Private violence and state control : the prosecution of homicide and its symbolic meanings in fourth-century BC Athens

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II

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PRIVATE VIOLENCE AND STATE CONTROL

THE PROSECUTION OF HOMICIDE AND ITS SYMBOLIC MEANINGS IN FOURTH-CENTURY BC ATHENS*

I. *Introduction*

How did the Athenian state rule itself and keep violence at bay in the absence of a regular police force? In the context of this article, I mean by "private violence" the physical maltreatment of another human being outside the direct realm of politics. For the purpose of brevity, I will focus on homicide and the symbolic reaction of the victim's relatives within the judicial system.

Anyone trying to explain the remarkable stability of the Athenian social and political system for almost two hundred years is inevitably confronted with questions of fundamental importance. To what extent can we speak of state control at all? How did Athenians maintain law and order? Many researchers have paid due attention to this question of law enforcement without solving it for good.[1] V.J. Hunter and D. Cohen have

* I thank Professor Michael Gagarin (University of Texas at Austin), Professor David Phillips (University of California at Los Angeles), and Professor Robert Wallace (Northwestern University) for reading and commenting on my text. I am indebted to David Carlisle (MA) for correcting my English. All remaining mistakes and inaccuracies are my own.

[1] N. FISHER, "Workshops of Villains: Was there much Organised Crime in Classical Athens?", in *Organised Crime in Antiquity*, ed. by K. HOPWOOD

discerned social control as a key factor in "policing" Athens.[2] Also self-help remained an integral part of the Athenian system of justice as long as it remained within a legal frame and did not affect the inviolability of the body or the house of an Athenian citizen.[3]

Since there was no state-run police apparatus, no bureaucracy, and no legal experts, the judicial system was largely dependent on self-help. The citizens had to do the detective work, examine the laws, collect the evidence, arrest the cul-

(London 1999), 53-96, 53, 71; ID., "Violence, Masculinity, and the Law in Classical Athens", in *When Men were Men. Masculinity, Power, and Identity in Classical Antiquity*, ed. by L. FOXHALL & J. SALMON (London – NY 1998), 68-97, 78-80. Based on ARIST. *Ath.Pol.* 24,3 who speaks of 700 *archai* in Athens, researchers have tried to calculate the total number of magistrates in Athens. In rejecting M.H. HANSEN, "700 Archai in Classical Athens", in *GRBS* 21 (1980), 151-173, D.S. ALLEN, *The World of Prometheus. The Politics of Punishing in Democratic Athens* (Princeton, NJ 2000), 305-316 finds Aristotle reliable. In accepting Aristotle's number, she includes the 500 *bouleutai*. Only a tiny minority of these 700 officials were concerned with law and order in the widest sense: first and foremost the Eleven, the board of prison guards and executioners, the 10 *agoranomoi*, 10 *astynomoi*, 10 *metronomoi*, 35 *sitophylakes*, 10 *epimeletai tou emporiou*, and the Forty (*hoi tettarakonta*): D.S. ALLEN, *The World of Prometheus*, 310-312. On the Forty cf. S.C. TODD, "The Rhetoric of Enmity in the Attic Orators", in *Kosmos. Essays in Order, Conflict, and Community in Classical Athens*, ed. by P. CARTLEDGE – P. MILLETT – S. VON REDEN (Cambridge 1998), 162-169, 166. It must have been a daunting challenge for these low-ranking magistrates, who were chosen by lot for a year, to enforce the law in the metropolis of Athens that counted app. 20,000-30,000 adult citizens during the fourth century BC: S.C. TODD, "The Rhetoric of Enmity", 163. G. HERMAN, *Morality and Behaviour in Democratic Athens. A Social History* (Cambridge 2006), 229-246 does not mention theses magistrates in this context, while the 300 Scythian archers, to whom he attributes a great deal of importance, were abolished by the end of the fifth century BC and cannot explain Athens' stability during the fourth century.

[2] V.J. HUNTER, *Policing Athens. Social Control in the Attic Lawsuits, 420-320 BC* (Princeton,NJ 1994), *passim*, but especially 3-8, 96-119; D. COHEN, *Law, Sexuality, and Society. The Enforcement of Morals in Classical Athens* (Cambridge 1991), 133-202. Most recently ID., "Crime, Punishment, and the Rule of Law in Classical Athens", in *The Cambridge Companion to Ancient Greek Law*, ed. by M. GAGARIN – D. COHEN (Cambridge 2005), 211-235.

[3] For example DEM. 22,55-56. Here lies the core of the problem Euphiletus has to cope with in justifying his deed in court (LYS. 1, *On the Death of Eratosthenes*).

prit (in most cases), initiate the legal proceedings, plead in court, and finally enforce or execute the verdict rendered (in most cases).[4] V.J. Hunter distinguishes between private initiative and self-help, the latter denoting the concrete physical action against a malefactor. At the same time, self-help is a subcategory of self-regulation, the sum of all actions an aggrieved party had to take to compensate for the shortcomings of the state in terms of law enforcement.[5] There is a broad consensus that Athens was a self-regulating society in this sense.[6]

[4] V.J. HUNTER, *Policing Athens*, 149-151; M. CHRIST, "Legal Self-Help on Private Property in Classical Athens", in *AJPh* 119 (1998), 521-545, 521. The reliance upon the individual to carry out the judges' sentence required superior physical force on his side: F. RUIZ, *Use and Control of Violence in Classical Athens*, Unpublished PhD dissertation (Johns Hopkins University 1994), 75. Normally, one had to collect the sum of money oneself that a debtor owed to him or even to the city: D.S. ALLEN, *The World of Prometheus*, 202. To ensure one's own physical superiority, one normally enlisted the help of friends to exact whatever was due: M. CHRIST, "Self-Help", 531. It was only under special circumstances, for example if the creditor thought himself too weak, that he could apply for state-help (*dike exoules*) in the form of officials appointed by the state who would help or even carry out the confiscation of property: A.R.W. HARRISON, *The Law of Athens. II. Procedure* (Oxford 1971), 186-189. On the *dike exoules* cf. M. CHRIST, "Self help", 532-533. Concerning the arrest of malefactors, the same mechanism was at work. If one was strong enough, one got hold of the perpetrator oneself (*apagoge*), if one was too weak, one could call upon a magistrate (*ephegesis*). Demosthenes mentions the *ephegesis* twice, once referring to a case of theft (DEM. 22,26). The other passage is DEM. 26,9, where the procedure is just mentioned. Cf. A.R.W. HARRISON, *The Law of Athens*, II 232 on these two instances.

[5] V.J. HUNTER, *Policing Athens*, 120-153, 188.

[6] D. PHILLIPS, *Homicide, Wounding, and Battery in the Fourth-Century Attic Orators*, Unpublished PhD dissertation (Ann Arbor, MI 2000), 256 characterizes the situation very well: "The law of classical Athens did not seek to eliminate or suppress self-help to any meaningful extent. Rather, given the [...] dichotomy of a highly-developed legal system with very limited personnel, the Athenians relied on the initiative of private individuals for the administration of justice at all stages". Cf. also N. FISHER, "Workshops of Villains", e.g. 66, 83; D. COHEN, "Crime", 214. P. RHODES, "Enmity in Fourth-Century Athens", in *Kosmos. Essays in Order, Conflict, and Community in Classical Athens* (Cambridge 1998), 144-161, 149-152 points out that private prosecution and private law enforcement often had the consequence of continuing and exacerbating the conflict.

II. *The Tension Between Self-Help and State Control*

There can be no doubt that Athenians were proud of their laws and took them seriously. Some even regarded them as the bulwark of democracy—they alone protected the poor and weak from the rich and strong—,[7] but Athenians had problems enforcing these laws. It may be right to speak of the rule of law at Athens,[8] but we should keep in mind that this concept is almost certainly an idealization of reality.[9] We know that Athenians were concerned about violence and were aware of the danger that an outraged victim could potentially trigger *stasis*,[10] but the state did not have the means to intervene and therefore had to rely on the individual citizen's capacity for self-help. But how much self-help is acceptable in a state that officially proclaims the rational rule of law? Where does the necessary and partly institutionalized self-help clash with the claim to power that every state makes? In other words, how much self-help does the Athenian state condone, although it badly needs it? How can revenge be limited, when, at the same time, self-help is permitted and even, to a large degree, required?[11] This tension between private self-help and state control needs to be examined in more detail.[12] M. Christ has

[7] DEM. 23,69. DEM. 21,76 finds classical formulations to postulate the state's monopoly of exerting violence. Demosthenes speaks here the democratic *polis*-discourse on his own behalf; the practice may have looked very differently.

[8] So E. HARRIS programmatically in the title of his collection of articles: *Democracy and the Rule of Law in Classical Athens. Essays on Law, Society, and Politics* (Cambridge 2006). P. RHODES, "Enmity", 160 doubts that we can speak of a "rule of law" in our sense. The fact that there were many trials does not make the social, political, and judicial system of Athens less foreign to us.

[9] V.J. HUNTER, *Policing Athens*, 186 explicitly denies the Athenian state's monopoly on the legitimate use of force.

[10] ARIST. *Ath.Pol.* 5,1,6-7.

[11] D. COHEN, "Crime", 226-229.

[12] D. COHEN, "Crime", 220 frames the question thus: "there were countervailing values to the rule of law at Athens, values that dictated that men should answer certain kinds of violence against their persons or families in like terms. Such values existed in tension with the recognition that the purpose of the laws

aptly treated this subject with regard to trespass. In Ps.-Demosthenes 47 and 58, to name just two examples, individuals invade private property and violate thresholds, allegedly backed up by state authorities to confiscate property the value of which they could legally claim.[13] In discussing this tension between the protection of one's private sphere and the right of the state to intervene and even invade private property if need be, M. Christ comes to an ambivalent conclusion. On the one hand, the *kyrios* had plenty of freedom in the defense of his *oikos*. On the other hand, the *polis* wanted and had to lay hands on private property to prevent or stop the abuse of the owner. The *polis*, however, was only allowed to violate the seclusiveness of the *oikos* under very special circumstances.[14]

III. *Self-Help in Athenian Homicide Law*

In the prosecution of homicide this tension was mitigated, because in homicide law the Athenian state had appropriated retributive violence more completely than in any other domain.[15] In favor of legal settlement, Drakon had eliminated self-help in its most extreme form, the blood feud, at least in cases of unintentional homicide.[16] In classical times, defendants found guilty of intentional homicide could either go into

providing punishment for violence, hubris, and the like is to take such conduct outside of the realm of private vendetta and make it the business of the state and its courts".

[13] In Ps.-DEM. 47, the speaker claims to have deposited the sum owed to Theophemus at a bank in the Peiraeus. Hence, the seizures at this farm were of questionable legality.

[14] Even agents of the state should not enter private homes without a decree: DEM. 18,132 (reporting a comment by Aeschines).

[15] Totally different is the situation in a case of rape, for example, where self-help was not only permitted, but even required in most ancient societies: G. DOBLHOFER, *Vergewaltigung in der Antike* (Stuttgart-Leipzig 1994), 47-52, 81-82.

[16] What remained from the archaic blood feud was the right of the relatives to watch the execution of the killer: D. COHEN, "Crime", 229.

life-long exile before the end of the trial or were executed by the Eleven right after the pronouncement of the verdict. Their property was confiscated by the state. Persons convicted of unintentional homicide had to go into exile and could return after reconciliation with the victim's family. There was no loss of property. Thus, the state controlled the whole prosecution for homicide, but could still not do without a high degree of self-help in this process.

M. Gagarin has dedicated a book to the relationship between the Drakonian law of unintentional homicide and self-help.[17] "[...] Drakon's law reveals a system of compulsory trial and sentencing in cases of homicide, supported by self-help on the part of the victim's relatives. In other words, the Athenian legal system has by this time incorporated the system of self-help into a system of compulsory legal procedure. The system makes extensive use of self-help, but the subordination of self-help to the judicial process is clear."[18] Since the Drakonian law of homicide remained quite stable over the centuries,[19] self-help remained an integral part of Athenian homicide law throughout the classical period.[20]

[17] M. GAGARIN, *Drakon and Early Athenian Homicide Law* (New Haven, Conn. 1981) also gives the text, provides an English translation (xiv-xvi) and a detailed interpretation of the Drakonian law. The homicide statute is partly preserved in DEM. 23,60; 43,57; *IG* I^2 115 = *IG* I^3 104 = *Syll.*^{3} 111 = R. MEIGGS–D. LEWIS, *A Selection of Greek Historical Inscriptions to the End of the Fifth Century BC* (Oxford 1969), No. 86 = M. TOD, *A Selection of Greek Historical Inscriptions* I^2 (Oxford 1946), No. 87 = K. BRODERSEN–W. GÜNTHER–H. SCHMITT, *Historische Griechische Inschriften in Übersetzung* I (Darmstadt 1992), 145. This epigraphic fragment from 409/8 BC, a copy of the law issued in 621/20 BC, was republished by R.S. STROUD, *Drakon's Law on Homicide* (Berkeley 1968).

[18] M. GAGARIN, *Drakon*, 163. On the historical development of the Athenian court system cf. E. CANTARELLA, "Violence privée et procès", in *La violence dans les mondes grec et romain. Actes du colloque international (Paris, 2-4 mai 2002)*, ed. by J.-M. BERTRAND (Paris 2005), 339-347.

[19] G.M. CALHOUN, *The Growth of Criminal Law in Ancient Greece* (Berkeley 1927) postulates a development in Athenian criminal law. His idealization is rightly rejected by M.H. HANSEN, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense 1976), 113-118.

[20] M. GAGARIN, *Drakon*, 164.

In order to file a *dike phonou* (δίκη φόνου), which was the normal procedure the victim's family inititiated to prosecute homicide,[21] the competent relative had to make two public proclamations: one at the funeral with a spear in his hand, an archaic relic reminding the mourners of the blood feud, and another in the *agora* to warn the murderer not to enter the *agora* and the holy places lest he defile them (πρόρρησις). Then the relative would file the charge with the *basileus* who made a third proclamation again forbidding the suspected murderer from approaching public places and holy things. After these procedures, the plaintiff had to investigate the case, study the homicide law, collect the evidence, summon witnesses, and prepare the three pre-trials (*prodikasiai*), which the *basileus* arranged, each of them held in a separate month. The prosecutor and the defendant made speeches on these occasions. They helped the *basileus* to assign the case to the appropriate homicide court.[22] The trial itself was held at the end of the fourth month, on the three days before the last day of the month. At the beginning of the trial, the litigants swore a solemn oath of self-execration (*diomosia*); the prosecutor that the defendant had in fact killed his relative, the defendant that he was innocent (not before the Delphinium, of course). The witnesses swore that they would tell the truth. The whole process had to be concluded within one *basileus*' term of office, which means that nobody could bring a *dike phonou* during the last four months of the *basileus*' term of office.[23] Thus, the judicial system required the family of the victim to have some organizational skills and put quite an

[21] According to a stipulation in Drakon's homicide law, relatives of the victim down to and including the degree of descendant first cousin once removed were obliged to take action: DEM. 47,70.

[22] E. HEITSCH, "Der Archon Basileus und die attischen Gerichtshöfe für Tötungsdelikte", in *Symposion 1985: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, hrsg. von G. THÜR (Köln-Weimar-Wien 1989), 71-87.

[23] On the whole procedure cf. D.M. MACDOWELL, *The Law in Classical Athens* (London 1978), 109-122; D.M. MACDOWELL, *Athenian Homicide Law in the Age of the Orators* (Manchester 1963), 8-32.

administrative burden on those who had to avenge their slain relative in court.

Self-help was even more conspicuous in the second major procedure the aggrieved party had at his disposal to bring a murderer to justice under certain circumstances, the *apagoge* procedure (ἀπαγωγή) in its different forms, with or without *endeixis*, and *ephegesis*. I summarize M.H.Hansen's view.[24] The *apagoge* was a public suit. Anyone who wished (*ho boulomenos*) could seize an offender who had committed a crime covered by the statute *in flagrante delicto* or manifestly (ἐπ'αὐτοφώρῳ) and take him with his own hands to the Eleven or Thesmothetai.[25] Three main groups were liable to *apagoge*: (1) *kakourgoi* [thieves (*kleptai*), clothes-robbers (*lopodutai*), kidnappers (*andrapodistai*), burglars (*toichorychoi*), and cutpurses (*ballantiotomoi*)], who were caught *ep'autophoro* (*apagoge kakourgon*). (2) *atimoi* who exercised rights from which they had been excluded. This group included suspects of homicide (*apagoge phonou*).[26] In their case, the substance of the charge does not seem to have been the homicide, but the defilement of the *agora* and the holy places. (3) Exiles (*pheugontes*), who had returned to Attica without obtaining reprieve. In cases one and three the Eleven had the right to execute the accused on the spot, if he confessed his guilt. In the second case, the accused was kept in prison until a dicastic court dealt with the case.

Endeixis and *apagoge* were not two different types of process, but two phases of the same procedure.[27] An *endeixis*

[24] M.H. HANSEN, *Apagoge*, 18-21, 122. Different A.R.W. HARRISON, *The Law of Athens*, II 221-232.

[25] On the discussion of the meaning *ep'autophoro* cf. A.R.W. HARRISON, *The Law of Athens*, II 222, 224-225; M.H. HANSEN, *Apagoge*, 48-53; E. VOLONAKI, "Apagoge in Homicide Cases", in *Dike* 3 (2000), 147-176, 167-170; E. HARRIS, "In the Act or Red Handed? Apagoge to the Eleven and Furtum Manifestum", in *Symposion 1993: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, hrsg. von A. BISCARDI–J. MÉLÈZE–MODRZEJEWSKI–G. THÜR (Köln–Wien 1994), 169-184, now reprint in ID., *Democracy and the Rule of Law*, 373-390.

[26] On the *apagoge phonou* now in detail E. VOLONAKI, "Apagoge", 152-153.

[27] M.H. HANSEN, *Apagoge*, 16-17, 26.

was the official denouncement of an offender. The plaintiff could then decide whether or not to arrest the accused himself. The arrest would be called *apagoge*. In an *ephegesis*, the plaintiff would denounce the culprit to a magistrate. The magistrate was then responsible for carrying out the arrest. M.H. Hansen differentiates four different types of *apagogai* and *endeixeis* against homicides: (1) against those accused of homicide, (2) against suspects of homicide, (3) against homicides who were specifically *kakourgoi*, and (4) against exiles who had been sentenced for homicide.[28] They would all be treated in a slightly different manner. It is important to note that an *apagoge* procedure could also be brought in cases of unintentional homicide, in which a *dike phonou* would have led to exile, a conviction in the *apagoge* procedure, however, to capital punishment.

To Athenians witnessing a case of *apagoge*, this summary arrest and legal procedure displayed a high degree of self-help. We have to keep in mind, however, that the purpose of the *apagoge* was to bring a culprit to justice fast, not to exercise vengeance. The *apagoge* was a regular legal procedure that maintained the fiction that the archaic self-help remained intact.[29] Although D.M. MacDowell is right that the tradition of self-help still loomed large in fourth-century Athens, I doubt that the highly sophisticated legal proceedings of the classical era were aimed at restricting self-help on a large scale.[30] Rather, it seems to me that self-help or better self-regulation was built into procedural law. Before we can embark on a scrutiny of fourth-century homicide cases and the anthropological analysis of the plaintiffs' underlying intentions, we have to put the aforementioned homicide procedures into the context of some principles of Athenian procedural law and its symbolic implications.

[28] *Ibid.*, 99-100.
[29] D. PHILLIPS, *Homicide*, 108-109.
[30] Implicitly D.M. MACDOWELL, *The Law in Classical Athens*, 114.

IV. *Procedural Flexibility and Its Symbolic Messages*

In both private (*dikai idiai*[31]) and public suits (*dikai demosiai*[32]) the plaintiff had to take the initiative from the beginning of the trial through to its end and execute the sentence. In private cases, there was no question that enforcing the verdict was the individual citizen's responsibility (for exceptions cf. above note 4). In public suits as well, the winner of the trial was himself responsible for carrying out the judgement.[33] Some exceptions—only the Eleven were allowed to execute people[34]—confirm the rule.

If the offended person decided to go to court, the great procedural flexibility of the law provided the aggrieved party with many possibilities to seek redress. The victim of a violent act, for example, could choose among a variety of private or public suits. He could file a *dike aikeias*, a *dike biaion*, or in case of homicide of a relative, a *dike phonou*. Available public suits were the *graphe hybreos*, the *graphe traumatos ek pronoias*, if the offender had tried to kill the plaintiff with a weapon,[35] the *eisangelia* (especially in the case of maltreatment of orphans),[36] and an *apagoge* procedure in the case of homicide

[31] A.R.W. HARRISON, *The Law of Athens*, II 187-190 on private suits. The *dikai idiai* included *dikai* in the narrow sense as used in the ensuing paragraphs.

[32] A.R.W. HARRISON, *The Law of Athens*, II 185-187 on public suits. On public and private suits D.M. MACDOWELL, *The Law in Classical Athens*, 57-61. The *dikai demosiai* included not only the *graphai*, but all procedures available to *ho boulomenos*, such as *eisangelia* and *apagoge*.

[33] D. PHILLIPS, *Homicide*, 253.

[34] A.R.W. HARRISON, *The Law of Athens*, II 185; D.S. ALLEN, *The World of Prometheus*, 201-202. The Eleven were also responsible for imprisonment and the stocks.

[35] The *graphe traumatos ek pronoias* was procedurally very similar to cases of premeditated homicide. Both types of trial were heard before the *Areopagus* (LYS. 3 and 4; DEM. 40,32; AESCHIN. 2,93 and 3,51). Cf. D. PHILLIPS, *Homicide*, 63ff., 166.

[36] On the procedure of *eisangelia* cf. M.H. HANSEN, *Eisangelia. The Sovereignty of the People's Court in Athens in the Fourth Century B.C. and the Impeachment of Generals and Politicians* (Odense 1975).

(under special circumstances).[37] The variety of these options reveals a good deal of ambivalence when it came to prosecuting an act of violence. This ambivalence reflects the difficulties Athenians felt in gauging the potential threat a concrete act of violence had for the stability of state and society. At the same time, Athenians wanted to leave the interpretation of the violent act to the discretion of the aggrieved party, who not only portrayed the insolence perpetrated in a special light, but also characterized himself through his choice of one procedure over another. The principle of self-regulation did not entrust the assessment of a crime to state authorities, but to the individuals concerned. The plaintiff was responsible for the substance of the charge. If the accused agreed to defend himself in court, the incident was framed as a crime and turned into a court case.[38] This procedure is an integral part of a self-regulating judicial system.

The analysis of the procedural flexibility of Athenian law from a symbolic perspective has not even begun yet, and against this backdrop of procedural choice, we should now ask what the symbolic difference between the *dike phonou* and the *apagoge* procedure was. Beyond questions of legal expedience and technicalities, we should explore what underlying messages Athenian plaintiffs wanted to express and communicate to their audience by their respective choice of procedure. Such an investigation will reveal a lot about the way the plaintiffs interpreted the case, how they portrayed the alleged murderer, and, even more importantly, how they represented themselves. Handling the complicated law masterfully was an appropriate means of self-representation in a society that placed extreme emphasis on public performance. Although Athenians of all social strata had

[37] F. RUIZ, *Use and Control of Violence*, 43-45 on the procedural differences.

[38] S. JOHNSTONE, *Disputes and Democracy. The Consequences of Litigation in Ancient Athens* (Austin 1999), 126-133; ID., "Transforming Disputes into Cases: Dem. 55, Ag. Kallikles", published online in the Center for Hellenic Studies' Discussion Series (Athenian Law): http://www.chs.harvard.edu/discussion_series.sec/athenian_law.ssp/athenian_law_lecture_2.pg.

access to the courts, it was the wealthy elites above all who were involved in important lawsuits and to whom the skillful performance of and playing with the law was another way of gaining symbolic capital. The choice of procedure alone sent symbolic messages to the various courts by underlining different concepts of law and involving the political collectivity to various degrees.

Choosing a *dike phonou* seems to have emphasized the legality of the initiative. Through the long period of preparation and the solemn oath, the plaintiff assured the judges that he was in the right. Because the *dike phonou* was a private suit—the blow to the family was judicially expressed—the prosecutor did not appeal to society as a whole, but to a specific law court with its competent magistrates. Reliable members of the elite (ca. 200 *Areopagitai* or 51 *ephetai*), who through their advanced age embodied a certain amount of experience and wisdom, were supposed to render justice. In contrast to the *apagoge* procedure, the *dike phonou* encapsulated the modesty of the plaintiff, his self-control, and low level of retributive desire, although he was entitled to *orge* and vengeance. The choice of a *dike phonou* procedure is to be seen within the philosophical and political discourse of the democratic polis on *enkrateia* and *sophrosyne*.[39]

Although Athenians insisted that redress for homicide was the business of the victim's relatives and therefore did not formally introduce a *graphe* to prosecute homicide, the administration of justice was flexible enough to allow for a public suit, the *apagoge*, if need be. In most cases of *apagoge*, it was also the family of the murdered victim who brought the action. But the

[39] One of the best examples in a case of battery is DEM. 54 (*Ag. Conon*), where Ariston insists that he had been entitled to a *graphe hybreos*, but on the grounds of respecting the rules of *enkrateia*, he preferred instead to bring a *dike aikeias*. In ARIST. *Eth.Nic.* 7,1-10; 7,2,12ff., 1146 b 6ff; 7,3,4ff, 1146 b 27ff; 7,9,6ff., 1151 b 32ff, *enkrateia* and *sophrosyne* are opposed to *akrasia* and *akolasia*. Cf. H.F. NORTH, *Sophrosyne. Self-Knowledge and Self-Restraint in Greek Literature* (Ithaca, NY 1966); A. RADEMAKER, *Sophrosyne and the Rhetoric of Self-Restraint. Polysemy & Persuasive Use of an Ancient Greek Value Term* (Leiden 2005), and J. ROISMAN, *The Rhetoric of Manhood. Masculinity in the Attic Orators* (Berkeley–London 2005), 176-185 on *sophrosyne*.

relatives made it clear that the crime was not only a severe offense against the particular family, but against the *polis* community as a whole. Choosing an *apagoge* emphasized that the crime was unheard of and had wide-ranging political dimensions. The suspects were not normal killers, but enemies of the Athenian democratic order. It seems that summary arrest in the case of homicide, carried out by whoever wished to do so (*ho boulomenos*), remained an extreme and unusual measure, only to be used in exceptional cases, for example in order to get hold of a foreigner from an unreliable allied city who could have easily evaded trial or to bypass the amnesty. Euxitheus was probably portrayed as a prime example of a dangerous ally just waiting for a chance to kill an innocent Athenian citizen (case nr. 1), Phrynichus was declared a traitor (case nr. 2), Menestratus and Agoratus had caused the death of democrats during the tyranny of the Thirty (cases nr. 3 and 4). In all these cases, a strong political impetus was involved that made the *apagoge* parallel to the *eisangelia* procedure. Unlike in the *dike phonou*, the plaintiff did not appeal to a select circle of elite members, but to a majority of the citizens as assembled in the dicastic courts. According to the plaintiffs, the state had to react as a collective entity. If the procedure was not an *ephegesis*, the concrete seizure of the suspect with one's own hands symbolized the indignation of the relative or *ho boulomenos*. Through this physical act, the aggrieved party appealed to the political community in its entirety. Taking the suspect and dragging him to the appropriate magistrate maintained the fiction of archaic self-help even in its legalized and institutionalized form. The difference when compared to the *dike phonou* could not be more significant.

V. *Prosecuting Homicides in Athens (422-322 BC)*

The following list contains all cases of homicide committed in Attica or involving Athenians, for which we know or have good reason to assume the procedure chosen or for which we

can discern a reaction from some party.[40] I exclude Antiphon's Tetralogies because of their fictional character. I focus on the reasons why relatives or friends of slain people chose one procedure over another. In doing so, I aim to reveal to what extent the plaintiffs sought to involve the *polis*-community. We should ask how the choice of procedure is to be seen on a symbolic level. What did the choice of procedure signify and what message was to be conveyed to the audience?

Cases of Apagoge

(1) 422-413 BC:[41] Euxitheus of Mytilene was charged with having killed the Athenian citizen Herodes,[42] probably resident as klerouch in Mytilene since 427 BC.[43] Both were traveling together from Mytilene on Lesbos to Ainos in Thrace, when a storm came up and they were forced to anchor at Methymna on Lesbos. During a night of drinking, Herodes

[40] I omit cases of homicide, for which we do not have any information concerning the family's or anyone else's reaction. Alcibiades' wife, for example, died of unknown causes after her husband had dragged her home by force (PLUT. *Alc.* 8,4). It would have been the responsibility of the woman's relatives to investigate the case, and, if necessary, to bring charges against Alcibiades. His high social status may have prevented any action against him. In DEM. 21,71 Euthynus the wrestler engages in a fistfight with the prize-fighter Sophilus at a private party. The passage is so vexed that it is unclear who actually killed whom. There is no reaction known to this incident. In ISAEUS 8 (*On the Estate of Ciron*) Diocles is accused of murder. This allegation clearly serves the purpose of character denigration. We do not hear anything about the reaction of the victim's family.

[41] U. SCHINDEL, *Der Mordfall Herodes. Zur 5. Rede Antiphons* (Göttingen 1979), 206-208 on the dating criteria.

[42] On Herodes' Athenian citizenship cf. U. SCHINDEL, *Der Mordfall Herodes*, 210-212. On the case in general cf. E. HEITSCH, "Antiphon aus Rhamnus", in *Abhandlungen der Geistes- und Sozialwissenschaftlichen Klasse der Akademie der Wissenschaften und der Literatur, Mainz,* Jhrg. 1984, 3 (Wiesbaden 1984), 33-89; M. GAGARIN, *Antiphon the Athenian. Oratory, Law, and Justice in the Age of the Sophists* (Austin 2002), 152-160.

[43] ANTIPHO 5, especially 17-18; 25-26. M.H. HANSEN, *Apagoge*, 124, Nr.1. U. SCHINDEL, *Der Mordfall Herodes*, 216-220 on the Athenian klerouchie in Mytilene.

disappeared. His corpse was never found, but under torture a slave accused Euxitheus of having killed Herodes and thrown his body into the sea. When the slave realized that he would be executed anyway, he revoked his confession. Nevertheless, his evidence weighed heavily against Euxitheus.[44] Herodes' relatives, probably residents of Mytilene too, brought charges of homicide against Euxitheus in Athens. Because Euxitheus expected to be indicted via a *dike phonou*, which would have allowed him to go into exile after his first speech, he followed the summons and went to Athens,[45] where he was subjected to *endeixis* and ensuing *apagoge kakourgon*.[46] He was immediately imprisoned and not even allowed to post sureties to prepare his trial,[47] which took place before a dicastic court and not before the *Areopagus* as would have been the case in a *dike*

[44] The question of guilt need not concern us here. H. ERBSE, "Antiphons Rede (or. 5) über die Ermordung des Herodes", in *RhM* 120 (1977), 209-227 has tried to refute F. SCHEIDWEILER, "Antiphons Rede über den Mord an Herodes", in *RhM* 109 (1966), 319-338, in whose opinion Euxitheus was innocent. Even more convinced of Euxitheus' guilt is M. GAGARIN, *The Murder of Herodes* (Frankfurt 1989), 117-125. U. SCHINDEL, *Der Mordfall Herodes*, 224-229 thinks that the substance of the charge was *andrapodismos*, because Euxitheus had illegally appropriated Herodes' slaves. The accusation of murder was only a secondary, auxiliary charge. Although Euxitheus makes many dubious and contradictory statements, his alibi is good: *ibid.*, 230-239, hence Euxitheus was innocent. J. ROISMAN, *The Rhetoric of Conspiracy in Ancient Athens* (Berkeley–Los Angeles– London 2006), 16 n.10 wisely refrains from judging the case.

[45] M. GAGARIN, *The Murder of Herodes*, 124. E. HEITSCH, "Antiphon", 57-60 differentiates between the summons, with which the prosecutors initiated an *agon timetos* to compensate for the damage caused by the disappearance of Herodes' slaves, and the actual charge for homicide, which the plaintiffs only lodged after Euxitheus arrived at Athens. This way, Euxitheus was duped into coming to Athens.

[46] M. GAGARIN, *The Murder of Herodes*, 121 speaks of an *endeixis kakourgon*, D.M. MACDOWELL, *Athenian Homicide Law*, 136 of an *endeixis kakourgias* or *apagoge kakourgias*. I stick to E. VOLONAKI's, "Apagoge", 153-160 terminology. M. GAGARIN, *The Murder of Herodes*, 17-29 on the procedural questions.

[47] According to M. GAGARIN, *The Murder of Herodes*, 123 the relatives did everything to make sure that Euxitheus could not escape into exile. On whether or not Euxitheus should have been allowed to post bail cf. M.H. HANSEN, *Apagoge*, 22-24.

phonou.[48] The outcome of the trial is unknown, but Euxitheus won for his defense the Athenian expert in homicide cases, Antiphon, who prepared the speech that was handed down to us.

The trial against Euxitheus is important, because it seems that the *nomos ton kakourgon* including the *apagoge* procedure was applied to a homicide case for the first time.[49] If so, it was the precedent for all ensuing *apagoge* procedures—and their different types—in cases of homicide.[50] If a *graphe phonou* did not exist before,[51] the application of an *apagoge* procedure to a homicide case meant that now a public action could also be brought against a suspect killer by anyone who wished (*ho boulomenos*), an innovation in Athenian homicide law that cannot be overestimated.[52] Since there was no precedent, Euxitheus' indignation and protest are understandable. The *apagoge* procedure caused serious disadvantages to his defense, whereas it greatly favored the prosecution. Unlike in a *dike phonou*, the prosecutors did not have to swear the terrible oath of self-execration, the *diomosia*.[53] There were no time limits for the prosecution to initiate a trial. Most of all, the defendant was imprisoned right at the beginning of the procedure and did not have the possibility of going into exile during the court

[48] E. HEITSCH, "Antiphon", 33-89 argues that Euxitheus was not entitled to a *dike phonou*, because he was a foreigner. According to him, it was not uncommon for Athenians to prosecute non-Athenians via an *apagoge* procedure. But he remains vague on the question which kind of prosecution was actually brought against Euxitheus.

[49] Different from the general consensus in research is E. CARAWAN, "Akriton Apokteinai: Execution without Trial in Fourth-Century Athens", in *GRBS* 25 (1984), 111-121, 120-121.

[50] The application of the *apagoge kakourgon* procedure to cases of homicide may have paved the way for ever more forms of summary arrest that could be used to indict suspected murderers.

[51] M.H. HANSEN, *Apagoge*, 108-112 does not rule out the possibility that a *graphe phonou* did in fact exist.

[52] On the tension between conservatism and innovation in Athenian homicide law cf. now E. VOLONAKI, "Apagoge", 173-174.

[53] The destruction called down by the swearer included his whole family and household: DEM. 23,67.

proceedings, as they did in a *dike phonou*.[54] Euxitheus rightly argues that the list of *kakourgoi*, as stated in the *nomos kakourgias*, did not include *androphonoi*,[55] and that the *apagoge* procedure was therefore not applicable in his case. But, as M.H. Hansen has demonstrated, the list of *kakourgoi* in the law was only meant to be exemplary. De facto, *moichoi* and *androphonoi* could well be regarded as *kakourgoi* and thus be subject to summary arrest and procedure.[56] In Euxitheus' case, the meaning of *kakourgos* was extended for the first time to include homicide, and historians should wonder why and how this extension became possible around 420 BC. For the prosecution it was vital to prevent Euxitheus from escaping into exile. Choosing to live in Ainos, Thrace with his father would have been no punishment at all for a Mytilenean citizen. The prosecuting party may have been successful in extending the use of the *apagoge kakourgon* procedure on a private basis convincing the Eleven of the legitimacy of their claim and proposed procedure. According to E. Volonaki, a more formal decree by the Assembly of the people may have made this innovation possible shortly before the trial against Euxitheus.[57] In this case, Herodes' relatives might have made this proposal to the Assembly. It is true that the Eleven could be meticulous in following the letter of the law—in the trial against Agoratus they required the plaintiffs to add the *ep'autophoro* stipulation to their indictment (see below case nr. 4)—, but we do not have the slightest evidence for such a decree of the assembly. On a more general level, researchers have pointed frequently to the *demos*' motives in extending the *apagoge kakourgon* procedure.

[54] H.D. Evjen, "Apagoge and Athenian Homicide Procedures", in *Tijdschrift voor Rechtsgeschiedenis* 38 (1970), 403-415, 411; E. Volonaki, "Apagoge", 153, 158-159.

[55] Antipho 5,9; H.D. Evjen, "Apagoge", 403.

[56] M.H. Hansen, *Apagoge*, 47-48, 104-112; Id., "The Prosecution of Homicide in Athens: A Reply", in *GRBS* 22 (1981), 11-30, 21-30; M. Gagarin, *The Murder of Herodes*, 20. According to E. Heitsch, "Antiphon", 80 *androphonoi* were not subsumed under the *kakourgoi* category.

[57] E. Volonaki, "Apagoge", 156-157.

Especially during the Peloponnesian war, the protection of Athenians living abroad in allied territory must have been more important than ever. To make sure foreigners from allied cities could be brought to justice in Athens, their summary arrest had to be made possible. If this assumption is correct, we can trace back a decisive alteration in Athenian homicide law to Athens' growing concern about the security of Athenian citizens within its empire. Obviously, the *demos* feared that Athenian citizens "might be murdered as a form of protest vote against Athenian imperialism".[58] Thus, Athens' imperial politics and problematic foreign relations had a profound impact on the administration of justice at home.[59] If Athenians regarded the *apagoge* procedure as a legalized form of self-help in the case of homicide, it is telling that they used this method against a foreigner first. In times of war, heightened anxieties, and growing tensions between Athens and its allies, it seemed important to the *demos* to be able to crack down on unruly allies fast and efficiently. The legal innovation in the domestic realm fits in well with the time period and reflects an encumbered Athenian foreign policy.

(2) 411 BC: Phrynichus, one of the leading members of the 400, was killed in the *agora* near the *Boule* by the metics Thrasyboulus from Kalydon and Apollodorus from Megara.[60] This assassination introduced the downfall of the Four Hundred. Because of their continuing reign, the assassins were right in escaping immediately so that it was not clear who they

[58] S. TODD, *The Shape of Athenian Law* (Oxford 1993), 331. Cf. e.g. the Phaselis decree (*IG* I^2 16 = *IG* I^3 10 = Tod I^2 32 = ML 31 = *HGIÜ* I 51) and the Chalcis decree (*IG* I^2 39 = *IG* I^3 40 = *Syll.*^{3} 64 = Tod I^2 42 = ML 52 = *HGIÜ* I 79) on the transfer of jurisdiction over serious cases under the Athenian empire. Cf. also Acheloion's "life insurance policy" (*IG* I^2 28.a = *IG* I^3 19 = *HGIÜ* I 64). I thank Professor David Phillips (UCLA) for directing me to these sources in this context.

[59] H.D. EVJEN, "Apagoge", 405, 412; H. ERBSE, "Antiphons Rede", 224.

[60] THUC. 8,90-92; LYS. 13,70-72; LYCURG. 1,112-115. Cf. LYS. 7,4; 20,9-11; 25,9. M.H. HANSEN, *Apagoge*, 125-126, nr. 4-5.

actually were.[61] It was not until the overthrow of the oligarchy and the restoration of the democracy that they came to the forefront and claimed responsibility for the assassination. Phrynichus' relatives or friends now felt compelled to react. Under the renewed democracy, it was certainly not easy for them to take action on behalf of their killed relative or friend, who had been a staunch oligarch throughout his life. In 409 BC, when the people of Athens saw the killers in danger of being prosecuted, they declared Phrynichus a traitor and regarded his murderers as tyrant slayers who were to be honored for the rest of their lives.[62] As a consequence, the plaintiffs' plan to bring the killers to justice (410/9 BC) failed.

The fact that the murderers were imprisoned for a short period of time shows that the plaintiffs probably resorted to an *apagoge kakourgon* or *apagoge phonou*[63] to get hold of the murderers, because, being foreigners, they could easily abscond. Phrynichus' friends, by bringing a public suit, emphasized the atrocity of the crime committed in the open, which, in their eyes, should shock and concern every citizen. According to the

[61] D.M. MACDOWELL, *Athenian Homicide Law*, 138-139.

[62] *IG* I^2 110 = *IG* I^3 102 = *Syll.*^{3} 108 = Tod I^2 86 = ML 85 = *HGIÜ* I 140: Thrasyboulus was rewarded with a golden crown and citizenship. His fellow conspirators, among them Agoratus, were also honored as *euergetai*. They received lesser rights, most notably the right to own real estate in Attica as non-citizens (*engktesis*).

[63] DEM. 23,80 describes the *apagoge phonou* procedure. If a suspected murderer has entered the *agora* or the holy places, anyone who wishes (*ho boulomenos*) can take him into prison. The offender is not supposed to suffer any harm nor can he be held in a private house. If he is found to be guilty, he is sentenced to death. M.H. HANSEN, *Apagoge*, 104 makes a case for an *apagoge kakourgon* in this case, because the *apagoge phonou* did not come into being before ca. 400 BC. D.M. MACDOWELL, *Athenian Homicide Law*, 139, in contrast, implicitly pleads for an *apagoge phonou*, although the relatives did not call the procedure thus. The relatives' argument must have been that the murderers had entered the holy places and the *agora* while being polluted. E. VOLONAKI, "Apagoge", 167 speaks of an *apagoge phonou* against Thrasyboulus and Apollodorus, but calls it "dubious" in this case. Cf. W. SCHMITZ, *Nachbarschaft und Dorfgemeinschaft im archaischen und klassischen Griechenland* (Berlin 2004), 364-365.

plaintiffs, this form of death was undeserved and the perpetrators' audacity ought to be punished with death, regardless of the political convictions of the victim. It is noteworthy that the restored democracy allowed Phrynichus' relatives or friends to argue along these lines and that they dared to do so.

(3) After 403/2 BC: In his speech against Agoratus, Lysias used the case of Menestratus as a precedent for the trial against Agoratus.[64] Under the rule of the Thirty, the Athenian citizen Menestratus of Amphitrope had denounced democratic leaders and thus caused their executions. Before he turned informer, the Thirty even passed a decree granting him immunity. After the restoration of the democracy, he was subject to an *apagoge* procedure and executed by *apotympanismos*.[65] Since the case was heard by a dicastic court and not the *Areopagus*, the procedure cannot have been a *dike phonou*. There is still debate on what kind of *apagoge* procedure was used. Due to the method of execution, M.H. Hansen argues for an *apagoge kakourgon*.[66] But we have no evidence that *apotympanismos* was reserved for *kakourgoi* only.[67] E. Volonaki and D.M. MacDowell make a case for an *apagoge phonou*,[68] because Menestratus is not called *kakourgos*, but is explicitly described as *androphonos* in the text (Lys. 13,56). Moreover, in the interval between his denunciation of the democrats and his trial, he must have frequented the holy places and the *agora*, despite his being a suspected murderer.

Whatever the exact form of procedure, this trial for homicide was a clear violation of the amnesty.[69] Under its stipulations, only those murderers who had killed with their own hands (*autocheiriai*) during the reign of the Thirty could be prosecuted.

[64] Lys. 13,55-57. See below Agoratus' case nr. 4. To S.C. Todd, *Shape*, 275, the case against Menestratus was the precedent for the trial against Agoratus'. M.H. Hansen, *Apagoge*, 130, nr. 11.

[65] D.M. MacDowell, *Athenian Homicide Law*, 137.

[66] M.H. Hansen, *Apagoge*, 104; Id., "Prosecution", 21-22, 30.

[67] E. Volonaki, "Apagoge", 166.

[68] *Ibid.*; D.M. MacDowell, *Athenian Homicide Law*, 137-138.

[69] M.H. Hansen, *Apagoge*, 130, nr. 11.

It seems that the *apagoge* procedure was a convenient tool for the *demos* to circumvent the stringent rules of the amnesty, i.e., to bring adherents of the oligarchy finally to justice and thus avenge the killing of democrats during the tyranny of the Thirty by using the legal loophole of the *apagoge* procedure.

(4) 399/8 BC or later: Lysias wrote his thirteenth speech (*Against Agoratus*) for the brother-in-law of the executed Dionysodorus.[70] This brother-in-law of the deceased served as supporting speaker (*synegoros*)[71] to help Dionysodorus' brother Dionysius, who was the main prosecutor against Agoratus to avenge the death of his brother. Agoratus, originally a slave, now a metic, had denounced Dionysodorus, a democrat and taxiarch, to the Thirty, who executed him without trial. Shortly before his death, he assembled his relatives and gave them an order to avenge his death by prosecuting Agoratus. Dionysodorus' brother and brother-in-law remembered these words and employed an *apagoge* procedure against Agoratus some time after the restoration of the democracy. The Eleven added the phrase *ep'autophoro* to the indictment,[72] the case was heard by dicastic judges, not the *Areopagites*, and the text explicitly talks about an *apagoge*.[73] We do not know the out-

[70] Relevant for our purposes especially LYS. 13,1-4; 39-42; 82-97.

[71] On their role now L. RUBINSTEIN, *Litigation and Cooperation. Supporting Speakers in the Courts of Classical Athens* (Stuttgart 2000).

[72] R. RAUCHENSTEIN, "Über die Apagoge in der Rede des Lysias gegen den Agoratos", in *Philologus* 5 (1850), 513-521, 516 explains the addition demanded by the Eleven. They wanted to make sure that the indictment was in line with the amnesty. But why do we not hear about the *ep'autophoro* stipulation in Menestratus' case (see above case nr. 3)? Moreover, *ep'autophoro* is not *autocheiriai*.

[73] M.H. HANSEN, *Apagoge*, 104, 130-132, nr. 12. There is no reason to assume a *graphe phonou*, as R. RAUCHENSTEIN, "Apagoge", 513-514 postulates it. H.D. EVJEN, "Apagoge", 414-415 argues against the *graphe phonou*, the existence of which M.H. HANSEN, *Apagoge*, 108-112 at least does not want to rule out. D.M. MACDOWELL, *Athenian Homicide Law*, 130-140 and ID., *The Law in Classical Athens*, 118-122 has tended to think that in practice also non-relatives could bring a *dike phonou*. With this opinion he stood alone until he changed his mind in his 1997 review of A. Tulin's book on homicide: D.M. MACDOWELL, "Prosecution for Homicide", in *CR* 111 (1997), 384-385. Cf. below note 117.

come of the trial. As is clear from Menestratus' case (see above case nr. 3), a condemnation would have implied capital punishment. Agoratus defended himself by interpreting the *ep'autophoro* clause in a narrow sense, equating it with *autocheiriai*. Having killed *autocheiriai* was the precondition for being prosecuted for homicide committed under the rule of the Thirty and tried under the amnesty. Since Agoratus had not killed in this sense, he was not liable to this serious charge unless the prosecutors, the Eleven, and the jury would be willing to violate the amnesty. The prosecution, however, interpreted the *ep'autophoro* stipulation in a wider sense as "manifestly".[74] R. Rauchenstein and S. Todd have supposed that the plaintiffs used the *apagoge*, which gave the accused no advantage whatsoever (unlike the *dike phonou*), because Agoratus was not a citizen,[75] but this cannot be the only reason. It is true that Euxitheus was a Mytilenean citizen, but Menestratus was Athenian.

There is still debate on which form of *apagoge* procedure was used. M.H. Hansen assumes an *apagoge kakourgon*. According to him, the *ep'autophoro* condition was closely connected to the *nomos kakourgias*, and nowhere in the text is there mention of Agoratus' trespassing holy places. Therefore, according to M.H. Hansen, the procedure cannot have been an *apagoge phonou* as described in Dem. 23,80.[76] H.D. Evjen, S. Todd, E. Volonaki, and D.M. MacDowell disagree. The *kakourgos* category is not mentioned in the text.[77] The *ep'autophoro* stipulation was a precondition for bringing both an *apagoge kakourgon* and an *apagoge phonou*.[78] According to D.M. MacDowell, the relatives had the

[74] In PLATO, *Apol.* 22 b, XEN. *Symp.* 3,13, and AESCHIN. 3,10, for example, the term appears in this wider sense. Cf. R. RAUCHENSTEIN, "Apagoge", 516-518; D.M. MACDOWELL, *Athenian Homicide Law*, 133; above note 25.

[75] R. RAUCHENSTEIN, "Apagoge", 515-516; S.C. TODD, *Shape*, 275. H.D. EVJEN, "Apagoge", 413-414 enumerates the advantages for the prosecution to bring an *apagoge* instead of a *dike phonou*.

[76] M.H. HANSEN, *Apagoge*, 48-53, 101-103 and ID., "Prosecution", 30. Similar V.J. HUNTER, *Policing Athens*, 135.

[77] H.D. EVJEN, "Apagoge", 406. He also discusses the meaning of *ep'autophoro*.

[78] E. VOLONAKI, "Apagoge", 161-162, 167-170.

possibility only of initiating an *apagoge phonou*. Under the stipulations of the amnesty, they could not prosecute the *bouleusis* of intentional homicide. They just arrested the suspect. The appearance in public places could have been at least the formal condition of the arrest.[79] In D.M. MacDowell's words "the ground for the arrest [...] can only have been that Agoratos had since 403 (in the period not covered by the amnesty) frequented sacred and public places although guilty of homicide. Thus, in this case, for the purpose of circumventing the amnesty, the *apagoge* procedure was used by the victim's family simply as a substitute for a homicide prosecution of the traditional kind".[80]

(5) 364-362 BC: From the famous decree regulating Athenian relations with Iulis on Ceos, we learn that Satyrides, Timoxenus, and Miltiades, all three Cean citizens, accused Antipatrus of Ceos of having murdered the Athenian *proxenos* Aesion.[81] The inscription does not tell us which procedure the three plaintiffs used, but *apagoge* is probable, since the *Boule* condemned Antipatrus to death without referring his case to a law court. It must be noted, however, that the administration of justice within the naval confederacy could differ from legal procedures concerned with Attica only. Back at home, the three plaintiffs were sentenced to death because of their pro-Athenian stance during an anti-Athenian turmoil on the island. Similar to Euxitheus' case, the *apagoge* procedure might have been regarded as the best way to get hold of a foreigner and bring him to justice.

[79] S.C. TODD, *Shape*, 276; E. VOLONAKI, "Apagoge", 164.

[80] D.M. MACDOWELL, *The Law in Classical Athens*, 121-122. E. VOLONAKI, "Apagoge", 152-153, 164 agrees that it was an *apagoge phonou* and that the legal grounds for the arrest was trespass. Siding with MacDowell, she adds that Agoratus must have defiled the holy places automatically in the long time period between 404 and 399. This did not have to be mentioned in the speech. The scenario of this case does not speak against DEM. 23,80.

[81] *IG* II^2 111 = M.N. TOD, *A Selection of Greek Historical Inscriptions* II (Oxford 1948), 142 = *Syll.*^{3} 173 = P.J. RHODES–R. OSBORNE, *Greek Historical Inscriptions 404-323 BC* (Oxford 2003), 39 = K. BRODERSEN–W. GÜNTHER–H. SCHMITT, *Historische Griechische Inschriften in Übersetzung* II (Darmstadt 1996), 231; M.H. HANSEN, *Apagoge*, 133, nr. 16.

Cases of *Dike phonou*

(6) 420-411 BC: A stepson brought charges against his stepmother for having planned the death of his own father (*bouleusis*), her husband.[82] Years earlier, when the plaintiff was a small child, the married woman made use of her maiden to give her husband and his friend, Philoneus, a potion (*pharmakon*). The maiden was Philoneus' concubine (*pallake*), but his passion for her had cooled and he threatened to sell her to a brothelkeeper. The married woman persuaded the deeply worried girl to give Philoneus a love potion in order to rouse his affection for her again. Her own husband should drink the potion, too. They probably had marital problems, a delicate point the plaintiff passes over in almost complete silence.[83] The girl, anyway, regarded the woman as partner in a similar fate, trusted her, and gave the potion willingly to the men. Philoneus died on the spot, his friend, the father of the plaintiff, some twenty days later after severe illness. On his deathbed, according to the plaintiff, his father made him promise to take revenge on his behalf once he grew up. There is no way to know whether or not this conversation had actually taken place. In any case, it was possible for the prosecutor to understand the *pharmakon*, the meaning of which is ambivalent in Greek, as poison.[84]

[82] ANTIPHO 1 (*Against the Stepmother*). On this case in general M. GAGARIN, *Antiphon*, 146-152.

[83] The only passage pointing to this direction is ANTIPHO 1,15.

[84] Cf. D.S. ALLEN, "Greek Tragedy and Law", in *The Cambridge Companion to Ancient Greek Law*, ed. by M. GAGARIN–D. COHEN (Cambridge 2005), 374-393, 383-393. Inexplicable cases of death were often attributed to the use of poison. Even if a victim did not die, the accusation of having poisoned someone was frequent and damaged the reputation of the accused person. Sometimes the accused resorted to curses against the accusers and to self-execrations in order to prove their innocence: e.g. *IKnidos* (*IK* 41) 147; 150; 154; G. PETZL, *Die Beichtinschriften im römischen Kleinasien und der Fromme und Gerechte Gott* (Opladen 1998), nr. 69. On these sources cf. H.S. VERSNEL, "Writing Mortals and Reading Gods. Appeal to the Gods as a Dual Strategy in Social Control", in *Demokratie, Recht und soziale Kontrolle im klassischen Athen*, hrsg. von D. COHEN (München 2002), 37-76, 64-65; A. CHANIOTIS, "Von Ehre, Schande und

From this perspective, the married woman intentionally committed mediated violence by using the girl to bring about the death of the two men. Since the girl did not know that the potion was poisonous, the woman did not instigate the homicide, but "only" plan it via a mediator. The accusation of *bouleusis* of intentional homicide, brought by the stepson years after the fact, makes sense.[85] But it has also been argued that the stepson brought a charge of intentional homicide (*phonos ek pronoias*) against his stepmother.[86]

Whereas the girl was tortured and executed right away after the "incident", the mother obviously got away for years by interpreting the death of the two men as accidental. She must have used the term *pharmakon* in the sense of "love potion". Since the maiden had given the potion, the woman may have claimed that she did not feel responsible for an inaccurate preparation of the potion or a possible overdose. The defense in this case, represented by the stepmother's own son, must have argued along these lines. He certainly denied his mother's intention to kill altogether.

For years, the community had accepted the woman's version. With the death of the girl, the case seemed to have come

kleinen Verbrechen unter Nachbarn: Konfliktbewältigung und Götterjustiz in Gemeinden des antiken Anatolien", in *Konflikt*, hrsg. von F. PFETSCH (Heidelberg 2004), 233-254, 236-237, 245-246, 249-250. I thank Professor Angelos Chaniotis (Oxford) for drawing my attention to these sources.

[85] S.C. TODD, *Shape*, 274, n.171; D.M. MACDOWELL, *Athenian Homicide Law*, 62-63; ID., *The Law in Classical Athens*, 116; E. HEITSCH, "Antiphon", 29-32; R.W. WALLACE, *The Areopagos Council to 307 BC* (Baltimore–London 1989), 101; G. THÜR, "The Jurisdiction of the Areopagos in Homicide Cases", in *Symposion 1990: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, hrsg. von M. GAGARIN (Köln–Wien 1991), 53-72, 65.

[86] M. GAGARIN, "Bouleusis in Athenian Homicide Law", in *Symposion 1988: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, hrsg. von G. NENCI–G. THÜR (Köln–Wien 1990), 81-99, 94-95; E. HARRIS, "How to Kill in Attic Greek: The Semantics of the Verb (ἀπο)κτείνειν and Their Implications for Athenian Homicide Law", in *Symposion 1997: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, hrsg. von E. CANTARELLA–G. THÜR (Köln–Weimar–Wien 2001), 75-88, now reprint in ID., *Democracy and the Rule of Law*, 391-404, 398-399.

to a satisfying conclusion. Why then did the stepson make the effort to accuse his stepmother and thus stir up his half-brother against him? A lot may have been at stake for the young prosecutor in financial terms. Years after the death of her husband, the woman and her own son might have taken steps towards securing the whole inheritance for themselves and passing over the stepbrother. Like taking responsibility for the burial of a close relative, seeking vengeance for him in court in the case of homicide was the solemn duty of his nearest kin.[87] This posthumous commitment bolstered his claim to the inheritance. Beyond the possible vow at his father's deathbed, these deliberations may have stood in the background, motivating the stepson to file a *dike phonou*, the only procedure available to him, against his stepmother.[88] The trial took place in front of the *ephetai* at the Palladion, if the charge was *bouleusis* of homicide.[89] Since there was no way of proving that the stepmother had committed the crime *ep'autophoro*—even *bouleusis* was in doubt—the possibility of bringing an *apagoge* was excluded. But it was not only procedural restrictions that made the plaintiff bring a *dike phonou*, but also his wish to show his meticulousness in preparing the case for a

[87] On the role of courts as instruments of vengeance H.-J. GEHRKE, "Die Griechen und die Rache. Ein Versuch in historischer Psychologie", in *Saeculum* 38 (1987), 121-149, 140-148; N. FISHER, "Violence, Masculinity", 92; D. COHEN, *Law, Violence, and Community in Classical Athens* (Cambridge 1995), *passim*.

[88] R. OSBORNE, "Law in Action in Classical Athens", in *JHS* 105 (1985), 40-58, 57.

[89] E. CARAWAN, *Rhetoric and the Law of Draco* (Oxford 1998), 390, M. GAGARIN, "Bouleusis", and E. HARRIS, "How to Kill in Attic Greek" think that the trial took place before the *Areopagus*, because the prosecutor pleaded for intentional homicide. R.W. WALLACE, *The Areopagos Council*, 101 observes that *bouleusis* was mostly tried in front of the Palladion, not the *Areopagus*. There is also textual evidence. The plaintiff always addresses the judges as *dikastai*, which is befitting the *ephetai*. He does not address the council (of the *Areopagus*) even once. Similar E. HEITSCH, "Antiphon", 21-32 and G. THÜR, "Jurisdiction", 68, who claims that the *Areopagus* was only competent for cases of homicide committed by one's own hand, the Palladion for those of indirect killing. On *bouleusis* as a non-technical term for homicide cf. M. GAGARIN, "Bouleusis", *passim*.

long time, as is typical of a *dike phonou*, and his intention to demand retribution for the intra-familial killing that concerned him more than the community at large.

(7) 419/8 BC: A rich and politically active Athenian served as *choregus* and had young chorus boys practice in his house. In his absence, one of the boys, Diodotus, drank a potion and died shortly afterwards. His brother Philocrates brought a *dike phonou* on grounds of *bouleusis* of unintentional homicide against the *choregus* before the Palladion.[90] Since all parties agreed that the boy's death was an accident, the plaintiffs extended the meaning of *bouleuein* (planning) and used *bouleusis* in a new sense (negligent homicide or involuntary manslaughter through failure to do something).[91] The *choregus* should have made sure beforehand that his helpers at home would not take risky measures: in other words, he had not done everything to guarantee the safety of the children. Since this new concept had added an additional meaning to the word *bouleusis*, the defendant deliberately used the traditional meaning of the word, thus distorting what the prosecutors had actually said and wrongly implying that they charged him of intentional homicide.[92] Confusing the judges who were all laymen was a habitual defense strategy. When Philocrates brought the *dike phonou* before the *basileus*, he realized that the three necessary preliminary inquiries that had to be spread out over three months could not be concluded within the current *basileus*' term of service. The *basileus* was not allowed to pass on a homicide case to his successor. Therefore, Philocrates had to wait until the beginning of the next year to bring a private

[90] ANTIPHO 6,16. R. OSBORNE, "Law in Action", 57; S.C. TODD, *Shape*, 274, n.17; D.M. MACDOWELL, *Athenian Homicide Law*, 63-64; ID., *The Law in Classical Athens*, 116; E. CARAWAN, *Rhetoric*, 391.

[91] E. HEITSCH, "Antiphon", 95-97; similar M. GAGARIN, *Antiphon*, 140. Nevertheless M. GAGARIN, *ibid.*; ID., "Bouleusis", 95, and E. HARRIS, "How to Kill in Attic Greek", 399-400 think that the charge was not *bouleusis*, but unintentional homicide (*phonos akousios*).

[92] ANTIPHO 6,16.

suit for homicide against the *choregus*. An *apagoge* was no way out; at least Diodotus' relatives did not resort to it, which can mean one of three things: (1) It was not yet established as a procedure to prosecute homicide.[93] (2) The *ep'autophoro* stipulation was mandatory and was not fulfilled in this case or (3) the plaintiffs deliberately chose the *dike phonou* to emphasize the legitimacy of their allegation. Through the *dike phonou*, the *choregus* gained time and could sue and have his political opponents convicted, who allegedly had bribed Philocrates into bringing the action against him. An accusation of homicide would have prevented him from pleading his cases, because as a suspect of homicide he was banned from the *agora* and the holy places. But since filing the *dike phonou* was not possible until the beginning of the next year, the boy's family now suggested a private settlement to the *choregus*, which he gladly accepted.[94] The reconciliation was perfect, and Philocrates even appeared in public places with the *choregus*. Although Philocrates was less obliged to take action on behalf of his brother who had died in an accident than Theocrines was for his brother (see below case nr. 18), it is striking to what extent homicide cases could be settled on a private basis. The great discretion that Athenian plaintiffs enjoyed was not only due to the notorious procedural flexibility of the law, but might also have had to do with the Athenians' strong belief in the family's prerogative and capacity to choose the right way of avenging the violent death of one of its members. The probable non-existence of a *graphe phonou* is only the legal reflection of this attitude.[95] After a time lapse of another 50 days in the new year, the boy's family finally filed the *dike phonou* for the second time, bribed again, according to the *choregus*, by his political opponents. The *choregus* regarded the break of the reconciliation agreement as outrageous. According to him, the

[93] M.H. HANSEN, *Apagoge*, 102-103; H.D. EVJEN, "Apagoge", 410.
[94] ANTIPHO 6,38-40.
[95] Cf. H.D. EVJEN, "Apagoge", 410, n.27.

sudden change of mind on the plaintiffs' side only testified to their vile character.[96] It was one of the *choregus*' defense strategies to interpret the accusation against him as politically motivated. He considered himself the victim of a major conspiracy. In their plots against him, his enemies would not even shrink away from bringing charges of unintentional homicide against him. In a worst-case scenario, he would have been sentenced to temporary exile without loss of property. The *choregus* retaliated on a harsher note. He had no qualms whatsoever about attacking his opponents with an *eisangelia*, which could have fatal consequences for the accused in case of a conviction. Through this speech, we catch a glimpse of Athenian hardball politics.

(8) After 403/2 BC: Lysias accused Eratosthenes, one of the Thirty, of having killed his brother Polemarchus.[97] Under the stipulations of the amnesty, nobody apart from the Thirty and their chief subordinates could be held liable for what he did during the reign of the Thirty,[98] the exception being homicide committed with one's own hand. It is not clear if Lysias, as a metic, delivered this speech in person, nor what the procedure was. Since there is no hint whatsoever that it could be an *apagoge*, it was probably either a *dike phonou* or an indictment brought forth in the context of Eratosthenes' *euthynai* in 403/2.[99] We do not know anything about the outcome of the trial.

(9) 402 BC: Isocrates' speech 18 (*Against Callimachus*) has an inserted tale about a faked homicide. Callimachus and his brother-in-law concealed a slave woman of their own and brought a *dike phonou* against their enemy Cratinus before the

[96] Different E. HEITSCH, "Antiphon", 103 and J. ROISMAN, *The Rhetoric of Conspiracy*, 47-51, to whom the relatives' changing relationships with the *choregus* and the steps that they take against him were not unusual.

[97] LYS. 12.

[98] ARIST. *Ath.Pol.* 39,1-6.

[99] E. CARAWAN, *Rhetoric*, 392 supposes a "special accounting of oligarchic principals (should they wish to return)."

Palladion.[100] Callimachus and his brother-in-law accused Cratinus of having visited their farm and having smashed the woman's head. According to what they claimed, she died from the wound. The plaintiffs' plan must have been as follows. Even if Cratinus were acquitted in the trial, they would have framed him for homicide in their ongoing dispute about a piece of land.[101] His reputation would be damaged forever. Although the whole case was fabricated, it is interesting to note that the main plaintiff and his primary witness, Callimachus, could muster fourteen more witnesses against Cratinus. He waited until the accusation was delivered in court and Callimachus had sworn an oath that the woman was dead, before he went out to the farm, freed the slave woman and brought her into the courtroom. When the plot lay bare, open for all to see, Callimachus did not get a single vote. He was now regarded as a perjurer.

(10) Ca. 400-380 BC: Lysias wrote one of his most famous speeches for Euphiletus who was accused of having murdered Eratosthenes, the seducer of his wife.[102] Euphiletus stylized his deed as an execution that was not only in full agreement with Athenian laws, but even necessitated by them. This interpretation probably went too far. Euphiletus cites three laws in his support, probably the *nomos ton kakourgon* (Lys. 1,28), the lawful homicide statute (Lys. 1,30),[103] and probably the *dike biaion* (Lys. 1,31-32).[104] Although the first two laws may have given Euphiletus the right to kill the seducer whom he caught in the act, this extreme reaction had almost certainly become

[100] ISOC. 18,51-52. R. OSBORNE, "Law in Action", 57; F. RUIZ, *Use and Control of Violence*, 79; A.R.W. HARRISON, *The Law of Athens*, II 40 on the difficulty that the text speaks about the Palladion, but mentions 700 judges.

[101] J. ROISMAN, *The Rhetoric of Conspiracy*, 56-57.

[102] LYS. 1. From a gender perspective cf. R. OMITOWOJU, *Rape and the Politics of Consent in Classical Athens* (Cambridge 2002), 72-115.

[103] The lawful homicide statute is also cited by DEM. 23,53. Cf. also DEM. 23,60-61; 24,113; AESCHIN. 1,91.

[104] On these laws cf. R. OMITOWOJU, *Rape*, 98-105.

obsolete in the fourth century.[105] Euphiletus had other means at this disposal.[106] He could exact ransom money, which Eratosthenes had offered him indeed.[107] He could inflict a painful and humiliating penalty upon him, the so-called radish-and-ash treatment (*rhaphanidosis*).[108] Under the *kakourgos* law, Euphiletus could have subjected Eratosthenes to the *apagoge* procedure and brought him before the Eleven. Since Eratosthenes admitted his guilt (Lys. 1,25; 1,29), the Eleven could have executed him on the spot. In addition, Euphiletus could have brought a *graphe moicheias*[109] or a *graphe hybreos*. In theory, also an *eisangelia* could be brought against a *moichos*.[110] Also a *dike aikeias* would have been conceivable.[111] All these options entailed a different degree of self-help and involvement of the community. Euphiletus chose the self-help option par excellence, the killing of the seducer without granting him the chance to appeal to a law court. Euphiletus took precautions so that his action could be considered lawful. First, he assembled a posse of neighbors who witnessed the whole scene. The extreme measure of self-help thus happened in the presence of a more or less representative sample of the community. This

[105] E. CARAWAN, *Rhetoric*, 135, 284, 291 reminds us that the amnesty's stipulation of *me mnesikakein*, not to recall past crimes, did refer to the atrocities committed during the civil war, but in fact had a tremendous impact not only on the conditions of justifiable killing, but also on the Athenians' understanding of retributive violence in general. Also for this reason, self-help killing had become problematic during the fourth century.

[106] In detail D. PHILLIPS, *Homicide*, 22-30; R. OMITOWOJU, *Rape*, 107-112.

[107] DEM. 59 provides ample evidence on this practice.

[108] XEN. *Mem.* 2,1,5; ARISTOPH. *Nub.* 1083-1084. On this and other *Schandstrafen* inflicted upon *moichoi* cf. W. SCHMITZ, *Nachbarschaft*, 338-348.

[109] ARIST. *Ath.Pol.* 59,3-4; DEM. 59,87.

[110] HYPER. *Lyc.* (Defense): Lycurgus prosecuted Lycophron by *eisangelia* (LYCURG. Fr.70 / Fr.10-11 [E. Harris]).

[111] D. OGDEN, "Rape, Adultery and Protection of Bloodlines in Classical Athens", in *Rape in Antiquity*, ed. by S. DEACY–K.F. PIERCE (London 1997), 25-41, 27 on these options. He emphasizes that the protection of the bloodline mattered most in persecuting a rapist or seducer. Since the outcome of forced or consensual, illicit sex could be the same, i.e., the birth of an illegitimate child, rapist and seducer were treated alike, just as a raped woman and an adulteress were (with older literature on this subject).

way, the bloody action appeared to be controlled and sanctioned by the bystanders. Second, Euphiletus emphasized again and again that Eratosthenes had admitted his guilt (Lys. 1,25; 1,29). Under these circumstances, also the Eleven could have summarily executed him in an *apagoge* procedure. Third, in his depiction of the homicide (Lys. 1,24-27) Euphiletus was eager to show how calm he was. Whereas a modern lawyer would try to convince the jury that the defendant had committed a crime of passion or acted under the influence of drugs, Euphiletus' strategy was aimed in the opposite direction. He did not get carried away by emotions. Full of self-restraint, he simply executed the law of the city. For the purpose of his defense, he skillfully spoke the moderate discourse of the democratic *polis*. In order to win the judges' favor, he appropriated in his speech of self-defense the "civic code" as opposed to the old "tribal code".[112] This pose was contrary to the facts.

Eratosthenes' relatives brought a *dike phonou* for intentional homicide against Euphiletus.[113] Since he pleaded for lawful homicide, the trial took place before the Delphinium. Given the fact that Euphiletus did not deny his deed and had killed with his own hands, Eratosthenes' relatives could easily have initiated an *apagoge* procedure against him. But in contrast to Euphiletus, they wanted to show that they were not so brazen as to resort to this extreme measure of legalized self-help. In full accordance with the democratic discourse of *enkrateia*, they preferred to bring a cumbersome and lengthy *dike phonou* against the killer of their relative.

(11) 400/399 BC: In Plato's dialogue *Euthyphro or on Holiness*, the young man Euthyphro of Prospalta shocks Socrates by telling him that he had filed a *dike phonou* against his own father.[114]

[112] G. HERMAN, "Tribal and Civic Codes of Behaviour in Lysias 1", in *CQ* 43 (1993), 406-419. For a full assessment of the two different discourses cf. now G. HERMAN, *Morality and Behaviour*, 175-183.

[113] R. OSBORNE, "Law in Action", 57.

[114] PLATO, *Euthyphr.* 4. R. OSBORNE, "Law in Action", 57.

The case is fictional, but must be plausible within the parameters of Athenian law in order to have a certain effect on the readership.[115] One of the father's dependants, a so-called *pelates*, had killed a house-slave. As a consequence, the father threw the killer in a ditch without taking further measures. He just sent a messenger to the *exegetai* in Athens to ask what to do with the murderer. In the meantime, the *pelates* died in the ditch from hunger, thirst, and cold. S. Panagiotou has shown that the father was indeed liable to charges of homicide. His intent to harm if not to kill through negligence is clearly discernable. Athenian law did not tolerate the maltreatment of the killer, who should have been brought to justice.[116] The only question is whether or not Euthyphro had the right to sue his father for having killed the *pelates*. Everything depends on the status of this man and his relationship with Euthyphro. Only masters of slaves could bring charges of homicide on behalf of their own murdered slave.[117]

[115] I. KIDD, "The Case of Homicide in Plato's *Euthyphro*", in *'Owls to Athens'. Essays on Classical Subjects Presented to Sir Kenneth Dover*, ed. by E.M. CRAIK (Oxford 1990), 213-221, 213-214.

[116] S. PANAGIOTOU, "Plato's Euthyphro and the Attic Code on Homicide", in *Hermes* 102 (1974), 419-437, 421-424.

[117] I follow the *communis opinio* that only relatives of victims or the master of a slain slave were allowed to bring a *dike phonou*: H.D. EVJEN, "[Dem.] 47.68-73 and the dike phonou", in *RIDA* 3rd ser. 18 (1971), 255-265, 262-265; A. TULIN, *Dike Phonou. The Right of Prosecution and Attic Homicide Procedure* (Stuttgart–Leipzig 1996); E. GRACE, "Note on Dem. XLVII 72: touton tas episkepseis einai", in *Eirene* 13 (1975), 5-18; I. KIDD, "The Case of Homicide"; M.H. HANSEN, "Prosecution". They all base their arguments on Ps.-DEM. 47 to a large degree (see below case nr.17). D.M. MACDOWELL, *Athenian Homicide Law*, 17-19, 94-96 thought that everyone, including non-relatives, could file a *dike phonou*. Similar is S. PANAGIOTOU, "Plato's Euthyphro". M. GAGARIN, "The Prosecution of Homicide in Athens", in *GRBS* 20 (1979), 301-323, 322-323 has taken a mediating position between D.M. MacDowell and A. Tulin, stating that normally only relatives of a victim could sue a killer, but there might have been exceptions. Most recently, D.M. MACDOWELL, "Prosecution for Homicide", 384-385, changed his mind in this review of Tulin's book and now agrees with A. Tulin that only relatives could bring a *dike phonou*. Another question is whether or not the relatives had to take action. S. PANAGIOTOU, "Plato's Euthyphro", 433 thinks that relatives had to take action, whereas non-relatives were allowed to sue, but were not obliged to do so (*ibid.*, 433-434); similar D.M. MACDOWELL, *Athenian Homicide Law*, 10-11, 94, 133. Based on a careful analysis of the evidence,

And indeed, with regard to the rank of the *pelates*, Kidd could show that "the evidence points to a category of servitude that is not of the class δοῦλος, but serfdom with a very strong sense of dependence, involving conditions and responsibilties".[118] Since this relationship must have been close to that of a master-slave relationship, Euthyphro felt obliged to avenge the man in court. Why then was Socrates shocked? He seemed to be less concerned about legal considerations than about kinship ties. According to common Athenian belief, the death of a slave, especially one who was a killer, did not justify the indictment of one's own father. It was disgraceful to sue one's own relatives in court.[119] Once more, we see that Athenian law, just as any other system of law, was not a neutral factor independent from society. Rather, notions and values of Athenian society conditioned the law's applicability and functioning. The philosophical dialogue could not express better the discrepancy between legal theory and social practice. This discussion makes for a smooth transition to the theme of holiness.

(12) After 349 BC: Ps.-Dem. 59, the famous speech of Theomnestus and Apollodorus against Neaera and Stephanus, highlights the long-term conflict between Apollodorus of Acharnai, the son of Pasion, and Stephanus of Eroiadai, which was carried out in a series of trials dealing with private and political matters. Framing for homicide was a typical stock-motif of character denigration, and was used by Stephanus against Apollodorus to drive him out of the country.[120] In his search for a runaway slave, Apollodorus had gone out to Aphidna and allegedly killed a woman there with his own

M.H. HANSEN, *Apagoge*, 111 and A. TULIN, *Dike Phonou*, 105-106, however, show that relatives were only allowed and even expected to prosecute, but were not obliged to do so. Cf. above note 73.

[118] I. KIDD, "The Case of Homicide", 220-221.

[119] D. PHILLIPS, *Homicide*, 105.

[120] J. ROISMAN, *The Rhetoric of Conspiracy*, 56.

hands.[121] Although he had no proof whatsoever to substantiate his accusation, Stephanus brought a *dike phonou* against Apollodorus at the Palladion.[122] In doing so, Stephanus was willing to swear the solemn oath of the *diomosia* calling down destruction upon himself and his family, if the allegations were not true. The text of the speech explicitly mentions the Palladion, but one wonders why Stephanus did not go to the *Areopagus*, since he claimed that Apollodorus had killed the woman with his own hands. He might have found it difficult to plead for intentional homicide. If R.W. Wallace is right in his differentiation of motives underlying homicides and their respective attribution to specific lawcourts, this alleged killing was intentional (*hekousios*), but not premeditated (*ek pronoias*) and thus a typical case for the Palladion.[123] A.L. Boegehold describes the cases treated there as accidental,[124] which probably comes close to the intentions Stephanus implied with his action. It is also possible that the slain woman was a foreigner or a slave. In this case, the Palladion was the prescribed court. Stephanus' suit failed completely, and he came out of these proceedings as a perjurer.

(13) Before 348 BC: In his speech against Meidias (Dem. 21), Demosthenes told the story about Euaeon having killed his drinking mate Boeotus in the context of a public feast in revenge for a single blow and the *hybris* he suffered because of it.[125] He was tried and convicted by a majority of one vote. There is disagreement as to which court heard the case. M. Gagarin and G. Thür argue for the *Areopagus*,[126] R.W. Wallace

[121] DEM. 59,9-10.

[122] R. OSBORNE, "Law in Action", 57.

[123] R.W. WALLACE, *The Areopagos Council*, 98-101. See below note 127 for the discussion of the relationship between *hekousios* and *ek pronoias*.

[124] A.L. BOEGEHOLD, *The Lawcourts at Athens. Sites, Buildings, Equipment, Procedure, and Testimonia* (Princeton 1995), 47-48.

[125] DEM. 21,71-75.

[126] M. GAGARIN, "Self-Defense in Athenian Homicide Law", in *GRBS* 19 (1978), 111-120, 112, 120 thinks that homicides in self-defense were not simply lawful killings, but were rather tried as intentional homicides before the *Areopagus*.

favors the Palladion.[127] The question remains unresolved. In both law courts, the procedure chosen would have been the *dike phonou*. In theory, Euaeon could also have been subject to an *apagoge*. His killing could certainly be characterized as *ep'autophoro*. It seems that Boeotus' relatives brought a traditional *dike phonou*. Nothing is known about the prosecuting party and their intentions with regard to the procedural option between a *dike phonou* and an *apagoge*.

Special Cases

(14) 348 BC:[128] Nicodemus of Aphidna, friend of Eubulus and Meidias, was brutally murdered, his tongue was cut off, and his eyes put out.[129] Nicodemus' family suspected Aristarchus, the son of Moschos, young friend and pupil of Demosthenes, because Nicodemus had slandered and provoked him. Although it was the family's duty to take revenge on behalf of the killed relative, it was Meidias who became active

G. THÜR, "Jurisdiction", argues *passim* and especially on 70 with regard to this case that the *Areopagus* was only concerned with homicide committed by one's own hand. All cases of *bouleusis* were dealt with at the Palladion.

[127] R.W. WALLACE, *The Areopagos Council*, 100-101. Against D.M. MACDOWELL, *The Law in Classical Athens*, 115, E. HEITSCH, "Antiphon", and W. LOOMIS, "The Nature of Premeditation in Athenian Homicide Law", in *JHS* 92 (1972), 86-95, for example. R. Wallace seems to be alone in his view that the Athenians did differentiate between intentional (*phonos hekousios*) and premeditated murder (*phonos ek pronoias*). Only the latter was tried at the *Areopagus*. In Euaeon's case, the homicide was intentional, but certainly not premeditated. In addition, the judges are described as *dikastai*, not as *bouleutai*, which would be the term to be expected in case the *Areopagus* had heard the case.

[128] Against H. STIER, *s.v.* 'Nikodemos', 2), in *RE* XVII 1 (1936), col. 347 who argues for the murder to have taken place in 354BC. The majority of researchers today favors 348BC, cf. B. DREYER, "Der Tod des Nikodemos von Aphidnai und die Meidias-Rede des Demosthenes", in *The Ancient History Bulletin* 14 (2000), 56-63, 60.

[129] DEM. 21,104-122 and *schol. ad* DEM. 21,102, 104, 116, 205; AESCHIN. 1,171-172; 2,148; 2,166 and *scholia*; DINARCH. 1,30-31; 1,47; SOPATER, in *Rhetores Graeci* VIII p.48 Walz; IDOMENEUS *FGrH* 338 F 12; ARIST. *Rhet.* 2,23, 1397 b 7-8.

by bringing Aristarchus before the *Boule*, probably through *ephegesis* followed by *apagoge kakourgon*.[130] Since Nicodemus wanted to sue Demosthenes for desertion, and the reconciliation between Demosthenes and Meidias that Nicodemos wanted to bring about failed, Demosthenes' enemies accused him again and again of complicity in this crime. We do not know why Meidias' proposal was rejected by the *Boule*—it is conceivable that there was not enough proof to fulfill the precondition of an *apagoge*, i.e., that the accused had to be the manifest perpetrator of the deed.[131] Nicodemus was found dead and there was no way of knowing for certain who the actual killer was. Aristarchus was the only suspect, but this may not have been enough to validate the *apagoge* procedure. The *bouleutai* knew without doubt that Aristarchus would be immediately executed after a verdict of guilt. To many councilors, this may have seemed an excessive penalty for someone who was only suspected of homicide. After the failure of the *apagoge* procedure, Nicodemus' family resorted to a traditional *dike phonou*.[132] In this trial, Aristarchus was probably convicted *in absentia*, for he went into exile before the trial.

This is the only homicide case we know of in which two different procedures were used separately by different plaintiffs, a fact that has been neglected in research so far. Both parties of plaintiffs had the goal of seeing Aristarchus convicted of homicide, but their underlying intentions were quite distinct. How political the whole affair was is made abundantly clear by the fact that Meidias brought a charge first, although there were relatives who could have launched a *dike phonou* right away. There must have been an understanding between Nicodemus' family and Meidias that he should go first and try to succeed with an *apagoge*, to which anyone who wished (*ho boulomenos*) was entitled. A conviction in an *apagoge* procedure would have

[130] M.H. HANSEN, *Apagoge*, 135-136, nr. 23.

[131] In the case of Agoratus (see above case nr. 4), the Eleven insisted on the stipulation *ep'autophoro* being added.

[132] R. OSBORNE, "Law in Action", 57.

ensured the capital punishment for Aristarchus, whereas a suspect accused in a *dike phonou* of intentional homicide could still go into exile before the end of the trial. Also, Nicodemus' family might have been inhibited from prosecution, feeling intimidated by Demosthenes looming in the background. It was clear from the outset that this trial was a political one, involving much more than ordinary homicide.

The fact that Meidias, Demosthenes' arch-enemy, took care of the case, sent a dramatic message to the Athenian *demos*. This homicide not only concerned the victim's immediate family, but had implications for the general public as well. The fact alone that the conflict between Meidias and Demosthenes was constantly getting worse suggested to the careful observer of the political scene that Demosthenes, somehow, was involved in the affair and that he could even have given the order to kill Nicodemus, Meidias' useful political instrument. A spurious insertion into the deposition to the judges as rendered by Dem. 21,121-122 speaks about an *eisangelia* to the *Boule*. This is false, but whoever the insertor was, the political implications seemed so dominant to him that the way of carrying out this conflict in public closely resembled an *eisangelia*. This extreme way of involving the public did not work. The *bouleutai* rejected Meidias' method, certainly a harsh setback for him in the ongoing conflict with Demosthenes. Meidias and Nicodemus' relatives now had to content themselves with bringing the much less dangerous *dike phonou* before the *Areopagus*. This option was not the preferred one, but it worked. Aristarchus went into exile before the trial even started, which was understood as a tacit confession of guilt. Once more, procedural flexibility had allowed the Athenian *demos* to make some wise decisions. It did not give in to the bullying of the strongman Meidias and his exaggerated schemes and machinations, but it did not let the suspect go scot-free either.

(15) 371-366 BC: Isaeus 9 (*On the Estate of Astyphilus*) reports about an intra-familial killing one generation back in

time.[133] The brothers Thydippus and Euthycrates could not come to an agreement regarding the just division of a piece of land. Instead of pleading their case before an arbitrator or going to court, they resorted to violence. During the fistfight, Euthycrates was injured so seriously that he died a few days later. G. Herman is right in observing that this homicide did not trigger a blood feud or a vendetta.[134] Euthycrates, on his deathbed, just banned Thydippus and his offspring from his tomb.[135] We do not hear anything about the reaction of Euthycrates' family except for the fact that Thydippus' homicide of his own brother did have repercussions on the next generation. Astyphilus, Euthycrates' son, did not talk with his cousin Cleon, Thydippus' son. They hated each other for all their lives, a low-key reaction indeed, if this was the only measure taken against the killer's family. But Astyphilus' half-brother, who sued Cleon after Astyphilus's death in an inheritance case, which is the preserved speech, came back to this homicide and used this incident in his argumentation. Although we do not have any information on the immediate family's reaction to the killing, we get some insight into the neighboring farmers' mentality in rural Attica. Although many of them became witnesses of the deed while tilling their fields, they did not want to give evidence in court on such a serious case. The killing of one's brother had almost mythical dimensions and so the farmers preferred minding their own business. We discern a similar attitude of staying aloof in Ps.-Dem. 47 (see below case nr. 17) and Plato's *Euthyphro* (see above case nr. 11). Very clearly, Athenians regarded homicide, even intra-familial killing, as a family business and did not want to take a bloody clash with fatal consequences to the level of the *polis*.

(16) 355 BC: In Demosthenes' speech for Diodorus against Androtion (Dem. 22), Diodorus tries to reveal Androtion's bad

[133] Isaeus 9,16-18.
[134] G. Herman, *Morality and Behaviour*, 161-162.
[135] Isaeus 9,17-19.

character. In his attempt to harm Diodorus as much as possible, Androtion even went so far as to insinuate that Diodorus had killed his own father.[136] The fact that he did not bring charges of homicide against Diodorus shows that the normal procedure in the prosecution of homicide was a private suit, the *dike phonou*, to which Androtion, as a non-relative of the victim, was not entitled.[137] Instead, Androtion brought a *graphe asebeias* against Diodorus' uncle, Euctemon, for having associated with the parricide. The idea of pollution formed the basis for this reproach. In fact, a public suit against homicide addresses just these concerns and one wonders why Androtion did not have recourse to the *apagoge phonou*, the substantive charge of which was probably that the murderer had defiled the holy places and the *agora* by frequenting them. We do not know anything about Androtion's deliberations, but to him at least bringing a *graphe asebeias* against the victim's brother, Diodorus' uncle, must have seemed easier than attacking Diodorus himself. Androtion failed in this respect.

(17) Ca. 350 BC: Ps.-Dem. 47 gives us wonderful insight into a long-term upper class conflict that even entailed battery and homicide. The trierach Theophemus had not passed on the naval equipment to the incoming trierarch, the plaintiff of this speech. When Theophemus did not respect an order of the court and would neither give back the equipment nor pay its value, the *Boule* encouraged the plaintiff with a decree to exact what was due to him in whatever way he could. In the absence of a police force, the council of the city was completely dependent on the new trierarch's capability to carry out the order himself. In other words, the council permitted the

[136] DEM. 22,2.

[137] W. SCHMITZ, *Nachbarschaft*, 234, n.286. G. GLOTZ, *La solidarité de la famille dans le droit criminel en Grèce* (Paris 1904), 436-437 states that the Athenians did not even permit a public suit in the case of parricide. The *graphe asebeias* threatening all those who had social contacts with the parricide created a material and moral vacuum around the killer. He had to go into exile forever.

use of self-help by a private citizen, which can be equated to an institutionalization of self-help.[138] The plaintiff went to Theophemus' house and wanted to confiscate some of his property to recover at least the value of the equipment that Theophemus owed him. It did not work. Theophemus would not tolerate the seizure of some of his property and struck a first blow against the plaintiff, who immediately returned the blow. It deserves mentioning that the new trierarch took an officer from the magistrate with him to secure the naval equipment.[139] Even the presence of a state official did not carry any weight whatsoever. After this brawl, the plaintiff filed a charge of battery against Theophemus, but finally accepted a very moderate compensation of twenty-five drachmas and the promise that Theophemus would agree to an arbitration procedure after a sea trip. Back in Athens, Theophemus delayed the action against him, but sued his opponent in turn. Through the false testimony of his friends Euergus and Mnesibulus, Theophemus won the case and the accused, the plaintiff of the speech Ps.-Dem. 47, was fined 1,100 drachmas and had to pay further court-related costs. He immediately brought an action for false testimony against Euergus and Mnesibulus, which is the preserved speech. Since the plaintiff could not pay the full sum right away, Theophemus went to his farm and seized property far above the value of the sum owned. The next day, the plaintiff did pay the money. Nevertheless, Theophemus and Euergus returned to the plaintiff's farm and brutally carried off property. On this occasion, an old woman, the plaintiff's nurse, wanted to prevent the intruders from taking a pitcher. She hid it under her garment and would not hand it over to Theophemus and Euergus. They treated her with such cruelty that she died six days later. Unlike most other scenes of homicide in the Attic

[138] D. PHILLIPS, *Homicide*, 252.

[139] DEM. 47,35: λαβὼν παρὰ τῆς ἀρχῆς ὑπηρέτην [...]. A.R.W. HARRISON, *The Law of Athens*, II 189.

orators, this incident is described in graphic detail.[140] The plaintiff was at a loss of what to do. The woman had lived in his household and was clearly his dependent, but not his slave. He asked the *exegetai* for advice. Their answer is one of the most debated passages in all of Athenian legal documents,[141] but we can say the following: Since the plaintiff was neither a relative nor the master of the deceased woman, he was not supposed to file charges before the king archon, but only to make a proclamation against the murderers in general terms. He was advised only to perform the appropriate rites to cleanse his house from pollution and to take vengeance in some other way.[142] In whatever terms we want to understand the broad semantics of τιμωρεῖν—the *exegetai* deliberately chose a vague formulation—they encouraged the plaintiff to resort to some kind of self-help within the latitude of Athenian law.[143] How exactly the plaintiff would go about this business, we do not know. To what extent the high social rank of the murderers and the low rank of the victim played a role in the *exegetai*'s decision, we cannot say.

(18) Ca. 350 BC: In Ps.-Dem. 58, 28-29, Epichares in his attempt to denigrate Theocrines' character reproaches him of not having reacted adequately to his brother's violent death. At first, Theocrines appeared to be shocked and searched for the killers of his brother. When he found out that Democharés was one of them, he promised to bring him to justice before

[140] DEM. 47,58-62; 47,67.

[141] DEM. 47,68-70. Cf. above note 117 and M.H. HANSEN, *Apagoge*, 110-111; E. GRACE, "Note".

[142] DEM. 47,70: ἄλλῃ δὲ εἴ πῃ βούλει, τιμωροῦ.

[143] D. PHILLIPS, *Homicide*, 134 on the magistrates' condonement of extra-legal self-help in this case. From DEM. 53, for example, it is also clear to what extent the individual had to resort to self-help and vengeance was an accepted social value. In this context, using the law courts against one's enemy may be understood as another form of taking vengeance (cf. above note 87). D.S. ALLEN, *The World of Prometheus*, 69 could show that the noun *timoria* means the "reassessment of honor and status in punishment".

the *Areopagus*, i.e., on grounds of intentional homicide. Although the facts were clear and Theocrines had a strong moral obligation to fulfill in avenging the homicide of his brother, in the end Theocrines did not bring charges, but accepted a sum of money in compensation. According to Athenian law, accepting blood money was legitimate, but unusual and obviously frowned upon during the fourth century. Not to take vengeance for one's relative, let alone in a case of intentional homicide, was a sign of personal weakness and cowardice.[144] Above all, Theocrines benefitted from his brother's death financially. The whole incident aroused the judges' indignation. It is interesting to note, however, how quickly and easily the parties involved could cope with a homicide case out of court.

VI. *Conclusion*

The scrutiny of all known homicide cases including the reactions they caused has once more cemented the view that Athenian homicide law was basically privately oriented, with the *dike phonou* being the primary procedure to seek vengeance in a case of homicide. Concerning the tension between self-help and state control, however, the Athenian homicide law was a hybrid.

On the one hand, the state could not do without private initiative and self-help. The lodging of a *dike phonou* was completely dependent on private initiative. If one was rich enough, one could hire a logographer, but there was no official prosecutor appointed by the state to help the family. The *apagoge* procedure with its summary arrest preserved the old notion of self-help even more clearly than the *dike phonou*.[145]

[144] G. GLOTZ, *La solidarité*, 439-440.

[145] This is the reason why H.D. EVJEN, "Apagoge", 413 dates the *apagoge* prior to the introduction of the *dike phonou*. The latter had the function to channel self-help, but not to supplant it.

Anyone who thought that the order of the state was in danger could intervene and arrest the malefactor.

On the other hand, Drakon had taken decisive steps to scale back the blood feud, at least in cases of unintentional homicide. The family's desire to take vengeance was carefully channeled and led into two legal avenues, the *dike phonou* and the *apagoge* procedure. Also the latter, as archaic as it may seem and as much as it may smack of self-help, was a legalized and institutionalized public suit within the purview of Athenian law.[146] In probably no other domain of Athenian law did the lawgiver go to greater lengths to reduce the risk of people taking the law into their own hands.

Speaking of Athenian procedural flexibility in general, we should begin seeing the various procedures in relation to each other. Behind the choice of procedure lay important decision-making processes that not only influenced the initiation and unfolding of the trial, but also conveyed symbolic messages to the audience concerning the self-image of the prosecuting party. The choice of procedure itself, including the preceding decision-making process, framed a positive self-image and was already the first step in the denigration of the opponent's character. Choosing one procedure out of many was not only a question of legal expediency and social propriety, but also an integral part of the performative actions taken against a criminal. Athenian law was far from being user-friendly, but through its immense procedural flexibility it enabled prosecutor and defendant to craft images of self and other with suggestive force and thus to express opinions and biases that go far beyond legal technicalities.

[146] H.D. EVJEN's, "Apagoge", 407 characterization of the *apagoge* as the "illegal enforcement of criminal law" is therefore wrong.

Appendix

List of Attesteded Homicides in Athens and Their Form of Prosecution (422-348 BC)

Nr. in text	Date	Source	Plaintiff	Murderer	Victim	Procedure
1	422-413	Antiphon 5	Herodes' relatives	Euxitheus of Mytilene	Herodes	*apagoge*
2	411	Thuc. 8,90-92; Lys. 13,70-72; Lycurg. 1,112-115. Cf. Lys. 7,4; 20,9-11; 25,9.	Phrynichus' relatives/friends	Thrasyboulus from Kalydon, Apollodorus from Megara	Phrynichus	*apagoge*
3	After 403/2	Lys. 13,55-57	relatives of democratic leaders?	Menestratus	democratic leaders	*apagoge*
4	399 or later	Lys. 13	Dionysodorus' brother Dionysius and victim's brother-in-law	Agoratus	democrat Dionysodorus	*apagoge*
5	364-362	*IG* II^2 111 = Tod, *SGHI* II 142 = *Syll.*^{3} 173 = Rhodes – Osborne, *GHI* 39 = Brodersen – Günther – Schmitt, *HGIÜ* II 231	Satyrides, Timoxenus, Miltiades (Aesion's relatives/ friends?)	Antipatrus from Ceos	Aesion (Athenian *proxenos*)	*apagoge*?
6	420-411	Antiphon 1	victim's son	plaintiff's stepmother	plaintiff's father	*dike phonou*
7	419/8	Antiphon 6	victim's brother Philocrates	choregus	Diodotus	*dike phonou*
8	After 403/2	Lys. 12	victim's brother Lysias	Eratosthenes	plaintiff's brother Polemarchus	*dike phonou?*

9	402	Isocr. 18,52-54	Callimachus and his brother-in-law	Cratinus	slave woman (faked homicide)	*dike phonou*
10	400-380	Lysias 1	Eratosthenes' relatives	Euphiletus	Eratosthenes	*dike phonou*
11	400/399	Plato, *Euthyphro* 4	Euthyphro	Euthyphro's father	a *pelates* (slave?) (fictional case)	*dike phonou*
12	After 349	Ps.-Dem. 59,9f.	Stephanus	Apollodorus	woman from Aphidna (false accusation)	*dike phonou*
13	Before 348	Dem. 21,71-75	Boeotus' relatives	Euaeon	Boeotus	*dike phonou*
14	348	Dem. 21,104-122 and *scholia ad* Dem. 21, 102, 104, 116, 205; Aesch. 1,171-172; 2,148; 2,166 with *scholia*; Din. 1,30-31; 1,47; Sopater (VIII p. 48 Walz); Idomeneus *FGrH* 338 F 12; Arist. *Rhet.* 2,23, 1397 b 7-8).	1. Meidias 2. Nicodemus' relatives	Aristarchus	Nicodemus of Aphidna	1. *apagoge* failed 2. *dike phonou*
15	371-366	Isaeus 9,16-19	N/A	victim's brother Thydippus	Euthycrates	no reaction known
16	355	Dem. 22,2	Androtion	Diodorus	Diodorus' father	*graphe asebeias* against Diodorus' uncle Euctemon
17	ca. 350	Ps.-Dem. 47,58-73	N/A	Theophemus and Euergus	speaker's nurse, previously slave woman	"vengeance in some other way"
18	ca. 350	Ps.-Dem. 58,28-29	Theocrines does not prosecute for homicide	Democharesand others	Theocrines' brother	private settlement through financial compensation ('blood money')

DISCUSSION

R. MacMullen: On the question of "Athenian law" and "Athenian society", as I listened to the exposition, I tried to recall some of the more general facts about the two, and the question, really how representative of the two are the 18 law cases presented to us. Suppose, as my best guess or recollection, that we have a city of 50,000 and a total population of 300,000 (even if quite mistaken the figures will serve for the question) — then in that case the laws are passed by a legislative assembly of some tiny proportion, a mere two or three thousand citizens, among whom only a few hundred in turn will be of the life experience, the stubbornness, the confidence, the wealth, and connections, to venture on the possible kinds of law-suit that are permitted. Excluded from any participation in citizenship itself are women and children, metics, and slaves, and visitors to Athens for business or worship or any other purpose. These have access neither to law-making nor to the enjoyment of its results.

But in addition, the extra-urban population do not appear in the dossier of litigation about homicide. I assume that is not the accident of the sources. The rural population generally don't come into the city.

All these excluded, amounting to, let us say, 99% of Athenian society, presumably were as prone to kill each other as the privileged of the 18 cases. Yet we hear of no great ill effects in society, no prevailing anarchy or chaos. So the 99% had their own practices for the tolerable control of violence — call those practices "Athenian law" or by any other name. It appears that we can have no knowledge of all this area of life, our sources being so exclusively occupied by the elite.

W. Riess: You rightly address a fundamental problem of Athenian democracy: How democratic in our sense was democratic Athens? The exclusion of vast parts of the population from political participation should prevent us from believing that the rule of law held uncontested sway in Athens. Moreover, our sources are far from being representative and, as you aptly observe, distorted by the fact that they were primarily shaped and transmitted by the elites. Nonetheless, I am inclined to think that there is reason to be somewhat more optimistic. It is certainly true that the few instances we can grasp in the evidence are just the tip of the iceberg of all homicide cases that must have occurred, but the few we have knowledge of do give us important insights. Herodes' relatives may have been humble klerouchs in Mytilene. Euphiletus had an estate in the countryside, which he tended to on a regular basis. Euthyphro's father was responsible for the death of a dependant worker, a *pelates*, and sent himself for the *exegetai* in Athens to ask them how he should behave. This case is fictional, but telling. Thydippus and Euthycrates and their descendants were farmers in the countryside. This is not to say that other cases of homicide could not have been treated differently, according to social and moral practices that might have had only little to do with the official law of Athens, but it is hard to imagine what these would have been. Women, children, and slaves stood under the complete control of their respective *kyrios*, an Athenian citizen. A metic had to have a *prostates* who represented him in court. The web of social dependencies and mutual obligations was closely knit, also and especially in the countryside, where people in the *demes* lived in face-to-face societies. Homicide cases are relatively rare in any given society compared to petty crimes like theft, and it is conceivable that in such extreme cases, people would have bothered to turn to the competent magistrates in the city of Athens and ask for their advice on how to seek redress. According to Gabriel Herman's theory ("How Violent was Athenian Society?" in *Ritual, Finance, Politics. Athenian Democratic Accounts Presented to*

David Lewis, ed. by R. Osborne – S. Hornblower [Oxford 1994], 99-117; Id., *Morality and Behaviour in Democratic Athens. A Social History* [Cambridge 2006], 237ff.), it was the community of the democratically oriented hoplite citizens who, in theory, would also rise up in arms in case of an internal threat in order to bolster, and, if need be, to defend the political, social, and judicial system of Athens against every challenge from in- and outside.

H. van Wees: The sheer complexity of the *dike phonou* is very well brought out in your paper, and your analysis of the symbolic significance of adopting this legal procedure in preference to others is highly persuasive. I wonder, however, whether we should also try to explain the *dike phonou* from the point of view of the state, as opposed to the litigant. The procedure is so demanding that it could hardly have been an efficient way of bringing murderers to justice — but on the other hand it seems ideally designed to inhibit *revenge* killings. Could you say something more on what, in your view, motivated the creation of Athens' various procedures for dealing with homicide?

W. Riess: Thank you for raising this important question. In my contribution, I only concentrated on the litigants' intentions and the symbolic messages they were eager to convey. But in order to complement the picture, you are right, we should also wonder about the lawgiver's intention in designing a procedure as complicated as the *dike phonou*. It seems to me that the lawgiver's primary concern was to cool off emotions on both sides. The lengthy procedure of the *dike phonou* certainly fulfilled this goal. Drakon's aim seems to have been the curbing and controlling of retributive vengeance, i.e., to abolish the blood feud in its unrestrained form. Pursuing a feud was not necessary any more, because the relatives of a killed victim could now file charges for unintentional and intentional homicide. If someone was found guilty of unintentional homicide, he had to go into temporary exile; his goods were not confiscated. This means the malefactor

was punished by being removed from the community for a while. This temporary expulsion must have satisfied the relatives, but at the same time, the life of the defendant was also protected from the blood feud. In the case of intentional homicide, a convicted defendant was executed in classical times, if he had not left the city before the end of the trial to go into lifelong exile. It is unclear when the official execution by state authorities was introduced. The emergence of the various homicide courts and especially the development of the role and functions of the Areopagus remain a thorny and much contested field of study. G. Thür, "Die Todesstrafe im Blutprozess Athens (Zum dikazein in IG I^3 104, 11-13; Dem. 23,22; Aristot., AP 57,4)", in *Journal of Juristic Papyrology* 20 (1990), 143-156 thinks that originally, the person convicted of intentional homicide by the *ephetai*, was handed over to the slain victim's relatives who could then do with him what they wanted, i.e., kill him legally. Since there had been a verdict rendered by representatives of the community, this killing was no private vengeance any more. The desire for retributive killing was thus satisfied, but approved of by the community and thus controlled. According to G. Thür, it was Solon who passed cases of intentional homicide into the competence of the Areopagus and had the killing of the convicted murderer transferred to state magistrates. This was the introduction of the capital punishment, now meted out by official representatives of the city.

C. Brélaz: Vous avez précisément montré la coexistence, dans la procédure pénale athénienne, de compétences revenant aux particuliers (arrestation, accusation) et de prérogatives étatiques (jugement, mise à mort). Cette situation est semblable à Rome: malgré la restriction, au cours de l'époque républicaine, des cas où était toléré le recours à la justice privée, les principes d'autodéfense ne furent pas entièrement abolis sous le Principat. Il est intéressant de noter qu'au contraire de ce qui s'est passé pour l'État moderne, cette tendance à la monopolisation de la force et de la justice pénale par les pouvoirs publics n'a pas

abouti à une substitution radicale de la justice privée par des structures étatiques. Un accroissement des tâches de l'État en matière de répression criminelle est-il néanmoins perceptible à Athènes sur le long terme?

W. Riess: On a methodological level, it is absolutely worthwhile comparing the legal systems of different cultures. As you rightly observe, the growing tendency of the state to monopolize the use of force from the Early Modern Period on is a phenomenon that I think we can find in the Roman world. Over the centuries, the Roman emperors and magistrates certainly tried to concentrate law enforcement in their hands. At the same time, however, we have to admit that even the quite successful attempts to systematize Roman law in Antiquity—a great achievement of the Roman jurists and a major factor in Rome's cultural legacy—did not lead to anything we could call "the monopoly of power", as we are used to finding it in the modern Western state. In the field of ancient Greek law, we can speak even less of efficient endeavors in this direction, although they were not entirely absent. First of all, legal conditions were very diverse in Greece with different conditions in every *polis* and region. We know a lot about the Attic legal system, but we should keep in mind that the evidence that is preserved only provides us with a glimpse of the original system. The sources from the classical epoch only cover approximately two hundred years and it is even difficult to trace the outlines of Attic law in Hellenistic times. What we do have from classical Athens does not make us very confident that Athenians even strove for a "governmental" monopoly of power. As I said in my paper, Attic law remained dependant on self-help to a large degree and could not even do without it. It is only in homicide law that we observe the deliberate wish from the part of the state to transfer the claim of the victim's family to seek vengeance to homicide courts. The channeling and ultimately even the abolishment of blood feud is a crucial step in the emergence of any penal system and cannot be overestimated in its significance for

the cultural development of Athens. But homicide law seems to have been an exception. In all other domains of Athenian law, self-regulation and self-help remained constituent parts of the system of justice.

H. van Wees: In the opening part of your paper you interestingly analyze a range of factors which may help to explain a comparatively high level of internal public security in the absence of a police force or other effective central coercive authority. Most of these factors, however, are surely common to many ancient (and indeed modern) societies and therefore cannot in themselves explain the exceptional stability of fourth-century Athens. My impression is that perhaps we should look for an explanation of this stability not so much in the *means* of maintaining public order as in the degree to which *causes* for conflict — such as social and economic inequality — were minimized in classical Athens. Would you agree?

W. Riess: You are perfectly right in observing that many of the means that seem to have made Athens relatively stable and peaceful are also to be found in other and even modern societies. Some of theses factors may have weighed more heavily in Athens than in other communities, but a quantitative assessment of the efficiency of these measures is impossible. The search for the reasons for conflict and violence is a traditional method exercised by sociologists, jurists, and criminologists. Among the factors causing strife and turmoil, economic, social, and political inequality need to be considered. On the one hand, G. Herman, *Morality and Behaviour in Democratic Athens* (Cambridge 2006), 374-391 has suggested that at least in classical Athens, economic inequalities had been reduced to a minimum. Sources of income for the *demos* were the silver mines of Laureion, the allies' tributes or taxes, and booty from the wars, to name just a few. In addition, more land than ever before was cultivated by Attic farmers. On the other hand, economic and social discrepancies continued to exist throughout

the classical period. Let us not forget that Solon refrained from any radical redistribution of the land (*anadesmos ges*) and was determined to grant everyone only what was due to him (Arist. *Ath.Pol.* 11-12). Athenians seem to have tolerated a considerable amount of economic and social stratification in their society. Payments for the attendance of law courts, assembly of the people, and theater were not the roots of a modern welfare system. Athenians reacted violently, however, towards any attempt at overthrowing the democracy, as attested in 411 and 404/3 BC. From this perspective, we could say that it was the political equilibrium and the participation of a vast majority of citizens in the political decision-making process that made Athens relatively safe and stable during the fifth and fourth century BC.