

Athenian Road Kill (Dem. 23.53)

According to a famous passage in Demosthenes, “It was permitted to kill a highwayman who waylaid one on a road.”¹ The law is quoted at 23.53:

Ἐάν τις ἀποκτείνει ἐν ἄθλοις ἄκων, ἢ ἐν ὁδοῦ καθελῶν ἢ ἐν πολέμῳ ἀγνοήσας, ἢ ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπ’ ἀδελφῆ ἢ ἐπὶ θυγατρὶ, ἢ ἐπὶ παλλακῆ ἢ ἄν ἐπ’ ἐλευθέροις παισὶν ἔχη, τούτων ἕνεκα μὴ φεύγειν κτείναντα.

If one kills unwillingly in games, or by pulling (someone) down in the road, or having failed to recognize (a comrade) in war, or (if one kills a man who is) with a wife, or with a mother, or with a sister, or with a daughter, or with a concubine kept for purpose of producing free offspring, he shall not, for these (acts) go into exile for having killed.²

It is worrisome that the phrase ἐν ὁδοῦ καθελῶν suggests nothing about self-defense, highway robbery, or ambush, which are widely regarded as the essential elements of this claim to lawful homicide. It is even more worrisome that in the exegesis that follows the quotation, Demosthenes does not even mention this clause.³ Neither does the *Ath. Pol.*, which includes the other scenarios but omits this one altogether: “If one admits to killing, but says that (one killed) in accordance with the laws, e.g. having caught a *moichos*, or unknowingly in war, or competing in games, they shall bring him to trial at the Delphinion.”⁴

¹ MacDowell 1978: 114; also 1963: 73: “catching him waylaying him,” and 75-76. Also e.g. Todd 1993: 274n18: “defence against highway robbery” (but cf. Todd 2007: 127: “catching him on the highway”); Phillips 2008: 60: “killing a highway robber in self-defense,” 2013: 57: “having come upon a highway robber in the road;” Lanni 2006: 87: “overpowering someone on the road [i.e. defending oneself from a highway robber].” Carawan 1998: 92 is cautious: “slaying upon the road.”

² Sometimes “shall not defend himself in court as having killed” (μὴ φεύγειν κτείναντα) vel sim. But see Gagarin 1981: 114-115n8. “With” cannot adequately capture the force of ἐπὶ; see Carey: 1995: 409-410n9 and 10.

³ Dem. 23.54-55: καίτοι σκέψασθ’ ὡς ὀσιῶς καὶ καλῶς ἕκαστα διεῖλεν ὁ ταῦτ’ ἐξ ἀρχῆς διελῶν. ἂν τις ἐν ἄθλοις ἀποκτείνει τινά, τοῦτον ὥρισεν οὐκ ἀδικεῖν. διὰ τί; οὐ τὸ συμβᾶν ἐσκέψατο, ἀλλὰ τὴν τοῦ δεδρακότος διάνοιαν. ἔστι δ’ αὐτῆ τίς; ζῶντα νικῆσαι καὶ οὐκ ἀποκτείνειν. εἰ δ’ ἐκεῖνος ἀσθενέστερος ἦν τὸν ὑπὲρ τῆς νίκης ἐνεγκεῖν πόνον, ἑαυτῷ τοῦ πάθους αἴτιον ἡγήσατο, διὸ τιμωρίαν οὐκ ἔδωκεν ὑπὲρ αὐτοῦ. πάλιν ‘ἂν ἐν πολέμῳ’ φησὶν ‘ἀγνοήσας,’ καὶ τοῦτον εἶναι καθαρὸν. καλῶς· εἰ γὰρ ἐγὼ τινα τῶν ἐναντίων οἰηθεὶς εἶναι διέφθειρα, οὐ δίκην ὑπέχειν, ἀλλὰ συγγνώμης τυχεῖν δίκαιός εἰμι. ‘ἢ ἐπὶ δάμαρτι’ φησὶν ‘ἢ ἐπὶ μητρὶ ἢ ἐπ’ ἀδελφῆ ἢ θυγατρὶ, ἢ ἐπὶ παλλακῆ ἢ ἂν ἐπ’ ἐλευθέροις παισὶν ἔχη,’ καὶ τὸν ἐπὶ τούτων τῷ κτείναντ’ ἀθῶνον ποιεῖ, πάντων γ’ ὀρθότατ’, ὧ ἄνδρες Ἀθηναῖοι, τοῦτον ἀφιεῖς. (And note how piously and well the one who originally defined these things defined them. “If someone kills someone in games,” he determined that this man did not do wrong. Why? He did not regard the thing that happened, but the intent of the one who had done it. And what is that? To conquer the man alive, not to kill. But if that man was too weak to bear the pain for victory’s sake, then he (sc. the lawmaker) thought him responsible for the suffering (that befell) him; wherefore he provided no vengeance on his behalf. Fine. For if I destroyed someone, because I thought him one of my enemies, it is just for me not to suffer legal exaction but to find pardon. “Or with a wife,” he says, “or with a mother or with a daughter, or with a concubine whom he has for purpose of free children,” and he makes guiltless anyone who kills a man who is with any of these—most rightly of all, Athenian men—letting this man off).

⁴ Dem. 57.3: ἐὰν δ’ ἀποκτείνει μὲν τις ὁμολογῆ, φηὶ δὲ κατὰ τοὺς νόμους, οἷον μοιχὸν λαβῶν, ἢ ἐν πολέμῳ ἀγνοήσας, ἢ ἐν ἄθλῳ ἀγωνιζόμενος, τούτ[ω] ἐπὶ Δελφινίῳ δικάζουσιν.

Why skip it? Carawan suggests that the clause is ancient, but not Draco's, that "there was a later statute recasting the substance of Draconian laws on justifiable killing to be found in the enabling ordinance for the Delphinium court," and that the editor (of Demosthenes) found ἡ ἐν ὁδῷ καθελών there and inserted it at 53, "probably assum[ing] that the Draconian law of justifiable homicide that Demosthenes had read to the court in §53 was the same as the law of the Delphinium court to which he alludes in §74."⁵ Draconian or not, the phrase is unambiguously ancient,⁶ and Canevaro has concluded that the law as quoted was "already present in the *Urexemplar*."⁷ Drerup thought the phrase either corrupt or else archaic and beyond Demosthenes' understanding.⁸ Gibson urges the latter: "Perhaps [Demosthenes] did not understand the archaic expression "seizing on the road" and thus was unable to use it in his argument."⁹ Right. Harpokration appears to have had no clue. He glosses ἡ ἐν ὁδῷ καθελών with "meaning seizing someone who is lying in ambush, i.e. falling upon someone in ambush."¹⁰ This is invention, derived perhaps from acquaintance with the kinds of violence that take place on roads, but not from anything explicit in the Greek. On καθελών he notes that Demosthenes "uses the phrase for ἀνελών or ἀποκτείνας," and that others do too.¹¹ They may, but in Demosthenes' formulation, ἄκων (in an athletic event) and ἀγνοήσας (in war) are circumstantial and describe subject and action. The participle καθελών must do the same and so is not likely to mean simply "kill" ("If someone kills by killing"?). Finally, Harpokration notes that Demosthenes uses the phrase "ἡ ἐν ὁδῷ καθελών for 'by ambush' and 'by trap'. And they say that such also is the Homeric 'or coming down the road.'"¹² But the Homeric phrase that he quotes appears once (*Il.* 1.151) and simply denotes travel on a road. The semantic distance between these two phrases is great; it is not clear what Harpokration meant to show. His comments bespeak guesswork, and perhaps some confusion too.¹³

There is nothing implausible in the suggestion that even Demosthenes or the author of the *Ath. Pol.* omitted discussion of the clause because they too did not understand it. Athenian law had its share of old and odd words. In a case that turned heavily on the constructed meaning and interpretation of words, Lysias charged that his opponent was "so dim-witted that he cannot understand what is being said," and then proceeded to "teach" his opponent a thing or two about

⁵ Carawan 1998: 92-96, quotes at 94 and 96.

⁶ Known to Harpokration (citations below) and the author of P.Berol. inv. 5008 [Trismegistos 59647] (see Gibson 2002: 157-171, esp. 160, 165-166), attested in *P.Mich.* III 142 [Trismegistos 59552].

⁷ Canevaro 2013: 69.

⁸ Drerup 1898: 277; as Canevaro 2013: 69n129 notes, with regard to the latter possibility, Weil 1886: 209n5 had reached the same conclusion.

⁹ Gibson 2002: 165. Canevaro too (2013: 69), following Drerup 1898; also Ruschenbusch 1960: 150n106.

¹⁰ Harp. s.v. ἡ ἐν ὁδῷ καθελών: ἀντὶ τοῦ ἐνεδρεύοντα ἐλών, τουτέστι ἐν τινὶ ἐνέδρῳ καταβαλών· Δημοσθένης ἐν τῷ κατ' Ἀριστοκράτους.

¹¹ Harp. s.v. Καθελών: Δημοσθένης ἐν τῷ κατ' Ἀριστοκράτους φησὶν "ἡ ἐν ὁδῷ καθελών" ἀντὶ τοῦ ἀνελών ἢ ἀποκτείνας. ἐχρήσαντο δὲ οὕτω τῷ ὀνόματι καὶ ἄλλοι, ὡς καὶ Στησίχορος ἐν Ἰλιοπέρσιδι καὶ Σοφοκλῆς ἐν Εὐμήλῳ.

¹² Harp. s.v. Ὀδός: Δημοσθένης ἐν τῷ κατ' Ἀριστοκράτους φησὶν "ἡ ἐν ὁδῷ καθελών" ἀντὶ τοῦ ἐν λόγῳ καὶ ἐνέδρῳ. τοιοῦτον δὲ εἶναι καὶ τὸ Ὀμηρικόν φησιν "ἡ ὁδὸν ἐλθέμεναι." εἰ δὲ ψιλῶθει ἢ προτέρα, σημαίνει τὸν βαθμὸν, ὡς παρὰ Λυσία ἐν τῷ κατὰ Φιλίππου, εἰ γνήσιος ὁ λόγος.

¹³ Gibson 2002: 165 suggests that Harpokration's reference to the alleged Homeric parallel may arise from conflation of καθελών and ἐλών.

a string of obscure, archaic words.¹⁴ “Realities are the same now as of old,” he concludes, “but some words we just don’t use the same now as previously.”¹⁵ Fine, but how many jurors would have known already that ἀπίλλειν meant simply ἀποκλείειν? The word is attested only in a passage of Lysias and the entry in Harpokration that quotes it.¹⁶ How many would have known that one swears an oath by Apollo with ἐπιορκέω, an apparently unique use of a verb that to most will have indicated a false oath!¹⁷ How many would have known that where the law specifies that “money shall be *stasimon* at however much the lender wishes,” *stasimon* did not imply “placing on a balance, but exacting interest.”¹⁸ Technical meanings can be clear at the time and opaque centuries later.

This, I suggest, was the case with this use of καθαιρέω. Its root meaning is clearly physical, ‘tearing down,’ and that persists. But in archaic and classical Greek it often denotes utter destruction, obliteration. In Homer “ruinous fate *destroys* one in long-painful death.”¹⁹ Time *obliterates* everything.²⁰ The gods *destroy* men like Paris.²¹ Hekataios recommends naval build-up on such a scale as to require total *exhaustion* of all of Kroisos’ dedications at Branchidae.²² Korinth *eradicated* piracy.²³ Panakton was *razed*.²⁴ The Greeks *obliterated* the power of Priam.²⁵ A tragic chorus cheers the *slaughter* of Aigisthos.²⁶ The list of examples could go on, and on. This was not the verb for self-defense against robbers. It signaled total destruction rather than the lethal reactions of a surprised pedestrian.

Furthermore, the clause is held to describe a form of justifiable homicide. “Lawful” homicide in Athens conformed to one of two fact patterns, in which the killing was what we might, for convenience, call either justifiable or inadvertent. The former inhered where one slew,

¹⁴ Lys. 10.15: ἐγὼ τοίνυν, ὦ ἄνδρες δικασταί, ὑμᾶς μὲν πάντας εἰδέναι ἠγοῦμαι ὅτι ἐγὼ μὲν ὀρθῶς λέγω, τοῦτον δὲ οὕτω σκαιὸν εἶναι ὥστε οὐ δύνασθαι μαθεῖν τὰ λεγόμενα. βούλομαι οὖν αὐτὸν καὶ ἐξ ἑτέρων νόμων περὶ τούτων διδάξαι, ἂν πως ἀλλὰ νῦν ἐπὶ τοῦ βήματος παιδευθῆ καὶ τὸ λοιπὸν ὑμῖν <μῆ> παρέχη πράγματα.

¹⁵ Lys. 10.20: ἀλλ’ εἰ μὴ σιδηροῦς ἐστίν, οἶμαι αὐτὸν ἔννονον γεγενῆσθαι ὅτι τὰ μὲν πράγματα ταῦτά ἐστι νῦν τε καὶ πάλαι, τῶν δὲ ὀνομάτων ἐνίοις οὐ τοῖς αὐτοῖς χρώμεθα νῦν τε καὶ πρότερον.

¹⁶ Lys. 10.17: τὸ ἀπίλλειν τοῦτο ἀποκλήειν νομίζεται, καὶ μηδὲν διὰ τοῦτο διαφέρει; Harp. s.v. Ἀπίλλειν: Λυσίας ἐν τῇ κατὰ Θεομνήστου, εἰ γνήσιος, “ἀποκλείειν νομίζεται.”

¹⁷ Lys. 10.17: τοῦτο τὸ ἐπιορκήσαντα ὁμόσαντά ἐστι.

¹⁸ Lys. 10.18: Νόμος: “τὸ ἀργύριον στάσιμον εἶναι ἐφ’ ὅποσῳ ἂν βούληται ὁ δανείζων.” τὸ στάσιμον τοῦτό ἐστιν, ὃ βέλτιστε, οὐ ζυγῶ ἰσάναται ἀλλὰ τόκον πράττεσθαι ὅποσον ἂν βούληται.

¹⁹ Hom. *Od.* 2.100, 3.238, 19.245: μοῖρ’ ὀλοὴ καθέλῃσι τανηλεγέος θανάτιο.

²⁰ Aes. Fr. 469 [Radt]: χρόνος καθαιρεῖ πάντα γηράσκων ὁμοῦ.

²¹ Aes, *Ag.* 396-402: λιτᾶν δ’ ἀκούει μὲν οὕτις θεῶν, / τὸν δ’ ἐπίστροφον τῶν / φῶτ’ ἄδικον καθαιρεῖ· / οἶος καὶ Πάρις ἐλθὼν / ἐς δόμον τὸν Ἀτρειδᾶν / ἥισχυε ξενίαν τράπε/ζαν κλοπαῖσι γυναικός.

²² Hdt. 5.36: εἰ δὲ τὰ χρήματα κατααιρεθῆ τὰ ἐκ τοῦ ἱεροῦ τοῦ ἐν Βραγχίδησι, τὰ Κροῖσος ὁ Λυδὸς ἀνέθηκε, πολλὰς εἶχε ἐλπίδας ἐπικρατήσῃ τῆς θαλάσσης.

²³ Thuc. 1.13.5: τὰς ναῦς κτησάμενοι τὸ ληστικὸν καθήρουν.

²⁴ Thuc. 5.42.1: τὸ μὲν Πανάκτον ὑπὸ τῶν Βοιωτῶν αὐτῶν καθηρημένον ἦν.

²⁵ Hdt. 1.4: Ἕλληνας δὲ Λακεδαιμονίης εἵνεκεν γυναικός στόλον μέγαν συναγεῖραι καὶ ἔπειτα ἐλθόντας ἐς τὴν Ἀσίην τὴν Πριάμου δύναμιν κατελεῖν.

²⁶ Eur. *El.* 876-878: νῦν οἱ πάρος ἀμετέρας γαίης τυραννεύσουσι φίλοι βασιλῆς / δικαίως, τοὺς ἀδίκους καθελόντες. This, just before he walks on stage carrying the dead body.

for example, a man who was ‘with’ a woman in one’s household, or a would-be tyrant, or a condemned and exiled killer who had returned to Athenian soil. Inadvertent homicide was different: a boxing match gone wrong, the unfortunate killing of a comrade in battle.²⁷ At Dem. 23.53, “ἐν ὁδοῦ καθελὼν” is flanked by two forms of inadvertent homicide, all three expressed in the same fashion: ἐν + dative + circumstantial participle. This trio precedes a clear example of justifiable homicide. The law as quoted, I urge, did not jumble the two classes; the first three scenarios are of a common type, all of them instances of inadvertent lawful homicide.

If this is right, then the phrase ἐν ὁδοῦ καθελὼν should refer to a type of accidental killing that happens on a road and can inflict ruinous damage on a person. Thalheim suggested accidental ejection of a person from a mountain road.²⁸ The more obvious candidate, I suggest, is vehicular homicide.²⁹ Such deaths happened.³⁰ And anyone who has witnessed a car running over a pedestrian knows that the action on the victim’s body can rightly be described as ‘pulling down.’ The clause, then, had nothing to do with self-defense against robbers who lay in ambush. Rather it protected drivers and passengers of carriages, carts, horses and the like from charges of intentional homicide when they accidentally ran over pedestrians in the road.³¹ But this was an old use of the verb, and by the fourth century BC a different term may have been current. Demosthenes and the author of the *Ath. Pol.* may not have known what to make of the phrase, and by Harpokration’s time one could only guess.

Antiquity’s most famous highway killing is the backstory to its most famous play. Where three roads meet, father drove at son and son killed father, neither knowing what ills would come. Some have thought that an Athenian audience might regard Oedipus as innocent of murder: he was waylaid in the road and acted in self-defense.³² But Harris has argued that Athenian theatergoers would have understood that Laios and driver had not laid in “ambush,” and that Athenian law would not have recognized their killing as justified and lawful. The driver shoved and Laios goaded, but Oedipus slew. For the audience member who was inclined to think in terms of Athenian law, Oedipus was guilty of intentional homicide.³³

²⁷ For recent discussion see Harris 2010: 131-133.

²⁸ Thalheim 1894: 50n4.

²⁹ A possibility considered but rejected by Carawan 1998: 92. Ruschenbusch 1960: 150 describes this scenario as “Wegsperre” (road-block), finding a possible parallel at *Lex Francorum Chamavorum* [MGH Font. iur. Germ. VI] XLI: *Si quis viam publicam clausurit, in fredo dominico solidos 4*. I do not understand how this scenario is thought to concern homicide.

³⁰ Some were memorialized on stone, for example the tragic death of a seven year-old (*I. Parion* 52, with Robert, *Hellenica* X 276-282), or that of a prized pig (*I. Epidamnus* T527); the accident that resulted in the death of the latter is depicted in the relief that accompanied the epitaph: Daux 1970: 611 fig.1. See also the shocking description of a person crushed beyond recognition by a collapsed freight vehicle at Juv. *Sat.* III 257-261; compare with Maiuri, *NSER* 48 (quoted at Robert, *Hellenica* X 282).

³¹ Carawan 1998: 92 asks how law on highway killings of any sort suited “public policy in the same way that athletics, military service, and defence of the *oikos* against sexual violation called for legal safeguards.” A great question. One thing that seventh-century athletes, hoplites, and carriage drivers/passengers have had in common is economic status. Laws set policy but also reflect the interests of constituencies. These three potentially common and highly visible types of tragic accident may have loomed large in elite Athenians’ minds.

³² See at Harris 2010: 122-123.

³³ Harris 2010: 136-137: guilty, at least insofar as the narrative at *OT* 800-813 suggests; see also Sommerstein 2011 for an extended response and discussion of Oedipus’ guilt and self-defense.

But if the clause addressed inadvertent vehicular homicide, as I suggest, then that same legally minded audience member will not have contemplated the possible innocence of Oedipus, in whose version of events Laios and the driver initiated the violence by “driving [Oedipus] off the road.”³⁴ What if, that Athenian might wonder, the collision had been accidental? In that case, a more direct, lethal strike would have brought the father neither guilt nor pollution, and so spared the son the very same. All the more tragic.

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³⁴ Soph. *OT* 804-805: κάξ ὁδοῦ μ’ ὅ θ’ ἠγεμῶν / αὐτός θ’ ὁ πρέσβυς πρὸς βίαν ἠλαυνέτην.