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## THE MURDER OF SLAVES IN ATTIC LAW

GLENN R. MORROW

IT WAS almost a commonplace among the ancient writers that the slaves at Athens enjoyed a peculiarly happy lot.<sup>1</sup> But to what extent was their position a matter of custom and to what extent a matter of legal right? There is no doubt that law as well as custom protected the slave in so far as he was regarded as a piece of property. But did the law of Athens also recognize the slave as a person, entitled in his own right to a certain protection from malicious injury to life and limb? The most recent general treatment of Athenian law, that of Kahrstedt,<sup>2</sup> does ample justice to the protection accorded by Athenian law to property in slaves. But Kahrstedt apparently thinks that, for Attic law, the slave was merely a valuable kind of property. The slave, he thinks, had no legal capacity whatever. The law allowed his master to take steps to protect him against injury by a third party and to recover damages when such injury had been caused. But it gave the slave no protection against his master: "die Strafgewalt des Herrn ist an sich unbegrenzt." Naturally the master's rights over his slave, like his other property rights, were sometimes limited by public law; but the purpose of such limitation was not the protection of the slave's person but the welfare of the state.

This is an extreme view which has at least the merit of consistency. The older interpretations are less consistent. Thus Busolt: "Der Sklave war daher im allgemeinen keine Rechtspersönlichkeit"; but "in Athen durfte kein Sklave ohne gerichtliches Urteil getötet werden."<sup>3</sup> Obviously, if the law forbade putting a slave to death without judicial process, then the slave was not quite rightless nor altogether devoid of personality. Lipsius openly attributes inconsistency to Attic law. "Der Sklave hat keine Rechtspersönlichkeit; er ist nur Besitztum des

<sup>1</sup> Xen. *Const. of Athens* i. 10; Plato *Rep.* viii. 563b; Dem. *Phil.* iii. 3; Plautus *Stichus* 447-50; Aeschines *Timarchus* 54; Aristophanes *Eccles.* 721-22.

<sup>2</sup> U. Kahrstedt, *Staatsgebiet und Staatsangehörige in Athen* (Stuttgart-Berlin, 1934), pp. 133 ff., 139 ff., 321-27.

<sup>3</sup> *Griechische Staatskunde* (Munich, 1920-26), pp. 273, 280, 281, 982.

Herrn"; consequently, the application of the law of *ὑβρις* to attacks upon slaves was an "Abfall vom Prinzip."<sup>4</sup> And Beauchet, while asserting that, for Attic law, the slave was considered as only a thing susceptible of ownership and therefore without juristic personality, yet admits that "la loi ... reconnaissait ... sa personnalité par la protection qu'elle lui accordait contre certains attentats dirigés contre sa personne ou contre sa vie."<sup>5</sup>

It is necessary, if we would avoid hasty conclusions, to distinguish between legal principles and legal remedies. When we read, for example, in the Old Oligarch's description of the Athenian democracy that it was not permitted to strike a slave,<sup>6</sup> we are given information (rather vague information, it is true) about a certain principle of Attic law; but we ought to know also what procedures are available for punishing violations of this principle before we draw the conclusion that Attic law was particularly humane. Likewise, when Antiphon tells us that the law forbade putting a slave to death without judicial process,<sup>7</sup> we must remember that such a principle must have been inoperative unless there was also some legal device whereby the offender could be brought to trial and punished. If the remedy was lacking to make the principle effective, we can say only that the law recognized a certain interest as worthy of protection, not that the law protected that interest. Much of the diversity of opinion as to the attitude of Athenian law toward the slave can probably be traced to a failure to recall this distinction.

It is abundantly attested that the deliberate killing of a slave (whether by his own master or by anyone else) without judicial sentence was contrary to Attic law. For the late fifth century we have the clear testimony of Antiphon.<sup>8</sup> The accusers of Euxitheus have put to death a slave whom they had previously purchased and put to the torture. Under torture the slave had denounced Euxitheus as the murderer of Herodes and confessed that he himself had assisted in disposing of the body. Euxitheus condemns them for having killed the

<sup>4</sup> *Das attische Recht und Rechtsverfahren* (Leipzig, 1905-8), pp. 793-94.

<sup>5</sup> *Histoire du droit privé de la République athénienne* (Paris, 1897), II, 423, 426, 428. Beauchet furthermore treats the slave law as part of the law of the family, whereas if the slave was considered merely a thing susceptible of ownership, the law of slavery should be a part of the law of property (cf. also p. 401).

<sup>6</sup> *Xen. loc. cit.*

<sup>7</sup> γ. 47, 48.

<sup>8</sup> *Ibid.*

slave on their own authority, without vote of the people. This, he says, is an illegal act; they have usurped the functions of judges and executioners. It is for the Athenian people to judge whether a man is to be put to death, and it is for the magistrates of the Athenians to execute the sentence. Now it is clear that Euxitheus is not reproaching his accusers merely for a breach of humanity;<sup>9</sup> he is accusing them of violating their "ancestral laws." But is Antiphon perhaps exaggerating the humanity of Athenian law? At least we find a similar exaggeration, if exaggeration it is, in Isocrates. Remarking upon the arbitrary power of the ephors at Sparta, he asserts that "among the other Greeks" (and Athens is clearly in his mind) not even the most worthless slave can be put to death without trial (*ἀκρίτους μισαιφονεῖν*).<sup>10</sup> For a much earlier period we have Lycurgus' testimony that the ancient lawgivers (Draco?) "did not permit even the killer of a slave to get off with a fine."<sup>11</sup> And the epigraphic evidence indicates that the homicide laws of Draco applied to the murder of slaves as well as freemen.<sup>12</sup> Thus, from at least the seventh century onward, it seems to have been recognized by Attic law that the killing of a slave rendered a man liable to legal penalties.<sup>13</sup>

So much for the principle recognized by the law. What, now, were the methods by which violations of this principle were punished? Let us consider first the protection accorded the slave against assaults from persons other than his own master. In such cases his master, as his *κύριος*, could obviously bring an ordinary suit for damages (*δίκη βλάβης*) against anyone who had injured his slave or taken his life. Such a suit emphasized the property interests of the master and was

<sup>9</sup> Despite Kahrstedt's dogmatic assertion (pp. 325–26): "Der Redner kann nicht sagen, dass die Tötung des Sklaven verboten war." But this is exactly what the speaker does say. Besides the mention of the *πάτριοι νόμοι*, note: *ἡ ψῆφος ἴσον δύναται τῷ δοῦλον ἀποκτείναντι καὶ τῷ ἐλεύθερον* (48). The *ψῆφος* refers to judicial procedure; cf. *οὔτε τῆς πόλεως ψηφισαμένης* (47) and *ψῆφος περὶ αὐτοῦ γενέσθαι* (48).

<sup>10</sup> *Panath.* 181.

<sup>11</sup> *Leocrates* 65.

<sup>12</sup> Dareste, Haussoulier, and Reinach, *Recueil des inscriptions juridiques grecques*, II, 4, 5, 8: *κατὰ ταῦτα φόνου δίκας εἶναι δοῦλον κτείναντι ἢ ἐλεύθερον*.

<sup>13</sup> Cf. also Euripides *Hecuba* 291–92 (cited below, p. 225). In Roman law, on the contrary, the master's power over his slave remained absolute until the time of the Antonines, when it was made illegal for a master to put his slave to death without cause (Gaius *Inst.* i. 53). Gaius even regards this unlimited *potestas* of the master as a part of the *jus gentium*: "nam apud omnes peraeque gentes animadvertere possumus, in servos vitae necisque potestatem esse" (i. 52).

hardly a device for protecting the slave's person as such. More significant was the master's right to bring a *δίκη φονική* against the offender. The right of the master to prosecute the murderer of one of his slaves was asserted in the law of Draco still in force in the fourth century.<sup>14</sup> Now the *δίκη φόνου* was not a suit for damages, but a demand for the punishment of one who had shed blood. The fact that it was permitted against the killer of a slave shows that the slave was regarded as a person to be protected in his own right. For the killing of an ox or a pig only a suit for damages would be allowed. Thus there was a very material legal difference between four-footed stock (*τετράποδα*) and "human-footed stock" (*ἀνδράποδα*), as slaves were often called.

Such a *δίκη φόνου* against the killer of a slave would come for preliminary hearing before the king archon and then be assigned to the Court of the Ephetae sitting at the Palladium.<sup>15</sup> This court, Aristotle tells us, had jurisdiction over unintentional homicide, conspiracy, and the killing of a slave, a metic, or a foreigner. What the penalty would be we can not precisely determine. The fact that such a case came before the Palladium instead of before the Areopagus suggests that the penalty would be less severe than the death sentence imposed by the Areopagus. There is a tradition that Attic law imposed the penalty of death for the murder of a citizen, exile for the murder of a metic.<sup>16</sup> We also know that the unintentional killing of a citizen was punished with exile.<sup>17</sup> This suggests that for all the homicides over which the Palladium had jurisdiction the penalty of exile could be imposed. Whether it would always be imposed is another matter. The passage cited above from Lycurgus, asserting that the ancient legislators punished the murder of a slave with more than a fine, seems to set the lower limit of the punishment that would be imposed by the Palladium. That it was something more than a puni-

<sup>14</sup> Dem. xlvii. 72: *κελεύει γὰρ ὁ νόμος τοὺς προσήκοντας ἐπεξέναι μέχρι ἀνεψιαδῶν, καὶ ἐν τῷ ὄρκῳ ἐπερωτᾶν, τί προσήκων ἐστὶ, κἂν οἰκίτης ᾖ, τούτων τὰς ἐπισκῆψεις εἶναι.* Pollux (viii. 118) is almost verbally identical with the foregoing. Antiphon v. 48: *εἴπερ γὰρ . . . ἐξεστι . . . τῷ δεσπότῃ, ἂν δοκῇ, ἐπεξελεῖν ὑπὲρ τοῦ δούλου, κτλ.*

<sup>15</sup> Aristotle *Const. of Ath.* lvii. 3; Isocrates xviii. 52; Dem. xlvii. 69, 70; Aeschines *Schol.* ii. 87.

<sup>16</sup> Bekker, *Anecdota*, I, 194, 11; cf. also Dem. xxiii. 88–89.

<sup>17</sup> Lipsius, pp. 609 ff.; Dem. xxiii. 72.

tive fine, something less than death—this is about all we can infer as to the penalty for murdering a slave.

How much protection the *δίκη φόνου* afforded the slave may be questioned. It rested with the master and the other legally competent members of the family to bring suit; and if they preferred to let the matter drop, or bring only a suit for recovery of damages, there was no other person competent to bring action to avenge the slave's murder. For Attic law regarded murder and bodily injuries as private wrongs, and action against an offender had to be initiated by the injured party or (in the case of murder) by one of his relatives.<sup>18</sup> Formally, of course, the slave's position was no different from that of any other member of the family; but actually there would probably be less inclination to press prosecution for the murder of a slave than for the murder of a kinsman.

Another type of suit was available for punishing attacks upon the person of slaves—the *γραφὴ ὕβρεως*. The text of the famous "law of ὕβρις" is given by Demosthenes: "If anyone commit ὕβρις against any child, woman, or man, slave or free, or do anything to them contrary to law, let any qualified Athenian bring a *γραφὴ* against him before the Thesmothetae."<sup>19</sup> Attempts to show that this text of the law is spurious have not succeeded.<sup>20</sup> The application of the law to attacks upon slaves is further confirmed by Athenaeus, who cites as his authorities not only Demosthenes (as above) but Hyperides and Lycurgus in orations that have been lost.<sup>21</sup>

Formally, this suit is distinguished from the foregoing ones by the

<sup>18</sup> This limitation of the *δίκη φόνου* is clearly brought out in Dem. xlvii. 55 ff., 68–73. An old nurse, once a slave of the speaker's father but later a freedwoman living in his house, had died of wounds inflicted upon her by Euergus and Mnesibulus, who had broken into the speaker's house during his absence. The speaker took the case to the Exegetes for advice. They told him the law did not permit him to prosecute, for the victim was neither a member of his family nor his slave (οὐ γάρ ἐστιν ἐν γένει σοι ἡ ἄνθρωπος οὐδὲ θεράπεινα). It is clear that the action contemplated was a *δίκη φόνου*, which would come before the king archon (cf. *πρὸς τὸν βασιλέα μὴ λαγχάνειν*) and then be sent to the Palladium for trial (cf. *εἰ διομεί ἐπὶ παλλαδίῳ*). The speaker also reports that the decision of the Exegetes as to the law (*τὰ νόμιμα*) was confirmed by his own examination of the stele on which the Draconian laws were inscribed.

<sup>19</sup> xxi. 47: *ἐάν τις ὕβριση εἰς τινα, ἢ παῖδα ἢ γυναῖκα ἢ ἄνδρα, τῶν ἐλευθέρων ἢ τῶν δούλων, ἢ παράνομόν τι ποιήσῃ εἰς τούτων τινά, γραφέσθω πρὸς τοὺς θεσμοθέτας ὁ βουλόμενος Ἀθηναίων οἷς ἐξεστίν.*

<sup>20</sup> Lipsius, p. 422 n.

<sup>21</sup> vi. 266 f.; cf. also Aeschines *Tim.* 15.

fact that it could be brought by any citizen and was not restricted to the injured person or his *κύριος*. Thus, if an indifferent master failed to bring suit to punish a person guilty of *ὑβρις* against his slave, it was legally possible for some other qualified citizen to prosecute. But what was the precise nature of the offense?<sup>22</sup> The law of *ὑβρις* given by Demosthenes seems bent on giving the *γραφὴ ὑβρεως* the widest possible application.<sup>23</sup> And the recorded cases of prosecution for *ὑβρις* in Attic law show a very great variety. It would seem that any attack upon the person or the interests of the person could furnish the substance of such a prosecution; as Partsch puts it, "der Hybrisbegriff schützte schlechthin die Interessensphären des einzelnen."<sup>24</sup> But *ὑβρις* was not merely the legal genus of which *φόνος*, *αἰκία*, *τραῦμα* are species; for, as Lipsius has shown, the essence of an act of *ὑβρις* was its insulting or degrading character, not the physical or other injury it caused. Since Demosthenes says that *ὑβρις* is "a kind of action than which there is nothing more to be abhorred or more deserving of anger,"<sup>25</sup> we cannot go far wrong in looking upon the law not merely as a protection of the interests of the individual but also as an assertion of the dignity of the person and of the respect due to the person of another.<sup>26</sup>

We can readily understand, therefore, why the orators of the fourth century sometimes felt it to be anomalous that the law of *ὑβρις* should apply to attacks upon slaves. For what honor has a slave to lose? It is clear that popular thought was inclined to think of *ὑβρις* as primarily an attack upon a free person. Thus Midias, in defending himself against the suit brought by Demosthenes, apparently contended that he should be charged with *ὑβρις*, not *ἀσέβεια*, because he had struck a freeman.<sup>27</sup> Aristotle gives this definition of *ὑβρις* in the *Rhetoric*, adding only that the attack must be unprovoked.<sup>28</sup>

<sup>22</sup> Cf. Lipsius, pp. 421-28; L. Gernet, *Recherches sur le développement de la pensée juridique et morale en Grèce*, pp. 183-97.

<sup>23</sup> The two clauses *ἐὰν τις ὑβρίσῃ* and *παράνομόν τι ποιῇ* are found elsewhere in conjunction; cf. Dem. xliii. 75.

<sup>24</sup> *Archiv für Papyrusforschung*, VI, 62.

<sup>25</sup> xxi. 46.

<sup>26</sup> Cf. also Aristotle *Pol.* v. 1311a. 30 ff.; *Rhet.* i. 1374a. 13; Dem. xxi. 72.

<sup>27</sup> Dem. xxi, Hyp. 3.

<sup>28</sup> ii. 1402a. 2. The conspirators in Dem. liii. 16 would probably not have thought of bringing a charge of *ὑβρις* if they had caught their opponent striking a slave child.

Yet the law recognized ὕβρις against slaves as well as against freemen, and the orators gave various explanations of what seemed an anomaly. Demosthenes argued that one should consider not the person of the injured but the reprehensible character of the injury.<sup>29</sup> And Aeschines explained that the intention of the lawgiver was not so much to protect the slave as to habituate the citizen to the kind of mutual self-respect necessary in a democracy. "For whoever commits ὕβρις at all, against any person of whatever degree, is not fit to be a fellow-citizen in a democracy."<sup>30</sup> Both these explanations, it will be observed, explain the anomaly only by admitting that ὕβρις had the wider meaning which seemed so puzzling. There could be no better evidence that the wider meaning was really alive in the fourth century. This conclusion is confirmed by a passage in which Plato, aristocrat that he was and little disposed toward lessening the distinction between slave and freeman, warns his citizens to refrain from ὕβρις toward slaves (μήτε τινὰ ὕβριν ὑβρίζειν εἰς τοὺς οἰκέτας), "for a genuine and unfeigned reverence for justice and hatred of injustice show themselves best in dealings with persons toward whom it is easy to be unjust."<sup>31</sup>

Attic law, then, in making the concept of ὕβρις cover attacks upon slaves as well as upon freemen recognized that a certain respect was due to the person of the slave despite (or perhaps because of) his weaker position. We must remember also the powerful religious emotions implicated in the horror of ὕβρις. Gernet contends that the public sense of ὕβρις was purest and most intense when an outrage had been committed upon an individual at a religious ceremony.<sup>32</sup> The prohibition of ὕβρις against slaves was therefore an acceptance of the slave as a member of the religious community. The religious community was manifestly broader than the political, as other Athenian customs bear witness. Although slaves were excluded from the assembly and from the gymnasia and palaestrae, where the citizens

<sup>29</sup> xxi. 46.

<sup>30</sup> *Tim.* 17.

<sup>31</sup> *Laws* vi. 777d. The contention that ὕβρις δι' ἀσχεροῦργίας was the only kind of ὕβρις toward a slave that was indictable in Attic law is without foundation, as Lipsius has shown (p. 427).

<sup>32</sup> *Op. cit.*, pp. 189 ff. Thus the gravity of the offense of Midias consisted not merely in its being a degrading attack on Demosthenes, but also in its having occurred at the Dionysia.



came together, yet they were ordinarily admitted to religious ceremonies and public sacrifices. Slaves could be members of *θιασοι* or religious brotherhoods, along with freemen; and those of Greek blood could even be initiated into the Eleusinian mysteries.<sup>33</sup> Thus, before the religious sentiments, the distinction between slave and freeman disappeared.

But how effective was this law in protecting the slave against injury to his person? The *γραφὴ ὕβρεως* would come before the junior archons (the *θεςμοθέται*) for preliminary hearing and then be passed on to one of the heliastic courts. In the case of *ὑβρις* it appears that the court had power to fix the penalty to be imposed upon a person found guilty, whereas in other cases it had to choose between the penalty proposed by the prosecution and that proposed by the defense.<sup>34</sup> The court seems to have been empowered to impose any penalty it pleased, from a fine to death.<sup>35</sup> But would the death penalty ever be imposed for *ὑβρις* against a slave? However improbable this might seem, it is unequivocally affirmed by Demosthenes, who says that many Athenians had been punished with death for *ὑβρις* against slaves.<sup>36</sup> We must allow for rhetorical exaggeration, but clearly such language would have had no effect upon an intelligent Athenian audience if there had not been some cases of the sort Demosthenes mentions. Other evidence is not lacking. We hear of a certain Themistius of the Attic deme of Ophidna who was put to death for assaulting a Rhodian harp-player at an Eleusinian festival.<sup>37</sup> In all likelihood this maiden was a slave, as Gernet thinks; in any case she was a foreigner, and the condemnation of Themistius shows how seriously the offense of *ὑβρις* against a weaker person in the community could be regarded.

The heliastic courts were usually large enough to constitute a representative cross-section of the citizen-body; and the lack of any

<sup>33</sup> For the references see Beauchet, II, 424. The exclusion of slaves from the Thesmophoria seems to have been unusual.

<sup>34</sup> So Lipsius (p. 428) interprets the *τιμᾶτω . . . παραχρήμα* of the law cited by Demosthenes.

<sup>35</sup> Cf. the words of the law in Dem. xxi. 47: *δρου ἂν δοκῇ ἄξιος εἶναι παθεῖν ἢ ἀποτεῖσθαι*, and the fragment of Lysias (*apud* Photion, s.v. *ὑβρις*): *τίς οὐκ οἶδεν ὅτι τὴν αἰκλίαν χρημάτων ἔστι μόνον τιμῆσαι, τοὺς δ' ὑβρίζειν δόξαντας ἔξεσθαι ὑμῖν θανάτῳ ζήμιον*.

<sup>36</sup> xxi. 49.

<sup>37</sup> Dinarchus *Demosthenes* 23.

sense of the binding power of precedent left the court free in any particular case to pass judgment in accordance with the prevailing sentiments of what was right and fitting. These courts must have been more than ordinarily sensitive to public opinion when dealing with cases of *ὑβρις*. The legal nature of the offense was not clearly defined and gave scope for great latitude of interpretation. Under such circumstances it is evident that the real protection afforded the slave by the law of *ὑβρις* would depend upon the prevailing opinion as to what was proper in the treatment of slaves. The *γραφὴ ὑβρεως* could be a powerful instrument for discouraging any kind of maltreatment that the popular sense of right condemned; but when public opinion was callous and unconcerned, it probably was of little real efficacy.

The protective effect of the *γραφὴ ὑβρεως* would also be limited by the fact that to bring a suit of this sort involved a certain risk to the prosecutor. If he failed to receive a fifth of the votes of the court, he was subject to a fine of a thousand drachmae, and having once begun proceedings he could not withdraw without incurring the same penalty.<sup>38</sup> This is doubtless why, in the case described in the oration against Euergus and Mnesibulus, the speaker did not bring a suit for *ὑβρις* against the murderers of the old freedwoman. Such an action would clearly lie against them, but the speaker evidently thought it too great a risk, especially as the only witnesses he could produce to establish the fact of *ὑβρις* were his wife and children. Demosthenes' oration against Conon shows how a citizen who had himself been outraged might prefer to proceed by way of the *δίκη αἰκίας* rather than by the riskier *γραφὴ ὑβρεως*.

Besides prosecution for homicide and for *ὑβρις*, to which the killer of a slave rendered himself liable, there were also certain ritual obligations laid upon him, and failure to discharge these could make him liable to legal penalties. The Greeks regarded homicide as an offense against the gods, involving religious pollution, and a slayer was required to undergo ritual purification. A passage in Antiphon informs us that the killing of a slave came under this general rule of purification. "Even when a man has killed one of his slaves and there is no one to prosecute him, he purifies himself and observes the abstinences

<sup>38</sup> Dem. xxi. 47.

mentioned in the law, because he respects what is customary and holy.”<sup>39</sup> A similar requirement of purification for the killing of a slave, even when no other penalty is incurred, appears in Platonic law.<sup>40</sup> It is not necessary to go into the details of this ritual purification.<sup>41</sup> Antiphon’s reference to the “abstinences” refers to the requirement that, until he is purified, the shedder of blood must absent himself from certain public and sacred places, in order not to spread his pollution. The first step in a prosecution for homicide was to make a public proclamation (*πρόρρησις*) warning the guilty person or persons to stay away from the forbidden places. The “law” governing these ritual requirements seems to have been a matter of religious tradition, probably very intricate and detailed, the interpretation of which was left to the Exegetes.<sup>42</sup> Doubtless the prescriptions of this law varied according to the degree of defilement, since Plato speaks of “greater” and “lesser” purifications.<sup>43</sup> The important fact for our present purpose is that the observance of these ritual requirements was not left to the conscience of the slayer. Plato provides that, when a homicide fails to observe the rule of purification, both he and the slain man’s next of kin shall be liable to a charge of impiety (*γραφὴ ἀσεβείας*).<sup>44</sup> Such a charge could be initiated by anyone, as Plato explicitly says, and not merely by a kinsman of the slain man. In Attic law we know that a *γραφὴ ἀσεβείας* could be brought against a delinquent kinsman for failure to prosecute,<sup>45</sup> and under certain circumstances against a homicide himself for entering the Agora and the temples unpurified.<sup>46</sup> We know, also, that an *ἐνδειξις ἀσεβείας* was brought against Andocides for visiting the temples and mysteries while under sentence of exclusion from them.<sup>47</sup> It appears, then, that the ritual purification

<sup>39</sup> vi. 4: *τοσαύτην γὰρ ἀνάγκην ὁ νόμος ἔχει, ὥστε καὶ ἂν τις κτείνει τινα ὧν αὐτὸς κρατεῖ καὶ μὴ ἔστιν ὁ τιμωρήσων τὸ νομιζόμενον καὶ τὸ θεῖον δεδιώς ἀγνέει τε αὐτὸν καὶ ἀφέξεται ὧν εἴρηται ἐν τῷ νόμῳ.*

<sup>40</sup> *Laws* ix. 865cd, 868a.

<sup>41</sup> See H. J. Treston, *Poine*, pp. 149 ff.

<sup>42</sup> Note Antiphon’s reference to “the law” and Plato’s mention of “the law brought from Delphi” (ix. 865b) and of the Exegetes who are to have authority over the purifications (ix. 865d). The *πρόρρησις*, specifically mentioning the places the slayer is not to visit, occurs frequently in Plato’s law of homicide (ix. 868a, 871a, 873b).

<sup>43</sup> *Laws* ix. 865c.

<sup>44</sup> *Ibid.*, 868b, 871b; cf. 868de. That the suit is a *γραφὴ* is shown by ὁ βουλόμενος and τῷ ἐθέλοντι.

<sup>45</sup> Dem. xxii. 2. <sup>46</sup> *Ibid.* xxiii. 80, 81; Treston, pp. 260 and 261. <sup>47</sup> Andocides i.

required of a homicide was not merely a penalty sanctioned by religious sentiments, but one capable also of being enforced by the city's courts. Thus the killing of a slave, though not exposing a man directly to legal consequences, might do so indirectly through his failure to observe the ritual requirements. And it hardly needs to be pointed out that the application of this rule of purification to the shedding of slave blood clearly sets the slave apart from all other species of property. It is a recognition of his membership in the civic and religious community, since his blood cannot be shed without bringing down the anger of the gods upon the community that neglects to punish it.

Thus far we have considered the protection that Attic law afforded the slave through remedies which the slave's master could make use of to punish an offender. But what legal protection had the slave against a cruel master? More particularly, was there any legal way of punishing a master who had murdered his own slave?

We have seen that an action for murder, according to the law of Draco still in force in the fourth century, could be brought by any person within a prescribed degree of relationship to the slain man, or by a master on behalf of his slave. This would seem to imply that the *δίκη φόνου* could not be brought against a master for the murder of a slave, not because his act was a lawful one, but because there was no person competent to prosecute. This inference is nevertheless not quite correct. What we should infer is, I think, that no person outside the family could bring action against the murderer; for it is possible that another member of the family had the right to prosecute.

A case of this sort occurs in Plato's *Euthyphro*. This case may, of course, be altogether fictitious, but we can certainly learn much from it about Athenian practice. Euthyphro is bringing a *δίκη φόνου* against his father for the murder of a *πελάτης* on their estate in Naxos. The *πελάτης* had slain one of the domestic slaves in a drunken quarrel, and Euthyphro's father had seized him, bound him hand and foot, and thrown him into a ditch, where he let him lie while he sent a messenger to Athens for advice from the Exegetes as to what should be done. The arrested man died of hunger and exposure before the messenger returned, and Euthyphro thereupon brought action against his father for murder. When we hear about the case in Plato's dia-

logue, it is still in its preliminary stages (i.e., before the king archon) and has not yet come before the Palladium. We do not know whether, if Plato's story is historical, this case was eventually allowed. Euthyphro was evidently something of a religious fanatic, and it is possible that the king archon later quashed the indictment. But whether or not this particular suit ever came to trial, the text shows that a *δίκη φόνου* could be brought by one member of the family against another. When Euthyphro says that he is prosecuting his father for murder, Socrates is amazed and then adds, "Why, then the person your father killed must be one of your own kinsmen [*τῶν οἰκείων τις*]!"<sup>48</sup> Euthyphro goes on to say that his father and other relatives think it an impious thing (*ἀνόσιον*) for him to prosecute his father for murder. They do not say, however, that it is contrary to law. The use of the *δίκη φόνου* against a kinsman is permitted (nay, even encouraged) in Platonic law,<sup>49</sup> and there is good reason to think that Plato's law of homicide is in general a faithful reflection of Attic law. It is fair to conclude, I think, that such an action as Euthyphro is bringing was most unusual, but allowable, provided that the slain man was one for whom Euthyphro had a right to bring action.<sup>50</sup> This raises the question whether the *πελάτης* was a freeman or a slave. The highhanded way in which Euthyphro's father arrested and bound him suggests that he was (or was thought by Euthyphro's father to be) a slave. But according to Pollux the word *πελάτης* denoted a freeman who through poverty had lapsed into virtual slavery.<sup>51</sup> This was the condition of the small farmers in Attica before Solon's reforms, and Aristotle calls them *πελάται*.<sup>52</sup> Doubtless the legal status of the *πελάται* on the Athenian estates in Naxos was not clearly defined, and this is why Euthyphro's father sent to the Exegetes for advice. Unless we suppose Euthyphro to have been extraordinarily ignorant of the law, there must have been a presumption that the man was a slave, and therefore good reason to think the king archon would recognize Euthyphro's right to bring suit against his murderer. The

<sup>48</sup> *Euthyphro* 4b.

<sup>49</sup> *Laws* ix. 871b, compared with 873b.

<sup>50</sup> See Treston, pp. 233 ff. (esp. p. 237) for evidence that kin-slaying was actionable at Attic law. But Treston does not bring out the implications of this fact for the slave-members of the family.

<sup>51</sup> iii. 82.

<sup>52</sup> *Const. of Ath.* ii. 2.

weakness of Euthyphro's case, then, did not lie in the fact that he was prosecuting his father for murder, but in the fact that he was prosecuting for the murder of someone who was not clearly an *οἰκεῖος*. If the dead man had been a *δοῦλος*, there could hardly have been any doubt of Euthyphro's right to bring suit.

This, however, was the only way in which a *δίκη φόνου* could be brought against a master for the killing of his slave. No person outside the family could institute such a suit.<sup>53</sup> But there were certain forms of public prosecution that could be used to bring a cruel master to justice. We have already seen that a *γραφὴ ἀσεβείας* could be brought against a delinquent kinsman who had failed to prosecute for murder, and it is probable that such a public suit could also be—though probably rarely was—brought for failure to prosecute for the murder of a slave. Besides this there was the suit for *ῥβρις*. The possibility that a *γραφὴ ῥβρεως* would lie against a master who had abused his slave is usually overlooked, when it is not expressly denied. Busolt mentions this form of prosecution only as a protection to the slave against mistreatment *durch Fremde*, the italics in his text showing that he is deliberately and emphatically limiting its application.<sup>54</sup> Lipsius maintains that a master who had murdered his own slave would be required only to observe the religious rule of purification.<sup>55</sup> This statement is based quite inadequately upon a passage from Antiphon already quoted.<sup>56</sup> This passage does not say that a master who has killed his slave will be in no danger of prosecution, but only that, even if he is not prosecuted, he will still observe the law of purification. On general grounds, if *ῥβρις* was an offense of such importance as to be actionable by means of a *γραφὴ*, it hardly seems that masters could commit *ῥβρις* with impunity. Plato's injunction to avoid *ῥβρις* toward slaves was addressed to masters, as the context shows. Furthermore, as Gernet points out,<sup>57</sup> the Greek sense of *ῥβρις* was particularly marked when the injured party had the status of a weaker person re-

<sup>53</sup> Isocrates xviii. 52 has sometimes been interpreted as showing that a *δίκη φόνου* could be brought against a master by someone outside the family. But Isocrates does not say to whom the slave belonged. It is probable that she belonged, not to Cratinus, the defendant, but to Callimachus, the prosecutor, which would bring this case into line with what is elsewhere the universal rule of procedure.

<sup>54</sup> *Op. cit.*, p. 983.

<sup>56</sup> See above, n. 39.

<sup>55</sup> *Op. cit.*, pp. 605 and 794.

<sup>57</sup> *Op. cit.*, p. 194.

quiring protection. The use of the *γραφὴ ὕβρεως* against a cruel master would be analogous to other devices in Attic law for punishing abuses of power by those in a legally privileged position, such as the public prosecutions of guardians for abuse or neglect of orphans (the *γραφαὶ κακώσεως ὀρφανῶν, κακώσεως ἐπικλήρου, οἴκου ὀρφανικοῦ*).

Apart from these considerations, there was a very practical reason why some form of public prosecution should have been available to restrain the power of a master over his slave. Athenian judicial procedure made considerable use of slaves. A slave could lodge information with a magistrate on which prosecution against a free person, his master or anyone else, could be based.<sup>58</sup> Slaves were even encouraged to give such information by the inducement of emancipation, which shows the importance the Athenians attached to this function of the slave. The position of the slave in the family obviously gave him access to information not easily obtainable in any other way. Lysias tells us that the master whose slave knows of some crime he has committed is the unhappiest of men.<sup>59</sup> What was to restrain a master from making away with a slave that knew too much? Plato in the *Laws* provides explicitly that a master who has murdered his slave for fear that he will give information to the officials is to be prosecuted "as if he had murdered a citizen," and elsewhere enjoins the magistrates to see to it that no one takes revenge on a slave informer.<sup>60</sup> Similar remedies could hardly have been lacking in Attic law. Thus I think it is safe to infer that a master could be proceeded against, not only indirectly, through the *γραφὴ ἀσεβείας* brought against a kinsman who had failed to prosecute him, but also directly, through the *γραφὴ ὕβρεως*. Until some shred of evidence to the contrary is produced, this inference should be allowed to stand.

Thus far the legal remedies we have considered have been such as the slave himself could not employ, since the slave had no right to bring suit in the courts. Was there any action which the slave himself

<sup>58</sup> Bonner, *Evidence in Athenian Courts*, p. 39. Kahrstedt's view (*op. cit.*, p. 324) that slaves did not ordinarily possess the right of *μήνυσις*, but only on special occasions as a result of a specific decree of the assembly, seems to be based entirely on a questionable interpretation of Thuc. vi. 27. The decree was not a grant of the right of *μήνυσις*, but a grant of immunity to informers who might otherwise incriminate themselves.

<sup>59</sup> vii. 16.

<sup>60</sup> ix. 872c; xi. 932d.

could take to protect his life or his person? It is possible that a slave could, by lodging information with a magistrate, be instrumental in initiating a suit for *ὑβρις* against his master. We do not know whether the slave had a right to defend himself against a murderous attack from a freeman. Plato provides that a slave who kills a freeman in self-defense is to be put to death;<sup>61</sup> but Plato's slave law is noticeably harsher than Attic law and is not a safe guide here. The only procedure we know of, which the slave could invoke for his own protection was to claim the right of asylum. The Theseum, near the Agora, and the altar of the Eumenides on the Acropolis, were sanctuaries in which the slave could take refuge from a cruel master. He could even demand to be sold to another master, though there seems to have been no legal way of enforcing this demand. But if the priest of the sanctuary granted asylum, the master could not regain possession of the slave by any legal method, and he would probably find that selling his slave was the best way out of a profitless situation.<sup>62</sup>

We have now surveyed the remedies that Attic law provided for the protection of the slave. It is clear enough that these remedies fell far short of affording the same degree of protection to the slave as to the freeman. This came about from a combination of two factors: the rule of Attic law that permitted only free persons to bring suit in the courts,<sup>63</sup> and the rule that murder and other bodily injuries, being private wrongs, could be redressed only by private prosecution brought by a kinsman or by the *κύριος* of the victim. Since the slave's kinsmen (if, in fact, he had any in the city) would probably themselves be slaves and hence without competence to prosecute, the murderer of a slave could be brought to justice only if the slave's master or (in a case of *ὑβρις*) some other public-spirited person saw fit to prosecute. This explains the situation described in Antiphon's *Herodes*. Here a slave has been put to death by his owners—an action clearly criminal in character. But the offenders have not been prosecuted, and there is apparently not much likelihood that they will be. They could not be indicted for *φόνος*, since they were the slave's

<sup>61</sup> ix. 869ab, d.

<sup>62</sup> Cf. Beauchet, II, 437 ff.

<sup>63</sup> Of course not all free persons could bring suit. Women and children were almost completely incompetent; metics and citizens suffering from *ἀριμία* possessed limited legal capacity.



κύριοι; and no one was sufficiently interested or sufficiently courageous to risk the *γραφὴ ὕβρεως*, since it would probably have been very difficult to establish the facts in the case. Under a system of law which recognizes murder as a public offense and the apprehension and punishment of the murderer as a duty of the public officials, such a situation could not easily arise.

But although, as a result of this peculiarity of Attic procedure, the murderer of a slave could often escape without punishment, and although the slave possessed no power of taking legal action to protect himself or a fellow-slave, yet it would be a gross error to conclude that the slave was rightless, even against his master. Plato in the *Gorgias* characterizes a slave as one "who, when he is injured or reviled, is without power to help himself or anyone else for whom he cares."<sup>64</sup> If this is to be taken literally as expressing Attic law without rhetorical exaggeration, it means that the slave was absolutely devoid of active legal capacity; it would imply also, I think, that the slave had no right of self-defense. But it does not say that anyone (even the master) may do what he pleases to a slave with impunity, as Kahrstedt supposes.<sup>65</sup> To say that the slave has no power of legal action is not to say that he has no rights before the law. A right exists wherever there is a correlative duty, and Attic law clearly imposed duties upon masters and other freemen with respect to slaves.

In his *Hecuba*<sup>66</sup> Euripides pictures the captive Trojan queen pleading with Odysseus for her own life and the life of the other captive women, who of course had become the slaves of the victorious Greeks:

νόμος δ' ἐν ὑμῖν τοῖς τ' ἐλευθέροις ἴσος  
καὶ τοῖσι δούλοις αἵματος κείμενός περ.

Euripides, an Athenian writing for an Athenian audience, was probably attributing to all Greek law the characteristics of the law most familiar to him and his hearers. What is meant by this "equal law of blood for slave and free"? Clearly what *Hecuba* intends to say is that the killing of a slave without judicial procedure is a violation of law and exposes the slayer to penalties. We cannot infer that the

<sup>64</sup> 483b: ἀνδραπόδου . . . ὅστις ἀδικούμενος καὶ προπηλακίζόμενος μὴ οἷός τε ἐστὶν αὐτὸς αὐτῷ βοηθεῖν μηδὲ ἀλλῳ οὐδ' ἂν κήδηται.

<sup>65</sup> *Op. cit.*, p. 326.

<sup>66</sup> *Il.* 291-92.

same penalty is imposed in the two cases, or that there is an equal likelihood that the killer will be brought to justice.

How ancient is this law of which Euripides boasts? It is clearly not the creation of the humanitarian and equalitarian movement of the classical period. Both the law of *φόνος* and the law of *ὑβρις* are demonstrably old. The homicide laws were the oldest section of Athenian legislation, having been in force since at least the time of Solon. The tradition was that Solon took them over from the legislation of Draco.<sup>67</sup> Lycurgus' reference to the ancient legislators and the severity of the penalties prescribed for the murder of a slave, Antiphon's mention of the "ancestral laws," and above all the religious defilement attached to the murder of a slave, show that the protection of the slave's life was an ancient feature of Attic law.<sup>68</sup> As for the law of *ὑβρις* cited by Demosthenes, there are good reasons for believing that it also is at least as old as Solon. The strangeness (to the fourth-century popular thought) of its provision protecting slaves; the term *ὑβρις* itself, so ancient and so difficult to make legally precise; its close associations with the religious sentiments—all this is good evidence of the antiquity of the law. We should naturally expect that the recognition of the slave's personality and his membership in the community would more easily arise at a time when (as in seventh-century Attica) most of the slaves were of Greek blood, and were used for domestic purposes, than in the more commercial and industrial age that followed, when the slaves in Athens were predominantly of barbarian origin.

If, then, the recognition of the slave's personality and his right to protection is such an ancient feature of Attic law, it is hard to acquiesce in the dogma that the slave was essentially and primarily a piece of property. Even in the later period the power of a master over his slaves is generally regarded as a form of "rule," like the rule of a father over his children, or a king over his subjects. The master is *ὁ δεσπότης*, not merely *ὁ κεκτημένος*; and the slaves are the subjects *ὧν κρατεῖ*, as well as *ἀνδράποδα* which he owns. The Aristotelian doctrine that the slave is an animated tool (*κτῆμα ἐμψυχον*) seems to have

<sup>67</sup> Arist. *Const. of Ath.* vii. 1.

<sup>68</sup> Treston (p. 134) maintains that the doctrine of pollution came in in the seventh century.

been a sophisticated product of the fourth century. But even in Aristotle the older view is evident, not only in his constant use of the term *δεσπότης* for slaveowner, but most strikingly in the distinction he draws in the first book of the *Politics* between the various kinds of rule, of which the rule of master over slaves is one. And in the fifth book of the *Nicomachean Ethics* we find him listing various species of justice corresponding to these types of rule.<sup>69</sup> No doubt there was a tendency in later Attic law, as in Roman law and in most modern systems, for the law of property to override the law of persons, and for power over slaves to be looked upon as a "by-product of ownership."<sup>70</sup> But just as the Greeks never permitted the rule of the father over his children to develop into anything like the *patria potestas* of Roman law, so the master's ownership of his slaves fell far short of the "right to use and abuse in the most absolute fashion" characteristic of the developed concept of property. It remained, as Aristotle's own usage testifies, a form of rule over subjects, not mere things; and a rule which was from quite early times limited in certain respects by religious requirements and by the law of the πόλις.

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<sup>69</sup> *Pol.* i. 1255b. 15 ff.; *Eth. Nic.* v. 1134b. 8 ff.; cf. also Plato's enumeration of the seven kinds of rule in *Laws* iii. 690b: τέταρτον δ' αὖ δούλους μὲν ἄρχεσθαι, δεσπότης δὲ ἄρχειν.

<sup>70</sup> Kahrstedt notes that the respect for property in slaves increased during the classical period (*op. cit.*, p. 139).