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ναυσὶ δ᾽ οὔτε πεζὸς ἰὼν κεν εὕροις
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(Pind. *Pyth.* 10. 29–30)

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THE NATURE OF SELF-DEFENSE IN DRACO'S HOMICIDE LAW: THE RESTORATION OF *IG* I^3 104, LINES 33–35*

As all those who have studied epigraphy know, most inscriptions do not survive intact. In many cases, only fragments are preserved, and in many other cases the stone is damaged, making it impossible to read every letter. Given this situation, many scholars have attempted to restore the missing text in various ways. The texts of many types of inscriptions are often formulaic, and one can therefore restore formulas that are wholly or partly missing in one inscription on the basis of formulas found in similar types of inscriptions. In other cases, one can attempt to restore the missing parts of an inscription on the basis of passages found in literary texts. For instance, there is much information about Athenian law found in the Attic orators and other sources that can help us to restore missing phrases in inscriptions. But scholars must use the evidence found in the literary sources with caution. One cannot just select any phrase from a literary work and place it in a gap in an inscription. Before using the evidence from a literary text to supplement missing words, one must determine, first, whether the information found in the literary text is reliable and, second, whether the information is relevant to the content of the inscription. In this essay, I will show how several scholars have used evidence from literary texts to restore a phrase in the text of Draco's homicide law preserved in an inscription without carefully analyzing the passages from the literary texts in which the phrase is found. As we will see, the words these scholars have restored in the text of Draco's homicide law come from a statute that has nothing to do with homicide; they are found in a law about assault (αἰκείας) and are therefore not relevant to Draco's law. The essay will also shed light on the nature of self-defense in Athenian homicide law and lead to a better understanding of the *Third Tetralogy* attributed to Antiphon.

* Robert Pitt, Mirko Canevaro and I are working on producing a new edition of *IG* I^3 104. I would like to thank them for their help with this essay. I dedicate this essay to Christian Habicht, who has helped me in many ways over the past thirty years with much appreciated advice and encouragement.

I. The Text of *IG* I³ 104, lines 33–35

An inscription found in Athens in the middle of the nineteenth century contains the republication of Draco's law about homicide, which was inscribed in 410/9 as part of the process "examining" the laws of Draco and Solon started that year (*IG* I³ 104).[1] Even though most of the prescript has been preserved (lines 1–9), the part containing the law of Draco (lines 10–58) is heavily damaged. As a result, scholars beginning with Köhler in 1867 have restored large parts of the text by drawing on literary sources.[2] Stroud based much of the text of the inscription he published in 1968 on the restorations proposed by Köhler,[3] and Gagarin accepted Stroud's text without question.[4]

One of Köhler's supplements was for the end of line 33: "Z. 33 stand [ἄρχον]τα χει[ρ]ῶ[ν ἀδίκων was auf Nothwehr gegen Misshandlungen deutet". Köhler did not provide any arguments or evidence to justify his restoration of the line. In 1898 Drerup noted that the phrase had been restored on the basis of a passage in Antiphon's *Third Tetralogy* (2. 1), but rightly noted that "Von Antiphon tetra. Γβ §1 wird nur behauptet daß der ἄρχων χειρῶν ἀδίκων dadurch schuld an seinem Tod gewesen sei, nicht aber, daß der Geschlagene das Recht gehabt habe, den Angreifer zu töten". Drerup therefore questioned Köhler's restorations in lines 33 and 34 and stated that there was no reason to restore a clause about self-defense in this section.[5] This restoration was however accepted by Stroud, who appears to have been unaware of Drerup's objections. Stroud claimed to find new letters to justify Kohler's restorations. In an essay about self-defense in Athenian law, Gagarin accepted Stroud's restoration and claimed that "a provision concerning killing in self-defense apparently occupied lines 33–36" of Draco's homicide law.[6] Gagarin repeated this view in his book about Draco's homicide law.[7]

In lines 33–35 of the inscription Stroud restores:

ἄρχον]τα χερ-
ôν ἀ[δίκον . . . . . 30 . . . . . χερ]ôν ἀδίκον κ-
τέ[νει

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[1] On the procedure of revising the laws see Canevaro–Harris 2012, 110–116 and Canevaro–Harris 2016, which refutes in detail Hansen 2016.

[2] Köhler 1867.

[3] Stroud 1968.

[4] Gagarin 1981, xiv–xv.

[5] Drerup 1898, 275.

[6] Gagarin 1978, 119. Cf. Gagarin 1997, 165–166 and Carawan 1998, 49; 199; 303.

[7] Gagarin 1981, 61–62.

First of all, one should note that the pair of words χειρῶν ἀδίκων found in several literary texts is not securely attested on the stone. According to Stroud's text, the end of line 33 and the beginning of line 34 appear to contain the word χερ|ὸν, and the end of line 34 the word ἀδίκον, but without the surrounding words, this could be accusative singular, neuter accusative singular, neuter nominative singular, or genitive plural. That is as much as one can state with certainty. One cannot be sure that the two words occurred together. Moreover we cannot be certain that this pair of words occurred in conjunction with any form of the verb ἄρχειν. In Stroud's text, the word ἄρχον]τα is restored, but the only letter Stroud could read was an *alpha*.

Robert Pitt re-examined the stone in November 2016 and reported that he could not confirm all the letters read by Stroud. He also examined photographs taken in June 2015 using RTI technology.[8] At the end of line 33 he could read only an *alpha* in space 47, a *chi* in space 48, and an *epsilon* in space 49. In space 46 is the base of a central upright, which could be a *tau* or another letter. The upright is visible on the stone and in the RTI file. Pitt could not fully confirm the *rho* read by Stroud in space 50; there is the base of a left upright in 50, which is consistent with *rho* or several other letters. At the beginning of line 34 there is most of a circular letter compatible with the omicron read by Stroud, but there is only the bottom of a left vertical stroke visible in space 2. At best one can with certainty read]AXE[.]|O[. ; no other letters can be read with certainty. At the end of line 34, there is a diagonal stroke compatible with an *alpha* in space 44. In general, what can be seen in space 45 is a diagonal stroke compatible with a *delta*, an *iota* in space 46, an *omicron* in space 48, a *nu* in space 49, and a *kappa* in space 50. In the first space of line 35 a *tau* can be read, but nothing can be read with certainty in the second space. Pitt could not confirm the reading of a possible upper horizontal trace with RTI in the second space. All that can be read with certainty at the end of line 34 and the beginning of line 35 is ĄĄIKONK|T[. This renders the restorations adopted by Stroud even more dubious, based on no more than a few letters. Above all, one cannot be certain that the word XEPON can be found on the stone or that the word AΔIKON can be linked to the word XEPON.

The next two sections will show that the phrase "starting unjust blows" (ἄρχων χειρῶν ἀδίκων) never occurs in passages about homicide but only in passages regarding the law about assault (δίκη αἰκείας). Antiphon's *Third Tetralogy* is not a case about self-defense but about killing after

[8] We would like to thank Charles Crowther for taking these photographs and combining them into a file using RTI technology.

provocation. The law about assault is mentioned there because the defendant is attempting to use an interpretation of the law about assault (αἰκείας), not because he is citing a law about self-defense in cases of homicide. Because there is no reason to believe that the phrase had anything to do with the law of homicide, there is no reason to restore the phrase in lines 33–35 of the inscription *IG* I^3 104 or to think that these lines contained a section about self-defense after "receiving unjust blows".

II. The Meaning and Context of the Phrase "Starting Unjust Blows"

The most extensive use of the phrase "began unjust blows" (ἦρξε χειρῶν ἀδίκων) occurs in the Demosthenic speech *Against Evergus and Mnesibulus* (Dem. 47). The speaker is a trierarch and a supervisor of his symmory, a group of contributors who were responsible for the upkeep of the fleet (22).[9] The trierarch was ordered to recover naval equipment from those who had failed to return it to the state (23). One of those from whom the trierarch was required to recover naval equipment was a man named Theophemus (25). The trierarch confronted Theophemus and asked him to return the equipment; when the latter refused, the trierarch summoned him before those in charge of dispatching the fleet (ἀποστολεῖς) and the supervisors of the dockyards (26). At the trial, Theophemus was convicted, but still refused to return the equipment (28–30). Theophemus claimed that others held the equipment, but never submitted any official written statement to this effect (31–32). At this point, the Council ordered all the trierarchs to recover the equipment in any way they could (33). After learning from Evergus, the brother of Theophemus, the location of his house, the trierarch went to the house and was met by a slave woman, who went to summon Theophemus (35). After Theophemus arrived, the trierarch asked him for an inventory of the equipment (36). When Theophemus refused, the trierarch asked him to state who had the equipment or to return it himself. If he did not, the trierarch said that he would seize property to satisfy the debt (ἐνέχυρα . . . λήψεσθαι, 37).[10] The trierarch then seized the slave, but Theophemus intervened to stop him. When the trierarch attempted to enter the house to seize some other property,

[9] For the difference between the *eisphora* symmories and the trierarchic symmories see Canevaro 2016, 51–53.

[10] Some translators render this phrase "take securities" but the phrase should be equivalent to the verb ἐνεχυράζειν, which means "seize property to satisfy an obligation". See Harris 2008.

Theophemus struck him on the mouth with his fist, and the trierarch retaliated (ἠμυνάμην, 38). It is important to observe the meaning of the verb ἠμυνάμην in this passage; it is clear that the trierarch was not defending himself to avoid serious physical harm, but returning blow for blow. Theophemus was not attempting to kill the trierarch, and the trierarch could have avoided further physical harm by retreating and was not acting under necessity. According to the trierach, Theophemus "began the unjust blows" (ἦρξε χειρῶν ἀδίκων, 39). After recounting the incident, the trierarch calls witnesses to testify that Theophemus struck the first blow (με πρότερον πληγέντα ὑπὸ τοῦ Θεοφήμου) and states that this constitutes assault (αἴκεια), that is, whoever starts unjust blows (ὃς ἂν ἄρξῃ χειρῶν ἀδίκων, 40). The trierarch and Theophemus each brought a private action for assault against each other (δίκην τῆς αἰκείας, 45). Before the public arbitrators, Theophemus promised to produce for torture the slave girl who witnessed the incident (45–46). The purpose of obtaining her testimony was to determine who "started the unjust blows" (ὁπότερος ἦρξε χειρῶν ἀδίκων) for that is "what constitutes assault" (αἴκεια, 47). This point is repeated at the beginning of the speech (7: ὁπότερος ἡμῶν ἦρξε χειρῶν ἀδίκων. τοῦτο γάρ ἐστιν ἡ αἴκεια. Cf. 15). What is clear from this speech is that the phrase "starting unjust blows" is from the law about assault and is not from a law about homicide. If there was a brawl in which two parties assaulted each other, the court had to decide who started the brawl. If a defendant on a charge of assault were the one to strike the first blow, he would be convicted of the charge. If he could prove that his opponent struck the first blow, he would be acquitted of a charge of assault. That is clearly the way the law was understood and applied in the two cases of assault mentioned in this speech. The phrase has nothing to do with a plea of self-defense against a charge of murder.

This is confirmed by a passage from Demosthenes' speech *Against Aristocrates* (Dem. 23. 50). The speaker is stressing the importance of intent and surrounding circumstances in cases of homicide as well as in other types of offenses. The speaker quotes from the law about assault: "You see how this is the case in all laws, not only in the laws about homicide. 'If someone strikes someone (ἄν τις τύπτῃ τινά)', the law says, 'starting unjust blows (ἄρχων χειρῶν ἀδίκων)'. Thus, if in fact he struck back (ἠμύνατο), he is not guilty (οὐκ ἀδικεῖ)". The language is compressed, but the meaning is clear. First, the speaker makes clear that he is not discussing the laws about homicide (οὐκ ἐπὶ τῶν φονικῶν). Second, the phrase occurs in a law about assault, not about homicide. Third, the law in effect absolves the person who struck back after being struck. In other words, the law granted the person who was struck by

another person the right to retaliate. But the speaker's analysis does not indicate how extensive the retaliation might be.

The phrase is found in two other speeches concerning assault. The first is in Isocrates' *Against Lochites* (20. 1). The accuser begins his speech by stating that all who were present testified that Lochites struck him (ὡς μὲν τοίνυν ἔτυπτέ με Λοχίτης, ἄρχων χειρῶν ἀδίκων), starting unjust blows. In the rest of the speech, the accuser describes his assailant's actions as ὕβρις (2, 3, 4, 5, 7, 9, 15, 16) and as assault (5: αἰκίας. Cf. 8). There is no discussion of homicide or the intent to kill in the speech.

The other passage is found in the speech *On Intentional Wounding* by Lysias (4. 1).[11] The accuser and the defendant had been competing to serve as a judge at the Dionysia. This led to some bitterness when the defendant was selected by lot and the accuser excluded, but the defendant claims that the two men were reconciled. The main charge in the speech is that the defendant entered the house of the accuser by force and wounded him (4. 5).[12] The defendant's entry into the house of the accuser appears to have been related to an ἀντίδοσις (4. 1). The defendant wishes to have a slave-girl tortured to provide evidence about the brawl, but the accuser would not agree (4. 10). Had they tortured the girl, they would have been able to discover the answers to the following questions: first, whether the defendant had contributed half of the money for her purchase or the accuser had paid the full price; second, whether the two men had been reconciled or not; third, whether the defendant came to the accuser's house because he had been summoned or without an invitation; and fourth, whether the accuser had started the fight (οὗτος ἦρχε χειρῶν ἀδίκων) or the defendant had struck first (ἐγὼ πρότερος τοῦτον ἐπάταξα, 4. 10–11). The phrase clearly occurs in the context of a dispute about which person struck the first blow in a brawl and does not concern the circumstances of a homicide.[13]

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[11] Todd 2007, 355 mistranslates the title (περὶ τραύματος ἐκ προνοίας) of the speech "Concerning a Premeditated Wounding", but elsewhere (282–283) translates the term πρόνοια as "previous knowledge", which is not the same. For an analysis of the term ἐκ προνοίας see Harris 2013, 183–189 with references to earlier analyses. For τραῦμα ἐκ προνοίας as intentional wounding see Phillips 2007.

[12] The defendant reports that the accuser alleges that he intended to kill him (Lys. 4. 5–6), but this claim is made only to prove that the defendant acted intentionally. The charge in the speech is wounding, not homicide, and the testimony of the slave is relevant to the question of who struck first, not about any intention to kill.

[13] Todd 2007, 377 n. 28 states that the expression derives from a phrase in a law on legitimate self-defense quoted at Dem. 23. 50 but does not see how this passage comes from the law about assault (αἰκείας) and not from the law of homicide.

The phrase occurs in a similar context in Aristotle's *Rhetoric* (2. 9. 1402 a 1–3). Aristotle is discussing "the fallacy of when and how" and gives two examples. This is a fallacy created by omitting a key fact, which alters the description of a situation. One of the examples Aristotle gives is the statement that "it is outrage (ὕβρις) to strike (τύπτειν) a free man". This is broadly true, but not in all cases. Aristotle points out that it is outrage only when the assailant "starts the unjust blows" (ἄρχῃ χειρῶν ἀδίκων). This means that if the assailant was not the first to strike and was striking back after being struck, he would not be guilty of outrage. Here again Aristotle is discussing two types of assault, one that is unprovoked and another that is provoked. It is only the first that counts as outrage (ὕβρις). It is clear that Aristotle is discussing cases of assault and when they qualify as outrage. The passage has nothing to do with homicide.

III. Antiphon's *Third Tetralogy*

After having examined the phrase in other passages, it is now possible to analyze how the phrase is used in the *Third Tetralogy* attributed to Antiphon.[14] Before examining these speeches, however, it is necessary to make a distinction between homicide committed in self-defense and homicide committed after provocation. When someone kills in self-defense, he is forced to use deadly violence in order to avoid serious harm to himself. The person who kills in these circumstances is acting out of necessity: he kills because he does not have an alternative. If he does not use deadly force, he risks serious harm if not death. The person who is threatened with deadly force does not have a choice: he must either respond with deadly force or suffer serious harm or death. In modern society, the person who kills in self-defense is considered innocent because he is acting out of necessity.

On the other hand, someone who kills after provocation is not under a serious threat of bodily harm or death and can avoid further harm by leaving the scene or appealing to by-standers. The person who kills after being struck in an insulting way has a choice: he can strike back or restrain himself without risk of further harm. In the Model Penal Code of the United States, which has been adopted by many states, killing after provocation is considered "voluntary manslaughter" and is distinguished both from a plea

[14] There is no reason to think that the laws and legal procedures assumed by the speaker in the *Tetralogies* are not those of Classical Athens. On the issue of the authorship of the Tetralogies see Sealey 1984 and Gagarin 1997 *passim*. Whoever wrote this work, the evidence examined in this essay shows that the author had a good knowledge of Athenian law and legal procedure.

of self-defense, which, if justified, is grounds for acquittal, and from first-degree and second-degree murder, both of which carry a heavier penalty than "voluntary manslaughter".

The laws of Athens recognized a plea of self-defense in two ways. First, the defendant accused of intentional homicide could argue that the victim had attacked "on the road", that is, had lain in ambush. A law inserted into the text of the speech *Against Aristocrates* by Demosthenes (23. 53) contains the following clauses:

> ᾽Εάν τις ἀποκτείνῃ ἐν ἄθλοις ἄκων, ἢ ἐν ὁδῷ καθελὼν ἢ ἐν πολέμῳ ἀγνοήσας, ἢ ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπ᾽ ἀδελφῇ ἢ ἐπὶ θυγατρί, ἢ ἐπὶ παλλακῇ ἣν ἂν ἐπ᾽ ἐλευθέροις παισὶν ἔχῃ, τούτων ἕνεκα μὴ φεύγειν κτείναντα.
>
> If anyone kills in athletic games involuntarily, or ἐν ὁδῷ καθελὼν, or during war in ignorance, or with his wife, or with his mother, or with his sister, or with his daughter, or with his concubine whom he keeps for the purpose of free children, one is not to go into exile because he has killed for one of these reasons.

In the analysis of the law following this text, the speaker does not discuss the meaning of this phrase ἐν ὁδῷ καθελὼν. In two entries in his lexicon about words in the Attic Orators, however, Harpocration explains the meaning of this phrase.

> (Η 6) ῞Η ἐν ὁδῷ καθελών· ἀντὶ τοῦ ἐνεδρεύοντα ἑλὼν, τουτέστι ἔν τινι ἐνέδρᾳ καταβαλών. Δημοσθένης ἐν τῷ κατ᾽ ᾽Αριστοκράτους.
>
> "Or taking on a road" instead of "taking while lying in ambush", that is, striking down (someone) lying in an ambush. Demosthenes in the *Against Aristocrates*.
>
> (Κ 5) Καθελών· Δημοσθένης ἐν τῷ κατ᾽ ᾽Αριστοκράτους φησὶν "ἢ ἐν ὁδῷ καθελών" ἀντὶ τοῦ ἀνελὼν ἢ ἀποκτείνας. ἐχρήσαντο δὲ οὕτω τῷ ὀνόματι καὶ ἄλλοι, ὡς καὶ Στησίχορος ἐν ᾽Ιλιοπέρσιδι καὶ Σοφοκλῆς ἐν Εὐμήλῳ.
>
> "Taking". Demosthenes in the *Against Aristocrates* says: "or taking in the road" instead of "killing". Other authors also used the word in this way such as both Stesichorus in the *Iliopersis* and Sophocles in the *Eumelus*.
>
> (Ο 2) ῾Οδός· Δημοσθένης ἐν τῷ κατ᾽ ᾽Αριστοκράτους φησὶν "ἢ ἐν ὁδῷ καθελών" ἀντὶ τοῦ ἐν λόχῳ καὶ ἐνέδρᾳ. τοιοῦτον δὲ εἶναι καὶ τὸ ῾Ομηρικόν φασιν "ἢ ὁδὸν ἐλθέμεναι".
>
> "Road". Demosthenes in the *Against Aristocrates* says "or taking in the road" instead of "in ambush or attack". They say that such an expression is also found in Homer (*Il.* 1. 151) "going on the road (to attack)".

One finds a similar explanation in Suda (s. v. ὁδός ο 47), which is the same as the explanation found in *P. Berol*. 5008.[15] Two of the authors of the most important surviving lexica from antiquity and one papyrus are therefore unanimous in their understanding of the phrase. What is more, they do not report any dissenting opinions. Either, on the one hand, Suda and the papyrus were drawing on Harpocration or a common source, or, on the other, Suda and papyrus were drawing on a different source from Harpocration. If the first scenario is correct, one has to ask why did Suda and Photius, who had access to more ancient literature than we do today, not question Harpocration's explanation but accepted it as correct. If the second scenario is correct, Harpocration on the one hand and Suda and Photius on the other are independent sources and therefore confirm each other. This should mean that the explanation agreed by all three authors should be reliable.[16]

Killing someone who attacked while lying in ambush was therefore one of the cases of "just homicide" or "homicide according to the laws" and was tried at the court of the Delphinion (Dem. 23. 53 with Harpocration s. v. ἐν ὁδῷ).[17] An attack from ambush was characterized by several features: first, the person who sets an ambush plans ahead and anticipates the arrival of his victim; second, the person lying in ambush is concealed from view until he emerges from his hiding place and attempts to take advantage of the surprise; and third, the person who attacks from ambush attempts either to kill or to capture as a slave his victim.[18]

The other way a defendant could reply to a charge of intentional homicide was to appeal to ἐπιείκεια, that is, extenuating circumstances.[19] Aristotle in the *Rhetoric* (1. 13. 15–16. 1374 b) states that one must distinguish among three types of actions: misfortunes (ἀτυχήματα), errors (ἁμαρτήματα) and vicious acts (ἀδικήματα), each of which require a different penalty. The first category clearly covers case of necessity because it includes acts that the person could not have anticipated and did not commit with malicious intent. Aristotle's analysis is not a theoretical

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[15] For discussion of the document at Dem. 23. 53 see Canevaro 2013, 64–70.

[16] *Pace* Sosin 2016.

[17] Sosin 2016 claims that the phrase "overtaking on the road" does not concern attack from ambush but cases in which someone is killed by a chariot, but this is not convincing. First, the ancient scholars who explain the phrase are unanimous in interpreting it as a case of ambush. Second, the case Sosin believes was covered by the phrase was already covered by other provisions in the law about homicide. Third, none of the passages in which the expression is found mention anything about vehicles.

[18] See Harris 2010, 132–133.

[19] On ἐπιείκεια see Harris 2013, 274–301.

discussion that bore no relationship to the ways in which Athenian judges made their decisions. One finds the same distinction in Demosthenes (18. 274–275). Several passages in the orators and some records of verdicts in the naval records show that the courts accepted pleas of necessity as grounds for acquittal.[20]

A case discussed by Demosthenes (21. 73–76) in his speech *Against Meidias* shows that the Athenian courts did not consider provocation as automatic grounds for acquittal. This was clearly a case of provocation and not a case of self-defense because Demosthenes makes it clear that Euaeon could have restrained himself without risk of further harm (Dem. 21. 73: ἀνασχόμενον καὶ κατασχόνθ᾽).[21] Demosthenes (21. 74) also compares Euaeon's case to his own, which he states was very similar (although Meidias' assault was much more insulting). Meidias struck Demosthenes in an insulting way, but Demosthenes did not strike back. Even though Euaeon did not restrain himself, Demosthenes was able to restrain himself and avoid further harm. Just as Demosthenes did not have to strike back out of necessity to avoid further harm, Euaeon was not forced to strike back at Boeotus and could have restrained himself without risk. If there was a law stating that the person who struck a person who had "started unjust blows" was innocent and entitled to acquittal, the court should have unanimously acquitted Euaeon because the circumstances of his actions would have precisely fit the terms of the law, which the judges swore to follow.[22] The fact that the judges were divided about how to apply the law clearly indicates that there was no statute that clearly applied in these circumstances. Half of the judges thought that Euaeon was guilty because they did not take the extenuating circumstances into account (μὴ ὅτι ἠμύνατο) and because he had caused death (ἀποκτεῖναι) and did not act against his will; the other half thought that extenuating circumstances ought to be taken into account and allowed Euaeon the right to retaliate

[20] See Harris 2013, 286–288, 298–300. Gagarin 1978 does not discuss ἐπιείκεια and pleas of necessity. Gagarin 1978, 113, followed by Carawan 1998, 91, believes that the law at Dem. 23. 60 applies to the case in which a person "kills someone forceably (*sic*) and unjustly seizing his property or himself", but the paraphrase of the law in Dem. 23. 61 shows that the law applied only to seizing someone's property, not someone's person. See Canevaro 2013, 70–71.

[21] The case is misunderstood by Gagarin 1978, 111, 117–118 and MacDowell 1990, 292–293. See Harris 1992, 78. Carawan 1998, 308–310 sees that the case is one of provocation, but does not draw out the implications of his view for our understanding of the nature of self-defense in Athenian law. Nor does he observe that I already made this point in 1992. He also mistakenly believes that the defendant relies on the clause in lines 33–35 of Draco's law.

[22] On the Judicial Oath see Harris 2013, 101–137.

more than equally (τὴν ὑπερβολὴν τῆς τιμωρίας), that is, to retaliate with deadly violence against an attack that was insulting (τῷ γε τὸ σῶμα ὑβρισμένῳ), but not life-threatening. This was a hard case in Athenian law because the statutes of Athens did not make a distinction between different types of intentional homicide, but grouped them all under one general rubric, φόνος ἐκ προνοίας, that is, intentional homicide.

It is now possible to examine the case in the *Third Tetralogy*. The accuser begins his first speech by discussing the serious nature of homicide. He then gives a brief account of the defendant's actions. He states that if the defendant had acted against his will (ἄκων), he would have been entitled to sympathy. But he alleges that the defendant was drunk (παροινῶν) and acted abusively (ὕβρει) without any restraint (ἀκολασίᾳ). He beat and choked (τύπτων τε καὶ πνίγων) him until he deprived him of life (τῆς ψυχῆς ἀπεστέρησεν αὐτόν). Because he killed his victim (ἀποκτεῖνας), he is subject to the penalties for homicide (τοῦ φόνου τοῖς ἐπιτιμίοις, 4. 1. 6). The accuser states that the judges have heard witnesses who were present when the defendant acted drunkenly (4. 1. 7).

The defendant starts his reply to the charges by arguing that the victim was responsible for his own death (ὁ ἀποθανὼν αὑτῷ αἴτιος) and much more responsible than the defendant. He then states that the victim "started with unjust blows" (ἄρχων γὰρ χειρῶν ἀδίκων), was drunk (παροινῶν), and offended a man who acted with greater self-restraint than he did (σωφρονέστερον, 4. 2. 1).[23] It is clear that he struck back with his fists and not with a weapon, a stone, or a piece of wood, but even if he had, he would still not be guilty. He supports his argument by stating that those who start a fight deserve to suffer in return not the same but greater and more harm (οὐ γὰρ ταὐτὰ ἀλλὰ μείζονα καὶ πλείονα δίκαιοι οἱ ἄρχοντες ἀντιπάσχειν εἰσί). The defendant argues that if he was hit by the victim's fists and retaliated with his fist for what he suffered, he is not guilty (4. 2. 2). The defendant is clearly relying on the law about assault, which, as we saw above, allowed the victim of an assault to retaliate, but did not indicate what degree of retaliation was permitted.[24] The law was obviously framed to apply to brawls in which two men struck each other, placed the blame on the person who started the fight, and absolved from guilt the person who retaliated. This is certainly how the law was applied in the case of the trierarch and Theophemus. In the *Third Tetralogy* the

[23] The accuser alludes to this argument at 4. 3. 2: τὸν γὰρ ἄρξαντα τῆς πληγῆς, τοῦτον αἴτιον τῶν πραχθέντων γενόμενον καταλαμβάνεσθαι ὑπὸ τοῦ νόμου.

[24] Gagarin 1978, 114–115 misunderstands the law and the speaker's use of the law. Carawan 1998, 301–308 sees that the case is not one of self-defense, but does not understand how the speaker uses the law about αἴκεια to support his case.

defendant is arguing that because the law placed the blame in a brawl on the person who started it, the person who started the brawl was responsible for whatever happened to him even if it caused his death. In other words, he is trying to stretch the meaning of the law about assault to cover his own case. There are many other examples of litigants in Athenian courts who attempted to exploit the "open texture" of law in similar ways.[25] There is no need to think that the defendant is appealing to a clause of the laws about homicide not attested in any other source. As Drerup noted, the defendant merely states that the person who started is responsible for the consequences of his actions.

It is important to observe that the defendant does not justify his actions by claiming that he was acting in self-defense.[26] If he had done so, he would have claimed that his victim was trying to kill him and that he had no other way of protecting himself than reacting with deadly force. In his speech, however, he does not make these claims, but argues that he was justified in striking back with greater force than his assailant. And the accuser in his second speech clearly implies that the victim intended only to strike, but not to kill (4. 3. 4).

In the same speech the defendant later argues that if what happened was an accident, the victim was responsible for the accident because he struck the first blow. If what happened was the result of irrational behavior (ἀβουλία), the victim died as a result of his own irrational behavior because he was not in his right mind when he struck the defendant (οὐ γὰρ φρονῶν ἔτυπτέ με, 4. 2. 6). One should note that here too the defendant states that the victim only intended to strike and did not threaten deadly violence.

Conclusion

A careful examination of the passages in which the expression "starting unjust blows" (ἄρχων χειρῶν ἀδίκων) occurs shows that the expression was found in the law about assault (αἰκείας) and not in the context of a clause about self-defense in a law about homicide. Moreover, *Third Tetralogy* attributed to Antiphon in which the phrase is found has nothing to do with a case of self-defense. Here the speaker alludes to the law about assault in an attempt to justify his retaliation against the victim who had struck him in an insulting way. In fact, a passage in Demosthenes' speech

[25] On the attempts of Athenian litigants to exploit the "open texture" of law see Harris 2013, 175–245.

[26] *Pace* Gagarin 1978 and Gagarin 1997, 160–162.

Against Aristocrates (23. 50) clearly indicates that the phrase "starting unjust blows" was *not* found in the laws about homicide. The laws of Athens did grant the right to kill an assailant who attacked him from ambush with the intent to kill, but the expression "starting unjust blows" (ἄρχων χειρῶν ἀδίκων) had nothing to do with this right. Because this phrase was not found in the literary sources for the laws about homicide, there is no reason to restore this phrase in lines 33–35 of *IG* I^3 104. This study shows that we urgently need a new edition of *IG* I^3 104, one that accurately reports what can be seen on the stone without any mistaken preconceptions about what is to be found there.

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This essay studies the phrase "starting unjust blows" (ἄρχων χειρῶν ἀδίκων) which has been restored in lines 33–35 of Draco's homicide law (*IG* I^3 104). A careful examination of the phrase shows that it does not come from a statute about homicide, but about a law concerning assault (αἰκείας). The phrase should therefore not be restored in lines 33–35 of Draco's law. A new edition of the inscription is urgently needed.

В статье исследуется выражение "первым наносящий противозаконный удар" (ἄρχων χειρῶν ἀδίκων), которое восстанавливают в стк. 33–35 закона Драконта об убийстве (*IG* I^3 104). При ближайшем рассмотрении оказывается, что эта фраза относится к закону не об убийстве, а о нападении, поэтому ее не следует восстанавливать в стк. 33–35 закона Драконта. Переиздание надписи – насущная необходимость.