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TRAUMA EK PRONOIAS IN ATHENIAN LAW*

Abstract: This article presents a comprehensive study of the offence of *trauma ek pronoias* (intentional wounding) in Athenian law. Part I catalogues every occurrence of the words τραῦμα and τιτρώσκω in the Attic orators and concludes that the requisite physical element of *trauma ek pronoias* was the use of a weapon. Part II analyses all attested *trauma* lawsuits and concludes that the requisite mental element of the offence was a bare intent to wound. Part III addresses the procedural evidence for *trauma ek pronoias* and concludes that the action for *trauma* was a *graphê*, not a *dikê*. Two appendices discuss the use of the terms *trauma* and *pronoia* in Plato's *Laws* and Aristotle's *Rhetoric* (Appendix A) and a reference to *trauma ek pronoias* in Lucian's *Timon* (Appendix B).

In the study of Athenian law, the offence entitled τραῦμα ἐκ προνοίας, 'intentional wounding', has received relatively scant attention: it merits a paragraph or two in general studies of Athenian law,[1] makes an occasional appearance in commentaries on certain speeches of Lysias, Demosthenes and Aeschines,[2] and boasts a modest scholarly bibliography.[3] The terminology of the offence, and thus its fundamental nature, has been the subject of some debate. *Trauma* is generally understood (albeit without significant proof) to mean 'wounding' by means of a weapon, and so to be distinguished from physical assaults not involving weapons, which gave rise to an action for (simple) battery (*dikê aikeias*), or possibly for *hubris* (*graphê hubreôs*). There is, however, no consensus regarding the interpretation of *pronoia*. Some critics interpret the word as meaning 'intent', while others prefer 'premeditation' or 'deliberation'. The referent of *pronoia* is also disputed: that is, does *pronoia* refer to the act itself (which would make *trauma ek pronoias* simply 'wounding with intent [to wound]') or to the intended result (on which view the phrase means 'wounding with intent to kill')?[4] Owing to procedural similarities between the action for *trauma* and the *dikê phonou*, the regular action for homicide, most scholars support the latter interpretation, define *trauma* as 'wounding with intent to kill' or 'attempted murder', and treat it accordingly under the rubric of Athenian homicide law.[5] The purpose of this study is to present a full analysis of the evidence, both philological and legal, relating to *trauma ek pronoias*, and so to determine the exact nature and treatment of the offence. The three principal questions to be answered are: (1) What distinguished *trauma* from other types of physical assault? (2) What was the significance of *pronoia* in the phrase *trauma ek pronoias*? and (3) Was *trauma ek pronoias* actionable by a *dikê*, a *graphê*, or both?

I. THE SEMANTICS OF *TRAUMA*

The Greek noun τραῦμα 'a wound' is derived ultimately from a Proto-Indo-European root **tr-* 'pierce', whose numerous descendants include Sanskrit *prá-turti-ḥ* 'a fight', Lithuanian *trunéti* 'to rot', English *thorn*, Latin *terere* 'to wear, grind', and a family of Greek words containing, besides τραῦμα, τιτρώσκω 'to wound', τρώω 'to wound', τρητός 'pierced', τέρναξ 'cactus

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[1] E.g. Lipsius (1905-15) 605-7; Harrison (1968-71) 2.103 with n.3; MacDowell (1978) 123-4; Todd (1993) 269, 272.

[2] E.g. Carey (1989) on Lys. 3; Paley and Sandys (1886-1910) on [Dem.] 40.32; Carey and Reid (1985) on Dem. 54.18; Richardson (1889) on Aeschin. 3.51.

[3] See especially Pecorella Longo (1981); Hansen (1983); also Hansen (1976) 108-10; Gagarin (1979) 322; Osborne (1985) 57; Fisher (1992) 80-1; *RE* s.v. τραῦμα ἐκ προνοίας.

[4] I borrow this terminology from the Model Penal Code, drafted by leading American scholars of criminal law in 1962, which defined act, result, and circumstance as elements of a criminal offence (see Robinson (1995) 62-3, 699-797).

[5] E.g. Todd (1993) 269 ('attempted murder'); Hansen (1983) 307 ('wounding with intent to kill').

spine', and others.[6] The earliest literary usage of words in this family appears in Homer's *Iliad* and *Odyssey*. In both epics, τρητός and its compounds (e.g. ἐΰτρητος, πολύτρητος) occur most commonly as epithets describing furniture and are usually rendered in English as 'perforated';[7] they are also used as epithets for sponges,[8] ears[9] and a mooring-stone.[10] Homer has neither τραῦμα nor τιτρώσκω, but he does employ τρώω, which literally means 'to wound'[11] but also carries the figurative senses 'to (cause to) grieve'[12] and 'to overcome'.[13] The two literal (and identical) instances of τρώω involve the presence of weapons: in both passages Odysseus, envisioning his final confrontation with Penelope's suitors, ends his speech with the comment 'for iron in itself attracts a man'. The adjective τρωτός 'vulnerable', derived from τρώω, occurs as a *hapax* in Homer, again in the context of a weapon: 'for surely this man's skin is vulnerable (τρωτός) to sharp bronze'.[14] In Hesiod we find only τρητός and its compound ἐΰτρητος, each used once in the *Theogony*: Τρητός is the name of a mountain near Nemea,[15] and ἐΰτρητος is an epithet for melting-pots.[16] In early epic, therefore, when used literally, the Greek reflexes of the PIE **tr-* root refer either to people putting holes in things (furniture, ears, stones, pots) or to things – iron or bronze weapons – putting holes in people.

Among the members of this family of words, only τραῦμα 'a wound' and τιτρώσκω 'to wound' (including one instance of the compound κατατιτρώσκω) appear in the Attic orators, who are by far the most authoritative sources for *trauma ek pronoias* in Athenian law.[17] The following is a catalogue of all the instances of these words in the orators: τραῦμα and τιτρώσκω are considered separately, and under each word the citations are divided into technical uses, which refer to *trauma ek pronoias*, and other ('non-technical') uses. Within each section, passages newly cited are arranged according to the canonical order of the Attic orators (Antiphon, Andocides, Lysias, Isocrates, Isaeus, Demosthenes, Aeschines, Hypereides, Lycurgus, Deinarchus); within the *corpus* of each orator the speeches are ordered in their standard numerical sequence, without distinction between genuine and spurious works.

Technical uses of τραῦμα

1. Lys. 3.41: And then I thought there was no intent to wound if someone wounded without intending to kill (οὐδεμίαν ἡγούμην πρόνοιαν εἶναι τραύματος ὅστις μὴ ἀποκτεῖναι βουλόμενος ἔτρωσε). For who is so stupid that he plans far in advance for one of his enemies to receive a wound?

Lysias 3 was delivered by a defendant on trial for *trauma ek pronoias*; the prosecutor alleges that the speaker assaulted him with a potsherd. At this point in his defence, the speaker offers a negative definition of *trauma ek pronoias* which focuses on the aspect of intent, asserting that a per-

[6] See Boisacq (1923) *s.v.* τιτρώσκω; Chantraine (1984) *s.v.* τιτρώσκω; Frisk (1960) *s.v.* τιτρώσκω; Sihler (1995) 103. The exact relationship between the various Greek reflexes is unclear. It appears that the PIE root **tr-* could have as a suffix the first laryngeal (H_1). This suffixed root **tr-H_1-* could form words (1) with e-grade root and zero-grade suffix (**ter-H_1-* > τέρετρον 'a drill'); (2) with vocalized zero-grade root and zero-grade suffix, or alternatively with zero-grade root and e-grade suffix (**tr̥-H_1-* or **tr-eH_1-* > τρητός 'pierced', τίτρημι 'to pierce'); (3) with zero-grade root and o-grade suffix (**tr-oH_1-* > τι-τρώ-σκω 'to wound', τρώω 'to wound', Doric and Ionic τρῶμα 'a wound'). With Attic τραῦμα: Doric and Ionic τρῶμα, *cf.* θαῦμα (Homer): θῶμα (Herodotus); see Beekes (1969) 177.

[7] Hom. *Il*. 3.448, 24.720; *Od*. 1.440, 3.399, 7.345, 10.12; Cunliffe (1924) *s.v.* τρητός.

[8] Hom. *Od*. 1.111, 22.439, 453.

[9] Hom. *Il*. 14.182.

[10] Hom. *Od*. 13.77.

[11] Hom. *Od*. 16.293 = 19.12.

[12] Hom. *Il*. 12.66, 23.341.

[13] Hom. *Od*. 21.293.

[14] Hom. *Il*. 21.568.

[15] Hes. *Theog*. 331.

[16] Hes. *Theog*. 863.

[17] As Hansen (1983) 311-12 notes, neither the idealistic pronouncements of Plato's *Laws* nor the theoretical observations in Aristotle's *Rhetoric* should be interpreted as accurate statements of contemporary Athenian law. Passages in these two works which relate to *trauma* and/or *pronoia* are collected and analysed below (Appendix A). For the evidence provided by [Arist.] *Ath. Pol*., see *infra*, pp. 94-7.

son who does not intend to kill cannot possess an intent to wound, and therefore cannot be guilty of *trauma ek pronoias*.[18]

2. Lys. 4.9: But he has reached such a level of churlishness that he is not ashamed to call a black eye a wound (τραῦμα), and to be carried around in a litter, and to pretend that he is in terrible shape, on account of a prostitute ...

The manuscript title of Lysias 4, 'Concerning *trauma ek pronoias*, in whose defence and against whom <unknown>' (Περὶ τραύματος ἐκ προνοίας, ὑπὲρ οὗ καὶ πρὸς ὃν ⟨ἄδηλον⟩) informs us that, like Lysias 3, it is a defence speech from a *trauma* lawsuit. In this case, too, the weapon allegedly used by the defendant is a potsherd; here the speaker disclaims liability on the grounds of the physical aspect of *trauma ek pronoias*, arguing that a black eye does not qualify as a 'wound'.

3. Isoc. 20.7-8: It is also necessary, you see, to have the same opinion about those who commit *hubris*, ... keeping in mind that often in the past flimsy pretexts have been responsible for grievous wrongs, and that, because of those who had the audacity to hit (τύπτειν) others, people have been brought to such a level of anger that they met with wounds (τραύματα) and deaths and banishments and the greatest misfortunes ...

The speaker of Isocrates 20, prosecuting Lochites for simple battery in a *dikê aikeias*, here describes an escalating cycle of violence in which punches (*tuptein*) lead to wounds (*traumata*), killings and exile; while no weapons are expressly mentioned, the speaker clearly regards *traumata* as more serious than punches.

4. Dem. 23.22 (*lex*): The Council of the Areopagus shall judge cases of homicide, *trauma ek pronoias*, arson and poisoning, if someone kills by administering poison.

This excerpt from an Athenian statute, cited in Demosthenes' *Against Aristocrates*, states the legal jurisdiction of the Council of the Areopagus, which includes homicide, *trauma*, arson and lethal poisoning. The cited clause gives no specifics regarding *trauma ek pronoias*. The close proximity and nearly identical form of the speaker's quotation of the law at §24 (passage **5**), and the similarity to the summary of Areopagite jurisdiction in the pseudo-Aristotelian *Constitution of the Athenians* (*infra*, pp. 94-5), support the authenticity of the citation.

5. Dem. 23.24: For it is written in the law: 'the Council shall judge cases of homicide, *trauma ek pronoias*, arson and poisoning, if someone kills by administering poison'.

Here Euthycles, the speaker of Demosthenes 23, quotes the law cited at §22 (passage **4**).

6. [Dem.] 40.32: And this man, having plotted against me along with Menecles, the architect of all these plans, and having proceeded from argument and verbal abuse to throwing punches, cut his own head and issued me a summons (προσεκαλέσατο) to the Areopagus for *trauma*, in order to exile me from the city.

In this passage the speaker, Mantitheus (*PA* = *APF* 9676), refers to a prosecution for *trauma ek pronoias* previously initiated against him by his half-brother Boeotus (*PA* = *APF* 9675), his adversary in the present lawsuit, who was apparently aided by an accomplice named Menecles.

[18] On the legal validity of this argument, see *infra*, pp. 84-7.

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According to Mantitheus, a dispute between the men came to blows, and Boeotus then cut himself in the head (presumably with an edged weapon such as a knife or potsherd) and filed a lawsuit for *trauma*, blaming Mantitheus for inflicting the wound (*cf.* passages **9**, **10**, **11**; Dem. 54.35 (*infra*)). As in passages **3**, **6**, **7** and **8**, we see an escalation of hostilities from verbal abuse to a fistfight to an accusation of *trauma*, which Boeotus lodges with the Council of the Areopagus (*cf.* passages **4** and **5**), with the intended penalty being Mantitheus' banishment from Attica.

> **7**. Dem. 54.18: They say that these [lawsuits for slander] exist for this reason: so that people exchanging insults are not led to hit each other. And again, there are lawsuits for battery (*aikeias*), and I hear that these lawsuits exist for this reason: so that a person, when he is in a weaker position, should not defend himself with a rock or something of that sort, but should await the justice provided by the law. And again, there are lawsuits for wounding (*traumatos graphai*), so that, when people are being wounded, killings do not occur.

The speaker, Ariston (*PA* 2139), delivers these comments in a *dikê aikeias* against Conon (*PA* 8715). Demosthenes has Ariston present a system of rationales for the laws punishing escalating acts of insult and injury (*cf.* passage **3**). The action for slander (*dikê kakêgorias*) exists so that the slandered party will avail himself of this legal remedy rather than punching the offender; the action for battery (*dikê aikeias*) exists so that a man losing a fistfight is not tempted to use a weapon ('a rock or something of that sort'); the action for *trauma* (*graphê traumatos*) is designed to forestall the escalation of a dispute from wounding to homicide. The element that distinguishes *trauma* from battery is the use of a weapon. This distinction is corroborated *e silentio* in Ariston's description of the assault which precipitated his *dikê aikeias* (§§8-9). According to Ariston, Conon and a gang of friends and relatives beat and kicked him nearly to death and stripped him of his cloak, and Conon crowed like a rooster over Ariston's prone body. At the beginning of his speech (§1), Ariston says that his relatives considered Conon to be liable to *apagôgê* for stealing Ariston's cloak and to a *graphê hubreôs* for the assault, but counselled him to file a *dikê aikeias* instead, owing to his youth and inexperience. Nowhere does Ariston mention an action for *trauma* as a possibility, presumably (in light of the distinction attested in the passage quoted above) because Conon *et al*. assaulted him with their hands and feet but did not use weapons.

> **8**. Dem. 54.19: The least serious, the action for slander, has in view, I think, the final and most terrible, so that killing does not occur and so that people are not led little by little from verbal abuse to punches, from punches to wounds, and from wounds to death ...

Here Ariston gives an abbreviated version of the escalating scale of offences and remedies offered in passage **7**. This shorthand account again clearly distinguishes between blows (*plêgai*) and wounds (*traumata*). In both passages, too, wounding is clearly regarded as more serious than battery. This point of view finds corroboration later in the speech, as Ariston contemplates the pre-trial machinations of Conon's gang:

> And these are the fine and high-spirited things they do. 'Will we not testify for each other? Is that not the duty of comrades and friends? And what is so terrible about the things he will bring to bear against you? Some people say they saw him being beaten (τυπτόμενον)? Well, we'll testify that he wasn't even touched. That he was stripped of his cloak? We'll testify that they did it first. That he had his lip stitched? We'll say that we had our heads or something else broken open (κατεαγέναι).' (§35)

In these deliberations imagined by Ariston, the plans conceived by Conon's associates to counter the potential charges available to Ariston progress from the least serious charge, *aikeia*, to the

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more serious allegations of cloak-snatching and finally wounding. Note that Ariston uses τύπτω to describe an assault by punching and/or kicking (*cf*. passages **3**, **7**), while κατάγνυμι (*cf*. passage **15**; Dem. 18.67 (*infra*, p. 82)) describes the result of a wound made by a weapon; and further, Ariston assumes that people who consider bringing false *trauma* charges will claim to have received head wounds (*cf*. passages **9**, **10**, **11**).

9. Aeschin. 2.93: And now you bring an accusation of receiving bribes, while previously you submitted to a fine from the Council of the Areopagus because you did not prosecute the *graphê traumatos* which you brought against Demomeles of Paeania, your own cousin, after cutting (ἐπιτεμών) your own head? And you speak in solemn tones to these people, as if they do not know that you are the bastard son of Demosthenes the cutler?

In this passage from his oration *On the False Embassy*, delivered in 343, Aeschines asserts that Demosthenes had inflicted a wound on himself and then initiated a lawsuit for *trauma* in which he blamed the wound on his cousin Demomeles (*PA* = *APF* 3554). Demosthenes subsequently dropped the case – Aeschines' insinuation is that he did so upon payment of a bribe by Demomeles – and was accordingly fined by the Areopagus. Aeschines' account corroborates several aspects of the definition and treatment of *trauma* seen in the previous passages. He suggests that Demosthenes inflicted a head wound upon himself with a sharp object, presumably a knife (hence the allusion to Demosthenes senior's profession). It appears from this passage, along with **10** and **11**, that self-administered head wounds might be employed in order to bring fraudulent *trauma* charges; cutting oneself on the head would be a natural choice, as even minor scalp lacerations tend to bleed profusely and thus present the appearance of a significant wound to a critical area: the ἐπι- in ἐπιτεμών may imply a surface wound. The legal action for *trauma* is described as a *graphê* (*cf*. passage **7**) and falls under the jurisdiction of the Council of the Areopagus (*cf*. passages **4**, **5** and **6**).

10. Aeschin. 3.51: For why is it necessary now to discuss the *graphê traumatos* which he was involved in, when he indicted before the Council of the Areopagus Demomeles of Paeania, his own cousin, and the cutting (ἐπιτομήν) of his head ...?

In the *Against Ctesiphon*, delivered in the celebrated *Crown* case in 330, thirteen years after *On the False Embassy* (passage **9**), Aeschines reiterates his allegation that Demosthenes wounded himself in the head and then brought a *trauma* charge against his cousin Demomeles. As previously, Aeschines labels the lawsuit a *graphê* and states that Demosthenes brought his accusation before the Council of the Areopagus.

11. Aeschin. 3.212: ... [Demosthenes,] who scorns the honour achieved before you so much that he has cut countless times that foul and accountable head of his, which this man [Ctesiphon], against all the laws, has nominated for a crown; and he has received payment for these cuts by filing *graphai traumatos ek pronoias*. And he has been beaten so badly that I think he still has clearly upon him the marks of Meidias' knuckles;[19] for the man has got himself not a head but a source of income.

[19] In 348, Meidias had punched Demosthenes in the face at the festival of the Greater Dionysia while Demosthenes was serving as *chorêgos* (chorus producer) for his tribe; Demosthenes secured a preliminary condemnation of Meidias by *probolê*. Dem. 21 (*Against Meidias*) may or may not have been delivered in a subsequent lawsuit (see MacDowell (1990)): Aeschines elsewhere accuses Demosthenes of abandoning proceedings against Meidias upon payment of a bribe of 30 minae (Aeschin. 3.51-2).

Here Aeschines indulges in standard rhetorical hyperbole, inflating the motif of Demosthenes' sycophantic self-mutilation such that Demosthenes has given himself head wounds 'countless times' and has filed a charge of *trauma ek pronoias* on each occasion. While exaggerated, this account is consistent in several key specifics with Aeschines' comments in passages **9** and **10**: the action for *trauma* is a *graphê*, and Demosthenes is again accused of wounding himself by cutting his head and using the threat of prosecution for *trauma* as a way to extort money from his targets.

Non-technical uses of τραῦμα

12. Lys. *fr*. 47 Thalheim = *fr*. III.3 Gernet-Bizos: ... with wounds (τραύματα) suffered not when others were coming after me, but when I myself was advancing ...

This fragment comes from a defence speech *For Iphicrates*, supposedly delivered by the illustrious general himself in a lawsuit for treason (*prodosia*).[20] As Iphicrates (*PA* = *APF* 7737) appears to be describing wounds he received in battle, we may assume that weapons were involved. His point here seems to be that all the wounds he sustained were on the front of his body and thus he cannot have committed treason by fleeing.[21]

13. Isoc. 18.52: And after a battle had broken out between them, they hid away a female slave and accused Cratinus of bashing her head in (συντρίψαι); claiming that the woman had died as a result of the wound, they filed a *dikê phonou* against him at the Palladion.

The speaker here relates a prosecution brought by his adversary Callimachus (*PA* 7996) and Callimachus' brother-in-law against Cratinus (*PA* 8751), not for *trauma* but for homicide. Callimachus and his brother-in-law falsely alleged that a female slave had had her skull caved in during the brawl between themselves and Cratinus, and that the wound had proved fatal; in an attempt to prevent the detection of their ruse, they kept the woman in hiding. The speaker's use of συντρίβω 'crush' suggests that a blunt instrument, such as a club or a rock, was supposed to have inflicted the wound.[22] Cratinus' homicide trial took place at the Palladion because the alleged victim was not an Athenian citizen (Dem. 23.71-3); he foiled his prosecutors' plan at the eleventh hour by producing the woman safe and sound (§54).

14. Dem. 18.262: For there was a war without truce or heralds between you and your spectators; having received many wounds at their hands, you naturally mock as cowards those who have no experience of such perils.

Here, in defending Ctesiphon against Aeschines in the *Crown* case (*cf*. passages **10** and **11**), Demosthenes refers sarcastically to Aeschines' experiences as an allegedly third-rate actor as battles against his disgruntled audiences. The wounds (*traumata*) suffered by Aeschines were inflicted, Demosthenes says, by edible missiles (figs, grapes and olives: §262 *supra*).

Technical uses of τιτρώσκω

1. Lys. 3.41: see passage **1** *supra*.
7. Dem. 54.18: see passage **7** *supra*.

[20] On the dubious authenticity of the surviving fragments of this speech, see Gernet and Bizos (1989) 2.233.

[21] *Cf*. C. Marius' speech at Sall. *Jug*. 85.29.

[22] *Cf*. Lys. 3.18 (*infra*, p. 87).

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15. Lys. 3.42: But clearly the men who established the laws here did not see fit to impose exile from the homeland if people who were fighting happened to break each other's heads open (ἀλλήλων κατάξαντες τὰς κεφαλάς); otherwise they would have exiled many men indeed. Rather, they made the penalties so strict for those who plotted to kill people and wounded them but were unable to kill them, in the belief that they should be penalized for what they planned and intended: if they did not succeed, the deed was no less done on their part.

Here the speaker theorizes that Athenian legislators designed the action for *trauma* not for cases of simple wounding but for wounding with intent to kill; i.e. attempted homicide.[23] In support of this interpretation he offers the rationale that, if the courts had traditionally applied the term *trauma* to any act of wounding, the number of people exiled from Athens for *trauma* would have been much higher than it actually was. In keeping with the statements of litigants in passages **6** and **16** (*cf.* **3** and Lys. 4.13), the speaker assumes that persons convicted of *trauma* receive an automatic sentence of exile. Note, too, that κατάγνυμι 'break open' implies the use of a weapon, and that the speaker posits head wounds as typical *traumata* (*cf.* passages **6**, **9**, **10**, **11**).

16. [Lys.] 6.15: It seems terrible to me that, if someone wounds (τρώσηι) a man's body, the head or face or hands or feet, according to the laws of the Areopagus he will be banished from the victim's city, and if he returns, he will be denounced and punished with death ...

[Lysias] 6 was delivered by one of Andocides' prosecutors in the *cause célèbre* in which Andocides defended himself with his speech *On the Mysteries*. In this part of the oration, the speaker compares the penalty for defiling the image of a divinity with the penalty for wounding a person. Several points in the passage are worthy of note. First, the speaker's reference to 'the laws of the Areopagus' indicates that an inscribed law or laws on *trauma* existed and were located on the Areopagus. Second, the stated penalty for *trauma* is exile from the home *polis* of the wounded person. As the Areopagus lacked competence to banish a person from areas over which it exercised no jurisdiction, at Andocides' trial date (in 400 or 399)[24] people convicted of *trauma* might be exiled from Attica and from Athenian cleruchies. However, the *trauma* law to which Andocides' prosecutor refers probably dates to the period of the Athenian Empire (478-404) and was originally intended to generalize the Athenian penalty for *trauma* so as to encompass all allied cities under Athenian hegemony.[25] Third, the speaker asserts that a person convicted of *trauma* who violated his exile could be denounced before a magistrate (by the procedure of *endeixis*),[26] arrested and executed; this procedure could also be employed against those exiled for homicide.[27]

In the MSS the phrase ἢ τραύματος ἐκ προνοίας, 'namely, for *trauma ek pronoias*', appears after τὴν τοῦ ἀδικηθέντος πόλιν. Modern editors, following Taylor, delete this phrase; evidently some glossator chose clumsily to insert the full technical name of the offence, presumably to be construed as genitive of the charge after φεύξεται: 'will be banished from the victim's city; namely, for *trauma ek pronoias*'.

[23] *Cf.* p. 74 *supra*.

[24] MacDowell (1962); Gagarin and MacDowell (1998).

[25] During the imperial period, by the 440s at the latest, lawsuits in member cities which carried penalties of death, exile (e.g. *trauma*), or disfranchisement were subject to mandatory referral to Athens: see, e.g., the Phaselis decree (*IG* I^3 10 = Meiggs-Lewis (1992) no. 31 = Fornara (1983) no. 68) and the Chalcis decree (*IG* I^3 40 = Meiggs-Lewis (1992) no. 52 = Fornara (1983) no. 103).

[26] See Todd (1993) 117; Hansen (1976).

[27] Dem. 23.28, with *IG* I^2 115.30-1 (these lines are not restored in *IG* I^3 104).

Non-technical uses of τιτρώσκω *(and compounds)*

7. Dem. 54.18: see passage **7** *supra*.

17. Ant. 3 β 4: For if the javelin had travelled outside the bounds of its [proper] course toward the boy and wounded (ἔτρωσεν) him, there would be no argument left to us [to assert] that we were not killers ...

Antiphon's *Second Tetralogy* consists of two pairs of speeches delivered by the prosecution and defence in a hypothetical homicide case. A boy observing javelin practice at a gymnasium has been struck and killed by one of the missiles, and his relatives bring a lawsuit for unintentional homicide (*dikê phonou akousiou*) against the thrower.[28] This passage appears in the second oration in the tetralogy, which is the first speech for the defence. The speaker uses τιτρώσκω (ἔτρωσεν) of the lethal wound inflicted by the javelin. Prosecution and defence stipulate that there was no *pronoia*; that is, that the thrower killed the victim unintentionally.[29] Had the victim survived, therefore, we might be confronted with a case of unintentional wounding (**trauma mê ek pronoias*), for which Athenian law had no attested action; but since the victim died, the charge is unintentional homicide.

18. Ant. 3 γ 5: For he has reached such a point of audacity and shamelessness that he asserts that the boy who threw (βαλόντα) [the javelin] and killed neither wounded nor killed (ἀποκτείναντα οὔτε τρῶσαι οὔτε ἀποκτεῖναι) ...

The third speech from the same tetralogy is the second speech for the prosecution. The speaker here reacts to the defence's claim that the thrower of the javelin bears no responsibility for the result of his actions because he threw the fatal javelin as instructed and within the designated area. Relevant to the definition of τιτρώσκω is Antiphon's use of τρῶσαι 'wounded' as a synonym for βαλεῖν 'threw, struck with a thrown object' (βαλόντα : τρῶσαι :: ἀποκτείναντα : ἀποκτεῖναι).

19. [Lys.] 20.14: But when he was compelled and swore the oath, after going to the Council Hall for eight days, he sailed off to Eretria. There he showed himself to be not faint of heart in the naval battles; he returned here wounded (τετρωμένος), and the revolution had already taken place.

[Lysias] 20, *For Polystratus*, was delivered by a son of the defendant Polystratus (*PA* = *APF* 12076), who was tried by an unknown procedure in connection with his participation in the regime of the Four Hundred in 411/10. The present passage describes Polystratus' involvement in naval action off Euboea as the oligarchs were seizing power in Athens. As the speaker uses τιτρώσκω to describe wounds Polystratus received in battle, we may presume that weapons were involved.[30]

20. Isoc. 19.39: And look how well it turned out for him. When we failed in our assault on the city and the retreat did not go as we wished, as he had been wounded (τετρωμένον) and could not walk, but was barely breathing, I carried him onto the boat with the help of my servant, bearing him on my shoulders. As a result, he has said often and to many people that I, alone among men, was responsible for his survival.

[28] For a similar Roman scenario, see *D*. 9.2.9.4 (Ulpian, *ad Ed*. 18).

[29] Ant. 3 β 6. On the equivalence of *ek pronoias* and *hekousios* in Athenian law, see Loomis (1972).

[30] With this use of τιτρώσκω to describe battlefield wounds, *cf*. passages **12**, **14** (sarcastic), **20**, **21**, **23**.

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Here again we find τιτρώσκω used in a battlefield scenario, where the presence of weapons can be taken for granted. The speaker claims credit for saving the life of Sopolis, the brother of the testator Thrasylochus whose will is being contested, after Sopolis had been wounded in action while leading an unsuccessful attack on the city of Siphnos.

21. [Dem.] 11.22: ... but this upstart from Macedonia is such a daredevil that, in the pursuit of expanding his empire, he has been wounded throughout his entire body (κατατετρῶσθαι πᾶν τὸ σῶμα) while fighting his enemies ...

This passage from the pseudo-Demosthenic *Response to the Letter of Philip* alludes to Philip's numerous and famous battlefield wounds (*cf*. Dem. 18.67). The compound κατατιτρώσκω, a *hapax* in the orators, also appears in Xenophon's *Anabasis*, where (as here) it designates multiple battle wounds delivered by different weapons.[31]

22. Dem. 24.113 (*lex*): And if a person should steal anything at all by night, one may pursue him and kill or wound him (τρῶσαι), or arrest him and take him to the Eleven, if one should so wish.

Diodorus (*PA* 3919), the speaker of Demosthenes 24, here cites a law which he (perhaps correctly) attributes to Solon. The law allows self-help against a nocturnal thief and does not require that the thief be apprehended on the spot; he may be chased from the location of the theft and, if caught, may be arrested by *apagôgê*, wounded, or killed with impunity. No weapon is specified.

23. [Dem.] 52.10: And in addition to this, when he was brought into port at Argos wounded (τετρωμένος), he gave the goods that had been brought into port with him to Strammenus, the Argive *proxenus* of the Heracleotes.

In his oration *Against Callippus*, Apollodorus relates the demise of Lycon of Heraclea, who was attacked by pirates in the Argolic Gulf while travelling to Libya. Lycon was wounded in the fighting and brought to Argos, where he died. Again we find τιτρώσκω used of wounds received in battle, and in this instance the cause of the wound is identified as an arrow (§5).

The foregoing comprehensive survey of the orators' use of τραῦμα and τιτρώσκω suggests several conclusions. The most basic observation is that the wound to which these words refer is always physical; none of the citations above refers to what we would call 'psychological trauma'.[32] In the passages which refer to the Athenian offence of *trauma ek pronoias*, when the cause of the actionable wound is specified, it is always a weapon, whether edged (potsherds: **1**, **2**) or blunt (rocks: **7**); even when no weapon is explicitly named, as in the repeated accusations of individuals' bringing false *trauma* charges for self-inflicted wounds (**6**, **9**, **10**, **11**), the relevant injuries are said to have been made by cutting, presumably with a knife or potsherd. While the preserved law (**4**) and statutory citations and paraphrases (**5**, **16**) dealing with *trauma* fail to define the term, the statements of litigants (**3**, **8**; *cf*. **2**) show that *trauma* was a more serious form of assault than *aikeia* (simple battery), and one passage (**7**) clearly implies that the use of a weapon distinguished *trauma* from *aikeia*. When the orators employ τραῦμα and τιτρώσκω non-technically, they are usually describing battles (**12**, **19**, **20**, **21**, **23**; *cf*. **14**), where the presence of weapons can be assumed even in the absence of a stated cause of the relevant wound (such as the arrow in **23**); in the remainder of cases, too, with the sole exception of the theft law quoted in **22**,

[31] Xen. *Anab*. 3.4.25-6, 4.1.10.

[32] Outside the orators these words can denote mental suffering: e.g. Eur. *Hipp*. 392-3. When Herodotus uses τρῶμα of a disastrous military defeat (e.g. 5.121, 6.132) he presumably has in mind both the physical and the mental effects suffered by the losers.

weapons are either explicitly (**17**, **18**) or implicitly (**13**) involved. The evidence of the orators, considered *in toto*, thus permits an answer to the first question posed in the introduction to this study, regarding the identification of the defining physical element of *trauma ek pronoias* in Athenian law. The passages cited above, both technical and non-technical, bear out the common scholarly assumption that the use of a weapon distinguished *trauma* from other types of non-lethal bodily assault. In order to address the second issue raised in the introduction, *viz*. the legal definition of *pronoia* in *trauma ek pronoias*, we shall now proceed to an analysis of the attested Athenian lawsuits for *trauma*.

II. ATTESTED LAWSUITS FOR *TRAUMA EK PRONOIAS*

Case 1. Simon (*PA* 12690) **v.** ***NN***[33] (*terminus post quem* August 394)[34]
Source: Lysias 3, *Against Simon*

Lysias 3, the only complete extant speech delivered in a *trauma* lawsuit, represents one side of the legal climax of a long dispute over a slave prostitute, a Plataean youth named Theodotus. The man who delivered Lysias 3 was being prosecuted for *trauma ek pronoias* by a fellow-Athenian named Simon (*PA* 12690); all that we know of the speaker's identity is that he was older and wealthier than his prosecutor (§§4, 47). Simon asserts that he paid Theodotus 300 drachmas to contract for his services, only to have the speaker seduce the boy away (§22). The speaker, however, claims that he succeeded in attracting Theodotus, who had been put off by Simon's obnoxious behaviour (§5). According to the speaker, Simon scorned legal means of redress[35] and attempted to reclaim Theodotus by means of violent self-help. First, accompanied by a posse of friends, an intoxicated Simon broke into the speaker's home at night; he did not find the speaker or Theodotus there but did manage to disturb the respectable seclusion of the speaker's female relatives (§6). Then, having learned where the speaker and Theodotus were eating, Simon called him outside and attacked him, first with his fists and then by throwing rocks. The rocks missed the speaker, but one hit Simon's friend Aristocritus (*PA* 1931) and wounded him in the forehead (§§7-8). Out of shame, the speaker refrained from prosecuting Simon for his actions,[36] choosing instead to leave Attica for an unspecified period of time, taking Theodotus with him (§9).

Upon his return, the speaker again clashed with Simon. Simon contends that the speaker and Theodotus came to his house armed with potsherds and that the speaker threatened to kill him and then attacked him, inflicting at least one serious wound (§§27-8). The speaker, on the contrary, claims that he and Theodotus were ambushed by Simon and a group of his friends outside the house of Lysimachus (*PA* 9487); the speaker himself fled in one direction, Theodotus – with the gang led by Simon in hot pursuit – in another (§§11-13). All parties reconvened at the shop of a fuller named Molon (*PA* 10410), and a general mêlée ensued in which each participant was wounded in the head (§§15-18). Four years later (§19), Simon prosecutes the speaker, who has just lost an *antidosis* (§20), for *trauma ek pronoias* before the Council of the Areopagus; the com-

[33] A(ulus) A(gerius) = anonymous prosecutor; N(umerius) N(egidius) = anonymous defendant.

[34] At Lys. 3.45, the speaker states that Simon was drummed out of the Athenian army after showing up late to the battles of Corinth and Coroneia (August 394) and striking the taxiarch Laches (*PA* 9012); the *trauma* trial at which Lysias 3 was delivered probably took place within the next few years, when these events were still fresh in the minds of the Areopagite jurors.

[35] Simon could have brought a *dikê blabês* (action for damages) against the speaker (or, possibly, against Theodotus' owner) for breach of contract. If he convicted the speaker, he would have been awarded double damages (600 drachmas), since the loss was caused intentionally; if he convicted Theodotus' owner, he would have been awarded simple damages, since Theodotus' owner presumably did not intend for his slave to violate the contract (Dem. 21.43).

[36] By his allegation that Simon committed *hubris* by breaking into his house and dishonouring his kinswomen (§7), the speaker implies that he could have brought a *graphê hubreôs* against Simon; he also could have brought a *dikê aikeias* for the fistfight, which he claims Simon initiated (*cf.* [Dem.] 47.40).

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bination of the lapse of time since the alleged offence and the speaker's weakened circumstances may indicate that Simon's lawsuit was conceived as an attempt at extortion. If convicted, the speaker faces a penalty of exile with confiscation of property (§§38, 41). The winner of the lawsuit is unknown.

Procedure: the diômosia

In a *dikê phonou*, the prosecutor, defendant, and all witnesses swore a special oath called the *diômosia*, an imprecation calling down destruction upon the swearer and his house should he lie.[37] Demosthenes (23.67) describes the pre-trial *diômosia* as follows:

> On the Areopagus, where the law grants and ordains that trials for homicide take place, first the man who accuses someone of such an offence swears an oath (διομεῖται) on the destruction of himself, his kin and his house; and he swears no ordinary oath, but one which no one swears for any other purpose, standing before the sacrificial pieces of a boar, a ram and a bull ...[38]

The prosecutor affirmed that the defendant had committed the charged homicide; the defendant, that he had not. The winning side swore an additional *diômosia* after the verdict was rendered (Aeschin. 2.87). Douglas MacDowell believes that the pre-trial *diômosia* of each side also contained a clause stating that litigants would keep to the point in their speeches,[39] but it is possible that the rule barring off-topic arguments (*mê exô tou pragmatos legein*) was simply a custom of the Areopagite court (*cf*. Lys. 3.46: *infra*).

Several references to a *diômosia* in Lysias 3 indicate that Demosthenes exaggerated in stating that the *diômosia* was limited to homicide cases. The speaker begins,

> Although I know many awful things about Simon, councillors, I never thought he would reach such a point of audacity as to file charges, claiming to be the wronged party, for actions for which he ought to be punished, and to come before you having sworn such a great and solemn oath (οὕτω μέγαν καὶ σεμνὸν ὅρκον διομοσάμενον). (§1)

Although διόμνυμι by itself does not necessarily denote the swearing of a *diômosia*,[40] its conjunction with the phrase 'such a great and solemn oath' indicates that the oath sworn here by Simon is not of the regular courtroom variety. Moreover, the speaker's contention in §4 that he is not liable under the terms of Simon's oath (οὐκ ἔνοχος εἰμὶ οἷς Σίμων διωμόσατο) shows that Simon, like the prosecutor in a *dikê phonou*, swore to his defendant's guilt. Finally, if MacDowell is correct and a section of the *diômosia* dealt with the relevance of trial arguments, then further proof of a *diômosia* sworn in the present case appears in §46, where the speaker indulges in *praeteritio*, disdaining to include additional details about Simon 'since in your [i.e. the Areopagite] court it is not customary [or "lawful": *nomimon*] to speak outside the issue (*exô tou pragmatos legein*)'.

Mens rea*: the elements of* pronoia

The two main indicators of *pronoia* adduced by Simon and rebutted by the speaker are the speaker's alleged threat to kill and his possession of a weapon: the speaker summarizes Simon's argument regarding his intent with the statement, 'He says that we [i.e. the speaker and Theodotus] came to his house with a potsherd, and that I threatened to kill him, and that this constitutes

[37] For a detailed analysis of the oaths sworn in homicide lawsuits, see MacDowell (1963) 90-100.

[38] Interestingly, the sacrificial victims here are the same as those in a Roman *suovetaurilia*.

[39] MacDowell (1963) 93.

[40] MacDowell (1963) 92: *cf*. Dem. 57.39, 44; Aeschin. 2.156.

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pronoia' (§28). In his note on this passage, C. Carey observes that, while Simon evidently used the speaker's possession of a potsherd to prove *pronoia*, at Lysias 4.6 (*infra*, p. 89) possession of a potsherd 'appears to be associated with unpremeditated violence, in contrast to a dagger, which would argue premeditation'.[41]

Before proceeding further, we must address the question of whether *pronoia* in the phrase *trauma ek pronoias* designated 'premeditation' or mere 'intent'.[42] Besides *trauma*, the only other form of assault which Athenian law categorized as occurring with or without *pronoia* was homicide. As demonstrated by W.T. Loomis, while in non-legal contexts *pronoia* may mean 'forethought' (i.e. premeditation), Athenian homicide law employs the designation *ek pronoias* interchangeably with *hekôn* and *hekousios*, both of which mean 'willing(ly), intentional(ly)'.[43] That is, the law did not distinguish between killings committed as the result of significant reflection (premeditation) and those committed intentionally on the spur of the moment: the requirement for *pronoia* was satisfied by an intent to commit the act at the moment of its commission.[44] Simply put, therefore, in the homicide law *pronoia* meant 'intent', not 'premeditation'. In accordance with Occam's Razor, we must presume that *pronoia* most likely had the same significance for wounding as for killing, and so *trauma ek pronoias* should be interpreted as 'intentional wounding', not 'premeditated wounding'. While premeditation proved intent *a fortiori*, and accordingly Simon and the prosecutor in Lysias 4 endeavoured to establish premeditation, it was not a legal necessity. Demosthenes' description of the legal remedies for escalating assaults in the *Against Conon* (passage **7**) corroborates this interpretation. Ariston there depicts Athenians as being liable to charges of *trauma* if a physical altercation, which itself may have arisen from an exchange of verbal insults, escalates to the point where weapons are used; there is no hint of premeditation, and in fact the scenario offered by Ariston seems to argue against premeditation, presenting instead a picture of disputants whose argument escalates in the heat of the moment from words to blows to wounds.[45]

In response to Simon's attribution of *pronoia* to him, the speaker of Lysias 3 not only disclaims *pronoia* on his part but attempts to prove that, if anyone exercised *pronoia*, it was Simon and his friends. Combating Simon's accusation of *pronoia* at §§29-34, the speaker uses the noun πρόνοια and the verb προνοέομαι once each, but prefers the latter's value-negative synonym ἐπιβουλεύω 'plot against', which appears three times (e.g. §29: 'To whom would it seem credible that I came to Simon's house having conceived an intent and plotting against him [προνοηθεὶς καὶ ἐπιβουλεύων]?'). The speaker's description of the brawl outside Molon's fullery also supports the attribution of *pronoia* to Simon rather than to himself: after narrating the chase-scene and the resulting fight, he concludes that 'it would be bizarre if I were deemed to have intended (προνοηθῆναι) the terrible and illegal things that they (i.e. Simon and his friends) did'. That is, it was not the speaker's idea that he and Theodotus be attacked and chased through the streets of Athens; his description of the setting of the ambush by Simon and his cronies places *pronoia* squarely in their corner.

Defence strategy

In his defence against the charge of *trauma ek pronoias*, the speaker of Lysias 3 devotes most of his efforts to disproving the mental component of the offence (*pronoia*) and hardly addresses the physical component (*trauma*) at all, except in denying that a fight outside the house of

[41] Carey (1989) 105-6.

[42] Premeditation: Lamb (1930) 85; Todd (2000) 42. Intent: Hansen (1983) 307 ('intent to kill'); Carey (1989) 109-10 (possibly, but not definitely, intent to kill); Todd (1993) 269 ('intent [to kill]'). *Cf.* Carey and Reid (1985) 90: 'deliberate wounding'; Lipsius (1905-15) 605: 'dass dies [i.e. an attempt to kill] die Bedingung der Klage war, und nicht, wie mehrfach behauptet worden ist, πρόνοια in dem allgemeinen Sinne böswilliger Absicht verstanden sein kann ...'; MacDowell (1978) 123-4 ('deliberate wounding').

[43] Loomis (1972), esp. p. 90.

[44] *Cf.* Carey (1989) 110.

[45] *Cf.* MacDowell (1978) 123-4.

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Lysimachus ever occurred (§14) and in using τύπτω 'strike, punch' and similar words, rather than τιτρώσκω, to refer to Simon's accusation (e.g. §27).[46] His relative reticence regarding the physical aspect of the charge suggests that he did, in fact, wound Simon with a potsherd and/or with a rock (*infra*, pp. 87-8), and that Simon has the witnesses to prove it (*cf.* §27, where the speaker states that over 200 people witnessed the fight outside Molon's shop). Significantly, the speaker never explicitly counters Simon's allegation that he armed himself with a potsherd (although he does make an attempt at mitigation: see *infra*, p. 87); presumably numerous witnesses saw him carrying (if not using) the potsherd, and he thinks it unwise to repeat, and thereby acknowledge, a piece of damaging evidence. In contrast to the weakness of the speaker's case with regard to *trauma*, Lysias skilfully constructs the argument against *pronoia*, as hinted above, by inflating and then refuting Simon's attempted *a fortiori* proof of premeditation. Why, his reasoning goes, would the speaker go to Simon's house in broad daylight, in the presence of a multitude of witnesses, and start a fight with Simon and his friends in which he was badly outnumbered, rather than trying to catch Simon alone or bringing a group of his own friends with him?

Another key element in the speaker's defence concerns the nature of the requisite intent: did *pronoia* in *trauma ek pronoias* refer to the offender's intent as to the result of his act or to his intent to commit the act itself? According to the speaker, *trauma ek pronoias* required not simply an intent to wound (intent as to act) but an intent to kill (intent as to result: §28 (*supra*, pp. 84-5); §§41-2: see passages **1** and **15**); in justification of his position he contends that the lawgiver(s) would not have inflicted a punishment as severe as exile and confiscation of property upon every Athenian who wounded another. The speaker's argument on this point has commonly been accepted as fact.[47] Again, however, Loomis' analysis of the parallel provided by Athenian homicide law suggests that the speaker is incorrect. Intentional homicide (φόνος ἐκ προνοίας/ἑκούσιος) required only that the actor intend the act, not the resulting death: this is clear from cases in which liability for intentional homicide resulted (or would have resulted had the victim died) from an act in which the offender intended to harm the victim but not to kill him. Loomis cites two such instances: the hypothetical lawsuit represented by the *Third Tetralogy* of Antiphon and Ariston's prosecution of Conon by *dikê aikeias* (Dem. 54). In the former case, the victim punched the defendant, who killed him in self-defence (Ant. 4 β 1, γ 3-4). The prosecution admits that the defendant did not intend to kill the victim (4 γ 4) but nonetheless brings a charge of intentional homicide (4 α 6): while the defendant did not intend the result of his act, he did intend the act itself (4 γ 4). In Demosthenes 54, Ariston alleges that Conon and a gang of his relatives and friends beat, kicked and robbed him, nearly killing him in the process. Ariston accordingly prosecutes Conon for simple battery (*aikeia*);[48] if he had died, however, Conon would have incurred liability for homicide (Dem. 54.25) and would have been prosecuted in the Areopagus court (54.28), which tried *dikai phonou* for the intentional killing of Athenian citizens (Dem. 23.65-70; [Arist.] *Ath. Pol.* 57.3; *cf.* passages **4**, **5**). As Loomis observes, Ariston nowhere accuses Conon of trying to kill him; nonetheless, Ariston's death as a result of the attack would have been treated as intentional homicide because, as in Antiphon 4, Conon intended the attack, if not the (hypothetical) result.[49]

The often-cited procedural similarities between *trauma* and homicide (including the jurisdiction of the Council of the Areopagus and the swearing of the *diômosia* by litigants and their witnesses) therefore indicate not that *trauma* was legally considered attempted homicide but that the element of *pronoia* had the same meaning in each offence: it designated an intent to act, not

[46] On τύπτω, see Paley and Sandys (1886-1910) 1.233-8; Cope and Sandys (1877) 1.289 (*ad* Arist. *Rhet.* 1377a21).

[47] See n.5 *supra*; also Lipsius (1905-15) 605; Todd (2000) 42.

[48] See p. 77 *supra*.

[49] Loomis (1972) 92-3; *contra* Wallace (1985) 98-100.

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(necessarily) an intent to kill. The implication suggested by the speaker of Lysias 3, and accepted (e.g.) by Carey,[50] namely, that the Areopagus will have hesitated to convict a *trauma* defendant who had not inflicted a serious injury and therefore presumably lacked an intent to kill, reflects (if true) the casuistic application of the *trauma* law by the Areopagite jury, not the wording or intent of the law itself.[51] In fact, the content of the speaker's comment at §41, ἔπειτα δὲ καὶ οὐδεμίαν ἡγούμην πρόνοιαν εἶναι τραύματος ὅστις μὴ ἀποκτεῖναι βουλόμενος ἔτρωσε ('and besides, *I thought* there was no intent to wound if someone wounded without intending to kill' (emphasis mine)), shows that the *trauma* law did not define *pronoia* as intent to kill: if it did, the speaker would have cited the relevant statutory language rather than merely offering a professed interpretation of the law which clearly serves his own immediate interests; and the speaker fails to cite the *trauma* law not only here but anywhere in Lysias 3.[52]

Besides his rebuttal of the element of *pronoia*, the other main component of the speaker's defence in Lysias 3 is an argument of self-defence. Rejecting as a fabrication the prosecution's account of a fight at Simon's house, the speaker asserts that Simon and his gang started the confrontation by ambushing him and Theodotus, who ran away, and that the actual fracas occurred shortly thereafter outside Molon's fullery, where Simon and his men had caught Theodotus and the speaker attempted to rescue him. The speaker describes the resulting free-for-all as follows:

> With a battle having begun, councillors, and as the boy [Theodotus] threw things at them (βάλλοντος αὐτούς) and defended his life, and they threw things at us (τούτων ἡμᾶς βαλλόντων) and even punched him out of drunkenness, and I defended myself, and all the bystanders came to our aid since we were being wronged, in this fracas we all had our heads broken open (συντριβόμεθα τὰς κεφαλὰς ἅπαντες). (§18)

Lysias' account, with its almost Polybian syntactical anaphora of genitive absolutes and frequent changes of subject, neatly matches the chaos of the fight it describes. However, the logographer takes care to de-emphasize and obscure his client's role in the brawl. Theodotus throws objects (presumably rocks and/or potsherds) at his attackers in defence of his own life; Simon and his posse hurl missiles at the speaker and Theodotus and even strike Theodotus with their fists in their inebriation; the speaker merely defends himself; and somehow every combatant receives an open head wound. All the passers-by render aid to the speaker and Theodotus because they see them as the victims of the assault and Simon's gang as the perpetrators.

This narrative is designed to mitigate the charge against the speaker. It is quite unclear in the foregoing description who threw the first punch or the first rock or potsherd; this information would have been extremely relevant, since Athenian law permitted self-defence against an attacker. Given the apparent presence of a large cohort of prosecution witnesses, the speaker may have considered it overly risky to argue outright that Simon struck first or resorted to a weapon first, but if he can inject into the minds of his jurors a measure of doubt as to who started the fight, his chances of securing an acquittal improve. Accordingly, in §40, the speaker's most fundamental response to the charge against him deals not with specifics (who threw the first punch? threw or swung the first potsherd? threw the first rock?) but with general responsibility for the fight: 'I think, councillors, that it has been sufficiently demonstrated that I am not responsible for any of the things that happened.' He was the pursued, not the pursuer; he had been the victim of numerous prior insults by Simon; and, during the brawl, Simon himself dealt him a head wound. Thus, while the speaker endeavours to disprove his possession of the mental requirement for *trauma ek pronoias* by narrowing the scope of *pronoia* to an intent to kill, he simultaneously seeks to broaden the jury's consideration of the physical requirement of the offence from the specific issue (did

[50] Carey (1989) 109.
[51] *Cf.* Loomis (1972) 92-4.
[52] Cf. *RE* s.v. τραῦμα ἐκ προνοίας col. 2232; MacDowell (1978) 123.

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the speaker intentionally wound Simon?) to a more general inquiry (who started the confrontation between Simon and the speaker?). While the speaker has the best chance of acquittal if he succeeds both in narrowing the focus of *pronoia* and in placing the blame for initiating hostilities on his adversary, since these arguments address the fundamental aspects of the charge (*pronoia* and *trauma* respectively), either one alone may suffice to secure the desired verdict.

Case 2. ***AA* v. *NN*** (date unknown but between 403 and c. 380)[53]
Source: Lysias 4, *On an Intentional Wounding, Defendant and Prosecutor Unknown*

Lysias 4 is a fairly long fragment (including the proofs (*pisteis*) and peroration (*epilogos*)) of a speech delivered, like Lysias 3, by a defendant answering a charge of *trauma ek pronoias*. The prosecutor and the speaker, both anonymous, had quarrelled over the ownership of a female slave: the prosecutor claimed sole ownership of the woman, while the speaker maintained that he and the prosecutor owned her jointly.[54] Thus the origin of the dispute in Lysias 4, as in Lysias 3, lies in the possession of a slave who is the object of the rival affections of the litigants (§1 *et passim*). In the present case, friends of the antagonists endeavoured to reconcile them (§§1-4), but the attempt failed, and eventually the dispute culminated in violence. The prosecutor alleges that the speaker broke into his house and assaulted him with a potsherd (§§5-6); the speaker admits only to having given the prosecutor a black eye and implies that he did so in self-defence (§§8-9, partially quoted as passage **2** *supra*). The prosecutor charges the speaker with *trauma ek pronoias* before the Council of the Areopagus (§1); the speaker, if convicted, will incur a penalty of exile with confiscation of property (§§13, 18, 19). We do not know which litigant won the lawsuit.

Procedure: the diômosia
The sole reference to a *diômosia* in Lysias 4 appears in §4, where the speaker offers the names of two men who can corroborate the execution of one element of the reconciliation agreement between himself and his prosecutor; *viz*. that the prosecutor voted for his tribe in the choral competition at the Greater Dionysia:

> And Philinus and Diocles know that I am telling the truth about these matters, but it is not possible for them to testify, since they have not sworn the *diômosia* concerning the charge on which I am being tried; since [if they could testify] you would clearly realize that we were the ones who nominated him [i.e. the prosecutor] as judge, and it was on our account that he took his seat [as judge].

Philinus (*PA* 14303) and Diocles (*PA* 3988) have not taken the *diômosia*, so they may not testify: so much is clear. Why, then, did the speaker neglect to have them sworn in? If they can testify that the prosecutor voted for the speaker's tribe, they were probably fellow-judges; in order to serve as judges at the Greater Dionysia, they had to be adult male Athenian citizens and therefore were competent to testify at the speaker's trial. It follows, therefore, that they did not swear the *diômosia* and give their testimony because either they themselves or the speaker did not wish them to do so: it may be that the speaker is lying about the reconciliation between himself and his prosecutor or that Philinus and Diocles possessed additional or contradictory

[53] These years represent the likely *termini* of Lysias' speechwriting career: see (e.g.) Blass (1887-98) 1.344, 542; Dover (1968) 44-6; Usher (1999) 55.

[54] It is possible that the prosecutor brought this lawsuit in order to avoid reimbursing the speaker's half of the purchase price of the slave: the speaker asserts in §9 that his prosecutor 'may possess her without dispute if he pays me the money'. *Cf*. passages **9**, **10** and **11** *supra*, in which Aeschines accuses Demosthenes of indicting his cousin Demomeles and others in order to extort money from them.

information that would damage the speaker's case. Regardless of the reason for their failure to testify, by mentioning their names the speaker offers apparent corroboration of his account while keeping scrutiny to a minimum.

Actus reus*: the concept of* trauma

The speaker of Lysias 4 tacitly concedes that he gave his prosecutor a black eye (§9: passage **2** *supra*) but mocks his adversary for calling this injury a 'wound' (οὐκ αἰσχύνεται τραῦμά τε ὀνομάζων τὰ ὑπώπια) and for feigning serious injury and having himself carried about on a litter. This section of the speech has two important implications for the popular concept of *trauma* current in everyday Athenian life, if not necessarily for its legal definition. First, from the dismissive tone adopted by the speaker we may conclude that the Areopagus would not normally consider a black eye *per se* to be sufficient proof of *trauma*. Second, if we believe the speaker, the prosecutor falsified the extent of his injuries in order to bolster his chances of securing a *trauma* conviction, much as a modern-day personal injury plaintiff might arrive in court wearing a medically unnecessary but perhaps forensically convincing neck-brace or cast. These observations accord with the findings reached above regarding both the definition of *trauma* and its possible interpretation by the Areopagite jury: a black eye can result from a punch as well as a potsherd, and thus by itself does not prove assault with a weapon; and the Council of the Areopagus may well have been reluctant to banish for life a man who had inflicted only a superficial injury, even if he had used a weapon. Nonetheless, in order to distance himself from the physical element of the charged offence, the speaker of Lysias 4, like his counterpart in Lysias 3, carefully avoids the use of verbs that connote the use of a weapon (e.g. τιτρώσκω, κατάγνυμι), instead employing more neutral terms appropriate to striking with a bare fist (παίω §6; πατάσσω §§11, 15; πλήττω §15).

Mens rea*: the elements of* pronoia

As in Lysias 3, so in Lysias 4 the prosecutor alleges that the defendant intended to kill him (§5), so as to prove *pronoia a fortiori*; again, such an accusation is a double-edged sword, as it invites the defendant to treat *pronoia* as equivalent to an intent to kill and to rebut the prosecution's argument accordingly. The speaker counters his prosecutor's claim that he tried to kill him with two arguments. First, given that he had been in a sufficiently superior position both to have worsted his prosecutor physically and to have seized the disputed slave, if he had intended to kill his prosecutor, he would have (§5). His failure to do so in spite of the evident opportunity disproves the prosecutor's claim as to his intent. Second, the prosecutor alleges that the cause of his wound was a potsherd; and, as the speaker observes, 'Of course, none of you [jurors] is ignorant of the fact that he would have died more quickly if struck with a dagger than if hit with a fist' (§6). That is, had the speaker intended to kill the prosecutor, he would have brought a real weapon with him rather than being compelled to resort to a makeshift one. Without explicitly admitting that he used a potsherd, the speaker thus tacitly argues that the possession of a makeshift weapon (a potsherd) rather than a more 'legitimate' one (such as a dagger) actually *disproves pronoia* (§7). While an argument that the possession of any weapon rebuts an allegation of *trauma ek pronoias* may appear patently to contradict the law, not to mention the jurors' common sense, such logic may have proven effective if the Areopagites subscribed to the interpretation of *pronoia* as an intent to kill.

As a seeming afterthought, the speaker adds a third piece of information designed to combat the prosecutor's accusation of *pronoia*; namely, that he had been drinking and carousing with boys and flute-girls before the alleged assault (§7). Athenian law did not recognize intoxication as a mitigating factor,[55] but Lysias and/or his client nonetheless thought that this point would

[55] *Per contra*, the lawgiver Pittacus of Mytilene made intoxication an aggravating factor (Arist. *Pol*. 1274b18-23).

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carry some weight with the jurors.[56] The speaker maintains that all these factors – his intoxicated state as well as his failure to kill the prosecutor or to bring a proper weapon to the prosecutor's house – coupled with the testimony of witnesses, prove that he did not exercise the *pronoia* requisite for his conviction (§12).

The argument of self-defence

Nowhere in Lysias 4 does the speaker explicitly state that he struck his prosecutor in self-defence (which would amount to an admission that he struck him), but he manages to convey this message by implication. In §8 he describes the prosecutor as an intemperate drunk and contends that self-defence becomes necessary in his presence: 'he gets riled up by the woman [i.e. the contested slave] and is excessively quick with his fists and a violent drunk, and a person has to defend himself'.[57] The very same woman who, according to the speaker, commonly incites his adversary to violence represents the key to his own argument of self-defence. Later in his speech, he complains that the prosecutor rejected his challenge to submit the woman to torture,[58] which (he claims) would have definitively resolved both the principal and the underlying issues at trial. Under interrogation, she could have established the identity of her owner(s) by testifying as to whether she was the common property of both litigants or belonged to the prosecutor alone, and whether the speaker had paid half her purchase price or the prosecutor had paid it all. She could also have established whether, at the time of the alleged assault, the litigants had been reconciled or were still enemies, as well as answering the related question of whether the prosecutor had invited the speaker to his house (which presumes reconciliation, in accordance with the speaker's account) or the speaker arrived spontaneously (which might argue continuing enmity, as asserted by the prosecutor). Finally, she could have testified as to whether the prosecutor or the speaker struck the first blow (§11; *cf.* §15). As is common in Athenian forensic oratory, the speaker proffers the prosecutor's rejection of his challenge to torture the woman as presumptive proof that she would have answered all these questions in his favour; this *argumentum e silentio*, such as it is,[59] represents the strongest element of the speaker's claim of self-defence (at least in the surviving portion of the speech).

Defence strategy

The arguments advanced by the speaker of Lysias 4 with regard to both the physical and the mental elements of *trauma ek pronoias*, as well as his hints at a claim of self-defence, establish that Lysias' general strategy in constructing this speech was similar to that employed in the *Against Simon*. In Lysias 4, as in Lysias 3, the speaker downplays the *actus reus* and endeavours to restrict the definition of *trauma* so as to exclude the act for which he is charged. With regard to *pronoia*, however, the situation is more complex. On the one hand, the speaker advances a defence as to intent which parallels his argument about the definition of *trauma*, by following his prosecutor's lead (and probably twisting his prosecutor's argument) in asserting that *pronoia* equals an intent to kill. At the same time, however, he endeavours to broaden the issue of *pronoia* by replacing the substance of the charge (did the speaker intentionally wound the prosecutor?), which he never explicitly denies, with an apparently unverifiable claim of self-defence (who

[56] *Cf.* Dem. 21.71-3, 180.

[57] *Cf.* the similar comments at Lys. 3.6, 12, where the speaker depicts Simon and his cronies as prone to drunken violence.

[58] On challenges to torture slaves for evidentiary purposes, see Thür (1977).

[59] To the usual battery of objections to the efficacy of torture as a means of extracting reliable testimony (of which the Athenians were aware: e.g. Ant. 5.31-3), we may add in this instance the speaker's knowledge that the woman whom he proposed to put to the torture was the object of the prosecutor's erotic interest (as well as his own), which the prosecutor would not be likely to compromise by allowing her to be tortured. Therefore, the speaker's challenge was a smart tactical move, even (or perhaps especially) if the slave in question possessed information that contradicted his argument.

struck the first blow?), which, significantly, ignores the question of escalation (*cf*. passage **7**). The speaker of Lysias 4 thus stakes his defence to a considerable degree upon two principal factors which he and his speechwriter evidently believe to be conducive to an acquittal: doubt as to which litigant initiated the fight addresses the mental aspect of the charge (*pronoia*), while doubt as to the seriousness of the wound (*trauma*) suffered by the prosecutor addresses the physical aspect of the charge and may reasonably deter the Areopagites from imposing the severe penalty of lifelong exile, even if they believe the speaker to be guilty under the terms of the *trauma* law.

Case 3. AA* v. *Lysitheus (date unknown but between 403 and *c*. 380)[60]
Source: ?Lysias *frr*. 158-63 Baiter-Sauppe; *frr*. 61-62a Thalheim; *fr*. XV Gernet-Bizos: *Against Lysitheus*

Seven meagre fragments survive from a speech for the prosecution of Lysitheus (*PA* 9400) attributed with reservations (εἰ γνήσιος) to Lysias by Harpocration, the *Suda*, Photius, the *Lexicon Seguerianum*, and the Patmos *Lexicon*. Of these sources, only the last named gives the charge and preserves the full title of the speech: *Against Lysitheus for Intentional Wounding* (κατὰ Λυσιθέου τραύματος ἐκ προνοίας). None of the fragments provides any information regarding *trauma ek pronoias*, save the one preserved in Harpocration's entry under γωνιασμός (quoted by the *Suda* s.v. γωνία), in which the speaker addresses the *boulê*: presumably, in light of the evidence presented above (passages **4**, **5**, **6**, **9**, **10**, **16**; Lys. 3.1, 4.1), this identifies the Council of the Areopagus as the court that heard the lawsuit.

Case 4*. *Boeotus* v. *Mantitheus (*terminus post quem* 346)[61]
Source: [Demosthenes] 40 *Against Boeotus on the Dowry* 32 (passage **6** *supra*)

Mantitheus (*PA* = *APF* 9676), the speaker of [Demosthenes] 40, alleges that he got into an argument with his paternal half-brother Boeotus (*PA* = *APF* 9675) and Boeotus' friend Menecles. The argument led to a fistfight, after which (according to Mantitheus) Boeotus cut himself in the head and initiated a prosecution of Mantitheus for *trauma ek pronoias* before the Council of the Areopagus with the intention of securing Mantitheus' banishment. Since Mantitheus remained in Attica, as evidenced by his present lawsuit against Boeotus, he was clearly not exiled: either Boeotus dropped his *trauma* lawsuit (as is perhaps suggested by Mantitheus' use of προσεκαλέσατο 'issued a summons' rather than ἐδίωξε 'prosecuted' *vel sim*.) or Mantitheus was acquitted.

Case 5*. *Demosthenes* v. *Demomeles of Paeania (*terminus ante quem* 343)
Sources: Aeschines 2 *On the False Embassy* 93; 3 *Against Ctesiphon* 51, 212 (passages **9**, **10**, **11** *supra*)

At some point before the delivery of Aeschines 2 in 343, Demosthenes initiated a *graphê* for *trauma* against his cousin Demomeles of Paeania (*PA* = *APF* 3554), which he filed with the Council of the Areopagus. Aeschines contends that Demosthenes obtained the evidence necessary to bring the lawsuit by cutting his own head but dropped the case before it came to trial and was accordingly censured and fined by the Council.[62]

[60] See n.53 *supra*.

[61] Epigraphical evidence appears to confirm that Mantias, the father of both litigants, was alive in 357 (Paley and Sandys (1886-1910) 1.140 n.1); [Dem.] 40 was delivered at trial eleven years after Mantias' death ([Dem.] 40.3).

[62] Hansen (1976) 109-11 (citing Dem. 23.80) compares this fine levied upon Demosthenes with the fine of 1,000 dr. for malicious prosecution (or sycophancy) regularly imposed on prosecutors in *graphai* who failed to garner one-fifth of their jurors' votes.

Note. AA* v. *NN *(father of the priestess of Artemis of Brauron)* (*terminus ante quem* 355/341)[63]
Source: Demosthenes 54 *Against Conon* 25

In contemplating the hypothetical legal consequences that would have ensued had Conon's assault on him proved fatal, Ariston, the speaker of Demosthenes 54, remarks:

> And in fact, if anything had happened to me [i.e. 'if I had died'], he [Conon] would have been liable to a charge of homicide and the most terrible things. The Council of the Areopagus, at any rate, exiled the father of the priestess from Brauron, although by all accounts he had not touched the dead man, because he had urged the one who beat him to hit him; and the Council was right to do so. For if bystanders, instead of trying to stop people who endeavour to commit offences because of wine or anger or some other reason, actually urge them on, then there is no hope of safety for the person who encounters violent men, but he will be treated with *hubris* until they give up – which is exactly what happened to me.

According to the traditional interpretation of this passage,[64] the father of the priestess of Artemis Brauronia was tried before the Council of the Areopagus on a charge of *bouleusis* (conspiracy, plotting) of homicide, convicted and exiled. MacDowell, however, argues that the charge was not *bouleusis* but *trauma ek pronoias* and offers two grounds for his position: first, the regular penalty for *bouleusis* was death, not exile; and second, the balance of the evidence (but not all the evidence: see below) suggests that *bouleusis* fell under the jurisdiction of the Palladion homicide court, not the Areopagus.[65] Yet the facts of the case, as reported by Ariston, indicate that an action for *trauma* would not have been appropriate: since the victim died, the relevant charge would have related to homicide, not wounding;[66] and moreover, since the convicted defendant did not touch the victim, he could not have wounded him with a weapon.

Carey and Reid have proposed an alternative scenario in which the defendant was tried for intentional homicide.[67] When the victim was an Athenian citizen, *dikai phonou hekousiou* came under the jurisdiction of the Areopagus, which coincides with Ariston's report. The penalty in such cases, however, was execution – a problem which Carey and Reid address by positing that the defendant exercised his right in a *dikê phonou* to withdraw into voluntary exile before delivering his second speech and thereby escaped judgement. This proposal has its problems as well. As the defendant did not assault the victim himself but merely urged a third party to do so, the charge would presumably be *bouleusis* of intentional homicide rather than intentional homicide *tout court*. Moreover, Ariston's statement that the Areopagus 'exiled' (ἐξέβαλεν) him seems to indicate a sentence passed by the jury, not a decision by the defendant; and in those instances where a defendant fled into exile rather than awaiting the court's verdict, he was convicted *in absentia*, and the penalty for *bouleusis* of intentional homicide was death (Ant. 1). It is, however, possible that, in stating that the Areopagus exiled the father of the priestess, Ariston is giving an inaccurate paraphrase of events: as Carey and Reid observe, '[p]recedents in Greek trials are cited from memory, not from law-books, and by people with a vested interest'. On balance, therefore, the circumstances of the case of the priestess' father, as narrated by Ariston, argue strongly against a charge of *trauma ek pronoias*, and the most likely scenario is that the defendant was tried by the Areopagus for *bouleusis* of intentional homicide[68] and fled into voluntary exile.

[63] On the date of Dem. 54, see Schäfer (1858-87) 4.251; Blass (1887-98) 3.1.456-7; Paley and Sandys (1886-1910) 2.lxiii, 242-4; Carey and Reid (1985) 69; Bers (2003) 67.

[64] E.g. Paley and Sandys (1886-1910) 2.209-10.

[65] MacDowell (1963) 67-8.

[66] *Cf.* passage **13** *supra*, in which the (feigned) death of a woman as the result of a wound is prosecuted by *dikê phonou* as a homicide.

[67] Carey and Reid (1985) 92-3.

[68] While the *Ath. Pol.* (57.3) assigns all cases of *bouleusis* to the Palladion court, Harpocration (*s.v.* βουλεύσεως) notes that the *Ath. Pol.* and the supporting testimony of Isaeus (*Against Eucleides*: frr. 12-13 Thalheim) are contradicted by Deinarchus (*Against Pistias*: fr. XV Conomis), who identifies the venue as the Areopagus. One way to reconcile the sources would be to posit that *bouleusis* cases were assigned to whichever court exercised jurisdiction over the relevant *dikê phonou*

III. *DIKÊ* OR *GRAPHÊ TRAUMATOS EK PRONOIAS*?

The question of procedure has attracted the greatest share of attention in recent studies of *trauma ek pronoias*. The range of procedural evidence adduced for *trauma ek pronoias* has led scholars to adopt one of three positions: that *trauma* could be redressed by *dikê* alone,[69] by *graphê* alone,[70] or by either *dikê* or *graphê*.[71]

A *graphê traumatos ek pronoias* is securely attested. The inclusion of *trauma* in the list of *graphai* in the *Onomasticon* of Pollux (8.40) has little independent value; what is considerably more significant is the corroboration of Pollux's classification by the Attic orators. The catalogue presented in Part I above documents that, in every case where an Attic orator specifies the action for *trauma*, he calls it a *graphê* (**7**, **9**, **10**, **11**), never a *dikê*. Those who would reject a *graphê traumatos* are therefore compelled to argue that Demosthenes and Aeschines are guilty of vague phrasing at best and deliberate falsehood at worst.[72] The first of these contingencies relies on the fluidity of the terms *graphê* and *graphein* (active)/*graphesthai* (middle), which can be used (1) to refer to a written indictment – usually connected with an action of the type technically called *graphê* (see (2)), but occasionally appearing in the context of an action of the type technically called *dikê*[73] (see p. 95 *infra*) – or (2) to the type of legal action technically called *graphê*. Moreover, as Hansen notes,[74] *graphê* plus a genitive of the charge, such as we find in the phrase *graphê* (or plural *graphai*) *traumatos ek pronoias* in all four passages noted above, commonly signifies the technical name of a procedure (*graphê* (2)), while this construction does not occur in reference to a written indictment (*graphê* (1)).[75] Perhaps the best piece of evidence for the existence of a legal action called *graphê traumatos* is Dem. 54.18 (passage **7**), where Ariston labels the actions for slander and battery as *dikai* (*kakêgorias* and *aikeias*, respectively) but calls the action for *trauma* a *graphê*. The distinction is significant; and, as Hansen observes,[76] there is no reason to suppose that Demosthenes employed technical language to describe two of these lawsuits (*dikê kakêgorias* and *dikê aikeias*) but not the third, especially as (*pace* Pecorella Longo) the identification of the procedure for *trauma* as a *dikê* or a *graphê* had absolutely no bearing on Ariston's argument. Finally, Aeschines informs us (2.93: passage **9**) that the Council of the Areopagus fined Demosthenes for failure to prosecute the *trauma* lawsuit he had filed against his cousin Demomeles. Withdrawal of a *graphê* was punishable by a fine of 1,000 drachmas; there is no evidence for a similar penalty for non-prosecution of a *dikê*. Therefore, the fine that the Areopagus levied upon Demosthenes, whether or not it is to be identified as the regular 1,000-drachma penalty,[77] represents a further indication that the action for *trauma* (or at least the one brought and then dropped by Demosthenes) was a *graphê*. Thus the unanimity of the orators in describing the action for *trauma* as a *graphê*, and especially the express contrast in Dem. 54.18 between the *graphê* available for wounding and the *dikai* available for slander and battery, proves decisively the existence of a *graphê traumatos ek pronoias*.[78]

proper; that is, trials for *bouleusis* of the intentional killing of a citizen were tried by the Areopagus, while trials for *bouleusis* of the unintentional killing of a citizen, or of the killing of a non-citizen, took place at the Palladion.

[69] Lipsius (1905-15) 123, 605-6; Pecorella Longo (1981); Osborne (1985) 57; *cf.* Harrison (1968-71) 2.103 with n.3. Todd (1993) lists *trauma ek pronoias* among the attested *dikai* (p. 105) but not among the attested *graphai*; he notes, however (p. 273), that Dem. 54.18 mentions a *graphê traumatos*.

[70] MacDowell (1978) 124.

[71] Hansen (1976) 108-10, (1983).

[72] Pecorella Longo (1981) 247.

[73] Hansen (1983) 309 lists the following examples of *graphê*/*graphesthai* used in reference to a *dikê*: Ant. 1.2 (hypothetical *dikê phonou*); Isoc. 18.12 (*dikê blabês*); Dem. 27.12 (*dikê epitropês*); Ar. *Nub*. 759, 770.

[74] Hansen (1983) 309-10.

[75] Appearances of the similar construction *graphesthai* plus genitive of the charge, which also signifies the filing of a specific *graphê* for the named offence, are catalogued by Hansen (1976) 109 n.11.

[76] Hansen (1983) 308.

[77] Hansen (1976) 109; more cautiously in Hansen (1983) 315; *contra* Pecorella Longo (1981) 254-8.

[78] Since I do not believe in the existence of a *graphê phonou* (as, e.g., MacDowell (1963) 133-5; Hansen

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Was there also a *dikê traumatos ek pronoias*? Several scholars have not only answered this question in the affirmative but have done so to the exclusion of a *graphê traumatos ek pronoias*, despite the evidence of the orators.[79] Hansen, on the other hand, believes that both procedures existed,[80] although the only secure parallel in Athenian law for an offence redressable by both *dikê* and *graphê* is theft.[81] Proponents of a *dikê traumatos* commonly rely upon an analogy with the well-attested *dikê phonou* and adduce the textual evidence provided by Dem. 23 (passages **4** and **5**) and *Ath. Pol*. 39.5 and 57.3, in which *dikê* and *dikazesthai* appear in conjunction with *trauma*/*titrôskô*.

Analogy with the *dikê phonou* is naturally posited by those scholars who interpret *trauma ek pronoias* as attempted homicide, in accordance with the arguments advanced by *trauma* defendants in Lysias 3 and 4 and a contested restoration of *Ath. Pol*. 39.5.[82] If Athenian law considered *trauma* a subcategory of homicide, the reasoning goes, then we should expect a *dikê traumatos ek pronoias*, available when an attempt to kill failed, corresponding to the *dikê phonou* that applied when an attempt to kill succeeded. But if, as argued above, the legal definition of *trauma ek pronoias* – arguments by interested litigants notwithstanding – was merely 'wounding with intent [to wound]', not 'wounding with intent to kill' (i.e. attempted homicide), then the rationale for an analogy with Athenian homicide procedure disappears. Moreover, even if we were to accept the proposal that *trauma ek pronoias* amounted to attempted homicide, the argument from analogy nonetheless suffers from some fundamental weaknesses. It is no more logically sound to extrapolate a *dikê traumatos* from the *dikê phonou* than to extrapolate a *graphê traumatos* from a supposed *graphê phonou* (or vice versa). In the fourth century, homicide could be redressed by *apagôgê* and/or *ephêgêsis* as well as by the *dikê phonou*;[83] must we assume that

(1976) 108-12; *contra* Gagarin (1979) 322), I reject, and hence omit, the corresponding argument from analogy which states, in brief, that since homicide was the subject of a *graphê*, wounding must have been as well (e.g. Hansen (1976) 110: a point of view reconsidered and rejected in Hansen (1978) 178; *cf*. Gagarin (1979) 322).

[79] See n.69 *supra*.

[80] See n.71 *supra*.

[81] Hansen (1983) 316 offers impiety (*asebeia*) as an additional example, on the basis of Dem. 22.27: 'In the same way [as regards theft], it is possible to prosecute by summary arrest (*apagein*), to bring a public lawsuit (*graphesthai*), to being a private lawsuit (*dikazesthai*) before the Eumolpidae, or to bring a *phasis* before the *basileus*.' It is not evident, however, that the Eumolpidae, an Athenian priestly clan, possessed any secular judicial authority (*cf*. their role as 'Interpreters' (*Exêgêtai*) of the Athenian sacred law ([Lys.] 6.10), by virtue of which they possessed some knowledge of the law of homicide, but no secular jurisdiction in that area ([Dem.] 47)). If the Eumolpidae could inflict only a religious censure upon an offender (Caillemer *apud* Wayte (1882) 35), then the phrase *dikazesthai pros Eumolpidas* does not refer to a regular legal *dikê asebeias*. Further, if Weil (1886) 30 is correct in maintaining that the Eumolpidae only heard accusations of the profanation of the Eleusinian Mysteries, then even if such lawsuits were *dikai asebeias*, they were sufficiently limited in scope as not to represent a true alternative to the *graphê asebeias*. On the subject of theft, however, both a *dikê klopês* and a *graphê klopês* are securely attested. Cohen (1983) has convincingly argued that this procedural variation arose from the substantive distinction between theft of private property, to be redressed by *dikê* by the victim, and theft of public property, which could be prosecuted by *graphê* by any willing Athenian citizen, since there was no individual victim. No such obvious distinction, which would motivate a similar (and rare) availability of both a dedicated *dikê* and a dedicated *graphê*, suggests itself with regard to *trauma* (although see Hansen (1983) 316-18 for suggestions).

[82] The relevant sentence of *Ath. Pol*. 39.5, which describes an exception to the Amnesty of 403, begins 'There shall be lawsuits (δίκας) for homicide according to ancestral custom, if a person [...does something to...] someone.' The papyrus then continues with the unintelligible sequence of letters 'αυτοχιραεκτισιοτρωσασ, with ε inserted above the first ι, ε inserted above the second ι, and οτ deleted and ιε inserted above' (Rhodes (1993) 468). Some editors (Kenyon; Mathieu and Haussoullier; Rhodes) restore (εἰ τίς τινα) αὐτοχειρίαι (or αὐτόχειρ) ἔκτεινεν ἢ ἔτρωσεν ('if a person killed or wounded someone with his own hand'); if correct, this would provide valuable evidence that the Athenians did place *trauma* under the rubric of homicide. However, this restoration is far from certain, and others (e.g. Chambers in the most recent Teubner edition) propose to read ... ἔκτεινεν τρώσας, not ... ἔκτεινεν ἢ ἔτρωσεν. According to this latter reading, which is closer to the papyrus text (as Rhodes acknowledges) and therefore more likely to be correct, the passage contains no reference to *trauma ek pronoias* but merely specifies that homicide lawsuits are to be available under the Amnesty 'if a person killed someone by wounding [him] with his own hand'.

[83] Hansen (1976); Gagarin (1979); Hansen (1981).

these alternative procedures were available against *trauma* as well, solely because they could be used to prosecute homicide? Further, the specific similarities between *trauma* and homicide in trial procedure, namely, the swearing of the *diômosia* and the rule against irrelevant arguments by litigants, do not support the identification of a *dikê traumatos ek pronoias*, since neither of these was a common feature of *dikai*: both occur only in trials for homicide and wounding.

Apart from the questionable reference at *Ath. Pol*. 39.5, the sole instance in which the word *dikê* is used to describe the action for *trauma* occurs at *Ath. Pol*. 57.3, where the author describes the jurisdiction of the Areopagite court as follows:

> There are *dikai* for homicide and *trauma*, if a person kills or wounds intentionally (ἐκ προνοίας ἀποκτείνηι ἢ τρώσηι), on the Areopagus; and also for poisoning, if a person kills by giving poison, and for arson: these are the only cases the Council [of the Areopagus] judges ...

Owing to the close similarity in language, the author's list of the individual lawsuits heard by the Areopagus evidently derives from the law cited at Dem. 23.22 (passage **4**) and quoted at Dem. 23.24 (passage **5**);[84] the law, however, uses the verb *dikazein*, not the noun *dikê*.[85] Whether this evidence supports the existence of an action called *dikê traumatos ek pronoias* depends upon the precise meaning of *dikê*/*dikazein* intended by Demosthenes and the author of the *Ath. Pol*. *Dikê* has a broad semantic range in Greek, and even in Athenian law it has no fewer than four principal meanings: (1) any lawsuit (including not only lawsuits technically called *dikai* (see (2)) but all other legal procedures: *graphai*, *eisangeliai*, *apagôgai*, etc.); (2) the particular type of private lawsuit classified as a *dikê* (e.g. the *dikê kakêgorias* for slander, the *dikê aikeias* for battery, and the *dikê phonou* for homicide); (3) the result of any lawsuit (a judgement, penalty or fine); and (4) the trial phase of any lawsuit. With the verb *dikazein*, Athenian law and oratory observe a consistent distinction between the active voice, used of those who render judgement (such as the Council of the Areopagus in the passages under discussion), and the middle voice, used of the litigants who submit to judgement. The active *dikazein* appears in legal and forensic contexts with the meaning 'to judge a lawsuit' (corresponding to *dikê* (1)), apparently without distinction as to the type of lawsuit judged, although it refers more often to *dikai* (2) than to other types of lawsuits.[86] It may be argued, however, that *dikazein* might in some instances carry the specific meaning *'to judge a lawsuit classified as a *dikê* (2)', since the middle voice *dikazesthai*, found more frequently than the active, can mean simply 'to go to law', regardless of the nature of the lawsuit (corresponding to *dikê* (1)), or, more specifically, 'to engage in a lawsuit of the type technically called *dikê*' (corresponding to *dikê* (2)).[87]

In the present passages relating to *trauma*, we must decide between 'general' *dikê*/*dikazein* (1) and 'specific' *dikê*/**dikazein* (2): we may safely assume that the sources are not speaking of judgement to the exclusion of trial (*dikê* (3)); and translating *dikazein* as 'try (a lawsuit)' (cf. *dikê* (4)) merely begs the question of the identification of the procedure. The case for a *dikê traumatos ek pronoias* would be stronger if the Areopagite law cited by Demosthenes (passage **4**) used the word *dikê*, or if it discussed the lawsuits under Areopagite jurisdiction from the point of view of the litigants, using the middle *dikazesthai*, rather than from the point of view of the court, using the active *dikazein*. *Dikazesthai*, as we have seen, has an attested specific meaning 'to engage in

[84] *Cf*. Rhodes (1993) 641-2.

[85] The summary of Areopagite jurisdiction in the *Onomasticon* of Pollux (8.117) similarly derives from either Dem. 23.22 and 24, *Ath. Pol*. 57.3, or both: 'The Areopagus: it tried lawsuits (ἐδίκαζε) for homicide, intentional wounding, arson, and poisoning, if someone killed by giving poison.'

[86] LSJ *s.v.* δικάζω I.2: e.g. [Dem.] 35.46 (referring to *dikai emporikai*); Lyc. 1.7 (*graphai paranomôn*); Dem. 19.132 (*euthynai*); Din. 1.46 (special prosecution of Demosthenes and others in the Harpalus affair).

[87] As Hansen (1983) 314 observes, this specific sense of *dikazesthai* is especially evident in Dem. 22.27 (*supra*, n.81), where 'δικάζεσθαι ... is explicitly set off against ἀπάγειν, γράφεσθαι, and γράφειν'.

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a *dikê* (2)' which is opposed to *graphein*/*graphesthai* (2) 'to engage in the type of lawsuit called *graphê*'. For the active *dikazein*, however, such a specific sense is merely conjectural, as *dikazein* serves as the *vox propria* for judging any lawsuit; significantly, moreover, there is no verb meaning 'to judge a *graphê* (2)' which would correspond to the hypothetical **dikazein* (2) 'to judge a *dikê* (2)'. While the active *graphein* can mean 'to compose a written indictment (*graphê* (1))' for any lawsuit, or 'to prosecute by *graphê* (2)', it is nowhere employed with the meaning 'to judge a *graphê* (2)'; and, in fact, Athenian law had no term that corresponded to *dikazein* as *graphesthai* (2) corresponds to *dikazesthai* (2). Therefore, since *dikazein* applied to both *dikai* (2) and *graphai* (2), and since there is no positive evidence for – and a negative semantic argument *e silentio* against – **dikazein* (2) 'to judge a *dikê* (2)', the appearance of *dikazein* in Demosthenes' law on Areopagite jurisdiction is very weak evidence indeed for a *dikê traumatos*: the use of *dikazein* alone does not identify the lawsuits judged by the Areopagus for homicide, wounding, poisoning or arson as *dikai* or *graphai* (or any other procedure: see n.86). Nor, inasmuch as *Ath. Pol*. 57.3 derives from the law cited at Dem. 23.22, does the use of the term *dikê* in isolation (as a paraphrase of the law's *dikazein*) support the conclusion that the author meant 'specific' *dikê* (2) rather than 'general' *dikê* (1).

There remains, however, an argument from context: that is, if all the other lawsuits tried by the Areopagus – or at least all those included in the jurisdictional statements given in the law cited in Dem. 23 and in the *Ath. Pol*. – were *dikai*, that might suggest (although it would not prove) that a *dikê* was available for *trauma*. The lists in Dem. 23.22 and *Ath. Pol*. 57.3 are almost identical: they include homicide, intentional wounding, arson and lethal poisoning; the only significant variant between the two is that the *Ath. Pol*. (correctly) specifies, within the field of homicide, that the Areopagus only tried cases of intentional killing (of an Athenian citizen: cf. *Ath. Pol*. 57.3 *infra*: trials for the killing of a slave, metic or foreigner are held at the Palladion). The regular procedure for homicide was, in fact, a *dikê* (the well-attested *dikê phonou*). By the late fifth century, poisoning which resulted in death was not distinguished procedurally from other means of homicide; it, too, was subject to the *dikê phonou*.[88] The action for arson, however, is unknown. While in both the cited law and the *Ath. Pol.* poisoning must result in death (*ean tis apokteinêi dous*) for the case to come under Areopagite jurisdiction, neither source states a similar qualification for arson, and we must therefore conclude that none existed.[89] The Areopagus, therefore, judged lawsuits for arson whether death resulted or not.[90] Presumably, an act of arson that proved lethal could generate up to three distinct legal actions: (1) an action for homicide[91] to redress the killing – which may or may not have come before the Areopagus, depending on the prosecutor's choice of procedure (*dikê phonou* or *endeixis*/*apagôgê*)[92] and

[88] Rhodes (1993) 642, citing Ant. 1.3, 20, etc.; 6.36, 42, etc.: *cf*. Gagarin (1997).

[89] In the law, the presence of a lethality requirement in cases of poisoning and its absence in cases of arson is indicated primarily by semantics. In the phrase καὶ πυρκαϊᾶς καὶ φαρμάκων, ἐάν τις ἀποκτείνηι δούς, it is grammatically possible for the concluding condition to apply to the further referent, arson, as well as the nearer referent, poisoning. Semantically, however, it is implausible that an Athenian either writing or reading the law would associate the phrase 'if someone kills by giving' with arson: while Prometheus might be said δεδωκέναι πῦρ (τοῖς ἀνθρώποις) (*cf*. Hes. *Theog*. 563-[4]: Zeus οὐκ ἐδίδου μελίηισι πυρὸς μένος ἀκαμάτοιο [θνητοῖς ἀνθρώποις]; *Op*. 57), an arsonist would hardly be said δοῦναι πυρκαϊάν. The *Ath. Pol*. draws the contrast even more clearly by means of word order: in the *Ath. Pol*.'s version καὶ φαρμάκων, ἐὰν ἀποκτείνηι δούς, καὶ πυρκαϊᾶς it is evident that the proviso ἐὰν ἀποκτείνηι δούς applies only to the poisoning clause and not to the arson clause.

[90] MacDowell (1978) 150. Hansen's assertion ((1976) 110) that the unifying principle underlying Areopagite jurisdiction was that the named offences were all 'types of homicide' is therefore incorrect with respect to arson as well as *trauma*.

[91] Or possibly more than one, depending on the number of victims.

[92] The Areopagus tried only certain *dikai phonou* (see the next note) and had no jurisdiction over *endeixis* or *apagôgê*. Suspected killers apprehended by *endeixis* and/or *apagôgê* were taken to the Eleven; if they admitted guilt, they were summarily executed, while if they maintained their innocence, they were tried by a regular jury-court (*dikastêrion*), regardless of the circumstances of the alleged homicide (Hansen (1976)).

(assuming a *dikê phonou*) the intent ascribed to the killer and the status of the victim;[93] (2) an action for arson to redress the arson itself; and (3) a *dikê blabês* to redress property damage resulting from the arson.[94]

We may accordingly conclude that there was a specific action for arson which came under the purview of the Areopagus, and which was independent of the *dikê phonou* and the *dikê blabês*. Unfortunately, the technical name of the action for arson is unknown. Pollux's statement that arson was the subject of a *graphê* (8.40) is not dispositive. The offences that begin his catalogue of *graphai* appear in the same order as in *Ath. Pol*. 57.3: γραφαὶ δὲ φόνου καὶ τραύματος ἐκ προνοίας καὶ πυρκαϊᾶς καὶ φαρμάκων ... ('There are *graphai* for homicide, intentional wounding, arson, poisoning ...'). Since there was no *graphê phonou* or *graphê pharmakôn*, homicide (including homicide by poison) being subject to a *dikê*, it is apparent that Pollux, like many scholars after him, is employing an argument from context, based on the simplifying (but incorrect) assumption that all the lawsuits heard by the Areopagus must have fallen under the same procedural rubric: they were either all *dikai* or all *graphai*. Paradoxically, however, Pollux's faulty reasoning may actually support the existence of a *graphê purkaias*. The greater the number of offences mentioned in the Areopagite jurisdiction law that were subject to documented *graphai*, the more likely Pollux would have been to extrapolate that the rest were tried by *graphê* as well. *Trauma* was definitely redressable by *graphê*, and homicide and (lethal) poisoning were not; this leaves only arson. Thus, on the basis of elimination, the probability that the Areopagite action for arson was a *graphê* arguably increases. However, as there is no secure evidence for a *graphê purkaias*, the safest conclusion is to second MacDowell's verdict that the arson lawsuits tried by the Areopagus 'may have been *graphai*'.[95]

This ambiguous evidence for arson further invalidates the already precarious argument from context which extrapolates a *dikê traumatos* on the basis of the procedural treatment of the other offences listed at Dem. 23.22 and *Ath. Pol*. 57.3. Homicide, including lethal poisoning, gave rise to a *dikê*, but given the lack of sufficient evidence to identify the action for arson with confidence as either a *graphê* or a *dikê*, the premise that *all* the listed offences (apart from *trauma*) were the subject of *dikai* remains unproven. Ultimately, since the argument from context would not be probative in any case, and in light of the repeated attestation of a *graphê traumatos* as against no unambiguous reference to a *dikê traumatos*, combined with the observable rarity in Athenian law of a specific named offence being the subject of both a *dikê* and a *graphê*, the evidence we have indicates that *trauma ek pronoias* was redressed only by a *graphê* and not by a *dikê*. When the author of *Ath. Pol*. wrote that the Areopagus judged *dikai* for *trauma*, he either meant 'lawsuits' in the broad sense (*dikê* (1)) or (less probably) was using *dikai* in its technical procedural sense (*dikê* (2)) and made a mistake.

There are several identifiable factors that may have influenced the Athenian lawgiver(s) to make the action for *trauma* a *graphê* rather than a *dikê*. *Dikai* had to be prosecuted, at least nominally, by the victim of the alleged offence; the sole exception to this rule was the *dikê phonou*

[93] *Supra*, p. 96.

[94] Again (*cf.* n.91), the number of potential *dikai blabês* arising from a given act of arson will have been determined by the number of people who suffered property damage. I see no need to posit an Areopagite action for arson and a *dikê blabês* as mutually exclusive options (as, e.g., Lipsius (1905-15) 984; MacDowell (1978) 150; Rhodes (1993) 642). Lipsius' proposal that non-lethal arson was tried by *dikê blabês* – that is, that in these cases the *dikê blabês was* the action for arson – can be safely rejected: *dikai blabês* were tried by dicastic courts (Dem. 39.1; 48.1; [Dem.] 40.1; Hyp. 3.2), not by the Areopagus. (Another possibility, however, is that a *dikê blabês* may have been unnecessary, if the penalty for arson was assessable (*timêtos*) and prosecutors could thus recover their financial losses; but in fact we do not possess any reliable details concerning the action for arson except that it was tried by the Areopagus.) That the law cited at Dem. 23.22 and paraphrased at *Ath. Pol*. 57.3 did not represent a comprehensive treatment of the offence is evident from the fact that, by the late fourth century (if not earlier), arson of public buildings could be prosecuted by *eisangelia* (Hyp. 1 *fr*. 3), which fell outside the purview of the Areopagus.

[95] MacDowell (1978) 150.

for homicide, in which (barring paranormal communication) the victim was by definition unable to plead his case, and the right to prosecute accordingly devolved upon his kinsmen within the degree of first cousin once removed descendant.[96] In a *graphê*, by contrast, prosecution was not restricted to the victim but could be mounted by any willing Athenian citizen. On the reasonable assumption that *trauma* was committed more often with rocks (Dem. 54.18: passage **7**; Lys. 3.18: p. 87 *supra*) or knives (Lys. 4.6: p. 89 *supra*; *cf*. passages **9**, **10**, **11**) than with potsherds, it will not have been uncommon for *trauma* victims to be physically incapable of representing themselves in court;[97] thus the nature of the offence was conducive to a *graphê* rather than a *dikê*. Furthermore, if the brawl outside Molon's fullery described by the speaker of Lysias 3 is a reliable indicator, an additional factor contributing to the treatment of wounding by *graphê* may have been that fights involving large groups of people were more likely to involve weapons, as the probability of the escalation of a fight may be expected to rise in proportion to the number of combatants. The converse of this observation, *viz*. that fights with weapons were more likely to involve large numbers of participants, may have encouraged the Athenians to see acts of *trauma* as common by-products of mob violence that threatened the public order (as was certainly the case in Lysias 3, according to the speaker's account of the fight). As keeping the peace was in the interest of every citizen, not just that of the wounded person(s), the Athenians may accordingly have seen *trauma* as a fit subject for a *graphê* for this reason as well. Finally, in conjunction with the aforementioned motivations, we should consider the (admittedly unverifiable) possibility that the action for *trauma* was instituted by Solon, among whose numerous and significant innovations to Athenian law was the creation of legal procedures available to any willing citizen (τῶι βουλομένωι),[98] which included those lawsuits known later (if not already in Solon's time)[99] as *graphai*.

* * *

The preceding analysis of the evidence provided by the Attic orators, considered together with the relevant statements in the *Ath. Pol*. and the lexicographers, thus supports the following answers to the questions posed in the introduction to this study:

(1) In Athenian law, the physical element that distinguished *trauma ek pronoias* from other types of non-lethal assault (definitely *aikeia*, and probably *hubris*: see especially Dem. 54) was the use of a weapon. To the Athenian mind, typical weapons included the knife[100] (Lys. 4.6; *cf*. [Dem.] 40.32; Aeschin. 2.93; 3.51, 212), rock (Dem. 54.18) and club (?Isoc. 18.52; *cf*. Lys. 1.27): these three together formed a quasi-formulaic catalogue of (civilian) weaponry (Ant. 4 β 2; Dem. 23.76; Aeschin. 3.244). It was presumably rare for combatants to throw javelins (*cf*. Ant. 3 β 4). Lysias 3 and 4, however, show that potsherds could be employed as makeshift weapons and that assault with a potsherd could render a person liable to a *trauma* charge. It is therefore possible that the use of any instrument to inflict an injury qualified that injury as *trauma*, rather than

[96] *IG* I^3 104; [Dem.] 47.70; Gagarin (1979). In consequence of his view that *trauma* was a subcategory of homicide, Hansen ((1983) 317) raises the possibility that, owing to the influence of the *dikê phonou*, the *dikê traumatos ek pronoias* (rejected here) may also have been open to relatives of the victim; however, as he correctly notes, the sources provide no evidence for this conjecture.

[97] MacDowell (1978) 124; Fisher (1992) 80-1.

[98] [Arist.] *Ath. Pol*. 9.1, with Rhodes (1993) *ad loc*.; *cf*. Plut. *Solon* 18.6.

[99] Plutarch (see previous note) may refer to the actions thus created by Solon as *graphai*, although this depends upon the interpretation of *graphesthai* in the relevant passage (*supra*, p. 93). The phrase ... ἐξῆν τῶι δυναμένωι καὶ βουλομένωι γράφεσθαι τὸν ἀδικοῦντα καὶ διώκειν ... may be translated either (1) 'he who was able and willing was allowed to indict (*graphesthai* (1)) the offender and prosecute him' or (2) 'he who was able and willing was allowed to bring a [lawsuit of the type called] *graphê* (*graphesthai* (2)) against the offender and prosecute him'.

[100] While the sources usually use terms appropriate to any edged weapon, and thus might refer to either swords or knives, Thucydides 1.6.3 indicates that it would have been highly irregular for a contemporary Athenian to go about his daily business carrying a sword.

aikeia, in which the assailant used only his own body to cause harm to his victim (*cf.* Dem. 54.18, 19). Although the typical *trauma* lawsuit appears to have arisen from a head wound (Lys. 4.9; [Dem.] 40.32; Aeschin. 2.93; 3.51, 212; *cf.* Lys. 3.18; Dem. 54.35), a wound to any part of the body could result in liability for *trauma* ([Lys.] 6.15).

(2) The mental element of *pronoia* required for the offence of *trauma ek pronoias* was the offender's bare intent to commit *trauma*. Patently biased pleas of *trauma* defendants notwithstanding (Lys. 3.28, 41-2; 4.6), *trauma ek pronoias* required neither prior planning or considered reflection ('premeditation') nor an intent to kill (intent as to result), but merely an intent to commit the act of wounding, which might be conceived on the spur of the moment (*cf.* Dem. 54.18, and note the failure to cite supporting statutory language in Lys. 3 and 4). *Trauma ek pronoias*, therefore, was 'wounding with intent [to wound]' or 'intentional wounding', not 'premeditated wounding' or 'wounding with intent to kill' (i.e. attempted homicide). The *pronoia* element in *trauma ek pronoias* is thus identical with the *pronoia* element in *phonos ek pronoias* (more commonly called *hekousios phonos*, without any difference in meaning), 'intentional homicide' (Ant. 4; Dem. 54.25, 28; Loomis (1972)). Accordingly, in Athenian law the phrase *trauma ek pronoias* is synonymous with *hekousion trauma*, a term not found in Athenian legal contexts but present in Plato's *Laws* (see Appendix A *infra*). For both *trauma* and *phonos ek pronoias* the requisite culpable intent was established by the actor's intent to commit the act in question at the time of its commission; neither premeditation nor intent as to result was required, although a *trauma* prosecutor might argue that premeditation and/or an intent to kill proved an intent to wound *a fortiori*.

(3) The only legal action for *trauma ek pronoias* was the *graphê traumatos ek pronoias*, which was heard by the Council of the Areopagus (Lys. 3.1, 4.1; [Lys.] 6.15; Dem. 23.22, 24; [Dem.] 40.32; Aeschin. 2.93, 3.51); the mandatory penalty enforced upon convicted offenders was permanent exile from Attica (Lys. 3.38, 42; 4.13, 18; [Lys.] 6.15; [Dem.] 40.32) and confiscation of their property (Lys. 3.38; *cf.* 4.19). In Attic oratory, whenever a litigant mentions the procedure used in an actual lawsuit for *trauma*, he either refers to it as a *graphê* (Dem. 54.18; Aeschin. 2.93; 3.51, 212) or uses the verb *graphesthai* (Aeschin. 2.93; 3.51, 212); and, significantly, at Dem. 54.18 *graphai traumatos* are explicitly distinguished from *dikai kakêgorias* and *aikeias*. Nowhere in Attic oratory does the noun *dikê* occur in conjunction with *trauma ek pronoias*. The two instances of the phrase *dikazein traumatos ek pronoias* (Dem. 23.22, 24), and the paraphrase *dikai traumatos ek pronoias* at *Ath. Pol*. 57.3, are traceable to a single source, the law on Areopagite jurisdiction cited at Dem. 23.22; as *dikazein* is the *vox propria* for judging a lawsuit, regardless of the procedure, these passages are consistent with the orators' descriptions of a *graphê traumatos* and do not indicate the existence of a separate *dikê traumatos*. Arguments for a *dikê traumatos* which rely on analogy with other legal procedures judged by the Areopagus are both indeterminative by nature and unjustified by the evidence. A *dikê traumatos* should not be posited either by specific analogy with the *dikê phonou*, since *trauma* did not equal attempted homicide, or by a more general analogy with all the other offences mentioned at Dem. 23.22 and *Ath. Pol*. 57.3 (*phonos* – including homicide by poisoning – and arson), since the action for arson is unidentifiable and may just as well have been a *graphê* as a *dikê*. On the other side of the issue, Pollux's testimony to the existence of a *graphê traumatos* (but no corresponding *dikê traumatos*) is of little value, except insofar as the lexicographer corroborates the witness of the Attic orators.

DAVID D. PHILLIPS
University of California, Los Angeles

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Appendix A. *Trauma* and *pronoia* in Plato's *Laws* and Aristotle's *Rhetoric*

Both the *Laws* of Plato and the *Rhetoric* of Aristotle include discussions of the terms *trauma* and *pronoia*: the former discusses these words in combination, the latter separately. Neither work, however, should be considered a trustworthy source for actual Athenian law absent explicit independent corroboration.[101]

Plato, *Laws* 874e-879b

Plato's *Laws* records an imaginary conversation between Cleinias of Crete, Megillus of Sparta and an anonymous Athenian Stranger, who (predictably) does most of the talking. The three men draft legislation for a new colony on the site of Magnesia in Crete, for which Cleinias has been appointed oecist. The discussion of *trauma*, which occupies *Leg*. 874e-879b, may be outlined as follows:

(1) Introduction of the topic of *trauma* and its division into types: 874e3-10
  (a) unintentional wounding (τὰ μὲν ἀκούσια)
  (b) wounding in anger (τὰ δὲ θυμῶι)
  (c) wounding in fear (τὰ δὲ φόβωι)
  (d) intentional wounding *ek pronoias* (τὰ δὲ ὁπόσα ἐκ προνοίας ἑκούσια συμβαίνει γιγνόμενα)
(2) Digression on the necessity of laws: 875a1-d5
(3) Prefatory statement on the penalties for the various types of *trauma*: 875d5-7
(4) Digression on the proper setter of penalties (courts or lawgiver): 875d7-876e5
(5) Wounding with intent to kill (*cf.* 1(d)): 876e5-878b3
  (a) Definition: *trauma* as attempted homicide: 876e6-877a1
  (b) Jurisdiction: the corresponding homicide court: 877a1-2, b4-5
  (c) General case and penalty: 877a7-b3
    (i) permanent exile to neighbouring city; no confiscation of property
    (ii) simple damages assessed by court, paid to victim
  (d) Special case 1: child wounds parent/slave wounds master: 877b6-7
    (i) penalty: death
  (e) Special case 2: sibling wounds sibling: 877b7-c1
    (i) penalty: death
  (f) Special case 3: spouse wounds spouse: 877c2-878b3
    (i) penalty: permanent exile
    (ii) support of and by children; disposition of estate
(6) Wounding in anger (*cf.* 1(b)): 878b4-879b1
  (a) General case and penalty: 878c1-d6
    (i) curable wounds: double damages
    (ii) incurable wounds: quadruple damages
    (iii) curable wounds which bring shame upon victim: quadruple damages
    (iv) if wound disqualifies victim from military service, perpetrator must serve in his place
  (b) Special case 1: kinsman wounds kinsman: 878d6-879a2
    (i) constitution of court and determination of damages
  (c) Special case 2: slave wounds free man: 879a2-b1
    (i) owner must either deliver slave to victim for punishment to be determined at victim's discretion or compensate victim for damages
    (ii) penalties for collusion
(7) Unintentional wounding (*cf.* 1(a)): 879b1-5
  (a) Penalty: simple damages
  (b) constitution of court and determination of damages

Even a cursory comparison of the Athenian Stranger's proposed *trauma* laws with the undisputed elements of the Athenian law of *trauma ek pronoias* indicates that the former bear little resemblance to, and are clearly not derived from, the latter. To give just a few examples of obvious and fundamental diver-

[101] Hansen (1983) 311-12 (*supra*, n.17); Todd (1993) 40.

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gence, Athenian law had no action for unintentional wounding and drew no distinctions based upon the relationship between assailant and victim. The most informative contrast between the Athenian Stranger's laws and Athenian law, and the one most relevant to this study, concerns the mental element required for the various types of *trauma* delineated by Plato. While in the Athenian law of *trauma* (and homicide) *ek pronoias* and *hekousios* were synonymous terms, both meaning 'intentional', in Plato's *trauma* regulations they are not. The Athenian Stranger initially proposes one category of unintentional wounds (*akousia traumata*, 1(a)) and one category of wounds which are both intentional (*hekousia*) and *ek pronoias* (1(d)). Wounds inflicted in anger (1(b)) occupy a middle ground between intentional and unintentional wounds (878b4-8); so too, presumably, do wounds inflicted in fear, although the Athenian Stranger does not mention wounding in fear after his initial categorization (1). So far, therefore, Plato's typology of wounds admits of two interpretations: either *hekousios* and *ek pronoias* are synonymous, as they are in Athenian law, and the Athenian Stranger indulges in redundancy in describing category 1(d); or the phrase *ek pronoias* has independent significance and further narrows the field of intentional (*hekousia*) wounds.

The meaning of *ek pronoias* in the wounding section of the *Laws* becomes clear in the Athenian Stranger's detailed description of various types of *trauma* and their legal remedies (5-7). His exegesis of *trauma ek pronoias hekousion* (5) asserts a concept of *pronoia* which explicitly differs from bare intentionality and thus from the definition of *pronoia* in Athenian law. The Athenian Stranger opens section (5) with the statement (876e5-877a2):

> Let our law (g*raphê*) concerning *trauma*[102] be written as follows: If someone, having intended by an act of will to kill a friendly person[103] (except one of those whom the law allows him to kill),[104] wounds him but is unable to kill him, under such circumstances the one who conceived this intent and wounded does not deserve pity and should not be treated otherwise than if he had killed, but should be compelled to submit to trial for homicide ...

The Athenian Stranger thus defines *trauma ek pronoias* as wounding with intent to kill; that is, attempted homicide. Although the phrase *ek pronoias* does not occur here, it is used twice in the succeeding provisions governing the special cases in which a child wounds a parent or a slave wounds his master (5(d)) and a sibling wounds his or her sibling (5(e)); and in the next case, spousal wounding (5(f)), the phrase 'with intent to kill' (ἐξ ἐπιβουλῆς τοῦ ἀποκτεῖναι) is employed as the equivalent of *ek pronoias* in the two preceding cases.[105] This conception of *trauma ek pronoias* as attempted homicide accords with the Athenian Stranger's decisions to treat *trauma* as second only to homicide in drafting legislation (874e3-5) and to divide *traumata* into categories identical with those used for homicide (unintentional, resulting from anger, resulting from fear, and intentional *ek pronoias*: 874e5-7; *cf.* the preceding section on homicide, 865-874e2). The defendants who delivered Lysias 3 and 4 could only have wished for a real Athenian statute with like wording; the fact that they attribute a similar spirit to Athenian *trauma* legislation but quote no statutory language in support of their interpretation indicates that the Athenian law of *trauma* did not resemble Plato's in this respect.

[102] *Graphê* here is neither 'written indictment' (*graphê* (1)) nor the name of a specific type of lawsuit (*graphê* (2)), but 'written law' (LSJ *s.v.* γραφή II.2.a). The meaning 'indictment' is inadmissible because what follows is a general rule; and the meaning *graphê* (2) is contra-indicated both by the verb κείσθω and by the fact that the Athenian Stranger speaks of a *graphê peri traumatos*, not a *graphê traumatos* (*cf.* Hansen (1983) 309-10 with n.7).

[103] In the present passage the adjective *philios* means 'friendly' in the military sense (i.e. 'not an enemy', as opposed to *polemios* 'enemy in warfare'). That is, the opening condition describes acts of wounding outside the context of warfare.

[104] *Cf.* Dem. 23.53 (*lex*): Athenian law exempted from liability those who killed unintentionally in an athletic contest or in self-defence against a highway robber, those who inflicted friendly-fire casualties in war believing their victims to be enemy troops, and those who killed men caught in (unlawful) sexual intercourse with the killer's wife, mother, sister, daughter or concubine kept for the procreation of free children.

[105] Pl. *Leg.* 877b6-c3: 'If a child wounds [either of] his parents or a slave wounds his master similarly *ek pronoias*, the penalty shall be death; and if a brother wounds his brother or sister, or a sister wounds her brother or sister similarly, and is convicted of *trauma ek pronoias*, the penalty shall be death. And a wife who has wounded her husband with the intent to kill, or a man who has wounded his wife, shall incur permanent exile.'

Thus, while *trauma ek pronoias* in Athenian law embraced acts of wounding that fell into Plato's categories 1(b), 1(d), and possibly 1(c) (depending on the reason for the actor's fear),[106] in the hypothetical lawcode authored by the Athenian Stranger only wounding with intent to kill qualifies as *ek pronoias*.[107] As well as exhibiting this fundamental difference in definition, Athenian law and Plato's *Laws* diverge with regard to the jurisdictions and penalties for *trauma ek pronoias*. In Athens, all *trauma* cases came before the Council of the Areopagus, which also exercised competence over some (but not all) trials for homicide and arson,[108] and, during Plato's lifetime, over trials for violating olive trees sacred to the goddess Athena.[109] Plato's jurisdictional arrangement coincides with his definition of *trauma ek pronoias* in making the connection between *trauma* and homicide explicit: using the categories common to both offences, he assigns trials for *trauma* to the corresponding homicide court. While Athenian law provided a single fixed penalty for *trauma ek pronoias*, permanent exile with confiscation of property, under Plato's regulations the penalty varies depending upon the relationship between the offender and the victim.[110] In the default case, a person convicted of *trauma ek pronoias* is exiled to a neighbouring city but allowed the profits of his property in his home city; he also must compensate his victim for the harm he has inflicted, in the form of simple damages. But if the offender and victim are slave and master, or siblings, the penalty is death; and if they are spouses, the penalty is perpetual exile, and the property of the condemned is transferred to his heirs.

In Plato's wounding laws we may discern the influence not only of his own hypothetical homicide laws but also of the actual homicide law of Athens. At several points the regulations on *trauma* refer to a kin group 'up to the sons of first cousins', i.e. first cousins once removed (μέχρι ἀνεψιῶν παίδων). Under Athenian homicide law, only the victim's kin in this category were eligible to bring a *dikê phonou*.[111] The same kin group is here empowered to appoint an heir in the case where a person wounds his or her spouse *ek pronoias* and the victim has no children (877c8-d5) and also serves as the jury when a person wounds a relative in anger (878d6-e2). Plato diverges significantly from Athenian homicide law, however, in including the female as well as the male relatives μέχρι ἀνεψιῶν παίδων in the relevant deliberations (878d8-e1).

Finally, Plato includes in his *trauma* law one clause that may be intended to combat the abuse of the *trauma* procedure repeatedly alleged by the Attic orators (passages **6**, **9**, **10**, **11**; *cf.* Dem. 54.35 (p. 77 *supra*)). The Athenian Stranger proposes that, when a slave wounds a free man in anger, the slave shall be surrendered to his victim for whatever punishment the latter decrees; if the slave's owner is unable to deliver him, he must pay compensation to the victim.[112] However,

> If someone alleges that what has happened is a fraud resulting from collusion between the slave and the wounded person, let him dispute the matter. If he does not obtain a conviction, let him pay treble damages; but if he obtains a conviction, let him hold the one who connived with the slave liable for kidnapping. (879a5-b1)

This clause aims to prevent slaves' intentionally procuring alienation from their masters under colour of the noxal-surrender provision of the *trauma* law. As that provision required the owner of a slave convicted of *trauma* either to transfer ownership of the slave to the victim or to pay money damages, enterprising

[106] Absent the threat of imminent harm, fear *per se* was probably not a valid legal defence to a charge of *trauma ek pronoias*. Self-defence, however, was another matter: for example, if *A* struck *B* with a weapon, and *B* defended himself with a weapon in fear for his life, *B* would presumably not be liable for *trauma ek pronoias*. Unfortunately, we cannot know exactly what Plato meant by 'wounding in fear', since no detailed treatment of the offence follows its initial categorization.

[107] Saunders (1991) 261 correctly notes the distinction regarding levels of intent in Plato but wrongly imputes a similar distinction to Athenian law.

[108] *Supra*, pp. 95-7.

[109] Through the early fourth century the Areopagus tried individuals charged with uprooting or cutting down these trees (Lys. 7); by the date of composition of the *Ath. Pol*., however, it had lost this capacity ([Arist.] *Ath. Pol*. 60.2; Wallace (1985) 106-7).

[110] *Cf.* Saunders (1991) 260.

[111] [Dem.] 47.72, where μέχρι ἀνεψιαδῶν is equivalent to μέχρι ἀνεψιῶν παίδων; cf. *IG* I^3 104.15, 21 (μέχρ' ἀνεφσιότετος καὶ ἀνεφσιô), 22 (συνδιόκεν δὲ κἀνεφσιὸς καὶ ἀνεφσιῶν παῖδας).

[112] Roman law provides a striking parallel: when a slave commits a delict without his owner's collusion, the owner must either surrender the slave to the victim (*noxae datio* or *deditio*, 'noxal surrender') or pay the damages assessed by the court (Gai. *Inst*. 4.75; Just. *Inst*. 4.8.pr; *D*. 9.4).

slaves might seize upon this opportunity to rid themselves of their masters, provided that they found a willing free partner in the scheme. The partner accordingly incurs liability for kidnapping (*andrapodismos*), since he has colluded in alienating the slave from his owner.

Aristotle, *Rhetoric*

In the first book of the *Rhetoric*, Aristotle discusses both *trauma* and *pronoia*, but unlike his teacher, he treats the terms separately and asystematically.

> 1374a32-b1 [in a discussion of loopholes in laws]: Take, for example, wounding (τὸ τρῶσαι) with an iron weapon of a certain size and type: you could spend your lifetime counting them. So if the term is undefined, and one must legislate, it is necessary to speak in simple terms, so that even if a man wearing a ring lifts his hand or strikes someone, according to the letter of the law he is liable and does wrong, but in truth he does no wrong; and this is equity.[113]

Aristotle's association of the term 'wounding' with an iron weapon is consistent with the use of τιτρώσκω in the orators (passages **1**, **7**, **15**-**23**). Significantly, in the case of a man who commits an assault while wearing an iron ring, which Aristotle does not regard as a weapon, the verb used is not τιτρώσκω but πατάσσω, which means 'to hit, to strike (with the fist)' and is synonymous with τύπτω (*cf*. Lys. 4.11, 15 (πατάσσω); passages **3**, **7**; Lys. 3.18, 27; Dem. 54.35 (τύπτω)).

Pronoia makes its only appearance in the first book of the *Rhetoric* at 1375a6-7:

> And the more savage offence is the greater offence, as is the offence committed with greater *pronoia*, and that which arouses fear rather than pity in those who hear of it.

Aristotle clarifies his conception of *pronoia* in the *Nicomachean Ethics*, where he equates *pronoia* with *proairesis*, 'choice (made beforehand)':

> *EN* 1135b24-7: [Those who do damage are not always wicked], but when damage is done by choice (*ek proaireseôs*), the doer is unjust and wicked. Therefore, actions committed in anger are rightly judged not to be *ek pronoias*: for it is not the person acting in anger who initiates [the confrontation], but the person who roused him to anger.

For Aristotle, therefore, as for Plato, *pronoia* is not equivalent to a bare intent to act, and both philosophers distinguish acts committed as a result of *pronoia* from acts committed in anger (*cf*. Pl. *Leg*. 878b4-8). However, while Plato defined *pronoia* in the contexts of wounding and homicide as intent as to result (namely, intent to kill), Aristotle requires an actor to make a deliberate choice, regardless of the nature of the act in question or its intended result; thus Aristotle's *pronoia* is equivalent to 'premeditation'.[114]

This equation of *pronoia* and *proairesis* established in the *Nicomachean Ethics* brings into play a final passage from the first book of the *Rhetoric* (1374a11-15):

> For the wickedness and wrongdoing are in the [premeditated] intent (*proairesei*). Words of this type, such as '*hubris*' and 'theft', signify the intent (*proairesin*) as well [as the act]: for a person does not commit *hubris* in every case where he hits someone, but only if he does so with a purpose: for example, in order to dishonour his victim or please himself.

As Aristotle here requires an element of premeditation (*proairesis* = *pronoia*) for the commission of *hubris* and theft, it is a fair assumption that, to the extent that he thought about *trauma ek pronoias* (cf. *EN* 1135b15), he likewise defined *pronoia* as premeditation.

Both Plato and Aristotle, therefore, diverge from Athenian law in their respective definitions of *pronoia*. Plato's definition of *pronoia* as intent to kill permits the tripartite division of *mens rea* asserted by the Athenian Stranger in the sections of the *Laws* dealing with homicide and wounding: a person may kill or

[113] *Cf*. Quint. *Inst. Orat*. 7.6.8.

[114] *Cf*. Cope and Sandys (1877) 1.266, who translate 'malice aforethought'.

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wound (1) with intent to kill (*ek pronoias*), (2) in a fit of emotion (whether anger or fear), or (3) without intent. Aristotle refined the Platonic system, categorizing wrongful acts as accidents (*atuchêmata*), errors (*hamartêmata*), intentional but unpremeditated wrongs (*adikêmata*), and premeditated (*ek proaireseôs*/*pronoias*) wrongs (*adikiai*).[115] In thus subdiving the field of intentional wrongs into 'crimes of passion' (*cf*. Arist. *EN* 1134a21, 1136a8: *dia pathos*) and premeditated offences, the philosophers advanced beyond the binary (yes-or-no) concept of bare intent to act which remained in effect in the contemporary Athenian law of *trauma* and homicide: Aristotle's comment that 'actions committed in anger are rightly judged not to be *ek pronoias*' refers to a distinction drawn by himself and his teacher, not by any Athenian lawgiver.

Appendix B. Lucian, *Timon* 46

> Timon. Truly, you will sing quite a mournful lament to the accompaniment of this fork.[116]
> Gnathonides. What's this? You're hitting me, Timon? Witnesses! Oh, Heracles, ow, ow! I summon (προ⟨σ⟩καλοῦμαι)[117] you before the Areopagus for wounding (*traumatos*)!
> TI. In fact, if you stick around a little longer, soon my summons will be for homicide.
> GN. Absolutely not! By all means, heal the wound (*trauma*) by pouring a little gold on it; it's a terrific styptic drug.

Lucian wrote some five centuries after the last of the canonical Attic orators and came from Samosata on the Euphrates; yet in this passage from the *Timon*, a dialogue set in fifth-century Athens, he displays an impressive knowledge of Classical Athenian law. Timon commits *trauma* with a weapon: a fork. His victim, Gnathonides, knows that jurisdiction over accusations of wounding lies with the Council of the Areopagus. (Gnathonides' name, from *gnathos* 'jaw', may hint at the location of the wound inflicted by Timon, thus reflecting the preference for head wounds evidenced by *trauma* prosecutors in the Attic orators.) Timon, for his part, displays a familiarity with the law equal to Gnathonides': his silence as to the venue of a possible prosecution for homicide (as opposed to *trauma*, for which he has already incurred liability) suggests an awareness that his trial location will not change if Gnathonides (presumably an Athenian citizen) dies of his wounds. Finally, Gnathonides exploits his wounding by Timon as an opportunity for extortion, an act which invites comparison with the motives behind *trauma* prosecutions alleged by the speaker of Lysias 4 (Lys. 4.9) and by Aeschines in passages **9**, **10** and **11** (*cf*. also Pl. *Leg*. 879a5-b1: pp. 102-3 *supra*).

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[115] Arist. *Rhet*. 1372b2-18; *EN* 1134a17-23, 1135b11-1136a9; Cope and Sandys (1877) 1.233. Tension between Aristotle's first two categories, accident and error, is evident already in Antiphon's *Second Tetralogy*.

[116] The *dikella*, a two-pronged fork, was used by farmers to loosen and aerate soil: *cf*. Luc. *Tim*. 8.

[117] The MSS have προκαλοῦμαι here and προκεκλήσομαι in Timon's next line. In legal contexts, προκαλοῦμαι means 'to issue a challenge' (usually to torture slaves); the insertion of sigma results in the much more appropriate προσκαλοῦμαι, 'to issue a summons' (*cf.* [Dem.] 40.32 = passage **6** *supra*). MacLeod (1972) and Harmon (1913) both print the MSS readings; Jacobitz (1851) supplies the sigma.

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