

The Prosecution of Homicide in Athens

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BEFORE the publication of D. M. MacDowell's *Athenian Homicide Law in the Age of the Orators*¹ there had been general agreement among scholars for about a century concerning the prosecution of homicide cases in Athens: the regular procedure of *δίκη φόνου* was available only to relatives of a homicide victim (or to the master of a slave); no *γραφὴ φόνου* existed; and under special circumstances the relatives might use a special procedure, *απαγογή*, to prosecute a homicide.² Against this consensus MacDowell argued first (12–22) that *δίκαί φόνου* could be brought by others than the relatives (or master) of the victim, and secondly (133–35) that a *γραφὴ φόνου* in connection with an *απαγογή* could be brought by anyone (in theory at least). These conclusions have been challenged by others,³ but no clear consensus has emerged.

The reasons for this disagreement are first that the evidence is incomplete and difficult to evaluate (a common situation in the study of Athenian law), and secondly that scholars tend to overlook certain features of Athenian laws and mistakenly assume that they displayed a clarity, consistency and degree of completeness resembling that of our own laws. Thus scholars often ask questions about Athenian laws that the Athenians themselves would probably not have been able to answer. It is especially with this consideration in

¹ Manchester 1963 [hereafter, MACDOWELL]. Other works cited by the author's name only: H. J. EVJEN, "(Dem.) 47.68–73 and the *δίκη φόνου*," *RIDA SER.* III 18 (1971) 255–65; E. GRACE, "Status Distinctions in Athenian Homicide Law," *Eirene* 11 (1973) 5–30 [hereafter, GRACE 1973]; E. GRACE, "Note on Dem. XLVII 72," *Eirene* 13 (1975) 5–18 [hereafter, GRACE 1975]; G. GLOTZ, *La solidarité de la famille dans le droit criminel en Grèce* (Paris 1904); M. H. HANSEN, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense 1976); S. PANAGIOTOU, "Plato's *Euthyphro* and the Attic Code on Homicide," *Hermes* 102 (1974) 419–37. In his most recent work, *The Law in Classical Athens* (London 1978), MacDowell adds little to the views on homicide procedure already expressed in his earlier book.

² See e.g. J. H. Lipsius, *Das attische Recht und Rechtsverfahren* II (Leipzig 1908) 243; Glotz 372–76, 425–34; R. J. Bonner/G. Smith, *The Administration of Justice from Homer to Aristotle* II (Chicago 1938) 198–99.

³ Evjen, Grace 1975, and Hansen 99–112.

mind that I am reëxamining the evidence for the prosecution of homicide in Athens. In so doing I shall try always to state my conclusions in terms that the laws themselves would allow. My hope is that in addition to providing satisfactory answers to the important questions concerning homicide prosecution, I may increase our understanding of the nature of Athenian laws.

I. The *δίκη φόνου*

It is agreed that the normal procedure for prosecuting a homicide case was a *δίκη φόνου*, a procedure which goes back at least to Dracon's homicide law (*ca* 620 B.C.). If, as is generally assumed, Solon introduced the procedure of *γραφη*,⁴ then in Dracon's time all ordinary prosecutions were *dikai*, and *δίκη φόνου* meant simply 'a homicide case'.⁵ The procedure to be followed in prosecuting a *δίκη φόνου* is designated in the preserved law (*IG I² 115*, lines 20–23):⁶ *προειπεῖν δὲ τῷ κτείναντι ἐν ἀγορᾷ μέχρι ἀνεψιότητος καὶ ἀνεψιοῦ. συνδιώκειν δὲ κἀνεψιοὺς καὶ ἀνεψιῶν παῖδας καὶ γαμβροὺς καὶ πενθεροὺς καὶ φράτορας.* "A proclamation is to be made against the killer in the agora [by relatives] up to the degree of first cousin once removed and first cousin. The prosecution is to be shared by cousins and cousins' sons and sons-in-law and fathers-in-law and phratry members." It may seem odd to us, but apparently the law contained no explicit statement of who was supposed to prosecute the case.⁷ Since the proclamation against the killer was the first step in a homicide prosecution, however, we must apparently infer from these two provisions that the closer relatives, *i.e.* the father, brothers and sons, are to be the primary prosecutors in a homicide case.

⁴ We are told (*Ath. Pol.* 9.1) that Solon first allowed anyone who wished to prosecute in certain cases, and this is one characteristic of the *γραφη*.

⁵ The term *δίκη φόνου* does not appear in the preserved portion of Dracon's law (*IG I² 115*), but the law in Dem. 23.51, which may be part of Dracon's original law, speaks of *δίκαι φόνου* or 'homicide trials'.

⁶ The inscription is supplemented from Dem. 43.57. It is possible that the provision in the inscription applies only to unintentional homicide, but if this is so (and I do not think it is), then there must have been a similar provision concerning the prosecution of an intentional homicide.

⁷ There is no room on the inscription for a statement of who should prosecute either before this provision or (apparently) after it until at least line 31, and it seems hardly possible that those who are to prosecute would be named much later in the law than those who are to assist in the prosecution.

This inference is supported by all known homicide cases (see below) and is accepted by modern scholars, but it leaves several questions unanswered: Why is the implicit rule that close relatives are to prosecute not explicitly stated in the law? Does the rule impose a legal obligation on the relatives? And finally, does the rule allow or prohibit the possibility that others might prosecute? In answer to the first question, we must assume that the expectation that one of these close relatives would prosecute was so firmly embedded in tradition that Drakon did not have to state it explicitly. This assumption is plausible, but it indicates a notably looser attitude toward the law than exists today, when we try to make every implication of a law explicit. For a society in transition from unwritten, customary law to written laws, however, an implicit rule which conformed to traditional practice must have been accepted without question as part of the law. We can thus assume that for practical purposes the Athenians understood their law to contain a provision that the close relatives of a homicide should prosecute and that they were not bothered by the lack of an explicit statement of this rule in the written text of the law.

Secondly, what degree of obligation is conveyed by jussive infinitives such as *προειπεῖν* and by the implicit rule that the close relatives are to prosecute? This cannot indicate a legal obligation in the strict sense, since there is no provision for any sanction if the obligation is not met,⁸ and we have evidence that even in the fourth century a relative could legally accept a monetary settlement and decline to prosecute. Such behavior is denounced by the speaker in Dem. 58.28–29, but (*pace* MacDowell) he never calls it illegal. On the other hand, this and other passages in the orators imply (as does the law itself) that the relatives certainly felt some obligation to prosecute after the death of a kinsman. We may refer to this situation as a ‘legal expectation’: the law implies that the relatives would be expected to prosecute, but they would suffer no legal penalty if they did not.⁹

⁸ A sanction could perhaps have been included later in the law, but Greek laws regularly provide sanctions for violating a rule shortly after the rule is stated. Such a sanction would, moreover, be very difficult to enforce in cases (*e.g.* Ant. 1) where the homicide was not committed openly.

⁹ *Cf.* Hansen 111 n.20. Note that in Ant. 1 the speaker criticizes his half-brothers for not having prosecuted their mother after their father’s death, but he mentions no legal obligation to do so; indeed a rather long period of time has evidently passed, during which they apparently suffered nothing for not having prosecuted.

In other words, I understand the implied order that close relatives 'are to prosecute' to mean more than 'are allowed to prosecute' but less than 'are required to prosecute', though the sense 'are expected to prosecute' lies closer to the latter than the former.

This interpretation of the positive rule that relatives 'are to prosecute' can guide our answer to the third question concerning non-relatives. The implication of the rule that the relatives 'are to prosecute' is surely that others 'are not to prosecute'.¹⁰ If our understanding of the positive rule is correct, then the implied negative rule may have the same sense: *i.e.* 'non-relatives are not to prosecute' means 'non-relatives are expected not to prosecute'. This rule would not absolutely prohibit non-relatives from prosecuting—only an explicit statement to that effect would do so—but it implies that non-relatives would not normally prosecute.

The question then arises (and for many this is the crucial question), what would happen if the victim has no relatives? Drakon's law apparently gave no explicit answer to this question (see further below on Dem. 47). It is hard to believe that Drakon did not envision the possibility, but he apparently did not think it important to provide explicitly for this case. The pursuit of a killer was traditionally the task of the victim's relatives, and Drakon may therefore have thought it unlikely that anyone other than a relative would wish to prosecute.¹¹ His law thus contains the legal expectation that the relatives and only the relatives will prosecute a homicide and makes no mention of the possibility that the victim may have no relatives.

The conclusions we have drawn from the explicit provisions of Drakon's law would, I am certain, have been acknowledged by Drakon or any other Athenian at the time. Since they are not explicitly stated, however, they might be subject to changing interpretations. Moreover, someone looking for a loophole in the law might later attempt to deny or avoid them. Thus MacDowell's contention (17–18) that "the law simply does not say" whether persons other

¹⁰ The absence of an explicit statement that "no one else is to prosecute" in no way weakens this implication; see Evjen 259.

¹¹ The case of pardon for a killer is quite different. It is possible that a killer in exile might wish to return, perhaps many years later, even if (or perhaps especially if) none of the victim's relatives still survived, and Drakon provided for this contingency in lines 16–19 of the law. On the other hand, if his main concern was to prevent interfamilial strife after a homicide, the case of a homicide victim without relatives would appear relatively unimportant to him.

than relatives of the victim could prosecute is, as far as we know, technically correct, and it is thus possible that an Athenian of the fifth or fourth centuries might bring a homicide prosecution on behalf of a non-relative based on such a contention. Whether the *archon basileus* (see *infra* n.18) or a jury would have accepted such a prosecution is uncertain; indeed even an Athenian at the time might have been unable to predict whether such a claim would be accepted.¹² The existence of this possibility, however, does not invalidate our conclusion that there was a legal expectation that only the victim's relatives would prosecute in a homicide case.

This expectation is confirmed by the few homicide cases for which we have evidence. In Ant. 1 the victim's son is prosecuting and in Ant. 6 his brother. In the hypothetical cases in Antiphon's *Tetralogies* a father prosecutes on behalf of his son in one case (Ant. 3) and in the other two it appears that relatives are prosecuting (*cf.* 2.1.3, 4.1.4). Even two cases of prosecution for homicide by *apagoge* (see below) are brought by the relatives: the victim's brother in Lys. 13 (*cf.* 13.41) and unspecified relatives in Ant. 5 (5.59).¹³ These cases support the conclusion that the close relatives of a homicide victim would normally undertake the prosecution. Moreover, the fact that in Ant. 6 the prosecution is (according to the defense) instigated by others but brought by the victim's brother and the reference in Dem. 21.104 to a similar situation confirm the general rule that only relatives prosecute, since there would otherwise be no reason for the non-relatives not to prosecute these cases themselves.

Finally, there is the case in Plato's *Euthyphro*.¹⁴ Euthyphro intends to prosecute his father for the death of a day-laborer¹⁵ who was working for the family. This prosecution would apparently be an exception to the rule, and this is precisely how it is presented in the dialogue. Euthyphro's 'piety' is obviously extreme; his statement that "it is amusing that you [Socrates] think it matters whether the victim is an outsider or a member of my *oikos*" (*εἶτε ἀλλότριος εἶτε*

¹² We must remember that in Athenian courts precedent had little of the force it has in the Anglo-American legal system.

¹³ *Cf.* Grace 1973, 17 n.7a; Hansen 124 n.7.

¹⁴ Whether or not this was an actual case, I am assuming that Plato's portrayal of the situation was intended to make it appear plausible to the reader.

¹⁵ It is generally assumed that the *pelates* was a free man (*cf.* Burnet's note on 4c3); if he was a slave, or if Euthyphro thought he was a slave, Euthyphro as his master would be allowed to prosecute on his behalf.

οἰκεῖος ὁ τεθνεώς, 4B7–8)¹⁶ would surely appear idiosyncratic—the criticism of a fanatic who finds secular law inadequate. And Socrates' initial assumption (4B4–6) that Euthyphro must be prosecuting on behalf of a near relative surely represents the common view.¹⁷ Whether or not Euthyphro's case would be accepted by the *archon basileus* is uncertain¹⁸ and probably irrelevant to the purpose of the dialogue. In any case the scene is consistent with the expectation that only relatives would prosecute a homicide case.

One further implication of Drakon's law is that all the provisions probably envisioned only the killing of a citizen.¹⁹ This does not mean that the provisions could not at a later date be taken to apply to the killing of non-citizens, but such an application might be questionable unless there was explicit mention of it elsewhere in the law. We must thus ask who would prosecute for the killing of a non-citizen (*i.e.* slave, metic or foreign) victim?²⁰ Before we turn to the notorious case of the old woman's death related in Dem. 47, let us briefly assess the other evidence. Aristotle tells us (*Ath. Pol.* 57.3) that killers of slaves, metics and foreigners were tried at the Palladion, but we have no clear evidence concerning who was allowed to prosecute except in the case of slaves: we are told in Ant. 5.48 that a master could, if he wished, prosecute for the killing of his slave (ἐξεστι . . . τῷ δεσπότῃ, ἂν δοκῇ, ἐπεξελεθεῖν ὑπὲρ τοῦ δούλου).²¹ Could anyone else prosecute? Presumably a slave's relatives would also be slaves and would thus not be able to prosecute, and there is no indication that anyone else would be allowed to prosecute on behalf of a slave.

¹⁶ I take *οἰκεῖος* to designate close family members; *cf.* And. 4.15.

¹⁷ Although Socrates' statement that Euthyphro 'would not' be prosecuting for the death of an outsider (οὐ γὰρ ἂν που ὑπὲρ γε ἀλλοτρίου ἐπεξῆεθα φόνου αὐτῷ) does not necessarily mean that he 'could not' prosecute (*cf.* Panagiotou 436), we cannot draw any inference from this concerning the law, since Socrates could make the weaker statement even if the law supported a stronger statement.

¹⁸ The rôle of the *archon basileus* in allowing homicide prosecutions is unclear. He could certainly reject a prosecution for a specific, technical reason (*cf.* Ant. 6.41–43), but we do not know whether he could stop a suit if he decided the prosecutor was not legally empowered to bring it.

¹⁹ See Grace 1973, 7 and *passim*.

²⁰ See Grace 1973, 16–21. Though slaves existed as early as Drakon's time, metics and foreigners were probably not granted legal status until the time of Cleisthenes; see D. Whitehead, *The Ideology of the Athenian Metic* (Cambridge 1977) 146–47.

²¹ *Cf.* Isoc. 18.52. Note also that the obligation to prosecute, which is regularly mentioned with regard to the death of a citizen, is considerably weaker in the case of a slave's death.

With regard to metics and foreigners evidence is lacking. One possibility is that no special mention was made of these in the law and that the normal rule that relatives were expected to prosecute applied to these cases too. It is certainly likely that relatives of metic victims, if resident in Athens and of metic status themselves, could bring a homicide suit,²² but the ability of the relatives of a foreign victim to prosecute may have depended on whether their city had an official treaty with Athens.²³ In some cases a citizen may have prosecuted on behalf of relatives, a procedure perhaps alluded to in Dem. 59.9–10: the speaker maintains that Stephanus concocted a false case against Apollodorus for having killed a woman in the deme Aphidna; Stephanus suborned certain slaves, who pretended to be Cyreneans, and then he prosecuted the case against Apollodorus, making the initial proclamation, swearing the oath and presenting the case at the Palladion. It is not certain why the slaves claimed to be Cyreneans, but one explanation is that the alleged victim was a Cyrenean (whether foreign or metic in Athens), that the slaves pretended to be her relatives and that Stephanus undertook the prosecution (allegedly) in their behalf.²⁴

Granting the possibility of prosecution, either directly or through the agency of a citizen, by relatives of the metic or foreign victim, the question remains whether someone could prosecute in the absence of any relatives. On this matter we have only the elusive evidence of Dem. 47.²⁵ The speaker in this case, a former trierarch, is the plaintiff in a suit against two friends of Theophemus, his long-time enemy. He relates a story that Theophemus and his friends once entered his home to seize some property and in the process they struck an old woman, who later died. The woman had been a slave of the trierarch's father, had been freed, had married and finally had returned to live in his house after the death of her husband (47.52–67). After the woman's death the trierarch went to the exegetes to inquire what he should do and after hearing their advice decided not to prosecute anyone for the homicide (47.68–73). It is in the course of explaining

²² See P. Gauthier, *Symbola* (Nancy 1972) 141.

²³ *Ibid.* esp. 149–56.

²⁴ Cf. Grace 1973, 17 n.7a. MacDowell (54) and others assume the woman was a slave of Stephanus, but this would not explain why the other slaves pretended to be Cyreneans.

²⁵ This evidence has been discussed in detail by (among others) MacDowell (esp. 13–20), Evjen, Grace 1975 and Panagiotou 431–34.

their advice and his decision that the trierarch provides some evidence for the law concerning prosecution in homicide cases.

Before looking closely at this evidence, however, we must emphasize the full context of the narrative and the nature of the trierarch's intentions. Of course he wishes to portray Theophemus and his friends in as bad a light as possible; he also wishes to make himself appear thoroughly innocent, honest and law-abiding. The mere fact that he feels it necessary to justify his failure to prosecute suggests that this action could be questioned; it suggests, in other words, that at least some members of the jury would have expected him to prosecute after the old woman's death. He maintains, however, first that he acted within the law and second that within these (perhaps broad and ill-defined) limits he acted sensibly.

Thus the trierarch does not explain the law in full, as an impartial observer might, but only in so far as he can find support for his position, namely that he acted both lawfully and sensibly in not prosecuting. This consideration may account for his remarkable omission of a crucial detail, the metic status of the old woman.²⁶ He defines his relationship to the woman in purely negative terms: she was neither his relative nor his slave. That she was a metic and that he was her *prostates* is left unspoken. True, the jurors may all have known that a freed slave had metic status, but the absence of any mention of this fact in contrast to the trierarch's emphatic denials that the woman was his relative or slave is nonetheless striking. One plausible inference from his silence is that the law did not explicitly mention metic victims; otherwise the trierarch could not have so completely ignored this factor.

The trierarch relates that after the woman's death he consulted the exegetes and that they agreed both to expound the law and to advise him what action would be to his advantage (*τὰ μὲν νόμιμα ἐξηγησόμεθα, τὰ δὲ σύμφορα παραινέσομεν*, 47.69). The fact that advice is necessary as well as clarification implies that the law is either silent or ambiguous with regard to this particular situation. The exegetes' statement of the law is brief: he is to make a proclamation at the woman's tomb, asking if there is anyone who is a relative of the

²⁶ It is generally agreed (see, e.g., Whitehead, *op.cit.* [*supra* n.20] 16–17) that freed slaves had metic status, and most commentators on this passage (e.g. Grace 1975, 6–7) accept as probable that the woman was a metic and the trierarch her *prostates*; cf. Harpocraton *s.vv.* *μέτοικον*, *ἀποκρατίου*. Only Grace (7) considers the omission of this fact significant.

woman,²⁷ and then is to watch the tomb for three days. This seems to imply that if a relative shows up in this time, he will take charge of whatever prosecution may be brought. This proclamation is the only legal requirement, according to the exegetes, and the rest of their statement is advice.

Their first advice is that the trierarch should not name any specific killer in the proclamation, since only his wife and children witnessed the event. Moreover, he should not bring suit (for homicide) before the *archon basileus* (47.69). This may imply that the exegetes' opinion would have been different if the trierarch himself had witnessed the attack, but we cannot be certain that this consideration alone would have altered their advice not to prosecute. They then give a further reason why he should not prosecute: "for in the law it is not for you [to prosecute], since the woman is not your relative nor your slave, according to your report, and the laws bid prosecution to be for these [*i.e.* for one's relative or slave]" (οὐδὲ γὰρ ἐν τῷ νόμῳ ἐστὶ²⁸ σοι. οὐ γάρ ἐστιν ἐν γένει σοι ἢ ἄνθρωπος, οὐδὲ θεράπαινα, ἐξ ὧν σὺ λέγεις. οἱ δὲ νόμοι τούτων κελεύουσιν τὴν δίωξιν εἶναι, 47.70). The trierarch repeats this reason in his own later summary of the action he took: "With regard to things which were of no further legal concern to me²⁹

²⁷ The noun *προσέκων* in εἴ τις προσέκων ἐστὶν τῆς ἀνθρώπου (47.69) is taken by many (*e.g.* Evjen 262–63; also Gernet and Murray in their Budé and Loeb translations) to be the subject of the jussive infinitives in the exegetes' statement: *i.e.*, "if there is a relative, let him proclaim. . ." That this interpretation is wrong is suggested by the position of the clause in the sentence and is confirmed by the exegetes' further advice to the trierarch that *he* should not name any specific person in the proclamation (*συμβουλευόμεν σοι . . . ὀνομαστί μὲν μηδενὶ προαγορεύειν*). (It goes against the natural sense of the passage to understand this as a different proclamation from the one mentioned just a few lines earlier.) Piérart (*AntCl* 42 [1973] 432) objects that *προαγορεύειν* is regularly construed with an infinitive and that since the proclamation was normally a declaration of intent to prosecute, the exegetes would not advise the trierarch to make a proclamation if he was not allowed to prosecute. But since the proclamation in this case would mention no killer by name, it would not be a declaration of intent to prosecute but rather the fulfillment of a religious requirement. And the indirect question following *προαγορεύειν* is clearly elliptical; we must understand an infinitive with it (*e.g.*, "if there are any relatives, [they should come forth]").

²⁸ *ἐστὶ* should be accented as an enclitic, and in any case (*pace* Evjen 258 n.11) the accentuation has no bearing on the sense; see C. Kahn, *The Verb 'Be' in Ancient Greek* (Dordrecht 1973) 420–24.

²⁹ There is some ambiguity, probably intentional, in *οὐκέτι*, which suggests both 'no longer' (*i.e.*, the woman was no longer my slave) and 'no further' (*i.e.*, I had already fulfilled my legal obligation); see Grace 1975, 10 n.(e). There is also an untranslatable play on *προσέκων* as both 'fitting' and 'related' (see *ibid.* 11–12).

I did nothing, for the law bids the relatives to prosecute to the degree of cousins' sons (and in the oath what is a relative is defined), and if [the victim] is a slave, prosecution³⁰ is up to these [the masters?]" (*ἃ δ' ἐκ τῶν νόμων οὐκέτι μοι προσήκεν, ἡσυχίαν εἶχον. κελεύει γὰρ ὁ νόμος τοὺς προσήκοντας ἐπεξιέναι μέχρι ἀνεψιαδῶν (καὶ ἐν τῷ ὄρκῳ διορίζεται ὃ τι προσήκων ἐστίν), κἂν οἰκέτης ᾖ, τούτων τὰς ἐπισκῆψεις εἶναι*, 47.71–72).

The parallelism between the exegetes' (reported) words and the trierarch's own statement has recently been stressed by Panagiotou (431–35),³¹ who notes the contrast between the strong and specific positive statement of who is required by the law to prosecute and the rather vague negative claims that the law does not apply to him ("in the law it is not for you"; "things which were of no legal concern to me"). Panagiotou concludes that the law did not explicitly prohibit prosecution by non-relatives but only affirmed that the relatives should prosecute, and this conclusion is quite logical. But as I have already said, the absence of an explicit prohibition does not necessarily mean that "the right of prosecution for homicide was not restricted to any particular group of people," as Panagiotou concludes (434). The clear implication of the law that the relatives are to prosecute is that others are not to (*i.e.* are expected not to) prosecute, and this expectation might be felt to be legally binding even though it would not have the unassailable rigor of an explicit statement.³²

We must now consider the rest of the exegetes' advice: "Thus, if you and your wife and children take oaths at the Palladion and call down curses upon yourselves and your house, you will seem to many to be rather mean (*χείρων*),³³ and if he is acquitted, you will seem to have sworn falsely, whereas if you convict him, you will be resented (*φθονήσει*)" (47.70). The trierarch returns to this same point after his own reassertion that the woman was neither his relative nor his slave: "I would not have dared to lie to you [the jurors] and to swear an oath, myself and my wife and children, not even if I knew I would convict them, for I do not hate them as much as I love myself" (47.73). These references to the oath the trierarch and his family

³⁰ For a good refutation of MacDowell's interpretation of *ἐπισκῆψεις* see Grace 1975, 15–17.

³¹ See also Grace 1975, 8–9.

³² Panagiotou's reference (434) to a restrictive law in Dem. 43.81 (=43.62) has no force: there the purpose of the provision is to restrict, whereas here the main purpose is to indicate a legal duty, and the restrictive implication of the law is secondary.

³³ One who does not win his case expects to be thought *χείρων* in Lys. 32.3.

would have to swear if he brought a homicide suit together with the remark (cited above) that “in the oath what is a relative is defined” (47.72) have been taken to support two different positions. Some (*e.g.* MacDowell 94–96) argue that the trierarch did not have to swear to be the relative or master of the woman in order to prosecute and that he simply refers to the possibility of lying in his testimony. Others (*e.g.* Evjen 263–65) maintain that he would have to swear to be the woman’s relative or master in order to prosecute and he does not wish to swear falsely.

Two considerations seem to me to support the first view: first, it is certain from 47.70 and probable from 47.73 that the oath would be sworn by the trierarch’s wife and children as well as by himself, and as witnesses they could only have sworn that the accused committed the homicide and not that the trierarch was able to prosecute. This makes it likely that the trierarch’s oath also would have affirmed the truth of his accusation rather than his right to prosecute. Secondly, the ambiguity of the trierarch’s remarks in itself supports the first view. He is trying to show that his decision not to prosecute was quite proper. If the matter were as straightforward as the second interpretation holds—namely that in order to prosecute he would have been compelled to swear a false oath concerning his relationship to the woman—he would surely have made this clearer. The ambiguity of his words (especially his final remark about loving himself more than he hates his enemies) suggests rather that he is intentionally obscuring the situation. The exegetes must have told him that he was under no legal obligation to prosecute and that his case against Theophemus was weak. The trierarch’s remark that he would not have dared lie to the jury is simply a vague bit of self-serving rhetoric and refers to no specific lie he would have had to tell in order to bring a homicide suit, though he may think he would have had to lie in order to gain a conviction.

The oath referred to in 47.72 in which “what is a relative is defined” may be the preliminary oath at the homicide trial or some other oath. In the first case I presume the trierarch would have had to include in his oath a true statement of his relationship to the woman. But it is possible that the definition of a relative was incorporated into the oath before the creation of the metic status (probably *ca* 500 B.C.),³⁴ in which case the definition would not be relevant to the trierarch’s situation. Thus the oath defining the

³⁴ See *supra* n.20.

necessary relationship may not have had the same legal force in this case as in the case of the killing of a citizen.

If we now consider the evidence from Dem. 47 together with our earlier conclusions based on the other evidence, we find a consistent picture emerging. First, the law,³⁵ according to the trierarch, states that relatives are to prosecute to the degree of cousins' sons. This is, as we have seen, the rule implicit in *IG I² 115* (cited above),³⁶ though it is possible that the trierarch is referring to a provision added later specifying explicitly those who are to prosecute. Moreover, either this same provision or a later one stated explicitly that a master could prosecute on behalf of a slave, if he wished.³⁷ It is quite unlikely that the law explicitly stated that the *prostates* is to prosecute for the death of a metic, since in that case the defendants in Dem. 47 could easily introduce this fact in their reply and denounce the trierarch's omission of it. We can thus conclude that the homicide law probably did not explicitly mention prosecution on behalf of metics or foreigners.³⁸

Secondly, we must conclude that there was no explicit statement in the law that no one other than the relatives of the victim or the master of a slave could prosecute; if there were, the trierarch could hardly have failed to cite such a statement. The law simply stated the positive injunction to prosecute, leaving the negative prohibition implicit. The absence of an explicit prohibition, however, meant that in certain cases someone other than a relative (or master) might argue that he should be allowed to prosecute, and it is possible that his suit would be allowed. Perhaps in such cases a prosecutor had to demonstrate a special concern for the victim; perhaps certain relationships, such as that of *prostates* to metic, were acknowledged *de facto* to be close enough to allow a non-relative to bring a suit. In such cases, however, there would presumably be no obligation to prosecute. Thus if he had wished (and if his case had been stronger), the trierarch could probably have brought suit on behalf of the old

³⁵ It is quite possible that "Drakon's law on homicide on the stele" referred to by the trierarch (47.71) is the same inscription we now possess (*IG I² 115*).

³⁶ *μέχρι ἀνεψιαδῶν* (Dem. 47.72) is probably equivalent to *μέχρι ἀνεψιότητος καὶ ἀνεψιοῦ* in *IG I² 115*, line 21.

³⁷ There is apparently no room for such a provision on *IG I² 115* until after the restorable portion of the text ends in line 39.

³⁸ Rules concerning such prosecution might have been mentioned (or implied) elsewhere, *e.g.*, in regulations concerning the legal status of metics and foreigners.

woman. And perhaps Euthyphro too could have brought suit on behalf of his day-laborer.

There is no evidence anywhere, however, that homicide prosecution was available to anyone who wished. The right and duty to prosecute lay with family members and were normally the concern of no one else. When someone other than the relatives wished to have a homicide suit brought, he persuaded (perhaps bribed) a relative to bring it (Ant. 6, Dem. 21.104). Moreover, it was up to the family members (if these survived) to pardon a killer (*IG I² 115*, lines 13–16), and if the family reached a monetary settlement with the killer before a trial (Dem. 58.28–29, see above), it is very unlikely that anyone else could prosecute. In short, prosecution for homicide was reserved for the relatives of the victim; others were expected not to prosecute. In the absence of relatives, however, a non-relative (perhaps someone specially close to the victim) might bring a suit. The law does not explicitly state this, nor does it cover every possible contingency. But by attending to the implicit as well as the explicit sense of the law and by treating the evidence of Dem. 47 with some care, we can accept this plausible conclusion as consistent with all the evidence.

II. *Ἀπαγωγή*

Both MacDowell (130–40) and Hansen (99–108) have recently examined the use of a different procedure, *apagoge* or ‘summary arrest’, in the prosecution of killers, and both divide the evidence into four basic types.³⁹ Beyond this, however, they disagree sharply, and the matter thus deserves further discussion. I shall follow MacDowell’s order (139–40).

The first type is referred to by the law in Dem. 24.105: “If someone is arrested because, having been convicted of mistreating his parents or of evading military service, or having been barred by proclamation from places specified in the laws, he goes where he must not (*ἐὰν δέ τις ἀπαχθῆ, τῶν γονέων κακώσεως ἐαλωκῶς ἢ ἀστρατείας ἢ προειρημένον αὐτῷ τῶν νόμων εἰργεσθαι, εἰσιῶν ὅποι μὴ χρή*), let the Eleven bind him and take him to the Heliaia, and let anyone who wishes of those eligible accuse him. And if he is convicted, let the Heliaia assess the

³⁹ Glotz (425–34) groups *apagoge* into three categories: against *kakourgoi*, *atimoi* and non-citizens; but though the first two categories at least are valid for *apagoge* in general, they are not so useful for discussing *apagoge* in homicide cases.

penalty he should suffer or pay, and if he is fined, let him be imprisoned until he pays.”⁴⁰ The law does not mention homicide explicitly, but since an accused killer was barred from a number of public places by the proclamation of the prosecutor and the *archon basileus* (cf. Dem. 20.158), this procedure must apply to publicly accused killers (and perhaps to others too). We must note that the law is not directed against the crime of homicide *per se* (nor against the crimes of mistreating one’s parents or evading military service) but against the violation of a ban laid on the person by a legal proclamation (or a legal conviction). The law implies that one could not use this procedure against someone who had not been banned by proclamation (or previous conviction), and this provides significant protection for citizens in public places, who could otherwise be accused on the spot of being a killer and summarily arrested.

The second type is described by Demosthenes in his speech *Against Aristocrates* after he has catalogued the five courts before which one may bring a homicide case (23.63–79). He then adds that in addition there is a sixth form of redress (τιμωρία): “If one is ignorant of all these [forms of redress], or the times in which one must act on each of them have passed, or if for any other reason one does not wish to prosecute in these ways, and one sees the killer (τὸν ἀνδροφόνον) going about in sacred places and in the agora, he is allowed to arrest (ἀπάγειν) him and take him to jail. . . And after being arrested he will not suffer anything in jail before his trial, but if convicted will be sentenced to death; whereas if [the prosecutor] does not win one-fifth of the votes, he will be fined a thousand drachmas.”

Hansen (100–01) and others take this passage as evidence for a so-called ἀπαγωγὴ φόνου, but we must be cautious. First, this is not the text of a law but Demosthenes’ description of a procedure. In this speech he has been trying to find legal provisions relating to homicide which Aristocrates has contravened in passing his special decree, and he introduces any relevant procedures he can find. If we keep in mind that he (like all orators) may be tailoring the legal evidence to fit his needs, our suspicions may be raised by the first clause I have quoted. Could someone really be ignorant of the regular procedure and yet know how to proceed by means of *apagoge*? It seems unlikely. Demosthenes’ second reason may have more validity, since homicide

⁴⁰ Cf. Dem. 24.60, where there is apparently a reference to this law.

suits were not allowed during the last three months of the year,⁴¹ but the suspicion remains nonetheless that one would normally have no good reason to prosecute an ordinary homicide case by *apagoge* rather than by a *δίκη φόνου*.

We should note that Demosthenes' description of this procedure includes the requirement that the killer be found in certain public places. Thus it seems that in this type of *apagoge*, as in the first type, the killer is not arrested for the homicide itself but for the crime of being in certain sacred or public places, and this public crime, not the homicide, apparently provides the justification for employing a public procedure against the criminal. This similarity between these two types of *apagoge* raises the question whether they really are separate types. If we consider each case carefully, keeping in mind the nature of the evidence, we find that the apparent differences between them can be reduced, if not completely eliminated.⁴²

First, although the penalty in the first case is said in the law to be assessed by the jury, in 23.80 Demosthenes states that the offender who is convicted is punished by death. However, Demosthenes' words are not a direct statement of the law, and they need not mean that the law explicitly assigned the death penalty.⁴³ The penalty in most other cases of *apagoge* was decided by the jury, and this may also have been true in cases Demosthenes has in mind. But we should expect the jury to vote the death penalty regularly in serious cases,⁴⁴ and thus Demosthenes may be stating the regular though not the legally required penalty.

The second difference is that the law in Dem. 24.105 states that a proclamation must have been made against anyone arrested for being in a place from which he is barred, but Demosthenes in 23.80 does not mention this requirement. It may be that he is simply ignoring the requirement in order to make this procedure appear

⁴¹ The statement in Lys. 13.83 that there was no statute of limitations for homicide cases is supported by the case in Ant. 1, which must have been prosecuted many years after the victim's death.

⁴² Glotz (428–29) considers both of these to be examples of the same type of *apagoge* (against *atimoi*), but he does not discuss these apparent differences.

⁴³ Hansen (100) takes Demosthenes' words as a statement of law (*i.e.*, that the death sentence is legally required), but he is aware (101) of the apparent anomaly such a legal requirement might produce.

⁴⁴ *Cf.* Ant. 5, where the defendant expects, if convicted, to be sentenced to death, though the jury will decide the sentence (see below).

completely separate from the regular homicide procedure. He is not giving a precise statement of the law and is thus free to include whatever details he wishes. Or it may be that a killer could be arrested by *apagoge* without a proclamation if certain other conditions were met. We shall return to this possibility shortly.

Thirdly, Demosthenes in 23.80 includes the information that a prosecutor will be fined if he does not receive enough votes; this is a common feature of the procedure of *apagoge*,⁴⁵ but it is not mentioned in the law in 24.105. The provision quoted from 24.105, however, is given there together with part of the law on theft for the clear purpose of providing examples of imprisonment for the non-payment of fines. There is no need for Demosthenes to cite the whole of either law. Thus we cannot say that the provision cited in 24.105 is incompatible with the law he refers to in 23.80, either on this score or in any other way; the two passages refer to the same or very similar types of *apagoge*.

The third type is straightforward: anyone in exile for homicide⁴⁶ who returned to Attica could be killed on the spot or arrested by *apagoge* (Dem. 23.28). This provision was part of Drakon's homicide law,⁴⁷ and as in the preceding cases it is directed against the crime of being in a place from which one is prohibited, not against the homicide itself. And although this third type applies to banishment by judicial sentence rather than by proclamation (as does the law in 24.105 in part), it is essentially similar in motivation and effect to the first two.

The similarity among these three types suggests that we pause a moment and ask just what we mean when we talk of 'types' or 'forms' of *apagoge*. We expect a law code to classify and categorize different types of procedures, but did the Athenian laws in fact contain such classifications? Did they have a law or group of laws systematically presenting all the different conditions for bringing an *apagoge*? The evidence indicates some variation in Athenian practice: there seems at least originally to have been one law on *eisangelia* stating all the offenses for which the procedure could be used (*cf.* Hyp. *Eux.* 7–8); on the other hand, Demosthenes cites two quite different and appar-

⁴⁵ See M. H. Hansen, *Eisangelia* (Odense 1975) 29 n.6, for references.

⁴⁶ Hansen (107–08) gives full particulars concerning exile for homicide.

⁴⁷ It probably occupied lines 30–31 of IG I² 115; see R. S. Stroud, *Drakon's Law on Homicide* (Berkeley 1968) 54–56.

ently separate laws on the procedure of *probole* (21.8–11). Which pattern did the laws on *apagoge* follow?

It seems clear from the evidence thus far discussed that the laws on *apagoge* were not presented systematically. One provision (Dem. 23.28), as we have seen, formed part of Drakon's homicide law and in its original version may have been followed by a brief description of the procedure of *apagoge*.⁴⁸ The other law (Dem. 24.105) is quite different in form: it does not state that *apagoge* is allowed in certain cases⁴⁹ but prescribes a procedure to be followed in certain cases when an *apagoge* is used. It must also be later in time.⁵⁰ Thus these two provisions must have been inscribed in separate parts of the Athenian laws, and this implies that there was no systematic treatment of *apagoge* in the laws but only scattered references to the procedure. There is no evidence, moreover, that the term ἀπαγωγὴ φόνου was ever used in the laws; the term in fact is a misnomer, since in these cases the *apagoge* is, as we have seen, not directed against the crime of homicide *per se*. *Apagoge*, in other words, was an old legal procedure applicable to a variety of public offenses, including being found in a public place from which one was barred because of an accusation or a conviction for homicide. We can trace a basic similarity among the various applications of the procedure, but there is no indication of any systematic account of *apagoge* in the Athenian laws.

The fourth type of *apagoge* we must consider involves the arrest of a person specifically for the act of homicide by means of an ἀπαγωγὴ κακούργων. This is the case of Euxitheus, accused of killing Herodes in Ant. 5.⁵¹ We have only the defendant's speech, in which he asserts (5.8–19) that he ought to have been prosecuted by a δίκη φόνου rather than by an ἀπαγωγὴ κακούργων.⁵² Bearing in mind that the claim

⁴⁸ There is room in lines 31–33 of the inscription for only a brief description of the procedure of *apagoge*; or, of course, the lines may have contained something quite different.

⁴⁹ It is very unlikely that the provision in 24.105 was preceded by a statement that *apagoge* was allowed in these cases, since in that case there would be no need to repeat the list of cases.

⁵⁰ The γραφή κακώσεως γονέων is certainly no older than Solon; see also *supra* n.4.

⁵¹ The fact that Euxitheus was arrested by *endeixis* and then prosecuted by *apagoge* is of no significance for our purpose. Hansen (9–28) is right to see the two as essentially parts of the same procedure.

⁵² The category of *kakourgoi* normally designated 'common criminals'—thieves, highwaymen, footpads and the like. The only explicit evidence besides Ant. 5 that a killer could be included in this legal category is a rather vague statement in *Lex.Seg.* 250.5–7, which by itself is of little value (*cf.* MacDowell 135). Aeschines in 1.91 does not (*pace* Hansen) say that killers are *kakourgoi*; see *infra* n.60.

that the prosecutor is employing the wrong procedure may have been fairly common in Athenian courts (*cf.* Dem. 21.25–28, Hyp. *Lyc.* 12), how are we to evaluate Euxitheus' assertion? Certain points in his argument seem very likely to be true. First, he claims (5.9–10) that this is the first time anyone in Athens⁵³ has been prosecuted for homicide by an ἀπαγωγή κακούργων and that the prosecution justified this procedure by maintaining that “surely homicide is a great wrongdoing” (τό γε ἀποκτείνειν μέγα κακούργημα εἶναι). Since killers were almost certainly not explicitly included in the law on ἀπαγωγή κακούργων,⁵⁴ it is plausible that the prosecution made precisely this argument based on a non-technical sense of κακούργημα. And if they did use this argument, then they were probably presenting a novel or relatively novel claim; otherwise there would be no need to argue for the inclusion of killers in the provisions of the law.

According to Euxitheus the prosecution used another argument to justify their unusual procedure, namely that he would have left Athens before his trial (as any defendant in a *dike* was allowed to do) if prosecuted by means of a δίκη φόνου (5.13). We have no reason to doubt that the prosecution did in fact make this point, and indeed it provides one likely reason (there may have been others) why they did not use the ordinary δίκη φόνου in this case. Euxitheus was a Mytilenean and therefore was more likely than an Athenian to flee Athens before or during his trial. There is no evidence, however, that before this case it was already established *de iure* or *de facto* that an ἀπαγωγή κακούργων could be rightly employed against foreigners (or any other group) accused of homicide. Indeed, were it a previously established legal procedure, Euxitheus probably would not have agreed to come to Athens voluntarily (5.93).

The fact that the Eleven allowed the case against Euxitheus to proceed is of little significance;⁵⁵ they may have had considerable leeway in such decisions, and they would have set only a weak precedent (if any) for future officials. We know nothing, moreover, of the jury's reaction to the arguments.⁵⁶ All we can say is that in this

⁵³ I do not think the expression οὐδέις . . . τῶν ἐν τῇ γῆ ταύτῃ is deliberately ambiguous, as many maintain. Euxitheus could hardly hope to deceive the jury concerning his own status; see Hansen 106–07.

⁵⁴ See Hansen 46–47.

⁵⁵ *Cf.* MacDowell 137.

⁵⁶ If the facts in the case were more or less as Euxitheus presents them (a risky assumption, to be sure), it seems likely that he would have been acquitted on the facts, no matter what the jurors thought of the procedural question.

one case, at least, the procedure of ἀπαγωγή κακούργων was used to prosecute a homicide.

As in the preceding cases of *apagoge*, the penalty, though assessed by the jury, would probably be death. Euxitheus does, it is true, distinguish his situation from that of someone prosecuted by a δίκη φόνου, where the penalty would automatically be death (5.10), but he is here trying to emphasize the difference between the two procedures, and he elsewhere (e.g. 5.16, 5.59) expects that if convicted he will be executed. The significant difference between this case and the other instances of *apagoge* discussed above is that Euxitheus is arrested and tried for the homicide itself, and the factor of being in some public place which he ought to avoid is absent.

In sum, the employment of *apagoge* in homicide cases falls into two basic categories: first where the offense is in fact the violation of some debarment resulting from a homicide, and secondly where the killer is considered a *kakourgos*. We must now decide into which category (if either?) we should put the prosecution of Agoratus (*Lys.* 13), the other surviving speech from a homicide case prosecuted by an *apagoge*. Hansen (101–02) and others maintain that the prosecution of Agoratus is an ἀπαγωγή κακούργων; MacDowell (131–33) and others that it is a so-called ἀπαγωγή φόνου, such as Demosthenes describes in 23.80. The difficulty with the former view is that the prosecutor never asserts that Agoratus is a *kakourgos*, as we would expect him to; the difficulty with the latter is that the prosecutor never specifically accuses Agoratus of appearing where he should not.

An additional factor, which has been taken as support by both sides, is that when Dionysius arrested Agoratus, the Eleven made him add the words ἐπ' αὐτοφώρῳ to the writ of *apagoge* (13.85–87). Why did they demand this insertion? What, moreover, do the words mean? To begin with, it is clear that the prosecutor applies the phrase to Agoratus' act of killing and not to his arrest;⁵⁷ moreover, Agoratus was clearly arrested several years after the victim's death. Thus the translation 'caught in the act' is accurate only if we understand this phrase in a sense broad enough to mean that the killer was observed, but not necessarily arrested, in the act of killing.⁵⁸ But why was it important that the homicide in this case be observed or

⁵⁷ See, e.g., 13.85: ἔοικεν [*sc.* Agoratus] ὁμολογεῖν ἀποκτεῖναι μὴ ἐπ' αὐτοφώρῳ δέ.

⁵⁸ MacDowell's 'manifestly' is a more accurate rendering of ἐπ' αὐτοφώρῳ in *Lys.* 13, but does not indicate the different use of the phrase in other contexts (where it can mean 'arrested in the act').

manifest? In discussing Dem. 23.80 we noted that the procedure there may not have included a formal proclamation against the killer as does the *apagoge* mentioned in Dem. 24.105. To prevent abuse it would be plausible, where there was no formal proclamation, for the procedure to be restricted to use against those ‘caught in the act’—that is, those clearly seen committing the homicide. This restriction would prevent someone from arresting a person merely suspected of homicide or only indirectly involved, such as the choregus in Ant. 6.⁵⁹ True, Agoratus did not kill anyone with his own hands (*αὐτοχειρία*), but the expression *ἐπ’ αὐτοφώρῳ* could arguably be stretched to cover cases like Agoratus’ denunciations, which were public and manifest. Thus the Eleven’s insistence on the insertion of the words *ἐπ’ αὐτοφώρῳ* in the writ of *apagoge* is plausible on the assumption that this was a prosecution of the sort described in Dem. 23.80, whereas there would apparently be no need for these words in a prosecution for homicide by means of *ἀπαγωγή κακούργων*.⁶⁰ Certainly the prosecutor in Ant. 5 could not have charged Euxitheus with killing *ἐπ’ αὐτοφώρῳ*.⁶¹

⁵⁹ This consideration, together with the fact that the prosecution would risk losing 1000 drachmas, adequately explains the fact that the prosecution in Ant. 6 did not use *apagoge*. Hansen’s conclusion (102–03) that the procedure did not yet exist is quite unwarranted.

⁶⁰ Hansen argues (52) that *ἐπ’ αὐτοφώρῳ* is “a characteristic of *ἀπαγωγή κακούργων* in contrast to other forms of *apagoge* and to all forms of *endeixis*,” but in order to reach this conclusion he misinterprets the crucial evidence of Aes. 1.90–91: [If this man is acquitted, then] *δέδεικται φανερά ὁδός, δι’ ἧς οἱ τὰ μέγιστα κακούργοι ἀποφεύγονται. τίς γὰρ ἢ τῶν λωποδυτῶν ἢ τῶν κλεπτῶν ἢ τῶν μοιχῶν ἢ τῶν ἀνδροφόνων ἢ τῶν τὰ μέγιστα μὲν ἀδικούντων, λάθρα δὲ τοῦτο πραττόντων, δώσει δίκην; καὶ γὰρ τούτων οἱ μὲν ἐπ’ αὐτοφώρῳ ἀλόντες, ἐὰν ὁμολογῶσι, παραχρήμα θανάτῳ ζημιοῦνται, οἱ δὲ λαθόντες καὶ ἔξαρνοι γερόμενοι κρίνονται ἐν τοῖς δικαστηρίοις.* Although Aeschines may be referring in part to the procedure of *ἀπαγωγή κακούργων*, as a similar passage in Aristotle (*Ath. Pol.* 52.1) indicates, he does not say explicitly or even imply that adulterers, killers and *οἱ τὰ μέγιστα ἀδικούντες* are all legally classified as *kakourgoi*. Indeed this would make little sense with respect to the last group. Aristotle, moreover, omits these three groups and includes only the traditional kinds of *kakourgoi*. Finally, as Hansen himself admits (52), Aeschines’ evidence indicates that trials by *ἀπαγωγή κακούργων* could take place without any claim that the defendant was caught *ἐπ’ αὐτοφώρῳ*, and to assume a legal change in the time between Lys. 13 and Aes. 1 is to isolate the earlier case as without parallel.

⁶¹ Hansen would maintain that since in Ant. 5 *apagoge* was preceded by *endeixis* and *ἐπ’ αὐτοφώρῳ* is never associated with *endeixis*, the restricting phrase was not required in this case. But in view of his own conclusion (correct, in my opinion) that *apagoge* and *endeixis* are essentially parts of the same procedure (*cf. supra* n.51), this explanation seems unlikely. If this were the case, moreover, then Dionysius could simply have proceeded against Agoratus by means of *endeixis* first, thereby eliminating the need to insert *ἐπ’ αὐτοφώρῳ* in the writ.

But if this is so, why does the prosecutor not emphasize Agoratus' appearing in public? It may be that there is so little doubt that Agoratus had appeared in public and so little concern that he would try to deny this point in his defense that the prosecutor does not think it worth mentioning. This might indicate that the kind of prosecution by *apagoge* described by Demosthenes in 23.80, though originally directed against the crime of a killer's appearing in public, came to be treated as in effect a prosecution for the homicide itself. This explanation of Lys. 13 seems to me possible and certainly more plausible than one which sees the case as an *ἀπαγωγή κακούργων*, but it remains speculative; there may have been other considerations, legal or political, which affected the presentation of the case in ways we cannot imagine. It is generally accepted that the reason for prosecuting Agoratus by means of *apagoge* was that all *δίκαι φόνου* were prohibited by the amnesty of 403/2 unless the homicide was committed *αὐτοχειρία* (*Ath. Pol.* 39.5);⁶² perhaps personal or political motives led the Eleven to insist on the addition of *ἐπ' αὐτοφώρῳ* to the writ. But without further evidence the most likely conclusion is that Lys. 13 is an example of the kind of *apagoge* mentioned in Dem. 23.80, and that the prerequisite for prosecution by this means was either a public proclamation against the killer or a statement that the killing had been public and manifest.

In sum, an *ἀπαγωγή κακούργων* was brought in a homicide case at least once, but perhaps only once; it may have been considered an improper procedure by most Athenians. The use of *apagoge* against killers who appeared in public places, on the other hand, was apparently regarded as proper, though to our knowledge it was only used when special considerations made the use of an ordinary *δίκη φόνου* impossible. Thus it is unlikely that the use of *apagoge* in homicide cases ever became common or that the procedure was ever seen as fully interchangeable with the *δίκη φόνου*. Certainly we have no evidence to suggest that it was ever used in order that someone other than the relatives of the victim could prosecute a killer, and in the three cases for which we have evidence (Lys. 13, Lyc. 112–13, Ant. 5) the prosecution was brought by relatives. This is not a legal restric-

⁶² Presumably the same reason applies to the prosecution of Menestratus (Lys. 13.56); see MacDowell 137–38. Lycurgus' report (112–13) of the arrest of Phrynichus' killers is too sketchy for us to know what procedure was used, but it was probably the same sort of *apagoge* as in Lys. 13; see MacDowell 138–39.

tion: the law in Dem. 24.105 (explicitly) and 23.80 (implicitly) allows anyone to prosecute by means of an *apagoge*. But it seems to have remained the rule in practice that even in cases of *apagoge* only the relatives (or master) of a homicide victim prosecuted.

III. The *γραφὴ φόνου*

Finally brief mention must be made of the possibility that Athenian law allowed a homicide to be prosecuted by a *γραφὴ φόνου*, which would (like other *graphai*) be available to anyone who wished. This possibility has been denied by most scholars in this century,⁶³ but recently first MacDowell (133–35) and then Hansen (108–12) have argued for it. Without going into details, which are well presented by these scholars, let me note that Hansen's rejection (111) of MacDowell's argument is now approved by MacDowell himself,⁶⁴ who in turn rejects Hansen's view. I fully agree with MacDowell⁶⁵ that "the fact that the *graphe* procedure was used for *τραῦμα ἐκ προνοίας* does not prove that it was used for homicide too." There is no other evidence for a *γραφὴ φόνου* except for a remark of Pollux (8.40), which by itself is of little value. And there is, I think, a strong argument *ex silentio* against it: not only is the general absence of reference to this procedure significant, but it is almost inconceivable that in his survey of the various types of homicide courts and procedures (23.65–80) Demosthenes would omit mention of a *γραφὴ φόνου* if it existed.⁶⁶ We should thus reject the theory that there ever existed a *γραφὴ φόνου* in Athens.

To sum up briefly: those who maintain that Athenian homicide law absolutely prohibited anyone other than a victim's relatives (or master) from prosecuting for his death are overstating the situation, since under special circumstances an exception to this general rule could be made. On the other hand, those who claim that Athenian law left open the possibility that anyone who wished could prosecute for homicide, though perhaps correct in a technical sense, are presenting a misleading picture. To the extent that the laws gave precise

⁶³ For references see Hansen 108.

⁶⁴ *CR* N.S. 28 (1978) 175.

⁶⁵ *Ibid.*

⁶⁶ The fact that a *γραφὴ φόνου* would be tried by the Areopagus would be no reason not to include it as an additional *timoria* either before or after the discussion of *apagoge* in 23.80.

information on the subject—and this extent was not so great as many scholars assume—they indicated that prosecution for homicide was up to the victim's relatives (or master). To the extent that the laws did not cover certain areas or certain special situations, they allowed for exceptions to the rule. But the rule itself persisted, and as far as we can tell, Athenians always considered it a basic feature of a homicide prosecution that it should be brought by the victim's relatives or master.⁶⁷

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⁶⁷ I am grateful to M. H. Hansen and D. M. MacDowell for reading an earlier draft of this article. Their criticisms have been extremely helpful.