THE NATURE OF PREMEDITATION IN ATHENIAN HOMICIDE LAW

An inscription (*IG* i² 115) consisting of a prelude and then of Drakon's law of homicide has long been known. The prelude dates it 409/8 B.C.; it was evidently part of the recodification of Athenian law carried out by Nikomakhos and a board of anagrapheis in most of the years 411/0–400/399 B.C. Drakon's law was on a separate stele, of which the upper part, probably about half, survives. In some period since Antiquity the marble was used as pavement, and the resulting wear has deterred study of it since the edition of 1867.[1] Recently, however, R. S. Stroud has published a new edition[2] of the code inscription and this has stimulated renewed interest in the Athenian law of homicide. Stroud has provided not only a new and much expanded text[3] of the code but also some persuasive solutions to problems that have long perplexed scholars.[4] The code deals with unpremeditated (μὴ ἐκ προνοίας) homicide. This very aspect—the precise *scope* of the code—receives, oddly, scant treatment. I propose to look into it.[5]

By scope I mean what sorts of homicide were covered by the extant portion of the code. Another, and I think inevitable, way of looking at this problem is to ask, Where did the missing portion of the code, dealing with premeditated homicide, stop, and where did the surviving portion start, i.e. where was the line drawn in Athens between premeditated and unpremeditated homicide? Thus stated, the question makes it clear that one cannot deal with the problem of premeditation *in vacuo*; it must be examined in the context of Athenian homicide as a whole.

By way of introduction, therefore, I should like to give an abbreviated sketch of such aspects of the Athenian law of homicide as may be relevant to the main discussion.[6] When a man (call him V) had been killed, his relatives to the degree of first cousin once removed[7] (call them P) made a complaint to the appropriate government official, the Basileus,[8] who

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[1] U. Köhler, *Hermes* ii (1867) 27–36.

[2] R. S. Stroud, *Drakon's Law on Homicide* (Berkeley, 1968) hereinafter cited as Stroud, *DLH*.

[3] Stroud, *DLH* 5–6.

[4] Among his more interesting conclusions are that Drakon's law on premeditated homicide, long assumed to have been inscribed on a different stone, in fact begins at the bottom of the existing fragment. He has detected parts of the rubric for this section. Stroud thinks that the stone originally was probably twice its present height, and that the rest of the law on premeditated homicide was inscribed on the now missing lower half. This would give a stele of normal proportions, and is doubtless correct.

Stroud also argues (*DLH* 60–64) that although the surviving inscription dates from 409/8 B.C., it was an exact republication of Drakon's law of *c.* 621/0 B.C. This conclusion is amply supported by the orators, e.g. Antiphon 6.2. Evidently the Athenians had an extraordinarily static homicide law, one that lasted, with minor modifications, from 621 to at least 338 B.C.

[5] The present paper originally was submitted to Professor S. E. Thorne of the Harvard Law School in satisfaction of the written work requirements of the J.D. degree. I wish here to express my appreciation to Professor Thorne and his wife, Margaret MacVeagh

Thorne, for their valuable suggestions on the manuscript. I owe a special debt to Professor S. Dow who first suggested that I look into πρόνοια and who made helpful suggestions at every stage of the article's development. Any sins of omission or commission are, needless to say, my own.

[6] In this background section I draw heavily on D. M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester 1963) hereinafter cited as MacDowell, *AHL*. This is the leading work on Athenian homicide law. In this article I occasionally take issue with some of MacDowell's conclusions or (more often) amplify them, but I never could have reached these points of disagreement or amplification had I not been led through the complex of evidence presented in his amazingly compact volume.

[7] *IG* i² 115.21, quoted *infra* 88.

[8] The office of basileus, or king, was a survival from the hereditary kings of prehistoric Athens. By the time of Drakon, the basileus had come to be appointed annually by lot. His duties were primarily religious, and his legal duties, such as handling homicide cases, derived from their religious implications: in homicide the notion that the state had been polluted by the fatal deed. For a good discussion, see MacDowell, *AHL* 33–8.

then ordered the accused killer (call him D) to 'stay away from legal things'.[9] There followed three pre-trial hearings (προδικασίαι)[10] in the course of which the Basileus and the parties were able to get a better idea of the charges, defences, and exact nature of the case. A proper trial court was then selected.[11] There were five courts to choose from: the Areopagos for intentional killings (including poisoning) and intentional woundings;[12] the Palladion[13] for unintentional killings, conspiracy (βούλευσις) to commit homicide, and killings of slaves, metics and foreigners;[14] the Delphinion for cases where D admitted the homicide but claimed a lawful excuse;[15] the Phreatto for killers who had been previously exiled;[16] and the Prytaneion for cases where the killer was unknown or death was caused by an inanimate object.[17] At the trial the prosecution (not the state but V's relatives) spoke first, then D, then the family again, with a final rebuttal by the defendant.[18] In the course of these speeches witnesses were called; the witnesses were in no sense impartial since they had to swear not only to the truth of their testimony but also to the guilt or innocence (depending on which party had called them) of the accused.[19] At the conclusion of the speeches (there was no summing up), the jury voted immediately, only a simple majority being required for conviction.[20] There was no appeal.[21] After the vote the Basileus rendered judgment.[22] If D were being prosecuted for premeditated homicide he had the option of going into exile after his first speech[23] or of awaiting the jury's verdict; if that

[9] Aristotle, *Ath. Pol.* 57.2; Antiphon 6.35–6.

[10] For the evidence concerning them, see MacDowell, *AHL* 36–7.

[11] Who decided which court the case would be tried in? Stroud (*DLH* 42–3) says the basileus made the decision on the basis of evidence adduced at the προδικασίαι. MacDowell twice implies (*AHL* 36, 96–7) that it was the basileus, but elsewhere (*AHL* 45) says 'the case went to the Palladion if the accuser, not merely the accused, said the killing was unintentional'. Although they at first appear to be contradictory, all of these statements are probably correct. The position was: (a) The law laid down which type of charge went to which court. (b) The accuser decided which type of charge he wished to bring (and the accused whether he wished to plead that the killing was lawful). (c) On the basis of (a) and (b) the basileus named the court. Once (a) and (b) were clear, (c) would be more or less automatic. At the προδικασίαι the basileus no doubt discussed the charge with the prosecuting relatives; quite often his advice must have been determinative of (b). Ultimately, however, the decision was theirs whether to prosecute in the Areopagos or the Palladion. We do know from Aristotle (*Ethika Megala* 1188b 29–38, quoted *infra* 89) that they did on occasion press a charge which the Areopagos decided should have gone to the Palladion. This passage illustrates that the juries in the several courts decided only very narrow issues. The Areopagos decided only if D were guilty of intentional homicide—if not, he was acquitted of that charge. But he could still be tried in the Palladion where the jury decided the issue of unintentional homicide; here acquittal was final as a practical matter. Where the defendant admitted the killing but claimed legal justification, the case went automatically to the Delphinion, regardless of what V's relatives or the basileus thought. But again if the Delphinion decided that

D had no justification, it did not go on to convict him of homicide; presumably the case was instead sent to the Areopagos or Palladion.

[12] Demosthenes 23.22; Aristotle, *Ath. Pol.* 57.3. We know *infra* Aristotle *Ethika Megala* 1188b 29–38, quoted *infra* 89 that *unintentional* poisoning was tried in the Palladion rather than the Areopagos.

[13] Aristotle, *Ath. Pol.* 57.3; Demosthenes 23.71.

[14] For the question whether the Palladion tried charges of βούλευσις of intentional as well as unintentional homicide, see MacDowell, *AHL* 65–9 and n. 45 *infra*.

[15] Aristotle, *Ath. Pol.* 57.3; Demosthenes 23.74.

[16] Demosthenes 23.77; Aristotle, *Ath. Pol.* 57.3–4.

[17] Demosthenes 23.76.

[18] See, e.g., the three *Tetralogies* of Antiphon each of which contains two model speeches for plaintiff and defendant.

[19] See, e.g., Antiphon 1.28.

[20] See, e.g., the case of Euaion described by Demosthenes (21.71–5) and discussed *infra* 93 where the accused was convicted by a majority of only one vote.

[21] Antiphon 6.3: ἔστι μὲν γὰρ περὶ τοῦ τοιούτου μία δίκη—'for this kind of case there is only one trial'.

[22] The meaning of the word δ]ικάζεν in line 12 of the code, quoted *infra* 88, has been much disputed. Stroud (*DLH* 42–5) discusses it at length and concludes that it refers to the activity of the basileus neither at the προδικασίαι nor at the trial, but to his final rendering of the verdict.

[23] This is what the defendant in Antiphon's *Third Tetralogy* did. See also Antiphon 5.13; Demosthenes 23.69. Professor J. H. Finley has kindly brought to my attention a possible Spartan parallel, the case of Drakontios, described in Xenophon's *Anabasis* iv 8.25, who as a child had slain another child with a stick, ἄκων, and had since been in exile.

proved adverse he was executed.[24] Whether he chose exile or execution, his property was confiscated.[25] For unpremeditated homicide the penalty was less severe: exile without loss of property and the possibility (sooner or later) of pardon by V's family. According to the very beginning of the law as given,

καὶ ἐὰμ μὲ 'κ [π]ρονοί[α]ς [κ]τ[ένει τίς τινα, φεύγ]ε[ν·δ]ι-
κάζεν δὲ τὸς βασιλέας αἴτιο[ν] φόν[ο] E . . . .[17]. . . . . . . .E [β]ολ-
εύσαντα·τὸς δὲ ἐφέτας διαγν[ô]ν̣[α]ι̣. [αἰδέσασθαι δ' ἐὰμ μὲν πατὲ]ρ ἒ-
ι ἒ ἀδελφὸ[ς] ἒ hυες, hάπαντ[α]ς, ἒ τὸν κο[λύοντα κρατεν· ἐὰν δὲ μὲ] ḥοῦ-
15 τοι ὄσι̣, μέχρ' ἀνεφ[σι]ότετος καὶ̣ [ἀνεφσιô, ἐὰν hάπαντες αἰδέσ]ασ-
θαι ἐθέλοσι, τὸν κο[λύ]οντα [κ]ρα[τεν· ἐὰν δὲ τούτον μεδὲ hες ει, κτ]έ-
νει δὲ ἄκο[ν], γνôσι δὲ hο̣ι [πε]ντ[έκοντα καὶ hες hοι ἐφέται ἄκοντ]α̣
κτεναι, ἐσέσθ[ο]ν δὲ ḥ[οι φ]ρ[άτορες ἐὰν ἐθέλοσι δέκα· τούτος δ]ὲ ḥο-
ι πεντέκο[ν]τ[α καὶ] hες ἀρ̣[ι]στ̣[ίνδεν haιρέσθον. καὶ hοι δὲ πρ]ότε[ρ]-
20 ον κτέ[ν]α[ντ]ε[ς ἐν] τô[ιδε τôι θεσμôι ἐνεχέσθον. προειπεν δ]ὲ τôι κ-
τέν̣αν̣[τι ἐν ἀ]γορ[âι μέχρ' ἀνεφσιότετος καὶ ἀνεφσιô·

    Even if someone kills someone without premeditation, he shall be exiled. The Basileis are to adjudge responsible for homicide either . . . or the one who instigated the killing. The Ephetai are to give the verdict. Pardon is to be granted, if there is a father or brother or sons, by all, or the one who opposes it shall prevail. And if these do not exist, pardon is to be granted by those as far as the degree of cousin's

15   son and cousin, if all are willing to grant it; the one who opposes it shall prevail. And if there is not even one of these alive, and the killer did it unintentionally, and the Fifty-One, the Ephetai, decide that he did it unintentionally, then let ten members of the phratry admit him to the country, if they are willing. Let the

20   Fifty-One choose these men according to their rank. And let also those who killed previously be bound by this ordinance. A proclamation is to be made against the killer in the agora by relatives as far as the degree of cousin's son and cousin.[26]

The penalty for βούλευσις was the same as that for homicide with one's own hand and depended on whether the homicide was adjudged premeditated or not.[27]

    In addition to this background in Athenian homicide law, it may be well to say a few words about our own.[28] Modern scholars really have not come to grips with the nature of premeditation in Athenian homicide law. Where they have *touched* upon it they quite understandably have been influenced by their own frames of reference, that is to say contemporary (and for the most part) Anglo-American notions of just what the categories of homicide are. We have three major categories: murder, manslaughter (voluntary and involuntary) and innocent (justifiable and excusable). If D intends in advance to kill V or inflict great bodily injury ('homicide committed with malice aforethought'), we call the killing murder. If D had no preconceived intent to harm V but killed him in a sudden rage of passion engendered by adequate provocation, he is guilty of voluntary manslaughter. If D had no malicious intent at all towards V but was grossly negligent, e.g. a reckless driver, he is charged with involuntary manslaughter, sometimes called negligent homicide. A killing

[24] Demosthenes 21.43; 23.69; Antiphon 2b.9.
[25] Demosthenes 21.43; Lysias 1.50; Aristotle, *Ath. Pol.* 47.2.
[26] *IG* i² 115.11–21, edited and translated by R. S. Stroud, *DLH* 5–7.
[27] Andokides 1.94, quoted *infra* 91.

[28] What follows is not intended to be a comprehensive statement of the Anglo-American law of homicide. My attempt here is only to indicate the frame of reference which contemporary non-lawyers bring to bear when they are looking at the homicide law of another society.

in war, in the course of arresting a felon, or in self-defence against great peril, is termed justifiable. If death results from an unfortunate accident, we call it excusable homicide.

Classical scholars generally are not legal experts, but as modern citizens they are not unaware that the seriousness of a killing is mitigated if it is committed suddenly and without premeditation. Thus Stroud notes that 'a man may kill intentionally, . . . in the heat of the moment, but his act may be μὴ ἐκ προνοίας'.[29] He suggests that the Athenians may also have made this distinction: this would explain, Stroud says, why relatives to the degree of first cousin once removed[30] could pardon intentional homicides μὴ ἐκ προνοίας while members of V's phratry[31] could grant pardon only if, in addition, the homicide were ἄκων—'unintentional'. MacDowell, writing five years earlier, at one point suggests, more perceptively in my opinion, that the πρόνοια distinction may be based not on intent to kill but intent to harm,[32] so that if D intended harm and death resulted he was guilty of intentional homicide, while if he intended no harm, it was unintentional homicide. MacDowell confesses uncertainty on this point and he does not press it further. Later on,[33] he seems to indicate that a person who plans an act which may or may not be intended to harm, but in any case is not intended to kill, would be guilty of unintentional homicide. Thus, in so far as the matter has been explored by scholars, it is rather confused.

I shall return to these modern theories again. At this point I merely wish to point out that they have been coloured by our own sense of the categories of homicide. If we can, for a moment, escape our own frame of reference, and look at what the Athenians themselves have to say, we shall have a clearer understanding of their notion of premeditation.

Drakon's code begins with a statement about what happens to D 'even if he kills without premeditation (πρόνοια)',[34] but it does not define πρόνοια. Further on,[35] it says that the phratry members may pardon D if he is ἄκων. Does this mean that ἄκων is the same thing as μὴ ἐκ προνοίας, or is it an additional condition for pardon by the phratry members, as Stroud suggests?[36] In his *Major Ethics*, Aristotle sheds some light on this question.

ὅταν γάρ τις πατάξῃ τινὰ ἢ ἀποκτείνῃ ἤ τι τῶν τοιούτων ποιήσῃ μηδὲν προδιανοηθείς, ἄκοντά φαμεν ποιῆσαι, ὡς τοῦ ἑκουσίου ὄντος ἐν τῷ διανοηθῆναι. οἷόν φασί ποτέ τινα γυναῖκα φίλτρον τινὶ δοῦναι πιεῖν, εἶτα τὸν ἄνθρωπον ἀποθανεῖν ὑπὸ τοῦ φίλτρου, τὴν δ' ἄνθρωπον ἐν Ἀρείῳ πάγῳ ἀποφυγεῖν· οὗ παροῦσαν δι' οὐθὲν ἄλλο ἀπέλυσαν ἢ διότι οὐκ ἐκ προνοίας. ἔδωκε μὲν γὰρ φιλίᾳ, διήμαρτεν δὲ τούτου· διὸ οὐχ ἑκούσιον ἐδόκει εἶναι, ὅτι τὴν δόσιν τοῦ φίλτρου οὐ μετὰ διανοίας τοῦ ἀπολέσθαι αὐτὸν ἐδίδου. ἐνταῦθα ἄρα τὸ ἑκούσιον πίπτει εἰς τὸ μετὰ διανοίας.

'Whenever a person hits another or kills him or does anything of that sort with no previous deliberation, we say that he did it unintentionally, on the ground that intention lies in deliberation. For instance, it is said that on one occasion a woman gave a man a love-philtre to drink, and afterwards he died from the philtre, but she was acquitted on the Areopagos, where they let off the accused woman for no other reason than that she did not do it deliberately. For she gave it to him for love, but she failed to achieve this aim; so they decided it was not intentional, because she did not give him the philtre with the thought of killing him. So here the intentional is classed with the deliberate.'[37]

Aristotle says that when D acts μηδὲν προδιανοηθείς he is said to be ἄκων. Can this mean

[29] Stroud, *DLH* 41.
[30] *IG* i² 115.13–16, quoted *supra* 88.
[31] *Ibid.* 16–18.
[32] MacDowell, *AHL* 59–60.
[33] *Ibid.* 60–2.

[34] *IG* i² 115.11.
[35] *Ibid.* 17.
[36] Stroud, *DLH* 41, discussed *supra*.
[37] Aristotle, *Ethika Megala* 1188b 29–38, translated by MacDowell, *AHL* 46.

that *all* unpremeditated acts are unintentional acts? This certainly is not the case in our own jurisprudence, as Stroud points out:

> 'Professor Herbert Morris of the Law School at the University of California at Los Angeles has kindly drawn my attention to the important distinction that if a killing is unintentional, it follows that it was without premeditation; whereas it does not follow that if a killing is without premeditation, it is unintentional. A killing may be intentional then, even though it was committed "without forethought". A man may kill intentionally, for instance, in the heat of the moment, but his act may be μὴ ἐκ προνοίας.'[38]

For us, therefore, the category of unpremeditated homicides is larger than the category of unintentional homicides, and, conversely, the category of intentional homicides is larger than the category of premeditated homicides. Aristotle does not directly confront the question of the scope of these categories but he twice says that 'the intentional is classed with the deliberate'. For us the deliberate could be classed with the intentional but not vice versa. This discrepancy indicates that perhaps we have not been understanding the Athenians very well. Before attempting to unravel this problem let us look at one more passage, this time from Demosthenes.

> τί οὖν ὁ νόμος κελεύει; τὸν ἀλόντ' ἐπ' ἀκουσίῳ φόνῳ ἔν τισιν εἰρημένοις χρόνοις ἀπελθεῖν τακτὴν ὁδόν, καὶ φεύγειν ἕως ἂν αἰδέσηταί τις [App. Francfurtana: τινα codd.] τῶν ἐν γένει τοῦ πεπονθότος.

> 'And what does the law ordain? That the man convicted for unintentional homicide shall depart within a certain specified period by a fixed route, and shall remain in exile until one of the relatives of the dead man pardons him' [the precise text of this phrase is uncertain, but the general sense is not in doubt].[39]

Demosthenes is here speaking of the sort of D to whom the penalty and pardon ordained in the surviving portion of Drakon's code apply. He calls them ἀκούσιος. The implication is that ἀκούσιος (or ἄκων) *is* the same (or at least has the same legal effect) as μὴ ἐκ προνοίας; so that when, in the context of the homicide law, the Athenians said unpremeditated, they meant unintentional, and conversely when they said premeditated they meant intentional.[40] If this is so, the otherwise knotty problem of the scope of intentional and deliberate homicide is avoided altogether, since the categories are the same. The Aristotle passage is also a bit more comprehensible: we now understand why he uses ἄκων and μηδὲν προδιανοηθείς interchangeably. Presently we shall see why he picked an example of what we would call accidental homicide to illustrate the principle of unpremeditated homicide.[41] Before reaching that, however, it is appropriate to note how appealing the notion of μὴ ἐκ προνοίας = ἄκων is to a sense of natural justice. We punish manslaughter (intentional but unpremeditated killing) with a heavy prison term. How could Athens, whose criminal system was, in general, more severe[42] than our own, let such a person off on occasions with

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[38] Stroud, *DLH* 41.

[39] Demosthenes 23.72, translated by MacDowell, *AHL* 120.

[40] Of course πρόνοια means more than ἐκούσιος. It is not only intentional and voluntary; the prefix πρό gives it the meaning of forethought. See *LSJ*. But πρό need not imply prior intent to *kill*, as we shall see, *infra*, 93–4.

[41] See, *infra*, 92.

[42] We use 'draconian' today to mean 'very severe'. On the whole Drakon's homicide laws are no more severe than our own, although, as we shall see *infra* 92, the possibility of exile for accidental homicide seems rather harsh. Stroud (*DLH* 77–9) attributes Drakon's reputation, even in classical times, for extreme severity to his other, less enduring laws, e.g. the one prescribing the death penalty for theft of fruit or vegetables.

only a pardon?[43]   The answer is that he was *not* let off but instead was prosecuted for *voluntary* homicide; the fact that he did not 'premeditate' in our sense of that word was irrelevant—he was still an intentional homicide and subject to the most severe penalty.

Proof of this somewhat startling statement is to be found in the literary sources.   They have the advantage of presenting actual situations that illustrate rather than expound the homicide law of Athens.   We shall be concerned here not only with homicide by one's own hand (αὐτόχειρ or χειρί)[44] but also with cases of βούλευσις—conspiracy or planning of homicide.   Although the latter were probably tried at the Palladion,[45] the penalties were the same as for homicide αὐτόχειρ and depended, therefore, on whether the βούλευσις was of intentional or unintentional homicide.

First there are some cases of what even we would call clearly premeditated homicide:

(*a*) Antiphon I (*Against the Stepmother*) is a prosecution by V's illegitimate son against V's widow.   V's friend, Philoneos, had a mistress[46] of whom he was tiring.   D, the stepmother, allegedly told the girl that she had a love philtre that would renew the two men's affection for the girl and herself, and they made a plan whereby D was to provide the potion and the girl was to put it in the wine when the two men were drinking together.   One evening when Philoneos was entertaining V at his home, the girl put the potion in the wine, giving Philoneos a rather larger share than V.   Philoneos died at once.   V fell ill and died some twenty days later.   The mistress was executed.   Later on P prosecutes D, charging her with βούλευσις, of intentional homicide—ἑκουσίως καὶ βουλεύσασα.[47]

(*b*) Had it not been for the amnesty law of 403/2 B.C., Meletos could have been prosecuted for the same offence.   In 404/3 the Thirty had ordered Meletos and others (including, it was said, Sokrates, who refused) to arrest Leon of Salamis.   The Thirty then had Leon executed.   Except for the amnesty law, Meletos could have been put to death, as Andokides notes:

τὸν βουλεύσαντα ἐν τῷ αὐτῷ ἐνέχεσθαι καὶ τὸν τῇ χειρὶ ἐργασάμενον.

'A person who has planned is to be liable to the same treatment as one who has committed with his own hand.'[48]

(*c*) The case of the father of the priestess from Brauron mentioned by Demosthenes in his speech *Against Konon*.

τὸν γοῦν τῆς Βραυρωνόθεν ἱερείας πατέρ᾽ ὁμολογουμένως, οὐχ ἁψάμενον τοῦ τελευτήσαντος, ὅτι τῷ πατάξαντι τύπτειν παρεκελεύσατο, ἐξέβαλ᾽ ἡ βουλὴ ἡ ἐξ Ἀρείου πάγου.

'At any rate the father of the priestess at Brauron, although it was admitted that he had not laid a finger on the deceased, but had merely urged the one who dealt the blow to keep on striking, was banished by the court of the Areopagos.'[49]

[43] Of course the pardon was not inevitable: it had to be secured from the dead man's family for the killer to escape exile.

[44] Antiphon 6.16; Andokides 1.94; Plato, *Laws* 871e–72b.

[45] There is no doubt that βούλευσις of unintentional homicide was tried at the Palladion, but there is some question about βούλευσις of intentional homicide.   MacDowell (*AHL* 64–9) reviews all the evidence and concludes that it also was tried at the Palladion.   I am not entirely convinced by his analysis, particularly of the passage about the father of the priestess from Brauron, quoted and discussed

infra.   How can he be guilty of intentional wounding if he did not lay a hand on V?   It seems better to interpret his 'banishment by the Areopagos' as voluntary exile to avoid the more severe penalty imposed by that body.

[46] For this young lady's precise status, see E. W. Bushala *AJP* xc (1969) 65–72.

[47] Antiphon 1. 26.

[48] Andokides 1. 94, translated by MacDowell, *AHL* 64.

[49] Demosthenes 54.25, translated by A. T. Murray, Demosthenes, *Private Orations* (Loeb Classical Library, London 1939), Vol. iii 145.

This seems to be a case of βούλευσις of intentional homicide, although there might be some disagreement on this point.[50]

These cases are fairly straightforward. In each case D has participated in the formulation or execution of a plan whose ultimate intended result was death. For us as well as the Athenians this was a capital offence.

The second category of cases is at the other end of the spectrum, what we would call excusable homicide:

(a) The woman described by Aristotle who gave V a love potion which turned out to be fatal. The Areopagos refused to convict her on the grounds that (as we would say) it lacked jurisdiction over this kind of homicide which it decided was οὐχ ἑκούσιον.[51]

(b) The case of the choregos in Antiphon 6. As one of the plutocrats of Athens, D had the civic duty of putting on a boys' chorus at the festival of the Thargelia. At one of the rehearsals one of the boys, Diodotos by name, took some kind of drink and died soon afterwards. D was not even present on the occasion, having entrusted the management of the chorus to four underlings.[52] The relatives of the boy charged D with ἀποκτεῖναί με Διόδοτον βουλεύσαντα τὸν θάνατον,[53] although they admitted that the boy's death was not caused deliberately—μὴ ἐκ προνοίας μηδ' ἐκ παρασκευῆς.[54] So the charge must have been βούλευσις of unintentional homicide.

(c) The case of the Javelin Thrower. Antiphon's *Second Tetralogy*[55] deals with D, a javelin thrower, whose javelin hit V, an innocent bystander. The question in the case is whether D is guilty of unintentional homicide or whether V is guilty of unintentional suicide. This was evidently a favourite debating topic, for we hear of it again in Plutarch's *Life of Perikles*: in addition to the two possibilities mentioned above, Perikles and Protagoras were alleged to have considered whether it was the javelin's fault, or perhaps even the fault of the judges of the contest.[56]

In each of these cases D intended some act (the drinking of the love potion, the rehearsal of the chorus, and the hurling of the javelin) but he or she intended no harm, to say nothing of death. The interesting thing about these three cases (perhaps even shocking from our point of view) is that any penalty at all could be imposed in them. Pardon was a possibility, it is true, but so was exile. Thus the Athenian category of 'unpremeditated' homicide, while considerably narrower than our own, carried the possibility of being put away for a longer period of time than even our most serious unpremeditated homicides.

The third group of cases is what we would call sudden unpremeditated killings, or voluntary manslaughters.

(a) The case of Ariston described by Demosthenes in his speech *Against Konon*. Ariston and a friend were walking one evening in the Agora when Konon and his son Ktesias, who had been drinking in a nearby house, fell upon them. They robbed Ariston of his cloak and trampled upon him, so that when they left him, he was half dead. He recovered but in the course of his speech (the action was for assault) Ariston says that if he had died from his injuries, Konon would have been prosecuted for homicide[57] and the case would have been tried in the Areopagos.[58] There is no allegation in the speech that Konon intended

[50] See n. 45 *supra*.

[51] Aristotle, *Ethika Megala* 1188b 36, quoted and translated *supra* 89.

[52] Today this might be a workmen's compensation case.

[53] Antiphon 6.16.

[54] *Ibid.* 19.

[55] This set of four speeches, like the Third Tetra-

logy discussed *infra* 93, was never used in a real case but instead was a pedagogical device for young orators. As a teaching device, however, it was based on current practice and is a valuable source of our knowledge of Athenian procedure.

[56] Plutarch, *Perikles* 36.3.

[57] Demosthenes 54.25.

[58] *Ibid.* 28.

to *kill* Ariston—no doubt we would have heard about it if he had—but he certainly did intend to inflict bodily injuries on Ariston.

(*b*) The self-defence situation in Antiphon's *Third Tetralogy*. V struck the first blow in a quarrel with D; D responded in kind and V ultimately died from his injuries. V's relatives claim that the initial blow was insufficient provocation and call D a βουλευτὴν τοῦ θανάτου even though he did more than he intended—μείζω ὧν ἤθελε πράξας.[59]   D alleges that the blow was sufficient provocation and that in any case V would have lived had it not been for his incompetent physician.   Besides, says D, V is responsible for his own death since he initiated the quarrel.   Whatever the merits of this case, it shows that there was no middle ground in Athenian homicide law.   We know that this case is set in the Areopagos because D's second speech is delivered by his relatives; he had evidently chosen to await the jury's verdict in exile.   If that verdict turned out to be guilty, he faced the same penalties—exile or execution plus confiscation of property—as the stepmother in the case in Antiphon I. If the verdict were innocent—either because V or his doctor were adjudged responsible or because D was thought to have acted in self-defence—D went free.   There was no thought of trying this case in the Palladion,[60] the court for unintentional homicides, because the act here *was* intentional.   The only question was whether it was excusable.

(*c*) Another case on the border between intentional and excusable homicide was that of Euaion and Boiotos.   Boiotos, seemingly drunk, struck Euaion at a public banquet. The latter, more angry at the indignity than the blow, immediately struck back, with fatal consequences.   At trial the issue was again self-defence or intentional homicide—with no middle ground.   Evidently, it was a close case because Euaion was convicted by only one vote.[61]

In all three of these cases D intended an act and he intended harm but he did not intend death (except perhaps Euaion—the account is too abbreviated for us to know).   In all three cases the fatal act was committed in sudden rage.   On the evidence of the Konon case, MacDowell suggested that the distinction between intentional and unintentional homicide may have been based on whether D intended to harm V.[62]   Although he later evinces some uncertainty on this point,[63] I think that the Konon case and the two self-defence cases bear him out.   MacDowell was uncertain, I suppose, because he did not see that premeditation as we know it was not a relevant factor in Athenian homicide law.   We have already seen that the Athenians used 'unpremeditated' and 'unintentional' interchangeably.[64]   We have also seen that the practical effect of this was to narrow unintentional homicides to our category of accidental killings.[65]   This meant that all other killings were classified as intentional and were subject to the severest penalties.   Sudden killings thus received no more lenient treatment than any other intentional killings unless some justification such as self-defence[66] could be shown.

From this survey of the literary and epigraphical evidence, what can be said of the nature of premeditation in Athenian homicide law?   The obvious point is that it was very different from our own concept of premeditation.   We tend to think of premeditated killing in contrast to sudden killing.   For the Athenians this distinction had no legal significance.   What then did they mean by πρόνοια?   Certainly more than an intent to

[59] Antiphon 4c.4.

[60] D could have elected to have this case tried in the Delphinion on the ground that he acted in lawful self-defence.   But since the Delphinion was only for those D's who admitted the killing, albeit with justification, he would have been precluded from asserting the defences that (*a*) the physician's negligence was responsible, and (*b*) V himself was responsible.

[61] Demosthenes 21. 71–5.

[62] MacDowell, *AHL* 59–60.

[63] *Ibid*. 60–2.

[64] *Supra* 90–91.

[65] *Supra* 92.

[66] Although the Athenians did not have our problem of deciding whether a homicide was premeditated, they did, as the two self-defence cases illustrate, share our problem of deciding whether there was sufficient excuse or justification for a homicide.

act, since any death that resulted from mere action without intent to injure would be φόνος μὴ ἐκ προνοίας.[67] But, if in addition to intending to act, D intended injury, the resulting death would be ἐκ προνοίας. I suppose, therefore, that the most accurate translation of πρόνοια at least in the context of homicide, would be 'harmful intent'. When the Athenians spoke of πρόνοια they were thinking of the *quality* of that intent rather than the time spent in its formulation.

If this more refined definition of πρόνοια is correct, it casts new light on the meaning of βούλευσις. Βούλευσις, it will be recalled, is the crime of planning or otherwise being indirectly responsible for a killing committed by someone else;[68] the same penalties attach as for homicide by one's own hand. MacDowell discusses half a dozen examples of βούλευσις in an effort to sort out their legal consequences.[69] In each case his analysis turns on whether D planned for V to die. But if, as MacDowell himself was the first to suggest,[70] πρόνοια need not intend death but only harm, *all* instances where D intends to harm V are cases of βούλευσις of intentional homicide. Only when D intended no harm at all, like Aristotle's woman with the love philtre or the choregos, is the charge βούλευσις of unintentional homicide.

There remains one category of cases whose treatment by the Athenians is somewhat uncertain. This is what we would call involuntary manslaughter or negligent homicide, e.g. where a reckless driver kills someone.[71] There is no harmful intent here but it is nonetheless rather different from an accident, and we attach different legal consequences to it. Although the literary sources have left us no case in point,[72] it is possible, I think, to make a few deductions. The driver (make him a cart driver) *would* be prosecuted. At the very least he would be charged with unintentional homicide like the choregos, the javelin thrower, and Aristotle's amatory chemist. The last two, it could be argued, were in some sense negligent. They were not, however, like our reckless cart driver. Because of this recklessness would he be convicted of intentional homicide? It was, of course, always open to the relatives of the deceased to press that charge,[73] but would they have succeeded? My own feeling is that they would not, unless they could convince the Areopagos that there was harmful intent in D's recklessness. Unless they could thus satisfy the requirements of πρόνοια, they probably would have to content themselves with D's exile and decline to pardon him.

At the conclusion of this study of premeditation, it may be well to ask: What purposes were served by the πρόνοια distinction in Athenian homicide law, and what did it reflect

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[67] *E.g.* the examples of the woman with the love philtre and the choregos, *supra* 92.

[68] MacDowell (*AHL* 60-2) notes that where D made a plan that resulted in death and in which he was the ultimate actor, he would doubtless have been charged with homicide rather than βούλευσις. He also notes that where wounding was the result, the charge would have been intentional wounding. Further on (*AHL* 62) he notes 'we several times find βούλευσις contrasted with χειρὶ or αὐτόχειρ, "with one's own hand".' From this it follows that βούλευσις prosecutions were only for those D's who had someone else carry out their plans. Once this is clear, it becomes unnecessary to discuss, as MacDowell painstakingly does, the various possibilities of D being guilty of βούλευσις of homicides in which he takes part.

[69] MacDowell, *AHL* 60-2. In connection with his examples of βούλευσις, it might be noted that dozens of variations could be imagined. In my opinion, they are all taken care of by the following

two rules: (1) D is not to be prosecuted for βούλευσις if he killed V himself; (2) All βούλευσις is of intentional homicide unless D's 'plan' intended no harm at all. One problem arises in connection with a case where D makes a plan to kill, or harm, V which is not carried out at all. (A wounding, of course, would be actionable.) Harpokration (*Lex. Seg.* 220.12-14) says that this can be prosecuted as βούλευσις but this is solitary, late, and unreliable evidence. In the absence of any other affirmative evidence it seems unlikely to me that any charge at all was pressed.

[70] MacDowell, *AHL* 60.

[71] *Supra* 92.

[72] One type of negligence was not actionable, that of a doctor under whose care a patient died. See Antiphon 4c.5. But medical negligence is usually not so extreme as the recklessness here under discussion.

[73] See n. 11 *supra*.

about the values of Athenian society? In our own society the criminal law interests itself only in non-accidental, unjustifiable homicides. The Athenian criminal law had a broader scope. To be sure, if there were some justification, such as killing the lover of one's wife, the Athenian killer paid no penalty. But the relatives of the deceased had the duty of bringing a charge against the killer and he was obliged to defend it, if only in the Delphinion. If there were no justification and the homicide were intentional, the killer had to pay with his life (unless he took the exile option) and property. Though harsh, this is understandable. We ourselves impose a penalty although we vary it in accordance with the amount of premeditation present. What is harder to understand, however, is the exile penalty for what we would call accidental homicide; here we would impose no penalty. The exile possibility seems especially harsh in view of the fact that there seems to have been no penalty at all for unintentional (i.e. accidental) wounding.[74] What accounts for this anomalous treatment? I think the answer is that the Athenians considered *all* unnatural deaths to be matters of extreme gravity. MacDowell[75] points out that three purposes were served by the Athenian homicide laws: vengeance for the wrong to the deceased, cleansing of the pollution to the state, and deterrence to future killers. How does this apply to accidental homicides? Insofar as they are accidental, there is not much deterrent value. But there is vengeance and cleansing. This vengeance and cleansing were *not* optional. V's relatives could not say, 'Oh, it was just an accident', and let the matter rest. They had to prosecute.[76] At the conclusion of the trial, D was sentenced to exile. Then, and only then, could V's relatives step in and pardon D.[77] This took care of vengeance, but what about cleansing pollution to the state? Demosthenes tells us:

τί οὖν ὁ νόμος κελεύει; τὸν ἁλόντ' ἐπ' ἀκουσίῳ φόνῳ ἔν τισιν εἰρημένοις χρόνοις ἀπελθεῖν τακτὴν ὁδόν, καὶ φεύγειν ἕως ἂν αἰδέσηταί τις [App. Francfurtana: τινα codd.] τῶν ἐν γένει τοῦ πεπονθότος. τηνικαῦτα δ' ἥκειν δέδωκεν ἔστιν ὃν τρόπον, οὐχ ὃν ἂν τύχῃ, ἀλλὰ καὶ θῦσαι καὶ καθαρθῆναι καὶ ἀλλ' ἄττα διείρηκεν ἃ χρὴ ποιῆσαι.

'And what does the law ordain? That the man convicted for unintentional homicide shall depart within a certain specified period by a fixed route, and shall remain in exile until one of the relatives of the dead man pardons him' [the precise text of this phrase is uncertain, but the general sense is not in doubt]. 'Then it allows him to return in a particular manner, not just at random; it specifies sacrifice, cleansing, and certain other actions which he must perform.'[78]

In this way, all unnatural deaths were, in a sense, put right.

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[74] Lysias 3.42, 47.

[75] MacDowell, *AHL* 1–7, 141–50.

[76] For a good discussion of this duty, see Mac-Dowell, *AHL* 8–11.

[77] Could V's relatives pardon D before trial? As a practical matter they probably could, by not bringing a charge against him, although D's safety would be forever in jeopardy since, according to Lysias 13.83, there was no statute of limitations for homicide prosecutions. But pardon by its very definition implies a previous conviction and the evidence of Drakon's code, quoted and translated *supra* 88 and Demosthenes 23.72, quoted and translated *infra*, support this.

[78] Demosthenes 23.72, translated by MacDowell, *AHL* 46.