CHAPTER ONE
(Drakon's Code [IG i^3 104])

We will start with a consideration of a part of the ancient law on homicide. The text is taken over from Ronald Stroud's admirable monograph,[11] and runs as follows:

Διόγν[ε]τος Φρεάρριος ἐγραμμάτε[υε]
Διοκλῆς ἔρχε

ἔδοχσεν τῆι βουλῆι καὶ τõι δέμοι· Ἀκα[μ]αντὶς ἐπ[ρ]υτάνευε, [Δ]ι ό[γ]-
νετος ἐγραμμάτευε, Εὐθύδικος [ἐ]πεστάτε..Ε...ΑΝΕΣ εἶπε· τὸ[ν]
Δράκοντος νόμον τὸμ περὶ τõ φό[ν]ο ἀναγρα[φ]σά[ν]τον οἱ ἀναγραφῆ-
ς τὸν νόμον παραλαβόντες παρὰ τõ βα]σ[ι]λέ[ος με]τ[ὰ τõ γραμμ]ατέο-
ς τῆς βουλῆς ἐ' στέλει λιθίνει καὶ κα[τ]α[θ]έντ[ον πρόσ]θε[ν] τῆς στο-
ᾶς τῆς βασιλείας· οἱ δὲ πολεταὶ ἀπομι[σθο]σ[άντον κατὰ τὸν ν]όμο-
ν, οἱ δὲ ἑλλενοταμίαι δόντον τὸ ἀρ[γ]ύ[ρ]ι[ον].

Πρõτος Ἄχσον
καὶ ἐὰμ μὲ 'κ [π]ρονοί[α]ς [κ]τ[ένει τίς τινα, φεύγ]ε[ν· δ]ι-
κάζεν δὲ τὸς βασιλέας αἴτι ο[ν] φόν[ο] Ε.....[17].....Ε [β]ολ-
εύσαντα· τὸς δὲ ἐφέτας διαγν[õ]ν[α]ι . [αἰδέσασθαι δ' ἐὰμ μὲν πατὲ]ρ ἔ-
ι ἢ ἀδελφὸ[ς] ἢ *hυ*ῆς, *há*παντ[α]ς, ἢ τὸν κ ο[λύοντα κρατῆν· ἐὰν δὲ μὲ] *h*οῦ-
τοι δοσι . μέχρ' ἀνεφ[σι]ότετος καὶ [ἀνεφσιõ, ἐὰν *há*παντες αἰδέσ]α σ-
θαι ἐθέλοσι, τὸν κο[λύ]οντα [κ]ρα[τῆν· ἐὰν δὲ τούτον μεδὲ *h*ῆς ἔι, κτ]έ-
νει δὲ ἄκο[ν], γνõσι δὲ *h*οι [πε]ντ[έκοντα καὶ *h*ῆς *h*οι ἐφέται ἄκοντ]α
κτῆναι, ἐσέσθ[ο]ν δὲ *h*[οι φ]ρ[άτορες ἐὰν ἐθέλοσι δέκα· τούτος δ]ὲ *h*ο-
ι πεντέκο[ν]τ[α καὶ] *h*ῆς ἀρ[ι]στ[ίνδεν *h*αιρέσθον. καὶ *h*οι δὲ πρ]ότε[ρ]-
ον κτέ[ν]α[ντ]ε[ς ἐν] τõ[ιδε τõι θεσμõι ἐνεχέσθον. προειπῆν δ]ὲ τõι κ-
τέναν[τι ἐν ἀ]γορ[ᾶι μέχρ' ἀνεφσιότετος καὶ ἀνεφσιõ· συνδιόκ]εν
δὲ [κ]ἀνεφσ[ιὸς καὶ ἀνεφσιõν παῖδας καὶ γαμβρὸς καὶ πενθερὸ]ς κ-
αὶ φρ[ά]τ[ο]ρ[ας.....[36]..... αἴτι-
ος [ἔι] φό[νο.....[26].....τὸς πεντέκοντ]α καὶ
*hέν*α.....[42]..... φόνο
*hέλ*οσ[ι.....35..... ἐὰν δ]έ [τ]ις τ-

[11] R. Stroud, *Drakon's Law on Homicide* (Berkeley and Los Angeles, 1968), p. 5. The reader should consult Stroud's original to ensure greater accuracy.

ὸ[ν ἀν]δρ[οφόνον κτένει ἢ αἴτιος ἢι φόνο, ἀπεχόμενον ἀγορᾶ]ς ἐφο-
ρ[[α]ς κ[α]ὶ [ἄθλον καὶ *hι*ερὸν Ἀμφικτυονικῶν, *hό*σπερ τὸν Ἀθεν]αῖον κ-
[τένα]ν[τα, ἐν τοῖς αὐτοῖς ἐνέχεσθαι· διαγιγνόσκεν δὲ τὸς] ἐ[φ]έτα[ς]
...E.....39.....TEIEMEΔ
.....45.....ONAT.
.....45.....ANA..
N.....39.....ἄρχον]τα χερ-
ὸν ἀ[δίκον.....30.....χερ]ὸν ἀδίκον κ-
τέ[νει.....]Σ[.....19.....διαγιγνόσκ]εν δὲ τὸς ἐ-
[φέτ]ας.....36.....ΕΙΣΕ ἐλεύθ-
ε[ρ]ος ἔ[ι. κα[ὶ ἐὰν φέροντα ἢ ἄγοντα βίαι ἀδίκος εὐθὺς] ἀμυνόμενο-
ς κτέ[ν]ει, ν[εποινὲ τεθνάναι.....19.....ΣΕΧΟΝΤΟΒ.[12]

The extant fragment of Drakon's Code (IG i^3 104), though badly worn, preserves a significant portion of the ancient law on unintentional homicide.[13] While many problems arising from this code remain to be

[12]Stroud's (1968) translation (6f.) of ll. 11-38 runs thus: "Even if someone kills someone without premeditation, he shall be exiled. The Basileis are to adjudge responsible for homicide either...or the one who instigated the killing. The Ephetai are to give the verdict. Pardon is to be granted, if there is a father or brother or sons, by all, or the one who opposes it shall prevail. And if these do not exist, pardon (15) is to be granted by those as far as the degree of cousin's son and cousin, if all are willing to grant it; the one who opposes it shall prevail. And if there is not even one of these alive, and the killer did it unintentionally, and the Fifty-One, the Ephetai, decide that he did it unintentionally, then let ten members of the phratry admit him to the country, if they are willing. Let the Fifty-One choose these men according to their (20) rank. And let also those who killed previously be bound by this ordinance. A proclamation is to be made against the killer in the agora by relatives as far as the degree of cousin's son and cousin. The prosecution is to be shared by cousins, sons of cousins, sons-in-law, fathers-in-law, and members of the phratry.....responsible for homicide...the Fifty-One... (line 26). If someone kills the slayer or is responsible for his being killed while he is avoiding a frontier market, games, and Amphiktyonic rites, he shall be treated on the same basis as one who kills an Athenian. The Ephetai shall bring in the verdict. (Line 33) ... one who is the aggressor... (line 34)... slays the aggressor... (line 35) .. the Ephetai bring in the verdict...(line 36)...he is a free man.... And if a man immediately defends himself against someone who is unjustly and forcibly carrying away his property and kills him, the dead man shall receive no recompense...." For a recent German translation, with brief commentary, see *Inschriftliche Gesetzestexte der frühen griechischen Polis aus dem Nachlass von R. Koerner*, ed. K. Hallof (Köln, 1993), 27-41.

[13]IG i^3 104 (= i^2 115 = M.-L. 86 = Tod GHI 87) is restored with the help of several passages from the Demosthenic corpus (see Koerner, 29n.2). The contents of IG i^3 104 are widely regarded as an excerpt drawn from a larger body of homicide laws (e.g., Lipsius, 25f.; A. Ledl, *Studien zur älteren athenischen Verfassungsgeschichte* [Heidelberg, 1914], 293ff.; Latte, "Mord im griechischen Recht," *RE* 16.1, 1933, 281 [=*Kl. Schr.*, 383]; Ruschenbusch (1960), 130; R. Meiggs and D. Lewis, *A Selection of Greek Historical Inscriptions to the End of the Fifth Century* B.C., rev. ed. [Oxford, 1988], 266). This is denied by Gagarin (1981), who thinks that the extant portion of the law contains a discussion of both intentional and unintentional homicide; see E. Carawan, "Trial of Exiled Homicides and the Court of Phreatto," *RIDA*, 3^e ser., 37, 1990, esp. 57ff.; Thür (1990), 146, and elsewhere; also D. Nörr, "Zum Mordtatbestand bei Drakon," in *Studi in onore di A. Biscardi* (Milano, 1983), 4:631-53, who claims (independently of Gagarin [653n.63]) that *only* unintentional homicide had been regulated by Drakon's code. On all this, however, see the criticisms by Sealey (1983), 291ff.; Wallace (1985), 16-20; MacDowell, *CR*, n.s., 32, 1982, 209f.; N. R. E. Fisher, *G&R*, 2nd ser., 29, 1982, 203; also Koerner, 32. Even apart from the difficult ellipsis which his position entails, Gagarin's argument that several aspects of the extant code imply that the discussion refers also to intentional homicide (see [1981], 45f., 50, 59f., 61f., 72-79) may more properly be an argument for the view that we are indeed dealing simply with an excerpt: so Ruschenbusch (1960), 130; *Gnomon* 52, 1974, 816; Wallace, 17f. For other such excerpts, see A. Boegehold, "The Establishment of a Central Archive at Athens," *AJA* 76, 1972, 24n.5; also R. Thomas, *Oral Tradition and Written Record in Classical Athens* (Cambridge, 1989), 48. Stroud's theory ([1968]; see Heitsch [1984], 22n.57; and, with a *caveat*, Koerner, 31f.) that the intentional law *followed* the extant portion is well criticized by Gagarin himself (1981) 72-79; also P. J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia* (Oxford, 1981), 111f.; D. Lewis, *CR*, n.s., 21, 1971, 390f.; B. M. Caven, *JHS* 91, 1971, 193. If the traditional view is correct, then 104.11 καὶ ἐὰμ μὴ 'κ [π]ρονο[[α]ς [κ]τ[ένει] will mark the beginning of the law dealing with unintentional homicide; and as l. 56 (cp. Stroud, 16ff.) likely marks the end of these provisions, we have an adequate idea (see Koerner, 31) of how much of the law has been preserved.

[14]That IG i^3 104 is a nearly verbatim copy should be beyond dispute. See Stroud (1968), 50 (ἀριστίνδην), *pace* Wallace (1985), 232n.42; 51 (on the retroactive clause of ll. 19f.); 53 (ἐφόρια ἀγορά); 54ff. (on Dem. 23.28; see n.18 infra); also 60-64; Gagarin (1981), 69f., 153-56. For a possible linguistic anachronism (ll. 11f. δικάζεν), see Stroud, 42ff., 63f.; also H. J. Wolff, "The Origin of Judicial Litigation Among the Greeks," *Traditio* 4, 1946, 71-8; Wallace, 26f.; Heitsch, "Der Archon Basileus und die attischen Gerichtshöfe für Tötungsdelikte," in *Symposion 1985: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, ed. Thür (Köln, 1989), 84n.29; Thür, (1990), 150ff.; for θεσμοῖ, restored in l.20, see Jacoby (1949), 309n.64; Rhodes, 177. Attempts to deny that IG i^3 104 is essentially a verbatim copy (e.g., Boegehold *CP* 68, 1973, 153; Ruschenbusch [1974], 816; D. Lateiner, *AJP* 104, 1983, 405; T. Figueira, "Draco and Attic Tradition," in *Excursions in Epichoric History: Aiginetan Essays* [Lanham, 1993], 236ff.; cp. idem, "The Strange Death of Draco on Aigina" in *Nomodeiktes: Greek Studies in Honor of Martin Ostwald*, edd. R. Rosen and J. Farrell [Ann Arbor, 1993], 291-95; see n.18 infra) are based on little in the way of real evidence, and the one substantial argument generally offered, that there appear to be variations in the way in which the *ephetai* are referred to (G. Smith, "Dicasts in the Ephetic Courts," *CP* 19, 1924, 353-58), has no merit; see Stroud, 48f. That there may have been no such thing as an *exact* verbatim copy (see Thomas, 47f.; cp. Dem. 43.57 ἐντὸς, with 104.15 μέχρ' [with Stroud, 52; also Humphreys {1991}, 25n.28]; 104.18 ἐσέσθον δὲ, with Heitsch [1984], 8) does not at all affect the point at issue.

solved, there can be little doubt that the extant portion of the code, inscribed in the year 409/8 B.C. as part of a general "revision" of the laws, is a more or less verbatim copy of a much older original.[14] This supports the view that the activity of the *anagrapheis*, at least as regards IG i^3 104, was simply that of a "re-publication" of Drakon's laws, and not

any sort of general revision.[15] Clearly, we may presume that the ancient code, or at least that portion of it that concerned the law on unintentional homicide, was still very much in force at the close of the Fifth Century. This need not occasion any great surprise. The ancient sources continually report that all Attic homicide laws go back to the time of Drakon, and that they were left unchanged by subsequent lawgivers.[16] To be sure, we cannot take such comments at face value, since these claims are part of an established pattern whereby all the laws of the *polis* were routinely ascribed to one or other of the great lawgivers.[17] Yet nearly all the specific attempts made by a wide range of scholars to prove that major changes had been introduced into the homicide codes *after* the time of Drakon are highly speculative and fall far short of certainty.[18] At any rate, regardless of how this particular problem is ultimately resolved, few will dispute that the later evidence, drawn largely from the orators, remains broadly consistent with the procedures laid down in the ancient code.

[15]Stroud (1968), 50ff., 60-64, with nn.124-125; Gagarin (1981), 69f.; N. Robertson, "The Laws of Athens, 410-399 BC: The Evidence for Review and Publication," *JHS* 110, 1990, 56ff.

[16]Ar. Ἀθ. Πολ. 7.1; Ant. 5.14; 6.2; Dem. 20.158; 23.51; [47].68-73; And. 1.81-83; Plut. *Sol.* 17.1; cp. J. Schreiner, *De Corpore Iuris Atheniensium* (Bonn, 1913), 74-91; Stroud (1968), 76f.; Rhodes, 110.

[17]See Schreiner, 12ff.; C. Hignett, *A History of the Athenian Constitution to the End of the Fifth Century BC* (Oxford, 1952), 17-27; Rhodes, 109ff., 131ff.; Figueira (1993), 237f.; also Hansen, "Athenian *nomothesia* in the Fourth Century BC and Demosthenes' Speech against Leptines," *Cl. Med.* 32, 1980, 90ff.; idem, "Solonian Democracy in Fourth-Century Athens," *Cl. Med.* 40, 1989, 71-99.

[18]Limitations of space preclude a full discussion of this important topic. Suffice it to say that every claim of innovation has produced a torrent of counter-claims. Of course, *some* innovations can be documented with certainty, though these have received far less attention. So, e.g., Dem. 23.28 (see n.14 supra; also n.176 infra), which may form the substance of 104.30-31, refers certain cases to the Heliaea, which must be post-Drakontian; see Stroud (1968), 54-56; idem, *The Axones and Kyrbeis of Drakon and Solon* (Berkeley, Los Angeles, and London, 1979), 11n.38; Gagarin (1981), 25f.; Ruschenbusch (1960), 139f., with n.45; Latte (1931), 44n.23 (= *Kl. Schr.*, 264); also, more generally, Hansen, "The Athenian *Heliaia* from Solon to Aristotle," *Cl. Med.* 33, 1981-82, 9-47; idem, *The Athenian Ecclesia II: A Collection of Articles 1983-89* (Copenhagen, 1989), 258-62. But all those changes that can definitely be established without recourse to speculation almost always turn out to refer to relatively minor procedural points. This fundamental conservatism in the matter of Attic homicide law is affirmed (despite current fashions) by MacDowell (1963), 5-7; W. T. Loomis, "The Nature of Premeditation in Athenian Homicide Law," *JHS* 92, 1972, 86n.4; Hansen (1976), 7, 113-21. Even Koerner (30f.), who thinks that we must admit alterations, is duly cautious when it comes to all specifics.

Unfortunately, the text of the code is not quite so explicit as we might have hoped. The fragment, in fact, does not even state who is actually to lead the prosecution.[19] But despite this silence, there can be no doubt that we are meant to infer that it was the agnate relatives who were to lead the prosecution. First of all, ll. 20-23 ascribe an initial proclamation (*prorrhesis*) to the agnate relatives, and then contrast this group with a wider group that may "join in" (συνδιόκειν) in a subsidiary role.[20] Even if the archaic *prorrhesis* is distinct from a legal act of prosecution,[21] this arrangement of clauses can only imply that it is the narrower group that is to initiate proceedings. Besides, [Dem.] 47 explicitly states that the agnate relatives are to prosecute,[22] and this at the very minimum suggests that the code was not thought to be ambiguous on *this* point. Finally, a regulation enjoining the agnate relations to prosecute for murder is fully in keeping with that more general consideration which always must be kept in view when discussing archaic conceptions of homicide. As we have already noted, it is a broad phenomenon that early societies are constructed as an aggregate of kinship units, and that murder is viewed initially as a violation of just this type of unit, and not of any larger corporate entity.[23] There is ample evidence, moreover, that in archaic Greece, as elsewhere, even before the establishment of a written code, the response to homicide was rooted in the family's right of vengeance (*poine*),[24] and that it was handled largely by resorting to self-

[19]See Gagarin (1979), 302; also Panagiotou, 429. 104.13-19 first discuss the right of pardon (*aidesis*) that may be granted after the trial has been completed; ll. 20-23 next refer to an initial proclamation (προειπεῖν) made by the agnate relatives, and then to a wider circle of relations who may "join in" (συνδιόκειν). There is no other place in the code where a regulation concerning the primary right of prosecution might plausibly be located.

[20]See text infra, with n.72.

[21]On the *prorrhesis*, see pp.38ff. infra.

[22]Cp. [Dem.] 47.72 κελεύει γὰρ ὁ νόμος...τοὺς προσήκοντας ἐπεξιέναι μέχρι ἀνεψιαδῶν κτλ.; also §70; Poll. 8.118 (n.6 supra). The speaker of [Dem.] 47 cites this law after consulting τοὺς [sc. νόμους] τοῦ Δράκοντος ἐκ τῆς στήλης, though this need not imply that he actually found this regulation cited in this form; see p.25n.e infra.

[23]See pp.1-2 supra; also Glotz (xi): "Dans cette période, qu'on peut appeler primitive au sens relative du mot et qu'il est plus prudent de nommer héroïque ou protohistorique, on verra les familles, fortement constituées en nombre et en puissance, *souveraines à l'égard des individus et de la cité*, appliquer ou subir les règles de la vengeance privée" (italics mine).

[24]See n.4 supra. For the role played by *miasma*, see pp.82ff. infra; for its early connection with the curse of the victim and with the avenging spirits of the dead (i.e.,

help. Clearly, the early codes were not developed to destroy this right — the importance of self-help survived well into the classical period.[25] The codes were developed rather to control and, perhaps, to subordinate this right to broader interests.[26] It would be surprising, then, if the ancient code had *not* expected prosecution to fall to the narrow circle of relations; and had this not been the case, then surely it is *this* anomaly that we might have expected the code unequivocally to state. For these several reasons, there can be no doubt that Drakon's code envisioned that the primary right of prosecution was to fall to the agnate relatives mentioned in connection with the proclamation.

That the code expected the agnate relatives to lead the prosecution, however, does not prove that *only* the agnate relatives could do so. Yet the text of the code seems to provide sufficient indications that the procedure was viewed restrictively. First, the various injunctions of the code are given in the form of a series of jussive infinitives that are usually understood to be restrictive. MacDowell has claimed that these infinitives, which admittedly state what the agnate relatives *are* to do, cannot be taken to imply the negative proposition that non-relatives are *not* to prosecute. But this argument has been widely and properly rejected on the ground that such an interpretation of the jussives would "create havoc" of our understanding of legal idiom.[27] Kidd has introduced the

with *poine*), see R. Parker, *Miasma: Pollution and Purification in Early Greek Religion* (Oxford, 1983), 106ff.; also Wallace (1985), 236n.93.

[25]Self-help survived most notably in the execution of judgment. While the death penalty was carried out by the state in the 5th Cen. (cp. Dem. 23.69; see Bonner-Smith, 2:276ff.; Latte, "Todesstrafe," *RE* Suppl. VII, 1940, 1599-1619 [= *Kl. Schr.*, 393-415]; MacDowell (1963), 110ff.; M. Gras, "Cité grecque et lapidation," in *Du châtiment dans la cité: Supplices corporels et peine de mort dans le monde antique. Actes de la table ronde de Rome, 9-11 novembre 1982,* Collection de l'École Française de Rome 79, 1984, 75-88; Thür [1990], 147ff.), recourse to self-help was still permitted in the case of an exiled homicide who failed to observe the conditions of exile (Hansen [1976], 99ff.; Rhodes, 645), for adulterers and thieves caught in the act (Hansen [1981], 23ff.; also Latte [1931], 129ff. [= *Kl. Schr.*, 268ff.]), or in the case of one who was otherwise completely *atimos* (for *atimia*, see n.84 infra). More significantly, the execution of all monetary settlements was left to private action even in the 4th Cen.; see Lipsius, 948ff.; Harrison 1:206ff.; 2:187ff.; Gernet (1954-60), 2:196f., with n.1; see n.47 infra.

[26]Cp. Latte (1920), 2f.: "Im Kampf gegen Fehderecht und Selbsthilfe sind Gesetzgebung und Verfahren in Hellas geformt worden"; Thür (1990), 144: "Man kann den Blutprozess der klassischen Zeit als in legale Bahnen gelenkte private Rache charakterisieren"; also Glotz (1904), 302: "de refréner le goût du sang". For traces of vendetta, such as they are, see Latte (1933), 279 (= *Kl. Schr.*, 380f.).

[27]See (*contra* MacDowell [1963], 17) Evjen, 259f.; Gagarin (1979), 304n.10; Kidd, 216. For the imperatival infinitive, see K. Meisterhans, *Grammatik der attischen*

additional argument that MacDowell's non-restrictive interpretation is inconsistent with the law's precise determination of the limits of the requisite relations. If the law takes such pains to define the exact degree of relationship required for prosecution (104.20-21; cp. l. 15) and, we should add, carefully distinguishes this group from those relations who may "join in" (ll. 21-23), then "it surely implies that it is improper or illegal for others outside this relationship" to prosecute.[28] This last argument is persuasive, and MacDowell's comment on the infinitives does nothing to undermine this approach. Consequently, while we may admit that the text of the code is not fully explicit, there are nonetheless clear grounds for believing that the code intended *only* the agnate relatives to prosecute.[29]

Inschriften (Berlin, 1900), 244ff. Obviously, nothing can be determined about the precise significance of these jussive infinitives by trying to infer the logical converse of the injunctions; see (*contra* Gagarin [1979], 303f.) Hansen (1981), 13n.7; also pp.102f. infra. Whatever exceptions might obtain in modern law, there can be no doubt that, in ancient societies, both law and its sphere of application were determined solely by traditional and/or practical needs, and not by the application of logical equivalencies.

[28]See Kidd, 216. The precise meaning of the phrase μέχρ' ἀνεφσιότετος καὶ ἀνεφσιῦ is unclear. See Lipsius, 552ff.; Glotz (1904), 85ff.; Latte (1931), 33ff. (= *Kl. Schr.*, 254ff.); U. Paoli, "L'ΑΓΧΙΣΤΕΙΑ nel diritto successorio attico," *SDHI* 2, 1936, 77ff. (= *Altri studi di diritto greco e romano* [Milano, 1976], 323-61); S. Bianchetti, "ΜΕΧΡΙ ΑΝΕΨΙΟΤΗΤΟΣ in IG I^2 115," *SIFC* 54, 1982, 129-65; Humphreys (1991), 25f.; Sealey (1994), 74ff. It is sometimes supposed that the attempt in ll. 20ff. to specify the exact degree of agnation empowered to prosecute may itself be an innovation on Drakon's part (see, e.g., Humphreys, 36 init). Homer, at least, shows no explicit concern with such formal and arbitrary limits (cp. Gagarin [1981], 5ff.). On the other hand, Homer may not be a reliable guide. Primitive societies tend to be extremely precise and legalistic: see, by way of comparison, the exhaustive accounts of L. Warner, et al., regarding "Murngin Social Organization," in P. Bohannan and J. Middleton, edd., *Kinship and Social Organization* (New York, 1968), 301-57; also Robin Fox, *Kinship and Marriage: An Anthropological Perspective* (Cambridge, 1967), *passim*; for more recent bibliography on kinship patterns generally, see A. Barnard, "Rules and Prohibitions: the Form and Content of Human Kinship," in T. Ingold, ed., *Companion Encyclopedia of Anthropology: Humanity, Culture and Social Life* (London and New York, 1994), 808-12.

[29]Kahrstedt's well-known theory that IG i^3 104.13-19 implies that in the absence of agnate relatives the prosecution would pass to the phratry (see U. Kahrstedt, *Staatsgebiet und Staatsangehörige in Athen* [Stuttgart, 1934], 245; followed by Bonner-Smith, 2:208f.; Hansen [1981], 12n.3), is to be rejected for the simple reason that these lines refer solely to the problem of pardoning, and so (*pace* Humphreys [1991], 24n.23) only to a problem that would be likely to arise at some moment after the trial itself. The lines in question therefore imply nothing at all about the actual right of prosecution. The code, it seems, simply provides a mechanism by which a homicide might be recalled from exile even if the prosecuting relatives were no longer present or alive; cp. Gagarin (1979), 304n.11; (1981), 48ff.; Panagiotou, 429f.; Heitsch (1984), 13ff.

Apart from these textual considerations, one also finds an argument from analogy commonly used to show that prosecution was restricted in the archaic period. As we have seen,[30] the Greeks distinguished between a δίκη and a γραφή. While a γραφή could be brought by 'anyone who wished', a δίκη could only be lodged by the injured party himself (or by his or her *kyrios* on his or her behalf). From this it would seem reasonable to maintain, by analogy with the procedure followed in the case of other *dikai*, that a δίκη φόνου could only be brought by the relatives of the deceased.[31] MacDowell, however, thinks this analogy a poor foundation on which to build.[32] First of all, he notes that in the case of homicide the injured party was no longer around to prosecute. Secondly, as Antiphon 6.6 attests (cp. 5.88-89), homicide proceedings were apparently unique in several important ways, and so they may well have diverged from the usual *dike* also as regards the right of prosecution.

MacDowell's objections, if *prima facie* attractive, turn out on closer scrutiny to have little substance. It is certainly true, as Antiphon says, that homicide cases were in many ways unique, though the reasons that Antiphon gives for this uniqueness have nothing whatever to do with the issues raised by MacDowell, but simply reflect the special solemnity of the occasion.[33] Most conspicuous among all the differences is that

[30]See p.3 supra

[31]Hansen (1981), 13, sees this argument from analogy as the best support for a restrictive interpretation of a δίκη φόνου. The γραφή was, of course, a post-Drakontian, presumably Solonian innovation, and as such, the argument from analogy strictly applies only to the period that follows the creation of the original code. But it still refers to the archaic period. Moreover, if the δίκη φόνου was thus restricted *after* the innovation of the γραφή, then it can be supposed *a fortiori* to have been restricted *prior* to this innovation.

[32]See MacDowell (1963), 17f.

[33]It is worth considering the passage in full. The defendant is arguing (6.3ff.; cp. 5.87-89) that the jury must treat the matter of homicide deliberations with great seriousness. The stakes are very high both for the defendant (τῷ κινδυνεύοντι καὶ διωκομένῳ) and for the jury (μάλιστα μὲν τῶν θεῶν ἕνεκα καὶ τοῦ εὐσεβοῦς, ἔπειτα δὲ καὶ ὑμῶν αὐτῶν). Moreover, a case of this kind can only be tried once, and the defendant therefore will have no recourse in the event of a wrong decision. αὐτῶν δὲ τούτων ἕνεκα οἵ τε νόμοι καὶ αἱ διωμοσίαι καὶ τὰ τόμια καὶ αἱ προρρήσεις, καὶ τἄλλ' ὅσα γίγνεται τῶν δικῶν τοῦ φόνου ἕνεκα, πολὺ διαφέροντά ἐστιν ἢ ἐπὶ τοῖς ἄλλοις, ὅτι καὶ αὐτὰ τὰ πράγματα, περὶ ὧν οἱ κίνδυνοι, περὶ πλείστου ἐστὶν ὀρθῶς γιγνώσκεσθαι· ὀρθῶς μὲν γὰρ γνωσθέντα τιμωρία ἐστὶν ὑπὲρ τοῦ ἀδικηθέντος, φονέα δὲ τὸν μὴ αἴτιον ψηφισθῆναι ἁμαρτία καὶ ἀσέβεια εἴς τε τοὺς θεοὺς καὶ τοὺς νόμους. Antiphon's point, then, is that homicide proceedings are a matter of great seriousness, since they affect the defendant's life as well as the jury's relations both with the gods and with the laws. And it is just for *these* reasons (αὐτῶν δὲ τούτων ἕνεκα) that special procedural matters are introduced into homicide proceedings.

homicide cases were tried in special courts, distinct from the ordinary heliastic panels.[34] But Antiphon does not seem to allude to these special courts at all; and those items that are mentioned (laws, oaths, sacrifices, and proclamations) refer primarily to ritual matters.[35] That homicide proceedings should be ritually unique, however, is entirely consistent with Antiphon's reasoning: it is precisely because of the special solemnity of the occasion that certain special, *ritual* procedures were to be observed.

It is equally true that in the case of murder the victim was no longer around to prosecute. But to use this obvious fact as an argument against

[34]The five homicide courts (Areopagos, Palladion, Delphinion, Phreatto, Prytaneion), together with the special competence of each, are well discussed by MacDowell (1963), chs. 4, 6-9.

[35]Antiphon's reference to οἱ νόμοι is not, perhaps, to a ritual matter; but the reference is extremely vague, and nothing certain can be inferred from it. It might as easily be taken to conflict with MacDowell's larger interpretation as to support it. (So, e.g., save in cases of inheritance and citizenship, homicide was unusual in basing obligations on the degree of kinship; see Humphreys, "Kinship Patterns in the Athenian Courts," *GRBS* 27, 1986, 88). On the other hand, this reference may indeed refer either to the special courts, which were not entirely devoid of ritual significance (as the examples of the Delphinion, Phreatto, and Prytaneion clearly show), or to the προδικασίαι, which also reflect the solemnity of homicide proceedings (see n.174 infra). As for the oaths (αἱ διωμοσίαι), of which we shall have more to say below (pp.28-32 infra), Antiphon clearly is not referring to the evidentiary oath, which was at one time either fully or partially probative, nor to the oaths sworn by ordinary witnesses (on both of which see nn. 53 and 68-69 infra), but only to the standard, preliminary, ritual oaths required of all the party litigants; and even here there was nothing especially unique to homicide cases either in calling down destruction upon one's self and one's *oikos* in the event of perjury (see R. Hirzel, *Der Eid: Ein Beitrag zu seiner Geschichte* [Leipzig, 1902], 33n.2, 137ff.; Glotz, "Jusjurandum," in C. Daremberg and E.Saglio, *Dictionnaire des antiquités grecques et romaines* [Paris, 1877-1919 {henceforth = Darem.-Sag.}], III.1, 752f., 756n.6; MacDowell [1963], 92; Parker, 186nn.234-35), or even in the use of the term *diomosia*, which was used of oaths taken on other occasions (Lipsius, 832n.12; E. Caillemer, "Diomosia," in Darem.-Sag., II.1, 228; Bonner-Smith, 2:165n.6, 166; MacDowell [1963], 92.). In fact, the only *significant* way in which the standard oaths taken in homicide proceedings may have been unique lies in the provision, mentioned at [Dem.] 47.72, whereby the prosecutor may have been bound to swear that he was indeed an agnate relation (on this disputed topic, see text infra). Swearing on cut pieces (τὰ τόμια; cp. Dem. 23.68; Aesch. 2.87), which also was not restricted to homicide proceedings (Ar. *Lys.* 186 *et pass.*; Pl. *Laws* 753D διὰ τομίων πορευόμενος; see Glotz [Darem.-Sag.], 751f.; J. Harrison, *Prolegomena to the Study of Greek Religion*, 3 ed. [Cambridge, 1922], 65ff.; P. Stengel, *Opferbräuche der Griechen* [Leipzig und Berlin, 1910], 78-85; idem, *Die griechischen Kultusaltertümer*, 3 Aufl. [München, 1920], 136ff.), was reserved for especially solemn occasions, and is obviously of ritual significance. That the proclamations (αἱ προρρήσεις) were also a purely ritual requirement, at least in the late 5th Century, will be argued for below.

the analogy of homicide with other *dikai* is to beg the very question that must be answered. Certainly, murder was an offense against the murdered victim, as is shown by the right of the dying victim both to demand and to forswear vengeance.[36] But we have already seen that the ancient response to homicide is at least equally rooted in the solidarity of the archaic family; and this would suggest that it was the family as much as the victim himself that was viewed as the injured party. This is shown above all by the fact that a murder could be settled by the payment of a *wergeld*.[37] We shall need to return to this general problem at the close of our discussion. At present, we simply note that there is at least a presumption that the family is itself an injured party in the event of murder; and we cannot exclude the possibility that homicide proceedings in no way depart from other *dikai* in imposing the task of prosecution not on the victim himself, but on the victim's family.[38]

[36]The victim could demand *poine*: Ant. 1.29-30; Lys. 13.41-42; or forswear it: Dem. 37.59-60 (though no known instances of this survive); cp. Glotz (1904), 69f.; also Bonner, *Evidence in Athenian Courts* (Chicago, 1905), 21f. MacDowell consistently assumes that murder is an offense against the victim, and that the family's response is rooted solely in the duty owed to the *victim's* anger; see (1963), 8f., 17, 133f.; cp. n.24 supra and n. 38 infra.

[37]We need not enter into the question of whether the payment of a blood-price survived into the 5th Century in Athens, as Glotz (1904), 314ff., and others have supposed. The practice may have been abolished even by the time of Drakon; see Stroud (1968), 57n.111; 81n.64; Gagarin (1981), 139f.; Heitsch (1984), 11f. For the survival of blood-money outside Attica, however, see Ruschenbusch (1960), 136f.; Parker, 116n.47. Also relevant, perhaps, is the fact that an unintentional homicide had to be avenged every bit as much as an intentional homicide. The results, as far as the family was concerned, were identical: the *oikos* had been deprived of a membership, even if no harm had been intended to the victim. For the overriding importance of result over intent, see Glotz, 48ff.; R. Maschke, *Die Willenslehre im griechischen Recht* (Berlin, 1926), 5ff.; Latte (1933), 280f. (= *Kl. Schr.*, 382); Loomis, 95; Gagarin (1981), 11ff.; Parker, 117f. Even inanimate objects had to be punished (ἐπὶ Πρυτανείῳ; cp. Rhodes, 648f.; Latte, 283 [= *Kl. Schr.*, 385]). Parker is correct in noting, however, that the source of this response is not any primitive notion of *miasma*, but the magical assumption that no mischance is purely accidental. The *locus classicus* for this explanation is, of course, E. E. Evans-Pritchard, *Witchcraft, Oracles, and Magic among the Azande* (Oxford, 1937), ch. 3.

[38]Cp. H. von Hentig, *Die Strafe, I: Frühformen und kulturgeschichtliche Zusammenhänge* (Berlin, 1954), 110ff.: "In der Rache gleicht der Clan oder die Familiengruppe einen Kraftverlust aus. Kollektiva stehen sich gegenüber, die als Einheiten leiden und handeln. Gruppen werden verantwortlich gemacht und übernehmen bedenkenlos die Verantwortung....Bei einem Totschlag sagen die Menschen eines arabischen Stammes nicht: >>Das Blut dieses oder jenes ist vergossen worden<< [sondern] >>*unser* Blut wurde vergossen<<" (author's italics); Glotz (1904), 47: "Le γένος, en face des autres γένη, forme un seul corps. Il souffre tout entier, quand un de ses membres souffre. Tous ceux qui sont du même sang n'ont qu'un seul esprit et qu'une seule chair: ils ressentent tous l'injure faite à l'un d'eux; si l'un d'eux est tué, c'est pour tous une douleur et une diminution. C'est pourquoi ils s'aident les uns les autres, et vengent leurs morts"; Lambert, 34: "La vengeance privée est une violence collective qui met en présence des groupes et non des individus". See Latte (1933), 280 (= *Kl. Schr.*, 382), on the gradual weakening of this collective responsibility.

MacDowell's attempt to find an ambiguity within the archaic code, finally, is guilty of anachronism. It has been observed by others that Drakon's code seems to presume, without any special comment, that both the victim and the culprit would be full Athenian citizens.[39] In the archaic community, however, it is not likely that a citizen, who was always entangled in the kinship system of the *oikos*, would be found to lack relations within the requisite degree.[40] In such a circumstance, it is difficult to see why any ambiguity would be required. Furthermore, there is no indication that the problem of murder involving "off-status" persons ever presented itself to the original framers of the code.[41] Yet this too should not be surprising. The problem of the legal status of foreigners, metics, freedmen, and other intermediate types would only be likely to emerge at a later date, with the growth of the archaic Athenian *polis* into an international and "hegemonic" capital, and so would not have pre-

[39]See Grace (1973), *passim*; also Gagarin (1979), 306ff.; D. Whitehead, *The Ideology of the Athenian Metic* (Cambridge, 1977), 146f.

[40]The specified degree of ἀγχιστεία was sufficiently broad to preclude this possibility; cp. Heitsch (1984), 14n.34; also Gagarin (1981), 51.

[41]Sealey (1983), 286n.26 (see Thür [1990], 149n.32) thinks that IG i^3 104.26-29 (esp. 28 *hόσπερ* τὸν 'Αθεν]αῖον; cp. Dem. 23.37), which apparently protects the exiled homicide (see Carawan [1990], 59) from illegal pursuit, may show that Drakon's code (or at least its republication) did in fact recognize certain status distinctions. Sealey is presumably thinking of the *xenos-polites* distinction as discussed, e.g., in Dem. 23.47-48 (but see Grace [1973], 13ff., who rightly denies that this Demosthenic passage refers to any legally recognized scheme of status classification). Sealey's inference, however, is unwarranted. Far from recognizing the legal status of *xenoi*, the lines in question (if the usual restoration is reasonably sound) assert that even a homicide is protected if he observes the conditions of exile; that he is, at least as concerns his bodily safety, still reckoned as a member of the community (to which, we must remember, he is likely to return after the completion of the period of banishment); that he is not, in other words, entirely an *Aüslander* over whom, it is thus implied, the archaic law would *not* take any cognizance. The implication, then, is exactly the opposite of what Sealey claims: far from recognizing the legal status of *xenoi*, the text implies that it is only Athenians, i.e., citizens, who are covered by the law; that outsiders are none of its concern (cp. Latte [1933], 280 [= *Kl. Schr.*, 381f.]). The problem of metics, on the other hand, is clearly post-Drakontian, and so would not appear in the ancient code. Nor is there any evidence that freedmen fell into a special category of their own, at least as regards homicide, even in the 4th Century (see n.50 infra). For the slave-citizen distinction in IG i^3 104, see n.43 infra.

sented itself to the archaic lawgivers.[42] Consequently, if the code failed to specify what was or was not to happen in the event that there was no relative to prosecute, we are probably quite safe in assuming that this was largely because the ancient code did not envision such a possibility as likely to occur.[43]

We may now summarize the conclusions we have thus far reached. Drakon's code, as we saw, does not actually indicate who was to lead the prosecution. But that it was the agnate relatives, as attested elsewhere, is clearly implied in the text of IG i^3 104. It is also true that the code does not explicitly restrict the primary right of prosecution to these same agnate relations. But it does enjoin this prosecution through a series of jussive infinitives that are readily understood to be restrictive. Furthermore, this restrictive interpretation best explains the very careful specifications of the exact degree of agnation given in the code, and it is fully consistent both with our general understanding of the procedure adopted by other *dikai*, as well as with broader historical considerations of some importance. It would be quite surprising, then, if archaic Athens had not viewed the matter in this restrictive way, and the burden of proof clearly lies with those who would deny it. MacDowell's several arguments, however, are extremely weak, and have failed to gain wide support. Even

[42]See the excellent discussion in Grace (1973).

[43]The rare exception could be dealt with on an *ad hoc* basis. Questions concerning the murder of slaves (cp. nn.184 and 264 infra) are more difficult to answer with any confidence. That masters were to prosecute in the event that a slave was murdered is attested by the orators ([Dem.] 47.68, 70-72; Ant. 5.48; Isoc. 18.52-53; cp. Poll. 8.118; see Grace [1975], 5; also MacDowell [1963], 20f.), but it is not mentioned in the extant portion of Drakon's code. It may have been written down somewhere, for the Trierarchos of [Dem.] 47 claims to verify this rule by consulting "the stele" (but see p.25n.e infra). Yet there is no place in the readable portion of our fragment where the law concerning slaves can be located (see Gagarin [1979], 312n.37); nor, if one follows the general logic of the fragment, is it clear where such a law might have occurred in the contents of the *protos axon*. (Obviously, nothing can be said about the contents of a "second axon" [ll. 56ff.].) In fact, we cannot even show with certainty that the distinction between a citizen and a slave was recognized in Drakon's code. IG i^3 104.36f. ἐλεύθε[ρ]ος ἔι may (if the verb is correctly restored) point to such a distinction; see B. Jordan, *Servants of the Gods: A Study in the Religion, History and Literature of Fifth-Century Athens*, Hypomnemata 55 (Göttingen, 1979), 39; also Stroud (1968), 56f., with n.110; Gagarin, "Self-defense in Athenian Homicide Law," *GRBS* 19, 1978, 119n.36; also (1981), 63. But in the context of a discussion of justifiable homicide (37-38 ἀμυνόμενος κτέ[ν]ει, ν[εποινὲ τεθνάναι; cp. ll. 33-35 χερῶν ἀ[δίκον..χερ]ῶν ἀδίκον, with Gagarin [1978], 115n.19, 119f., [1981], 61ff.), the word may perhaps be taken to refer only to "freedom" from penalty; e.g., "straflos" (Nörr, 649n.53). On the other hand, slavery was certainly known in the 7th Century, and it is not likely that absolutely no provisions were made for it in Drakon's code (cp. Grace [1973], 17f.).

Gagarin insists that there cannot be much doubt that the intent of the ancient code was probably restrictive. And so, we need not trouble ourselves any further with Drakon's code, or with the question of its original intent. There was no ambiguity in the archaic law.