

CHAPTER TWO
(Ps.-Demosthenes 47.68-73)

Ps.-Dem. 47 (*Against Euergos and Mnesiboulos*) is the only extant forensic oration that explicitly treats the question of who has the right to prosecute in a δίκη φόρου. The speech is probably not by Demosthenes, and may be one of the works of Apollodoros, several of which are included in the Demosthenic corpus.⁴⁴ Opponents of the restrictive reading of the law have claimed that the evidence supplied by this speech is ambiguous and does not prove that only the relatives or master were allowed to prosecute. It has also been thought that the speech may even imply that anyone at all could prosecute if they so desired. We must consider the relevant passage in some detail.

The anonymous speaker, who is generally called the Trierarchos, was engaged in a long-running series of suits and counter-suits with a certain Theophemos.⁴⁵ In the course of all this, the Trierarchos has brought a δίκη ψευδομαρτυρίων against the brother (Euergos) and brother-in-law (Mnesiboulos) of Theophemos for swearing false testimony against the Trierarchos in an earlier suit.⁴⁶ During his narrative, the Trierarchos tells how Theophemos had previously won a suit for assault (δίκη αικελας) that was to be settled by the payment of a fine. But on the very day that the

⁴⁴The authenticity of this speech was already doubted in antiquity (see Harpokration, s.v. ἐκαλιστρου); cp. A. Schaefer, *Demosthenes und seine Zeit* (Leipzig, 1858-87), 3.2:130-34, 184-99; F. Blass, *Die attische Beredsamkeit* (Leipzig, 1887-98), 3.1:484-89; C. Rüger, "Zur pseudodemosthenischen Rede gegen Euergos und Mnesibulus (47)," *Philologische Wochenschrift* 40, 1920, 117-20; J. Trevett, *Apollodoros, the Son of Pasion* (Oxford, 1992), 50ff., esp. 62, 73ff., is too cautious in this matter.

⁴⁵For this pattern of suit and counter-suit, so common in Attic litigation, see Harrison, 2:131ff. The best summary of the case is still Gernet (1954-60), 2:195-200. For Theophemos, see J. Kirchner, *Prosopographia Attica* (Berlin, 1901-03), nr. 7094; also J. K. Davies, *Athenian Propertied Families, 600-300 B.C.* (Oxford, 1971), *ad loc.*

⁴⁶On the δίκη ψευδομαρτυρίων, see Harrison, 1:156n.3, 2:127ff., 192ff.; E. Berneker, "Pseudomartyrion dike," *RE* 23.2, 1959, 1364-85; and, more recently, A. C. Scafuro, "Witnessing and False Witnessing: Proving Citizenship and Kin Identity in Fourth-Century Athens," in *Athenian Identity and Civic Ideology*, ed. A. L. Boegehold and A. C. Scafuro (Baltimore and London, 1994), 170ff.; also see n.138 *infra*. For family members appearing as witnesses, see Humphreys (1986), *passim*, esp. 77n.29 on the precise relationship of Mnesiboulos; cp. Kirchner, nrr. 10265 (Mnesiboulos) and 5458 (Euergos).

Trierarchos offered to bring Theophemos to the bank for payment, Theophemos went instead to the Trierarchos' estate so as to seize the value of the penalty himself.⁴⁷ Theophemos, accompanied by Euergos and Mnesiboulos, burst into the Trierarchos' home while the Trierarchos was away and while his wife and children were having their daytime meal. An old woman was present. Originally one of the family's slaves, she had been freed long ago by the Trierarchos' father. She had married and moved away. But on her husband's death she returned to live at the Trierarchos' house as a faithful servant. When the men burst in, this elderly woman clutched a goblet from which she was drinking to her breast; the men tried to seize the cup and, in the ensuing fight, the woman received some blows from which she presently died.

We now come to the relevant passage, 47.68-73. The following translation is that of A. T. Murray.⁴⁸

⁴⁷Seizure of property was legal if a settlement had not been paid within a specified period of time; see n.25 supra. On the δίκη αικείας, see Gernet (1954-60), 2:197ff.; Lipsius, 643ff.

⁴⁸*Demosthenes V, Private Orations XLI-XLIX, with an English Translation* (London, 1939), 319-23. There are several points where my own interpretation diverges from that offered by Murray; see text infra. The Greek runs as follows: [§68] Ἐπειδὴ τοίνυν ἐτελεύτησεν, ἦλθον ὡς τοὺς ἐξηγητάς, ἵνα εἰδείην ὅ τι με χρῆ ποιεῖν περὶ τούτων, καὶ διηγησάμην αὐτοῖς ἅπαντα τὰ γενόμενα, τὴν τε ἀφίξιν τὴν τούτων, καὶ τὴν εὐνοίαν τῆς ἀνθρώπου, καὶ ὡς εἶχον αὐτὴν ἐν τῇ οἰκίᾳ, καὶ ὡς διὰ τὸ κυμβίον, οὐκ ἀφείσα, τελευτήσσειν. ἀκούσαντες δέ μοι οἱ ἐξηγητὰὶ ταῦτα, ἤροντό με πότερον ἐξηγήσονται μοι μόνον ἢ καὶ συμβουλευέωσιν. [§69] ἀποκρινάμενός μοι αὐτοῖς ἀμφοτέρως, εἶπόν μοι "ἡμεῖς τοίνυν σοὶ τὰ μὲν νόμιμα ἐξηγησόμεθα, τὰ δὲ σύμφορα παραινέσομεν. πρῶτον μὲν ἐπενεγκεῖν δόρυ ἐπὶ τῇ ἐκφορᾷ, καὶ προσαγορεύειν ἐπὶ τῶν μνημάτων, εἰ τίς προσήκων ἐστὶ τῆς ἀνθρώπου, ἔπειτα τὸ μνημα φυλάττειν ἐπὶ τρεῖς ἡμέρας. τὰ δὲ συμβουλευόμενά μοι ἔπειδὴ αὐτὸς μὲν οὐ παρεγένου, ἢ δὲ γυνὴ καὶ τὰ παιδιά, ἄλλοι δέ μοι μάρτυρες οὐκ εἰσίν· ὀνομαστί μὲν μηδεὶν προσαγορεύειν, τοῖς δεδρακόσι δὲ καὶ κτείνασιν, εἴτα πρὸς τὸν βασιλέα μὴ λαγχάνειν. [§70] οὐδὲ γὰρ ἐν τῶ νόμῳ ἐστὶ σοὶ· οὐ γὰρ ἐστὶν ἐν γένει σοὶ ἡ ἀνθρώπος, οὐδὲ θεραπεία, ἐξ ὧν σὺ λέγεις· οἱ δὲ νόμοι τούτων κελεύουσι τὴν δίωξιν εἶναι· ὥστ' εἰ διομῆ ἐπὶ Παλλαδίᾳ αὐτὸς καὶ ἡ γυνὴ καὶ τὰ παιδιά καὶ καταράσασθε αὐτοῖς καὶ τῇ οἰκίᾳ, χείρων τε δόξεις πολλοῖς εἶναι, κὰν μὲν ἀποφυγῇ σ', ἐπιωρκηκέναι, ἐὰν δὲ ἔλθῃ, φθονῆσαι. ἀλλ' ὑπὲρ σεαυτοῦ καὶ τῆς οἰκίας ἀφορισσόμενος ὡς ῥᾶστα τὴν σύμφορὰν φέρειν, ἀλλῆ δὲ εἰ πη βοῦλει, τιμωροῦ." [§71] Ταῦτα ἀκούσας ἐγὼ τῶν ἐξηγητῶν, καὶ τοὺς νόμους ἐπισκεψάμενος τοὺς τοῦ Δράκοντος ἐκ τῆς στήλης, ἐβουλευόμην μετὰ τῶν φίλων ὅ τι χρῆ με ποιεῖν. συμβουλευόντων δέ μοι ταῦτά, ἃ μὲν ὑπὲρ τῆς οἰκίας προσῆκέ μοι πράξαι καὶ ἃ ἐξηγήσαντό μοι οἱ ἐξηγητὰί, ἐποίησα, ἃ δ' ἐκ τῶν νόμων οὐκέτι μοι προσῆκεν, ἡσχίαν εἶχον. [§72] κελεύει γὰρ ὁ νόμος, ὡς ἀνδρες δικασταί, τοὺς προσήκοντας ἐπεξίεναι μέχρι ἀνεφιαδῶν, καὶ ἐν τῶ ὄρκῳ διορίζεται [codd. et plur. edd.: ἐπερωτῶν Fgr. Qgr. Pollux {n.6 supra}] ὅ τι προσήκων ἐστὶ, κὰν οἰκέτης ἦ, τούτων τὰς ἐπισκήψεις εἶναι. ἐμοὶ δὲ οὔτε γένει προσῆκεν ἡ ἀνθρώπος οὐδὲν, εἰ μὴ ὅσον τιτθὴ γενομένη, οὐδ' αὖθις ἀνθρώπων γὰρ ἀφείτο γὰρ ὑπὸ τοῦ πατρὸς τοῦ ἐμοῦ ἐλευθέρως καὶ χωρὶς ὧκε καὶ ἀνδρᾶ ἔσχεν. [§73] ψεύσασθαι δὲ πρὸς ὑμᾶς καὶ διομόσασθαι αὐτὸς καὶ τὸν υἱὸν καὶ

(§68) Well then, after her death I went to the Interpreters^a in order to learn what I ought to do in the matter, and I related to them all that had taken place: the coming of these men, the devotion of the woman, why it was that I kept her in my house, and that she had met her end because she would not surrender the cup. When the Interpreters had heard all this from me, they asked me whether they should interpret the law for me and nothing more, or should also advise me. (§69) On my answering them, "Both," they said to me, "Very well, we will interpret for you the law, and also give you advice to your profit.^b In the first place, if there be anyone related to the woman, let him carry a spear when she is borne forth to the tomb and make solemn proclamation at the tomb, and thereafter let him guard the tomb for the space of three

τὴν γυναῖκα οὐκ ἂν ἐτόλμησα, οὐδ' ἂν εἰ εὔηδεν ὅτι αἰρήσοιμι αὐτούς· οὐ γὰρ οὕτως τούτους μισῶ, ὡς ἐμαυτὸν φιλῶ. "Ἴνα δὲ μὴ λόγῳ μόνον ἀκούσητέ μου, αὐτὸν ὑμῖν τὸν νόμον ἀναγνώσεται [F²QD].

^a The exegetes were official propounders of sacred law. We do not know when they were established (though the institution must be relatively old), how many there were, how they were appointed and distributed, or precisely what powers they possessed. What is clear is that some exegete or exegetes were to be consulted in matters involving pollution, and so in cases of homicide. The fundamental study of this complex subject remains Jacoby, (1949), 8-70 (with 75f.); also *Die Fragmente der griechischen Historiker* (Berlin, 1923-58 [henceforth = FGh]), IIIb, Suppl. II, 534-36 (with 323 F14 and nrr. 352-54); J. Oliver, *The Athenian Expounders of the Sacred and Ancestral Law* (Baltimore, 1950); idem, "On the Exegetes and the Mantic or Manic Chresmologians," *AJP* 73, 1952, 406-13; idem, "Jacoby's Treatment of the Exegetes," *AJP* 75, 1954, 160-74; M. Nilsson, *AJP* 71, 1950, 420-25; N. G. L. Hammond, "The Exegetai in Plato's *Laws*," *CQ*, n.s., 2, 1952, 4-12; H. Bloch, "The Exegetes of Athens and the Prytaneion Decree," *AJP* 74, 1953, 407-18; idem, "The Exegetes of Athens: a Reply," *HSCP* 62, 1957, 37-49. F. Schachermeyr, *Religionspolitik und Religiosität bei Perikles* (Wien, 1968), who speaks of Lampon (unfortunately, without any consideration of FGh IIIb, Suppl. II, 534f.; cp. n.161 infra) as "angesehenen und akkreditierten Theologen" (27), errs in reviving the old conception of exegetes as, *inter alia*, "der Hort ... eines sittlich-religiösen Urwissens..." (25f.). On the rather limited scope of the exegetes' activities (limited, that is, to the non-political, explication of ritual; cp. Glotz [1904], 300n.3), Jacoby is surely correct. The plural of Pl. *Euthyphro* 9A6 (cp. 4C8) is correctly explained by Bloch (1957), 40f.

^b MacDowell (1963), 16, correctly notes that the principal division which runs throughout the passage is between what the exegetes *expound* and what they *advise* (see p.33n.j infra). They expound solely in matters of ritual; their advice, on the other hand, which is more wide-ranging, is not binding. This is shown, *inter alia*, by the fact that the Trierarchos follows their advice only *after* consulting with the stele and with his *philoi*. As such, consulting the exegetes is proof primarily that the Trierarchos acted scrupulously in *religious* matters; cp. Jacoby (1949), 44f., 48.

days. And this is the advice which we give you: since you were not yourself present, but only your wife and your children, and since you have no other witnesses, we advise you not to make proclamation against anyone by name, but in general against the perpetrators and the murderers; and again not to institute suit before the king. (§70) For that course is not open to you under the law, since the woman is not a relative of yours nor yet a servant [sc. a slave], according to your own statement; and it is to relatives or to masters that the law appoints the duty of prosecuting.^c If, then, you should take the oath at the Palladium,^d yourself and your wife and your children, and imprecate curses upon yourselves and your house, you will lose the goodwill of many, and if your opponent is acquitted, you will be thought to have committed perjury, and if you convict him, you will be an object of malice. No, after you have performed the proper religious rites to cleanse yourself and your house, bear your misfortune with such patience as you can, and, if you choose, avenge yourself in some other way.”

(§71) When I had received this advice from the Interpreters and had looked at the laws of Draco on the inscribed slab,^e I consulted with my friends as to what

^c τούτων here, and in §72 below, probably refers to the prosecutors, and not to the victims; see (pace Gernet [1954-60], 2:223; Evjen, 263) Grace (1975), *passim*. See n.114 *infra*.

^d εἰ διομῆϊ ἐπὶ Παλλαδίῳ means, in effect, “if you should bring the case to court” (see T. Lenschau, *RE* 18.3, 1949, 168-71, s.v.). It is widely assumed that a case against Theophemos, had it been pursued, would have been one of *intentional* homicide, on the supposition that φόνος ἔκων included deaths resulting from any intent to harm (Dem. 54.25-28; see Loomis, 93). Intentional homicide was generally tried at the Areopagos. The reference here to a trial at the Palladion would therefore be due to the old woman’s non-citizen status: cp. Stroud (1968), 39f.; MacDowell (1963), 69; Grace (1973), 18; Gagarin (1981), 56f., 141n.77. On the Palladion, see Jacoby ad FGrH 323 (Kleidemos) F20 (cp. 325 F16); MacDowell (1963), 58-69; Rhodes, 642ff.; Heitsch (1984), 11n.26; Humphreys (1991), 22n.17; A. L. Boegehold, *The Athenian Agora, XXVIII. The Lawcourts at Athens* (Princeton, 1995), 47f., 139ff. Thür, “The Jurisdiction of the Areopagos in Homicide Cases,” in Gagarin, ed., (1991), 53-72, is unpersuasive; see Wallace (1991), 73ff. On the legal role of the King Archon, or *Basileus*, see n.186 *infra*.

^e Drakon’s stele was set up at the *Stoa Basileios* (cp. IG i³ 104.7-8; Stroud [1968], 30; Rhodes, 134f.; Robertson, 64f.; see n.158 *infra*), and laws thus posted around the city were occasionally consulted by litigants (Thomas, 60-68). It is commonly assumed,

course of action I should pursue.^f As they gave me the same advice, I did what was necessary to purify the house and what the Interpreters had prescribed, and abstained from further action which the laws forbade.^g (§72) For the law, men of the jury, ordains that prosecution shall be by relatives within the degree of children of cousins; and that in the oath inquiry shall be made as to what the relationship is, even if the victim be a servant [sc. a slave];

therefore, that the stele mentioned by the Trierarchos was Drakon’s stele (Stroud, 39f.; Gagarin [1979], 312n.35; [1981] 57n.71; M. Piérart, “Note sur la *prorrhesis* en droit attique,” *L’Antiquité classique* 42, 1973, 430n.17; K. Clinton, “The Nature of the Late Fifth-Century Revision of the Athenian Law Code,” in *Studies in Attic Epigraphy, History and Topography Presented to Eugene Vanderpool*, Hesperia Suppl. 19 [Princeton, 1982], 35). But this cannot be known with certainty. The normal procedure, at least prior to the establishment of the central archive, was (presumably) for the laws relevant to a particular office to be housed at that location (cp. Jacoby [1949], 383n.27; Stroud [1968], 28f.; Boegehold [1972], 29; Thomas, 73ff.), and we hear, in fact, of homicide laws set up at the Areopagos (Dem. 23.22; Lys. 1.30; [6].15; cp. Ἀθ. Πολ. 35.2). Gagarin, to be sure, thinks these Areopagite laws were not identical with those posted at the *Stoa Basileios* ([1981], 26ff.; also Figueira [1993], 240); but Dem. 23.28 (see n.18 *supra*), used to support this contention, refers to the Heliaea and not to the Areopagos, and so may not provide any evidence at all about the contents of this Areopagos code (note the apposite remarks by Humphreys [1991], 32n.54). Because of the absence of any mention of the status of slaves in Drakon’s code, Grace ([1973], 18; [1975], 5) proposed that the Trierarchos may have consulted a stele at the Palladion (citing, somewhat loosely, Dem. 23.63 and 71). This, however, is also far from certain. There was apparently more than one copy of the homicide code within the city (see above), any one of which may have been consulted by the Trierarchos. There may even have been minor variations among them. Laws could be amended. But such changes probably would not have altered the original texts in any significant way, since they were not always added to the formal inscriptions or, if added, could be placed at the bottom as *addenda* (Gagarin [1981], 23ff.; [1986], 84n.12; Thomas, 48nn.113-114). Moreover, the practice of making duplicate copies was common enough (Thomas, 75f.; cp. Stroud [1979], 16f.), and it is possible that all the stelai set up in the city that contained the homicide code were nearly identical with one another. In any event, the claims to have consulted the stele may well be nothing more than a hollow conceit intended to impress the jury; see Bonner-Smith, 2:16f.; Thomas, 60-68; and next note *infra*.

^f τῶν φίλων here may indicate “brothers and cousins” (MacDowell [1963], 16), but more likely refers to expert legal advice; see Bonner-Smith, 2:16ff.; Harrison, 2:157f., esp. 158n.2; Bonner, *Lawyers and Litigants in Ancient Athens: The Genesis of the Legal Profession* (Chicago, 1927), ch. 10 *passim*, esp. 201ff., 213f. For φίλος used of friends as well as kin, see W. R. Connor, *The New Politicians of Fifth-Century Athens* (Princeton, 1971), 35ff.

^g ἃ δ’ ἐκ τῶν νόμων οὐκέτι μοι προσήκεν = “what was *no longer* legally proper”. For οὐκέτι, see Grace (1975), 10n.e, who (pace Gagarin [1979], 309n.29) sees no ambiguity. As the woman is now free, it is “no longer” fitting for the Trierarchos to proceed.

and it is from these persons that criminal actions shall proceed.^h But the woman was in no way related to me by blood, she had only been my nurse; nor again was she a servant [sc. a slave]; for she had been set free by my father, and she lived in a separate house, and had taken a husband.ⁱ (§73) Now, to tell a false story to you and support it by an oath with imprecations on myself, my son, and my wife, was a thing I dared not do, even if I knew well that I should convict these men; for I do not hate them as much as I love myself. But that you may hear this not merely from my own lips, the clerk shall read you the law itself.

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^h ἐπισκήψεις = ἐπεξίεναι; see (*contra* MacDowell [1963], 20; Harrison, 1:169n.4; Panagiotou, 433) Grace (1975), 11ff., esp. 15f.; also Gagarin (1979), 310n.30.

ⁱ χωρὶς ζῶκει has often been thought to be a technical term for a freedman who continued to pay an annual fee, and some have claimed such freedmen were still technically slaves (based on *Lex. Seg.*, 316.11ff.). On this entire question, see A. Calderini, *La Manomissione e la condizione dei liberti in Grecia* (Milano, 1908), 374f.; Harrison, 1:167n.5; E. Perotti, "Les Esclaves χωρὶς οἰκοῦντες," in *Colloque Besançon 1972: actes du colloque 1972 sur l'esclavage* (Paris, 1974), 47-56; Whitehead, 25n.87; also Э. Л. Казакевич (E. Kazakevich), "Были ли рабами ОΙ ΧΩΡΙΣ ΟΙΚΟΥΝΤΕΣ," *ВДИ* 3, 1960, 23-42. (This paper, written in Russian by the American expatriate, Emily Grace, deserves wider attention than it has hitherto received. Apart from the phrase under discussion, it includes a detailed review of both μισθός and ἀποφορά.) There is little justification, however, for the view that individuals so characterized represented any sort of rigid legal category at all. The classical sources (Aesch. 1.97; Dem. 4.36) are highly ambiguous at best, and the lexicographical reports (which are very late) are not, in fact, uniform (cp. Harpokration, s.v. τοὺς χωρὶς οἰκοῦντας), and probably do not rest on any independent sources of information; see Kazakevich, 34-36. The phrase, moreover, is often used in a very generalized manner, even of free citizens (cp. [Dem.]. 47.35 καὶ χωρὶς οἰκοῖη ὁ Θεόφνημος). Besides, the entire clause at 47.72 ἀφείτο γὰρ ὑπὸ τοῦ πατρὸς τοῦ ἐμοῦ ἐλευθέρᾳ καὶ χωρὶς ζῶκει καὶ ἄνδρα ἔσχευ shows that the elderly woman is certainly portrayed by the Trierarchos (and cp. §55) as definitely *not* still a slave (see n.128 *infra*; also Gernet, "Aspects du droit athénien de l'esclavage," in *Droit et société dans la Grèce ancienne* [Paris, 1955], 169); and the fact that the exegetes' response (based solely on the Trierarchos' narrative; cp. §70 ἐξ ὧν οὐ λέγεις) is that the Trierarchos is not to prosecute since the woman is neither a relative *nor* a slave (§70 οὐδὲ θεράπαινα; 72 οὐδ' αὐ θεράπαινά γε; see p.36n.w *infra*), shows that the official exegetes also believed that the woman was no longer a slave.

The Trierarchos' narrative is not fully convincing. While the Trierarchos represents Theophemos' violent seizure as completely unwarranted, the reader may well suspect that Theophemos was having more difficulty in obtaining his payment than the speaker lets on.⁴⁹ There is also a question as to whether the Trierarchos has accurately described the old woman's legal status.⁵⁰ What is important for our purposes, however, is that the speaker has introduced this narrative of the nurse's death in order to show the character of his opponents in a negative light, and to indicate that he, on the other hand, acted with all scrupulousness and without being overly litigious.⁵¹

⁴⁹Cp. §§ 49-54.

⁵⁰Very little is known about the legal status of freedmen. They do not seem to have constituted a distinct legal category of their own, and were probably classed simply as metics (see, e.g., M. Clerc, *Les Métèques athéniens* [Paris, 1893], 282-94; Harrison, 1:184-86; Whitehead, 16f.). Yet the question of metic status poses difficult problems of its own. It is widely believed that metics had full access to Athenian courts (though some would restrict this right to *dikai* only); cp. Harrison, 1:193ff.; Rhodes, 655; P. Gauthier, *Symbola: Les Étrangers et la justice dans les cités grecques* (Nancy, 1972), 136-49; Whitehead, 89ff.; also (with reference to freedmen) Calderini, 326-35. But the common view (cp. Ar. Pol. 1275^a7-14) that metics had to be represented in court by their *prostates* is probably to be rejected (cp. Clerc, 260-74; Whitehead, 90ff.; Gauthier, 126-36). The *locus classicus* for the status of metic-victims in homicide procedures is, in fact, [Dem.] 47.68-73. Grace (1975), 6ff. (also Gagarin [1979], 308), thinks it significant that the Trierarchos appears to conceal the metic status of the nurse, but this is only because she seems to assume that the *prostates* would be entitled to prosecute on behalf of a metic-victim. Yet even apart from the fact that the forensic obligations of the *prostates* were presumably quite limited, we cannot imagine that the exegetes (or the jury, for that matter) would have failed to observe that the elderly nurse was indeed a metic *had this fact been significant for the case at hand*. The exegetes are clearly given the same information as is the reader (cp. §68 ἀκούσαντες δέ μου οἱ ἐξηγηταὶ ταῦτα), and their advice is specifically based upon this information (cp. §70 ἐξ ὧν οὐ λέγεις; p.26n.i *supra*). Besides, the status of the woman is not really hidden at all (cp. §70 ἐπὶ Παλλαδίῳ, with p.24n.d *supra*). Consequently, the silence of the exegetes is sufficient to prove that apart from the fact that metics (together with other non-citizens) had their cases tried at the Palladion, there were no special regulations regarding the prosecution of homicide on behalf of metic victims.

⁵¹See Blass (3.1:488): "die Charakterschilderung der Gegner für den Sprecher sehr wesentlich war"; also p.23n.b. *supra*, and pp.49-50 *infra*. Litigiousness was not viewed favorably by the Athenians (cp. K. J. Dover, *Aristophanes, Clouds*. Edited with Introduction and Commentary [Oxford, 1968], ad v. 208; idem, *Greek Popular Morality in the Time of Plato and Aristotle* [Oxford, 1974], 187ff.; also Thuc. 1.77.1 φιλοδικεῖν δοκοῦμεν), and litigants often took pains to prove to the jury that they were not seeking delays on purely technical grounds (Bonner [1927], 189-99). Homicide charges were not rarely used as a legal strategy to confound one's opponents, since anyone accused of homicide was subject to *atimia*, and thereby barred from entering the courts; see Bonner-Smith, 2:72f.; Rhodes, 641; Parker, 132n.108; also n.84 *infra*.

A straightforward reading of the passage will suggest that the law is to be taken restrictively, for the Trierarchos seems to be claiming that he wanted to prosecute on behalf of the old woman, but was advised not to do so since the law stated that only relatives or the master of a slave could prosecute, while the nurse was not a relative, and was also no longer a slave. Several objections to this interpretation have been offered,⁵² but the chief objection concerns the nature and contents of the oaths (*diomosiai*) that are mentioned in the passage.

All Greek trials began with an obligatory, preliminary oath sworn by both parties and called, in the case of homicide proceedings, *diomosiai*.⁵³

⁵²(1) §70 οὐδὲ γὰρ ἐν τῷ νόμῳ ἔστι σοι = "La loi ne te le permet pas non plus" (Gemet [1954-60] *ad loc.*; cp. R. Dareste, *Les Plaidoyers civils de Démosthène* [Paris, 1875], 1:377 "La loi ne t'autorise pas à le faire"). MacDowell (1963), 19, who admits that the law enjoined an obligation to prosecute upon the relatives or master, but claims that it did not actually prohibit others from prosecution, reads ἐστὶ pro ἔστι, and translates "it is not legally your concern". In this case, the passage does not *prohibit* prosecution on the ground that the Trierarchos is neither a relative nor a master; it simply states that a prosecution is *not required* since the Trierarchos is neither a relative nor a master. προσῆκεν in §72 below does not help to solve the problem (*contra* Evjen, 258n.11). Admittedly, this question can only be answered by considering the entire context. Still, *pace* Gagariñ ([1979], 309n.28; cp. W. S. Barrett, *Euripides, Hippolytos* [Oxford, 1964], 425f.), the choice of accentuation is important; see H. Chandler, *A Practical Introduction to Greek Accentuation*, 2nd ed. (Oxford, 1881), §§938-9. (2) MacDowell also thinks that the law could not be restrictive since the exegetes do not simply tell the Trierarchos not to prosecute on the familiar grounds (cp. [1] above), but apparently feel the need to offer *other reasons* as well: (a) that the Trierarchos did not witness the events himself (§69 ἐπειδὴ αὐτὸς μὲν οὐ παρεγένου... ἄλλοι δὲ σοι μάρτυρες οὐκ εἰσὶν); (b) that even if he won the case, he would be unpopular (§70 ἐὰν δὲ ἔλθῃς φθονήσῃ; see text *infra*); (c) and because such a troublesome prosecution on behalf of an old freedwoman would be beneath his dignity (§70 εἰ διομῆϊ ἐπὶ Παλλαδίῳ... χείρων τε δόξεις πολλοῖς εἶναι). MacDowell, however, has failed to grasp the structure of the passage, which, when properly viewed, will show that none of these three features are offered as independent reasons not to prosecute. See text *infra*.

⁵³See n.35 *supra*. Also Lipsius, 829ff.; Glotz (Darem.-Sag.), 761f.; Bonner-Smith, 2:165ff.; MacDowell (1963), 92. These preliminary oaths, legally and formally required, must not be confused with what is conveniently termed the 'evidentiary' oath, occasionally sworn in response to a challenge (πρόκλησις). The evidentiary oath, which undoubtedly had been fully probative at an early date (see Lipsius, 895ff.; Bonner [1905], 74f.; Latte [1920], 5ff.; Bonner-Smith, 2:146ff., 158ff.; Harrison, 2:99, 150ff.), could only be sworn with the consent of both parties (Glotz, 761, 765f.). A challenge to swear the evidentiary oath was rarely offered (Bonner-Smith, 2:158f.; also D. C. Mirhady, "The Oath-Challenge in Athens," *CQ*, n.s., 41, 1991, 78-83) for obvious reasons: either because the evidentiary oath remained probative into the classical period, or (more plausibly, perhaps) because agreeing to swear the oath, *while no longer in itself decisive*, was calculated still to have a positive effect upon the jury. Nor should the formal *diomosia*, sworn by the party litigants, be confused with the oaths that were sworn by ordinary witnesses in homicide proceedings (cp. Ant. 1.28, 5.12; Lys. 4.4.;

In these oaths, the swearer would call down destruction upon himself and his posterity in the event of perjury.⁵⁴ It seems that the litigants had to swear to several items. They clearly had to swear to the truth of the events they were about to describe.⁵⁵ They also had to swear that their statements would be relevant to the topic at hand (εἰς αὐτὸ τὸ πρᾶγμα), though there was apparently no way this provision might be enforced.⁵⁶ More importantly, it is often stated that the prosecution in a homicide procedure had to swear that he was, in fact, of the requisite relation to the victim. If this is so, then the law was clearly and explicitly restrictive. But the only evidence for this claim comes from [Dem.] 47.68-73, and it is precisely the interpretation of this aspect of the passage that has most often been called into doubt.⁵⁷

Oaths are mentioned on three occasions in our passage: prominently at §70 (εἰ διομῆϊ ἐπὶ Παλλαδίῳ κτλ.) and §73 (ψεύσασθαι δὲ πρὸς ὑμᾶς καὶ διομόσασθαι κτλ.); parenthetically at §72 (καὶ ἐν τῷ ὄρκῳ διορίζεται ὁ τι προσήκων ἐστὶ). Some have simply stated that the general context of §73, at least, suggests that the oath there mentioned should include an oath of relationship, since it is the Trierarchos' relation to the nurse that is apparently under discussion, while this oath of relationship is sufficiently confirmed by the parenthetic clause of §72.⁵⁸ Against this, however, MacDowell has offered several objections which have thus far gone unanswered. First of all, he thinks that the parenthetic clause of §72, which seems to refer unequivocally to an oath of relationship, is in fact too vague to allow of any definite conclusions, and need not even refer to

MacDowell [1963], 98f.; also Bonner-Smith, 2:166n.7 [and, on the question of witness oaths *outside* of homicide proceedings, 172ff.]; cp. n.64 *infra*), which is a different matter altogether.

⁵⁴See n.35 *supra*; also Bonner-Smith, 2:165n.6; Parker, 199n.50.

⁵⁵Ant. 6.16; Lys. 10.11; Dem. 23.67-69; 59.9-10; Glotz (Darem.-Sag.), 762; Bonner-Smith, 2:166nn.2 and 4; MacDowell (1963), 91f.

⁵⁶Ant. 5.11, 6.9; cp. Latte (1920), 19n.38; MacDowell (1963), 93; Rhodes, 718f.

⁵⁷An oath of relationship is accepted, *inter alios*, by Lipsius, 831n.11; Glotz (1904), 305, 374; idem (Darem.-Sag.), 762; Latte (1920), 19; Bonner-Smith, 2:166n.1; Evjen, 264f.; Kidd, 217f. It is denied by MacDowell (1963), 94-96; Gagariñ (1979), 310f.; Panagiotou, 431ff.; Wallace (1985), 258n.110. It is worth noting, perhaps, that an oath of relationship (though probably a voluntary oath; cp. W. Wyse, *The Speeches of Isaeus*. With Critical and Explanatory Notes [Cambridge, 1904], ad 11.6; cp. Dem. 39.2-4, 40.10-11) is attested for another procedure (a dispute over inheritance) in which the question of relationship was also relevant to the outcome of the case.

⁵⁸So Kidd, 218.

the same oaths as do §§70 and 73.⁵⁹ §73, he thinks, need not refer to an oath of relationship at all;⁶⁰ while §70, he claims, *cannot* refer to such an oath, since a later clause in the passage (ἐάν δὲ ἑλῆς, φθονήσει) must be taken to mean that the Trierarchos envisions that the case might indeed have *legitimately* come to trial.⁶¹

Before we consider this question of the oaths of relationship, however, one specific objection must first be disposed of. The wife and children are apparently to swear the *diomosia* with the Trierarchos.⁶² But there is uncertainty as concerns their precise capacity in this regard. It has been stated, more than once, that the oaths of §§70 and 73 must be oaths pertaining to the *truth of the events*, and not at all to the facts of relationship, since the only thing to which the wife and children, as eyewitnesses, could have sworn was to the events themselves.⁶³ It is certainly true that the term *diomosia* could be used of oaths that were sworn

⁵⁹MacDowell (1963), 96; cp. Gagarin (1979), 311f. The parenthesis might even have been a scholiast's gloss that found its way into the text; see n.120 *infra*.

⁶⁰MacDowell (1963), 95f., apparently believes that the meaning of §73 depends on whether the καί in ψεύσασθαι δὲ...καὶ διομόσασθαι is taken as part of a hendiadys, or as adversative (for the adversative use of καί, see W. J. Verdenius, *Mnem.*, ser. iv, 9, 1956, 250), and states that either alternative is grammatically possible. This is true enough. And yet, MacDowell fails to note that such grammatical ambiguities are to be resolved by reference to the general context, not *vice versa*. See n.123 *infra*.

⁶¹Evjen, 262; states that MacDowell "overlooks the possibility" that the Trierarchos might gain a conviction (ἑλῆς) by swearing falsely to his relation to the nurse. But MacDowell clearly anticipates this claim and argues that, *on this very assumption*, the interpretation founders on φθονήσει: for if we assume that the Trierarchos, bound by an oath of relationship, could prosecute *only* by lying about his relation to the nurse, then the crucial passage in §70 must be taken to mean that (a) if it is discovered that his oath was false, Theophrastos would be acquitted (κάν μὲν ἀποφύγη σ'), and the Trierarchos would be thought to be a perjurer (ἐπιωρκηκέναι); but (b) if, on the other hand (ἐάν δὲ), his oath was believed, and Theophrastos was convicted (ἑλῆς) — then why would he be unpopular (φθονήσει)? "This," says MacDowell, "is the point where this interpretation runs into difficulty" (95). Some might attempt to meet this problem by understanding ὑπὸ θεῶν with φθονήσει (see, e.g., E. Rohde, *Psyche*, tr. W.B. Hillis, 8th ed. [London, 1920], 212n.156; also Evjen, 264n.33). But cognates of φθόνος are not thus used elsewhere in Demosthenes, where the word seems always to be used of *human* resentment (e.g., Dem. 18.315; 20.56, 139-40; often opposed to φιλανθρωπία: 20.165; 25.52; or to ἔλεον: 21.196). See text *infra*.

⁶²§70 εἰ διομῆϊ ἐπὶ Παλλαδίῳ αὐτὸς καὶ ἡ γυνὴ καὶ τὰ παιδία καὶ καταράσασθε [n.b. the plural] αὐτοῖς καὶ τῇ οἰκίᾳ; cp. §73 διομόσασθαι αὐτὸς καὶ τὸν υἱὸν καὶ τὴν γυναῖκα οὐκ ἂν ἐτόλμησα; see p.37n.y *infra*.

⁶³See Lipsius, 874n.30; Gagarin (1979), 311; and cp. §69 ἐπειδὴ αὐτὸς μὲν οὐ παρεγένου, ἡ δὲ γυνὴ καὶ τὰ παιδία, ἄλλοι δὲ σοι μάρτυρες οὐκ εἰσίν, κτλ. This same conclusion, though not this specific argument, is adopted by Carawan (1991), 4n.10; also MacDowell (1963), 94ff.

by witnesses.⁶⁴ It is often said, moreover, that while only free males of age could appear as witnesses in Attic courts, an exception allowed women (at least) to appear in homicide proceedings on behalf of the prosecution.⁶⁵ But the problem is not quite as simple as it thus appears. While the competence of women to appear as witnesses is itself problematic, [Dem.] 47.68-73 gives unequivocal evidence that women, and apparently children also, could swear *some* type of oath.⁶⁶ Even skeptics will allow that women could swear an evidentiary oath.⁶⁷ Yet the oaths mentioned in [Dem.] 47 cannot be evidentiary oaths;⁶⁸ nor can they be the oaths that were sworn by ordinary witnesses.⁶⁹ In fact, the oaths of §§70 and 73 clearly seem to form part of the preliminary oath.⁷⁰ We may, therefore, need to assume that the oath to be sworn by the wife and children was actually some type of oath of cojuration, in which the family of the litigants would have appeared at the *diomosia* in the capacity of oath-helpers.⁷¹ In cojuration proper, if we may judge by analogy, the

⁶⁴See n.53 *supra*; also Caillemer, 228n.7.

⁶⁵Cp. Bonner, "Did Women Testify in Homicide Cases at Athens?" *CP* 1, 1906, 127-32; Bonner-Smith, 2:125f., 221f. MacDowell (1963), 102ff., however, is rightly skeptical; also Harrison, 2:136f.

⁶⁶So Bonner (1906), 127f.; see n.62 *supra*.

⁶⁷Harrison, 2:151; also cp. Bonner (1905), 33n.3; Bonner-Smith, 2:125, 159; Mirhady, 82, with n.14.

⁶⁸The wife and child would not have been given the opportunity to swear an evidentiary oath for the simple reason that such an oath required the consent of both parties (see n.53 *supra*), which would not likely be granted in the present circumstance; see Bonner (1906), 129; also Bonner-Smith, 2:222n.1.

⁶⁹Even if we allowed that women could appear in the capacity of witness (n.65), we cannot suppose (on the strength of this single, ambiguous passage) that children (§70 τὰ παιδία) also would be admitted as competent in this regard (cp. Bonner [1906], 129f.; Pl. *Laws* 937A is certainly an innovation; see Lipsius, 874n.32); yet, in the present passage, they too are made to swear the very same oath as the Trierarchos and his wife (see n.62 *supra*).

⁷⁰The oaths of the wife and children are apparently sworn in close connection with the Trierarchos' own oath (n.62 *supra* and esp. p.37n.y *infra*). Yet the Trierarchos' oath must be a preliminary oath, since (a) the swearing of this oath is made a condition for the case moving to trial (p.24n.d *supra*); and, in any event, (b) a litigant could not appear as a witness on his own behalf (Dem. 46.9f.; cp. 40.58).

⁷¹On cojuration, see Glotz (1904), 288ff.; (Darem.-Sag.), 765; R. Meister, "Eideshelfer im griechischen Rechte," *Rh. Mus.* 63, 1908, 559-86; Bonner-Smith, 2:174-90; Latte (1933), 286 (= *Kl. Schr.*, 388f.); Wolff (1946), 41n.43 (cp. 75, with n.198); Gernet, "La *Diamartyrie* procédure archaïque du droit athénien," in eodem (1955), 99n.5. The use of cojuration in Athens, of course, is disputed; see, recently, Gagarin, "The Nature of Proofs in Antiphon," *CP* 85, 1990, 28.

oath-helpers would have sworn not to the actual events, but simply to the truth of the litigants' own oath.⁷² This is not precisely what is occurring in our passage, for the family of the Trierarchos presumably would swear also to the events.⁷³ Still, there may have been a type of cojuration used in homicide proceedings such that the family of the prosecution was allowed to swear their general support as part of the *diomosia*, including (perhaps) an oath in support of the prosecution's claim to the requisite degree of relationship with the victim.⁷⁴ Admittedly, the existence of this type of oath cannot be established with any certainty nor on independent grounds. Yet the foregoing comments suffice to refute the claim that the wife and children, as witnesses, *must* have been swearing *only* to the events.

Still, the key to a proper understanding of the passage does not rest on such speculations as these, but will be found to lie in the rhetorical structure of the Trierarchos' narrative.⁷⁵ To this end we start by offering the following outline of [Dem.] 47.68-73:

⁷²See previous note. What counted, then, would be the number of oath-helpers that could be assembled, not the quality of their testimony (Glötz [Darem.-Sag.], 765). Indeed, such witnesses as family members probably would be considered biased and not fully credible; see Bonner-Smith, 2:135f.; Humphreys (1986), 74ff. It has been supposed that IG i³ 104.21 (συνδίοκεν) might refer to cojuration (see R. Dareste, B. Haussoullier, and Th. Reinach, *Recueil des inscriptions juridiques grecques* [Paris, 1892-1904], 2:12, with n.1; also Glötz, 765; J. Plescia, *The Oath and Perjury in Ancient Greece* [Tallahassee, 1970], 54f.). This is possible, though there is no reference to an oath at 104.16 (see Stroud [1968], 9f., 49f.) as was formerly believed (e.g., U. Köhler, "Attische Inschriften," *Hermes* 2, 1867, 32f.); but see 1.43, with Boegehold (1973), 153 init.

⁷³See n.63 supra.

⁷⁴So Bonner-Smith, 2:190f. (cp. 221f.); also, though he does not allow an oath of relationship, MacDowell (1963), 107.

⁷⁵Only Grace (1975) has recognized the importance of the rhetorical structure, and used her analysis to good effect.

Ἐπειδὴ τοίνυν ἐτελεύτησεν.... ἀκούσαντες δέ μου οἱ ἐξηγηταὶ ταῦτα,
ἤροντό με πότερον

(I) ἐξηγήσωνταί μοι μόνον

(II) ἢ καὶ συμβουλεύσωσιν.

ἀποκρινάμενοι δέ μου αὐτοῖς ἀμφότερα, εἶπόν μοι "ἡμεῖς τοίνυν σοι

(I) τὰ μὲν νόμιμα ἐξηγησόμεθα,

(II) τὰ δὲ σύμφορα παραινήσομεν. ἰ

(I)

(τὰ νόμιμα ἐξηγησόμεθα)

πρῶτον μὲν^k

1) ἐπενεγκεῖν δόρυ ἐπὶ τῇ ἐκφορᾷ.

2) καὶ προαγορεύειν ἐπὶ τῷ μνήματι

— εἰ τις προσήκων ἐστὶ τῆς ἀνθρώπου —^l

3) ἔπειτα τὸ μνῆμα φυλάττειν ἐπὶ τρεῖς ἡμέρας.

^ἰ The exegetes clearly distinguish what they *expound* (ἐξηγήσωντα/ἐξηγησόμεθα = I) from their *advice* (συμβουλεύσωσιν/παραινήσομεν = II). They expound on ritual matters (τὰ νόμιμα; cp. Jacoby [1949], 273n.242). Their advice, on the other hand, which pertains largely to legal issues (see II below), is not binding, but only for the Trierarchos' profit (τὰ σύμφορα); see p.23n.b supra.

^k πρῶτον μὲν is answered by τάδε δὲ below. πρῶτον μὲν introduces three ritual requirements (τὰ νόμιμα), and can only refer to what the exegetes expound.

^l εἰ τις προσήκων ἐστὶ should be taken as the *subject* of the infinitives, and not as the object of προαγορεύειν; see p.44 infra, with nn.106-107.

(II)

τάδε δε^m συμβουλευόμεν σοι (sc. οἱ ἐξηγηταί)

1) ἐπειδὴⁿ αὐτὸς μὲν οὐ παρεγένου,

ἢ δὲ γυνὴ καὶ τὰ παῖδια,
ἄλλοι δὲ σοι μάρτυρες οὐκ εἰσίν.^o

ὀνομαστὶ μὲν μηδὲν προαγορεύειν,

τοῖς δεδρακόσι δε καὶ κτείνασιν.

2) εἶτα πρὸς τὸν βασιλέα μὴ λαγχάνειν

(a) οὐδὲ γὰρ ἐν τῷ νόμῳ ἔστι σοι

(b'x) οὐ γὰρ ἔστιν ἐν γένει σοι ἡ ἀνθρωπος,

(b'y) οὐδὲ θεράπαινα...

(b'') οἱ δὲ νόμοι τούτων κελεύουσι τὴν δίωξιν εἶναι.^p

^m τάδε δε answers πρῶτον μὲν above, and introduces the section of advice; cp. συμβουλευόμεν σοι with συμβουλεύσωσιν above.

ⁿ Cp. γὰρ infra, with n.p.

^o N.b. the A-B-A structure.

P II.2.b gives the reason (γὰρ) for II.2.a, which is itself the ground (γὰρ) of the injunction in II.2 (μὴ λαγχάνειν). N.b. the chiasmic structure of II.1 and II.2: the ground (ἐπειδὴ) + the injunction (προαγορεύειν), followed (εἶτα) by a second injunction (μὴ λαγχάνειν) + its ground (οὐδὲ γὰρ). The exegetes thus offer two distinct pieces of advice, together with the reasons for each. As such, Murray's punctuation (n.48 supra) is incorrect. For chiasmus in Demosthenes, see C. Rehdantz and F. Blass, *Demosthenes ausgewählte Reden* (Leipzig, 1886-1910), 2.2, Indices, s.v. "Stellung"; 1:123 ad *Olynth.* 3.1, etc.; also G. Gebauer, *De Hypotacticis et Paratacticis Argumenti ex Contrario Formis Quae Reperiuntur Apud Oratores Atticos* (Zwiccaviae, 1877), 346-53; A. Bloch, "Literarische und inschriftliche Gesetzesprosa im Griechischen," *Mus. Helv.* 32, 1975, 147.

3) ὥστ' εἰ διομεῖ ἐπὶ Παλλαδίῳ αὐτὸς καὶ ἡ γυνὴ καὶ τὰ παῖδια
καὶ καταράσσεθε αὐτοῖς καὶ τῇ οἰκίῳ.

(γ) χείρων τε δόξεις πολλοῖς εἶναι.

(δ) καὶ

(δ') ἐάν μὲν ἀποφύγη σ', ἐπιωρκηκέναι,

(δ'') ἐάν δὲ ἔλῃς, φθονήσει.^q

4) ἀλλ'

(φ) ὑπὲρ σεαυτοῦ καὶ τῆς οἰκίας ἀφοσιωσάμενος,^r

(ψ) ὡς ῥᾶστα τὴν συμφορὰν φέρειν, ἄλλη δὲ εἴ πῃ βούλει,
τιμωροῦ.^s

^q Evjen, 263, thinks this entire syntactical unit (sc. II.3) contains three ascending conditional sentences. This is not correct. We clearly have here a single conditional (εἰ διομεῖ κτλ.) with a complex apodosis (τε...καί), the second part of which (καί) is itself composed of two further conditionals related to one another by μὲν...δέ. I.e., II.3.γ and II.3.δ are both the consequents of the initial protasis (εἰ διομεῖ). The primary conditional (εἰ διομεῖ...δόξεις) is minatory; the two subordinate conditions (II.3.δ'/δ'') are more vivid. Consequently, the whole of II.3 may be considered as a *warning* to the Trierarchos not to swear at the Palladion, i.e., not to bring the case to trial.

^r While ὥστ' κτλ. states the negative consequences that will follow if the Trierarchos swears at the Palladion, with ἀλλ' we are brought back to the previous injunctions that, if followed, would preclude an appearance at the court; see J. D. Denniston, *The Greek Particles* (Oxford, 1954), 7f.

^s II.4.ψ clearly closes II (cp. τὴν συμφορὰν φέρειν with τὰ δὲ σύμφορα παραινέσωμεν above). In fact, II.4.ψ must refer specifically to II.2, rather than to II.1, since it focuses primarily on what the Trierarchos ought *not* to do (sc. μὴ λαγχάνειν) rather than on what he *is* advised to do (sc. προαγορεύειν τοῖς δεδρακόσι). The structure of the passage thus encourages us to take II.4.φ to refer to II.1. In II.4.φ the Trierarchos is urged to undertake the necessary ritual actions (cp. ἀφοσιωσάμενος, with Parker, App.1), and II.1 must also refer to a ritual rather than a legal proclamation precisely because the Trierarchos is not to proclaim against anyone by name (p.42 infra). It might be objected that I also refers to ritual requirements (p.33n.k supra). But there is really no problem here since, as we shall see, II.1 and I.2 refer to a single proclamation, and not to two distinct proclamations as is sometimes claimed. The point, then, is that the Trierarchos will ritually purify himself (II.4.φ) by observing injunction II.1; and he will best serve his interests (II.4.ψ) by observing injunction II.2. II.4 therefore closes section II.

(III)

Ταῦτα ἀκούσας ἐγὼ τῶν ἐξηγητῶν, καὶ τοὺς νόμους ἐπισκεψάμενος τοὺς τοῦ Δράκοντος ἐκ τῆς στήλης, ἐβουλεύομην μετὰ τῶν φίλων ὅ τι χρῆ με ποιεῖν. συμβουλευόντων δέ μοι ταῦτά, ^t

1) ἃ μὲν ὑπὲρ τῆς οἰκίας προσῆκέ μοι πράξει καὶ ἃ ἐξηγήσαντό μοι οἱ ἐξηγηταί, ἐποίησα (cp. II.1), ^u

2) ἃ δ' ἐκ τῶν νόμων οὐκέτι μοι προσῆκεν (cp. II.2a),
ἡσυχίαν εἶχον (cp. II.2). ^v

(a') κελεύει γὰρ ὁ νόμος (cp. II.2.b'')...

(i) τοὺς προσήκοντας ἐπεξιέναι μέχρι ἀνεψιαδῶν (cp. II.2.b'x)
— (καὶ ἐν τῷ ὄρκῳ διορίζεται ὅ τι προσήκων ἐστίν) —

(ii) κὰν οἰκέτης ἦ (II.2.b'y).

(a'') τοῦτων τὰς ἐπισκήψεις εἶναι (cp. II.2.b''). ^w

(b) ἐμοὶ δὲ οὔτε γένει προσῆκεν...οὐδ' αὐθέραινα γέ-

ἀφεῖτο γὰρ.... (cp. II.2.b') ^x

^t συμβουλευόντων clearly announces that III will recapitulate not I, nor I and II, but specifically II; cp. τὰδε συμβουλεύομεν above.

^u A glance at the whole of III (and see previous note) will show that III.1 must look back to II.1, rather than to I, despite the language of ἐξηγήσαντό μοι οἱ ἐξηγηταί. The Trierarchos says that he did (ἐποίησα) just what the exegetes told him to do — viz., to proclaim simply against the doer. III.1 thus refers to the same ritual activity as II.1 (cp. II.4.φ). The καὶ in καὶ ἃ ἐξηγήσαντό is probably explanatory.

^v And what the exegetes advised him *not* to do — viz., μὴ λαγχάνειν — he did not do (cp. II.4.ψ, with previous note).

^w III.2 seems *prima facie* to differ significantly from II.2. But on closer inspection it is seen that the differences are quite deliberate and a sign of careful composition. III.2.a recapitulates II.2.b (II.2.a appears at III.2). In II.2.b, the τοῦτων of b'' clearly refers to *both* relatives *and* masters. But in III.2.a the τοῦτων (a''), placed where it is, puts its stress unmistakably on the prosecution of the masters only. This shift in emphasis is easily explained. In II, the exegetes are speaking generally about the requirements of the law. In III, on the other hand, the Trierarchos is speaking with reference to his own particular case where it is only the relationship of master to slave that is at issue. See Grace (1975), *passim*. It is worth noting, moreover, that this shift in emphasis is accomplished by the rather mechanical means of splitting II.2.b'' (= III.2.a) in half, and placing part of it (III.2.a') in front of what corresponds to II.2.b' (= III.2.a'.i/ii), and part of it (III.2.a'') afterwards. θέραινα is further stressed in III.2.b; cp. οὔτε...οὐδ' αὐθέραινα, with Denniston, 193; also L. L. Forman, *Selections From Plato* (London, 1911), 420f.

^x Here too, III and II appear to differ more than they really do, and the difference is again clearly deliberate. To paraphrase:

3) (c') φεύσασθαι δὲ πρὸς ὑμᾶς καὶ διομόσασθαι αὐτὸς καὶ τὸν υἱὸν καὶ τὴν γυναῖκα οὐκ ἂν ἐτόλμησα (cp. II.3) ^y
— οὐδ' ἂν εἰ εὔηδειν ὅτι αἰρήσοιμι αὐτοὺς (cp. II.3.d'')
(c'') οὐ γὰρ οὕτως τοῦτους μισῶ, ὡς ἑμαυτὸν φιλῶ (cp. II.3.γ/δ).

4) Ἴνα δὲ μὴ λόγῳ μόνον ἀκουσῆτέ μου, αὐτὸν ὑμῖν τὸν νόμον ἀναγνώσεται. ^z

It has been noticed by others that II and III are essentially doublets of one another.⁷⁶ But few have observed how closely the two correspond in minute detail, and no one has noted how this fact is significant for determining precisely the nature of the oaths mentioned in the passage.⁷⁷

(II.2.a) It was not in the laws, for

(b') she is neither your relative nor slave

(b'') and the law orders relatives and masters to prosecute.

(III.2) What was not in the laws, I did not do; for

(a) the law orders relatives and *especially* masters to prosecute,

(b) but she was not a relative nor slave — for she had been freed....

One will notice once again the chiasmic structure. Presumably, the different arrangement within II and III was intended primarily for the purpose of stylistic *variatio*. It succeeded too well, for commentators have not always seen that the passages are, in fact, *identical in content*.

^y III.3.c' obviously picks up II.3. As such, the accusatives (τὸν υἱὸν καὶ τὴν γυναῖκα) must be subjects of the infinitives, just as much as ἡ γυνὴ καὶ τὰ παῖδια are the subjects in II.3. Dareste and Gernet both translate thus; also Bonner (1906), 128n.3. This shows that MacDowell (1963), 107 ("I should not have dared to...take an oath *for* myself, my son, and my wife"; cp. Murray, p.26 *supra*), is incorrect. Both son and wife *themselves* swear at the *diomosia*. See n.62 *supra*.

^z While III.4 does not repeat the contents of II.4, it nevertheless compositionally closes III in a similar way. For clearly, the law to be read (IG i³ 104 or some version thereof) can only refer to the material discussed in III (= II), since the regulations expounded by the exegetes (= I) were surely unwritten.

⁷⁶See, e.g., Grace (1975), 14, who speaks of "the device of persuasion by repetition". On the use of "parallelisms" in dicanic oratory, see Dover, *Lysias and the Corpus Lysiacum* (Berkeley and Los Angeles, 1968), 60ff.

⁷⁷Panagiotou (431ff.), though seemingly aware of the doublet, fails to analyze it. Furthermore, the distinction he *does* note between the "strong positive words" of the

Yet the rhetorical structure of the passage clearly demonstrates that II and III are, for all practical purposes, identical to one another in their contents, and nearly identical in their form.

* * * *

Before returning to the problem of the oaths of [Dem.] 47, we must first confront a question regarding the nature and number of the proclamations (*prorrheseis*) mentioned in the passage. A reference to proclamations is found on two occasions: §69 καὶ προαγορεύειν ἐπὶ τῷ μνήματι κτλ. (= I.2); *ibid*, ὀνομάσῃ μὲν μηδὲν προαγορεύειν κτλ. (= II.1). There are several issues surrounding these *prorrheseis*. First of all, MacDowell claimed that the Athenians made use of three distinct proclamations: (a) a proclamation made at the tomb of the deceased, mentioned explicitly only at [Dem.] 47.69 (I.2);⁷⁸ (b) a proclamation made by the family ἐν ἀγορᾷ (IG i³ 104.20-21 = Dem. 43.57; Pl. *Laws* 874AB);⁷⁹ and finally, (c) a proclamation made by the *Basileus* (Ar. 'Aθ. Πολ. 57.2).⁸⁰ Yet many scholars have objected to the redundancy of this

positive injunctions and the "only loose negative constructions" of the complementary prohibitions, while itself of dubious value (cp. n.27 *supra*), is (as we shall see [pp.45ff. *infra*]) completely irrelevant to the logic of the passage.

⁷⁸While MacDowell (1963), 24, thought this was a special call for relatives (cp. n.105 *infra*), it is more generally believed that the reference is to a standard and purely ritual requirement (see Bonner-Smith, 2:219f.; Piérart, 432f.; Evjen, 262; A. Pieri, "ΤΡΟΕΙΠΕΙΝ ΕΝ ΑΓΟΡΑ," in *Munus Amicitiae: Scritti in memoria di Alessandro Ronconi* [Firenze, 1988], 2:91). For the religious observances connected with homicide proceedings, including the carrying out of the spear, see Heitsch (1984), 14n.34; also Glotz (1904), 70f.

⁷⁹Cp. Pl. *Laws* 871AB, 873B, etc. ἐν ἀγορᾷ simply = "in assembly", "Volksversammlung"; see Ruschenbusch (1960), 144, with n.68; Stroud (1968), 52; Jordan (1979), 38f. MacDowell supposes that several references found in the orators belong in this category (e.g., Ant. 6.34ff.; Dem. 59.9-10 [cp. Piérart, 430n.17]).

⁸⁰Also *Lex. Seg.* 310.6-8; Poll. 8.90; Schol. Patm. ad Dem. 23.76 (*BCH* 1, 1877, 138f.; cp. O. Riemann, "Remarques sur les scholies de Démosthène et d'Eschine du manuscrit de Patmos," *BCH* 1, 1877, 185). None of these later notices, however, is independent. Both Pollux (cp. Bonner-Smith, 1:114n.1, 2:221n.1) and *Lex. Seg.* (cp. 310.8f. περὶ τῶν ἱερῶν καὶ τοῖς γένεσι) are clearly dependent upon Aristotle, while the Patmos scholion obviously derives (at least in part) from Pl. *Laws* 874AB; see nn.96 and 100 *infra*.

scheme, and the *communis opinio* has tended to regard the family's proclamation ἐν ἀγορᾷ (b) and the proclamation of the *Basileus* (c) as essentially one and the same, often ascribing the confusion of the sources to a variously dated historical alteration in which the family's right to make a legally binding proclamation was given over to the *Basileus*.⁸¹ MacDowell further ascribed [Dem.] 47.69 (ὀνομάσῃ μὲν κτλ. = II.1) to the familial proclamation made ἐν ἀγορᾷ,⁸² though most would prefer to see this proclamation as identical with that made at the tomb.⁸³ A final problem concerns the question of when *atimia* was imposed, and how the imposition of *atimia* was related to these proclamations. It is well known that someone under indictment for homicide was *atimos* and enjoined εἶργεσθαι τῶν νομίμων;⁸⁴ but there is some disagreement as to precisely when *atimia* was legally effective.⁸⁵ Despite this wide array of views, however, the actual evidence on the subject of *prorrheseis* remains fairly uniform. In fact, not one of the passages cited mentions all three proclamations and, with the possible exception of [Dem.] 47.69, none of these passages mentions even two of them.⁸⁶

The only extended treatment of proclamations is found in Ant. 6.34-46. An unnamed Choregos had given one of his *choreutae* a potion to improve his voice, and when the boy died as a result of the drink, the Choregos was threatened with a charge of murder. The passage mentions

⁸¹So, U. von Wilamowitz-Moellendorff, *Aristoteles und Athen* (Berlin, 1893), 1:253; Latte (1933), 283f. (= *Kl. Schr.*, 386); Ruschenbusch (1960), 146, with n.80; Piérart, 429f.; Pieri, 95ff. Bonner-Smith (2:220f.) and Harrison (2:9n.5) both resist this trend, though not unequivocally. U. Paoli, "La Notion de prorrhésis en droit attique," *RIDA*, 3^e ser., 3, 1956, 135-42 (= *Altri studi*, 243-49), thought the family made two proclamations, each of which involved a different degree of ἀγχιστεία; but see Pieri, 92n.8.

⁸²Also Rhodes, 640f.

⁸³Evjen, 262; Piérart, 432f.; Gagarin (1979), 309n.27; Pieri, 93f.

⁸⁴On *atimia*, esp. as it pertains to homicide, see Harrison, 2:169ff.; Ruschenbusch, *Untersuchungen zur Geschichte des athenischen Strafrecht* (Köln, 1968), 16ff.; G. E. M. de Ste. Croix, *The Origins of the Peloponnesian War* (Ithaca, 1972), 397f.; Piérart, 427n.2; Hansen (1976), 70f., 99f.; Rhodes, 641; also J. M. Rainer, "Über die Atimie in den griechischen Inschriften," *ZPE* 64, 1986, 163-72; Humphreys (1991), 33ff.; cp. nn. 25 and 51 *supra*.

⁸⁵Paoli (1956), 136f. (= *Altri studi*, 244f.; cp. n.224 *infra*), thought *atimia* followed immediately *ipso iure* on the deed. But *atimia* is more commonly thought to follow only on the proclamation of the *Basileus*: so MacDowell (1963), 26; Saunders, *JHS* 85, 1965, 225; Hansen (1976), 99; Pieri, 92; cp. Piérart, 428ff.

⁸⁶On Pl. *Laws* 874AB, see n.100 *infra*.

only two distinct activities, ἀπογράφεσθαι and προαγορεύειν.⁸⁷ The speaker's enemies, we are told, were eager to "lay a charge"⁸⁸ of homicide against the Choregos on the day after the burial. This charge, however, was rejected by the *Basileus* on the sound procedural ground that it was too late in the calendar year to bring such a suit.⁸⁹ The term ἀπογράφεσθαι, as here used, clearly means something more than simply "to submit a charge in writing", as is shown by the fact that the speaker can say indifferently, as a result of its rejection by the *Basileus*, either that it was the speaker's *enemies* who did not ἀπογράφεσθαι the charge,⁹⁰ or that it was the *Basileus* himself who did not do so.⁹¹ As such, the term will mean something like "to register a charge",⁹² and it must imply that the charge has been duly accepted by the presiding magistrate. It is also clear that it is only upon the *registration* of the charge that any legal consequences are to follow.⁹³ For in the present case it is said that the charge has *not* been registered (see above), and there are in fact no legal consequences that have been laid upon the speaker;⁹⁴ yet it has not been denied that the speaker has been proclaimed against.⁹⁵

Several conclusions may be drawn from this passage as regards, at least, late Fifth Century procedure. First of all, concerning ἀπογράφεσθαι, the following situation emerges: (a) ἀπογράφεσθαι is to be carefully

⁸⁷Cp. Ant. 6.35 πείσαντες δὲ τούτους ἀπογράφεσθαι καὶ προαγορεύειν ἐμοὶ εἶργεσθαι τῶν νομίμων. ἤγησαντο ταύτην σφίσι ἐσσεσθαι σωτηρίαν καὶ ἀπαλλαγὴν τῶν πραγμάτων ἀπάντων; also 34 παρεσκευάζοντο αἰτιάσθαι καὶ προαγορεύειν εἶργεσθαι τῶν νομίμων.

⁸⁸6.37 πρόθυμοι ἦσαν ἀπογράφεσθαι με.

⁸⁹6.38 οὐκ ἐγχωροῖ ἀπογράψασθαι; also 42f.; see p.74 *infra*.

⁹⁰6.44-46 ἀρξαμένοις ἐξὸν αὐτοῖς ἀπογράφεσθαι ἤτινι ἐβούλοντο. οὐδ' αὖ πω ἐνταῦθα ἀπεγράψαντο...ἐν αἷς ἐξὸν αὐτοῖς ἀπογράψασθαι οὐκ ἀπεγράψαντο, etc.

⁹¹6.41 καὶ διὰ τὴν ἐμὴν σπουδὴν οὐ φασι ἐθέλειν αὐτὸν [sc. τὸν βασιλέα] ἀπογράφεσθαι τὴν δίκην; 42f. ἔδει μὲν γὰρ τὸν βασιλέα, ἐπειδὴ ἀπεγράψατο, τρεῖς προδικασίας ποιῆσαι...οὐδ' ἀπογράφεσθαι ἡξίου παρὰ τοὺς ὑμετέροους νόμους.

⁹²So Maidment, in his Loeb translation; see *Minor Attic Orators I: Antiphon, Andocides* (London, 1941); cp. Lipsius, 301ff., 810f.; also nn.103 and 175 *infra*.

⁹³Cp. 6.36 ὁ γὰρ νόμος οὕτως ἔχει. ἐπειδὴν τις ἀπογραφή φόνου δίκην, εἶργεσθαι τῶν νομίμων; also n.85 *supra*.

⁹⁴6.38 καὶ ἐγὼ τοὺς ταῦτα μηχανωμένους εἰσάγων εἰς τὸ δικαστήριον...; 39f.; 45f.

⁹⁵6.40 ὥστε δεινὸν δοῦναι εἶναι τῇ βουλῇ. ἐπειδὴ ἐπύθετο προειρημένον μοι εἶργεσθαι τῶν νομίμων ὑπὸ τούτων οὐς ἐώρων μοι τῇ προτεραίᾳ συνόντας καὶ διαλεγόμενους.

distinguished from προαγορεύειν; (b) it is only ἀπογράφεσθαι that carries any legal force; and (c) even ἀπογράφεσθαι is legally binding only *after* it has been accepted by the *Basileus*. These several distinctions, as we shall see, will prove to be critical to an analysis of [Dem.] 47. Yet before taking up these matters in any greater depth, we must first consider the implications of the passage for προαγορεύειν.

We see that the passage mentions only a single proclamation, to be made by the family of the deceased, but which is not in any way legally binding. This familial proclamation, obviously, cannot be confused with the proclamation ascribed by Ἀθ. Πολ. 57.2 to the *Basileus*, for such a proclamation by the *Basileus*, if it in fact existed, could only have been made *after* the *Basileus* had accepted and registered the charge. It is, of course, quite possible that the *Basileus* was required to offer such a proclamation after he had registered the charge.⁹⁶ In this case, the following picture would emerge: the family's initial proclamation would simply announce their intent to prosecute,⁹⁷ though this familial proclamation would not have any legal force; a second proclamation, then made by the *Basileus*, would subsequently announce that a process was actually under way — though this second proclamation would presumably be only the oral pronouncement that a charge had been duly registered.⁹⁸

Now, it is easy to identify the familial proclamation described in Ant. 6 with the familial proclamation ἐν ἀγορᾷ, mentioned at IG i³ 104.20-21. But there is also the question of the proclamation to be made at the tomb, attested by [Dem.] 47.69 (= I.2). We need to decide whether or not this latter proclamation is distinct from the familial proclamation of Ant. 6. Put another way, because the *second* proclamation of [Dem.] 47.69 (= II.1) is itself plausibly identified with the familial proclamation ἐν ἀγορᾷ, we need to determine whether or not the two proclamations of §69 are themselves distinct from one another, as MacDowell maintained.

⁹⁶See Schol. Patm. ad Dem. 23.76 καὶ ἀποφέρει τὴν γραφὴν πρὸς τὸν βασιλέα, καὶ ὁ βασιλεὺς διὰ τοῦ κήρυκος κηρύττει καὶ ἀπογορεύει τόνδε τὸν ἀνελόντα τὸν δείνα μὴ ἐπιβαίνειν ἱερῶν καὶ χώρας Ἀττικῆς. Cp. n.100 *infra*.

⁹⁷Or, perhaps more accurately, it simply informed the community of the charge; see Gagarin (1979), 309n.27; (1981), 151.

⁹⁸Cp. Thür (1983), 607: "Die Auseinandersetzungen in Ant. 6, 36-43 scheinen mir nicht um die...Annahme der Klage gegangen zu sein, sondern um die bloße Bestätigung der privaten *Prorrhesis*, die der *Basileus* offenbar nach völlig freiem Ermessen auch noch in dieser Zeit vornehmen konnte."

As we have seen, some scholars hold that the two proclamations of §69 should refer to the same act. This must be correct. As Gagarin rightly observes, in the second proclamation of §69 (ὀνομάσῃ μὲν κτλ. = II.1), the Trierarchos is advised to proclaim "not by name, but only against the doer". This must be a purely ceremonial proclamation, without any legal significance, for a proclamation against an unnamed killer obviously could not, all by itself, constitute the *legal* initiation of a δίκη φόνου.⁹⁹ In this case, however, the Trierarchos' proclamation ὀνομάσῃ μὲν κτλ. is simply a ceremonial doublet of the proclamation to be offered at the tomb. As such, it is far easier to identify these two proclamations than it is to separate them, since we nowhere else hear of *two* purely ceremonial proclamations.¹⁰⁰

Leaving aside, then, a possible post-registration proclamation by the *Basileus* (Ἀθ. Πολ. 57.2; Schol. Patm. ad Dem. 23.76), we find in all the evidence mention only of a single, non-binding, pre-registration proclamation, which is once referred to the tomb ([Dem.] 47.69), sometimes ἐν ἀγορᾷ (IG i³ 104.20-21; Pl. *Laws* 874A7), and occasionally not specified as to local (e.g., Ant. 6). The solution obviously is to assume the existence of a single, non-binding, pre-registration proclamation made usually, if not exclusively, by the family of the deceased in an

⁹⁹That the proclamation of II.1 (ὀνομάσῃ μὲν κτλ.) is a purely ritual procedure is, in fact, amply confirmed by II.4.φ (ἀφοσιωσάμενος; see p.35n.s supra), and III.1 (ἄ μὲν...καὶ ἄ ἐξηγήσαντό μοι οἱ ἐξηγηταί, ἐποίησα; see n.u supra). Cp. the proclamation made against an *unknown* killer (to be tried at the Prytaneion) which also, ultimately, was of a purely ritual nature; see Ἀθ. Πολ. 57.4, with Rhodes, 648f.

¹⁰⁰Pl. *Laws* 874AB (Ἐάν δὲ τεθνεώσῃ μὲν αὐτὸς τις φανῆ, ἀδελφὸς δὲ ὁ κτείνων ἢ...τὰς μὲν προρρήσεις τὰς αὐτὰς γίνεσθαι καθάπερ τοῖς ἄλλοις, προαγορεύειν δὲ τὸν φόνον τῷ δράσαντι, καὶ [A7 καὶ σμ. AO; see Diès *ad loc.*] ἐπιδικασάμενον ἐν ἀγορᾷ κηρῦξαι τῷ κτείναντι τὸν καὶ τὸν καὶ ὠφληκὸτὸν φόνου μὴ ἐπιβαίνειν ἱερῶν μηδὲ ὅλης χώρας τῆς τοῦ παθόντος κτλ.) might be thought to indicate two such ceremonial proclamations (cp., e.g., Gernet, *Platon, Lois livre IX*. Traduction et commentaire [Paris, 1917], 170; also Piérart, 434) since προαγορεύειν and κηρῦξαι seem to name two distinct actions undertaken by the same person, one of which is prior to and the other of which is posterior to ἐπιδικασάμενον ἐν ἀγορᾷ. Yet the distribution of τῷ δράσαντι and τῷ κτείναντι (which otherwise appear together [so, at least, {Dem.} 47.69]) between the two clauses, shows that in fact the καὶ of A7 must be explanatory, not conjunctive. To judge from his punctuation, Burnet also took καὶ in this way. The real contrast of the passage is given by τὰς μὲν...προαγορεύειν δὲ, which states that the proclamations (generalizing plural) are the same as usual; but in this case (δέ), one proclaims against the *doer*, that is (καὶ)... (The Patmos scholiast to Demosthenes [n.96 supra] clearly did not take the passage in quite this way, since he claims that it is the *Basileus* who κηρῦξαι, and only *after* the charge has been brought [ἀποφέρει]. Whether the scholiast is here interpreting *Laws* 874AB, or merely adapting its language, *this* at least cannot be Plato's meaning).

assembly (ἐν ἀγορᾷ), and distinct from any formal proclamation offered by the *Basileus* upon his legal acceptance of the charge. Consequently, while the *communis opinio* has tended to respond to MacDowell's three-fold division by conflating the proclamation ἐν ἀγορᾷ with that made by the *Basileus*, we should maintain this distinction and either identify, or at least closely associate, the family's proclamation ἐν ἀγορᾷ with any ritual proclamation offered at the tomb.¹⁰¹

The foregoing discussion has concerned the nature and number of what are essentially *pro forma* announcements. The critical distinction, however, remains that between the purely ceremonial proclamation(s) of the family (προαγορεύειν), and the formal lodging and acceptance (registration) of the charge by the *Basileus* (ἀπογράφεσθαι). This simple two-fold division (προαγορεύειν/ἀπογράφεσθαι), thus noted in Ant. 6, is, in fact, already present in IG i³ 104.20-23: Προσιπῆν δὲ τῷ κτείναντι ἐν ἀγορᾷ...συνδιόκειν δὲ...καὶ φράτορας.¹⁰² Still more importantly, this same division appears also in [Dem.] 47.69-70: τάδε δὲ συμβουλευόμεν σοι. ἐπειδὴ αὐτὸς μὲν οὐ παραγένου...ὀνομάσῃ μὲν μηδὲν προαγορεύειν...εἴτα πρὸς τὸν βασιλέα μὴ λαγχάνειν, οὐδὲ γὰρ...¹⁰³ Only after the charge has been duly registered, finally, would the accused be subject to *atimia*.¹⁰⁴

¹⁰¹It is not necessary, of course, that these two proclamations be *exactly* identical in every instance, for they may reflect different aspects of what is generally a single set of preliminary ritual requirements. The evidence does not encourage too great a dogmatism on such matters. It is possible, moreover, that in Drakon's time the proclamation made by the family was legally effective, and that its effectiveness was weakened as the entire procedure was increasingly formalized. Yet all such reconstructions of archaic procedure must remain highly conjectural.

¹⁰²While II. 11-13 deal with the general problem of penalty and competence, and 13-20 discuss the right of pardon (*aidesis*) that follows a conviction, it is only in II. 20-23 that the code treats of the purely procedural aspects of the prosecution and there offers the two provisions mentioned in the text above. 104.23ff. then turns to other matters, perhaps to the treatment of accused and/or convicted killers. That 104.20-23 thus reveal the same two-fold division found elsewhere is unaffected by the possibility that συνδιόκειν might possibly refer to cojuramentation (n.72 supra), since cojuramentation would still be part of the actual trial procedure.

¹⁰³See the outline of the passage offered in the text above, with nn. *ad loc.*, esp. p.34n.p supra; also Jacoby [1949], 243f.n.44. While we cannot be certain that λαγχάνειν is an *exact* synonym for ἀπογράφεσθαι (n.92 supra; see MacDowell [1963], 34), the two expressions clearly describe related acts; for λαγχάνειν, see Lipsius, 816ff.; Harrison, 2:88f.; see n.175 infra. Also cp. B. Borecky, *Survivals of Some Tribal Ideas in Classical Greek. The Use and Meaning of λαγχάνω, δατέομαι, and the Origin of ἴσον εχειν, ἴσον νέμειν, and Related Idioms* (Prague, 1965), 35f.

¹⁰⁴Dem. 23.80 (cp. Lipsius, 324ff.; Harrison, 2:226ff.; Hansen [1976], 100ff.; Gagarin [1979], 114ff.) does not contradict this, for the passage does not refer to *dikai* at

A final problem that must be addressed concerns the syntax of εἰ τις προσήκων ἐστὶ (§69) in I. It is often supposed that this clause is syntactically dependent upon προαγορεύειν, so that the sense will be that the Trierarchos is to make a proclamation at the tomb to see whether there are any relatives about.¹⁰⁵ Gagarin argues this view by claiming that the position of the clause supports this interpretation; also, that this interpretation gives the best sense to the passage thus: while the Trierarchos should make a call for the relatives to appear (in order that *they* may lead the prosecution), *he* should not proclaim against anyone by name, since he was not present as a witness to the crime. The position of the clause, however, proves nothing at all, and the grammar suggests, if anything, that εἰ τις is more likely to be subject of the infinitives than their object.¹⁰⁶ But more importantly, the contrast of the passage, as we have noted, lies not between what the Trierarchos *should* and *should not* do, but rather between what the exegetes officially expound as general religious law (I), and what they unofficially advise the Trierarchos to do on this particular occasion (II). This, however, strongly suggests that εἰ τις, occurring in the section where the exegetes officially expound on religious law (I), should be taken simply as the indefinite subject of the infinitives.¹⁰⁷

all (n.b. ἀπάγειν ἔξεστιν), and only implies that *atimia* is, as it were, retroactive in the case of *apagoge*. This would be a reasonable exception to the rule inasmuch as *apagoge* would be the procedure used precisely in those cases in which no δίκη φόνου (and thus, no formal registration of the charge) had, in fact, been lodged. In such circumstances, *atimia* might be presumed by the arrestor, with the presumption resting on the condition that a conviction would result. This indeed would explain the superadded restrictions mentioned in the passage, including the gentle treatment accorded to the prisoner, and the one-fifth vote requirement (on which latter point, esp. in its application to *apagoge*, see Hansen, *Eisangelia. The Sovereignty of the People's Court in Athens in the Fourth Century B.C.* [Odense, 1975], 29f.; also [1976], 63ff.), neither of which is applicable in an ordinary *dike*. *Atimia*, in other words, might be presumed in certain cases of *apagoge*, but only at the arrestor's own risk; cp. Thür (1983), 607f.; cp. n.176 infra.

¹⁰⁵Treston, 182; MacDowell (1963), 24; Gagarin (1979), 309n.27.

¹⁰⁶See Piérart, 432n.27, who correctly notes that προαγορεύειν regularly takes an infinitive, not an object clause.

¹⁰⁷The infinitives of II are clearly directed at the Trierarchos (τάδε δὲ συμβουλευόμεν σοῦ). This is not the case in I, where no hint of any such definite subject is given. Consequently, we need to supply an indefinite subject for the infinitives in any case. It would be very difficult, therefore, for a reader, when sighting such an indefinite clause as εἰ τις κτλ., to take this clause as anything other than the requisite indefinite subject of *all* the surrounding infinitives. εἰ τις is so taken by Gernet and Murray in their translations; also Evjen, 262f.; Bonner-Smith, 2:218. Pieri, 93n.12, cites Harpocration s.v. ἐπενεγκεῖν δόρυ (= FGh 334 [Istros] F14; cp. 323a [Hellanikos] F1, with comm. *ad loc.*), where Istros is reported as saying that it is the *relatives* who carry out *all* the

We can now discern the flow of the initial stage of the argument (I-II.2). The exegetes ask whether they should expound only (ἐξηγήσονται ...μόνον) or advise also (ἢ καὶ συμβουλεύσωσιν). The Trierarchos requests both. So: (i) first of all (πρῶτον μὲν) they expound that, if the nurse has any relatives, it is the relatives who should carry a spear at the funeral, proclaim at the tomb, and sit guard over the grave for three days. All this is a general ritual requirement (= I);¹⁰⁸ (ii) but their advice to the Trierarchos in *this particular instance* (τάδε δὲ συμβουλευόμεν σοι [=II]) is that (a) as he was not present at the deed, the Trierarchos should not proclaim against anyone by name, but only against the doer (= II.1); and (b) that he should not formally lodge a charge before the *Basileus* (πρὸς τὸν βασιλέα μὴ λαγχάνειν), because the victim was neither a relative nor a slave, and the law orders that the prosecution falls to these, sc. to the relatives and the master (= II.2). The shift from I to II thus marks a shift from the expounding of *general* ritual requirements to the exegetes' advice as to what the Trierarchos should do *on this particular occasion*.¹⁰⁹ This advice is two-fold (II.1-II.2): the first portion of advice (II.1) concerns how the Trierarchos should respond to the *ritual* need for a proclamation (προαγορεύειν); the second portion of advice (II.2) concerns how the Trierarchos should respond to the *legal* question of whether or not to register a charge with the *Basileus* (λαγχάνειν).¹¹⁰

Now, II.1, as we saw, refers to a purely ritual proclamation. As such, while I.1-3 has stated the general ritual requirements which include a proclamation to be offered at the tomb (I.2), II.1 advises the Trierarchos on how to respond to these ritual needs in the present instance: because he was not present at the deed, he should not proclaim against anyone by name. But — and this is the point — none of this affects the question of who has the right to prosecute. For the fact that the Trierarchos was not present at the murder is, to be sure, given as the reason why he should not ritually proclaim (προαγορεύειν) against anyone by name; but it is *not* given as a reason why he should not formally bring the case to court (μὴ λαγχάνειν). This last point, which alone is determinative of the purely legal question of whether or not the case would go to trial, is not men-

actions at the tomb (διὰ τὸ νόμιμον εἶναι τοῖς προσήκουσι τοῦτον τὸν τρόπον μετῆρθεσθαι τοὺς φονεῖς; see FGh IIIb, Suppl. II, 513n.2).

¹⁰⁸See p.33n.k supra.

¹⁰⁹This is also recognized by Pieri, 93.

¹¹⁰See n.103 supra.

tioned until II.2, and it receives its own justification only in the lines that follow it.¹¹¹ As such, the fact that the Trierarchos was not a witness (II.1) does not bear on this latter point (II.2) in any way at all.¹¹²

* * * *

The second piece of advice (II.2) is that the Trierarchos should not bring his case before the *Basileus* (μη λαγχάνειν). This injunction is followed by two γάρ clauses, each of which supplies the ground of its immediate predecessor. I.e., the Trierarchos should not prosecute (II.2) because (γάρ) it "is not in the law" to do so (II.2.a); and it "is not in the law" because (γάρ) the nurse is neither a relative nor a slave, while the law enjoins that the prosecution "be of these" (II.2.b). This question of status and relationship is the only reason given by the exegetes as to why the Trierarchos ought not to prosecute (μη λαγχάνειν).

Taken by itself, without any additional context, II.2 might appear to be ambiguous. As we saw, οὐδὲ γάρ ἐν τῷ νόμῳ ἔστι σοι is susceptible, on purely syntactical grounds, of more than one solution;¹¹³ the same is

¹¹¹See the outline offered in the text above, with p.34n.p supra; cp. Kidd, 217.

¹¹²Evjen (263), MacDowell (19, 94), Gagarin (309), and others, are therefore mistaken in the claim that one of the reasons given to the Trierarchos not to bring the case to trial is that there were no credible or persuasive witnesses. It is pointless, moreover, to insist that, *because of the proximity of the two pieces of advice*, the failure to proclaim by name *must* bear on the injunction not to prosecute: there is no evidence that prosecution *required* a prior (ritual) proclamation *by name*, and it is just as easy to argue that it is precisely because the Trierarchos was not to prosecute that the exegetes thought it would be more profitable (τὰ σύμφορα) for him not to publicly announce the killer's name. At any rate, it was not *legally* necessary that the prosecutor in a δίκη φόνου himself should be an eyewitness to the deed or, for that matter, even that there be any witnesses at all (Ant. 2.1.1-2; 6.18, etc.), though it may well have been difficult to gain a conviction in the absence of such evidentiary proof (see Carawan, "The *Tetralogies* and Athenian Homicide Trials," *AJP* 114, 1993, 243ff., with n.16; also Bonner [1906], 129). Still, there *were* witnesses to the deed in question (both women and slaves [§§52-53, 56, etc.]) as well as neighbors (§60 Hagnophilos) who saw the commotion: in one way (n.65 supra) or another (see esp. Bonner [1905], 24f., 31-38; Bonner-Smith, 2:130f.; also 126ff., 223ff.) all these accounts would have been introduced into the case.

¹¹³See n.52 supra.

possibly true of τούτων in both appearances.¹¹⁴ But II.2 is not given in isolation. First of all, II.2 is followed by an extended ὥστε clause, given in II.3. To be sure, students of the passage have not been sufficiently clear as to exactly how II.3 (= III.3) relates to II.1 and II.2 (= III. 1 and III.2).¹¹⁵ Yet this question can be settled easily. As II.1 refers to a purely ritual requirement that the Trierarchos is to, and subsequently does,¹¹⁶ undertake, while II.2 unequivocally states what the Trierarchos is *not* to do,¹¹⁷ it clearly follows that II.3 (which *warns* the Trierarchos not to swear at the Palladion)¹¹⁸ must primarily refer to what the Trierarchos is ordered *not* to do (at II.2), and not to what he is advised to do (at II.1). Besides, διομῆ ἐπὶ Παλλάδιῳ refers to a legal oath to be taken at the court of the Palladion, and not to any ritual oath, and so can only warn the Trierarchos what will ensue if he ignores the exegetes' injunction not to bring the case before the *Basileus* (II.2). This is confirmed by the doublet of III.3, where φεύσασθαι δὲ πρὸς ὑμᾶς (sc. the jury) καὶ διομόσασθαι...οὐκ ἂν ἐτόλμησα must likewise refer not to what the Trierarchos does do in III.1 (= II.1), but only to what he will *not* do in III.2 (= II.2). In both instances, then, the warning not to swear given in #3 is seen to follow closely on the legal prohibition mentioned in #2, and does not refer in any meaningful way to the ritual injunction of #1. ὥστε, in other words, gives the result of ignoring the exegetes' advice not to prosecute (μη λαγχάνειν). As such, II.3 (= III.3) provides us with a specific context for an interpretation of II.2 (= III.2).

Furthermore, as was shown in our outline of the passage, II and III are obvious doublets of one another: III.2 closely corresponds to II.2; III.3 corresponds to II.3. As such, the oath mentioned in §73 (διομόσασθαι αὐτὸς καὶ τὸν υἱὸν καὶ τὴν γυναῖκα κτλ.) must be identical

¹¹⁴See p.24n.c above. Grace's view that τούτων refers not to the victims, but only to the relatives and master, would clearly entail a restrictive interpretation of the law. But it should be noted that even if τούτων refers to the *victims* of the crime, it nevertheless follows that inasmuch as these victims are explicitly defined as being either "relations" or "slaves", the implication remains that it is the relations of these relations or the masters of these slaves who are to prosecute.

¹¹⁵So, e.g., MacDowell (1963), 95 (also Grace [1975], 10n.c) assumes that ὥστε κτλ. follows as the result of II.2; but MacDowell, 19 and 94 (also Evjen, 263f.) implicitly take ἕαν μὲν (II.3.8') to refer to II.1 and the absence of persuasive witnesses.

¹¹⁶Cp. II.4.φ; III.1.

¹¹⁷Cp. II.4.ψ; III.2.

¹¹⁸See p.35n.q supra.

with the oath mentioned in §70 (εἰ διομῆ...αὐτὸς καὶ ἡ γυνὴ καὶ τὰ παῖδια κτλ.).¹¹⁹ Indeed, given this, it is all but necessary that the parenthetic oath of §72 (καὶ ἐν τῷ ὄρκῳ διορίζεται ὃ τι προσήκων ἐστὶ), which clearly mentions an oath of relationship, should also refer to the very same oath as do §§70 and 73.¹²⁰ The passage thus appears to mention only one single oath, and not several different oaths as MacDowell suggests. In this case, we have quite an extended context with which to operate in our attempt to analyze the precise significance of II.2 (= III.2).

ὥστε, as we saw, follows only as the result of II.2, and comments solely on the injunction not to prosecute (μὴ λαγχάνειν). It does so by introducing a single, complex condition that is minatory (εἰ διομῆ...χείρων τε δόξεις...κἄν...). As such, II.3 consists in a warning *not* to swear the *diomosia* at the Palladion. Now, as the only reason given for the injunction not to prosecute (II.2) is this question of the status and relation of the nurse, the subsequent warning not to swear at the Palladion (II.3) must also refer to this question of status and relationship. For, *in the present context*, there is nothing else on which it is relevant to warn the Trierarchos not to swear. The point, then, is that the Trierarchos is not to prosecute since the woman is neither a relative nor a slave, with the result that (ὥστ') if he *does* swear at the Palladion, dire consequences will ensue. The same logic holds with reference to the swearing at III.3.¹²¹

Secondly, just as II.3 warns of the consequences of ignoring the injunction of II.2, so III.3 is the Trierarchos' response to the injunction of III.2.¹²² In this way, ψεύσασθαι δὲ πρὸς ὑμᾶς καὶ διομόσασθαι κτλ. clearly states that if he is to ignore the exegetes' injunction not to bring the case before the *Basileus*, the Trierarchos would have to lie and swear — which

¹¹⁹See p.37n.y supra.

¹²⁰This has been denied by some; see n.57 supra. But n.b. the article τῷ, which presumably refers the reader to an oath already mentioned — viz., that of §70. Those who deny that the parenthetic clause clinches the restrictive reading of the law ought therefore to reject the clause outright as a gloss, though no one to my knowledge has done so. This solution, which would have no manuscript authority, could not be disproved. But if the clause were a gloss, then either it would represent a separate and confirmatory historical tradition, or it will have been an inference drawn from our very passage, in which case the ancient glossator, at least, already interpreted the oaths of §§70 and 73 as clearly implying an oath of relationship.

¹²¹See n.58 supra. The context in *both* §§70 and 73 thus connect the swearing of an oath to the problem of relationship. On the 'dire' consequences, see text below.

¹²²ἄ δ' ἐκ τῶν νόμων οὐκέτι μοι προσήκεν. ἡσυχίαν εἶχον. κελεύει γὰρ ὁ νόμος... ἐμοὶ δὲ οὔτε...οὐδ' αὐ...ἀφείτο γὰρ...ψεύσασθαι δὲ...καὶ διομόσασθαι...οὐκ ἂν ἐτόλμησα.

he will not do. Yet the only *lie* that can be at issue, *again in the present context*, is a lie concerning the status and relation of the nurse, since there is no other reason given by the exegetes for the Trierarchos not to prosecute. Consequently, inasmuch as both the oath and the lie must refer to the very same question of status and relationship, it is clear that ψεύσασθαι...καὶ διομόσασθαι should be taken as a hendiadys.¹²³ III.3 therefore claims that in order to prosecute, and thereby circumvent the exegetes' injunction not to do so, the Trierarchos must "falsely swear" about the status and relationships involved. And as III.3 is a doublet of II.3, the same implication holds also for the earlier warning not to swear at the Palladion. This, of course, is sufficient to prove that it is only by lying under oath about the nurse's status and relationship that the Trierarchos could prosecute for murder and, *a fortiori*, gain a conviction — as the Trierarchos himself clearly suggests at III.3.c: ψεύσασθαι δὲ πρὸς ὑμᾶς καὶ διομόσασθαι...οὐκ ἂν ἐτόλμησα, οὐδ' ἂν εἰ εὖ ᾔδειν ὅτι αἰρήσοιμι αὐτοὺς. From this it should be clear, even apart from the explicit statement offered in the parenthetic clause, that the Trierarchos has in view an oath of relationship that he supposes must be sworn by the prosecuting parties if the case is to be tried; and consequently, that the law was thus presumed to be legally restricted to the relatives and the master of the victim. As such, at least as presented by the Trierarchos, there was no ambiguity in the law on the question of who, and who alone had the right to prosecute.¹²⁴

These conclusions, drawn from a consideration of the text, are fully consistent with the larger picture provided by the speech. The Trierarchos, as we noted, is trying to prejudice the jury by pointing out how wickedly his opponents behaved in the events that led to the old woman's death.¹²⁵ He also strongly emphasizes the *pathos* involved as this old and

¹²³So Grace (1975), 11; Evjen, 264; cp. n.60 supra. For the use of hendiadys in Greek, see D. Sansone, "On Hendiadys in Greek," *Glotta* 62, 1984, 16-25.

¹²⁴We should therefore retain the usual accentuation of ἔστιν in §70, which thereby remains an explicit statement that the law was thus restrictive; see n.52 supra.

¹²⁵I.e., *diabole* (cp. Ar. Rhet. 3.15); see n.51 supra, and n.253 infra; also §§52-61 ὁ δὲ Θεόφημος ἀντὶ τοῦ τὴν καταδικὴν ἀπολαβεῖν...ἐλθὼν μου τὰ πρόβατα λαμβάνει...καὶ ταῦτα ἔχουσιν οὐκ ἐξήρκεσεν αὐτοῖς. ἀλλ' ἐπεισελθόντες...καὶ ἐκβαλόντες τὴν θύραν...ἐξεφορήσαντο...πάντα λάβοντες...ἐπεισηδῶσιν...ἤρπασον...ἀπαγορευούσης τῆς γυναικός...τὸ ἀργύριον αὐτοῖς κείμενον εἶναι ἐπὶ τῇ τραπέζῃ...ἀλλὰ...οὔτω διέθεσαν...ὥστε ὕψαιμοι μὲν οἱ βραχίονες καὶ οἱ καρποὶ...ἀμυχᾶς δ' ἐν τῷ τραχήλῳ εἶχεν ἀγχομένη...εἰς τοῦτο δ' ἤλθον πονηρίας ὥστε...οὐκ ἐπαύσαντο ἀγχοῦντες καὶ τύπτοντες τὴν γράψιν.

faithful nursemaid, who had been a devoted servant throughout her entire life and who now, after freedom and the death of her husband, with no surviving kin, and still thoroughly dependent upon the charity of her former master, nevertheless remained so faithful as to suffer a brutal death in order to save a little cup (τὸ κυμβίον) from these marauders.¹²⁶ At the same time, the Trierarchos tries to show that he himself had acted with all scrupulousness, and without being overly litigious. He consulted not only the exegetes, but also the code itself and his *philoï*, and he everywhere received the same advice: that he should perform the ritual requirements, but that he should not prosecute since the law enjoined that relatives and masters are to do so.¹²⁷ Yet the Trierarchos takes great pains to show that for all her dependency, the old woman was not in fact his slave — for she had been freed long ago by the Trierarchos' father.¹²⁸ And he concludes by noting that he would have needed to lie under oath about the status of the nurse in order to bring a prosecution — which he would not dare to do.

It is not the case, then, as is sometimes argued, that the Trierarchos' speech shows signs of special pleading that betray a weakness in his case; that he appears to be trying to "justify" his failure to prosecute; that either he or the exegetes offer "other reasons" why he should not do so, apart from this question of the nurse's status; that if the law were as straightforward as proponents of the restrictive view maintain, the Trierarchos "would surely have made this clearer".¹²⁹ In fact, the Trierarchos could hardly have been more explicit about the fact that he is told not to prosecute because, *and only because*, the law orders relatives and masters to prosecute;¹³⁰ and he unequivocally implies that he could proceed only if he dared to falsely swear an oath that, he remarks parenthetically,

¹²⁶§§55ff. τιτθὴ τις ἐμῆ...πρεσβυτέρα...εὐνοῦς καὶ πίστη καὶ...γραυῆς ἦν καὶ οὐκ ἦν αὐτῆν ὁ θρέφων...ἀναγκαῖον οὖν ἦν μὴ περιδεῖν ἐνδεεῖς ὄντας μήτε τιτθὴν γενομένην μήτε παιδαγωγόν...ἀλλὰ καὶ τῆς τιτθῆς τὸ κυμβίον λαβοῦσας...ἵνα μὴ οὗτοι λάβοιεν...οὕτω διέθεσαν...ὥστε ὕφαιμοι...ἔκτη τοῖσιν ἡμέρα...ἐτελεύτησεν ἡ τιτθὴ.

¹²⁷III.2.a' = II.2.

¹²⁸§55f. ἀφειμένη ἐλευθέρα ὑπὸ τοῦ πατρὸς τοῦ ἐμοῦ. συνῶκησε δὲ ἀνδρὶ, ἐπειδὴ ἀφειθὴ ἐλευθέρα· ὡς δὲ οὗτος ἀπέθανε...ἐπανῆκεν ὡς ἐμέ...ὥστε καὶ τῆ γυναικὶ βουλομένη ἦν τοιαύτην οἰκουρὸν μετ' αὐτῆς με καταλιπεῖν. §70 οὐ γάρ ἐστιν ἐν γένει σοι...οὐδὲ θεράπεινα. ἐξ ὧν σὺ λέγεις... §72 οὐκέτι (n.g)...οὔτε γένει...οὐδ' αὖ θεράπεινά γε (n.w)· ἀφείτο γὰρ...ἐλευθέρα καὶ χωρὶς ζῶκει (n.i) καὶ ἀνδρὰ ἔσχευ.

¹²⁹Gagarin (1979), 308, 311; MacDowell (1963), 17ff., with n.52 supra.

¹³⁰Cp. III.2.a; II.2.

defines relationship.¹³¹ The only points that require any special explanation, and which the Trierarchos *is* at pains to establish, is that the old woman is indeed no longer a slave, and how it is that she nevertheless came to be a servant in his household.¹³² Yet even this requirement is easily explained. Anyone (such as a jury) looking at the situation, but who was not intimately familiar with the details of the Trierarchos' household, would probably assume that the old servant was still one of the Trierarchos' slaves: manumission was generally a private act, not widely publicized; records (at least in Athens) were not often kept. As such, the freedman status of the nurse would not be widely known.¹³³ The point would have to be made clearly and emphatically that the woman was not actually a slave. And this, in fact, is precisely what the Trierarchos does. There is no other special pleading, however, of any sort.

We may now return to II.3 and so conclude our analysis of the passage. The principal difficulty concerns the significance of φθονῆσαι in II.3.δ'.¹³⁴ II.3 presents a single condition with a complex apodosis (χείρων τε δόξεις πολλοῖς εἶναι κἂν κτλ.). χείρων δόξεις πολλοῖς εἶναι simply means that the Trierarchos' reputation will suffer if he swears at the

¹³¹The fact that the Trierarchos was unsure as to precisely how to proceed, that he had to make inquiries of the exegetes, that even then he still had to consult both the stele and his *philoï*, proves nothing. The case was obviously a little murky on several grounds, including that of the nurse's status (see text below, with n.133), and the exegetes clearly were to be consulted in such a circumstance. But their advice was binding only in ritual matters, and it was therefore only proper that the Trierarchos should also consult both the written laws and his personal advisors — who, in fact, came to exactly the same conclusion as did the exegetes. Thus, upon investigation, the law was deemed to be perfectly clear, and the Trierarchos, though not himself a legal expert, has no qualms about his failure to prosecute, and even uses this failure as proof to the jury that he was not a litigious sort of fellow.

¹³²See esp. §68 'Επειδὴ τοῖσιν ἐτελεύτησεν, ἤλθον ὡς τοὺς ἐξηγητὰς...καὶ διηγησάμην αὐτοῖς ἅπαντα τὰ γενόμενα, τὴν τε ἀφίξιν τὴν τούτων (n.125), καὶ τὴν εὐνοίαν τῆς ἀνθρώπου (n.126), καὶ ὡς εἶχον αὐτὴν ἐν τῇ οἰκίᾳ (n.128).

¹³³Dem.29.25-26; see H. Rädle, *Untersuchungen zum griechischen Freilassungswesen* (Diss. München, 1969), 8ff.; idem, "Freilassung von Sklaven im Theater," *RIDA*, 3^e ser., 18, 1971, 361f.; also G. Foucart, *De Libertorum Conditione apud Athenienses* (Paris, 1896), 13f.; Calderini, 269; Gernet (1954-60), 2:223n.2; Grace (1975), 10nn.e, g; Evjen, 262n.34.

¹³⁴See n.61. Obviously, it will not do to seek just any possible significance, and then to use this possibility to offer a radical interpretation of Attic homicide procedure. Rather, we must interpret φθονῆσαι in the light of probability and in a manner consistent with the sense of the passage as a whole.

Palladion.¹³⁵ καὶ then introduces two consequences that will vividly follow (ἐπιωρκηκέναι/φθονήσει) depending on whether or not the Trierarchos gains a conviction (ἔαν μὲν...ἔαν δέ). If we assume that τε...καὶ is coordinating, then we find that the Trierarchos has failed to explain either why, or in what manner, his reputation will suffer as a result of bringing a prosecution. It is therefore best to take τε...καὶ as explanatory so that the sense will be that his reputation will suffer regardless of the outcome — i.e., whether he fails or succeeds in gaining a conviction.¹³⁶

II.3.δ' (ἔαν μὲν ἀποφύγη σ', ἐπιωρκηκέναι) states that if the Trierarchos fails to convict, he will be thought (δόξεις πολλοῖς) to have perjured himself. This could be taken to refer exclusively to II.2, so that the sense would be that if he lies about the status of the nurse, and yet fails to convict, it will be because he was caught lying and people will therefore know that he lied about the status of the nurse. But this assumes that the jury would judge the case on purely procedural grounds, which is not wholly satisfactory,¹³⁷ and it places the emphasis on the fact that he will be *found* to be a perjurer (δόξεις πολλοῖς), whereas the real emphasis obviously falls on ἐπιωρκηκέναι. It is therefore better to take III.3.δ' more broadly as indicating that an acquittal would mean that the jury did not believe his account of the matter generally, and therefore thought that he had perjured himself when he swore the *diomosia* at the Palladion — all of which would surely result in a loss of the Trierarchos' reputation.¹³⁸ This, at least, explains the emphasis on ἐπιωρκηκέναι, while still accounting for its grammatical dependence on δόξεις πολλοῖς. It is not necessary, however, in any way to connect this with II.1 and the absence of persuasive witnesses, as is sometimes done.

¹³⁵Lys. 16.3; 32.3; Isoc. 19.4.

¹³⁶For this commonly overlooked use of τε...καὶ, see G. J. de Vries, *A Commentary on the Phaedrus of Plato* (Amsterdam, 1969), 105f. (ad Pl. *Phdr.* 242B8-9); Verdenius, "Notes on the Prologue of Euripides' *Bacchae*," *Mnem.*, ser. iv, 33, 1980, 11 (ad Eur. *Ba.* 43); also Forman, 283. So, apparently, Gernet (1954-60), 2:223 "Si donc vous prêtez au Palladion..., tu te feras du tort dans l'opinion: si l'adversaire est acquitté, tu passeras pour parjurer; s'il est condamné, tu seras mal vu." Dareste and Murray both incorrectly render the καὶ as a mere conjunction. More recent writers have typically ignored this question.

¹³⁷See pp.101-102 infra.

¹³⁸While a *dike pseudomartyrion* (n.46 supra) could be brought for bearing false witness, there was no legal penalty for perjury as such, and no legal penalty for falsely swearing the *diomosia*. The sanctions were social and religious. See Bonner-Smith, 2:190; Glotz (*Darem.-Sag.*), 768f.; Haussoullier, "Epiorkia," in *Darem.-Sag.*, II.1, 697; Latte, "Meineid," *RE* 15.1, 1931, 349ff. (= *Kl. Schr.*, 370ff.).

II.3.δ'' (ἔαν δὲ ἔλης, φθονήσει), on the other hand, must presuppose that the Trierarchos lies,¹³⁹ and the only point on which he could be lying concerns the status of the nurse. Obviously, there can be no question here about the truth of the events, for ἔαν δὲ κτλ. is part of the exegetes' advice, and the entire section is predicated on the exegetes' assumption that the matter is as the Trierarchos says it is.¹⁴⁰ The only question, then, as MacDowell realized, is this: if the Trierarchos lies so successfully as to gain a conviction (ἔλης), then why should he be φθονήσει? I.e., if he wins the case by lying about the nurse's status, then presumably it would not be *known* that he had lied, and so there would be no reason to incur resentment.¹⁴¹ Now, φθονήσει must refer to human resentment, and not to divine jealousy.¹⁴² As such, II.3.δ'' is admittedly vague and rhetorical. Syntactical balance, after all, is surely as important to the writer of this speech as is precision. Yet several solutions are possible. It may be that the prosecution of a citizen on a slave's behalf was an unpopular act in itself;¹⁴³ that enmity was always likely to arise from prosecution;¹⁴⁴ or that the action would seem in any case due to purely personal motives.¹⁴⁵ More plausible, perhaps, is that even if the many did not know that the Trierarchos had lied, he would still be acting in an overly litigious manner.¹⁴⁶ On either ground, the φθόνος thus incurred would result in a loss of reputation.

Fortunately, we need not be dogmatic on any of these points. One might prefer some other, though similar explanation. What is important for our purposes, however, is that absolutely nothing about φθονήσει compels us to conclude that a prosecution must be possible even when the status of the nurse is known. Indeed, such an interpretation of φθονήσει would not only overturn our entire understanding of Attic homicide procedure on the basis of this single ambiguous word; it would actually contradict the sense of the passage as a whole — a sense that we hope has

¹³⁹Cp. III.3.c', and text supra.

¹⁴⁰Cp. §70 ἐξ ὧν οὐ λέγεις.

¹⁴¹See n.61.

¹⁴²See n.61.

¹⁴³See Evjen, 263; cp. Grace (1973), 18.

¹⁴⁴Lys. 1.44, with Bonner-Smith, 2:51f.

¹⁴⁵MacDowell (1963), 19, 94; but cp. Bonner-Smith, 2:41ff.; Bonner (1927), 109f., 122-27; Evjen, 258n.13.

¹⁴⁶See n.51 supra.

been securely established on grounds that are wholly independent of φθονήσει.

Finally, we may add, for completeness' sake, that III.3.c (οὐ γὰρ οὕτως τούτους μισῶ, ὡς ἑμαυτὸν φιλῶ) recounts, in summary fashion, the Trierarchos' acquiescence in the exegetes' claim (at II.3.γ/δ) that it is in the Trierarchos' own self-interest not to prosecute. The sentiment here expressed is a common one.¹⁴⁷

Nothing in the passage, then, supports the view that a prosecution could be undertaken even by one who was neither a relative nor master of the victim; nor does the Trierarchos hint at any ambiguity within the law that might be exploitable. Quite the contrary, a detailed analysis of the passage reveals that the Trierarchos himself unwaveringly assumes that he could proceed *only if he lied about the status of the nurse*; and the only possible anomaly, concerning φθονήσει, is easily explained on this account. The law as presented by the speaker of [Dem.] 47 is thus seen to be restrictive in the usual sense that *only* the relatives and masters of a slave were allowed to prosecute a δίκη φόνου.

¹⁴⁷See Eur. *Med.* 86, with D. Page, *Euripides, Medea*. The Text, Edited with Introduction and Commentary (Oxford, 1938), *ad loc.*; also Lys. I.1; cp. n.202 infra.

CHAPTER THREE (Plato's *Euthyphro* 3E7-5D7)

The final passage for consideration comes from Plato's *Euthyphro*. Since our discussion requires the reader's familiarity with the general course of the dialogue, it will help to begin our analysis with a brief summary of the work as a whole. As we also need to consider several specifics of the passage, I append the text of 3E7-5D7.¹⁴⁸

¹⁴⁸All references to the text of Plato, unless stated otherwise, are to J. Burnet, *Platonis Opera. Recognovit Brevique Adnotatione Critica Instruxit*. Tom. I-V (Oxford, 1900-07); but the following critical editions of the *Euthyphro* should be consulted with regularity: M. Schanz, *Platonis Opera Quae Feruntur Omnia ad Codices denuo Collatos* (Lipsiae, 1875); idem, *Platonis Euthyphro in Scholarum Usam* (Lipsiae, 1887); M. Wohlrab-C. F. Hermann, *Platonis Dialogi Secundum Thrasylli Tetralogias Dispositi. Post Carolum Fr. Hermannum Recognovit M. Wohlrab*, vol. I (Lipsiae, 1887); and now (though their decision to abandon Burnet's lineation is unfortunate) E. A. Duke, W. F. Hicken, W. S. M. Nicoll, D. B. Robinson, and J. C. G. Strachan, *Platonis Opera. Recognoverunt Brevique Adnotatione Critica Instruxerunt*. Tomus I. *Tetralogias I-II* (Oxford, 1995): "Euthyphronem...Nicoll suscepit...at...persaepe de locis difficilioribus inter nos consultabamus" (xx). The most recent, scholarly commentaries on the *Euthyphro* remain those of J. Adam, *Platonis Euthyphro* (Cambridge, 1926), and J. Burnet, *Plato's Euthyphro, Apology of Socrates, and Crito*. Edited with Notes (Oxford, 1924). Only two full-length books on the dialogue have appeared in the interim: R. E. Allen, *Plato's "Euthyphro" and the Earlier Theory of Forms* (New York, 1970), and L. Versényi, *Holiness and Justice: An Interpretation of Plato's Euthyphro* (Lanham, New York, and London, 1982). This state of affairs is quite remarkable, given the torrent of literature produced on Plato each year. Serious students of the dialogues should always consult the older commentaries, which continue to be of enormous value, though nowadays they are widely ignored. The most important of these, as regards the *Euthyphro*, are (in reverse chronological order): W. A. Heidel, *Plato's Euthyphro with Introduction and Notes* (New York, Cincinnati, and Chicago, 1902; rpt. 1976); M. Wohlrab, *Platonis Euthyphron für den Schulgebrauch*, 4 verb. Aufl. (Leipzig, 1900) (= C. Crön and J. Deuschle, ed., *Platons ausgewählte Schriften für den Schulgebrauch erklärt* [Leipzig, 1865-1931], vol. 3.2); M. Schanz, *Sammlung ausgewählter Dialoge Platons mit deutschem Kommentar. Erstes Bändchen. Euthyphro* (Leipzig, 1887); R. Fritzsche, *Platonis Meno et Euthyphro Incerti Scriptoris Theages Erastae et Hipparchus. Recensuit Prolegomenis et Commentariis Instruxit* (Lipsiae, 1885), which is Fritzsche's completely revised version of G. Stallbaum, *Platonis Meno et Euthyphro Itemque Incerti Scriptoris Theages Erastae et Hipparchus. Recensuit et Prolegomenis atque Commentariis Illustravit* (Gothae et Erfordiae, 1836) = *Platonis Opera Omnia. Recensuit et Commentariis Instruxit* (henceforth = *Plat. Opera Omnia*), Vol. VI, Sect. II (Gothae et Erfordiae, 1836; rpt. New York, 1980); also, see this same author's *Platonis Euthyphro. Prolegomenis et Commentariis Illustravit G. Stallbaumius. Accesserunt Scholia Graeca ex Codice Bodl. Aucta cum Annotatione Ruhnkenii* (Lipsiae, 1823). These two editions differ in many important ways, and despite the author's own judg-