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IN SEARCH OF DRAKON

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This paper takes issue with two widely held views on Drakon. The first is the claim made at least as early as the fourth century BC that only the homicide laws survived the subsequent intervention of Solon; the second is the repeated assertion that Drakon's laws were uniformly harsh. It argues that more of Drakon's work survived into the Classical period, both in substance and in procedure, than the Athenians realised or admitted, and that the harshness has been exaggerated.

This paper is an attempt to revisit two key aspects of Drakon's legislation. The first is the nature of the legislation, where I want to test the stereotype of Drakon as draconian; the second is the influence of that legislation on the law code of Classical Athens, beyond the usual focus, in place since the *Athenaion politeia*, on the homicide law. The larger purpose is quite simply to help make a little better sense of Drakon's place in the history of Athenian law and the legal system.

I have nothing to say about Drakon the man.[1] Already for Greeks of the Classical period Drakon was a shadowy figure. We get no patronymic, no biography; he simply emerges fully formed as a legislator. He may be wholly or in part a fiction.[2] But for my present purposes Drakon the man is a distraction. We have a date for the legislation, which *Ath. pol.* 4.1 places in the archonship of Aristaichmos, which is generally taken to be in the region 624–621/620 in our chronology. There is no good reason to reject the dating. Written laws are beginning to emerge across Greece in this period and the dating is unlikely to be far wrong.[3] The crucial point is that in Athens as elsewhere someone wrote laws down, and we might as well call him (or them) Drakon.

The element of mystery is not just prosopographical. The laws too were (except for homicide) a distant memory for most Athenians by the fifth century. Our references to

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1 I also ignore here the question of the immediate motives for the generation of the laws. Like most scholars I incline to see a close link between the massacre of the Kylonians and the intervention of Drakon, even if the nature of the link is difficult to pin down. This has been doubted, most recently by Gagarin (2005; 2007, 94–6). Fortunately the link does not matter for my present purposes.

2 Hölkeskamp (1992) 87–9 plausibly argues that the single authoritative lawgiver is a stereotype which owed more to Greek ways of constructing the past, including seminal legislators, than to any factual evidence available.

3 The evidence for early Greek written law is conveniently summarised in Gagarin (2008) ch 2.

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Drakon from the fifth century (when we first meet the name) are vague and tend toward caricature. We are told by the *Ath. pol.* (7.1) that after Solon the Athenians 'no longer used Drakon's laws apart from those on homicide' (τοῖς δὲ Δράκοντος θεσμοῖς ἐπαύσαντο χρώμενοι πλὴν τῶν φονικῶν). Though we shall see that there is reason to adjust this picture in terms of the amount of Drakonian law absorbed into Solon's legislation, at the level of physical text this is likely to be true; there is every reason to believe that in the Classical period the only valid inscribed texts identified as Drakon's (whether or not they were revised in subsequent ages) were the homicide laws. The standard procedure with invalidated documents in Athens[4] was to discard or recycle the material. It is conceivable that the laws of Drakon which were no longer in use were physically destroyed or (materially) reused. A statement by Anaximenes[5] may imply the continued physical survival of the text of Drakon's laws into the fifth century:

> Ephialtes brought the *axones* and the *kyrbeis* [that is the laws of Drakon and Solon] down from the Areopagos to the *bouleuterion* (or *prytaneion*) and the agora.

This statement is however entirely intelligible as a comment on the text of the homicide laws alone.[6] But even if the physical text survived, in a society where people (except perhaps logographers) tended to read law mainly if not exclusively for the purposes of specific litigation, there was no incentive to peruse Drakon's defunct laws, even if they existed. It was not until the philosophical and comparative studies of law from Plato and Theophrastos in the fourth century that antiquarian interest in such texts came into being. The key point in all of this is that the Athenians probably relied on oral tradition

4 Thomas (1989) 43–4.

5 PBerol. 5008 B 7 ff. = *FGrH* 72, F.13:

> Δίδυμος . . . . ἐπεί, φησί, τοὺς ἄξονας καὶ τοὺς κύρβεις ἄνωθεν ἐκ τῆς ἀκροπόλεως εἰς τὸ βουλευτήριον καὶ τὴν ἀγορὰν μετέστησεν Ἐφιάλτης, ὥς φησιν Ἀναξιμένης ἐν Φιλιππικοῖς.
>
> Didymos says: 'because Ephialtes moved the *axones* and the *kyrbeis* from the Akropolis to the Council chamber (*bouleuterion*) and the Agora, according to Anaximenes in his *Philippika*.

Pollux 8.129:

> ἄξονες δὲ τετράγωνοι χαλκοῖ ἦσαν, ἔχοντες τοὺς νόμους. ἀπέκειντο δὲ οἵ τε κύρβεις καὶ οἱ ἄξονες ἐν ἀκροπόλει πάλαι· αὖθις δ' ἵνα πᾶσιν ἐξῇ ἐντυγχάνειν, εἰς τὸ πρυτανεῖον καὶ τὴν ἀγορὰν μετεκομίσθησαν.
>
> The *axones* were four-sided bronze objects containing the laws. The *kyrbeis* and the *axones* were set apart on the Akropolis in olden times. Subsequently, so that all would be able to encounter them, they were moved to the Prytaneion and the Agora.

6 If Anaximenes means the larger corpus (whatever it was), it may be that (as Stroud suggested, 1979, 42) the two texts (Drakon's and Solon's) were put in separate locations. Possibly the Drakonian and Solonian texts still in use were placed in the Agora and the defunct *axones* in the *prytaneion* or *bouleuterion*. The latter were now monuments, not living laws. This would be all the more so, if we accept the reading *prytaneion* from Pollux rather than *bouleuterion*, since recent research (Schmalz (2006)) suggests that the Prytaneion was probably in the old Agora at the east end of the Acropolis. Since the real business of the city was conducted in the classical Agora, texts in the old Agora were effectively mothballed.

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for all of Drakonian legislation beyond the homicide laws, whether or not the laws were available somewhere in some form. This does not undermine everything we read about Drakon, unless we are to reject oral tradition in its entirety. But the fact that few if any Athenians of the Classical period had direct experience of Drakon's code should make us sceptical of anything we are told about Drakon, unless we can verify or test it, and of any conclusions drawn from it. This applies of course to the present discussion.

I begin with the nature and scope of the legislation as a necessary preliminary to an evaluation of the Athenian narrative on the fate of the laws. The legislation was probably fairly typical of its period in being at once both radical and conservative. It was radical in the very basic sense that the laws have been removed forever from the grasp of a narrow group of officials and located in the central space of the *polis*; it does not matter that political power still remains concentrated, as it will for another century or more. A vital symbolic statement of collective ownership has been made.[7] But the legislation is probably also conservative in some key aspects of procedure and substance. The narrative in *Ath. pol.* of Athens as Solon found it indicates that (at least as far as fourth-century writers could reconstruct it) the system after Drakon located judicial authority in the hands of magistrates, as it had been before. This we infer from the fact that it is Solon who institutes the right of appeal to the courts against judicial decisions by officials.[8] These are public officials, not local chieftains such as we find in the Boiotia described by Hesiod.[9] But since we are told that officials at this period were chosen at least in part on grounds of birth,[10] evidently no radical change has been made in this respect.

We can also detect a degree of conservatism in the area of substance and procedure. Here we move on to still thinner ice. If we ask how Drakon set about determining what the law should say, we have a suggestive answer if we look at key areas where we can get some sense of before and after. One of these is *moicheia*. We know from classical sources that the law of Athens in the fifth and fourth centuries allowed a man considerable rights of self-help when he caught another male in a sexually compromising position (ἐπ' αὐτοφόρωι) with at least

7 See Thomas (1992) 71–2.

8 *Ath. pol.* 9.1 (see pp. 00–000 below).

9 Hesiod *Works and Days* 34–9:

> σοὶ δ'οὐκέτι
> δεύτερον ἔσται
> ὧδ' ἔρδειν· ἀλλ' αὖθι διακρινώμεθα νεῖκος
> ἰθείῃσι δίκῃς, αἵ τ' ἐκ Διός εἰσιν ἄρισται.
> ἤδη μὲν γὰρ κλῆρον ἐδασσάμεθ', ἄλλα τε πολλὰ
> ἁρπάζων ἐφόρεις μέγα κυδαίνων βασιλῆας
> δωροφάγους, οἳ τήνδε δίκην ἐθέλουσι δικάσσαι.
>
> But you will have no second chance to act this way again. Rather let us settle our dispute here with true judgement which is from Zeus and is excellent. For we have already divided our legacy, and you would seize a much greater share and carry it off, paying court to the bribe-swallowing princes who are to judge this case.

10 *Ath. pol.* 3.1, 3.6.

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certain classes of females under his control. The issue has been discussed repeatedly and at length and needs no further treatment here. Though much has been made of the right to kill, the one I wish to stress here is the right to imprison. We are told by our sources that the aggrieved *kyrios* could hold the offender in custody pending the payment of a ransom, or release him on the cognisance of a third party who guaranteed the payment of the ransom agreed. All are attested in [Demosthenes] 59.65:

> Στέφανος οὑτοσί, μεταπεμψάμενος εἰς ἀγρὸν ὡς θύων, λαμβάνει μοιχὸν ἐπὶ τῇ θυγατρὶ τῇ Νεαίρας ταυτησί, καὶ εἰς φόβον καταστήσας πράττεται μνᾶς τριάκοντα, καὶ λαβὼν ἐγγυητὰς τούτων Ἀριστόμαχόν τε τὸν θεσμοθετήσαντα καὶ Ναυσίφιλον τὸν Ναυσινίκου τοῦ ἄρξαντος υἱόν, ἀφίησιν ὡς ἀποδώσοντα αὐτῷ τὸ ἀργύριον.
>
> Stephanos here invited Epainetos to the country on the pretext of making sacrifice, then seized him as a seducer caught with the daughter of Neaira here, and by intimidation extorted a ransom of thirty mnai. He accepted as sureties for this sum Aristomachos who had served as Thesmothetes and Nausiphilos the son of Nausinikos who had been Archon and released Epainetos on an understanding that he would pay the money.[11]

We could construct a good case for making this law originate with Solon or with Drakon. A good reason to ascribe it to neither is that the procedure is identical to the one implied in the narrative of Ares and Aphrodite in *Odyssey* 8.329–48:

> "οὐκ ἀρετᾷ κακὰ ἔργα· κιχάνει τοι βραδὺς ὠκύν,
> ὡς καὶ νῦν Ἥφαιστος ἐὼν βραδὺς εἷλεν Ἄρηα,
> ὠκύτατόν περ ἐόντα θεῶν, οἳ Ὄλυμπον ἔχουσι,
> χωλὸς ἐών, τέχνῃσι· τὸ καὶ μοιχάγρι' ὀφέλλει."
> ὣς οἱ μὲν τοιαῦτα πρὸς ἀλλήλους ἀγόρευον·
> Ἑρμῆν δὲ προσέειπεν ἄναξ Διὸς υἱὸς Ἀπόλλων·
> "Ἑρμεία Διὸς υἱέ, διάκτορε, δῶτορ ἐάων,
> ἦ ῥά κεν ἐν δεσμοῖσ' ἐθέλοις κρατεροῖσι πιεσθεὶς
> εὕδειν ἐν λέκτροισι παρὰ χρυσῇ Ἀφροδίτῃ;"

11 For the right to exact a ransom see also the mention in passing at Lysias 1.29:

> οὐκ ἠμφεσβήτει, ὦ ἄνδρες, ἀλλ' ὡμολόγει ἀδικεῖν, καὶ ὅπως μὲν μὴ ἀποθάνῃ ἠντεβόλει καὶ ἱκέτευεν, ἀποτίνειν δ' ἕτοιμος ἦν χρήματα.
>
> He did not dispute his guilt, gentlemen, but confessed it, and begged and pleaded not to die but offered to pay money.

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τὸν δ' ἠμείβετ' ἔπειτα διάκτορος Ἀργεϊφόντης·
"αἴ γὰρ τοῦτο γένοιτο, ἄναξ ἑκατηβόλ' Ἄπολλον.
δεσμοὶ μὲν τρὶς τόσσοι ἀπείρονες ἀμφὶς ἔχοιεν,
ὑμεῖς δ' εἰσορόῳτε θεοὶ πᾶσαί τε θέαιναι,
αὐτὰρ ἐγὼν εὕδοιμι παρὰ χρυσῇ Ἀφροδίτῃ."
ὣς ἔφατ', ἐν δὲ γέλως ὦρτ' ἀθανάτοισι θεοῖσιν.
οὐδὲ Ποσειδάωνα γέλως ἔχε, λίσσετο δ' αἰεὶ
Ἥφαιστον κλυτοεργόν, ὅπως λύσειεν Ἄρηα·
καί μιν φωνήσας ἔπεα πτερόεντα προσηύδα·
"λῦσον· ἐγὼ δέ τοι αὐτὸν ὑπίσχομαι, ὡς σὺ κελεύεις,
τείσειν αἴσιμα πάντα μετ' ἀθανάτοισι θεοῖσι·"

'Wicked acts do not thrive. The slow catches the swift,
as now Hephaistos, slow as he is, has overtaken Ares,
though he is swiftest of the gods who hold Olympos.
Though lame he has caught him by cunning, and he owes the penalty for seduction.'
So they spoke to one another.
But to Hermes the lord Apollo, son of Zeus, said:
'Hermes, son of Zeus, messenger, giver of good things,
would you indeed choose, though held tight with strong bonds,
to lie in bed beside golden Aphrodite?'
Then the messenger, Argeiphontes, answered him:
'Would that this might happen, lord Apollo, far darter;
that though thrice as many inescapable bonds might hold me about
and you gods and all the goddesses too might look on,
but I might still I might sleep by the side of golden Aphrodite.'
So he spoke and laughter arose among the immortal gods.
But no laughter seized Poseidon, but he ever begged
Hephaistos, the illustrious craftsman, to free Ares;
and he spoke, and addressed him with winged words:
'Free him, and I promise that, as you bid,
he will pay you all that is right in the presence of the immortal gods.'

(Trans. A. T. Murray, adjusted)

Here Hephaistos catches his wife and her lover *in flagrante*. He imprisons Ares (together with Aphrodite) with the device of the net. To secure Ares' freedom (λῦσον 347) Poseidon guarantees (ὑπίσχομαι) payment of the *moichagria* (8.332), which evidently means 'payment for the catching of a *moichos*'.[12] The impression that we are in a legal context of some sort is increased by the verb ὀφέλλει in 332. The features of the later Athenian

12 Cf. Hdt. 3.36.5 δῶρα ζωάγρια, 'reward for finding someone alive'.

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system are already in place – imprisonment, the need for a guarantor to secure release, release conditional upon payment of a ransom. It is highly probable (no more can be claimed) that Drakon has simply ratified in epigraphic form a practice which was permitted in the Athenian system prior to the arrival of written law.

At this point we hit a snag. There is a genuine and general methodological problem in the use of the judicial procedures found in the Homeric poems as the basis for the reconstruction of a history of Greek juridical practice and prescription. This is the enduring question of the historicity of Homeric society, a question which interests political historians but which legal historians almost universally sidestep in their understandable desire to extract at least some conclusions for early Greek law from the abysmally limited evidence available.[13] Scholars divide on the question whether the Homeric poems depict a historical society and (for those who are inclined to see it as a broadly factual account of an historical Greek society) on the precise period represented.[14] My own view is that the Homeric world is a poetic amalgam drawing together elements of poetic and folk tradition, contemporary and past historical experience and material culture, and imagination. But on any attempt to make sense of the society depicted in the text, we have an element of fictionalisation, which is an obstacle to any attempt to reconstruct a historical reality from socio-political features we meet in the poems. Where we can identify (using comparative evidence) real features of Greek practice, they are in the Homeric text deracinated from any local context and presented as part of a panhellenising socio-political construction. Thus, though Homeric sacrifice contains many of the features we find in (some) later cult activity, the poems contain none of the local variation which we know to have been the case in historical Greece; we have a single homogeneous ritual throughout the poems. And the gods worshipped, even within individual Homeric *poleis*, come without the cult titles which distinguished local worship. Again, though we know that individual Greek cities differed in the specifics of their political systems throughout Greek history, the poems present us with a homogeneous model.[15] This element of imaginative (re)construction is an obstacle to any attempt to use the text as a transparent historical source, if such a thing exists.

However, the nature of this fiction is as much an advantage as a problem. We must simply adjust our notion of historical value. Recent scholars have rightly insisted[16] on panhellenic diffusion as part of both of the goal and of the appeal of the Homeric text. The absence of local colouring is a deep feature of the epic text which allows it to speak throughout the Greek world. This aspect of the relationship between text and context gives us an important insight into the process of Homer's fictive law-building. In a text

13 See e.g. Gagarin (2005) 82–4, 2008, 13–18, MacDowell (1978) 11–23, Van der Vliet (2003) 29. For a rare exception see Cohen (2005) 8.

14 For a review of the question and a positive verdict see Raaflaub (1997); Hall (2007) 25–6 though more tentative is broadly in agreement. For a sceptical position see e.g. Snodgrass (1974).

15 See Austin and Vidal Naquet (1977) 39.

16 See especially Nagy (1979) 7ff., Nagy (1990) 70ff.

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designed to speak to an audience across Greece, it is likely that aspects of legal practice in evidence would be recognisable in outline in at least some, and perhaps many, though certainly not all, Greek states in the early archaic period, even if not in identical form.[17]

We can in fact test the approach propounded above in this particular area of law on the basis of a combination of epigraphy and anecdote. I begin with epigraphy. The law code of Gortyn speaks matter-of-factly of the capture of an adulterer and also includes the element of ransom found both in Homer and in classical Athens (though here in the form of a tariff):[18]

αἴ κα τὰν ἐλευθέραν
μοικίōν αἰλεθêι ἐν πατρὸς ἐν ἀ-
δελπιô ε͂ ἐν τô ἀνδρός, ἑκατὸν
στατōρανς καταστασεῖ· αἰ δέ κ' ἐ-
ν ἄλō, πεντε͂κοντα· αἰ δέ κα τὰν
τô ἀπεταίρō, δέκα· αἰ δέ κ' ὁ δ̄λος [τὰ]-
ν ἐλευθέραν, διπλêι καταστασε
ῖ· αἰ δέ κα δ̄λος δ̄λō, πέν-
τε. προϝειπάτō δὲ ἀντὶ μαιτ-
ύρōν τριō̄ν τοῖς καδεσταῖ-
ς τ̄ ἐναιλεθέντος ἀλλύεθ-
θαι ἐν ταῖς πέντ' ἀμέραις·

> If one be taken in adultery with a free woman in her father's, brother's, or husband's house, he shall pay one hundred *staters*, but if in another's house, fifty; and if with the wife of an *apetairos*, ten. If a slave be taken with a free woman, he is to pay double the amount, and if a slave is taken with a slave, five staters. Let him proclaim before three witnesses to the relatives that the man taken is to be ransomed within five days.

Now for the anecdote. Aristotle in his *Constitution of Tenedos* mentioned the violent self-help available for the man who catches a seducer in early Tenedos.[19] This forms the basis of a

17 This offers a partial response to Todd's concern about the representative nature of the Homeric text, (1993, 34). I should stress that this is not an argument for 'Greek law'; there is too much divergence in the systems for which we have evidence. It is however an argument for a significant (if highly lacunose and intermittent) convergence in the area of procedure. So rightly Gagarin (2005) 29–40, though his conclusion (p. 40) that there is 'essential unity' significantly overstates, as noted by MacDowell (2007) 176. But MacDowell in turn understates the degree of convergence; his observation that some features common in Greek systems are also known from non-Greek systems is a problem only if one insists that to be Greek a feature must be exclusively Greek. Thür (2007) argues for convergence at a macro level of evolution.

18 *IC* IV 72 (Gortyn) col. II.20–5.

19 Stephanos of Byzantion *Ethnika*. *Epitome* 2 p. 615 (=Arist. fr. 551 Rose):

> Τένεδος … ἔστι καὶ ἑτέρα παροιμία Τενέδιος πέλεκυς, ἐπὶ τῶν ἥτοι πικρῶς ἢ καὶ μᾶλλον συντόμως ἀποκοπτόντων τὰ ζητήματα καὶ τὰ ἄλλα πράγματα. … φησὶν Ἀριστοτέλης ἐν τῇ Τενεδίων πολιτείᾳ ὅτι βασιλεύς τις ἐν Τενέδῳ νόμον ἔθηκε τὸν καταλαμβάνοντα μοιχοὺς ἀναιρεῖν πελέκει ἀμφοτέρους. ἐπειδὴ δὲ συνέβη τὸν υἱὸν αὐτοῦ καταληφθῆναι μοιχόν, ἐκύρωσε καὶ περὶ τοῦ ἰδίου παιδὸς τηρηθῆναι τὸν νόμον καὶ ἀναιρεθέντος εἰς παροιμίαν παρῆλθε τὸ πρᾶγμα ἐπὶ τῶν ὠμῶς πραττομένων.

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story pattern which recurs in the case of Zaleukos.[20] Though the recurrence indicates that we are dealing with a floating myth rather than a nugget of historical fact, the important point here is the way in which capture in the act is taken for granted as a defining feature in some cases of *moicheia*. A fragment of Hipponax (fr. 31)[21] also speaks of the capture of the *moichos*; the passage as we have it is unspecific about penalties but it is quite clear that we have here an element of self-help in Ephesos or Klazomenai comparable in outline with what we have met in our other sources. Not all of the features are reproduced across our examples (as far as the evidence allows us to judge) but the recurrence of capture in the act and self-help of different sorts suggests that we have in *Od*. 8 an aspect of procedure on seduction which would be recognisable in many parts of the Greek world, and by extension we can probably see in the similarity between Classical Athenian and Homeric practice in this area a continuity which bridges not only Drakon but also Solon and Classical Athens. I shall return to this last point below but for now we can deduce with some plausibility that what Drakon is doing in this area and probably more generally is giving inscriptional form to existing practice. There is nothing remotely new about this suggestion; but it is useful to be able to give a little substance to the view. On this basis much of Drakon is not legislation in any creative sense but a process of making visible and explicit; in this respect it prefigures the work of the *anagrapheis* who reinscribed the laws at the end of the fifth century. The same applies in the case of homicide. Some aspects of Athenian law in the Classical period explicitly ascribed to Drakon show a pronounced affinity with

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> There is another proverb: *axe of Tenedos*, referring to those who ill-humouredly or too brusquely cut short enquiries or other matters. … Aristotle says in his *Constitution of Tenedos* that a certain king at Tenedos made a law that a man who caught people in *moicheia* could kill both with an axe. And when it transpired that his son was taken in adultery, he ruled that the law should apply even in the case of his own son, and when he was killed, the incident became a proverb relating to people who act cruelly.

20 Aelian *VH*. 13.24:

> Ζάλευκος ὁ Λοκρῶν νομοθέτης προσέταξε τὸν μοιχὸν ἁλόντα ἐκκόπτεσθαι τοὺς ὀφθαλμούς. ἃ τοίνυν μηδὲ προσεδόκησε, ταῦτα ὁ δαίμων αὐτῷ παρὰ τὴν δόξαν καὶ τὴν ἐλπίδα ἐπήγαγεν· ὁ γάρ τοι παῖς ἁλοὺς ἐπὶ μοιχείᾳ εἶτα ἔμελλε πείσεσθαι τὰ ἐκ τοῦ πατρῴου νόμου. ἐνταῦθα ἵνα μὴ διαφθαρῇ τὸ ἅπαξ κεκυρωμένον, ὑπέμεινεν αὐτὸς ὁ ἐσηγησάμενος ὑπὲρ τοῦ ἑτέρου τῶν τοῦ παιδὸς ὀφθαλμῶν ἀντιδοῦναι τὸν ἑαυτοῦ, ἵνα μὴ ὁ νεανίσκος τυφλωθῇ τελέως.
>
> Zaleukos the lawgiver of Lokris prescribed that a man was taken in *moicheia* should have his eyes put out. But against his expectation and his hope, the god brought about something he did not anticipate. For his son was caught in *moicheia* and was as a result about to suffer the punishment in his father's law. At that point, to prevent the destruction of the law formerly enacted, the very man who proposed the law agreed to give one of his own eyes for one of his son's, so that the young man would not be completely blinded.

21 Fr. 31W:

> οὔ μοι δικαίως μοιχὸς ἁλῶναι δοκεῖ
> Κριτίης ὁ Χῖος ἐν †τῶι κατωτικῶι† δούμωι (κατώγεῳ τῳ West).

I don't think it right that Kritias of Chios was taken as a *moichos* in ?the underground room?.

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homicide procedures as depicted in Homer, specifically the emphasis on the family both to pursue and to pardon. So Ajax says at *Iliad* 9.629–33:

> ἄγριον ἐν στήθεσσι θέτο μεγαλήτορα θυμὸν
> σχέτλιος, οὐδὲ μετατρέπεται φιλότητος ἑταίρων
> τῆς ᾗ μιν παρὰ νηυσὶν ἐτίομεν ἔξοχον ἄλλων
> νηλής· καὶ μέν τίς τε κασιγνήτοιο φονῆος
> ποινὴν ἢ οὗ παιδὸς ἐδέξατο τεθνηῶτος·

But Achilles has made wild the proud heart in his breast, cruel man! He cares neither for the love of his comrades with which we honoured him by the ships above all others – pitiless one! Indeed, a man accepts recompense from the slayer of his brother, or for his dead son.

Though Athens never formalised the receipt of blood money, unlike sharia law,[22] and in this respect differs from the process of compensation envisaged by Ajax in *Iliad* 9 Athens like Ajax recognised the right of the family both to pursue and in some circumstances not to pursue (*IG* I^3 104. 10–16):

> πρῶτος ἄχσον.
> καὶ ἐὰμ μὲ ’κ ἐκ [π]ρονοί[α]ς [κ]τ[ένει τίς
> τινα, φεύγ]ε[ν· δ]ικάζεν δὲ τὸς βασιλέας αἴτιο[ν] φόν[ο] . . . . [β]ολ-
> εύσαντα· τὸς δὲ ἐφέτας διαγν[ō]ν[α]ι. [αἰδέσασθαι δ’ ἐὰμ μὲν πατὲ]ρ ἑ-
> ι ἒ ἀδελφὸ[ς] ἔ hυος, hάπαντ[α]ς, ἒ τὸν κο[λύοντα κρατêν· ἐὰν δὲ μὲ] hοῦ-
> τοι ὅσι, μέχρ’ ἀνεφ[σι]ότετος καὶ [ἀνεφσιô, ἐὰν hάπαντες αἰδέσ]ασ-
> θαι ἐθέλοσι, τὸν κο[λύ]οντα [κ]ρα[τêν·

First *axon*: ‘And if [or ‘even if’] a man kills without intent, he is to be exiled. And the kings are to judge the man guilty of murder … contriving. And the *ephetai* are to decide. Pardon may be given by father if there is one or brother or sons, all of them, or the one who refuses is to prevail. If there is none of these, then as far as the rank and person of cousin, if all wish to pardon, the one who refuses is to prevail.’

All this suggests that much of Drakon’s job was publication. This continuity between Drakon and what went before is an issue to which we shall return below.

This of course risks understating the importance of what is happening. Though I have stressed the continuity in the area of content, the placing of the laws in the public domain is a radical change. What before was known only by tradition or to a few is now fixed in form and openly available to all. And despite the argument for broad conservatism offered above, common sense suggests that the act of writing down will

22 For the possibility that informal compensation might be offered see Phillips (2008) 52.

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have drawn attention to lacunae and inconsistencies, with the consequent need for amendment or supplementation. My purpose, however, is not the ideology or effects of written laws; I wish simply to look at what Drakon's laws said. Which takes me to the question of the scope of the legislation. It has often been suggested that Drakon's legislation dealt only with homicide.[23] There is nothing inherently implausible in the suggestion. The problem is that it requires us to ignore several pieces of evidence in a context where we have very little to go on anyway.

The first of these is the explicit statement of the *Ath. pol.* that Solon revoked all of Drakon's laws except for those dealing with homicide. The statement makes no sense unless we suppose other, suppressed, laws. We can if we wish rationalise this away by arguing that subsequent ages mistook the existence of Drakonian homicide laws and no other Drakonian legislation as indicating that this was a fragment surviving from a larger code which never in reality existed. This, however, is to ignore the corroborative evidence for non-homicide legislation. For the second piece of evidence is the tradition from the Classical period that there were specific enactments of Drakon on areas beyond homicide. Most important, for all its probable rhetorical exaggeration, it is the reference in a lost speech of Lysias (fr. 40b) to a law of Drakon on idleness:

> ἀργίας δίκη· Λυσίας ἐν τῷ κατὰ Ἀρίστωνός φησιν ὅτι Δράκων ἦν ὁ θεὶς τὸν νόμον, αὖθις δὲ καὶ Σόλων ἐχρήσατο, θάνατον οὐχ ὁρίσας ὥσπερ ἐκεῖνος, ἀλλ' ἀτιμίαν, ἐάν τίς ἁλῷ τρίς, ἐὰν δ' ἅπαξ, ζημιοῦσθαι δραχμὰς ἑκατόν.
>
> Suit for idleness. Lysias in his speech *Against Ariston* says that Drakon was the person who passed this law and that Solon too subsequently used it, but not with death as the penalty unlike Drakon but loss of rights (*atimia*), if a man was convicted three times and a fine of a hundred drachmas if he was convicted once.

There is of course some discrepancy in our sources about the origin of the law on idleness;[24] Herodotos (2.177) has Solon import it to Athens from Egypt and Theophrastos (*Plutarch* Solon 21) ascribes it to Peisistratos. The testimony of Herodotos is suspect, given the mythologisation of Solon's travels, Herodotos' fondness for imitation as a means of explaining political and cultural similarity and the tendency in the anecdotological tradition to bring famous names together.[25] Theophrastos is more difficult to dismiss. But the fact that Pollux, who seems to have been well briefed on early Athenian law, favours the attribution to Drakon, while the striking difference in the presentation of the

23 See especially Humphreys (1991) 18–20 and most recently Schmitz (2001). Given the state of the evidence I cannot quite accept Phillips' crisp assertion (2008, 43) that the 'burden of proof falls upon those who wish to limit the scope of Draco's law', though I am in complete sympathy with his view of the legislative cover.

24 See on this subject Leão (2001).

25 It is also worth noting that Herodotos at 1.29 dates the travels after the legislation supposedly influenced by the travels.

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law by Pollux and Lysias seems to rule out dependence of the former on the latter.[26] It has been suggested[27] that this belongs to homicide law. What we might have is a defence allowed under the prescription for legally permitted killing. In a conservative agrarian society a man with no visible means of earning a living can be presumed to live by theft; so the absence of work may be advanced in support of the killing. This is superficially attractive. The fundamental weakness is that this would be not a legal prescription but a hypothetical argument from probability. Nothing in what survives of homicide law in inscriptional or literary sources suggests that it included such additional clauses; lawful killing was addressed solely in terms of immediate attendant circumstances.[28] So our source is telling us (rightly or wrongly) that Drakon legislated on idleness and imposed a severe penalty.

Also important is the tradition found in Plutarch that the penalty for theft under Drakon was death (*Solon* 17). Here too it can be suggested that what we have is a reference to homicide law, which allowed a defence of justified killing in the case of some thieves at least.[29] This is not, however, what Plutarch's wording suggests; it points rather to the existence of specific enactments in relation to theft. It is also difficult to fit a comprehensive right of legitimate killing against thieves into homicide law, which appears never to have given blanket indemnity for the killing of thieves, only in cases where theft was accompanied by aggravating circumstances. Finally, we have seen reason to believe that Drakon's legislation included provision for *moicheia*. We do know that a man found with certain categories of female relative could be killed with impunity and that this included those who would be classed as *moichoi*. But the provision discussed above was not for killing but for imprisonment for ransom. So if we are correct to suppose that Drakon's legislation acknowledged the right to take non-lethal action against a *moichos*, this cannot have been incorporated in homicide law but must have been dealt with separately.

The third factor which supports the existence of a corpus that extended beyond homicide is the evidence that we have (largely from archaic poetic texts) for the existence of legislation (if unwritten) in a wide range of areas which were subsequently covered by legislation in the Greek cities. We have already encountered homicide and *moicheia* in Homer and we have seen further evidence for procedures against *moicheia* in a number of Greek cities. But we also find procedures for dealing with inheritance disputes in Hesiod,[30] and for theft in

26 Pollux 8.43:

> τῆς δὲ ἀργίας ἐπὶ μὲν Δράκοντος ἀτιμία ἦν τὸ τίμημα· ἐπὶ δὲ Σόλωνος, εἰ τρίς τις ἁλῴη, ἠτιμοῦτο.
>
> For idleness the punishment under Drakon was loss of rights (*atimia*), under Solon loss of rights on third conviction. I deal below with the discrepancy between Lysias and Pollux.

27 Schmitz (2001) 14.

28 Listed in MacDowell (1963) 70–81.

29 See Dem. 23.60, 24.113–14 and MacDowell (1963) 75–6.

30 Hesiod *Works and Days* 34–9 (see n. 9 above).

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the *Hymn to Hermes*, where the god is arrested in possession of the loot by what we would call a procedure of self-help.[31] This falls far short of direct evidence for the reconstruction of the Athenian law code in the late seventh century. But since these are areas of importance,[32] and areas on which the Athenians continued to legislate, the existence of comparable enactments elsewhere makes it on the whole likely that seventh-century Athens too had a substantial body of unwritten laws in existence prior to the advent of written law late in the century. Drakon had a substantial corpus on which to draw. It is also worth noting here the content of the earliest inscribed law we have, from Dreros in the seventh century,[33] which deals with constitutional matters. Dreros is not Athens; but this example confirms that there is nothing inherently implausible in the ancient claims for a body of Drakonian law beyond homicide.

Here we need to bear in mind the evidence of *Ath. pol.* for the existence of written judgments prior to Drakon.[34] Though we tend to focus on homicide against the background of continuing unrest and (some) political violence in the seventh century, there must have been areas for instance in the area of private litigation and property matters where judgment had given rise to principles rather like the emergence of the

31 *H.Hom.Merc.* 313–18:

> Αὐτὰρ ἐπεὶ τὰ ἕκαστα διαρρήδην ἐρέεινον
> Ἑρμῆς τ' οἰοπόλος καὶ Λητοῦς ἀγλαὸς υἱὸς
> ἀμφὶς θυμὸν ἔχοντες· ὁ μὲν νημερτέα φωνὴν
> <. . . . . .>
> οὐκ ἀδίκως ἐπὶ βουσὶν ἐλάζυτο κύδιμον Ἑρμῆν,
> αὐτὰρ ὁ τέχνῃσίν τε καὶ αἰμυλίοισι λόγοισιν
> ἤθελεν ἐξαπατᾶν Κυλλήνιος Ἀργυρότοξον·
>
> Hermes the shepherd and Leto's glorious son bluntly disputed each point
> as they quarrelled; Apollo, speaking truly
> . . .
> not unfairly *sought to seize* glorious Hermes for the cows;
> but he with tricks and cunning words,
> the Cyllenian, tried to deceive the god of the silver bow.
> (Trans H. G. Evelyn-White, adjusted)

32 As Thomas (2005) 54 puts it, these are the 'rules that constantly cause trouble'.

33 Meiggs–Lewis (1969) no. 2.

34 *Ath. pol.*3.5:

> θ[εσ]μοθέται δὲ πολλοῖς ὕστερον ἔτεσιν ἠρέθησαν, ἤδη κατ' ἐνιαυτὸν αἱρουμέ[νων] τὰς ἀρχάς, ὅπως ἀναγράψαντες τὰ θέσμια φυλάττωσι πρὸς τὴν τῶν ἀμφι[σ]βητ[ού]ντων κρίσιν.
>
> The Thesmothetai were selected many years later, when the officials were already chosen annually, in order to write down the thesmia and preserve them for use in the judgement of disputes.

It has been suggested plausibly (e.g. Rhodes (1981) 102, Gagarin (1986) 56) on the basis of the form – not *thesmoi*, the normal term for the laws of Drakon, but *thesmia*, literally 'things related to *thesmoi*' – that these are judgments which serve as precedents. We must of course recognise the possibility that what we have is intelligent reconstruction rather than hard fact. But the assertion is plausible enough, to the extent that the transition to written law is less abrupt, if writing has already started to play a role in the area of law. A complementary continuity between pre- and post-inscription administration of justice can be seen in the role of the *mnemones*, 'remembrancers', in the age of written law, discussed by Thomas (1992) 69–70, (1996) 19–23.

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English common law system; our source indicates that these were preserved for the exclusive use of the *thesmothetai* and so were not widely available. In a context in which the creation of written law probably reflects an attempt to increase control over magistrates, a clarification of their powers may also have figured in the written prescripts. Here the example of Dreros is again relevant. Homicide was not the only area in which clarification would be of value. There is also another dimension to these *thesmia*. Their existence would add to the material available to Drakon in creating a written text. He was not creating written law in a vacuum; some at least of the work had been done. Again none of this establishes beyond doubt the existence of a body of law which goes beyond homicide; but it does establish the potential value of such a code in its historical context and the feasibility of its existence.

This does not of course indicate that the corpus of inscribed law was at this stage comprehensive. Rosalind Thomas has suggested recently that the early written codes focused on areas deemed to be particularly important rather than attempting to cover all areas of dispute and misconduct.[35] The suggestion is inherently plausible. It is borne out by the code of Gortyn and the Twelve Tables in Rome, also by the nature of Athenian law in the Classical period, which left some areas of activity either unregulated or with minimal or partial legislative intervention; for instance contract, buying and selling. Only philosophers ever wanted a comprehensive law code. This, however, takes me to the most difficult aspect of legal cover. Ruschenbusch in a magisterial paper suggested that Drakon's laws covered only delictual litigation.[36] This cannot be refuted absolutely. However, there is one important hint that pre-Solonian law was wider than Ruschenbusch suggests. We have a law text cited which explicitly enacts the right to make wills. The law cited at [Demosthenes] 46.14 says:

> Ὅσοι μὴ ἐπεποίηντο, ὥστε μήτε ἀπειπεῖν μήτ' ἐπιδικάσασθαι, ὅτε Σόλων εἰσήει τὴν ἀρχήν, τὰ ἑαυτοῦ διαθέσθαι εἶναι ὅπως ἂν ἐθέλῃ, ἂν μὴ παῖδες ὦσι γνήσιοι ἄρρενες, ἂν μὴ μανιῶν ἢ γήρως ἢ φαρμάκων ἢ νόσου ἕνεκα, ἢ γυναικὶ πειθόμενος, ὑπὸ τούτων του παρανοῶν, ἢ ὑπ' ἀνάγκης ἢ ὑπὸ δεσμοῦ καταληφθείς.
>
> All those who had not been adopted when Solon entered upon his office, and so could neither renounce nor claim an inheritance, are to have the right to dispose of property by will as he may see fit, if there are no legitimate male children, unless his mind is impaired by one of these things, madness or old age or drugs or disease, or unless he is influenced by a woman, or under duress or held captive.

35 Thomas (2005) 54. See also Thür (2007) 26–7. More radically Hölkeskamp (1992) 89ff., (1999) 262ff. argues from the fact that only isolated enactments are cited by later sources that the early laws were themselves single enactments intended to meet specific problems. The argument is highly tendentious. See especially Osborne (1997) 78–9.

36 Ruschenbusch (1960) 148.

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Even if the status of this document is questioned, the broad content and some specifics of wording are confirmed both by the summary which follows in the speech and (if we distrust that) the text is independently confirmed by the speaker at [Demosthenes] 44.68:

> "ὅσοι μὴ ἐπεποίηντο" φησίν "ὅτε Σόλων εἰσῄει εἰς τὴν ἀρχήν, ἐξεῖναι αὐτοῖς διαθέσθαι ὅπως ἂν ἐθέλωσιν."
>
> 'All those who had not been adopted,' it says, 'when Solon entered upon his office are to have the right to dispose of property by will as they may see fit.'

It gives that right to 'all who were not adopted when Solon entered his office'. My interest here is in the restrictive clause excluding adopted sons from testamentary freedom, which explicitly takes us to the period before Solon. It appears to indicate that the law before Solon allowed for formal adoption. We can also infer that the law which preceded Solon made no allowance for free disposal of property or at least limited it. All this suggests that Drakon's law also included rules on succession. Given the importance of succession, this does not surprise. How much prescription was included in this area is irrecoverable and for my present purposes irrelevant. The important point is that the text suggests that Drakon's legislation was not simply delictual, as Ruschenbusch supposed.

So much then for scope. I turn now to the spirit of the laws. The best-known feature of Drakon's laws was their severity. Drakon was – well – draconian. This view of Drakon has occasionally been contested in passing. But in general it simply sits unquestioned in the scholarly tradition. There is no suggestion of gratuitous cruelty. Alongside the tradition of severe punishment, there survives a tradition of Drakon as a figure of integrity, as Schlesinger demonstrated long ago. He is the Cato of ancient Athens.[37] The tradition of severity may have begun quite early. We first encounter it in a pun attributed to Herodikos in the fifth century cited in Aristotle's *Rhetoric*;[38] even if we are sceptical of the attribution, we can certainly take the tradition to the beginning of the fourth century. In Lysias fr. 40b (cited above) we are told that Solon changed the penalty in the law on

37 See on this Schlesinger (1924).

38 *Rhetoric* 1400b20ff:

> ἄλλος ἀπὸ τοῦ ὀνόματος, οἷον ὡς ὁ Σοφοκλῆς
> σαφῶς σιδήρῳ καὶ φοροῦσα τοὔνομα,
> καὶ ὡς ἐν τοῖς τῶν θεῶν ἐπαίνοις εἰώθασι λέγειν, καὶ ὡς Κόνων Θρασύβουλον θρασύβουλον ἐκάλει, καὶ Ἡρόδικος Θρασύμαχον "ἀεὶ θρασύμαχος εἶ", καὶ Πῶλον "ἀεὶ σὺ πῶλος εἶ", καὶ Δράκοντα τὸν νομοθέτην, ὅτι οὐκ ἀνθρώπου οἱ νόμοι ἀλλὰ δράκοντος (χαλεποὶ γάρ).
>
> Another topic is derived from the meaning of a name. For instance, Sophocles says,
> 'Certainly you are iron, like your name.'
> This topic is also frequently employed in praise of the gods.
> Konon used to call Thrasyboulos 'bold in counsel,' and Herodikos said of Thrasymachos, 'You are always bold in fight,' and of Polos, 'You are always *polos* (colt)' and of Drakon the legislator that his laws were not those of a man, but of a snake, so harsh were they.

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idleness from death under Drakon to a fine of 100 drachmas for the first offence to loss of citizen rights on three convictions. We shall return below to what this means in practice. The key point at this stage of our discussion is that when we first encounter him as a person rather than the name of a code, Drakon is presented as more severe than Solon. Aristotle twice refers to the severity of the laws, on one occasion dismissing them as noteworthy only for their harshness.[39] Demades famously said of Drakon that his laws were written not in ink but in blood.[40] By the time of Plutarch this tradition has been elaborated with anecdote. Allegedly Drakon was asked why he set the penalty at death for so many offences and his response was that he felt that the smaller offences deserved death and he had no more severe penalty for the larger offences. The anecdote is suspect. But the point here is not the historicity of the anecdote but the continuity of the tradition of Drakon's severity.

In some key points the tradition is likely to be sound. We are informed that he set the penalty for theft at death irrespective of the value of the article stolen. Plutarch's testimony on this point is echoed by Aulus Gellius.[41] There is no good reason to doubt this. As far as we know, the Athenian law of theft in the Classical period did not persistently use value as a criterion for determining the penalty in cases of theft. Cohen has argued persuasively that the key differentiator is the circumstance of commission or detection.[42] Value of the stolen object is used intermittently in legislation in use in the Classical period but there is no coherent scale of values and in some cases no reference at all in the law to value. So it is plausible that value played little or even no role in Drakon's treatment of theft.

Severity is also underlined by the statement of Pollux that the law of idleness under Drakon imposed *atimia*, while Solon brought in a 'three strikes' rule, that *atimia* resulted from three convictions. Given the state of our evidence it is impossible to determine with confidence which is the more reliable source. Though superficial considerations of chronology seem to demand that we accept the statement of Lysias that Drakon set death as the penalty for idleness at face value, the issue is not so simple. Firstly, Pollux is generally a good source for Drakon. Much of what we know about Drakon's homicide procedure comes from Pollux. He has a source which knows something about Drakon. Secondly, where Pollux is simply relaying useful information, Lysias is arguing a case.

39 Aristotle *Pol.* 1274b 16–18:

> ἴδιον δ' ἐν τοῖς νόμοις οὐδὲν ἔστιν ὅτι καὶ μνείας ἄξιον, πλὴν ἡ χαλεπότης διὰ τὸ τῆς ζημίας μέγεθος.
>
> There is nothing distinctive or memorable in the laws, beyond the harshness of the penalty.

40 Plutarch *Solon* 18.

41 Aulus Gellius 11.18.3:

> In illis legibus furem cuiusmodicumque furti supplicio capitis poeniendum esse et alia pleraque nimis severe censuit sanxitque.

Alkiphron 2.38.3 in contrast presents both Solon and Drakon as punishing theft with death.

42 Cohen (1983) 40, 60

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And it is striking that the case in question is a prosecution for idleness. With an ulterior motive (jurisprudence in the orators is rarely objective), the orator may be less reliable here than the grammarian.

But it is possible that both are telling us the same story in different terminology. The current consensus is that *atimia* in the archaic period meant outlawry. If this is correct (and I confess I am not entirely sure), the *atimos* was outside the protection of the law, with death as a real prospect for anyone who did not flee into exile.[43] So the two sources are not widely separated. There is still a complication to note. It has been argued[44] that the terms *atimos* and *atimia* appear to mean the same thing in Solon's laws as in Drakon's. If so, though the gap between the two legislators is narrowed, Solon's law certainly emerges as more lenient than Drakon's. Solon has also significantly increased the flexibility available.

But there is reason to hesitate before acquiescing too readily in the undifferentiated picture of Drakon as draconian. The antithesis between Drakon and Solonian legislation is created by ignoring a key feature of Athenian legislation of the Classical period, its procedural flexibility.[45] Though attempts have been made recently to adjust the picture of comprehensive flexibility which has enjoyed widespread popularity recently,[46] it remains the case that Athens often had more than one procedure operational in a given area and that in some circumstances at least the prosecutor had a choice between different procedures, with different consequences for himself in terms of kind and scale of satisfaction or compensation and for the accused in terms of scale and nature of punishment. In Classical Athens, a thief who could not be apprehended on the spot could only be tried through a private suit, with compensation going to the victim. But a thief at night could be killed with impunity and other kinds of property theft exposed the thief to summary arrest with the prospect of execution on confession or conviction. The neat, implied contrast between Drakon and Athenian law of the Classical period is created by selective treatment of the evidence. Fifth- and fourth-century Athenians were happy to execute for theft, even of small sums. Plutarch may also be influenced by Roman law on theft, which was more lenient than Athenian law even at the date of the Twelve Tables and by the time of the Principate prescribed pecuniary compensation for all categories of theft.[47]

This is symptomatic of a larger process of exaggeration of the severity of Drakon's laws. It is illuminating here to look at the way in which Plutarch represents the relationship between Solon and Drakon. We are told there (*Solon* 17) that Solon abandoned Drakon's laws because of their severity:[48]

43 Ruschenbusch (1960) 149 suggests that *atimia* in this sense was the standard penalty for offences against the state. However, the availability of *apagoge* and *endeixis* in the Drakonian legislation (discussed below) suggests a desire to limit the use of extreme self-help.

44 Hansen (1976) 75–8.

45 The classic statement is Osborne (1985), though the position is already anticipated by Hansen (1976) 120, (1975) 9. See also Todd (1993) 122, 160–3, Fisher (1990) 127

46 Carey (2004).

47 See in brief Riggsby (2010) 190–1.

48 Gellius 11.18.4 disagrees only in making it a matter of tacit common consent:

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> Πρῶτον μὲν οὖν τοὺς Δράκοντος νόμους ἀνεῖλε πλὴν τῶν φονικῶν ἅπαντας διὰ τὴν χαλεπότητα καὶ τὸ μέγεθος τῶν ἐπιτιμίων. μία γὰρ ὀλίγου δεῖν ἅπασιν ὥριστο ζημία τοῖς ἁμαρτάνουσι θάνατος, ὥστε καὶ τοὺς ἀργίας ἁλόντας ἀποθνῄσκειν, καὶ τοὺς λάχανα κλέψαντας ἢ ὀπώραν ὁμοίως κολάζεσθαι τοῖς ἱεροσύλοις καὶ ἀνδροφόνοις.
>
> In the first place, then, he repealed the laws of Drakon, all except the homicide laws, because of their severity and the scale of the penalties. For one penalty was assigned to almost all offences, death, so that even those convicted of idleness were executed, and those who stole greens or fruit received the same punishment as those who committed sacrilege or murder.

The phrase ὀλίγου δεῖν here ('almost') may be revealing; unless it is merely a rhetorical flourish to suggest a large hinterland of knowledge behind the specific statement, it may reflect an awareness that the reality was a little more complicated than the myth. Be that as it may, we can be sure that though the first statement came from the *Ath. pol.*, what follows did not, since *Ath. pol.* notes only the fact of the annulment of Drakon's laws. Like many traditions, this one gathered momentum with time. But since the severity of Drakon is attested by the late fifth century, Plutarch's explanation for Solon's intervention probably reflects an old tradition. The reputation of Solon as a moderate and a man who protects the weak, together with his status as sage, would tend to generate by contrast a Drakon who lacked this moderation. Solon and Drakon become antithetical elements in a binary structure. It is probable (as was suggested to me several years ago by a student questioner in Corfu) that the process started with Solon himself, whose propaganda for his reforms tells a before and after story which was for Greeks of the Classical period the only contemporary fixed account of Athens at the end of the seventh century. The binary opposition was helped by Drakon's name, which is already the source of a pun in Aristotle; 'Snake' is not a good name for a legislator. It also fits into a larger tendency to stress the severity of early law codes. We have already seen the story of the anonymous king of Tenedos. The story that Zaleukos allowed the blinding of adulterers caught in the act falls into the same pattern, which is based ultimately on the past/present antithesis (as well as the prevalence of the story pattern of the lawgiver caught by his own law).

The structural antithesis I offer here is in part hypothetical. But it is not just hypothesis. For there is some evidence that Drakon's severity has been exaggerated. The first piece of evidence is the surviving homicide law, which allows for pardon by relatives in restricted cases in the case of unintentional killing,[49] as well as pardon by the victim before dying.[50] It also allows for a person accused of intentional homicide to withdraw unhindered into exile after his first speech instead of waiting for the outcome of the trial.

> Eius igitur leges, quoniam videbantur impendio acerbiores, non decreto iussoque, set tacito inlitteratoque Atheniensium consensu oblitteratae sunt.

49 See above p. 9.

50 Dem. 37.59.

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The reasons for these provisions are unlikely to be humanitarian. They almost certainly embody aspects of pre-existing law, inscribing established family rights. If one accepts (as I accept) that homicide law took the issue of pollution seriously, they also note the collective interest in removing a source of pollution and allow this to override the individual and family. By allowing the accused to escape unhindered they impose the severe penalty of exile and prevented feuding from destabilising Athenian society. But my point is not that the laws were humanitarian, simply that death was not inevitable. The Athenians had evidence that Drakon's laws did not unfailingly impose death but they chose to ignore it.

A further (though rather more ambiguous) piece of evidence is the argument in Plutarch for the existence of the Areopagos before Solon, which seems to envisage exile in the pre-Solonian system for offences other than homicide:

> ὁ δὲ τρισκαιδέκατος ἄξων τοῦ Σόλωνος τὸν ὄγδοον ἔχει τῶν νόμων οὕτως αὐτοῖς ὀνόμασι γεγραμμένον· "ἀτίμων ὅσοι ἄτιμοι ἦσαν πρὶν ἢ Σόλωνα ἄρξαι, ἐπιτίμους εἶναι, πλὴν ὅσοι ἐξ Ἀρείου πάγου ἢ ὅσοι ἐκ τῶν ἐφετῶν ἢ ἐκ πρυτανείου καταδικασθέντες ὑπὸ τῶν βασιλέων ἐπὶ φόνῳ ἢ σφαγαῖσιν ἢ ἐπὶ τυραννίδι ἔφευγον ὅτε ὁ θεσμὸς ἐφάνη ὅδε."
>
> Yet Solon's thirteenth *axon* contains the eighth of his laws recorded in these very words: 'All those deprived of rights who were deprived of rights before the archonship of Solon, shall have rights and franchises, except such as were condemned by the Areiopagus, or by the ephetai, or in the prytaneion by the kings, on charges of murder or homicide, or of seeking to establish a tyranny, and were in exile when this ordinance was made public.'

The precise interpretation depends on our view of *atimia*; but what is clear is that the system before Solon allowed for penalties other than death.

There is corroborative evidence in another passage in Pollux (9.61), which speaks of a provision in the law of Drakon for someone to pay a fine or penalty of twenty oxen:

> καὶ μὴν κἀν τοῖς Δράκοντος νόμοις ἔστιν ἀποτίνειν εἰκοσάβοιον·
>
> And indeed in Drakon's laws occurred the phrase "pay a twenty-oxen".

The passage in question is likely to be reliable, because it is not trying to make a point about substantive law; it is commenting only on language, and the word 'pay' is not necessary to the argument, only the syntax of the citation. Now twenty oxen is a very high price in a peasant economy. This is a heavy fine or compensation. But fines were regularly heavy (at least in certain contexts) in Classical Athens. So without the context we should refrain from judgement for or against a more severe system in the seventh century. The point that matters however is simply that death is not an option (or at the very least not the

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only option) here. Drakon is less draconian than his reputation and his legislation is probably more diverse than the later tradition suggests.

Finally, we are told that Solon invented third-party intervention:

> δοκεῖ δὲ τῆς Σόλωνος πολιτείας τρία ταῦτ' εἶναι τὰ δημοτικώτατα· πρῶτον μὲν καὶ μέγιστον τὸ μὴ δανείζειν ἐπὶ τοῖς σώμασιν, ἔπειτα τὸ ἐξεῖναι τῷ βουλομένῳ τιμωρεῖν ὑπὲρ τῶν ἀδικουμένων, τρίτον δὲ <ᾧ καὶ> μάλιστά φασιν ἰσχυκέναι τὸ πλῆθος, ἡ εἰς τὸ δικαστήριον ἔφεσις.
>
> The three most democratic features of Solon's constitution seem to be these: first and most important the prohibition of loans upon the person, secondly the right of anybody who wished to exact redress on behalf of injured persons, and thirdly, what is said to have been the chief source of the power of the mass, the appeal to the jury-court. (Trans. H. Rackham, adjusted)

It is important to note what this text does not say; Solon significantly adjusted Athenian legal procedures but he did not invent the private suit. If we are right for instance to suppose that there were laws in existence to deal with inheritance before Solon, then unless we suppose that the penalty for failure in an inheritance case was death, we have to suppose that swathes of Drakon's legislation allowed for simple redress on an individual basis.

So what do we have so far? A body of law which in many respects (we cannot say all) reflects pre-existing practices; which probably focused on key areas of dispute rather than aiming for comprehensive cover but which went beyond homicide. A corpus which was probably severe and relatively inflexible but less severe than it was later taken to be.

It is now time to press the evidence a little harder. We are told by the *Ath. pol.* (7.1) that after Solon the Athenians 'no longer used Drakon's laws apart from those on homicide' (τοῖς δὲ Δράκοντος θεσμοῖς ἐπαύσαντο χρώμενοι πλὴν τῶν φονικῶν). We should perhaps linger a little over this. Certainly Solon's intervention in the Athenian legal system was radical. Structurally he revolutionised it. The introduction of the third-party *graphe* added a completely new dimension to Athenian law. There must have been public actions of some sort before Solon, though it is unclear how they worked, and the author of *Ath. pol.* is careful not to say that Solon invented the public action; he invented the *graphe* in its classical form as a means of *third-party* intervention to deal with offences *against the individual*. We are told by a source, which seems well informed, that the Kylonians were due to be tried by the Areopagos when they were massacred.[51] Solon did not invent the idea of the public action. He extended the scope of the public action dramatically, but there was legislation already in existence to deal with political offences. The (unrealised) trial of the Kylonians is an example of an action which is *politikos* in the narrow sense of 'political' as we understand it. But there is good evidence that some actions which were classified as public in the Classical period (but not necessarily political in the narrow

51 Schol. Ar. *Knights* 445, Putarch *Solon* 12.

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sense) were already in place in Drakon's day. This applies specifically to some instances of what are often called self-help procedures.[52] Confinement of seducers is one, as we saw above. Summary arrest was another. The homicide law used the verb ἀπάγειν of the right to arrest a returning homicide.[53] So we can add this to our procedures which predate Solon.[54] *Endeixis*, a procedure which seems to involve the laying of information about an offence with a magistrate and the related procedure of summary arrest, again is attested for Drakon's day, as we know from Demosthenes 23.51.[55] It is more difficult to say anything about the other procedure which seems to belong with these, *ephegesis*, in which an official is led to the scene of a delict by someone witnessing it.

What is not clear in all of this is whether the type of *graphe* directed against a delict without an individual victim which we find in the Classical period was available under Drakon, that is, whether the system allowed for an individual to bring a formal action (without direct intervention of the sort envisaged in procedures such as *apagoge*) for offences against the *polis*.[56] The summary procedures listed above (*apagoge*, *endeixis* and *ephegesis*) all seem to presuppose intervention during an offence, at least in their classical form; they leave a substantial lacuna in apparently not allowing for intervention after the fact. Even archaic Athens, a fraction of the size of its fifth-century dimensions both in population and in extent, would have found it difficult to rely solely on magistrates with limited resources to deal with all issues. The existence of something resembling what was later called *graphe* would assist magistrates by incorporating an element of civic support based on citizen initiative. This also makes better sense of the success of Solon's introduction of the third-person *graphe*. The new procedure is no longer a blue-skies invention but a recognition and expansion of the potential inherent in existing legal processes. We may have a pointer toward both the concept and the punishment of such offences under Drakon in the action against idleness, if this does go back beyond Solon.

52 The important role played by self-help in Drakon's laws is stressed by Ruschenbusch (1960) 146, 151; see, however, n. 43 above.

53 Dem. 23.28, 31.

54 Here too Drakon probably enshrined pre-existing procedure, since the process in *H.Hom.Herm* (see n. 31 above) involves the seizure of a thief and his interrogation by a figure in authority which resembles in many respects the treatment of the *kakourgos* in Athens in the historical period.

55 Dem. 23.51:

> Ὁ μὲν νόμος ἐστὶν οὗτος Δράκοντος, ὦ ἄνδρες Ἀθηναῖοι, καὶ οἱ ἄλλοι δὲ ὅσους ἐκ τῶν φονικῶν νόμων παρεγραψάμην· δεῖ δ' ἃ λέγει σκέψασθαι. "κατὰ τῶν ἐνδεικνύντων" φησὶ "τοὺς κατιόντας ἀνδροφόνους ὅποι μὴ ἔξεστι δίκας φόνου μὴ εἶναι."
>
> This statute, men of Athens, is Drakon's, like all the others from the homicide laws which I have cited for comparison; and you must pay attention to what it says. 'No man is to be liable to prosecution for homicide for laying information against killers who return from exile illegally.'

56 Cf. Ruschenbusch (1960) 149: 'Die öffentlichen Straftatbestande der Bestechung im Amt, der unrechtmässigen Bereicherung am Gemeindegut, des Hochverrats und evtl. der Feigheit vor dem Feinde sind der drakontischen Zeit bekannt gewesen. Über ihre Behandlung im einzelnen sind wir jedoch nicht unterrichtet.'

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But unfortunately, even if we accept the existence of this offence under Drakon, we know nothing about procedure and any of the summary procedures would in theory be possible.

We do, however, have good reason to believe that the *graphe* in its full Solonian range was a new phenomenon, since it allowed initiative not just as victim to secure redress nor on behalf of the city to deal with offences against the state but on behalf of a third party. If we focus on the practical results of this for the legislator and the legislation, we can immediately see the need for an unspecified but substantial number of new laws putting in the place the possibility of *graphe* in a range of circumstances. As well as this wholesale creation of new laws, there was a need for procedural change to old laws. *Ath. pol.* identifies *ephesis* to a law court as one of the most democratic of Solon's reforms. The laws which he found in place must have specified the penalties available to a magistrate in a range of cases. Though we cannot cite specific evidence, what we know of classical Athens suggests that the penalties available will have varied from some form of assessment of compensation to fixed punishments. The introduction of appeal to the courts meant that in all cases there must have been at least an additional section to add, which allowed the possibility of appeal against the magistrate's decision and/or set an upper limit on his capacity to punish on his own initiative. The continuation of magisterial discretion within fixed limits is indicated by the survival into the Classical period of *epibole*, cash-limited penalties imposed by individuals or bodies other than the dikasteria. Finally, there must have been laws needed for some of the other aspects of Solon's reforms. For instance, if there is any truth in the statement that Solon forbade loans made on the security of the person, presumably a law was needed for this.[57]

In introducing *graphe* to protect the individual victim Solon significantly expanded the flexibility of procedure in Athenian law. But the *Ath. pol.* at no point states or implies that Solon invented or meddled with the basic notion or nature of the private action. This supports the view taken above that there was a range of laws already in existence allowing for private actions in many of the areas covered by the new public actions. It is also likely that in some areas, such as theft, there was already a degree of flexibility in the system. The unifying concept in cases of self-help is flagrance, as Cohen and Hansen have stressed.[58] If this was also a feature of self-help in the seventh century (and this is suggested by what we actually find in citations of Drakon's laws, in what we see in the pre-Drakonian verse texts, and the hints of laws dealing with self-help from other Greek

57 We have evidence from Lysias for old laws relating to the setting of interest (10.18):

> Τὸ ἀργύριον στάσιμον εἶναι ἐφ' ὁπόσῳ ἂν βούληται ὁ δανείζων. τὸ στάσιμον τοῦτό ἐστιν, ὦ βέλτιστε, οὐ ζυγῷ ἱστάναι ἀλλὰ τόκον πράττεσθαι ὁπόσον ἂν βούληται.
>
> Money shall be set out at whatever rate the lender may choose. 'Set out' here, my good man, is not to place in the balance, but to fix interest at such amount as one may choose.

Though the ambiguity in the law cited (it is unclear whether coin is envisaged) makes one reluctant to posit Solon as the source, it may give an insight into the formulation of the laws, since as well as prohibiting it may also have defined what was permitted.

58 Cohen (1983) 58–60.

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states), then it is likely that archaic Athens before Solon had procedures to deal with non-flagrant breaches of the law. In which case an action such as the *dike klopes* is likely to have existed before Solon (together with the right to search which survived into the Classical period). Certainly the right of search, which was embedded in the legislation, has all the hallmarks of self-help which we find in other laws we have ascribed to Drakon.

This is of course conjectural. But it raises the possibility that the continuity from Drakon to Solon was still greater than I have suggested and adds to one's reservations about the statement that Solon abandoned all of Drakon's laws. It is probable that some of Solon's intervention was amendment, not annulment. Over and above the survival of old clauses in lightly redrafted laws, Drakon appears to have influenced the range of Solonian legislation.

In one sense the *Ath. pol.* is right. In the Classical period the only functioning laws whose *ipsissima verba* could be traced back to Drakon were those on homicide. But the blanket statement of annulment obscures the probability that some of Solon's task was editing. This in turn reflects the nature of law as text throughout Athenian history. In a world without lawbooks editing is inevitably a radical process. In a world in which statutes were by definition material monuments, Solon had to replace not just specific words but also the physical text. But if we look at the hints both of substantive overlap and of procedural survival, it is difficult to resist the conclusion that the statement that the Athenians stopped using Drakon's laws considerably oversimplifies the situation. Though one could not reasonably argue (even in a revisionist reading like this one) that Drakon as lawgiver was as influential in Classical Athens as Solon, there was a lot more of Drakon in fifth and fourth century Athens than the Athenians either realised or, had they realised, would have cared to admit.

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