politeia*, when the King does not know who did it, he and the tribal kings themselves 'judge' ($\delta\iota\kappa\acute{\alpha}\zeta\epsilon\iota$).²⁵ So it seems that the Kings of the classical period still have some vestigial function as judges.²⁶

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 $\acute{\epsilon}\phi\epsilon\tau\omicron\tau\iota\varsigma$, appeal/referral, it would seem entirely appropriate for us to refer to them as 'Appellate Judges', but the confusions this might cause make the use of the Greek term preferable.²⁷ Many judgments 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 the preliminary assignation of *aitia* by the Kings. Two decisions seem necessary: first, whether the *aitia* is correct (in some cases it will be conceded by the defendant); and second, concerning the defendant's volition. The *Ephetai* do not judge, $\delta\iota\kappa\acute{\alpha}\zeta\epsilon\iota\upsilon$; the action Drakon assigns them is rather 'to decide', $\delta\iota\alpha\gamma\gamma\omega\sigma\alpha\iota$.²⁸ In later Athenian law vestiges of this distinction occur in several passages. Public arbitrators, for instance, are said to render a $\gamma\omega\sigma\tau\iota\varsigma$.²⁹ As in the Drakon 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 *dikastērion*, the popular court, became the great appellate court; an appealed arbitrator's decision went to it.³⁰ However, in Demosthenes 23.71, where the Palladion (which is staffed by the *Ephetai* and whose area was principally involuntary homicide; cf. *And.* 1.78; *Dem.* 23.38, 43.57) is referred to as a *dikastērion*, it is also said to render a decision, a $\gamma\omega\sigma\tau\iota\varsigma$.³¹ Not only in Drakon's law, but also in other passages, decisions or determinations of motive

seem to be referred to using the verb διαγγυώσκειν (Lys. 3.43, cf. 3.28). Likewise, in their oath the *dikastai* swore that they would judge (δικάζειν) according to the laws and by their 'most just decision,' γνώμη τῆ δικαιοσύμῃ (cf. Aes. *Eum.* 674-5: ἀπὸ γνώμης φέρειν πρῆτον δικασίας).³² 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.³³

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: τοια ἃ χέρνυ φρερέπων προοδέξεται).³⁴ Such a readmission seems to annul the proclamation debarring the killer from public places; it releases the defendant, the φεύων, from internal exile. Given the importance for the Athenian democracy of Solon's law of ἔφεσις to the *dikastērion* (*Ath. Pol.* 9.1), it should not be surprising that ἔφεσις already had precedent in Drakon'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 *dēmos* and judgment of the popular court, then it seems that homicide procedure consistently maintains an aspect of archaism. In the fifth century, Ephialtes stripped the once-powerful Areiopagos of many of its political functions, but left it with homicide jurisdiction (*Ath. Pol.* 25.2; Philoch. F 64). In Drakon's law, the judgment of the presumably once-powerful Kings, while maintaining a place in the judicial procedure, is checked by a mechanism for appeal and qualification, if not reversal.

The last part of the first sentence of Drakon's law deals with reconciliation (*αἰδέσασθαι*), which includes not only the polis but in particular the family of the deceased, the prosecution. In *Eumenides* 600-2, Orestes explains that Klytaimnestra faced two counts of pollution, the first because she killed her husband and the second because she killed Orestes' father. Only the second count (προοβολή) 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 and the other from the perspective of the family of the victim. That is why they in particular take on the role of prosecution. Attention to the killer dominates the first sentence of Drakon's law: he flees, is judged, and is finally 'decided' upon. But his perspective then gives way to that of his victim's family. Of course they have taken part in prosecuting the killer, but it seems likely that they do so out of obligation.³⁵ Now, once the killer has been convicted, they must consider whether or not to reconcile.

Αἰδέσασθαι (literally '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 ἐπιεικεία ('fair-mindedness') outlined by Aristotle (*Eth. Nic.* 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 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).³⁶ Demosthenes associates reconciliation with φιλαφροῦντα (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.* 37.59; 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 (lines 16-18). These two acts must substitute for the reconciliation by the family. (Drakon uses the imperative mood, rather than a jussive infinitive, for the admission; perhaps the phratry members are to have no discretion about the readmission.) 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 ἄρκωμα) to facilitate reconciliation. It seems to have been common practice for the families of the killer and the deceased to make and receive such payments after the judicial process and presumably usually, but not always, after 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 (*αἰδέσθαι*) 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: *αἰδέσθαι θ' ἱερῆα καὶ δῶλα δέχθαι ἄρκωμα*; 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.³⁷

The re-inscription in 409 BC of Drakon'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.³⁸ The results of this analysis suggest that there may indeed have been a time when *aitia* and liability, and so the suitability for punishment, were identified, that there was an automatic penalty attached to a judgment of *aitia*. But Drakon's law in fact goes two steps beyond this judgment: first, a decision of the *Ephetai* determines both whether the judgment is correct and also, if it is, whether the *aitia* was voluntary or not; second, it formulates grounds for achieving, not 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 Hephaistos 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 (*veitkos*). With the crowds of the *dēmos* demonstrating partisan support for each side, the elders each propose a *dikē* as a basis for ending the strife, for settling the dispute, for achieving reconciliation. Likewise, in the *Homeric Hymn to Hermes*, although the babe Hermes protests that he is not the cause (*aitios*; 4.275, 383) for Apollo's cattle being missing, when the strife between him and Apollo is resolved by the arbitration of Zeus, the father largely disregards the issue of cause and directs Hermes to show his brother where he had hidden the missing animals. Zeus moves beyond *aitia* to a basis for reconciliation, to find resolution or, as the hymnist puts it, *quōphrona* *thunōn* (4.391).

Notes

- 1 The text printed here is essentially that of Stroud 1968: 5. There are many gaps in the text, but Stroud's restorations (like that proposed in his commentary, p. 47, for the 17-letter gap in line 12) have received widespread acceptance. I have included Stroud's restoration in line 12 with his text.
- 2 In his lucid and comprehensive discussion, Gagarin (1981: 96–110) has championed this interpretation, which I find the most plausible. Against, see the bibliography of Carawan 1998: 35 n. 4.

3 Note that in the last clause, *[ai]deσσaθaι δ' εἴμ παρῆμ*, there may be a bigger break, a new complete sentence with a new protasis, indicated by *εἴμ μὲν*, but there seems no interruption in the paratactic sequence. See Gagarin (1981: 146), who sketches how each procedure begins with an infinitive.

4 Regarding the law's authenticity and the circumstances of its re-inscription, see most recently Sickinger 1999: 14–24.

5 This translation of the adjective *aitios* 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 *aitia* can refer either to a 'cause' or to an attribution of cause, that is, an 'accusation.' In line 27 (cf. *Dem.* 23.38 *εἰδν τις ἀποκρῆντην τὸν ἀποφθόνων ... ἢ αἴτιος ἢ φόνου*), *aitios* seems to stand in for *[β]ολέυσαντα* (12–13), denoting not the person who actually kills but the one who plans and thus causes a killing indirectly. Cf. *Ant.* 6.17: *αἰτιῶνται δὲ οὐτοι μὲν ἐκ τοῦτον, ὡς αἴτιος ὅς ἐκέλευσε μῆνιν*, and 1.20.

6 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 *anakrisis*, 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? Sommerstein (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 *βουλεύων* is, in this case Apollo (cf. *Ant.* 6.17, *Lys.* 13.87; and n. 4 above). At any rate, these questions would need to be answered before a determination of the appropriate court could be made.

7 Stroud 1968: 7; Gagarin 1981: xvi; Carawan 1998: 33.

8 Tsantsanoglou (1972: 173, cited by Gagarin 1981: 30 n. 1) reads the inscription somewhat differently but also with the understanding that *φύετιν* refers to the killer standing trial. Treston (1923: 195) supplies the translation 'let him be put on trial,' without comment.

9 E.g. *Ant.* 5.9: *παρόντων μὲν γὰρ κακοῦργος ἐνδοξογυμένος φόνου δίκην φύετω*. ('Although charged as a malfeasant, I am fleeing an action for murder.') Cf. *Dem.* 23.69: *τῷ δὲ φύεσθαι τὰ μὲν τῆς δικομοσιῶς ταυτά, τὸν πρότερον δ' ἔξεσθαι εἰρόντα λόγον μεταστῆνα, καὶ οὐθ' ὁ δικάων οὐθ' οἱ δικάζοντες οὐτ' ἀλάος ἀφθόρων οὐδεὶς κύριος κολύουσι*. ('As for the defendant [Ileer], 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: *εἰς τις ἀποκρῆντην ἐν δίκῃσι ἄκων, ἢ ἐν ὀδῷ κοθέλων ἢ ἐν πολέμῳ ἀγνοήσας, ἢ ἐπὶ δόμοισι ἢ ἐπὶ μητρὶ ἢ ἐπ' ἀδελφῇ ἢ ἐπὶ θυγατρὶ, ἢ ἐπὶ παλαιᾷ κτῆ*

ἦν ἄρ' ἐλευθέριος ποιοῖν ἔχη, τοῦτον ἔνεκα μὴ φεύγειν κρεινάντα. ('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' οὐκ ἔτι νῆφω φόνου φεύγω τοῦ πατρός. ('In the same vote I am fleeing [an accusation] of murdering my father.')

10 In Dem. 23.45, those in exile as a result of involuntary homicide are referred to in fact both as ἐξελθόντων and μεθεστηκότων. However, the φεύγόντων seem to be those exiled for more serious crimes, those whose property has been confiscated. In 23.77, the exile is a πεφύγως, one who has fled.

11 Cf. Lys. 4.4: περὶ τῆς αἰτίας ἧς ἐγὼ φεύγω; cf. Hdt. 7.214.2: φεύγοντα Ἐρωάτην ταύτην τὴν αἰτίαν οἴδαμεν. Ant. 5.10: τοῖς τοῦ φόνου φεύγουσι τὰς δίκας cf. e.g. Dem. 21.91; 30.5, 9, 16; Aes. Eum. 753. In Ath. Pol. 57.3 there is the idiom ἐάν δὲ φεύγων φύγην ἄν αἰθεσίς ἐσται, which refers to exile. Cf. Dem. 23.38: τὸν πεφύγόντ' ἐπ' αἰτίᾳ φόνου καὶ ἐκακώτα, ἐάντερ ἄλλοξ' ἐκφύγη καὶ σωθῆ, φεύγειν is certainly used of exile in Dem. 22.66; 23.31, 38, 42, 51-2, 72-3, 85; 24.149, 153; 50.48.

12 See, however, Tsantsanoglou 1972: 172.

13 A brief survey of passages using the phrase ἐάν 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; Lys. 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; Lys. 1.20; Lys. 1.32; 14.8. Dem. 21.47 can be counted in both lists. An analogous expression for φεύγειν in these procedural contexts is ἠρόδικος (cf. Lys. 10.9).

14 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. Of course, throwing javelins at each other is not part of the competition in the way that punching is part of boxing. 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 Erasosthenes (as Erasosthenes was lying) upon his wife. But the prosecution seems to argue that the case was premeditated homicide, a case of entrapment (Lys. 1.37).

15 Dem. 20.158: ἐν τοιῶν τοῖς περὶ τούτων νόμοις ὁ Ἀπάκων φόβερὸν κατασκευάζων καὶ δεινὸν τὸ τιν' αὐτόχειρ' ἄλλαν ἄλλου γίγνεσθαι, καὶ ἤρῳαν χεῖρον βίος εἰργασθαι τὸν ἀνδροφόνου, σπουδῶν, κρητηρῶν, ἱερῶν, ἀγροφῶν, πάντα τὰλλα διελάβον οἷς μάλιτ' ἐν τινας φέρ' ἐπιτρέχειν τοῦ τοιοῦτου τὰ ποιεῖν, ὅμως οὐκ ἀφείλετο τὴν τοῦ δικαίου τάξιν, ἀλλ' ἐθήκεν ἐπ' οἷς

ἐξείναι ἀνοκρινώοντα, κἂν οὐρὰ τις ὁδοῦν, καθάρον διώπρισεν εἶναι. ('Now Drakon, 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.')

16 Carawan (1998: 33-4) 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.

17 Thür 1970.

18 There is actually very little evidence of what occurred at the προδικασία. But cf. Thür 1990: 151. Although the prosecution and defence 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.

19 MacDowell (1963: 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 προσηγορέων εἰρησθαι τῶν νομίμων οὐτός ἐσται. Cf. Lys. 6.9.

20 Arnaoutoglou (1993: 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.

21 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.

22 See Carawan 1999. Cf. Dem. 47.69.

23 The Lawcode of Gortyn also makes of δικάζειν (δικαζόμεν, δικροδέστρο) a fairly formal process governed by the presence of witnesses (cols. 1.21, 9.30, 38, 50, 11.27-8). Cf. Carawan 1998: 59.

24 Ath. Pol. 57.4: δικάζουσι δ' οἱ λαχόντες καὶτ' ἐφέται πλὴν τῶν Ἀπειῶ πύρῳ γιγνομένων, εἰσάγει δ' ὁ βασιλεὺς, καὶ δικάζουσι ἐν ἱερῷ καὶ ἠραιότρον. ἐφέται is the supplement of Kenyon 1920. 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: κύριοι δ' ἦσαν καὶ τὰς δίκας ἀνορελαίτις [κρίναι], καὶ οὐκ ὄσπερ τῶν προανακριβειν. Cf. also Ant. 6.42.
- 25 *Ath. Pol.* 57.4: ὅταν δὲ μὴ εἰδῆ τὸν ποιεῖαντα, τῷ δρασσαντι λαγγάσαι, δικάζει δ' ὁ βασιλεὺς καὶ οἱ φύλοβασιλεῖς; καὶ τὰς τῶν ἀνύγων καὶ τῶν ἀλλῶν ζώων.
- 26 Cf. *Dem.* 23.28: εἰσάγειν δ' ἐς τὸς ἀρχοντας, ὧν ἕκαστος δικάσσει εἰτα, τῷ βουλομένῳ τὴν δ' ἡλείων διαγγυώσκειν. ('The Archons shall bring cases into court, of which each is severally a judge for the volunteer [prosecutor], and the Heliaea decides.')
- 27 MacDowell (1963: 48) notes that although Harpokration 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.'
- 28 'Decide' seems the best translation for διαγύνωσι, but it is far from adequate. The verb seems to be used because the *Ephetai* must not simply follow the 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.
- 29 *Ath. Pol.* 53.1-2: καὶ τὰ μὲν μέχρι δέκα δραχμῶν ἀντορελαίτις εἰσι δίκαι[ε]ι[ν], τὰ δ' ὑπερ τοῦτο τὸ τίμημα τοῖς διατριταῖς παραδίδασιν· οἱ δὲ παραλαβόντες, [2] ἐάν μὴ δύνωνται διαλύσει, γυνώσκουσι, κἄν μὲν ἀποφόροις ἀπεκτι τὰ γνωσθέντα καὶ ἐπιμένωσιν, ἔχει τέλος ἡ δίκη, ἀν δ' ὁ ἔσπερος ἐπὶ τῶν ἀντιδίκων εἰς τὸ δικάσθησιον, ἐμβόλοντες τὰς μαρτυρίας καὶ τὰς προκλήσεις καὶ τοὺς νόμους εἰς ἐχλίνου, χροίσι μὲν τὰς τοῦ δίκοντος, χροίσι δὲ τὰς τοῦ φευγόντος, καὶ τοῦτους κατασημαίνεσθαι, καὶ τὴν γυνῶσιν τοῦ διατριτοῦ γεγραμμένην ἐν γραμματεῖῳ προσοφρῆσθαι, παραδιδόσθαι τοῖς δ' τοῖς τὴν φύλιν τοῦ φευγόντος δικάζουσιν. ([The Forry] 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 verdict written on a tablet, and hand them over to the four judges taking the cases of the defendant's tribe.) Thür (1990: 150) suggests that
- διαγγυώσκειν 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.
- 30 Admittedly, not all cases went to an arbitrator.
- 31 In *Dem.* 23.71, the γνῶσις τοῦ δικάσθησιον follows oath swearing and arguments; cf. Ant. 6.3.
- 32 *Dem.* 20.118, 23.96, 39.40, 57.63. Aisch. 3.6. See Mirhady 2007: 231, n. 42 and Sommerstein 1989: 212.
- 33 The *Eumenides* offers several more passages that echo the idiom of deciding a case on the basis of γνῶσις: καταγνώσθη δίκη, 573; καὶ γνῶσιν αἰπεῖν καὶ διαγγῶνοι δίκην αἰδουμένους τὸν ὄρκον, 709-10; cf. διαίπειν, 488.
- 34 Both Podlecki (1989: 178) and Sommerstein (1989: 206) interpret this passage of the *Eumenides* to refer only to ongoing rites of the phartries 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. Cf. Eur., *Phoen.* 1706: τίς σε πρόγος; Ἀθήδος προσδέξεται; and Soph., *OT* 1428.
- 35 The obligation was probably not legal. Cf. Gaganin 1981: 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.
- 36 Heitsch (1984: 9) also notes the occurrence of a payment (Il. 9.632-6).
- 37 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 (ἐπειθ' οἱ φονεῖται τοὺς μὲν ἐκ προνοίας ἀνοκτανόντας θανάτῳ καὶ ἀειφνίτῳ καὶ δηγεύσει τῶν ὑπερχόντων ζήμιον, τοὺς δ' ἀκονοίως αἰδέσεσθαι καὶ φιλανθρωπίας κολλᾶντες ἡξίωσιν. (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 substantial 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.

38 Carawan 1998: 42.

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Hypereides, Aristophan, and the Settlement of Keos

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In 363/2 BC Aristophan of Azenia, a prominent politician of long standing, was sent as general to the island of Keos to quell a revolt. In the wake of his success there he proposed a decree to settle affairs, but his settlement soon came under attack. In 362/1, at the relatively young age of twenty-eight and perhaps to make a name for himself, Hypereides (frs. 40–4) prosecuted Aristophan, charging that his settlement was harmful and motivated by greed. Hypereides conducted a vigorous prosecution of the wily old politician, who was acquitted, it seems, by only two votes (Hyp. 3.28). Shortly thereafter Hypereides assisted Apollodoros in his prosecution of the general Autokles (Dem. 36.53) over his failed activities in the Hellespontos (Dem. 23.104). The attack was again directed against Aristophan, who in 362/1 had persuaded the Athenians to pass a decree dispatching an expedition to the region under Autokles' command (Dem. 50.6). Since the one-year limit for indicting the proposer of the decree had passed, the prosecution went after his associate: Autokles was suspended from office (Dem. 50.12) and at the trial Hypereides spoke in support of Apollodoros, who had served as trierarch on the campaign.

A number of fragmentary inscriptions survive (IG ii² 111; IG ii² 404; IG xii.5 594; SEG xiv 530) relating to Keos and to Aristophan's settlement of the island. In this paper I explore Hypereides' motivation for prosecuting Aristophan and consider what in that settlement could be deemed harmful and what implications these two factors have for our understanding of Athenian politics and foreign policy during the period.

Aristophan's Settlement of Keos

IG ii² 111 (Harding no. 55)¹ records a treaty between Athens and Loulis² that

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Hypereides, Aristophon, and the Settlement of Keos

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In 363/2 BC Aristophon of Azenia, a prominent politician of long standing was sent as general to the island of Keos to quell a revolt. In the wake of his success there he proposed a decree to settle affairs, but his settlement soon came under attack. In 362/1, at the relatively young age of twenty-eight at perhaps to make a name for himself, Hypereides (frs. 40–4) prosecuted Aristophon, charging that his settlement was harmful and motivated by greed. Hypereides conducted a vigorous prosecution of the wily old politician, which was acquitted, it seems, by only two votes (Hyp. 3.28). Shortly thereafter Hypereides assisted Apollodoros in his prosecution of the general Autokles (Dem. 36.53) over his failed activities in the Hellespontos (Dem. 23.10). The attack was again directed against Aristophon, who in 362/1 had persuaded the Athenians to pass a decree dispatching an expedition to the region under Autokles' command (Dem. 50.6). Since the one-year limit for indicting the proposer of the decree had passed, the prosecution went after his associate: Autokles was suspended from office (Dem. 50.12) and at the trial Hypereides spoke in support of Apollodoros, who had served as trierarch on the campaign.

A number of fragmentary inscriptions survive (IG ii² 111; IG ii² 404; I xii.5 594; SEG xiv 530) relating to Keos and to Aristophon's settlement of the island. In this paper I explore Hypereides' motivation for prosecuting Aristophon and consider what in that settlement could be deemed harmful and what implications these two factors have for our understanding of Athenian politics and foreign policy during the period.

Aristophon's Settlement of Keos

IG ii² 111 (Harding no. 55)¹ records a treaty between Athens and Ioulis² that