specious claims of Meletus, long before these claims themselves are subjected to scrutiny (ἐξετάσωμεν) and exploded in the *Apology* (24B3-28A1; esp. 26A8-B2). This is how the *Euthyphro* serves an apologetic aim. Clearly, then, if we may summarize briefly the chief point of the present section, the legal impossibility of Euthyphro's case is not at all hard to square with a sound interpretation of the dialogue.

CONCLUSION

We have seen that there was no ambiguity in Drakon's original code concerning the right of prosecution, in spite of the fact that there was no explicit injunction to the effect that *only* the relatives or master of a slave could prosecute. The code itself was clearly intended to be restrictive. Nor is it the case that later litigants assumed there to be any ambiguity within the law. At least, in the one forensic speech that explicitly deals with this question, we saw that the Trierarchos himself supposed that he could not prosecute the old woman's murder *precisely* and *only* because he was neither a relative nor her master. He clearly suggests that he could have proceeded only if he had lied *on just this issue* under oath — which, he assures the jury, he would not have dared to do. This, in turn, implies what is actually stated parenthetically: that litigants in a δίκη φόνου had to swear an oath of relationship, presumably as part of the standard *diomosia*. There is, in fact, no contradictory evidence; in every case known to us in which a δίκη φόνου is at issue, the prosecution is formally led by the relatives or by the master of the deceased.[249] The *Euthyphro* proves no exception. Euthyphro's case, the legality of which is immediately challenged by Socrates precisely on this point of the victim's status, ultimately rests on principles that are *extra leges*. In fact, though we are not told the outcome of a case that may well be fictitious, both the specifics of Plato's careful composition and a general consideration of the broader context of the dialogue are fully consistent with the claim that Euthyphro had no legal case, and offer no support whatsoever to those who oppose a restrictive reading of the law. We must conclude, therefore, from our review of the evidence, that Athenian law was indeed restrictive *de jure* as regards the question of who had the right of prosecution in a δίκη φόνου.

The foregoing argument, of course, cannot prove that it was absolutely impossible *de facto* for a homicide proceeding initiated by a non-relative to come to trial. So, it is generally presumed that the *Basileus*, as presiding magistrate in homicide procedures, had the right to pronounce a case inadmissible on diverse grounds; but, as we saw, the *Basileus* (who did not much resemble a modern judge) was likely to err

[249] See Gagarin (1979), 305.

instead on the side of caution, and allow a disputed case to proceed. Once the trial itself had actually begun, purely technical considerations became less dominant still. The vagueness of Athenian laws seems to have provided a great deal of leeway for the jury to become the ultimate arbiter of all decisions.[250] The jury did not even need to distinguish fact from law,[251] and cases were rarely decided on purely procedural grounds.[252] As such, the jury could be persuaded by factors that a modern court ought to deem irrelevant.[253] But when all is said and done, such considerations as these, apart from establishing the rather informal nature of Athenian law generally, still fail to prove that a charge of homicide initiated by a non-relative or -master could ever have come to trial. Such considerations indeed reflect the ingenuity of modern scholarship as to how such a case *might conceivably* have found its way to court, but they do not in any way show that such a case could *in fact* have gone to trial. Consequently, that proponents of the restrictive reading cannot prove that it was absolutely impossible that such a case — in violation of every oath, every injunction, every social and legal expectation — might nevertheless (though there are no known instances), *at least in theory*, have found its way to trial, is hardly a compelling argument for the claim that 'anyone, in fact, could prosecute a δίκη φόνου.' Still, the limitations of the restrictive argument must hereby be acknowledged.

That such hypothetical conjectures as these should have determined some interpretations of Attic law is ultimately due to a reliance upon several erroneous assumptions. These are easily stated. In the first place, it is anachronistic to believe that ancient Athenian law would have felt the need to circumscribe precisely the limits of its injunctions. As such, the failure to state the negative complement of who was *not* to prosecute

[250]Ar. Ἀθ. Πολ. 9.1; cp. Bonner-Smith, 1:151f.; Ruschenbusch, "ΔΙΚΑΣΤΗΡΙΟΝ ΠΑΝΤΩΝ ΚΥΡΙΟΝ," *Historia* 6, 1957, 257-74; Harrison, 2:48; Dover (1974), 292ff.; Sealey (1994), 51ff.

[251]As Bonner-Smith, 2:87f. point out, Athenian juries did not need to observe the maxim *ad questionem iuris non respondent iuratores; ad quaestionem facti non respondent iudices*. The dicast was both *iurator* and *iudex*.

[252]See previous notes; also Bonner (1927), 74f., 178f., 188-93; cp. the cases discussed by Gagarin (1979), 317ff.

[253]E.g., by the tears of the defendant's wife and children (Harrison, 2:163f.; also Riddell, xxii); by prejudicing the character of one's opponents (see W. Voegelin, *Die Diabole bei Lysias* [Basel, 1943]; see n.125 supra); by appeals of the advocate to services he himself has rendered to the state (Lys. 12.86, 16.13, 21.1, etc.; cp. Pl. *Apol.* 32A8, with Burnet [1924] *ad loc.*), and the like.

proves nothing about the law's intent.[254] Secondly, and more fundamentally, there is often a failure to realize that the sanctions that enforced the Attic codes (certainly in the early period, but later as well) were as often as not primarily social and religious, rather than strictly legal, and that in antiquity this situation was not perceived usually as a sign of the weakness of these sanctions.[255] But if this is so, then Gagarin's distinction between "mere" legal expectation and legally enforceable restrictions is, I believe, equally anachronistic, and the principal support for his position is thereby undermined.[256] Thirdly, a concern over *miasma* and its generalized effect on the *polis*, which played so prominent a role in the *Tetralogies* of Antiphon and in other literary sources, has sometimes been thought to provide a powerful motive for the city to act in a way that was contrary to the traditional (and restrictive) procedure. But as we have seen, there is no trace of this concern over pollution ever having this effect in actual legal settings — however else specific individuals, such as Euthyphro or the author of the *Tetralogies*, may have felt about the matter.[257] Finally, and most importantly of all, opponents of the restrictive interpretation of the law have failed to appreciate the fact that such cases as they envision were not to be undertaken simply because there was no reason at all for such a case to be taken up. Murder was and remained a private suit, rooted in the family's right of vengeance, which itself was grounded in the fundamental solidarity of the ancient *oikos* — and not in any abstract, moral or social

[254]Gagarin (1979), 301, correctly observes that scholars expect too much clarity from the ancient codes (cp. Nörr, 652; Thür [1990], 146), and he uses this observation in support of his claim that Attic homicide law was not fully or explicitly restrictive. But the lack of precision he observes in the formulation of the early codes more properly implies that the statements of the codes are to be understood in the context of the general assumptions of the time, and that the failure to state explicitly both who was to prosecute, and *therefore, who was not to prosecute*, hardly proves that the code was unclear in its original intent.

[255]We have already seen in the case of perjury (n.138 supra) that the sanctions that enforced true oaths were not legal ones. Many other examples could be adduced; see next paragraph infra.

[256]While I believe that Gagarin's argument is thus vitiated by the introduction of an anachronistic distinction, his excellent discussion in the first chapter of *Early Greek Law* shows that Gagarin is fully aware of the fact that one cannot understand rule formation and rule enforcement in the archaic community *solely* in terms of positive statute law.

[257]See pp.82ff. supra; also Parker, 119ff., who explicitly notes miasma's lack of coercive power.

considerations.[258] Indeed, the notion of the sanctity of life[259] and, more critically perhaps for the issue at hand, that of the over-riding requirements of the 'body politic' or 'State', are both essentially later developments.[260] That a discussion of these topics began to find their

[258]As to the private nature of homicide, even as it survived into the Fourth Century B.C., one may consider such passages as, e.g., Dem. 23.39 εἰ δὲ τοῦτ' ἔσται [sc. if the rights of exile are not observed], ἡ μόνη λοιπὴ τοῖς ἀτυχοῦσιν ἅπασι [sc. those who have *murdered*] σωτηρία διαφθαρήσεται. ἔστι δ' αὕτη τίς; ἐκ τῆς τῶν πεπονθότων μεταστάντα εἰς τὴν τῶν μηδὲν ἠδικημένων ἀδεῶς μετοικεῖν; also §42, where exile is again described as ὃ τοῖς ἀτυχοῦσιν ὑπάρχειν εἰκὸς παρὰ τῶν ἔξω τῶν ἐγκλημάτων ὄντων; also Ant. 4.4.11 τὸν δὲ μιαρὸν τῷ χρόνῳ ἀποδόντες φῆναι τοῖς ἔγγιστα τιμωρεῖσθαι ὑπολείπετε; 6.4-5 κἂν μὴ ὁ τιμωρήσων ᾖ. The presuppositions of these lines ought to be clear.

[259]On the extremely difficult and delicate problem of the emergence of the individual in antiquity, see (by way of illustration) Glotz (1904), 95ff.; L. R. Farnell, *The Higher Aspects of Greek Religion* (London, 1912); Hirzel, *Die Person: Begriff und Name Derselben im Altertum* (Munich, 1914); R. Mondolfo, *La Comprensione del soggetto umano nell'antichità classica*, tr. L. Bassi (Firenze, 1958); E. Benveniste, *Le Vocabulaire des institutions indo-européennes* (Paris, 1969), 1:328ff.; H. Fränkel, *Early Greek Poetry and Philosophy*, tr. M. Hadas and J. Willis (New York and London, 1973), 527ff.; A. Snodgrass, *Archaic Greece: The Age of Experiment* (London, 1980), 160-200; J. N. Bremmer, *The Early Greek Concept of the Soul* (Princeton, 1983), esp. 66ff.; Parker, 251ff. Of course, we must not carry this argument too far. The Greeks, from the time of Homer onwards, i.e., the Greeks of the historical period, always had a taste for the strong personality (so Bremmer, 67f.); they were not nearly as anonymous as, for example, were the sculptors of the High Middle Ages (cp. Ullmann, *The Individual and Society in the Middle Ages* [Baltimore, 1966], 32ff., 104ff., 138n.74); for a relatively early (i.e., 6th Cen.) interest in culture-heroes, see Tulin, "Xenophanes Fr. 18 D.-K. and the Origins of the Idea of Progress," *Hermes* 121, 1993, 136n.38; for Plato's 'already' critical treatment of excessive ἰδίωσις (*Rep.* 462B), see L. Edelstein, "Platonic Anonymity," *AJP* 83, 1962, 14n.33; also Shorey, "Plato and the Stoic OIKEIOSIS in the Berlin *Theaetetus* Commentary," *CP* 24, 1929, 409f. (= *Sel. Pap.*, 1:442f.); idem, "Plato's *Laws* and the Unity of Plato's Thought, I," *CP* 9, 1914, 358f. (= *Sel. Pap.*, 2:227f.); finally, for the incipient *legal* rights of the 'individual', see Hansen (1991), 76f. — though it is, perhaps, the highly tentative nature of the rights there enumerated that remains most striking.

[260]It is difficult for us to imagine a situation in which murder would *not* be of paramount concern to the 'body politic' or 'State'. But such concerns are clearly anachronistic. Admittedly, classical scholars of the highest caliber, at least those in the English-speaking world (the French tend to use the less objectionable term, *cité*), continue to describe the ancient πόλις as a 'State' (see n.3 supra); yet Medievalists, toiling in a field well littered with documents in which one can actually witness the formation and development of the modern, 'corporate' State, have long been pointing out the difference between ancient and modern conceptions; see, e.g., C. H. McIlwain, *Constitutionalism: Ancient and Modern*, rev. ed. (Ithaca and London, 1947), 23-40, esp. 36ff.; A. London Fell (n.3 supra); also, in a somewhat different, though analogous context, Ullmann, *Papst und König: Grundlagen des Papsttums und der englischen Verfassung im Mittelalter* (Salzburg und München, 1966), 32f. While the idea of the *corpus populare*, commonly associated with John of Salisbury, can, perhaps, be traced to the Greeks (though only by implication; see Isoc. 7.14; 12.138; Dem. 24.210; Ar.

way, in rudimentary form, into the philosophical debates of the Fourth Century, obviously should have no bearing upon our interpretation of Attic legal procedure of this same period.

The fact is that the family had the right — and perhaps the moral obligation — to prosecute on behalf of their own, and the failure to do so could lead to disgrace.[261] Yet there was no way that the family could be

Pol. 1295[a]40f. [cp. W. L. Newman, *The Politics of Aristotle* {Oxford, 1887-1902}, 1:210n.1]; Sext. Emp. *Adv. Math.* 2.31), the legal concept of *incorporation* cannot; see, e.g., J. -P. Waltzing, *Étude historique sur les corporations professionnelles chez les Romains depuis les origines jusqu'á la chute de l'empire d'occident* (Louvain, 1895-1900), esp. 1:339ff., 2:139ff.; Ullmann, *ibid.*, 38ff.; (1975), 33f., 36f., 47f. Of course, the πόλις did have certain features that would be constitutive of a modern 'State': it had institutions, magistrates, and laws (see Hansen, "On the Importance of Institutions in an Analysis of Athenian Democracy," *Cl. Med.* 40, 1989, 107-13); it clearly allowed for the delegation of power. To this extent, then, government "was something separate from the folk-ways of the community...." (cp. Strayer, 18). It also had a "monopoly of force", to use a Weberian notion (see C. Morgan, "Ethnicity and Early Greek States: Historical and Material Perspectives," *PCPS* 37, 1991, 145f.). Yet the πόλις, *even in the classical period*, still failed to meet several crucial tests: it never succeeded in shifting loyalty away from the family to the 'public' institutions (cp., e.g., Dover [1974], 273); it never attained the status, derived from incorporation, of a legal or juristic individual (one could not, for instance [despite the strangely ill-considered remarks of Hansen {1991}, 78; cp. 203f.], bring suit against the *polis* as such); and, as Jacoby knew ([1949], 333n.21), at least before the Hellenistic period, it had no formal constitution like the charters of the medieval towns, much less anything resembling the modern *legum principio*. In fact, the ancients never even gained a notion of 'sovereignty' as something distinct from the members of the community (that the *dikasterion* is a distinct 'institution' is hardly the issue; see [pace Hansen, 154f.] J. Ober, *Mass and Elite in Democratic Athens* [Princeton, 1989], 145ff.). How far the πόλις stood from thus constituting a 'State' in the modern sense appears from the following consideration. While there clearly existed state sponsored executions (as Socrates could attest), there generally was no public mechanism for enforcement; as we saw (n.25 supra), individuals were responsible for collecting their own indemnity. Even the γραφή (n.5 supra), though open to 'anyone who wished', was not prosecuted either by the 'State', nor by the institutions of the πόλις, but only by private citizens who (for whatever reason; cp. Lyc. 1.3-6) chose to take this burden upon themselves. "Here, perhaps, more clearly than anywhere else we see the largely non-legalistic character of the Polis; it was no abstract conception above the citizens, but their community" (Ehrenberg, 79). At any rate, our argument does not depend upon such facts as these. That a private response to murder is not incompatible even with a highly developed constitutional structure is shown by the survival in British law, into relatively modern times, of the so-called 'appeal of felony', adduced by Evjen, 260ff.; see Latte (1920), 1: "So wenig jemals eine Gesetzgebung völlig die ethischen Anschauungen ihrer Zeit ausschöpfen wird und so notwendig die Kluft zwischen den einmal festgelegten Satzungen und dem fortschreitenden sittlichen Empfinden sich stetig erweitern muss, bis das positive Recht den Forderungen der Moral langsam nachkommt".

[261]See, e.g., Dem. 58.28-29. It is often claimed, on the basis of Dem. 22.2, that the failure to prosecute a homicide could leave one open to a charge of impiety. But Parker, 123n.72, and Hansen (1976), 111n.20, are both rightly skeptical.

compelled to act, and there probably were no legal sanctions whatsoever.[262] The sanctions, in other words, were social and religious. But the fact that the family's obligation thus fell short of a legal necessity proves not that the converse — that non-relatives were *not* to prosecute — also fell short of an actual legal restriction; to the contrary, what it proves is that it might not infrequently be the case that in certain instances there simply would be no trial.[263] Likewise, if there was no family around to prosecute, there simply would have been no trial — and that was that.[264] It is true that in certain cases other exceptional procedures may have been occasionally available.[265] But such alternative procedures clearly would not have been the norm, and would be subject to various restrictions of their own. In a δίκη φόνου, however, no one but the agnate relatives or the master of the victim had the right to prosecute, and any violation of this rule would surely have struck observers as extraordinary, morally dubious, and, indeed, as legally impossible — for, after all, the code itself instructed that relatives or the master were to prosecute, and in the oath it was even stated who was considered a relation. This, then, was the Attic view of homicide, and there is no evidence of any ambiguity or equivocation.[266]

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[262]See previous note; also MacDowell (1963), 10f.; Gagarin (1979), 303f.; (1981), 138f.; Heitsch (1984), 15f., with n.39; Humphreys (1991), 24n.24.

[263]Cp. n.27 supra. On the requisite purifications, see Parker, 121n.66, 370ff.

[264]See Hansen (1976), 121, who notes that there were many cases that probably were never tried; also (1991), 195f. Even *opponents* of the restrictive view concede that a slave killed by his or her master (cp. n.184 supra) either would not (MacDowell [1963], 21) or could not (Gagarin [1979], 306) be avenged.

[265]Even apart from the alleged prosecution by the phratry (n.29 supra) and the γραφὴ φόνου (n.5), there have been many proposals, some less plausible than others. *Apagoge*: Glotz (1904), 425ff.; Bonner-Smith, 2:211ff.; MacDowell (1963), 130ff.; Harrison, 2:222ff.; Hansen (1976), *passim*, esp. 99ff., with nos. 1, 4-5, 11-12, 16-17, 23; (1981), 17-30; Gagarin (1979), 313-22; (1986), 113n.35.; *γρ. ἀσεβείας*: Bonner-Smith, 2:213f.; Morrow (1960), 275n.74; cp. n.261 supra; *γρ. ὕβρεως*: Bonner-Smith, 2:215f.; Morrow (1937), 214f., 222f.; Evjen, 264n.31; cp. Harrison, 1:168ff.; *Endeixis*: MacDowell, 135ff.; Carawan (1991), 13f.; cp. Hansen (1976), 100; (1981), 21ff.

[266]It is fitting to close with these remarks by Glotz (1904), 425: "Malgré l'ampleur que prit dans le droit athénien du Ve et du IVe siècle le système des actions publiques, on ne voit nulle part que les poursuites pour homicide aient cessé d'être des δίκαι. Le privilège que Dracon avait constitué à la famille en matière d'accusation et que Solon avait scrupuleusement maintenu était désormais sacré. Tout passait, tout changeait, dans une cité ardente au progrès; les tribunaux chargés d'appliquer les φονικοὶ νόμοι furent à maintes reprises bouleversés par les révolutions politiques, et les φονικοὶ νόμοι eux-mêmes restèrent immuables, continuant de réserver aux parents le droit de venger leur parent."

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