

DEUXIÈME PARTIE

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# Trial of Exiled Homicides and the Court at Phreatto

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Among the five homicide courts at Athens with their complex rules of jurisdiction, the court at Phreatto (τὸ ἐν Φρεαττοῦ δικάστηριον) is perhaps the most inscrutable <sup>(1)</sup>. It would appear to be an institutional oddity of little or no practical significance in classical times, and the few ancient comments upon it suggest that the Athenians themselves found the original purpose of the court quite unintelligible. In his defense of the

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1) The standard discussions are brief: H.J. TRESTON, *Poiné* (London 1923), 256-7; K. LATTE, "Phreattys", *RE* 20.1 (1941), 759-60; D. MACDOWELL, *Athenian Homicide Law* (Manchester 1963), 82-4. The handbooks offer only brief mention: J.H. LIPSIUS, *Das attische Recht und Rechtsverfahren*, vol. I (1905), 130-31; G. BUSOLT and H. SWOBODA, *Griechische Staatskunde* (Munich 1926), 813; R. BONNER and G. SMITH, *The Administration of Justice from Homer to Aristotle*, vol. I (Chicago 1930), 105, 110, 124; A.R.W. HARRISON, *The Law of Athens*, vol. II, Procedure (Oxford 1970), 37; cf. R. SEALEY, *CP* 78 (1983), 285 f. For further references see *infra* nn. 5-6.

traditional courts against the decree of Aristocrates, Demosthenes gives an explanation of the Phreatto jurisdiction, which was met no doubt by a sceptical audience but which modern scholars have treated as standard (2).

See how he has violated yet a fifth court, the court in Phreatto. For here, Athenians, the law commands that the accused submit to judgment *if one exiled for unintentional homicide, not yet reconciled to his prosecutors, faces charges of a second, intentional slaying.*

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2) Dem.23.77: Ἐτι τοίνυν πέμπτον δικαστήριον ἄλλο θεάσασθ' οἷον ὑπερβέβηκε, τὸ ἐν Φρεαττοῖ. ἐνταῦθα γάρ, ὃ ἄνδρες Ἀθηναῖοι, κελεύει δίκας ὑπέχειν ὁ νόμος, εἴαν τις ἐπ' ἀκουσίῳ φόνῳ πεφευγῶς, μήπω τῶν ἐκβαλλόντων αὐτὸν ἡδεσμένων, αἰτίαν ἔχῃ ἐτέρου φόνου ἐκουσίου. καὶ οὐχ, ὅτι δεῦρ' οὐχ οἷόν τ' ἐλθεῖν αὐτῷ παρεῖδεν αὐτὸν ὁ ταῦθ' ἕκαστα τάξας, οὐδ', ὅτι καὶ πρότερόν τι τοιοῦτον ἐποίησε, καὶ δὴ τὴν ὁμοίαν ἐποίησατο πιστὴν αἰτίαν κατ' αὐτοῦ, ἀλλὰ τό τ' εὐσεβὲς εὔρεν ὅπως ἔσται, κἀκείνον οὐκ ἀπεστέρησε λόγου καὶ κρίσεως. τί οὖν ἐποίησεν; ἦγαγε τοὺς δικάσοντας οἷ προσελθεῖν οἷόν τ' ἐκείνῳ, τῆς χώρας ἀποδείξας τόπον τιν' ἐν Φρεαττοῖ καλούμενον ἐπὶ θαλάττῃ. εἴθ' ὁ μὲν ἐν πλοίῳ προσπλεύσας λέγει τῆς γῆς οὐχ ἀπτόμενος, οἱ δ' ἀκροῶνται καὶ δικάζουσιν ἐν τῇ γῇ. κὰν μὲν ἄλῃ, τὴν ἐπὶ τοῖς ἐκουσίοις φόνοις δίκην ἔδωκε δικαίως, ἂν δ' ἀποφύγῃ, ταύτης μὲν ἀθῶος ἀφίεται, τὴν δ' ἐπὶ τῷ πρότερον φόνῳ φυγὴν ὑπέχει. The italicized lines are put in quotes in most major editions (e.g. DINDORF - BLASS, BUTCHER, but not by GERNET in the Budé of 1959); I omit the quotation marks as, it will be argued, this is probably not a verbatim citation of the law but a paraphrase involving at least one misleading gloss.

The lawgiver did not merely disregard the charge because the defendant was unable to return ; nor, because the defendant had previously committed such an offense, did he automatically credit a similar charge ; but he sought a means of righteous resolution, and did not deny to the defendant his plea and his trial. What recourse did he provide ? He convened the jurors where the defendant could face them, designating a certain venue at the sea, "in Phreatto" (as it is called). The defendant comes then and makes his plea on shipboard, without reaching shore ; the others hear and judge on land. And if convicted, he rightly pays the penalty for wilful murder ; but if acquitted, of this charge he goes free, though he yet faces exile on the earlier count.

Demosthenes himself seems aware that his audience will find the workings of this court arcane, and he endeavors to extract from the law apposite principles (which Aristocrates' decree of inviolability for Charidemus would clearly contravene). But this exercise in jurisprudence yields rather dubious findings, and the other ancient authorities give a somewhat different account of the procedure, at odds with Demosthenes' claim that the court for exiled killers heard charges of intentional homicide exclusively. This inconsistency in the ancient testimony suggests that the Phreatto court was originally designated for some purpose long forgotten in the fourth century. Trivial as this relic may seem, it is likely to yield us a valuable clue to the development of Athenian justice.

Demosthenes, of course, supposed that intentional killing had been treated differently from unintentional homicide — that a more serious penalty was prescribed for wilful and malicious murder, and that a separate jurisdiction for such cases was assigned to the Areopagus — from time immemorial; and he treats what he regards as the Laws of Drakon as presupposing just such a division of jurisdiction according to the principle of intentionality. These premises of his argument are now very much in doubt, and a new reconstruction of the evolving system of justice is emerging (3). The Phreatto court is a crucial piece of the puzzle that has not yet been fitted into place.

Already in Antiquity it was noted that the jurisdiction at Phreatto — as it was understood in the fourth century — seemed to serve little or no purpose. Aristotle, in fact, in the *Politics* (1300b 27-30) observes that cases such as were heard at Phreatto were likely to occur "rarely in the whole history of even great states" (4). This observation is all the more striking as Aristotle seems to have assumed a somewhat broader jurisdiction than

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3) The primacy of the Areopagus court was challenged long ago, notably by Adolf PHILIPPI, *Der Areopag und die Epheten* (Berlin 1874), esp. 200-329; and now Robert WALLACE has effectively revived the argument, *The Areopagos Council* (Baltimore 1989), esp. 3-47. Against the old view that the extant copy of Drakon's Law treats only unintentional homicide, see esp. M. GAGARIN, *Drakon and Early Athenian Homicide Law* (New Haven 1981), 132-36; and see the discussion *infra* at nn. 14-17.

4) Pol. 1300b 27-30: τέταρτον δὲ ὅσα τοῖς φεύγουσι φόγου ἐπὶ καθόδῳ ἐπιφέρεται, οἷον Ἀθήνησι λέγεται καὶ τὸ ἐν Φρεαττοῦ δικαστήριον. συμβαίνει δὲ τὰ τοιαῦτα ἐν τῇ παντὶ χρόνῳ ὀλίγα καὶ ἐν ταῖς μεγάλαις πόλεσιν.

Demosthenes had defined : in the *Politics* he speaks simply of a fourth class of homicide charges, "such as are brought against those exiled for homicide *upon their return*" (or perhaps "against their return"), without specifying that the second charge be intentional murder. Thus on the narrow grounds that Demosthenes defined for trial at Phreatto — where a convicted man, exiled for unintentional homicide, is charged with a second count of homicide that must be intentional murder — there would hardly seem to have been much need for a special court.

There is other ancient testimony to suggest, as we shall see, that Demosthenes' account is mistaken on this point, and that a much broader jurisdiction was originally assigned to the Phreatto court. On this assumption various solutions have been proposed. It was once suggested that the court at Phreatto tried all homicide cases where the defendant was extradited from abroad ; but this purely speculative theory has not found much acceptance <sup>(5)</sup>. Recently, Ernst HEITSCH has given a more persuasive explanation for the purpose that Demosthenes assigned to the Phreatto court, but it is doubtful whether HEITSCH's solution can resolve all of the difficulties in the ancient testimony <sup>(6)</sup>.

In origin the hearings at Phreatto would certainly appear to be a safeguard of the exile's right to seek reconciliation or 'pardon'

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5) J.C. MILES, "The Court in Phreatto", *RIDA* first series, vol. 5 (1950), 219-224.

6) "Der Archon Basileus und die attischen Gerichtshöfe für Tötungsdelikte", *Symposium 1985* (Akten der Gesellschaft für Griechische und Hellenistische Rechtsgeschichte, Bd. 6, Cologne 1989), 71-87 ; on Phreatto, see esp. pp. 77-78.

(*aidesis*) and return to Attica. HEITSCH connects this aim with other rules that are often attributed to Drakon's Law : (1) the guarantee of a safe path to exile for the homicide whose crime is judged unintentional, if he departs within a specified period by a prescribed route (Dem. 23.72) ; and (2) the protection, apparently extended to any homicide in exile, against retributive murder (*IG* 1<sup>3</sup>,104.26-29 = Dem. 23.37). Of these provisions, the former is often assumed to be Drakonian — and so HEITSCH assumes — though, as we shall see, it is probably a later addendum. The second provision of the law is shown to be authentic by the agreement between Demosthenes' citation and the extant fragmentary inscription. To these HEITSCH would add (3) a further principle of legal protection inherent in the rule for voluntary exile in classical procedure : the defendant accused of *intentional* homicide is allowed to go safely into exile before the final speech at trial : presumably this specific rule developed from the general principle that even the accused murderer should have some opportunity for safe exile which seems inherent in the other protections that Drakon devised to restrict vindictive self-help (rules 1 and 2). By this view, (4) the Phreatto hearing was yet another bar to vendetta : the exiled homicide was entitled to use lethal force in self-defense against unlawful pursuers ; and, in the event of his assailant's death, if the victim's family charged him with intentional homicide to bar his return, he could plead innocence or justification by the law of Phreatto (7).

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7) This hypothesis gains support from Michael GAGARIN's reinterpretation of the issue in Antiphon IV (*Tetralogy* 3) : self-defense would be ordinarily prosecuted as intentional homicide, perhaps before the

This is an insightful explanation, and it is indeed likely that this was the chief function of the Phreatto court as it developed historically and as Demosthenes understood it. But there are a number of considerations that tend to disprove the hypothesis that this was the *original purpose* of the special court. These considerations involve, first, specific inconsistencies in the extant testimony on the Phreatto court (section I), as well as general issues of the reconstruction of Drakon's Law (section II). It will be helpful to begin with the more direct evidence first, to clear away the misconceptions that Demosthenes' account has fostered ; we can then turn for a solution to the more general questions of Drakon's Law and the evolving homicide jurisdiction of the early polis — which are complex matters, beyond the scope of this paper fully to resolve, but from which sufficient confidence can be put in a few fundamental points to answer the riddle of Phreatto.

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Areopagus court ; see *GRBS* 19 (1978), 111-20 ; cf. HEITSCH, "Archon Basileus", p. 78. The fragmentary lines on assault and seizure in Drakon's Law, 33-8, are consistent with this interpretation, as they seem not to envision outright acquittal for killing in self-defense.



## I

There is first the obvious question why this procedure, as Demosthenes insists, is to be available only in cases where an exiled homicide is charged with a second, *intentional* murder. If the principle of fairness that Demosthenes extracts from the law — that a man once convicted not be prejudged on a second count — were indeed the aim of the lawgiver, it is difficult to see why a similar trial should not be available also in cases where a second count of unintentional killing was alleged (8). Presumably, by the intent that Demosthenes attributes to the lawgiver, any homicide eligible for pardon should be allowed a hearing on *any* charge that might jeopardize his rightful hopes of a safe return; yet Demosthenes assumes that *only* a second count of intentional murder is to be tried in this way. Furthermore, if as Demosthenes supposes this procedure applies only in cases of intentional murder, the special precautions at Phreatto seem inconsistent with the law of the classical era: in principle, convicted murderers were to be executed, yet the position of the defendant (on shipboard) would allow him an avenue of escape even after the verdict had been rendered (9). Thus, *prima facie*, there is reason to be suspicious of Demosthenes' claim that this hearing is only available when a charge of intentional murder (in the death of a second victim) is brought against a defendant already exiled for another homicide.

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8) In fact a second charge of unintentional homicide could be just as damaging to the exile's hopes of safe return: presumably there would be a

The other ancient testimony, in fact, confirms our suspicions. In the Aristotelian *Athenian Constitution* (57.3) <sup>(10)</sup>, as in the *Politics* (1300b 27-30), there is no suggestion that the second count of homicide must be intentional murder to qualify for trial in the Phreatto court. The lexicographers, moreover, though often dependent on Demosthenes *v. Aristocrates* for their knowledge of the homicide courts, generally follow a tradition similar to that in Aristotle : they apparently assume that charges before the Phreatto court need not be intentional murder <sup>(11)</sup>.

judgment against him *in absentia*, and without *aidesis* for this second charge, he could be arrested and put to death upon his return.

9) Defendants on trial for intentional homicide were ordinarily allowed to go into exile so long as they departed before the last speech (Ant. IV 4.1 ; V 13), but they were presumably apprehended and executed by the Eleven or other officers of the court if they awaited the verdict and were convicted.

10) *Ath. Pol.* 57.3 : ἔὰν δὲ φεύγων φυγὴν ὦν αἵδεσις ἐστὶν αἰτίαν ἔχ[η] ἀποκτεῖναι ἢ τρῶσαι τινα, τοῦτ' αὖ ἐν φρεάττου δικάζουσιν. ["If one in exile, under conditions for which pardon is allowed, be subject to a charge of slaying or wounding, for this they hold trial in Phreatto".]

11) Thus one entry in *Lex. Seg.* 311.21-22, tells us that defendants at Phreatto were "those in exile for unintentional slaying but tried for some other offense" (ἐπ' ἄλλῃ δέ τινι κρινόμενοι). Hesychius *s. v.* ἐν φρεάττου, says simply "in the court in which they judged cases of unintentional homicide (ἐν τῷ δικαστηρίῳ ἐν ᾧ ἐδικάζοντο ἐπὶ ἀκουσίῳ φόνῳ)". And in Pollux 8.120, discrepancies in the manuscript tradition suggest that the lexicographer found a rather different account than Demosthenes gave, though a later hand attempted to reconcile the two accounts : τὸ ἐμ φρεαττοῦ ἐν τούτῳ ἐκρίνετο εἴ τις τῶν φευγόντων ἐπ' ἀκουσίου [φόνου αἰτία δευτέραν αἰτίαν ἐκουσίου] προσλάβοι. ἦν δ' ἐπὶ θαλάττῃ τὸ δικαστήριον, καὶ τὸν ἐν αἰτίᾳ προσπλεύσαντα τῆς γῆς οὐ προσεπτόμενον ἀπὸ τῆς νεὸς ἐχρῆν ἀπολογεῖσθαι [μήτ' ἀπο]βάθραν μήτ' ἄγκυραν εἰς τὴν γῆν

Moreover, the traditional *aition* for the Phreatto court that Pausanias reports, though worthless as historical evidence, is at least an indication of popular belief that such courts originally held broad jurisdiction for homicide charges against any returning exile — even for hearings on the *original charge* : in Pausanias we are told that the first trial of this kind was held when Teucer made his defense before Telamon on charges of complicity in the death of Ajax (12).

Thus the balance of the ancient evidence tends to contradict Demosthenes on the very point where his account is inconsistent in itself. It is therefore reasonable to suppose that the Phreatto court originally fulfilled a broader function than Demosthenes and most modern commentators have supposed. There is yet one ancient document relevant to this problem, which no one has, as yet, brought to bear upon it. To this untried evidence we now turn.

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βαλλόμενον. [bracketed readings in FS only]. Harpocration, *Lex.* 115.7 quotes Demosthenes 23.77, but adds that Theophrastus made note of the name Phreattos (eponymous hero) in *Peri Nomon*. On the notes in *Lex. Seg.* see *infra* at n. 19.

12) Pausanias 1.28.11 : ἔστι δὲ τοῦ Πειραιῶς πρὸς θάλασση φρεαττύς· ἐνταῦθα οἱ πεφευγότες, ἢν ἀπελθόντας ἕτερον ἐπιλάβῃ σφᾶς ἔγκλημα, πρὸς ἀκροωμένους ἐκ τῆς γῆς ἀπὸ νεῶς ἀπολογοῦνται· Τεῦκρον πρῶτον λόγος ἔχει Τελαμῶνι οὕτως ἀπολογήσασθαι μηδὲν ἐς τὸν Αἴαντος θάνατον εἰργάσθαι.

## II

In the fragmentary copy of Drakon's Law we have, in fact, a likely reference to a trial procedure prescribed for homicides already in exile :

If there are none of these kinsmen surviving — *if the killing was unintentional and the fifty-one judges, the "ephetai", decide that the killing was unintentional* — let there be ten members of the clan (*phrátōres*) to grant pardon, if they are willing ; and let the fifty-one choose them by rank.

And let those also who were earlier guilty of homicide be subject to this statute <sup>(13)</sup>.

Now it is often assumed that the decision on the question of intent to which these lines refer belonged to the original verdict of the *ephetai* in response to charges soon after the killing ; presumably, this previous verdict was to be the basis upon which the *ephetai* would later choose phratry-members to decide upon pardon. But this can only be so if in fact intentionality itself was

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13) Cf. Dem. 43.57 (= IG I<sup>3</sup>, 104.16-20) : ἔὰν δὲ τούτων μηδεὶς ᾗ, κτείνῃ δὲ ἄκων, γνῶσι δὲ οἱ πεντήκοντα καὶ εἴς, οἱ ἐφέται, ἄκοντα κτείνειν, ἐσέσθων οἱ φράτερες, ἔὰν ἐθέλωσι, δέκα· τούτους δὲ οἱ πεντήκοντα καὶ εἴς ἀριστίνδην αἰρεῖσθων. καὶ οἱ πρότερον κτείναντες ἐν τῷδε τῷ θεσμῷ ἐνεχέσθων.

ordinarily at issue in trials before the homicide judges, and it has been convincingly argued to the contrary that the extant fragment of Drakon's Law contains the major provisions of a law which made *no statutory distinction* between intentional and unintentional homicides in ordinary cases prosecuted by the victim's family. That is not to say that the lawgiver was ignorant or indifferent to the killer's intent — the language of intentionality in the law is too emphatic to allow that conclusion — but it is evident that the law itself prescribed no separate penalty for the intentional murderer, so long as kinsmen of the victim survived to forbid his return.

It is beyond the scope of this study to argue the case in detail, but there are several points in Drakon's Law itself which strongly tend to the conclusion that the chief provisions for exile and *aidesis* applied equally to intentional as to *unintentional* homicides ; among these must be counted the very provision in question. Special pardon by the phratry is allowed only in cases where there are no eligible kinsmen of the victim surviving ; in such special cases *pardon is forbidden only if the killing is judged intentional*. The clear implication of this exceptional restriction is that under ordinary circumstances the kinsmen are free to grant pardon or deny it, regardless of the killer's guilt or innocence of intent. If, after all, pardon in ordinary cases by the immediate kinsmen was also to be allowed only when the *ephetai* had judged the killing unintentional, we would expect to find

some indication of a general rule to this effect in the extant statute, but there is none to be found <sup>(14)</sup>.

We are drawn to this conclusion by the opening lines of the inscription (*IG*, I<sup>3</sup>, 104.10-11), where the same provisions for exile and *aidesis* would appear to apply in cases of "planning" (βούλευσις, which originally implied intent) as in the other cases to which the major provisions of the law are addressed. And whatever the original heading, the extant *incipit*, καὶ ἔὰμ μὲ ἐκ προνοίας, would naturally imply that the same penalties apply in both categories — for intentional homicide and "even if without intent". Again, the protection afforded to homicides in exile in lines 26-29 (= Dem. 23.37) also appears to imply no distinction in penalty between intentional and unintentional killings <sup>(15)</sup>.

The law providing a safe path to exile for the unintentional homicide — that one convicted of unintentional homicide depart by a prescribed route within a given period (Dem. 23.72) — is generally treated as an authentic provision of Drakon's code

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14) For the view that Drakon's Law applied equally to intentional as to unintentional homicides, see GAGARIN, *Drakon*, pp. 65-79. For the common view that the major provisions apply only to unintentional homicide, aside from received opinion in the handbooks, see E. RUSCHENBUSCH, "ΦΟΝΟΣ. Zum Recht Drakons und seiner Bedeutung für das Werden des athenischen Staates", *Historia* 9 (1960), 129-54; HEITSCH assumes a similar reconstruction, in "Archon Basileus" (*supra*, n. 6) and in *Aidesis im attischen Strafrecht* (Akad. Wis. Mainz, 1984 no. 1), 3-10.

15) That the prohibition against vindictive murder of homicides in exile protected both intentional killers and others is argued by GAGARIN, *Drakon*, pp. 58-61, and allowed by HEITSCH, "Archon Basileus", p. 77.

(HEITSCH's rule 1), but this basic premise of the standard interpretation is dubious on several counts. No such rule is to be reconstructed nor is any similar rule, regarding how a verdict is to be implemented, to be found anywhere in the extant copy of Drakon's Law. And Demosthenes cites the law *not* among those statutes which *can* be reconstructed in the inscription, but among those which are given *after* what is almost certainly the closure of the Drakonian statutes : § 62 gives the rule that any officer or citizen who confounds the *thesmos* is to be *atimos* (the language is appropriate to the statute's antiquity) ; all of the authentic Drakonian statutes, including those that can be confidently restored in the inscription, are cited before this "seal". The homicide laws cited after this closure are almost all specific ordinances defining the jurisdictions of the separate courts (Palladium, Delphinium, and so on) ; and these certainly belong to the era after Drakon.

If the separate penalties of classical procedure — death or lifelong exile and confiscation for intentional murder, exile and *aidesis* for unintentional — were not yet recognized or enforced by Drakon's law, then ordinarily the verdict of the *ephetai* would have made no meaningful distinction on the question of intent ; and therefore the verdict of the *ephetai* on the question of intent must have been given in a special hearing for pardon by the phratry, separate from ordinary trial. Further evidence pointing to this conclusion is to be found in the clause for retroactivity that immediately follows the provision for special *aidesis* and would

appear to be most strictly relevant to it, if we are to judge from the other archaic evidence.

In the epics the most common outcome of a homicide dispute is that the killer goes voluntarily into exile without trial ; he and his family may then offer compensation to the victim's family and negotiate with them for pardon ; such was likely to be the practice in Drakonian Athens. It is unreasonable to assume, as some do, that Drakon's Law prescribes compulsory trial for the settlement of all homicides ; rather, it is obviously assumed by the lawgiver that there are homicides in exile who have not stood trial but will some day seek to return <sup>(16)</sup>. For the untried killer already in exile, if the victim's kin survive, the determination of pardon is entirely in their power — nothing in Drakon's Law changes that. But if there are no eligible kinsmen surviving, now the lawgiver provides a means by which the killer may return if he was innocent of malice : now for the first time and only in these special cases, officers of the polis will participate in the decision for pardon and make the determination whether the killing was wilful or innocent of intent.

Such cases would require special arrangements for trial. Even though there are no surviving kinsmen eligible to prosecute or take part in *aidesis*, the defendant, if he returns without pardon,

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16) HEITSCH himself suggests that the aim of this provision was to allow for settlement by those homicides who had gone into exile without trial, especially relevant to the transitional period when Drakon's Law came into effect ; *Aidesis* pp. 17-20. GAGARIN surprisingly assumes the contrary (*Drakon*, 48-51), that this decision on intent belongs to the ordinary verdict of the *ephetai* in the first instance.



is still in danger of arrest and immediate execution by other relatives and possibly by any concerned citizens (17). Therefore the hearing for special pardon would require extraordinary precautions to assure the defendant a safe avenue of escape — similar to the arrangements at Phreatto. The special arrangements at Phreatto — with the judges on shore and the defendant on board ship — have often been interpreted as dictates of *miasma*-doctrine, but it is more reasonable to suppose that the original purpose of these precautions was not simply to avoid defilement (which could be managed at any number of border sites), but to ensure that a fair hearing could be given to a defendant whose life was in jeopardy *wherever* he could be physically apprehended by his pursuers (18). From these special precautions it is clear that the law of Phreatto belongs to the same era as the law cited in Dem. 23.37 against the vengeful murder of homicides in exile (HEITSCH's rule 2). This provision can be confidently restored in Drakon's Law (*IG* 1<sup>3</sup> 104.26-29). Both statutes clearly

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17) The primitive right of self-help, to seize and put to death wrongdoers (*apagoge*) was recognized by Drakon (Dem. 23.28,51,60). For the view that this right extended beyond the family of the victim to any citizen, see M. GAGARIN, *Early Greek Law* (Berkeley 1986), 113 n. 35; cf. M.H. HANSEN, *Apagoge* (Odense 1976), 99-108.

18) Cf. Plato, *Laws*, IX 867e, prescribing special hearings at the border to determine whether the conditions of exile and pardon have been duly met; Dem. 23.37: Ἐὰν δέ τις τὸν ἀνδροφόνον κτείνῃ ἢ αἵτιος ᾗ φόνου, ἀπεχόμενον ἀγορᾶς ἐφορίας καὶ ἄθλων καὶ ἱερῶν Ἀμφικτυονικῶν, ὥσπερ τὸν Ἀθηναῖον κτείναντα, ἐν τοῖς αὐτοῖς ἐνέχεσθαι, διαγιγνώσκειν δὲ τοὺς ἐφέτας. For the tenuous connection between *miasma*-doctrine and homicide procedure, see esp. R. PARKER, *Miasma* (Oxford 1983), 104-43.

address the danger that the victim's kinsmen may yet pursue their vendetta beyond the borders of Attica, without respect for traditional sanctions of exile.

In Drakon's Law the close connection between the provisions for special pardon and for retroactivity suggests that special pardon was expected to be especially important in the period of transition, from the pre-legal, customary rules of an era when homicides were settled almost exclusively by voluntary exile, to the full application of statute law. The lawgiver expected the older, customary rules to persist, that those involved in homicides would continue to go into exile voluntarily, sometimes without trial, and later seek to return ; but he now prescribed procedural rules for trial by an official body of the polis, which would tend to restrict private claims and vendettas. The exiled homicide was not to be eternally banished from his homeland, beyond the lifetime of his victim's kin, if he could establish his innocence of wilful murder. If these were the original aims of the law, the Phreatto court would seem suited to the purpose.

Of course, we have no record of any case tried at Phreatto and no direct reference to a single case heard under Drakon's provision for special pardon ; but it is clear that the Phreatto court was originally connected in some way with the general category of cases that the law envisions — where the exiled killer sought to assure his right to return. And the Phreatto court seems especially suited to precisely those cases where there were no surviving kinsmen of the victim to grant or deny pardon. None of the ancient sources mentions the prosecutors at Phreatto,

though they specifically account for the positions of the defendant and the judges ; this silence is perhaps more than an accident of the evidence. The absence of the kinsman-plaintiffs at Phreatto would be, in fact, consistent with the nature of the hearing for special pardon. In all likelihood, the trial of an exiled homicide seeking special pardon, such as Drakon's Law seems to envision, would be initiated by family or friends of the defendant in his behalf, and not as an adversarial process.

### CONCLUSION

By this hypothesis, the issue before the Phreatto court was not a second, separate count of homicide, as Demosthenes supposed, but a formal question on the original homicide for which the defendant had undergone voluntary exile; he had thus implicitly acknowledged culpability, but he would now plead innocence of intent in order to qualify for pardon by the phratry. The wording of the lexicographers, in fact, suggests that the tradition available to them assigned to the Phreatto court not charges of a second, separate homicide (ἑτέρου φόνου, as Demosthenes insists), but a *second charge* ; cf. Pollux 8.120, δευτέραν αἰτίαν ; Pausanias 1.28.11, ἕτερον ἔγκλημα. Consistent with this reading is the entry in *Lexicon Seguerianum* regarding Zea, the supposed site of the harbor court "at Phreatto" : the defendants were "those in exile for unintentional

homicide but subject to *charges* for intentional homicide" (19). We are not told that the defendant was charged with a separate *crime* in any of the testimonia independent of Demosthenes (20). The traditional *aition* in Pausanias is particularly noteworthy : it suggests that the Phreatto court was the proper venue for hearings in which an accused homicide who attempted to return to his homeland might answer charges not on a second count of homicide but on the one, original charge which barred his return : "Teucer was the first to make his defense in this manner, pleading to Telamon that he had done nothing to cause the death of Ajax".

If such was the original purpose of the Phreatto court, it is likely to have been of much greater importance in the development of judicial proceedings for homicide than Demosthenes and his contemporaries could tell. It was received opinion in Demosthenes' time (and often assumed to this day) that the Areopagus council was the ancient homicide court before

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19) *Lex. Seg.* 311.17-20 : ἐν Ζέῳ· τόπος ἐστὶ παράλιος· ἐνταῦθα κρίνεται ὁ ἐπ' ἀκουσίῳ μὲν φόνοϛ φεύγων, αἰτίαν δὲ ἔχων ἐπὶ ἔκουσίῳ φόνοϛ. In legalistic contexts, αἰτία after all ordinarily means "(formal) charge" rather than 'crime' or actual 'culpability' (though the latter meaning is sometimes treated as equivalent). The earliest speeches afford many examples : for αἰτίαν ἔχειν / φέρειν or αἰτιᾶσθαι denoting "(formal) charge", see e. g. Ant. II.2.10,3.2, V.38,55,69,85, VI.16-18,26-27,34 ; and note esp. the parallel in Ant. V.89-90, where the speaker protests against the charges (αἰτιᾶσθαι, αἰτίασις) in *apagoge* as an abuse of procedure, and calls upon the judges for a second hearing (proper to the charges) by *dike phonou*. On the Zea court, cf. A. BOEGEHOLD, *CSCA* 9 (1976), 7-19.

20) See *supra* nn. 4,10-11 ; Harpocraton, of course, simply follows Dem. 23.77.

Drakon, and the separate penalties for intentional as opposed to unintentional killing were meted out by this primeval body from time immemorial. But we can reasonably conclude, to the contrary, that the *ephetai* preceded the Areopagus as homicide judges, and it was Solon who first assigned separate jurisdiction for intentional homicide to the council of former archons (21). Drakon's provision for 'special pardon' — "if the killing was unintentional and the fifty-one judges decide that it was unintentional" — opened the door on the question of intentionality and first allowed official intervention in matters that had previously been solely for the victim's family to weigh. If, as this reconstruction supposes, the Phreatto court was founded to decide precisely such cases as these, in addressing the question of intent it was a precursor of the Areopagus court itself. After the founding of the murder court at the Areopagus, the Phreatto court soon became all but obsolete. The homicide jurisdiction was divided, and it was prescribed by law that much more serious and irrevocable penalties were to be assessed for murder than for unintentional killing ; it became necessary at the outset to charge the accused either as an intentional killer or as innocent of intent ; and from then on, the defendant was much less likely to go voluntarily into exile without a judgment to confirm his plea and his right to return. Other reforms of Solon's era, restricting the family's claim to retribution, accord with this model (22).

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21) This was the view of PHILIPPI and RUSCHENBUSCH, among others, and is most recently argued by R. WALLACE : see *supra* nn. 3 and 14.

22) For reform of *aidesis* as restrictive of the plaintiffs' claims, see HEITSCH, *Aidesis*, esp. 3-10. On the later evolution of the homicide

By virtue of the open texture of Athenian procedural law, the court established for hearings on 'special pardon' came to be invoked in other cases such as Prof. HEITSCH supposes : if a homicide should lawfully abide by the terms of his exile but kill an assailant in self-defense, he could presumably make his plea on that second count of homicide at the one court where the charges against exiled homicides were to be given a hearing. The latter scenario would seem a natural consequence of Drakon's law against the vindictive killing of an exiled homicide, and it is certainly the most plausible rationale for Demosthenes' interpretation of proceedings at Phreatto. But such trials for a second killing in self-defense probably evolved as a later extension of the court's original jurisdiction. The Phreatto court would appear to be an institutional relic of the era when statute law first recognized the distinction between intentional and unintentional wrongs : it is likely to be the first mechanism of official intervention to release a defendant innocent of intent from eternal condemnation by his victims. And after more effective mechanisms were implemented, such hearings as were held at Phreatto, as Aristotle says, were almost unheard of "in the whole history of even great states".

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jurisdiction, see my study of the *ephetai*, forthcoming in *Classical Philology* 86 (1991).