ΕΦΕΤΑΙ AND ATHENIAN COURTS FOR HOMICIDE IN THE AGE OF THE ORATORS

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THE JUDGES who tried homicide cases at the Palladium and Delphinium courts in the era of Antiphon and Lysias have never been securely identified. The extant copy of Draco's homicide law (*IG* 1^3 104) seems to indicate that the traditional body of fifty-one ἐφέται still judged homicide cases in the late fifth century, and the testimony of the orators and lexicographers suggests that the ἐφέται maintained their ancient jurisdiction long after the date of the reinscription (409/8). Nonetheless, for over a century most scholars have assumed that, by 403/2 at the latest, trials for unintentional and "justifiable" homicide came before ordinary juries of the people. The role of aristocratic ἐφέται in the archaic regime has been often treated with great ingenuity, but in recent work the question of homicide jurisdiction in the age of the orators has generally been disregarded as a peripheral issue or a closed case. The prevailing view, that the ephetic courts were occupied by panels of ordinary dicasts chosen by lot from among citizen-jurors—what we may call the "dicastic model"—conforms to the received opinion on democratic reforms of the judiciary at Athens: the system of dicastic panels was, supposedly, an ancient innovation; by the late fifth century even the most archaic and formalistic procedures, where some practical qualifications would seem necessary, were nonetheless alloted to the layman. Much recent work on the extant homicide speeches, in fact, relies upon the assumption that expert logographers could expect to deceive a majority of the jurors on subtle legalities. Thus the competence of the homicide judges is a significant issue for the development of both democracy and rhetoric at Athens. It is the purpose of this study, therefore, to identify, as precisely as the evidence will allow, the judges who tried such cases as Antiphon 6 (*Choreutes*) and Lysias 1 (*On the Murder of Eratosthenes*).

Adolf Philippi argued long ago that the traditional body of ἐφέται, chosen from among the Eupatrids, was replaced by ordinary dicastic juries at the Palladium and (probably) the Delphinium in the reforms of 403/2.[1] Half a century after Philippi, Gertrude Smith argued that the

1. *Der Areopag und die Epheten* (Berlin, 1874), pp. 200–246 (on the archaic regime) and 318–29 (on ephetic courts in the fourth century); cf. M. H. Meier and G. F. Schömann, *Der attische Process* (Halle, 1824), pp. 143–45; F. Blass, *Die attische Beredsamkeit*, vol. 1 (Leipzig, 1887), pp. 188–95. The view that homicide jurisdiction was transferred to dicastic courts was followed by U. von Wilamowitz-Moellendorff,

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ἐφέται, who were members of the Areopagus before and after Solon, were replaced by dicastic panels in the era of Pericles. This view was adopted in the classic handbook that Smith wrote with R. J. Bonner;[2] and although there is still disagreement on the date of the reform, the dicastic model has gone almost unchallenged ever since.[3] Eberhard Ruschenbusch supposed that the ephetic courts were taken over by juries of the people as early as the reforms of Solon, and Raphael Sealey has taken a similar view.[4] In recent work on the argumentation of the homicide speeches, Ernst Heitsch assumed that the ἐφέται were a body of fifty-one dicasts, perhaps chosen by seniority but nonetheless "Laienrichter."[5] Now Robert Wallace, in a provocative work on the Areopagus, has adopted a version of the dicastic model, holding that the ephetic courts were transferred from the Areopagites to the popular juries sometime after 480.[6]

It will be helpful first to reexamine the most basic form of the dicastic models, according to which the ephetic courts were manned by ordinary dicastic panels (of 501 or more) after the year 403; we can then consider separately the modified version, according to which the Palladium and Delphinium courts had special juries, whose judges—perhaps fifty-one in number, perhaps over fifty years of age—were chosen from the roll of ordinary dicasts and thus had no special competence in the law. Against the dicastic model we must also weigh the opposite view, that the ἐφέται in the late fifth and fourth centuries were specially qualified by experience in legal procedures and religious sanctions: it is sometimes suggested (though never directly argued) that they were still committees of the Areopagus; and Philippi himself supposed that until 403 the ἐφέται continued to be chosen from among the Eupatrids (such would have been the body that tried the case of Antiphon 6). Thus we begin with what would appear to be a simple question of numbers: does the evidence in fact indicate that there were juries of several hundred (i.e., dicastic panels) at the ephetic courts after 403? We have then to consider a more complicated question: does the argumentation in the speeches indicate that the

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Aristoteles und Athen, vol. 1 (Berlin, 1893), p. 251, n. 137. The dicastic model was also accepted by J. H. Lipsius, *Die attische Recht und Rechtsverfahren,* vol. 1 (Leipzig, 1905), pp. 40–41 (with n. 125); cf. J. Miller, "Ephetai," *RE* 5 (1905): 2825–26.

2. See Smith, "Dicasts in the Ephetic Courts," *CP* 19 (1924): 353–58; R. J. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle,* vol. 1 (Chicago, 1930), pp. 97–102.

3. The dicastic model was questioned by D. M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester, 1963), pp. 52–57, though his suggestion that Areopagites continued to serve as ἐφέται in classical procedure has not won general acceptance. See also R. S. Stroud, *Drakon's Law on Homicide* (Berkeley, 1968), pp. 48–49, criticizing Smith's theory; cf. A. R. W. Harrison, *The Law of Athens,* vol. 1 (Oxford, 1971), pp. 40–41; M. Gagarin, *Drakon and Early Athenian Homicide Law* (New Haven, 1981), pp. 132–36, also suggesting that ἐφέται were committees of the Areopagus.

4. See Ruschenbusch, "ΦΟΝΟΣ: Zum Recht Drakons und seiner Bedeutung für das Werden des athenischen Staates," *Historia* 9 (1960): 129–54, esp. 131 and 147; Sealey, "The Athenian Courts for Homicide," *CP* 78 (1983): 294–96.

5. *Recht und Argumentation in Antiphons 6. Rede,* Abh. Akad. Wiss. Mainz, Nr. 7 (Mainz, 1980), p. 52, n. 31; *Antiphon aus Rhamnus,* Abh. Akad. Wiss. Mainz, Nr. 3 (Mainz, 1984), p. 6. Wilamowitz ("Die sechste Rede des Antiphon," *Sitz. Preuss. Akad. Wiss.* 21 [1900]: 406, n. 1) also assumed a jury of 51 chosen from the 6,000 dicasts; see n. 36 below.

6. *The Areopagos Council, to 307 B.C.* (Baltimore and London, 1989), pp. 103–5.

juries in ephetic courts had some special competence in procedures and legal principles, or does it suggest a body of the popular judiciary like the other dicastic juries? Finally, we will need to reexamine the extant statutes regarding the ἐφέται and the treatment of homicide procedure in the Aristotelian *Athenaion Politeia* (57. 3–4).

I

The proceedings mentioned in Isocrates 18. 52–54 have often been cited as the best evidence for a homicide trial held before an ordinary jury of dicasts, in this case a panel of seven hundred.[7] A remarkably similar case is found in pseudo-Demosthenes 59. 10, which seems to indicate a jury of five hundred in homicide proceedings. Both cases, however, involve allegations of perjury; and the rules of procedure in such cases, where witnesses and principals in homicide proceedings are charged with false witness, cannot be conclusively deduced from the evidence that we have. We therefore cannot be certain, in either case, whether the verdict of the dicastic jury decided the main issue in a δίκη φόνου or the question of perjury in a δίκη ψευδομαρτυρίων. The procedural details, however, suggest the latter.

In the case reported in Isocrates 18 (soon after 403/2), Callimachus had perjured himself in trumped-up charges of homicide brought by his brother-in-law against one Cratinus. Cratinus was charged with having struck a slave-woman belonging to the κηδεστής, and it was alleged that the woman had later died of the wound, though in fact she had been kept in hiding. Cratinus discovered the victim and brought her before the court. The speaker concludes: "As a result, when seven hundred were sitting in judgment, though fourteen other witnesses gave the same testimony as he, [Callimachus] received not a single vote" (54).

Against the received opinion, MacDowell argued that the trial before the jury of seven hundred was a δίκη ψευδομαρτυρίων subsequent to the homicide case.[8] Wallace has now revived the view of Smith and Philippi, that this passage refers to a single trial, for homicide, before dicasts. He insists that reference to the fourteen perjured witnesses would have been irrelevant at a second trial: "Once the arrival of the 'corpse' proved that Kallimachos was lying, there would be no point in mentioning at a second trial that fourteen witnesses had agreed with him."[9] This objection is misleading on three counts.

First, we must remember that the homicide charges were initiated not by Callimachus but by his brother-in-law, and it would be all too obvious a distortion to describe a verdict against the brother-in-law in homicide

7. See Philippi, *Areopag*, p. 320, n. 211; cf. Lipsius, *Attische Recht*, 1:158, n. 76 (emending to πεντακοσίων δικαζόντων); Bonner and Smith, *Administration of Justice*, 1:271; Wallace, *Areopagos*, pp. 103–4.

8. *Athenian Homicide Law*, pp. 52–54; cf. Harrison, *Law of Athens*, 2:40–41; but see also the review of Harrison by R. Seager in *JHS* 95 (1975): 246–47.

9. *Areopagos*, p. 103.

proceedings as a case in which Callimachus himself "received not a single vote." Second, the perjury of Callimachus, together with his involvement in the perjury of others, is precisely the point of the speaker's argument (51 μεθ' ὧν συνέστηκε καὶ καθ' ὧν τὰ ψευδῆ μεμαρτύρηκεν). His insistence upon that point should leave little doubt that Callimachus was in fact convicted in a δίκη ψευδομαρτυρίων: "Others you must judge by their own statements, but this fellow's testimony the judges themselves saw to be false."[10] The perjury in question must involve the oath to the fact of the killing (μεμαρτυρηκὼς ἢ μὴν τεθνάναι), which the parties in δίκαι φόνου had to affirm at the trial and presumably also in προδικασίαι. Otherwise it would be surprising that fourteen witnesses all testified to the same fact (μαρτυρησάντων . . . ἅπερ οὗτος); but in such cases it was necessary for immediate προσήκοντες to swear to the fact of the crime, supporting the proclamation of the homicide and the sanctions that it entailed.[11]

Finally, the passage indicates a sequence of proceedings, evidently including the hearings in προδικασίαι and the subsequent δίκη ψευδομαρτυρίων (53–54): "Cratinus kept quiet *the rest of the time* [i.e., during the prescribed hearings before the βασιλεύς] so that they [viz., Callimachus et al.] might not change tactics and invent other arguments, but be caught in the act. When the κηδεστής had made his charges and Callimachus had sworn [in hearings] to the fact of the crime (ἢ μὴν τεθνάναι) they [viz., Cratinus et al.] entered the house where the victim was concealed, took her by force, and brought her before *those present* at the court. As a result (ὥστε), when seven hundred were sitting in judgment, though fourteen other witnesses gave the same testimony as he, [Callimachus] received not a single vote."

In this sequence it seems unlikely that the initial charges, the discovery of the "victim," and the verdict of the seven hundred all belong to the same hearing; it appears, rather, that the false charges were sworn at an earlier hearing, that the charges were disproven by the discovery of the victim at a later stage of the proceedings, and that the discovery was prior to the trial before seven hundred jurors.

On the opposite assumption—that the "victim" was brought into court before the judges—this case is sometimes cited as proof of the admissibility of new evidence at the trial.[12] Such an interpretation, however,

10. The speaker dwells upon the charge of perjury at some length: cf. 56–57 ἐπιορκῶν ἐξελέγχεται . . . τὰ ψευδῆ μαρτυρῶν . . . ψευδῆ τολμᾷ μαρτυρεῖν; evidently witnesses confirmed the earlier conviction (54–55). For oaths to the fact of the homicide, to be sworn by προσήκοντες, cf. [Dem.] 47. 70; on the latter case and oaths of plaintiffs and witnesses, see MacDowell, *Athenian Homicide Law,* pp. 94–109. For the oaths in δίκαι φόνου, see Dem. 23. 67–68, [Dem.] 47. 72, and Aeschin. 2. 87; on perjury in homicide proceedings, see n. 15 below.

11. MacDowell, *Athenian Homicide Law,* pp. 96–98, argues against the view that oaths were sworn in προδικασίαι, but see Philippi, *Areopag,* pp. 80, 84–88; Lipsius, *Attische Recht,* 1:831; Bonner and Smith, *Administration of Justice,* 2:167–70.

12. See R. Bonner, "Evidence in the Areopagus," *CP* 7 (1912): 452–53; F. Lämmli, *Das attische Prozessverfahren* (Paderborn, 1938), pp. 96–97; M. Lavency, *Aspects de la logographie judiciaire attique* (Louvain, 1964), pp. 131–33. Cf. E. Leisi, *Der Zeuge im attischen Recht* (Frauenfeld, 1908), p. 81, n. 2, treating this case as a rare instance of "autopsy" (*Augenschein*).

yields, at best, an awkward scenario. The apprehension of the victim in the midst of proceedings would require a delay or recess, and it is doubtful that the βασιλεύς could be relied upon to grant ἀναβολή once the trial had begun. The defendant would also have run the risk that the prosecution could dispute the identity of the victim. It seems unlikely, therefore, that the defendant would have waited until after the first speech to present new evidence.

The reference to "those present" at the court, οἱ παρόντες, to whom the woman was presented for examination, presumably indicates principals and interested parties, rather than specifically the judges, οἱ δικάζοντες, mentioned in the next line. In the extant speeches "those present" are often interested parties who supported the ἀντίδικοι in preliminaries and were later called for testimony at the trial (cf. Dem. 45. 13, 54. 26, [Dem.] 59. 47).[13] In this instance the prima facie case for the prosecution rested upon the oath of such witnesses to the fact of the homicide. Thus the incidental note that the victim was brought before "those present" at the court suggests that testimony to the fact of the crime was challenged prior to the court hearing. It is therefore reasonable to suppose that the suit for false witness would have been heard before a verdict could be reached in the δίκη φόνου. The perjury conviction would have left the prosecution without a prima facie case for homicide; hence we must reckon with the likelihood that the δίκη φόνου never came to trial.

In the later case, pseudo-Demosthenes 59. 10 refers to a jury of five hundred in another trial before the Palladium; but here too we have a case of perjury as to the fact of the homicide. It was again alleged, with no reliable evidence, that a slave-woman had been slain; and the oaths of the prosecutor and the witnesses were again found to be perjured.

In this case Stephanus, himself the prosecutor, had sworn that Apollodorus struck and killed the woman with his own hand, and he suborned the perjury of others to support him in this charge. This passage lacks the dramatic detail of the earlier scenario, but again the sequence of proceedings is indicated: Stephanus first provided himself with witnesses, then made proclamation of the homicide and began the προδικασίαι; in these hearings he swore by the required oath to the fact of the killing, "which had neither happened nor been witnessed nor been reported." Then, "*having been proven a perjurer* (ἐξελεγχθεὶς δ' ἐπιορκῶν) and instigator of false charges and exposed as a hireling . . . , *he ended up* winning few votes out of five hundred, *convicted of perjury*" (ἀπῆλθεν ἐπιωρκηκώς).[14] The last phrase seems superfluous unless we are to understand that the conviction for perjury (or subornation) before a jury of five hundred

13. The orators regularly use οἱ παρόντες and similar terms such as οἱ περιεστῶτες to denote those in attendance *other than* the judges (e.g., Dem. 30. 32, Antiphon 6. 14); I find no clear instance where οἱ παρόντες is a loose synonym for δικασταί.

14. In the key phrase, the MSS read ὀλίγας ψήφους μεταλαβὼν ἐκ πεντακοσίων δραχμῶν ἀπῆλθεν ἐπιωρκηκώς, but most editors delete δραχμῶν as an interpolation inspired by μεμισθωμένος in the preceding line. MacDowell, *Athenian Homicide Law*, p. 55, protested against the deletion; he is followed by P. J. Rhodes, *A Commentary on the Aristotelian "Athenaion Politeia"* (Oxford, 1981), p. 647.

followed earlier proceedings in a δίκη φόνου where the sworn charges were manifestly disproven.

Suits for perjury in homicide proceedings evidently constituted a special category: *Athenaion Politeia* 59. 6 refers to τὰ ψευδομαρτυρία ⟨τὰ⟩ ἐξ Ἀρείου πάγου among cases that came before the court of the Thesmothetes (cf. Poll. *Onom.* 8. 88). We have no reason to doubt this information, since we would not expect Areopagites or ἐφέται (as traditionally constituted) to hear cases beyond their formal jurisdiction. Moreover, our evidence suggests that δίκαι ψευδομαρτυρίων could not be used (as in other perjury cases) to overturn or compensate for a previous judgment in a δίκη φόνου; rather, if testimony was disputed in προδικασίαι, the δίκη ψευδομαρτυρίων would be tried before the homicide charges came to trial. The peculiar proceedings in δίκαι φόνου were designed to allow every opportunity for settlement without trial. The required προδικασίαι, in which the charges were given a hearing each month for three months preceding the trial, were thought to preclude the usual danger that perjury could lead to the wrong verdict. Thus Demosthenes 23. 66 claims that no verdict of the Areopagus in a δίκη φόνου was ever proven wrong (ἐνταυθοῖ μόνον οὐδεὶς πώποτ' . . . ἐξήλεγξεν ὡς ἀδίκως ἐδικάσθη τὰ κριθέντα). This claim is undoubtedly exaggerated, but in substance it appears to be true that no one who lost a case before the Areopagus because of perjured testimony was later vindicated in a δίκη ψευδομαρτυρίων, precisely because suspect testimony was ordinarily challenged before the trial.[15]

Whatever the reconstruction of procedure, it is a reasonable conclusion that the two crucial passages, Isocrates 18. 52–54 and pseudo-Demosthenes 59. 10, involve proceedings for perjury: their references to juries larger than the traditional body of fifty-one ἐφέται are therefore not reliable evidence that dicastic panels judged homicide trials. In the following sections we will consider the more valuable evidence that remains: first, passages where the orators themselves seem to identify the judges in δίκαι φόνου as dicastic juries, or attribute some special competence to the ephetic courts; second, passages in the *Athenaion Politeia,* Demosthenes 23, and Draco's law (*IG* 1^3 104) where the ephetic courts are treated directly.

II

The dicastic model rests in large part upon passages in the speeches where a speaker appears to address the jury in a δίκη φόνου as a court of the people, or where, in proceedings before dicastic courts, a speaker suggests

15. Antiphon 5. 95 (regarding procedure in δίκη φόνου) and 6. 14 suggest that there was no legal recourse against perjury once the case came to trial; but Antiphon 2. δ7 clearly refers to penalties for perjury and treats the suits for false witness against free men as parallel to the torture of slaves (before the trial). On δίκαι ψευδομαρτυρίων and related procedures, cf. Lipsius, *Attische Recht,* 2:778–83; Leisi, *Zeuge,* pp. 120–41; and Harrison, *Law of Athens,* 2:192–97 (esp. 196, on *Ath. Pol.* 59. 6). Antiphon 5. 95 ῥᾷστον δὲ . . . ἀνδρὸς περὶ θανάτου φεύγοντος τὰ ψευδῆ καταμαρτυρῆσαι would seem to contradict Dem. 23. 66, unless challenges to testimony in homicide cases were ordinarily lodged in the preliminaries. The hypothesis that I have suggested here, that suits against false witness in a δίκη φόνου would be tried before a verdict could be given on the main issue, will receive more detailed argument elsewhere.

that the judges are "the same" jurors who would decide a case in the ephetic courts. Much is made of the fact that the judges are called δικασταί, ἄνδρες δικασταί, or simply ἄνδρες, and are never called ἐφέται, whereas the Areopagus court is occasionally addressed as βουλή (though not in homicide proceedings). It is often assumed that δικασταί had become a technical term for jurors of the popular courts; but though the term δικασταί often does mean "dicasts" (in the narrow sense for which we have coined the term), it does not follow that δικασταί always refers to the ordinary panels of the popular courts.

On the assumption, however, that δικασταί always means dicasts, Wallace finds support for the dicastic model in Antiphon 6, where judges in the Palladium court are addressed as ἄνδρες δικασταί. He invokes the questionable evidence of Antiphon 1. 23 (καὶ δικασταὶ ἐγένεσθε καὶ ἐκλήθητε), to prove that this case was also tried before a dicastic jury in the Palladium court.[16] Others have argued more persuasively that the case of "planning" or instigation of an intentional homicide in Antiphon 1 would come before the Areopagus.[17]

Against the view that δικασταί or δικαστήριον must refer to dicastic courts, a few examples should suffice: in Demosthenes 23. 66 and 74 the twelve gods who first judged upon the Areopagus are said to have served as δικασταί; Lysias 1. 30 and 6. 14 refer to the Areopagus court as δικαστήριον; in the Draconian law cited at Demosthenes 23. 28, the archons are identified as δικασταί; and, perhaps most striking, throughout Lysias 14 and 15—in a court martial tried before a body of soldiers, with generals presiding—the speaker consistently refers to the judges as δικασταί, never as στρατιῶται or the like. Thus, in each case, the speaker addresses the jury in their role as judges, whatever the competence of the court. The reference in Lysias 6. 14, moreover, typifies a common theme: ἐν Ἀρείῳ πάγῳ, ἐν τῷ σεμνοτάτῳ καὶ δικαιοτάτῳ δικαστηρίῳ (cf. Dem. 23. 65 σεμνότατον τὸ ἐν Ἀρείῳ πάγῳ δικαστήριον). Such passages tend to confirm the clear implication of Antiphon 6. 51 καὶ ὑμᾶς . . . εὐσεβεστάτους . . . δικαστάς, that the δικασταί who sat at the Palladium were indeed a delegation of the Areopagus.[18]

To support the dicastic model, however, Wallace gives particular emphasis to Antiphon 5. 11: ἅπαντα τὰ δικαστήρια ἐν ὑπαίθρῳ δικάζει τὰς δίκας τοῦ φόνου, οὐδενὸς ἄλλου ἕνεκα ἢ ἵνα τοῦτο μὲν οἱ δικασταὶ μὴ ἴωσιν εἰς τὸ αὐτὸ τοῖς μὴ καθαροῖς τὰς χεῖρας, κτλ. He concludes: "This testimony seems clear and straightforward. Dicasts in dikasteria adjudicated homicide cases at the end of the fifth century."[19] Wallace is

16. *Areopagos,* pp. 103–4; but cf. MacDowell, *Athenian Homicide Law,* p. 56.

17. See Wilamowitz, *Aristoteles und Athen,* 1:125, n. 138; cf. id., "Die erste Rede des Antiphon," *Hermes* 22 (1886): 200, n. 1, remarking that the reference to the divine founding of the court in Antiphon 1. 3 would ordinarily indicate the Areopagus; and, regarding the crucial passage, 1. 23, "Auch δικαστής in der strengen Bedeutung des Rächers ist tragische Sprache, z.B. Eur. *Her.* 1150" (p. 206, n. 2); cf. Heitsch, *Antiphon,* p. 24, n. 55.

18. Antiphon 6. 51 has in fact sometimes been seen as evidence that the case was tried before the Areopagus; cf. Philippi, *Areopag,* p. 32, nn. 45–46.

19. *Areopagos,* p. 103. It is clear that Wallace means by "dicasts" and "dikasteria" the dicastic panels of the popular courts.

not alone in this approach to the evidence. But Antiphon 5. 11 obviously refers to the Areopagus court among δικαστήρια and δικασταί who tried δίκαι φόνου; and although we cannot be sure of the composition of the other courts, we can be reasonably certain that the Areopagus court was the traditional body of former archons and not a dicastic panel. This passage, therefore, does not support the dicastic model but only proves that judicial bodies other than dicastic judges were regularly called δικασταί. Δικασταί is not an exclusive, technical term for the dicastic juries of the popular courts.

Rather than support the dicastic model, the argument in Antiphon 5 proves that there was a clear distinction between the dicastic courts and the ephetic courts. It is precisely the point of the speaker's argument that the court before which he is being tried, a dicastic court in an ἀπαγωγὴ κακούργων, is not competent to judge the case at hand, and that his accusers have abused procedural rules to have him tried for homicide before this body, when the proper judges (as he interprets the charges) would be the court of the Areopagus.[20]

Despite the thrust of the argument, however, the speaker's plea in 5. 90 is sometimes supposed to identify the judges in the ephetic courts as the same jury who try the case in ἀπαγωγή:[21] διαφεύγω γὰρ οὐδ' οὕτω τὰς ὑμετέρας γνώμας, ἀλλ' ὑμεῖς ἔσεσθε οἱ κἀκεῖ περὶ ἐμοῦ διαψηφιζόμενοι. καὶ φεισαμένοις μὲν ὑμῖν ἐμοῦ νῦν ἔξεστι τότε χρῆσθαι ὅ τι ἂν βούλησθε. But here again the speaker is interpreting the charges against him as intentional homicide, and he clearly implies that the proper court to hear such charges would be the court of the Areopagus. It is mistaken, therefore, to take the speaker's appeal literally, as indicating that the very same body would then hear the case in a δίκη φόνου. Rather, in response to allegations against his political loyalties, he assures the judges that he would not escape Athenian jurisdiction. He clearly addresses the jury as "you [sc. Athenians]" regarding Athenian policy vis-à-vis Mytilene (76–80, esp. 76–77); he makes repeated reference to the Athenian legal system as ὑμέτεροι νόμοι, ὑμέτεροι ἄρχοντες, πόλει τῇ ὑμετέρᾳ (19, 42–48, 61); and he refers to the popular court as τὸ ὑμέτερον πλῆθος (8, 80).

One further reference to the judges in ephetic courts is sometimes taken to indicate that the courts of the people had assumed jurisdiction in δίκαι φόνου. In Lysias 1. 36 the speaker refers to the court's verdict as πάντων τῶν ἐν τῇ πόλει κυριωτάτη, and it is sometimes assumed that the phrase could properly refer only to the popular courts in the era after 403.[22] By that assumption, however, the argumentative context is misconstrued: the

20. On the argumentation and the legalities in Antiphon 5, see Heitsch, *Antiphon,* pp. 34–89; F. Scheidweiler, "Antiphons Rede über den Mord an Herodes," *RhM* 109 (1966): 319–38; U. Schindel, *Der Mordfall Herodes,* Nachr. Akad. Wiss. Göttingen, Phil.-hist. Kl. Nr. 9 (Göttingen, 1979); and now M. Gagarin, *The Murder of Herodes: A Study of Antiphon 5,* Studien zur klassischen Philologie 45 (Frankfurt, 1989), pp. 17–30.

21. See Sealey, "Athenian Courts," pp. 294–95, on Antiphon 5. 90; but cf. MacDowell, *Athenian Homicide Law,* p. 56.

22. See Smith, "Dicasts," p. 354, and Bonner and Smith, *Administration of Justice,* 1:271; but cf. Philippi, *Areopag,* p. 326, n. 218.

argument that concludes with the words πάντων . . . κυριωτάτη is *not* meant to exalt the court but is intended to question the admissibility of the charges.

The defendant's case depends entirely upon his claim that he acted in obedience to the laws: it was not his own initiative but the laws that led to the death of the adulterer. The argument that concludes with the words πάντων . . . κυριωτάτη, after all, involves a conventional attack on the legality of the proceedings.[23] Against charges of entrapment, the defendant claims to have sworn, as he struck the fatal blow, "It is not I who kill you but the law that you transgressed" (26). He cites the law regarding adultery and the lawful slaying of adulterers caught in the act (30); and he pointedly refers to the clause that expressly forbids the Areopagus, "to whom both ancient law and current statute assign jurisdiction in homicide cases," to condemn the lawful slayer of an adulterer. The verdict of the ephetic court, he suggests, embodies "the highest authority" in that the judges have the power to invalidate the spirit of the law (cf. 29 ἐγὼ δὲ . . . τὸν δὲ τῆς πόλεως νόμον ἠξίουν εἶναι κυριώτερον). If the judges were a jury of the people, we might expect the speaker to ask: "how can this body assume authority to judge a case where the law forbids even the Areopagus to condemn?" But there is no such argumentative question, and no such distinction. The treatment of the statute that excludes lawful homicide from the jurisdiction of the Areopagus would therefore have greater relevance if the judges were in fact a committee of Areopagites.

Thus, though Antiphon 5. 90 and Lysias 1. 36 are often taken to suggest that the ordinary dicastic panels were also judges in the ephetic courts, the argumentation in both speeches in fact suggests quite the opposite. There is yet another set of passages that suggest a clear distinction between the competence of the ephetic courts and that of the dicastic juries. The law μὴ ἐξω τοῦ πράγματος λέγειν (Arist. *Rhet.* 1354a18–24) clearly applies to cases before the Areopagus and almost certainly in the ephetic courts as well. Apparently a similar rule applied in dicastic courts: *Athenaion Politeia* 67. 1 reports that in suits before the dicastic courts the parties swear to "speak to the issue"; and the dicastic oath in Demosthenes 24. 149–51 indicates that the judges are to disregard irrelevant arguments (καὶ διαψηφιοῦμαι περὶ αὐτοῦ οὗ ἂν ἡ δίωξις ᾖ). Nonetheless, the rule of relevance in cases before the Areopagus seems to have been more restrictive than the corresponding rule in the dicastic courts.[24] Antiphon 6. 9 suggests that the same strict rule of relevance that applied in cases before

23. For the standard warning to the jury that a wrong verdict (through abuse of procedure) is ἰσχυρότερον τοῦ δικαίου, cf. Antiphon 5. 87 = 6. 3–4; for the categories of lawful or "justifiable" homicide, cf. *Ath. Pol.* 57. 3 and Dem. 23. 74.

24. On the law μὴ ἔξω τοῦ πράγματος λέγειν, cf. Antiphon 5. 11 and passim; Lys. 3. 46; and esp. Lycurg. 1. 11–13, emphasizing the strict provision against irrelevance in the Areopagus, in contrast to the popular courts. On *Rhet.* 1354a18–24, see E. M. Cope and J. E. Sandys, *The "Rhetoric" of Aristotle,* vol. 1 (Cambridge, 1877), pp. 7–8; Wallace, *Areopagos,* p. 124. Poll. *Onom.* 8. 117 reports that proems and emotional appeals were prohibited before the Areopagus; Lucian *Anach.* 19, that the herald would silence the speaker if he violated the rule. These appear to be fictitious embellishments; no fifth- or fourth-century source indicates any overt means of preventing or penalizing irrelevance.

the Areopagus also applied in the ephetic courts: the speaker protests against irrelevant allegations, which *none* of his accusers had *ever* been able to prove in earlier legal action (οὐδεὶς πώποτε); "but in this case, *where they are prosecuting for homicide and the law provides* εἰς αὐτὸ τὸ πρᾶγμα κατηγορεῖν," they fabricated false charges regarding his duties to the state. The reference to earlier legal action is vague,[25] but the key phrase (φόνου διώκοντες καὶ τοῦ νόμου οὕτως ἔχοντος, κτλ.) certainly implies that a stricter rule of relevance applied in the homicide courts than elsewhere.

We know of no penalty or procedure to challenge irrelevant accusations: evidently, it was left to the discretion of the judges to disregard irrelevant material, and that is precisely the reason why the ἀντίδικοι had to argue against the relevance of opposing arguments. If there was a stronger rule against irrelevant charges in homicide proceedings than in the dicastic courts, it would appear that the judges themselves were expected to have a greater command of the laws and rules of procedure, by which relevance was determined, than did the ordinary dicasts.

Thus the argumentation in Antiphon 5 (treating δίκη φόνου as the proper procedure), Antiphon 6, and Lysias 1 indicates that the judges in the ephetic courts were specially qualified to decide the *legal* issues involved in homicide proceedings. It is noteworthy in this regard that the statutes cited in Lysias 1 (against the legality of the proceedings) are the only direct citations of law in the extant homicide speeches, whereas such citations are a familiar aid to the argument in speeches before the dicastic courts. Evidently δίκαι φόνου were decided by judges who possessed some basic, formal competence in the workings of the legal system. They were not jurisprudents or true legal experts (any more than the Areopagites were), nor were they immune to artful arguments based on probability and causation (any more than the layman dicast); but they were certainly regarded as having a better working knowledge of the legal principles and procedural rules than did the dicastic juries. This special command of the legalities is a clear indication that the judges at the Palladium and Delphinium courts had magisterial experience; and the body from which such judges were most likely to be chosen was the Areopagus.

III

The most direct evidence regarding the ἐφέται and the homicide courts is to be found in the extant copy of Draco's law (*IG* 1^3 104) and in the Aristotelian *Athenaion Politeia* (57. 4), but both texts are fragmentary and the implications of key phrases are often uncertain. Draco's law in several contexts clearly refers to the ἐφέται, and the decree for reinscription of the law as a valid statute in 409/8 evidently means that the traditional body still had jurisdiction over homicide; ingenious theories

25. It is sometimes supposed that this passage refers to the δοκιμασία βουλευτῶν, but see Heitsch, *Recht und Argumentation*, p. 42.

have been proposed, however, to diminish that authority.[26] Much of the law has been reconstructed with reasonable confidence from citations in the orators, and direct reference to the ἐφέται in three areas of jurisdiction is not in doubt. First, in the inscription, trials for homicide are assigned to the ephetai (line 13 τὸς δὲ ἐφέτας διαγν[ῶ]ν[α]ι; and the decree of Patroclides of 405/4 refers to those exiled by verdict of the ἐφέται (among those excluded from amnesty, Andoc. 1. 78). Second, in cases of unintentional homicide, if there are no living relatives and the fifty-one ἐφέται have given a verdict of unintentional homicide, the fifty-one are then to appoint phratry members to decide upon "pardon" or reconciliation (αἴδεσις, lines 16–19 = [Dem.] 43. 57). Third, if an exiled homicide who abides by the prohibitions is nonetheless slain, the ἐφέται are to judge the case, "just as in the killing of an Athenian" (lines 26–29 = Dem. 23. 37–38).

In the first clause, regarding the trial of homicides by the ἐφέται, the archaic phrasing is often assumed to be merely a "survival" preserved for the sake of traditionalism; presumably, later addenda would have recognized dicastic juries as (so-called) ἐφέται. The amnesty decree also uses archaic language, modeled on Solon's law, but here it seems unlikely that a misleading archaism would be used without an explanation if in fact those exiled for homicide had been convicted by ordinary dicasts (who were only identified as ἐφέται by an addendum to an earlier law). So, too, the third provision, for trial of those who unlawfully took vengeance against an exiled homicide, is often discounted as an archaism. But Demosthenes treats this clause as a valid statute, and it would seriously undermine his argument in a γραφὴ παρανόμων if his opponents could cite amendments to the ancient law to dispute its validity.

The second rule, regarding special "pardon" or αἴδεσις in cases of unintentional homicide when no relatives of the victim survived, is a disputed issue, and it is beyond the scope of this paper fully to consider the original intent of Draco's law on αἴδεσις, to which this passage is crucial.[27] On either of the most credible interpretations of this passage, however, it is clear that duties assigned to the ἐφέται extended beyond the offices of the ordinary dicasts. Gagarin supposes that this clause applied after a conviction for unintentional homicide (i.e., a case prosecuted by a relative who later died); thus the reference to the verdict of the ἐφέται (17–18 γνῶσι δὲ hοι [πε]ντ[έκοντα καὶ hῆς hοι ἐφέται ἄκον]τα κτεῖναι) would refer to a previous trial and conviction by the ἐφέται.[28] Heitsch suggests that this clause also allowed a plea for αἴδεσις by a homicide who had gone into exile *without trial;* presumably, the ἐφέται would have

26. For the validity of the statutes, see Stroud, *Drakon's Law,* p. 49, followed by Gagarin, *Drakon,* pp. 22–23 and passim; but see also Smith, "Dicasts," p. 356, suggesting that a separate group of fifty-one ἐφέται (also dicasts) were involved in αἴδεσις; cf. Wallace, *Areopagos,* p. 104, concluding that *IG* I^3 104 and the relevant citations in the orators "are all old legal texts" and therefore of little value as evidence for classical jurisdiction.

27. For earlier views on the role of ἐφέται in αἴδεσις, see Ruschenbusch, "ΦΟΝΟΣ," pp. 137–39.

28. *Drakon,* pp. 48–51.

held a hearing to determine whether the homicide was in fact unintentional, and thus whether to provide for αἴδεσις.[29] On the latter interpretation, the proceedings to allow for αἴδεσις would appear to be initiated by the exiled homicide (or by others acting in his behalf), and the hearing by the ἐφέται obviously would not have been a true adversarial trial; it is possible that the verdict of the ἐφέται on the question of intent in such cases was largely a formality. But however the determination was made that the killing was unintentional, the role of the ἐφέται in selecting phratry members for αἴδεσις was more a magisterial function than a matter for ordinary dicasts. No other known function of the dicastic jurors is precisely parallel to this duty, and the dicastic oath (Dem. 24. 149) does not seem to allow for such authority: οὐδὲ τοὺς φεύγοντας κατάξω, οὐδὲ ὧν θάνατος κατέγνωσται.

Finally, the third clause, providing for trial by the ἐφέται if the exiled homicide was slain unlawfully, "just as in the killing of an Athenian, under the same terms," strongly suggests that the ἐφέται were identified with the Areopagus. The killing of an exiled homicide envisioned here could conceivably involve either unintentional or justifiable homicide, and the trial would therefore be held at either the Palladium or the Delphinium court; but the most likely event, which this clause is clearly intended to address, is the vindictive murder of an exiled homicide by his victim's kinsmen. Such is the scenario that Demosthenes supposes in his argument on this clause (23. 42). In the original procedure, if we assume that the Areopagus court was manned by ἐφέται, the provision for trial of intentional homicide by the ἐφέται, "just as in the killing of an Athenian," involves no inconsistency.[30] If, however, later amendments to the law expressly transferred the offices of the ἐφέται from the Areopagus to the dicastic juries, the provision for trial of intentional homicide by the ἐφέται, "just as in the killing of an Athenian," would be obviously inconsistent. Again, it is highly improbable that Demosthenes would have given such emphasis to this clause in his argument for a γραφὴ παρανόμων if there had been such amendment.

Thus on two counts the extant copy of Draco's law strongly suggests that the traditional body of fifty-one ἐφέται continued to decide homicide cases in the late fifth century, and this body would appear to have been distinct from the ordinary dicastic panels. This jurisdiction is clearly implied by Demosthenes' treatment of the law in the speech *Against Aristocrates* in the mid-fourth century; and the role of the ἐφέται in αἴδεσις, an extra-judicial function, leads to the same conclusion. Without direct evidence to the contrary or more cogent arguments than have yet been given for the dicastic model, we have no reason to discount the statute as evidence that the traditional body of ἐφέται occupied the homicide courts.

29. *Aidesis im attischen Strafrecht,* Abh. Akad. Wiss. Mainz, Nr. 1 (Mainz, 1984), pp. 17–20.

30. Cf. Wallace, *Areopagos,* pp. 17–18, arguing from this clause (*IG* I^3 104, lines 28–29 = Dem. 23. 37–38) that the Areopagus court for homicide was occupied by ἐφέται before Solon; for similar views on the archaic ἐφέται, see nn. 1, 2, and 4 above.

The one testimony that is sometimes taken as a direct reference to reform of the ephetic courts occurs in Pollux *Onomasticon* 8. 125 (s.v. ἐφέται). After a questionable sketch of the courts' historical development, Pollux makes a curious remark on the *decline* of the ἐφέται: κατὰ μικρὸν δὲ κατεγελάσθη τὸ τῶν ἐφετῶν δικαστήριον. Miller supposed that this passage refers to a period of decline in the late fifth century, leading to reform of ephetic jurisdiction in 403/2.[31] But Pollux does not refer explicitly to such reform, as he does to the reforms of Draco and Solon. The most likely explanation is that Pollux derives this note, on the decline of the ἐφέται, from Demosthenes 23, the source of much of the lexicographers' information on the homicide courts.[32] At 23. 64 Demosthenes anticipates that some of his audience will have only contempt for the traditional homicide courts: . . . πάντ' ἐπὶ πέντε δικαστηρίοις γίγνεται προστεταγμένα τοῖς νόμοις. νὴ Δί', ἴσως εἴποι τις ἄν, ἀλλὰ ταῦτα μὲν οὐδενός ἐστ' ἄξι' οὐδὲ δικαίως εὑρημένα. It may be argued that this objection is not to be taken entirely in earnest, but neither is it facetious. Despite the conventional posture of reverence for the ancient laws, it is evident as early as Lysias 1 that trial before the ephetic courts was sometimes regarded as an antiquated and irrelevant procedure; and the cases mentioned in Isocrates 18. 52–54 and pseudo-Demosthenes 59. 10 show that δίκη φόνου was notoriously subject to abuse. Aside from such litigious devices, the traditional homicide procedure appears to have been seldom used.

Evidence of this obsolescence is found in the argument of Demosthenes 23 itself: the survey of the homicide courts concludes with a reference to the alternative and undoubtedly more familiar procedure in ἀπαγωγή and ἔνδειξις, which allowed for the prosecution of homicide if the prosecutor "has ignored all other measures, or [if] the proper time for lodging charges has passed, or [if] for any other reason he does not wish to follow these procedures" (80). This passage, though much disputed, certainly recognizes the limitations of the traditional procedure;[33] it clearly implies that δίκη φόνου was an awkward and seldom-used procedure. In this regard we should note that for all the cases known to have been prosecuted by δίκη φόνου after Antiphon, we know of as many homicide cases prosecuted by alternative procedures, chiefly ἀπαγωγή and ἔνδειξις.[34]

31. "Ephetai," coll. 2825–26; cf. Wallace, *Areopagos,* p. 104, with n. 42. (p. 253).

32. For the lexicographers' dependence on Dem. 23 (and Arist. *Ath. Pol.*), see Philippi, *Areopag,* pp. 59–60 and 84, and cf. G. Busolt and H. Swoboda, *Griechische Staatskunde* (Munich, 1926), pp. 803–4; the specific connection between Poll. *Onom.* 8. 125 and Dem. 23. 63–64 has not been noted. For similar "contempt" of the Areopagus itself, cf. Din. 1. 50–55 and see E. Carawan, "*Apophasis* and *Eisangelia:* The Role of the Areopagus in Athenian Political Trials," *GRBS* 26 (1985): 130–34.

33. On Dem. 23. 80 and the procedural issues it raises, see MacDowell, *Athenian Homicide Law,* pp. 130–40; M. H. Hansen, *Apagoge, Endeixis and Ephegesis* (Odense, 1976), pp. 99–112; M. Gagarin, "The Prosecution of Homicide in Athens," *GRBS* 20 (1979): 301–23; and Hansen, "The Prosecution of Homicide in Athens: A Reply," *GRBS* 22 (1981): 11–30.

34. In addition to the trumped-up charges in Isoc. 18. 52–54 and [Dem.] 59. 10 (see section I above) we know of only five or six δίκαι φόνου after Antiphon, some doubtful: Lys. 1; Pl. *Euthphr.*; Dem. 21. 104 (after an ἀπαγωγή had been rejected); Dem. 23. 31 (arrest of a convicted homicide); and Dem. 54. 25 (which MacDowell, *Athenian Homicide Law,* p. 68, identifies as τραύματος rather than a δίκη φόνου); another possible case is cited in Dem. 21. 72–74. The case against Eratosthenes (Lys. 12) was obviously

It is highly unlikely that any reform of homicide jurisdiction is to be dated to the period after 409/8. The report in Pollux, that "the court of the ἐφέται was held in contempt," probably reflects Demosthenes' response to such sentiment in the 350s. The contempt of the ἐφέται that Demosthenes addresses is certainly not the sort of active opposition that would demand reform. We would perhaps expect reform if the traditional courts were inadequate to deal with current and pressing legal issues; but in this case, traditional proceedings and trial before the ἐφέται had been largely superseded by more summary methods and had simply fallen into disuse. After all, the traditional procedure was originally intended to serve chiefly as an alternative to self-help and a guarantee of safe exile for unintentional homicides; it was not intended to resolve all homicide charges by jury trial.

The various theories that the ephetic courts were alloted to juries of the people by Solon or by Pericles have at least the advantage of supposing a constitutional crisis to account for the reform. But Smith's view of Periclean reform goes against the common tradition that homicide jurisdiction alone was unaltered; and the more radical views of Ruschenbusch and Sealey rest upon no very secure foundation, since it is still much disputed whether Solon in fact established a system of jury panels such as we find in classical procedure.[35] But the greatest obstacle to any theory of dicastic jurisdiction in the ephetic courts is the evidence of the extant speeches, where no reliable testimony identifies the ἐφέται with the ordinary juries of the people. To the contrary, the argumentation in those passages that address the ephetic judges indicates that they were distinguished by a special competence or formal expertise equal to that of the Areopagus court.

It may still be argued that the ἐφέται were special panels of fifty-one, chosen from among the dicasts but distinguished by seniority, rank, or merit, and were thus expected to have special competence. We do, indeed, find other official bodies chosen from citizens above the age of fifty, but it is likely that the lexicographers who attribute such qualifications to the ἐφέται have misinterpreted their sources.[36] We find no reference to special

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not prosecuted by a δίκη φόνου but would probably have been handled in special accountings of the Thirty (*Ath. Pol.* 39. 6); Lys. 10. 31–32 may also refer to such proceedings. For homicides prosecuted by ἀπαγωγή and related procedures in the same period, see Hansen's catalog in *Apagoge*, nos. 4–5, 11–12, 16–17, and 23.

35. For debate on the establishment of δικαστήρια, see D. M. MacDowell, *The Law in Classical Athens* (Ithaca, 1978), pp. 30–32; P. J. Rhodes, "Εἰσαγγελία in Athens," *JHS* 99 (1979): 104; and M. H. Hansen, "The Athenian Heliaia from Solon to Aristotle," *C&M* 33 (1981–82): 9–47.

36. See Photius *Lex.*, s.v. ἐφέται (1:236 Naber): ἄνδρες ὑπὲρ πεντήκοντα ἔτη γεγονότες καὶ ἄριστα βεβιωκέναι ὑπόληψιν ἔχοντες, οἱ καὶ τὰς φονικὰς δίκας ἔκρινον (= Suda E 3876, 2:484 Adler); cf. Poll. *Onom.* 8. 125 ἀριστίνδην αἱρεθέντας). We do find reference to similar age qualifications, e.g., for public arbitrators ("in their sixtieth year," *Ath. Pol.* 53. 4), and for special embassies ("over fifty years of age," Plut. *Per.* 17; cf. Aeschin. 1. 23), but there is no mention of a roster of senior jurists among the dicasts. As Philippi recognized, *Areopag.* pp. 138–40, the report that the ἐφέται were chosen by rank or merit is almost certainly a misinterpretation of [Dem.] 43. 57 (= *IG* I^3 104, line 19) ἐσέσθων οἱ φράτερες . . . δέκα· τούτους δὲ οἱ πεντήκοντα καὶ εἷς ἀριστίνδην αἱρείσθων. Philippi's suggestion (p. 211) that the age qualification is also an error—the number of ἐφέται having been misread as their age—was followed by Lipsius, *Attische Recht*, 1:18, n. 62, but has otherwise been generally disregarded; cf. Busolt and

grouping of dicasts by age or rank in any fifth- or fourth-century sources; and in particular, the treatment of dicastic courts at *Athenaion Politeia* 63–66 gives no indication whatever that special juries were chosen for the homicide courts.

The account of the homicide courts in *Athenaion Politeia* 57. 4, moreover, clearly implies that ἐφέται were chosen from the Areopagus in the fourth century. It was long ago supposed from Harpocration's testimony that *Athenaion Politeia* referred directly to ἐφέται;[37] when the London papyrus was found, editors were quick to read ἐφέται in the gap following οἱ λαχόντες (line 17 Chambers). But more careful examination revealed that the doubtful letters cannot be ἐφέται, and that ἄνδρες is the probable reading. R. S. Stroud proposed ⟨$\overline{να}$⟩ ἄνδρες, which would indicate the ἐφέται by their number.[38] It is often supposed that οἱ λαχόντες denotes the ordinary dicasts, and on this assumption it has been suggested that we read δικασταί (though it is an unlikely reading). The usage of the *Athenaion Politeia*, however, regarding officers appointed by lot or those (as in 57. 4) whose duties were assigned by lot, strongly suggests that the phrase οἱ λαχόντες ἄνδρες—without more specific designation—must refer to those chosen from the larger body indicated by the immediate context.[39] The author has begun his account of homicide courts by referring to the Areopagus: "cases of intentional homicide only are tried by the [full] council" (ταῦτα γὰρ ἡ βουλὴ μόνα δικάζει). In this context, the phrase identifying the ἐφέται as οἱ λαχόντες ταῦτ' ⟨$\overline{να}$⟩ ἄνδρες, πλὴν τῶν ἐν Ἀρείῳ πάγῳ γιγνομένων, evidently implies that the judges were chosen from the Areopagus itself.

The interpretation of *Athenaion Politeia* 57. 4 offered here is perhaps not in itself certain; but taken together with the sum of the evidence in the orators, the Aristotelian account strongly indicates that a committee of the Areopagus continued to serve as judges at the Palladium and Delphinium courts in the fourth century. The various arguments in favor of dicastic jurisdiction are all essentially groundless. The supposed references to juries of several hundred in Isocrates 18. 52–54 and pseudo-Demosthenes 59. 10 refer rather to suits for perjury initiated in homicide

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Swoboda, *Griechische Staatskunde*, pp. 803–4; MacDowell, *Athenian Homicide Law*, p. 50; Wallace, *Areopagos*, p. 52.

37. Harpocr. *Lex.* 127. 13 Dindorf ἐπὶ Παλλαδίῳ· Δημοσθένης ἐν τῷ κατ' Ἀριστοκράτους. δικαστήριόν ἐστιν οὕτω καλούμενον, ὡς καὶ Ἀριστοτέλης ἐν Ἀθηναίων πολιτείᾳ, ἐν ᾧ δικάζουσιν ἀκουσίου φόνου καὶ βουλεύσεως οἱ ἐφέται.

38. "Aristotle *A.P.* 57. 4 and the *Ephetai*," *CP* 63 (1968): 212. It is still puzzling that the term ἐφέται is not found in this context. Possibly ἐφέται or οἱ ἐφέται is to be read in the second lacuna (line 18 Chambers): εἰσάγει δ' ὁ βασιλεὺς καὶ δικάζουσιν [οἱ ἐφέται] καὶ ὑπαίθριοι, κτλ.; the usual supplement, ἐν ἱερῷ, is not confirmed by Chambers' examination of the papyrus.

39. Where *Ath. Pol.* refers to the dicastic courts as "jurors assigned by lot" (vel sim.), the identification is specific: τὸ δικαστήριον τὸ λαχόν (49. 3, 63. 5), τῷ λαχόντι δικαστηρίῳ (66. 1), τῶν λαχόντων δικαστῶν (63. 2); and in all but the first instance it is immediately clear from the context that dicastic courts are meant. To indicate at 57. 4 that the ordinary dicasts were assigned to the homicide courts, the author of *Ath. Pol.* would probably have used the phrase δικαστήριον τὸ λάχον (as in 49. 3), or possibly οἱ λαχόντες ἐκ τῶν δικαστῶν; but neither phrase is a possible reading here. Where οἱ λαχόντες refers to other magisterial bodies, it clearly denotes officials chosen from the larger body that is indicated by the immediate context: see 4. 3 τοὺς λαχόντας ἐκ τῆς πολιτείας; 30. 3; 30. 5 τοὺς λαχόντας ἐκ τῆς βουλῆς.

hearings (section I). The few passages where speakers seem to identify ordinary juries of the people with the judges in ephetic courts have simply been misconstrued (section II); the key passages in Antiphon 5 and 6 and Lysias 1 clearly imply that cases in the ephetic courts were in fact decided by a body distinct from the ordinary dicastic panels—a body, moreover, whom the speakers regarded as having special competence or formal expertise equal to that of the Areopagus. In light of these findings, the extant copy of Draco's law and the testimony of the *Athenaion Politeia* (section III) appear to be decisive evidence against dicastic jurisdiction in the homicide courts.

In the fifth and fourth centuries the traditional body of ἐφέται retained their ancient jurisdiction, while in other areas of the law the very premises of the democracy were being redefined. Whatever powers the Areopagus relinquished to the people under Ephialtes and Pericles, the homicide jurisdiction appears to have remained unaltered. In the era of popular sovereignty, the courts of the ἐφέται stood alongside the Areopagus as singular exceptions to the rule that citizen-judges, regardless of qualifications, constituted the supreme power in the state. If, as this study suggests, the ἐφέται were chosen from the Areopagus, they brought to the task considerable legal experience from their tenure as archons and as Areopagite judges. The homicide judges were perhaps as easily influenced by artful reasoning on probable motives, causation, and responsibility as were their counterparts in the dicastic courts; but the ἐφέται were expected to have a better working knowledge of general legal principles and procedural rules, as well as of the religious sanctions peculiar to δίκαι φόνου. Precisely because of this archaic framework and the special competence that it required, the ephetic courts by the mid-fourth century came to be regarded as an awkward anachronism. In the few cases known to us, homicide proceedings appear to have been more a tool of litigation than a viable remedy. Nonetheless, the ancient jurisdiction of the ἐφέται continued to be a symbol of the rule of law, and the unreformed procedure of the fourth century stands as testimony to the conservatism of the Athenian system of justice.[40]

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40. For their constructive remarks, I am indebted to Michael Gagarin, Douglas MacDowell, Bob Wallace, and the referees and Editor of *CP*.