

I. ARCHAIC AND CLASSICAL GREEK LAW

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DRAKON'S HOMICIDE LAW

Introduction¹

In 409/8 B.C. the Athenian government commissioned the transcription of Drakon's law of homicide onto a marble stele, to be erected in the Agora. The original, dating from the seventh century, had been inscribed on *axones*, which appear to have been four-sided rectangular wooden beams set horizontally in an oblong frame that could be rotated in order to read each surface (Stroud 1979: 41). The *axones* have of course long since perished, but a part of the marble stele that had survived in secondary use was recovered in 1843. It contains a preamble describing the commission to copy the law, the heading "first *axon*" and the first 60 or so lines of the text, although only the first third thereof is more than fragmentary and much of that is heavily restored. The heading "second *axon*" has been deciphered towards the end of the extant text (Stroud 1968: 16-18, 58-60).

The main body of the recoverable text reads as follows (lines 1-20):

Secretary: Diognetes of the Deme Phrearrioi

Archon: Diokles

Decree of the Council and the People, the prytany of Akamantis, Secretary: Diognetes, Chair: Euthydikos, motion of ...

Let the Registrars of the Laws transcribe the law of Drakon regarding homicide, after receiving it from the Basileus, with (the assistance of) the Secretary of the Council, on a marble stele, and let them place it before the Stoa Basileia. Let the Poletai subcontract in accordance with the law. Let the Hellenotamiai pay the money.

First Axon

And if without premeditation someone kills somebody, he is to be exiled.

The Basileis shall find guilty of homicide either ... or the one who plots. The Ephetai shall render a verdict.

¹ Earlier versions of this study were presented as lectures to the Classics and Near Eastern Studies Departments of the Johns Hopkins University, the Institut für Römisches Recht of the Karl-Franzens-Universität Graz, and to the 2007 Symposium at Durham University. I am grateful to all the participants for their useful comments, criticisms, and suggestions. Responsibility for the ideas expressed in this text remains, as always, with the author.

Pardon is to be granted, if there is a father or brother or sons, by all, or the one who opposes it shall prevail. And if these do not exist, pardon is to be granted by those as far as the degree of cousin's son and cousin, if all are willing to grant it; the one who opposes shall prevail. If not one of these exists, and he killed unintentionally and the Fifty-One Ephetai find that he acted unintentionally, let ten members of the phratry admit (him) if they wish. Let the Fifty-One choose the latter according to their rank. And let those who killed previously be bound by this law.

The Problem

The focus of this article is on the first sentence of the law itself (line 11 of the text): "And if without premeditation someone kills somebody, he is to be exiled." And our concern is with the first word of the first sentence, the Greek *kai*, here translated literally "and." This simple conjunction has given rise to an immense amount of scholarly commentary, for the obvious reason that laws, or any other rational prose, for that matter, should not in logic begin with a copula.

Early commentators presumed that the law as copied was incomplete. Another law preceded it in the original, most probably the section of Drakon's code that covered intentional homicide. The obvious difficulty with this assumption is why it was not copied with the rest of the law. The explanation requires a further assumption, namely that the law on intentional homicide was abolished between the time of Drakon and republication on the marble stele. As Stroud points out, there is no evidence whatsoever for such an assumption (1968: 35).

It is true that the emphatic position of the phrase "without premeditation" at the beginning of the sentence naturally suggests contrast to a preceding sentence emphasizing premeditation. In a thorough study of the use of *kai* in Greek laws, however, Gagarin has shown that it denotes continuity or new matter ("moreover"), not contrast. The appropriate designation of contrast between two rules is the far more common *de* (1981: 80-95).

A different approach, proposed by Stroud and followed by most recent scholars, is to translate the troublesome *kai eam* as "Even if." Thus the original law did not begin with a provision regarding intentional homicide at all. Rather, its opening provision, the one before us, equated the punishment for unintentional homicide with that of intentional homicide. A provision on intentional homicide either came later, in that part of the stele now lost (Stroud), or not at all, being sufficiently covered by the ellipsis in the opening provision (Gagarin).²

This interpretation raises as many difficulties as it resolves. Firstly, it is inherently unlikely that a law would begin with the statement "even if." That kind of extreme ellipsis is simply not the way that legislative prose is drafted, in any legal system on earth, ancient or modern. Gagarin has diligently searched the Greek

² Stroud 1968: 34-40, summarizing the earlier literature; Gagarin 1981: 65-144; see Schmitz 2001: 20-22 for a recent summary.

corpus and managed to come up with only one dubious example, taken indirectly from a citation by Demosthenes (1981: 93-94).³

Secondly, it requires further assumptions regarding Drakontian homicide law, primarily that the most severe penalty for intentional homicide was exile, not death. The purpose of the law would have been to extend the harshest possible punishment, exile for murder, to unintentional killing. The death penalty, however, was certainly imposed for murder in later Athenian law, so a hardening of attitudes between the seventh and the fifth century would have to be presumed. It may well be that Drakon's reputation as a harsh lawgiver, whose laws were written in blood, was a fantasy concocted by later generations. But it is equally unlikely that Drakon was so far inclined in the opposite direction that he could not bear to contemplate the thought of the death penalty.⁴

The principle objection to this interpretation, however, is that it is a rationalization. It seeks to make an illogical sentence into something that could pass as a law, however awkward the result and however many distortions it introduces into the overall fabric of the legal system.

The Context of Drakon's Law

Our intention is to approach the problem from a completely different angle. We take the opening *kai* to be a simple connective, which means that there was a provision that preceded the law on unintentional homicide in the original document and that provision was omitted in the extant copy, for good reason.

To identify the missing provision, it is necessary to place Drakon's law in its historical context, not only within Greek law but also in the world from which ancient Greek law developed. It is necessary, to borrow a phrase from the grammarians, to discover the deep structure of Drakontian jurisprudence.⁵

³ Dem. 24.39, where, as Lateiner points out, "its probable meaning emphasizes the retroactive nature of the law in question. In this quotation, *kai ei* does not assume a previous law or subsume a current one" (1983: 406).

⁴ A distinction between execution and vengeance (or self-help), as made by Gagarin (1981: 119) and Schmitz (2001: 28-29) is specious. Vengeance was not lawless feud; it was a legal right supported and regulated by the law. Whether the killer was killed by a public authority or by a private individual in pursuit of a legal right, it amounts to execution of the death penalty.

⁵ Failure to recognize historical depth is a conspicuous feature of the "historical" approach, whereby some contemporaneous political event is sought out as the cause and focus of the legislation. Thus Humphreys (1991) tries to link Drakon's law to a putative political dispute arising out of the wrongful execution of Kylon's supporters some 15 years earlier. Inevitably, the law's universal provisions are tied to a Procrustean bed to make them fit the specific circumstances of the event. For example, "non-intentional" homicide is hardly appropriate to the deliberate execution of a rebel, but Humphreys stretches the term to cover self-defense, lack of personal animosity, and acting under orders (p. 22). For further criticisms of Humphreys' thesis, see Gagarin 2007: 4-5.

The style and content of the present excerpt from Drakon's legislation reveals it to belong to a well-known literary legal genre: the law code. Within Greece, early examples are found in inscriptions from Crete, the most complete being the Great Code of Gortyn.

The genre, however, has a long ancestry in the Mediterranean basin and the Near East. The most famous example dates back to the 18th century BCE, namely the law code of king Hammurabi of Babylon. Codex Hammurabi (CH) is in fact only one of seven codes in cuneiform script that have so far been recovered from the Near East. Two Sumerian codes from southern Mesopotamia are earlier: Codex Urnamma (CU) from the city of Ur and Codex Lipit-Ishtar (CL) from the city of Isin date to the 21st and 19th centuries respectively. A code in Akkadian from Eshnunna (CE), a city to the north of Babylon, dates to about thirty years before CH. Moving forward in time to the Late Bronze Age, the Middle Assyrian Laws (MAL) from Assyria are thought to have been written between the 14th and 11th centuries and the Hittite Laws (HL) from the Hittite capital Hattusha in Anatolia are preserved in several versions covering a slightly earlier time span. Finally, a small excerpt of a code, the Neo-Babylonian Laws (NBL), comes from sixth-century Babylonia.⁶

In the first millennium, the Hebrew Bible furnishes us with three law codes. They appear as discrete clusters of laws that have become embedded in the Pentateuchal narratives: the Covenant Code, a block of laws in Exodus 21 and 22: 1-16, the Deuteronomic Code, a similar block in Deuteronomy chapters 21 and 22, and the Priestly Code, which consists of a few fragments found scattered in the books of Leviticus and Numbers. The Deuteronomic Code is generally dated to the reign of king Josiah in the 7th century and the Priestly Code to the Babylonian Exile of the sixth century or the subsequent Persian period. There is no consensus on the date of the Covenant Code, with opinions ranging from the 9th to the 4th century. The final member of this genre is the Roman Twelve Tables, traditionally dated to 450 BCE.⁷

The characteristics that mark these sources as belonging to a single genre, notwithstanding the immense distances of time and space that separate them, lie in both their form and content. The predominant form employed by all of the law codes is the *casuistic* sentence, namely a conditional clause stating the circumstances of a hypothetical case, followed by a clause stating the legal consequences. For example: "If a man knocks out the eye of a man, his eye shall be knocked out" (CH 196).

The predominant subject-matter of all the codes is everyday law as would be practiced in the courts. Their similarity in content, however, runs much deeper. Many of the same cases keep recurring in different codes, not always with identical

⁶ A convenient edition and translation in English of the extant cuneiform law codes is available in Roth 1997.

⁷ The following discussion summarizes a series of published studies by the author, in particular Westbrook 2003: 9-10, 16-24, reviewing the nature of the Near Eastern codes and the relationship between them, and Westbrook 1998a, which discusses their connection with the Greek and Roman codes.

facts or with the same solution, but close enough to show that they drew upon the same situations and the same legal principles. For example, the case of an adulterer caught in the act is found in MAL, HL and the Gortyn Code, with variations in the punishment inflicted, but all with some discretion in punishment allowed to the husband. The punishment of theft by payment to the owner of a multiple of the thing stolen is found in CH, HL, CC, and the Twelve Tables. The case of the burglar caught by night, who could be killed on the spot, assumes the character of a literary topos, being reported in CE, CC, XII Tables, and, apparently, the laws of Solon (as reported by Demosthenes, *Against Timocrates* 113).

Closer examination of the recurring cases points not merely to a literary connection by copying or emulation but to a much deeper underlying intellectual tradition. It is revealed through the process of composition of a casuistic code. The starting point was a legal case. It may have been a real case judged by a court, or it may have been drawn from a well-known incident in epic or historical legend (which were regarded as factual events), or it may have been a purely fictitious case invented for the sake of argument. Preferably it was a case that involved some delicate or liminal legal point that would provide food for discussion and throw into relief more commonplace rules. The case was stripped of all non-essential facts (e.g. the names of the parties, circumstances not relevant to the decision), and turned into a theoretical hypothesis, with its legal solution, thus forming an individual casuistic law.

That was by no means the end of the process. The law codes are not a concatenation of individual laws or even associated laws; rather, they are composed of sets of theoretical discussions. Once a law had been created, details of its hypothetical circumstances were then altered to produce a series of alternatives that would, for example, change liability to non-liability, or would aggravate or mitigate the penalty. That set of variations around a single case formed a scholarly problem, which could be used as a paradigm for teaching or for further discussion.

A good illustration of the ancient methodology is the problem of the goring ox in CH:

250. If an ox gores a man while walking down the street and causes his death, that case has no claim.

251. If a man's ox is a gorer, and his local council has warned him that it is a gorer and he does not dock its horns and does not check his ox and it gores the son of a man and causes his death, he shall pay thirty shekels of silver.

252. If a man's slave, he shall pay twenty shekels of silver.

If we take the central paragraph as the original hypothesis, we can see that it has been varied along two axes: 1) circumstances in which there is no liability; 2) the status of the victim (which changes the level of liability). Many more variations could be imagined.

Over time, a canon of traditional problems emerged that was passed on from school to school and from society to society, through several millennia. Where the same

problem emerges in a number of law codes, two features of the academic method used in creating those codes ensured that the content would be similar and yet different. Those features may be characterized as *abridgement* and *creativity*.

It can be seen from the example of the goring ox that the discussion is by no means complete. The casuistic method precludes comprehensiveness, but even so, the three paragraphs in CH leave it clear that many intermediate situations were known but were excluded for the sake of brevity. All the law codes are equally summary in their presentation of scholarly problems. They stake out the parameters of a problem rather than cover all its facets. Thus when we find a variant in one code but not in another, it does not necessarily mean that the variant was unknown to the latter code.

On the other hand, the discussion in one school may lead to a line of variation not pursued elsewhere. Having a fund of well-known problems at their disposal, intellectual circles could refer to them obliquely, while they adapted and extended them by logical extrapolation.⁸ (This is not to be confused with different rulings on the same facts, which is always possible in different legal systems.)

These features are well illustrated by the treatment of the goring ox problem in the two other codes in which it is found.

Codex Eshnunna

53. If an ox gores another ox and causes its death, both ox owners shall divide the price of the living ox and the carcass of the dead ox.

54. If the ox is gorer and the local council has warned its owner but he has not docked its horns and it gores a man and causes his death, the owner of the ox shall pay 40 shekels of silver.

55. If it gores a slave and causes his death, he shall pay 15 shekels of silver.

56. If a dog is vicious and the local council has warned its owner but he has not guarded his dog and it bites a man and causes his death, the owner of the dog shall pay 40 shekels of silver.

57. If it bites a slave and causes his death, he shall pay 15 shekels of silver.

58. If a wall is threatening to fall and the local council has warned its owner, but he does not strengthen his wall and the wall collapses and causes the death of a man's son, it is life; order of the king.

⁸ While a creative process cannot always be proved in individual cases, its existence in principle is demonstrable, because certain codes have characteristic obsessions. For example, all codes are concerned with status, mostly as between free men and slaves, sometimes with sons as an extra variant. CH goes further, in considering again and again variations of class between free men. Again, most codes vary punishment for theft according to the type of animal stolen, e.g. an ox or a sheep, but the HL provisions on theft list in obsessive detail different species, grades, and ages of animals. Some codes trace rights through several degrees of affinity, but Gortyn lists every possible relative, however distant, who may be entitled, a trait echoed by Drakon's law regarding the relative who is entitled to pardon a killer.

Exodus 21

28. And if an ox gores a man or a woman and they die, the ox shall be stoned and its flesh not eaten but the owner of the ox is free of liability.

29. If the ox is a previous gorer and its owner is warned but does not guard it and it causes the death of a man or a woman, the ox shall be stoned and its owner shall be killed.

30. If ransom is demanded of him, he shall pay for saving his life whatever is demanded of him.

31. If it gores a son or a daughter, the same rule will apply to him.

32. If it gores a male or female slave, he shall pay their owner 30 shekels and the ox shall be stoned.

33. And if a man opens a pit or digs a pit and does not cover it and an ox or an ass falls in it,

34. the owner of the pit shall pay, he shall indemnify its owner and the carcass is his.

35. And if a man's ox gores his neighbor's ox and it dies, they shall sell the living ox and divide its price and they shall also divide the carcass.

36. Or if he was warned that it was previous gorer and its owner did not guard it, he shall pay ox for ox and the carcass is his.

Comparing all three, we see that the case of an ox goring an ox is found in the biblical code and CE, but is missing from CH. It is unlikely that Hammurabi's draftsmen were unaware of this possibility, found in an earlier and a much later code that have no historical connection between them. The same applies to CE, which omits circumstances where the owner would not be liable, considered by CC and CH. On the other hand, CE's extension of the analogy, applying the same principles of liability to a savage dog but not to a tumbledown wall, seem to be its own invention, especially since it brings in a local decision to support the latter ruling.

The purpose of this long digression into the jurisprudence of the ancient Near East is to avoid a superficial juxtaposition of cross-cultural parallels. Instead, we would emphasize structural relationships between elements within a very long tradition, notwithstanding the complexity that longevity and transmission in themselves engender in the relationship between different cultures.⁹

The Greek law codes stand on the very edge of the Near Eastern tradition and on the cusp of an intellectual paradigm shift that was to transform the concept and function of a law code. The predominantly casuistic Bronze Age codes of Mesopotamia belonged to the realm of scientific inquiry, while legislation was a

⁹ An example of the complexities of transmission is the word *theoi* that heads many Greek legal inscriptions. Pounder (1984) has traced the origins of this enigmatic heading through earlier Greek inscriptions back into the Ancient Near East, into the extensive curses and blessings that are common at the *end* of inscriptions such as CH.

separate genre, in the form of predominantly apodictic decrees and edicts. The Iron Age codes of the Mediterranean – Hebrew, Roman, and Greek – begin to combine the two, until the code itself becomes a legislative instrument. Thus Drakon’s law could well have been a legislative act, while drawing on the features of the law code tradition.¹⁰

Were we to seek a simple parallel to Drakon’s law, we need look no further than near-contemporary laws from the Bible. The distinction between intentional and unintentional killing, in connection with the issues of asylum and exile, is made in no less than three laws in the Pentateuch, one from each of its law codes.¹¹

Exod. 21: 12-14 read:

He who strikes a man and kills him shall be put to death. As for one who did not stalk him but God forced his hand, I shall establish a place whither he may flee. But if a man plots against his neighbor to kill him with guile, from my altar you shall take him to die.

At first sight, the biblical parallel neatly fills in the missing elements in the Drakontian law, supporting Stroud’s surmise that a law on intentional homicide followed the law on unintentional homicide, being inscribed on a part of the stele that is now lost. Unfortunately, it does not solve the problem of the word *kai* at the beginning of the Greek law, whether we translate “and (if)” or “even (if).” On the first hypothesis, if the Drakontian law began with a general statement on homicide like the biblical law, then the copyists would surely have copied it. On the second, the pattern of the biblical law, with its contrast between asylum for unintentional homicide and death for intentional homicide offers no support for the legal framework required by the translation, namely exile as a universal penalty. As Gagarin points out, the phrase “even if” makes reiteration of the law on intentional homicide unnecessary: the phrase takes as a matter of common knowledge that the law is identical to that of unintentional homicide (1981: 101-102).

The usefulness of the biblical law lies in its showing that Drakon did not invent the distinction between intentional and unintentional homicide or the penalty of exile. At the very least, these elements were part of a common legal culture of the Mediterranean basin in the first millennium B.C. The “deep structure” of Drakon’s

¹⁰ See Westbrook 1990 and 2000. It is important to note that “casuistic” is a mode of thinking more than a stylistic feature. None of the law codes comprise solely conditional clauses, although some are purer than others. The Mediterranean codes of the first millennium (with the notable exception of the Great Code of Gortyn) contain a high admixture of apodictic commands, which may reflect the shift from academic treatise to normative legislation.

¹¹ Exod. 21: 12-14 (Covenant Code); Num. 35: 9-34 (Priestly Code); Deut. 19: 1-13. Josh. 20: 1-9 contains a further version of the same law. The relationship between these laws, each of which differs in detail, is the subject of considerable debate among biblical scholars. See Barmash 2005: 71-93.

law makes it highly unlikely that its idiosyncrasies can be explained as deriving from the special facts of an actual contemporary case to which the lawgiver was responding, as Thür has proposed. (1985: 509). On the contrary, it is legitimate to look beyond Athens, indeed, beyond Greece, for a solution to our problem, even if this particular parallel failed to provide one.

A New Theory

It is a common assumption of all commentators on the Drakon inscription that the original inscription from which it was copied was exclusively concerned with homicide. There is no demonstrable basis for that assumption.

We have no idea of the length of the original inscription on the *axones*, or how many *axones* there were, for that matter. Plutarch's reference to the eighth law on the thirteenth axon of Solon indicates that a single *axon* could contain far more than a single law (Solon 19.4). Drakon's monument could have contained laws on many different subjects, just like the Gortyn Code. Later sources refer to laws of Drakon on various matters, notably adultery, theft, oaths, and idleness, but we are informed that Solon abolished all Drakon's laws except for those on homicide, which would explain why they alone would be of interest to the Athenian commission of 409/8.¹²

The extant fragment comprises highly specialized rules on certain narrow aspects of homicide, mostly pardon by the relatives for an unintentional killer and certain modalities of the killer's exile. There are many other aspects of homicide that could have been regulated, such as intentional homicide, justified homicide, indirect causation, procedural matters, etc., etc. In the casuistic law code tradition, not all the rules regarding one topic (or what we would regard as one topic) are necessarily dealt with in a single block; they may be scattered in different parts of the code. If that were the case with Drakon's law, even to a small degree, the commission would have had to comb the text looking for passages to extract.

Schmitz argues that the use of the singular "law" (*nomos*) in the preamble to the inscription infers that Drakon's law only concerned homicide (2001: 17). The preamble, however, tells us only what law was to be copied; it says nothing about the source from which it was copied. If we are to rely on inferences, then the headings "first *axon*" and "second *axon*" inserted by the copyist are powerful evidence for the opposite thesis. The use of such references makes much more sense if one is presenting excerpts from various locations in a longer source than if one is simply copying a text in its entirety.

¹² Ath. Pol. 7.1; Plut., Solon 17.2. Schmitz (2001: 9-16, cf. Humphreys 1991: 18-19) argues that Drakon's laws concerned only homicide and that what apparently were other offences in fact all related to homicide. That might be arguable for adultery, where the husband who kills the lover caught in flagranti with his wife is not guilty of murder, but to assimilate theft of fruit and vegetables or a fine for breach of oath into homicide requires special pleading.

If the copyist were merely going through Drakon's inscription and extracting the sections on homicide and the section before the present law on unintentional homicide located on the first *axon* did not concern homicide, then clearly he would not have bothered to copy it. At the same time, that preceding law must have had sufficient connection with the homicide law for the latter to begin with the word "and."

What then was the subject of the missing law? The law code tradition suggests an answer. It provides compelling evidence not from an isolated parallel but from a canonical legal problem attested in several codes. Our starting point is a Mediterranean code roughly contemporary with the era of Drakon. Ex. 21: 18-19 from the biblical Covenant Code reads:

If men quarrel and a man strikes his neighbor with a stone or a fist and he does not die, but falls to his bed: if he rises and walks abroad on his stick, the striker is clear of liability; he shall only pay for his idleness and ensure his medical treatment.

Strikingly modern in its emphasis on compensation and rehabilitation, this law is a singular exception to the standard principles of redress for physical injury. They are best summarized in the Roman law of the Twelve Tables (8.2):

If he destroys a limb, unless he compounds with him, there shall be like for like.

This is the famous talionic law, which is found not only as a scholarly problem but constitutes a literary topos in its own right. The biblical version is (Ex. 21: 24-25):

An eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a burning for a burning, a wound for a wound, a lash for a lash.

In case the meaning should be unclear, the law from CH that we have already seen is unsparingly literal (196):

If a man knocks out the eye of a man, his eye shall be knocked out.¹³

Two elements of the compensation law in Exodus indicate why it is an exception to the talionic principle. Firstly, the injury is not permanent and appears to leave no visible mark. This is not stated expressly, but emerges from the detailed description of the consequences. Secondly, it was not intentional, or at least not premeditated: it

¹³ Some law codes have fixed payments instead of talio (e.g. CE 42-46, HL 7-9, 11-16), while CH has a mixture of both. We have argued elsewhere that these represent fixed ransom in lieu of revenge (Westbrook 1988b: 39-77).

arose from a quarrel and did not involve a weapon, merely a fist or stone that was picked up in anger.¹⁴

Moving backwards in time, HL present the same case, with some variations:

10. If someone wounds a man and makes him ill, he shall nurse him. He shall give a man in his place and he (the latter) shall work in his house until he is well. When he is well, he shall give him six shekels of silver and pay the doctor's fee.

The question of intention is not mentioned, but that is no indication that it was not a factor in the law or that the draftsman was unaware of the question. For the third and earliest source on this same problem focuses directly on the mental element. CH 206-208 also add a further variation of great significance:

If a gentleman strikes a gentleman in an affray and inflicts a wound on him, that gentleman shall swear, "I did not strike knowingly" and shall pay the doctor.

If he dies of his blow, he shall swear, and if he (the victim) is the son of a gentleman he shall pay 30 shekels of silver;

If he is the son of a commoner he shall pay 20 shekels of silver.

The discussion is therefore less concerned with the temporary nature of the injury but makes abundantly clear that the lack of intention (to cause injury when he punched someone in a fight) is a key mitigating factor. It then extends the discussion of unintentional wounding to that of unintentional homicide.

If Drakon's original law derived from this traditional problem, then the law on unintentional homicide would naturally have followed a law on unintentional injury. Of course, this extension of the traditional problem on injury could reflect creative jurisprudence on the part of CH, that was restricted to its own legal system. One final piece of evidence demonstrates that, to the contrary, it was part of the canonical discussion.¹⁵

It will be recalled that the biblical version of this law states that the injured man "does not die, but falls to his bed." It is a seemingly superfluous piece of negative information, since we are told in graphic terms how the victim makes a recovery. Its inclusion reveals that the biblical draftsman was well aware of a variation in the

¹⁴ There is a striking resemblance to classical Athenian *aikeias*, which was a private claim for compensation for physical assault arising from an altercation, as opposed to deliberate wounding (*trauma ek pronoias*): Dem. 47.45-7, 47.64. See MacDowell 1978: 123; Cohen 2005: 215-16.

¹⁵ CE 47-47A most probably involve the same problem, with the same extension to homicide, but the terseness of the discussion and uncertainties in the terminology make the evidence of these paragraphs unreliable: If in a fight(?) a man injures(?) a man, he shall pay 10 shekels of silver. If in a brawl a man causes the death of the son of a man, he shall pay 40 shekels of silver.

standard problem leading the discussion into the realm of homicide, but chose not to include it. It was a case of abridgement, not creativity. If the traditional problem also informed Drakon's law, it would have regarded unintentional homicide as a legitimate component in the discussion of unintentional injury.

Summary and Conclusions

The commission charged with copying Drakon's law of homicide extracted from the existing monument all relevant rules on homicide that they found and excluded any connected rules that were on other subjects. Accordingly, they excluded a section on injury that had preceded the first excerpt that they found, leaving only the provisions on homicide.¹⁶

The commissioners were highly pedantic in the execution of their task. They copied; they did not revise. As has been pointed out, they even copied obsolete rules that could no longer be valid.¹⁷ Taking their orders literally and pedantically, they copied the homicide section as they found it, with the initial "and" (*kai*), even though it served no particular purpose in its new context.¹⁸

Furthermore, if the present text on the marble stele is a digest of disparate rules on homicide extracted from various places in the original source, then a more radical possibility emerges. The twenty or so decipherable lines of law that we have may themselves not represent a single law but several laws juxtaposed. This would explain certain anomalies that have disturbed commentators.

For example, the first sentence of the law (line 11), which has been the subject of our present inquiry, may have been separate from what follows, being a mere supplement to a law on unintentional wounding. The next rule (lines 11-13), which seems to introduce premeditated homicide in an inappropriate context, would have

¹⁶ It has been suggested that ll.33-34 in fact contained a section on injury, thereby making it unlikely that one had existed before the opening paragraph (oral communication of Prof. G. Thür). Since only a fragment remains, any reconstruction is speculative, but it seems to us unlikely that a text otherwise entirely concerned with homicide should suddenly discuss minor injury. The lines could well have concerned the same homicide mentioned in ll.34-35. More important is the fact that they were not concerned with substantive liability but with an entirely different legal issue: that of evidence. The statement regarding the one who initiated the violence ([... *archon*]ta *cherōn a[dikon]* ...) points to an evidentiary presumption for the purpose of allocating culpability.

¹⁷ E.g. the retroactive clause in lines 19-20. See Stroud 1968: 50-51. The pedantry of the copyists is well illustrated by a companion piece to the present inscription, where the damaged original was transcribed with such caution that the stonemason preferred to carve three pairs of points to indicate an illegible word rather than make the most obvious restoration: Lewis 1967: 132. (I am grateful to Prof. P. Rhodes for bringing this text to my attention.)

¹⁸ It should be emphasized that this hypothesis could be constructed independently, without mention of the ancient Near East. What the Near Eastern evidence does is to place the hypothesis in a tangible context and thereby lift it out of the realm of interesting speculation.

been a later section concerned essentially with jurisdictional matters. The rules on pardon (lines 13-20), which use a different term for unpremeditated (*akon*), would again have started life as an independent rule.

If the first rule that the commissioners came across on the axon was merely a brief remark extending a discussion of unintentional wounding to unintentional homicide, then it is all the more understandable why they should have left the sentence in its entirety, including its initial *kai*.

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