

The Prohibition of Just and Unjust Homicide in Antiphon's *Tetralogies*

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AT THE END of the last century serious doubts were raised, especially by Dittenberger,¹ concerning the legal accuracy of the *Tetralogies* ascribed to Antiphon. A rebuttal by Lipsius² explained several of the alleged discrepancies between the *Tetralogies* and Athenian law, but in his reply to Lipsius Dittenberger³ stuck firmly to one point above all: that the prohibition μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν, which is quoted four times in the *Second* and *Third Tetralogies* (3.2.9,⁴ 3.3.7, 4.2.3, 4.4.8), is clearly inconsistent with Athenian homicide law, which from the time of Drakon recognized that certain cases of homicide were lawful and went unpunished.⁵ Following Dittenberger some critics⁶ have accepted this inconsistency and taken it as part of the evidence for the 'sophistic', non-legal and non-Antiphontic nature of the *Tetralogies*. Others have sought to explain the inconsistency and to reconcile the prohibition of just and unjust homicide with Athenian law.

Paoli⁷ argued that as the city magistrates gradually assumed the legal tasks originally left to self-help, individuals were no longer allowed to kill a criminal themselves except in their own homes but had to bring him (by the process of *apagoge*) to a magistrate for execution. This change, he argues, was reflected in the law prohibiting all homicides, even those previously considered just. Paoli's theory of the development of Athenian legal institutions is not supported by the evidence.⁸ We know, for instance, that Athenian law in the fourth

¹ *Hermes* 31 (1896) 271–77, 32 (1897) 1–41; the topic of the present paper is treated in the first of these articles.

² *Berichte Leipzig* 56 (1904) 191–204.

³ *Hermes* 40 (1905) 450–70, esp. 451–55.

⁴ The word order in 3.2.9 is μήτε ἀδίκως μήτε δικαίως. This variation does not appear significant.

⁵ Cf., e.g., Drakon's law (*IG I²* 115) lines 37–38 (=Dem. 23.60).

⁶ E.g., L. Gernet, *Antiphon, Discours* (Paris 1923) 6–16.

⁷ *RIDA* 1 (1948) 153–61, esp. 158–60.

⁸ Cf. M. H. Hansen, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense 1976) 113–18.

century allowed certain kinds of homicide outside one's own home to go unpunished,⁹ and there is no evidence that this category was less restricted in early times;¹⁰ indeed Solon apparently enlarged the category of lawful homicide as a means of self-help.¹¹

More recently MacDowell,¹² following Maschke,¹³ has proposed a differentiation between killing 'justly' (*δικαίως*) and killing 'lawfully' (*ἐννόμως, κατὰ τοὺς νόμους*), and has argued that in Athenian law the latter (e.g., killing an adulterer) was allowed but the former (e.g., killing one's father's murderer) was not. The difficulty with this theory is that we have no direct evidence to indicate that either word, *δίκαιος* or *ἐννομος*, was used in the actual laws allowing certain kinds of homicide,¹⁴ and the orators seem to use both terms without any such distinction.¹⁵

Finally, in a lengthy discussion Caizzi¹⁶ suggests that the law prohibiting all homicide, just and unjust, was a religious not a legal prohibition, and that since a defendant might have to defend himself against this *ius sacrum*, which prohibited all homicides, as well as against the *ius civile*, which allowed homicide in certain cases, the *Second* and *Third Tetralogies* illustrate a proper defense against both sorts of law. Against this view, however, we should note that there is no awareness in the *Tetralogies* of the existence of two different categories of law, religious and civil (let alone any discrepancy between them), either in general or in connection with the prohibition against just and unjust homicide.

⁹ See Dem. 23.53, Arist. *Ath. Pol.* 57.3 and, for other references to specific kinds of lawful homicide, Gagarin, "Self-defense in Athenian Homicide Law," *GRBS* 19 (1978) 116–17 [hereafter, GAGARIN, "Self-defense"].

¹⁰ Cf. the law cited in Dem. 23.28, where the restriction against maltreatment of a convicted killer seems to be a later addition to Drakon's original law, but the permission to kill a convicted killer found in Attica was left unchanged; see R. S. Stroud, *Drakon's Law on Homicide* (Berkeley 1968) 54–56.

¹¹ Demosthenes (24.113) tells us that Solon instituted the provision allowing one to kill a thief at night in one's own house.

¹² D. M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester 1963) 80–81 [hereafter, MACDOWELL].

¹³ R. Maschke, *Die Willenslehre im griechischen Recht* (Berlin 1926) 53 n.1.

¹⁴ Demosthenes (23.74) uses *ἐννόμως*, Aristotle (*Pol.* 1300b27) refers to a dispute *περὶ τοῦ δικαίου*, and most later sources use the term *δικαίως*; see Gagarin, "Self-defense" 112 n.7. I shall use the term 'lawful homicide' to designate this category.

¹⁵ MacDowell 80, cites Dem. 23.74 for his use of *ἐννόμως*, without noting that a few lines later in the same section Demosthenes cites Orestes' acquittal to explain the existence of this category of *δίκαιος φόνος*; cf. J. H. Kells, *CR* n.s. 15 (1965) 207.

¹⁶ F. Caizzi, *Antiphontis Tetralogiae* (Milan 1969) 21–44.

In addition to these objections, a weakness common to all three theories is that not one of them takes into consideration the full arguments of the *Second* and *Third Tetralogies* and in particular the context within which the prohibition against just and unjust homicide is introduced. It is this context which I shall examine in this paper, and in so doing I hope to set forth more precisely the nature and purpose of this prohibition against just and unjust homicide. We shall then have a firmer basis from which to consider its relation to Athenian homicide law.

Before we look more closely at the *Tetralogies* some general observations are in order. First, we should note that by itself the prohibition *μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν* does not meet the formal requirements of statutory legislation since it does not provide any sanction for violations of the prohibition.¹⁷ This is not to say that the prohibition could not possibly have formed part of a written law, but it would have to be followed in that case by some statement of the sanction or legal procedure which would result in the event of a violation.¹⁸ Thus although the expression can be called a ‘law’ or *νόμος* in the wider sense of these words, I shall for convenience refer to it as a prohibition.

We should further observe that if the basic Athenian homicide law was written in the standard conditional form—*i.e.*, “if a man kills another man, he shall be exiled (or executed)” —as we have reason to believe it was,¹⁹ then any further prohibition of homicide would be legally superfluous, since such a law obviously implies that the homicide in question is prohibited. Furthermore, if the terms *δίκαιος/*

¹⁷ This is as true of early or ‘primitive’ laws as it is of modern law; *cf.* A. S. Diamond, *Primitive Law Past and Present* (London 1971) 45: “All genuine codes are couched in the natural language of statutory legislation, namely conditional sentences in the third person, the protasis containing the facts supposed, and the apodosis the sanction. Nowhere is there to be found a rule of law in the second person. Nowhere is there a rule of law without its sanction.”

¹⁸ D. Daube (*Forms of Roman Legislation* [Oxford 1956] 23–30) compares two forms of legislation, first where a separate prohibition is followed by a sanction (*x* is wrong; if anyone does *x*, he shall be punished), and secondly the simple sanction, where the prohibition is implied (if anyone does *x*, he shall be punished). Daube concludes that the former form is used only “where a duty to be imposed is new, unexpected or complicated.” Clearly the prohibition of homicide does not fit this category.

¹⁹ See Drakon’s law, line 11, and Stroud, *op.cit.* (*supra* n.10) 40. Every reconstruction of Drakon’s law on intentional homicide I know of uses the form of a conditional sentence.

ἄδικος in the prohibition mean ‘just/unjust’ in the sense of ‘allowed/prohibited by law’, then (as has often been noted)²⁰ one part of the prohibition is self-contradictory, whereas the other part is tautologous. We shall return to these considerations later.

If we turn now to the text and examine the prohibition in the context in which it occurs in the *Second* and *Third Tetralogies*, one fact strikes us immediately: in both *Tetralogies* it is the defendant who introduces this prohibition as part of his defense (3.2.9, 4.2.3); only once is the prohibition cited by the plaintiff (3.3.7), who mentions it in his second speech in response to the previous argument of the defendant. This surprising feature, which to my knowledge no scholar has yet considered remarkable, leads to some obvious questions: Why does the defendant in each case introduce the prohibition? What use does he make of it? What does the prohibition mean to him? These questions, which are regularly ignored in discussions of the problem,²¹ will be the starting point of our inquiry.

The *Second Tetralogy* concerns the accidental death of a young boy struck by a javelin. The boy’s father presents the accusation briefly: the youth who threw the javelin is guilty not of intentional but of unintentional homicide, and he should be exiled as the law provides. The accusation is exactly what we should expect on the basis of Athenian homicide law.²²

In defense the youth’s father, after a rhetorical opening (3.2.1–2), presents a series of admittedly subtle²³ arguments (3.2.3–8) to the effect that the victim himself was responsible (unintentionally, to be sure) for his own death and that the youth who threw the javelin is not at all guilty of homicide, not even of unintentional homicide. This is the entire substance of the defense, as it must be. Because the charge is unintentional homicide, the question of intent is irrelevant; nor are the basic facts in dispute. Essentially the case turns on the question of negligence—*i.e.*, which party neglected to follow the proper procedure?—and the defense must plead that the youth was not the principal cause of the boy’s death.

²⁰ See, *e.g.*, Dittenberger, *op.cit.* (*supra* n.1) 272–73.

²¹ Paoli, *op.cit.* (*supra* n.7) 159, notes only that the law is “mal invoquée,” by which he seems to mean that the context is irrelevant to the meaning of the law.

²² The case in the *Second Tetralogy* is one of unintentional, not lawful homicide (as some have claimed); see Gagarin, “Self-defense” 116 n.24. For exile as the penalty for unintentional homicide see Drakon’s law, line 11, and Dem. 23.72.

²³ See Ant. 3.2.2: ἐὰν ἀκριβέστερον ἢ ὡς σύνθητες ὑμῖν δόξω εἰπεῖν . . .

Having made this argument the defense continues (3.2.9):²⁴ ἀπολύει δὲ καὶ ὁ νόμος ἡμᾶς, ᾧ πιστεύων, εἴργοντι μήτε ἀδίκως μήτε δικαίως ἀποκτείνειν, ὡς φονέας διώκει. ὑπὸ μὲν γὰρ τῆς αὐτοῦ τοῦ τεθνεῶτος ἀμαρτίας ὄδε ἀπολύεται μηδὲ ἀκουσίως ἀποκτεῖναι αὐτόν· ὑπὸ δὲ τοῦ διώκοντος οὐδ' ἐπικαλούμενος ὡς ἐκῶν ἀπέκτεινεν, ἀμφοῖν ἀπολύεται τοῖν ἐγκλημάτοι, <μήτ' ἄκων> μήθ' ἐκῶν ἀποκτεῖναι—“And also the law acquits us in which the plaintiff puts his faith²⁵ in prosecuting us as killers, [the law] prohibiting killing unjustly or justly. For on the one hand, by the error of the dead boy himself this youth is acquitted of having unintentionally killed him; and on the other hand not even being accused by the plaintiff of killing intentionally, he [the youth] is acquitted of both charges, of killing unintentionally and intentionally.” Though this argument is a bit awkward in its striving for rhetorical effect,²⁶ it is clear that the prohibition against unjust and just homicide is introduced as part of an argument for acquittal. The argument, simply stated, is as follows: the prohibition prohibits two kinds of homicide; the youth is innocent of these two kinds of homicide; therefore the prohibition acquits the youth of homicide.

Two observations are necessary. First, the defendant must be equating the pair of terms in the prohibition, ἀδίκως/δικαίως, with the pair of terms in his supporting argument, ἐκῶν/ἄκων (ἀκουσίως). Without this equivalence the argument would be transparently nonsensical, which is not only *prima facie* improbable but is disproved by the fact that the plaintiff repeats and responds to this argument in his reply (3.3.7, see below).

The fact that ἀδίκως/δικαίως must here be equivalent to ἐκῶν/ἄκων was suggested long ago by Blass²⁷ but was rejected by Dittenberger²⁸ and has for the most part been ignored ever since. For support Blass cited only a law μήτε ἄδικον μήτε δίκαιον λέγειν mentioned by Lysias (fr.152), but this expression seems not to provide a parallel and was easily dismissed by Dittenberger. I should emphasize, however, that even if no exact parallel can be adduced, the terms ἀδίκως and δικαίως

²⁴ I use the Blass-Thalheim Teubner text of Antiphon (Leipzig 1914) throughout, except where noted. In 3.2.9 Aldus' emendation <μήτ' ἄκων> is required by the context and is accepted by all recent editors.

²⁵ For πιστεύω with νόμος see Aeschin. 3.1; the expression does not imply that the law was actually mentioned by the plaintiff.

²⁶ Note that the two clauses beginning ὑπὸ μὲν . . . ὑπὸ δέ are not quite parallel.

²⁷ F. Blass, *Die attische Beredsamkeit*² I (Leipzig 1887) 164, esp. n.3.

²⁸ *op.cit.* (*supra* n.1) 274 n.2; Lipsius, *op.cit.* (*supra* n.2) 198 n.2, approves this rejection.

in the above passage must be taken to designate intentional and unintentional homicide. There is, in fact, one other passage (Aeschines 2.88, discussed in the Appendix below) where *ἄδικος* and *δίκαιος* seem to be used to designate intentional and unintentional homicide.

Our second observation is that one half of the prohibition, namely the prohibition of unjust (= intentional) homicide, has no relevance whatsoever to the defendant's case in the *Second Tetralogy*.²⁹ The plaintiff has already conceded that the killing was unintentional, so that there is no question of intentional homicide and the defendant's innocence on this count is a moot point. The only relevant question is the charge of unintentional (or 'just') homicide, which the defendant quickly reduces to a question of homicide without qualification (did the youth kill the boy?). Thus the argument in 3.2.9 is nothing more than a rhetorically embellished restatement of the argument in sections 3–8, namely that the youth was not the cause of the boy's death. It adds nothing substantive to the defendant's case,³⁰ and the qualification *μήτε ἀδίκως μήτε δικαίως* adds nothing substantive to the simple prohibition of homicide.

The method of argument here is a more extreme form of a method Gorgias apparently used in his treatise *On Non-existence*.³¹ In order to prove the first of his major theses, that nothing exists (*οὐδέν ἐστιν*), Gorgias first maintained that if anything exists it is either being (*τὸ ὄν*) or non-being (*τὸ μὴ ὄν*) or both (66). After easily showing that non-being does not exist (67), Gorgias devoted most of the argument to rejecting the possibility that being exists (68–74) and then concluded with the demonstration that being and non-being cannot both exist together (75–76). Gorgias' method was thus to divide his thesis into three subtheses and argue for each in turn. We should note, however, that only one of these subtheses, namely that being does not exist, is really important, and it was apparently argued at much greater length

²⁹ E. Kemmer (*Die polare Ausdrucksweise in der griechischen Literatur* [Würzburg 1903] 205–07) notes the rhetorical effect of the 'polar expression' in this case and cites other cases where only one half of the polarity is relevant.

³⁰ As Wilamowitz observes of section 3.2.9, "nihil novi continet" (*Commentariolum Grammaticum* IV [Göttingen 1889] 18 = *Kl.Schr.* IV 682).

³¹ Diels, *Vorsokr.* 82B 3 §§66–76. The text is Sextus' summary of Gorgias' argument. Another report of the argument is preserved in [Arist.] *De Melisso, Xenophane, Gorgia* 979a13–980a8, and some feel that Sextus' summary is derived partly or wholly from this version (see H.-J. Newiger, *Untersuchungen zu Gorgias' Schrift Über das Nichtseiende* [Berlin 1973]). The version in *De MXG* does not reveal the form of Gorgias' argument as clearly as Sextus' version, but otherwise it supports the conclusions I draw from Sextus' version.

than the other two. Once Gorgias could prove that being does not exist, the conclusion that nothing exists must have followed quite easily.³² Thus the method is similar to that of the defendant in the *Second Tetralogy* in that in both cases a thesis is subdivided but only one subthesis is really important.

Two passages later in the *Second Tetralogy* confirm our observations that the terms *ἀδίκως/δικαίως* in the prohibition are understood as equivalent to *ἐκών/ἄκων* and that the qualification *μήτε ἀδίκως μήτε δικαίως* adds nothing to the simple prohibition of homicide. First, the prohibition is mentioned by the plaintiff (3.3.7), who is responding to the defense point by point:³³ *ἀκουσίως δὲ οὐχ ἤρσσαν ἢ ἐκουσίως ἀποκτείναντές μου τὸν παῖδα, τὸ παράπαν δὲ ἀρνούμενοι μὴ ἀποκτείνειν αὐτόν, οὐδ' ὑπὸ τοῦ νόμου καταλαμβάνεσθαι φαίνεσθαι, ὃς ἀπαγορεύει μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν. ἀλλὰ τίς ὁ βαλών; . . . ἐγὼ δὲ τὸν νόμον ὀρθῶς ἀγορεύειν φημι τοὺς ἀποκτείναντας κολάζεσθαι—*“Having killed my boy unintentionally no less than [if they had killed him] intentionally but denying that they killed him at all, they also claim not to be convicted by the law which forbids killing justly or unjustly. But who threw [the javelin]? . . . and I say that the law correctly declares that those who kill are to be punished.” Clearly the plaintiff here, like the defendant earlier, takes the terms *ἀδίκως* and *δικαίως* to designate intentional and unintentional homicide. He also understands that the prohibition applies essentially to homicide pure and simple (*τοὺς ἀποκτείναντας*) and that the basic issue is simply who is responsible for the homicide (*τίς ὁ βαλών*). In other words, the qualification *μήτε δικαίως μήτε ἀδίκως* is irrelevant to the argument.

Secondly, the defendant also alludes again to the law in his second speech (3.4.8): *τὸν δὲ νόμον ὃν παραφέρουσιν, ἐπαινεῖν δεῖ. ὀρθῶς γὰρ καὶ δικαίως τοὺς ἀκουσίως ἀποκτείναντας ἀκουσίως παθήμασι κολάζει—*“We must praise the law which they cite,³⁴ for correctly and rightly does it punish with unintended suffering those who kill unintentionally.” He then reiterates that the victim was to blame for his own death.

³² We cannot say that Gorgias' discussion of the possible existence of non-being was wholly irrelevant to his purpose (whatever that may have been), but the argument that being does not exist must have constituted the essence of his case that nothing exists.

³³ I follow Blass, but not Thalheim, in reading *ἀποκτείναντες, ἀρνούμενοι* and *φαίνεσθαι* in the first sentence of the following excerpt. The reading does not affect the basic sense of the passage.

³⁴ The structure of the argument here and the verbal echoes of 3.3.7 indicate that “the law which they cite” is the one cited in 3.2.9 and 3.3.7; cf. Caizzi, *op.cit.* (*supra* n.16) 235.

Here too the prohibition by implication applies to unintentional homicide, and intentional homicide is irrelevant.

Let us now turn to the *Third Tetralogy*, a case of homicide (allegedly) in self-defense.³⁵ We should note first that the defense in this case is essentially similar to that of the *Second Tetralogy* in that the defendant seeks to show that the real cause of the homicide was someone else.³⁶ In this case in addition to blaming the victim himself, the defendant also blames the doctor.³⁷ In spite of this complexity, however, the defendant's reasoning is quite similar to that of the defendant in the *Second Tetralogy*, and here too it is he, not the plaintiff, who introduces the prohibition against just and unjust homicide.

The argument that the victim himself is to blame for his own death (since he started the fight) is the first and most important part of the defendant's case (4.2.1–2). He then continues (4.2.3–4): ἐρεῖ δέ “ἀλλ’ ὁ νόμος εἴργων μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν ἔνοχον τοῦ φόνου τοῖς ἐπιτιμίοις ἀποφαίνει σε ὄντα· ὁ γὰρ ἀνὴρ τέθνηκεν.” ἐγὼ δὲ δεύτερον καὶ τρίτον οὐκ ἀποκτεῖναί φημι. εἰ μὲν γὰρ ὑπὸ τῶν πληγῶν ὁ ἀνὴρ παραχρήμα ἀπέθανεν, ὑπ’ ἐμοῦ μὲν δικαίως δ’ ἂν ἐτεθνήκει—οὐ γὰρ ταῦτά ἀλλὰ μείζονα καὶ πλείονα οἱ ἄρξαντες δίκαιοι ἀντιπιάσχειν εἰσί—νῦν δὲ πολλαῖς ἡμέραις ὕστερον πονηρῶ ἰατρῶ ἐπιτρεφθεὶς διὰ τὴν τοῦ ἰατροῦ μοχθηρίαν καὶ οὐ διὰ τὰς πληγὰς ἀπέθανε—“But the plaintiff will say, ‘but the law prohibiting killing justly or unjustly shows you to be liable for the penalties for homicide; for the man is dead’. But a second and a third time I say I did not kill him. For if the man had died immediately from the blows, he would have died by my agency, to be sure, but justly—for it is right that those who begin a fight suffer in return not the same amount but more. But as it is, he died many days later, attended by an evil doctor, on account of the wickedness of the doctor and not on account of the blows.” The argument that the doctor is responsible is relatively minor, however, and the defendant soon returns to his main argument, that the victim was responsible for his own death (4.2.5–6).

³⁵ For a discussion of this defense see Gagarin, “Self-defense.”

³⁶ The author of the hypotheses to both these defense speeches (3.2 and 4.2) observes that in each case ἡ στάσις μετέστασις.

³⁷ As the plaintiff notes in 4.3.5, a doctor could not normally be held legally responsible for his patient's death. We do not know the precise wording of the law (cf. Pl. *Legg.* 865b2–4). It is possible that the defendant's language in 4.2.4 (πονηρῶ ἰατρῶ . . . διὰ τὴν τοῦ ἰατροῦ μοχθηρίαν) is intended to suggest the extreme degree of negligence necessary to make even a doctor legally responsible.

Here the prohibition against just and unjust homicide is introduced into the defendant's argument for reasons which are not immediately clear. At first the qualification *μήτε δικαίως μήτε ἀδίκως* seems to be quite irrelevant, since the question is simply who caused the death, as is made clear by the plaintiff's (hypothetical) supporting argument, *ὁ γὰρ ἀνὴρ τέθνηκεν*, and by the defendant's primary response to the charge, *οὐκ ἀποκτεῖναι φημι*. Thus far the defendant treats the prohibition as an unqualified prohibition of homicide and simply repeats his argument of the preceding sections, that the victim himself was to blame.

The next sentence (*εἰ μὲν γάρ. . .*), however, leads to the defendant's secondary argument, that the doctor is to blame, and here the qualification *μήτε δικαίως μήτε ἀδίκως* becomes functional, though only for rhetorical purposes. In a counterfactual condition the defendant maintains that if he had killed the man, he would have done so *δικαίως*, and then adds that in fact he did not kill him, the doctor did. The effect of this argument is first to deny that the defendant could possibly have killed *ἀδίκως* (if anything the killing would have been *δικαίως*), and secondly to deny that he killed *δικαίως* (since he did not in fact kill at all). The first part of this argument is a weaker statement of the argument that the victim started the fight and was responsible for his own death (therefore the defendant did not kill unjustly); the second part is a weaker statement of the argument that the doctor was responsible (therefore the defendant did not kill justly). Rhetorically the argument appears to accomplish something, but in fact it adds nothing to the substance of the case, since either one of the stronger arguments (that the victim was responsible or that the doctor was responsible) would lead *a fortiori* to the conclusion that the defendant did not kill at all, whether justly or unjustly. The qualification *μήτε δικαίως μήτε ἀδίκως* is thus rhetorically useful in providing a transition from the first to the second of the defendant's arguments, but it has otherwise no substantive function.

A confirmation of the substantive irrelevance of the qualification *μήτε δικαίως μήτε ἀδίκως* is that in his second speech the plaintiff ignores the prohibition and simply presses home the argument that the defendant, not the victim (or the doctor), is the killer. Moreover, when the defendant's friends introduce the prohibition again in the second speech for the defense, which for the most part repeats points made in the first defense speech, their reply to it is simply to deny

that the defendant was the killer (4.4.8): *πρὸς δὲ τὸ μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν ἀποκέκριται· οὐ γὰρ ὑπὸ τῶν πληγῶν ἀλλ' ὑπὸ τοῦ ἰατροῦ ὁ ἀνὴρ ἀπέθανεν, ὡς οἱ μάρτυρες μαρτυροῦσιν. ἔστι δὲ καὶ ἡ τύχη τοῦ ἄρξαντος καὶ οὐ τοῦ ἀμυνομένου*—“The prohibition against killing justly or unjustly has been answered; for the man died not from the blows but by the agency of the doctor, as the witnesses testify. And furthermore, the mischance is attributable to the beginner of the fight and not to the self-defender.” Here the qualification *μήτε δικαίως μήτε ἀδίκως* is ignored.

It is evident that the defendant in this case uses the terms *δίκαιος* and *ἄδικος* in their more normal sense of ‘just’ and ‘unjust’.³⁸ However, this in no way affects the meaning of the terms in the *Second Tetralogy*, as Dittenberger³⁹ maintained, since the context there requires us to understand the terms as we have shown above. Indeed the evident flexibility of the terms is significant (see below) and is moreover consistent with the fact that in both *Tetralogies* the qualification *μήτε δικαίως μήτε ἀδίκως* is used primarily for rhetorical effect.

If we now consider the two *Tetralogies* together, the following picture emerges: the prohibition *μήτε δικαίως μήτε ἀδίκως ἀποκτείνειν* is a simple prohibition of homicide expanded rhetorically with the ‘polar expression’ *μήτε δικαίως μήτε ἀδίκως*. In both cases the prohibition is introduced for rhetorical purposes by the defendant, who pretends to be defending himself against both halves of it. In fact, in both cases the real argument is that the defendant did not kill the victim at all, and the qualification *μήτε δικαίως μήτε ἀδίκως* has no substantive significance.

The rhetorical nature of the qualification is further indicated by the fact that *δικαίως/ἀδίκως* in one *Tetralogy* must be interpreted as designating unintentional and intentional homicide, whereas in the other they have their more normal sense of ‘just’ and ‘unjust’. This variation indicates that the expansion *μήτε δικαίως μήτε ἀδίκως* can have no precise legal significance, since otherwise the defendants could not use it in two different senses in the two *Tetralogies* without incurring some criticism. It is especially significant that the plaintiff in the *Second Tetralogy*, where the application of *ἄδικος* and *δίκαιος* to intentional and unintentional homicide would appear to be abnormal, accepts it without hesitation.

³⁸ See Blass, *op.cit.* (*supra* n.27) 169 n.6.

³⁹ *op.cit.* (*supra* n.1) 274 n.2.

We noted earlier that the prohibition is not strictly speaking a law and would probably be superfluous in Athenian homicide law, and the legal vagueness of the rhetorical qualification is further evidence that the prohibition was probably not written into the law. The question remains, however, what was the status of the prohibition introduced by the defendants, and how could it have existed in any way together with the known Athenian laws allowing certain kinds of homicide to go unpunished?

If we examine all the surviving laws relating to lawful homicide, we shall note, as Lipsius⁴⁰ and others have done, that none of them uses the term *δίκαιος*; rather they state simply that a homicide in such-and-such a case (e.g., killing an adulterer) is to go unpunished.⁴¹ Dittenberger⁴² attributed the absence of this expression to the fact that Greek laws are cast in the form of conditional sentences, but even in a conditional sentence it would be easy to write, e.g., *δίκαιον εἶναι τὸν φόνον* in the apodosis. Dittenberger argued that the substance of the homicide law indicated that some cases of homicide were *δίκαιοι*, and this term is in fact used by the orators. I believe, however, that the absence of the term from the letter of the law is significant, since if the category of lawful homicide were legally designated *δίκαιος φόνος*, the prohibition *μητέ δικαίως μητέ ἀδίκως ἀποκτείνειν* would have to be understood as referring to this legal category, whereas the absence of the expression *δίκαιος φόνος* from written law allows the term *δίκαιος* to be used with some vagueness in the *Tetralogies* and elsewhere.

We should note in this respect that cases of self-defense, such as that argued in the *Third Tetralogy*, were probably not included among the cases of lawful homicide.⁴³ Thus when the defendant says (4.2.3) that if he had killed the man he would have done so *δικαίως*, the word is not being used in any precise legal sense. Indeed even if his were a true case of lawful homicide, *δίκαιος* still would not designate this category, as is shown by a close parallel in Lysias 1, probably the only extant speech from a case of lawful homicide. There the defendant maintains (1.37), in response to the accusation that he entrapped the victim,

⁴⁰ *op.cit.* (*supra* n.2) 192.

⁴¹ For references see Gagarin, "Self-defense" 119–20, to which add SEG XII 87.7–11, where it is decreed that whoever kills a tyrant *δίκαιος ἔστω*.

⁴² *op.cit.* (*supra* n.3) 452–53.

⁴³ See Gagarin, "Self-defense."

ἐγὼ δὲ δίκαιον μὲν ἂν ποιεῖν ἡγούμην ὥτινιοῦν τρόπῳ τὸν τὴν γυναῖκα τὴν ἐμὴν διαφθείραντα λαμβάνων—"I believe I would have done the right thing in no matter what way I got hold of the man who destroyed my wife." But in fact, he continues (1.39), he did not entrap the man.⁴⁴ It is clear that in this passage the term δίκαιον does not designate the specific legality of a homicide but refers more generally to a claim of moral justification, and the same is true of the defendant's use of δικαίως in Ant. 4.2.3.

These observations tend to support MacDowell's view⁴⁵ that certain homicides might have been considered δίκαιοι by most Athenians but would nonetheless have been punished by law. Certainly it is not surprising to find someone in court claiming to have killed δικαίως, whether or not his case could legally be classified as lawful.⁴⁶ On the other hand, our conclusions also suggest a rather different view of the historical context for the prohibition against just and unjust homicide from the one suggested by Paoli and accepted in its general outline by MacDowell and Caizzi.⁴⁷ In their view the prohibition should be understood in the context of the change from an earlier system of self-help, where the relatives of a homicide victim were allowed to take their vengeance on the killer, to the later system of compulsory judicial procedure, under which such retaliatory killings were no longer allowed. This change was expressed in the law by a provision prohibiting all homicides, those that were once considered just together with those that were unjust. Thus the prohibition is a sign of the gradual replacement of the system of self-help by a legal process under the authority of the *polis*.

This view, however, is not supported by the evidence we have examined. In the first place it is not accurate to say that the retributive killing of someone who had killed one's relative was 'allowed' under

⁴⁴ On entrapment in cases of adultery cf. the Gortyn laws (*I.Cret.* IV 72) II 36–45.

⁴⁵ *loc.cit.* (*supra* n.12).

⁴⁶ Orestes' killing of Clytemnestra, as it is presented by Aeschylus in *Eumenides*, does not fall into the legal category of lawful homicide (though it might if it were argued as a case of tyrannicide). Yet Orestes believes he killed Clytemnestra δικαίως (cf. 468, 612, 615) and is in fact acquitted, though not strictly on legal grounds (see Gagarin, *Aeschylean Drama* [Berkeley 1976] 76–79). Though this acquittal does not have any firm legal basis, we must remember that Athenian juries were not so strictly bound by the law as are modern juries. Note that Demosthenes sees Orestes' acquittal as the prototype for a plea of lawful homicide at the Delphinion (23.74), even though he was originally tried at the Areopagus (23.66).

⁴⁷ *opp.citt.* (*supra* nn. 7, 12, 16).

the system of self-help since such a killing could itself be avenged and could thus scarcely have been considered just. Secondly, the prohibition against just and unjust homicide has, as far as we can tell, nothing to do with retaliatory killing but is introduced in two cases only, accidental homicide and homicide in self-defense. To our knowledge both of these cases would have been equally if not more severely punished in the pre-Drakontian period.⁴⁸ Finally, there is no evidence for any significant decrease in the kinds of homicide allowed by law between the seventh and fourth centuries. As I remarked at the beginning of this paper, the change if any seems to have been to expand rather than narrow the category of lawful homicide. For all these reasons the traditional explanation of the prohibition against just and unjust homicide is impossible.

Rather than seeing the prohibition as the result of a process of development in the homicide laws, I believe it was the result of the increasing moral sophistication of the mid-fifth century, stimulated by the intellectual investigations of the sophistic movement. The discussions of responsibility or guilt in homicide cases, of which the *Tetralogies* are a good example,⁴⁹ led to a sharper distinction between various kinds of homicide, such as intentional and unintentional, and a more careful delineation of the nature of criminal responsibility than was the case earlier. From this more developed moral perspective certain homicides, such as those involving accidents or extreme provocation, could be considered morally just, even though they were still punishable according to the rather conservative letter of the law, since they were not included in the category of lawful homicide. From this perspective it was a moral comment on the Athenian legal system to observe that even though a certain killing might be morally justified, the killer must be punished, since “the law prohibits both just and unjust homicide.” This cannot have been a common observation, or we would probably see traces of it elsewhere in the orators or in some of the rhetorical debates in Euripides; but the author of the *Tetralogies* seized on the observation in order to experiment twice with its rhetorical possibilities.

⁴⁸ For accidental homicide see Odysseus' killing of Antinous (*Od.* 22.1–33), which I shall discuss in a forthcoming work on Drakon's law. The only possible example of killing in self-defense in the epics is Odysseus' killing of the suitors, whose relatives certainly expect to exact vengeance for their deaths (*Od.* 24.430–37).

⁴⁹ Cf. Plut. *Per.* 36.3.

In sum, both defendants call upon “the law prohibiting just and unjust homicide” for their own rhetorical purpose. In so doing they are not referring to a specific piece of statutory legislation, but rather to a characterization of Athenian homicide law based on a moral rather than a legal perspective. This characterization is certainly not inconsistent with Athenian law, and it thus provides no reason to reject the traditional ascription of the *Tetralogies* to Antiphon.

APPENDIX: Aeschines 2.87–88

In his speech *De Falsa Legatione* Aeschines assails his prosecutor Demosthenes for telling lies about him when he (Aeschines) is facing the possibility of a capital sentence.⁵⁰ He continues (2.87–88):⁵¹ *πῶς οὐκ εἰκότως οἱ πατέρες ἡμῶν ἐν ταῖς φονικαῖς δίκαις <ταῖς> ἐπὶ Παλλαδίῳ κατέδειξαν, τέμνοντα τὰ τόμια τὸν νικῶντα τῇ ψήφῳ ἐξορκίζεσθαι, καὶ τοῦτο ὑμῖν πάτριόν ἐστιν ἔτι καὶ νῦν, τὰ ληθῆ καὶ τὰ δίκαια ἐψηφίσθαι τῶν δικαστῶν ὅσοι τὴν ψήφον ἤνεγκαν αὐτῷ, καὶ ψεῦδος μηδὲν εἰρηκέναι, εἰ δὲ μή, ἐξώλη αὐτὸν εἶναι ἐπαρᾶσθαι καὶ τὴν οἰκίαν τὴν αὐτοῦ, τοῖς δὲ δικασταῖς εὔχεσθαι πολλὰ καὶ ἀγαθὰ εἶναι; καὶ μάλα ὀρθῶς καὶ πολιτικῶς ὦ ἄνδρες Ἀθηναῖοι· εἰ γὰρ μηδεὶς ἂν ὑμῶν ἑαυτὸν ἀναπλήσαι φόνου δικαίου βούλοιο, ἢ που ἀδίκου γε φυλάξαιτ' ἂν, τὴν ψυχὴν ἢ τὴν οὐσίαν ἢ τὴν ἐπιτιμίαν τινὸς ἀφελόμενος*—“Surely it was reasonable for our ancestors to introduce the practice in homicide trials at the Palladion that the one who wins the verdict should cut the pieces and swear an oath—and this has remained your traditional custom even now—to the effect that those of the jurors who voted for him had voted truly and justly and that he had spoken nothing false, and that otherwise he prays that he and his household be destroyed and asks for many blessings for the jurors. And this custom, gentlemen, is right and befits the city, for (a) if no one of you should wish to infect himself with ‘just’ homicide, surely (b) he would guard himself against ‘unjust’ homicide, depriving another of life or property or civic rights.”

I have quoted this passage at some length because the full context helps clarify the sense of *δίκαιος* and *ἄδικος* in the last sentence. In my translation I have divided this sentence into two parts corresponding formally to the protasis and apodosis of a conditional sentence, but the sense of the sentence is not truly conditional but rather: “since (a) is the case, it is even more true that (b) is the case.”⁵² Now it appears that the two kinds of homicide mentioned in these two parts of the sentence, *δίκαιος* and *ἄδικος*, must correspond to two

⁵⁰ *κινδυνεύοντος ὑπὲρ τοῦ σώματος* (2.87). The case is a *γραφὴ παραπρεβείας* for which the penalty was *τιμητός* (to be assessed by the court); see A. R. W. Harrison, *The Law of Athens* II (Oxford 1971) 82.

⁵¹ I follow Blass' Teubner text (2d ed. 1908), except that I read *τέμνοντα* for *τέμνοντες*.

⁵² As the scholiast notes, *ἢ που* here is equivalent to *πολύ πλέον*.

different kinds of homicide suggested by the long preceding sentence, which in my view are (a) actually killing someone and (b) causing someone's death through a false prosecution. Aeschines is apparently saying, "we try to avoid *φόνος δίκαιος* (for which we are brought to trial at the Palladion), and even more do we try to avoid *φόνος ἄδικος* (by making a false accusation which might lead to someone's conviction and death)." If this is indeed his meaning, then he must be using the terms *δίκαιος* and *ἄδικος* to refer to unintentional and intentional homicide respectively, since the Palladion was primarily the court for unintentional homicide.⁵³

I believe this is the correct interpretation of Aeschines' words here, though an objection can be raised to it: since, as Philippi⁵⁴ argued, the penalty of depriving someone of life or property was seldom if ever imposed on anyone convicted at the Palladion (though these could be penalties for intentional homicide tried at the Areopagus),⁵⁵ the *φόνος ἄδικος* which might result from a false prosecution does not seem to fit the context of prosecution at the Palladion. Philippi thus deleted *ἐπὶ Παλλαδίῳ* as a gloss on *ἐν ταῖς φονικαῖς δίκαις*. It is difficult, however, to account for this gloss,⁵⁶ and furthermore, although Philippi's revised text might give us an easier context for understanding the *φόνος ἄδικος*, it provides no satisfactory explanation of the *φόνος δίκαιος* which Aeschines assumes we all seek to avoid. Homicide in general is of course not *δίκαιος*, and homicide tried before the Delphinion as lawful (i) would not be referred to here without a specific mention of this court, (ii) would probably not be thought of as something everyone obviously seeks to avoid, and (iii) would probably not have been considered an 'infection' (i.e. a religious pollution).⁵⁷

Lipsius⁵⁸ accepted Philippi's deletion of *ἐπὶ Παλλαδίῳ* but assumed a different explanation of the first half of Aeschines' last sentence: the *φόνος δίκαιος* which people seek to avoid is a just conviction voted by the court (presumably the Areopagus). Again, however, obtaining a just conviction in court can scarcely have been thought to bring pollution upon the plaintiff, and moreover the sentiment that one would not wish to infect oneself by justly prosecuting

⁵³ Dem. 23.71, Arist. *Ath. Pol.* 57.3. The Palladion was also the court where the killers of slaves, metics and foreigners were tried, but Aeschines can hardly be referring to these cases.

⁵⁴ *RhM* 29 (1874) 10–11.

⁵⁵ See Dem. 21.43.

⁵⁶ Philippi, *loc. cit.* (*supra* n.54), thinks the glossator was thinking of Dem. 47.70, where an oath at the Palladion is mentioned, but a commentator who knew this passage would surely also know that a similar, if not identical, oath was sworn at the Areopagus (see Dem. 23.67–68).

⁵⁷ See MacDowell 128–29 on the difficult question whether purification was ever required of persons judged guilty of lawful homicide.

⁵⁸ J. H. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig 1905–15) 833 n.17.

a killer and obtaining a just sentence of death conflicts with the commonly expressed desire to see justice done, the guilty one punished, etc. Indeed it could be said to be one's legal and moral duty to prosecute and if possible convict the murderer of a relative.⁵⁹

If we reject Philippi's deletion,⁶⁰ we do, however, have to explain the end of Aeschines' statement, where he seems to imply that a false prosecution at the Palladion might have the result of depriving people of life, property and civic rights. I suggest that Aeschines does not intend such an implication, but rather is conflating the situation of bringing a false prosecution before the Palladion and his own situation, where Demosthenes (he maintains) is bringing a false prosecution against him. In essence Aeschines is saying, "[this analogy with the oath sworn at the Palladion is significant since] just as one would not wish to infect oneself with a *φόνος δίκαιος* [and be tried at the Palladion], so one would even more avoid a *φόνος ἄδικος*, depriving someone of life, property and civic rights [as will be the result if Demosthenes wins his false prosecution against me]."

In sum, on the most likely interpretation of this passage, Aeschines uses *δίκαιος* and *ἄδικος* to refer to unintentional and intentional homicide, the latter arising indirectly from a false prosecution.

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⁵⁹ See MacDowell 9–11.

⁶⁰ No editor to my knowledge even mentions Philippi's deletion. All recent editors accept Scaliger's <ταῖς>.