

# *Graphe or Dike Traumatatos?*

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**I**N *Apagoge, Endeixis and Ephegesis* I argued that the offence *trauma ek pronoias* in classical Athens could be redressed both through a private action (*dike*) and through a public action (*graphe*).<sup>1</sup> In support of the existence of a public action for wounding with intent to kill I adduced four sources which explicitly refer to a *γραφή τραύματος*: Dem. 54.18; Aeschin. 2.93; 3.51, 212. Recently Chiara Pecorella Longo<sup>2</sup> has restated the traditional view,<sup>3</sup> that the reference, in all four passages, is to a *dike traumatatos*. Her line of argument is that Athenian legal terminology lacks precision and is often confused. Accordingly the use of the terms *γράφεσθαι* and *γραφή τραύματος* does not prove that the Athenians had a *graphe traumatatos*, i.e., a public action for wounding. The other sources relating to *trauma* (where the terminology, according to Longo, is always precise and consistently used) show that the action brought was a *dike*. It seems useful therefore to discuss in detail the problems in distinguishing between *dike* and *graphe*, in order to support my view that both a *δίκη* and a *γραφή τραύματος ἐκ προνοίας* could be brought before the council of the Areopagos.

Following Longo I will begin with a discussion of the passage in Demosthenes' speech *Against Konon* (54.18):

οἶον . . . εἰσὶ κακηγορίας δίκαι· φασὶ τοίνυν ταύτας διὰ τοῦτο γίνεσθαι, ἵνα μὴ λαιδορούμενοι τύπτειν ἀλλήλους προάγωνται· πάλιν αἰκείας εἰσὶ· καὶ ταύτας ἀκούω διὰ τοῦτ' εἶναι τὰς δίκας, ἵνα μηδεὶς, ὅταν ἡττων ᾖ, λίθῳ μηδὲ τῶν τοιούτων ἀμύνηται μηδενί, ἀλλὰ τὴν ἐκ τοῦ νόμου δίκην ἀναμένῃ. τραύματος πάλιν εἰσὶν γραφαὶ τοῦ μὴ τιτρωσκομένων τινῶν φόρους γίνεσθαι.

The tenor of this passage is that a man should always bring the proper action instead of resorting to retaliation. When abused, a man should bring a *dike kakegorias* instead of using violence. When

<sup>1</sup> M. H. Hansen, *Apogoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes* (Odense 1976) 108–10.

<sup>2</sup> “*γραφή τραύματος ο δίκη τραύματος*,” *Stlta* 53 (1981) 246–61, cited hereafter by author's name alone.

<sup>3</sup> Cf. J. H. Lipsius, *Das attische Recht und Rechtsverfahren* I–III (Leipzig 1905–15) 606 n.22; A. R. W. Harrison, *The Law of Athens* II (Oxford 1971) 103 n.3.

thrashed, a man should rather bring a *dike aikeias* than resort to an armed attack. When wounded, a man should avail himself of a *graphe traumatos* and not proceed to homicide. The argument does not bespeak an advanced level of juridical thought, but it is neither muddled nor confused in terminology. Longo argues (247) that Demosthenes in this passage does not use legal technical terms: (a) the offence is *trauma ek pronoias*, not only *trauma* as stated by Demosthenes, and (b) the characteristic of *trauma ek pronoias* is the intent to kill and not the use of weapons which Demosthenes mentions. Neither argument carries any weight. As to (a): in the case Demosthenes versus Demomeles, the offence is twice described as *trauma* (Aeschin. 2.93, 3.51) and once as *trauma ek pronoias* (Aeschin. 3.212). And similarly, in Dem. 40.32, the speaker refers to *trauma* and not to *trauma ek pronoias*. Since there was no ἀκούσιον τραύμα as opposed to τραύμα ἐκ προνοίας, the simple form τραύμα could not be mistaken for any other offence, and so the addition ἐκ προνοίας was, of course, optional. As to (b): in Lys. 3.28 and 4.6–7, both dealing with the offence *trauma ek pronoias*, the use of weapons is mentioned as one of the distinguishing marks of the offence *trauma*,<sup>4</sup> precisely as indicated in Dem. 54.18. The only difference is that Lysias mentions an *ostrakon* whereas Demosthenes refers to a stone or a similar weapon. So there is no reason to doubt that Demosthenes uses technical language, and the fact that *ek pronoias* is not emphasized is of no consequence. *Dike kakegorias* and *dike aikeias* are both precise technical terms. Why should *graphe traumatos* be an inaccurate description of a *dike traumatos*? Longo suspects “una deliberata mancanza de chiarezza,” but in Demosthenes’ speech *Against Konon* the distinction between *dike* and *graphe traumatos* is utterly unimportant for the case. Thus there is no reason to suspect that the passage is biased in this respect.

The other three passages mentioning a *graphe traumatos ek pronoias* are all from Aeschines and relate to the same incident, Demosthenes’ action against his cousin Demomeles.

2.93: καὶ νῦν μὲν δωροδοκίας κατηγορεῖς, πρότερον δ’ ὑπέμεινας τὴν ἐπιβολὴν τῆς βουλῆς τῆς ἐξ Ἀρείου πάγου, οὐκ ἐπεξῶν τῇ τοῦ τραύματος γραφῇ, ἣν ἐγράψω Δημομέλην τὸν Παιανιᾶ, ἀνεψιὸν ὄντα, ἐπιτεμῶν τὴν σαυτοῦ κεφαλὴν;

<sup>4</sup> Lys. 3.28: λέγει δὲ ὡς ἡμεῖς ἦλθομεν ἐπὶ τὴν οἰκίαν τὴν τούτου ὄστρακον ἔχοντες, καὶ ὡς ἠπειλοῦν αὐτῷ ἐγὼ ἀποκτενεῖν, καὶ ὡς τοῦτό ἐστιν ἡ πρόνοια. 4.7: καίτοι φανερόν ἤδη ἐξ ὧν εἴρηκεν, ὅτι οὐ πρόνοια γεγένηται. οὐ γὰρ ἂν οὕτως ἦλθομεν, ἀδήλου ὄντος εἰ παρὰ τούτῳ εὐρήσομεν ὄστρακον ἢ ὅτῳ αὐτὸν ἀποκτενοῦμεν, ἀλλ’ οἴκοθεν ἔχοντες ἂν ἐβαδίζομεν.

3.51: τί γὰρ δεῖ νῦν ταῦτα λέγειν, ἢ τὰ περὶ τὴν τοῦ τραύματος γραφὴν αὐτῷ συμβεβηκότα, ὅτ' ἐγράψατο εἰς Ἄρειον πάγον Δημομέλην τὸν Παιανιά, ἀνεψιὸν ὄντα ἑαυτῷ, καὶ τὴν τῆς κεφαλῆς ἐπιτομήν.

3.212: ὥστε τὴν μιὰν κεφαλὴν ταύτην . . . μυριάκις κατατέτμηκε καὶ τούτων μισθοὺς εἴληφε τραύματος ἐκ προνοίας γραφὰς γραφόμενος.

Longo suggests that the meaning of *graphe* in these passages is not 'public action' but 'written document' (250, 260). It is well known that the word *graphe*, as a legal technical term, regularly has the figurative meaning 'public action', but occasionally is used in the literal sense 'indictment', *i.e.* written accusation handed over to the the *archai* or read out to the jurors.<sup>5</sup> In this sense *graphe* can even denote a written document in a *dike*, and similarly the verb *γράφεισθαι*, 'to bring a public action', can be used in the phrase *δίκας γράφεισθαι* 'to draw up in writing a private action'. In the orators I have found the following three examples of this usage: Antiph. 1.2, ὡς καὶ ἐγὼ καὶ ἡ γραφὴ λέγει (in a *dike rhotou*); Dem. 27.12, ὅταν κατ' αὐτῶν τὰς γραφὰς ἀπενέγκωμεν (in a *dike epitropes*); Isoc. 18.12, πείσας δὲ τὴν ἀρχὴν πάλιν τὴν αὐτὴν δίκην ἐγράψατο (in a *dike blabes*). And we can add two more examples from Aristophanes' *Clouds*: εἴ σοι γράφοιτο πεντετάλαντός τις δίκη (759), and ὁπότε γράφοιτο τὴν δίκην ὁ γραμματεὺς (770).<sup>6</sup>

According to Longo, *graphe* has the special meaning 'written document' in all the four passages referring to a *graphe traumatos*. But this is most unlikely, for the following reasons. (a) *Graphe* in the figurative sense 'public action' frequently governs an objective genitive describing the offence and delimiting the type of public action: *γραφὴ παρανόμων*, *ξενίας*, *ἀσεβείας*, etc. When *graphe* has its literal meaning 'written document', such an objective genitive is not attested and less likely to occur. The proper idiom is rather *γραφὴ περὶ τινος*.<sup>7</sup> In

<sup>5</sup> Cf. Lipsius (*supra* n.3) 263–64 n.1.

<sup>6</sup> Longo 249 nn.2–3, following Lipsius, adduces three more passages: (a) Dion. Hal. *Din.* 635 (= *Din.* fr.48 test.2): καὶ ἐξ ὧν αὐτὸς περὶ αὐτοῦ συνέγραψεν ἐν τῷ λόγῳ τῷ κατὰ Προξένου, ὃς εἴρηται μὲν μετὰ τὴν φυγὴν, προσκειμένην δὲ ἔχει τὴν γραφὴν ταύτην Δεῖναρχος . . . κτλ. But here τὴν γραφὴν ταύτην is not part of the fragment, but Dionysios' *introduction* to the indictment quoted (in a *dike blabes*). So the passage is not a reliable source for Athenian legal terminology. (b) Dem. 38.6: εἴκοσι δὲ καὶ δυοῖν (ἐτῶν γεγενημένων) ἀφ' οὗ τυγχάνουσιν γεγραμμένοι, where the preferable reading, however, is ἐγγεγραμμένοι (A), accepted by Blass (Teubner), Rennie (OCT), and Gernet (Budé), and not γεγραμμένοι (cett.), accepted by Murray (Loeb). (c) Dem. 38.15: ὅτε τοίνυν ἐλάγχανον τῷ πατρὶ τῆς ἐπιτροπῆς, τὰναντί ἐγράψαντο τούτων, where, *pace* Lipsius, we do not find the idiom *γράφεισθαι δίκην* in any of the MSS.

<sup>7</sup> When Plato, in *Laws* 876E, refers to the written text of the law concerning *trauma* he uses the phrase ἡ γραφὴ περὶ τραύματος, and not ἡ γραφὴ τραύματος. For this meaning of *γραφὴ* in the *Laws* cf. *e.g.* 788B, 859A, and 871A. Similarly, in Arist. *Pol.*

all the four passages describing a *graphe* for wounding, the objective genitive *τραύματος* is added, which strongly suggests that the author has the figurative and not the literal sense in mind. (b) As pointed out in *Apagoge* 109, and acknowledged by Longo 249,<sup>8</sup> the *schema etymologicum γραφήν γράφεσθαι* is never used in references to private actions, but occurs in two of Aeschines' three references to *graphe traumatos* (2.93 and 3.212). (c) The use of *γραφή* and *γράφεσθαι* denoting the written accusation in private actions is indeed extremely rare, and we must not forget that hundreds of passages attest the common meaning '(to bring a) public action', or '(indictment in a) public action'.

In public actions it is, of course, more difficult to distinguish between the figurative and the literal sense of *graphe*, but when the action is technically a *graphe*, the distinction is insignificant, as can be illustrated by the following examples: Dem. 18.53, *καί μοι λέγε τήν γραφήν αὐτήν λαβών. ΓΡΑΦΗ. . . ἃ μὲν διώκει τοῦ ψηφίσματος . . . ταῦτ' ἐστίν. Dem. 58.36, ἄλλ' ὅμως ἐξ αὐτῆς τῆς γραφῆς αὐτίκα γνῶσεσθε διότι πρόφασίς ἐστίν τῆς ἐνδείξεως ἢ γραφῆς. λέγε τὰς γραφὰς ταύτας. ΓΡΑΦΑΙ. (Both are in connection with a *graphe paranomon*.)*

More significant is the fact that *graphe* is occasionally used in descriptions of other types of public action, as for example *eisangelia* or *apographe*. The most prominent examples, often discussed, are to be found in Isaios' speech 11 *On the Estate of Hagnias*. It was delivered in an *εἰσαγγελία κακώσεως ὀρφανοῦ* (11.6, 15), but in five passages *graphe* is used in descriptions of the action:

28: ὡσπερ καὶ γραφὰς κατ' ἐμοῦ δέδωκεν, οὕτω καὶ δίκας ἐμοὶ εἶναι καὶ τῷ παιδὶ πεποίηκεν.

31: ἐπὶ ταύτας τὰς συκοφαντίας ἐλήλυθεν, ἐξ ὧν γραφήν γραψάμενος καὶ ἐμὲ διαβάλλων ἐλπίζει χρήματα λήψεσθαι . . .

1280a40, treaties of alliance are called *γραφαὶ περὶ συμμαχίας*. At 1321b36 and 1331b7, however, *γραφαὶ δικῶν* means 'registration of actions' and not 'written accusations', cf. LSJ s.v. *γραφή* II. For the meaning of *δίκη* in these two passages cf. 313f *infra*. In the papyri *γραφή* is frequently used in the sense 'list, catalogue'; here too the objective genitive is regular and often occurs, cf. Preisigke s.v.

<sup>8</sup> Longo states (248–49 n.4) that my list of passages is not complete and adduces three more examples, of which two (Aeschin. 1.1 and 3.216) are recorded in my note (*Apagoge* 109 n.11) but, admittedly, not recorded twice, whereas the third example, taken from the *nomos hybreos* quoted in Dem. 21.47, is the very phrase of that law which has aroused most suspicion as to the authenticity of the document: *ὅσοι δ' ἂν γράφονται γραφὰς ἰδίας κατὰ τὸν νόμον*. Even scholars who accept the law as genuine tend to reject this passage as spurious or corrupt, and so I omitted it from my list. On reflection, however, I am prepared to envisage the possibility that even this phrase may be genuine.

32: οὐκοῦν οὐ δεῖ . . . ἐθίζειν εἶναι γραφὰς περὶ ὧν ἰδίας δίκας οἱ νόμοι πεποιήκασιν.

35: ταῦτα καὶ οἱ νόμοι κελεύουσιν, οὐ μὰ Δία οὐ γραφὰς ἐμὲ φεύγειν περὶ ὧν δίκας ἰδίας εἶναι πεποιήκασιν . . .

35: ἀλλ' εἴ τι τῶν ὁμολογουμένων εἶναι τοῦ παιδὸς εἶχον . . . τότε ἄν μοι κατὰ ταύτην προσήκε κρίνεσθαι τὴν γραφήν, οὐ μὰ Δί' οὐκ ἐπὶ τοῖς ἐμοῖς.

Longo believes (250) that *graphe* in these passages denotes the written indictment, and this may well be true in the second and fifth, but it is most unlikely to be the correct explanation in the other three. Here *graphai* are explicitly opposed to *dikai* in the sense 'private actions' and must accordingly mean 'public actions', as in Aristotle's description of the same procedure at *Ath. Pol.* 56.6: γραφαὶ δ[ὲ] καὶ δ[ί]και λαγχάνονται πρὸς αὐτόν, ἅς ἀνακρίνας εἰς τὸ δικαστήριον εἰσάγει, [γο]νέων κακώσεως (αὐταὶ δ' εἰσὶν ἀζήμοι τῷ βουλομένῳ δ[ι]ώκειν), ὀρφανῶν κ[ακώ]σεως . . . The fact that the action *kakoseos* is *azemios* for the prosecutor shows that it is, specifically, an *eisangelia*,<sup>9</sup> but it is nevertheless subsumed under the general heading *γραφαὶ δὲ καὶ δίκαι*. Since most of the public actions were technically *graphai*, this usage should cause little surprise, and we have other examples. In the speech *Against Nikostratos*, Apollodoros contemplates the risk of losing the *apographe* he has brought: ἐκινδύνεον δ' ἄν περὶ τε χιλίων δραχμῶν καὶ τοῦ μηδέποτε μηδένα αὐθις ὑπὲρ ἔμαντοῦ γράψασθαι (53.1). Here ἀπογράψαι instead of γράψασθαι would have been a more precise description of the consequences.<sup>10</sup> And similarly, in *Lys.* 19.55, *graphe* is used instead of *apographe*: περὶ μὲν οὖν αὐτῆς τῆς γραφῆς . . . ἀκηκόατε καὶ μεμαρτύρηται ὑμῖν. So we have some evidence that *graphe* is sometimes used in the broader sense 'public action' even in references to some of the special public actions as *eisangelia* or *apographe*,<sup>11</sup> but we have certainly no support for the view that *graphai* in the broader sense 'public actions' can be used about *dikai*, 'private actions'.

Longo (250–51) also argues from the action for *paranoia* in Plato's *Laws* 929D–E, and here I will confine myself to a note on method. Plato is a good source for Athenian legal terminology when he describes Athenian society, especially in the opening scenes of the early dialogues (*cf.* 313 *infra*). But in the *Laws*, where he describes an

<sup>9</sup> *Cf.* Dem. 37.46; Isae. 3.47; Hyp. 2.8, 12.

<sup>10</sup> *Cf.* Hansen, *Apagoge* 65 n.29.

<sup>11</sup> *Cf.* Dem. 58.2, ὁ πατήρ . . . ὠδύρετο . . . εἰ . . . περιόψομαι . . . Θεοκρίνην . . . παρὰ πάσας τοὺς νόμους γραφὰς γραφόμενον . . ., where the reference is both to the *phasis* brought against Mikon (5ff) and to the *graphai paranomon* (1, 23, 30ff), *cf.* 15, 47.

ideal society, he is certainly not using Athenian technical terms consistently. So to adduce passages from Plato's *Laws* in support of the view that Athenian legal terminology lacks precision is, to say the least, not advisable.<sup>12</sup> Similarly, the notes in rhetorical treatises, lexi-ca, and scholia may be good sources for terminology if they quote or paraphrase a lost speech. But when they describe legal institutions in their own words, we cannot quote the passage as an example of confused legal terminology in fourth-century Athens.<sup>13</sup> Finally, many of the documents inserted in the forensic speeches are probably genuine and excellent sources. But some are undoubtedly spurious and some are very suspect, as for example the *martyriai* inserted in Demosthenes' speech *Against Meidias*.<sup>14</sup> Thus there is no reason to discuss the *testimonium* inserted in Dem. 21.109, which no scholar will defend as authentic.

Similarly, Longo invokes a description, in Dem. 59.97–98, of an action brought by the Plataeans against the Spartans during the Persian wars: οἱ Πλαταιεῖς λαγχάνουσι δίκην τοῖς Λακεδαιμονίοις εἰς τοὺς Ἀμφικτύονας χιλίων ταλάντων ὑπὲρ τῶν συμμάχων . . . The source applies to litigation between cities, where the word *dike* is often used,<sup>15</sup> and it has no relation to the Athenian administration of justice. Accordingly, the passage does not show that the Athenians were inaccurate in their legal terminology.

Another source adduced by Longo is Dem. 21.25:

εἶπερ ἀληθῶς ἐπεπόνθειν ταῦθ' ἃ λέγω, δίκας ἰδίας μοι προσήκεν αὐτῷ λαχεῖν, τῶν μὲν ἱματίων καὶ τῶν χρυσῶν στεφάνων τῆς διαφθορᾶς καὶ τῆς περὶ τὸν χορὸν πάσης ἐπηρείας, βλάβης, ὧν δ' εἰς τὸ σώμ' ὑβρίσθαι φημί, ὕβρεως, οὐ μὰ Δι' οὐχὶ δημοσίᾳ κρίνειν αὐτὸν καὶ τίμημ' ἐπάγειν ὃ τι χρῆ παθεῖν ἢ ἀποτεῖσαι.

According to Longo, Demosthenes seems (wrongly) to include the *graphe hybreos* among the *dikai*, and she infers that the orator's legal terminology lacks precision (251–52). But if we read the following sections (not quoted by Longo) the apparent terminological confusion

<sup>12</sup> In the *Laws* Plato often copies Athenian institutions and he may often use Athenian technical terms, cf. M. Piérart, *Platon et la cité grecque* (Brussels 1974) 465–66. But the differences between the constitutions of Athens and Magnesia, as regards both the institutions and the nomenclature, are so great that it is impossible, on the basis of the *Laws*, to make any inference about how consistent the Athenians were in their legal terminology.

<sup>13</sup> Cf. e.g. Dion. Hal. *Din.* 635, discussed *supra* n.6.

<sup>14</sup> Cf. E. Drerup, *Über die bei den attischen Rednern eingelegten Urkunden* (NJbb Suppl. 24 [1898]) 313–14. The authenticity of the inserted *nomoi* is a different problem, cf. Drerup 297–305.

<sup>15</sup> Cf. e.g. Thuc. 4.118.8, 5.18.4; Dem. 18.150.

disappears. When Demosthenes opposes *δίκας ιδίας λαχείν* to *δημοσία κρίνειν*, he has no intention of drawing a line between private and public actions. He emphasizes instead the distinction between actions brought by a private citizen (*βλάβης* and *ὑβρεως*) and actions brought by a citizen on behalf of the *polis* (*προβολή*). The distinction is developed in 26 where Demosthenes states the reasons for bringing a *probole*: ὅ τε γὰρ χορὸς ἦν τῆς πόλεως, ἢ τ' ἐσθῆς τῆς ἐορτῆς εἵνεκα πάντα παρεσκευάζετο, ἐγὼ θ' ὁ πεπονθὼς ταῦτα χορηγὸς ἦν. The whole argument is summarized in 28, and here Demosthenes correctly points out that the action *hybreos* is a *graphe*, and not a *dike* in the technical sense: μὴ δὴ τοῦτο λέγειν αὐτὸν ἐάτε, ὅτι καὶ δίκας ιδίας δίδωσ' ὁ νόμος μοι καὶ γραφήν ὑβρεως. The reader is only confused if he stops in 25 in the middle of the argument instead of proceeding to its conclusion in 28.<sup>16</sup>

Finally, in corroboration of her view that Athenian legal terminology is often confused, Longo adduces some sources relating to the action for impiety. I leave out Plato's *Laws* (cf. 311f *supra*). The other passages are from Plato's *Euthyphro*, the Lysianic speech *Against Andokides*, and Demosthenes' speech *Against Androtion*.

Pl. *Euthyphr.* 2A: ΕΥΘ: ... οὐ γὰρ πού καὶ σοί γε δίκη τις οὔσα τυγχάνει πρὸς τὸν βασιλέα ὡσπερ ἐμοί. ΣΩ: οὔτοι δὴ Ἀθηναῖοί γε, ὦ Εὐθύφρων, δίκην αὐτὴν καλοῦσιν ἀλλὰ γραφήν. ΕΥΘ: τί φῆς; γραφήν σέ τις, ὡς ἔοικε, γέγραπται ... 5A-B: ΣΩ: καὶ εἰ μὲν, ὦ Μέλητε, φαίην ἄν, Εὐθύφρονα ὁμολογεῖς σοφὸν εἶναι τὰ τοιαῦτα, καὶ ὀρθῶς νομίζειν καὶ ἐμὲ ἡγοῦ καὶ μὴ δικάζου· εἰ δὲ μή, ἐκείνῳ τῷ διδασκάλῳ λάχε δίκην πρότερον ἢ ἐμοί ... καὶ ἄν μή μοι πείθηται μηδὲ ἀφή τῆς δίκης ἢ ἀντ' ἐμοῦ γράφηται σέ, αὐτὰ ταῦτα λέγειν ἐν τῷ δικαστηρίῳ ἃ προυκαλούμην αὐτόν;<sup>17</sup>

Lys. 6.11: Ἀνδοκίδης δὲ τοσοῦτον καταπεφρόνηκε τῶν θεῶν ... ὥστε πρὶν ... ἢ ἐπιδημηκέναι δέκα ἡμέρας ἐν τῇ πόλει προσεκαλέσατο δίκην ἀσεβείας πρὸς τὸν βασιλέα, καὶ ἔλαχεν ... φάσκων τὸν Ἄρχιππον ἀσεβεῖν περὶ τὸν Ἑρμῆν τὸν ἑαυτοῦ πατρῶον.

Dem. 22.27: τῆς ἀσεβείας κατὰ ταῦτ' ἔστ' ἀπάγειν, γράφεσθαι, δικάζεσθαι πρὸς Εὐμόλπιδας, φαίνειν πρὸς τὸν βασιλέα.

First, Plato's use here of *δίκη/δικάζεσθαι* versus *γραφή/γράφεσθαι*: it is a common linguistic phenomenon that, in a pair of antonyms, one of the two opposed words may also be used to denote the

<sup>16</sup> So, in 25, *dike* has its regular general meaning 'action' (comprising both private and public actions) whereas in 28, when opposed to *graphe*, it has the specific meaning 'private action', cf. 314 *infra*. An exact parallel to the use of *dike* in 25 can be found in Dem. 37.33.

<sup>17</sup> In other passages the action is unambiguously described as a public action: *γράφεσθαι* (5B *bis*), *ἀσεβείας γράφεσθαι* (5C, 12E), *γραφὴν γράφεσθαι* (2B, 3B), *τὴν γραφήν φεύγειν* (6A), and *ἢ πρὸς Μέλητον γραφή* (5A, 15E).

whole category, whereas the other invariably has its specific meaning. As an example let me adduce the antonyms *ἡμέρα* and *νύξ*. Like the English word 'day', *ἡμέρα* can denote both the twenty-four hour period and the daytime as opposed to the night hours; whereas *νύξ* invariably means 'night'.<sup>18</sup> Similarly, of the antonyms *δίκη* and *γραφή*, the word *dike* has both a general meaning 'action' (comprising both public and private actions) and a specific meaning 'private action', whereas the word *graphe* only has the specific meaning 'public action'. The specific meaning of *dike* is much more common than the general meaning, which however can be found both in laws inserted in the forensic speeches and in the speeches themselves. A few examples will suffice:

Dem. 24.54: ΝΟΜΟΣ: ὅσων δίκη πρότερον ἐγένετο ἢ εὐθυνα ἢ διαδικασία περὶ τοῦ ἐν δικαστηρίῳ, ἢ ἰδία ἢ δημοσία . . .

Dem. 46.26: ΝΟΜΟΣ: εἰάν τις . . . συνήγορος ὧν λαμβάνη χρήματα ἐπὶ ταῖς δίκαις ταῖς ἰδίαις ἢ δημοσίαις . . .

Is. 3.46: καὶ οὐκ ἂν εἰσήγγελες πρὸς τὸν ἄρχοντα κακοῦσθαι τὴν ἐπίκληρον . . . ἄλλως τε καὶ μόνων τούτων τῶν δικῶν ἀκινδύνων τοῖς δῶκουσιν οὐσῶν καὶ ἐξὸν τῷ βουλομένῳ βοηθεῖν τοῖς ἐπικλήροις.

Dem. 18.121: ἀλλ' οὐδ' αἰσχύνει φθόνου δίκην εἰσάγων . . . (in a *graphe paranomon*).

These examples explain, in my opinion, the language used by Plato in the *Euthyphro*: Meletos' *graphe asebeias* against Socrates is sometimes referred to specifically as a public action, and is then correctly called a *graphe*. But sometimes Euthyphro and Socrates refer in general to the action brought against Socrates, in which case *δίκη* and *δίκην λαγχάνειν* are correct, but less common idioms.

On the other hand, in Dem. 22.27, the verb *δικάζεσθαι* in all probability refers to a private action, for it is explicitly set off against *ἀπάγειν*, *γράφεσθαι*, and *γράφειν*; and Longo's only reason for rejecting this interpretation is her *a priori* belief that there cannot have been a *dike asebeias* of any kind, not even to the Eumolpidae.

So Lys. 6.11 is the only confusing passage. It is not impossible that the speaker does refer to a *dike asebeias* to the *basileus*, and it is worth pointing out that Andokides' action probably relates to a Hermes dedicated by Andokides' family,<sup>19</sup> *i.e.*, a case in which Andoki-

<sup>18</sup> Other examples in Greek are *ζῶν/ἄνθρωπος*, *χώρα/ἄστν*, etc. For the linguistic phenomenon (sometimes called participatory opposition) cf. J. Lyons, *Semantics I* (Cambridge 1977) 307–08, 'semantic marking'. Examples of 'formal' (instead of semantic) marking can also be adduced, *e.g.* *δοκιμασία/ἀποδοκιμασία*, where *δοκιμασία* means (a) examination, (b) acceptance on examination, whereas *ἀποδοκιμασία* always means rejection on examination.

<sup>19</sup> Cf. D. M. MacDowell, *Andocides On the Mysteries* (Oxford 1962) 5 with n.6.



des, as the wronged person, was entitled to bring a private action. On the other hand, I will certainly not preclude the possibility that all actions to the *basileus* for impiety were public actions, in which case the speaker of Lys. 6 must use *dike* in the general sense 'private action'. Here, for once, the reader is bewildered by the terminology, and there is no indication in the context that allows him choose between the two meanings of *dike*. The attested fact, however, that the word *dike* is sometimes used in a general sense, even in references to *graphai* and other public actions, cannot be adduced in support of the opposite view that *graphe* can be used in references to a *dike* in the specific sense 'private action'.

Aeschines 2.93 mentions an *epibole* incurred by Demosthenes for withdrawing his *graphe traumatos* against Demomeles. In *Apagoge* 109 I compared this fine to the 1000 drachmas for withdrawing a public action. Questioning my interpretation, Longo (254–58) points out, correctly, that *epibole* in other sources denotes a fine imposed by a magistrate. But the Areopagites were not magistrates and the council of the Areopagos was not a regular board of *archai*.<sup>20</sup> So on any interpretation we have to admit that the fine incurred by Demosthenes is a case apart and cannot be an ordinary *epibole* imposed by an *arche*. Admittedly we have no information that Demosthenes was fined 1000 drachmas. But this is of minor importance. What I wish to argue is that the *epibole* mentioned in Aeschin. 2.93 is analogous with the fine of 1000 drachmas for withdrawing a public action and serves the same purpose, *viz.* to discourage sycophants, and this points to a public rather than a private action. I take no position on the questions whether Demosthenes had to pay exactly 1000 drachmas, or whether the fine was automatic or had to be imposed by a special act of the council of the Areopagos. In homicide actions heard by the Areopagos many procedural rules were slightly different from the rules applied in actions heard by the people's court: the *anakrisis* took the form of three *prodikasiai*, the *antomosia* took the form of a solemn *diomosia* connected with a sacrifice, and, contrary to the normal practice, witnesses in homicide trials had to take an oath.<sup>21</sup>

Longo prefers a modified form of the traditional view that *δίκαι φόνου καὶ τραύματος ἐκ προνοίας* differed from other private actions in that a fine could be imposed for withdrawing the indictment. Her modification is that the fine was not automatic but imposed only if

<sup>20</sup> Cf. M. H. Hansen, "Seven Hundred *Archai* in Classical Athens," *GRBS* 21 (1980) 172–73.

<sup>21</sup> Cf. D. M. MacDowell, *Athenian Homicide Law* (Manchester 1963) 34–37 (*prodikasiai*), 92 (*diomosia*), 98–100 (oath of witnesses).

the Areopagos decided that the withdrawal of the action was due to a misuse of the action and not to a genuine reconciliation between plaintiff and defendant. Again, however, I emphasize that the only evidence supporting this view is the *epibole* mentioned by Aischines in connection with Demosthenes' *graphe traumatos* against Demomeles. In all descriptions of the *dike phonou* or *traumatos ek pronoiias* there is not the slightest evidence of any fine for withdrawing the *dike*. Furthermore, Aischines' mention of the *epibole* is too brief to allow us to decide whether the fine was obligatory or discretionary: if the fine was automatic, the Areopagos would have to report the withdrawal of the action to the *praktores*, who would then record Demosthenes as a debtor to the state if he did not pay.<sup>22</sup> If the fine was discretionary, the Areopagos would have to debate the withdrawal and to take a vote on the fine. Aischines gives no information, and I suspend judgment.

We may turn now to the possible relationship between the *dike* and a *graphe traumatos*. Longo (258–60) maintains that *klope* is the only other offence for which the coexistence of a *dike* and a *graphe* is attested (259). But this statement is only true if we accept her *a priori* assumption that *δικάζεσθαι* cannot mean 'to bring a private action' in Dem. 22.27: *τῆς ἀσεβείας κατὰ ταῦτ' ἔστ' ἀπάγειν, γράφεσθαι, δικάζεσθαι πρὸς Εὐμολπίδας, φαίνειν πρὸς τὸν βασιλέα*. And her observation is further invalidated if we focus on concepts rather than on words: we know from the forensic speeches that a person exposed to violence often had a choice between a *graphe hybreos* and a *dike aikeias* (cf. 317 *infra*), and we know from the first speech *Against Stephanos* (Dem. 45.4) that a temporary adjournment of all *dikai* could be circumvented by Apollodoros by bringing a *graphe hybreos* against Phormion instead of a *dike*. On the relation between the *graphe hybreos* and the *dike aikeias* see 318 *infra*.

Next, presupposing that the *graphe* and the *dike traumatos* must have been identical (apart from the fact that the first was public and the second private), Longo can see no reason for having both types of action simultaneously. And she states that it would be an unbelievable masochism if Demosthenes had preferred to prosecute Demomeles by a *graphe traumatos*, which involved a fine of 1000 drachmas, instead of avoiding this risk by bringing a *dike*. But there is no support for the view that the two types of action must have been identical apart from the rules for prosecution and the fine. And it is not absolutely certain that it was less risky to bring a *dike* than a *graphe*.

<sup>22</sup> For the *praktores* cf. Harrison (*supra* n.3) 187.

(a) Longo states that the penalty must have been the same in a *dike* and in a *graphe traumatos*. But none of the four passages referring to a *graphe traumatos* gives any information about the penalty. We know that conviction in a *dike traumatos* resulted in lifelong exile.<sup>23</sup> In a *graphe traumatos* the penalty may have been fixed by an assessment *ὅτι χρὴ παθεῖν ἢ ἀποτεῖσαι*. We do not know.

(b) Athenian homicide law prescribed that prosecution rested with the family of the victim.<sup>24</sup> This rule applied unquestionably to *phonos ek pronoias*, but *trauma ek pronoias* was also an offence falling under the *phonikoi nomoi*,<sup>25</sup> and so we must ask: was the bringing of a *dike traumatos* restricted to the victim (as in other *dikai*) or was the family involved in the prosecution (as in a *dike phonou*)? If the prosecution in a *dike traumatos* did *not* involve the family, it is easier to understand why the Athenians, to protect the victim, allowed the bringing of a *graphe* by any citizen in addition to the bringing of a *dike* which was restricted to the victim.<sup>26</sup> If the prosecution in a *dike traumatos* did involve the family (whereas the *graphe* could be brought by any citizen or by the victim alone), there will have been less need for a *graphe traumatos*. On the other hand, this may have been the reason why Demosthenes, who was allegedly wounded by his cousin, preferred a *graphe* to a *dike*. The sources give no information, and I suspend judgment.

(c) Longo's argument that a *graphe traumatos* brought by the victim presupposes an unbelievable masochism on the part of the prosecutor carries little weight, for it applies not only to a *graphe traumatos* but even more to a *graphe hybreos* brought by the victim. But such action is well attested in the sources and has never been doubted. If a victim of violence was entitled to bring a *graphe hybreos*, he was also entitled to bring a *dike aikeias* (whereas the reverse was probably not always true).<sup>27</sup> By bringing a *graphe hybreos* he risked a fine of 1000

<sup>23</sup> Lys. 3.38, 43–44.

<sup>24</sup> Cf. *IG I<sup>3</sup>* 104.21 = Dem. 43.57, where *συνδιοκῆν* implies joint prosecution by the family, although regularly one of the members of the family would be the principal, in practice perhaps the sole prosecutor.

<sup>25</sup> That the *φονικοί νόμοι* included actions *τραύματος ἐκ προνοίας* has been argued in M. H. Hansen, "The Prosecution of Homicide in Athens: A Reply," *GRBS* 22 (1981) 13–17.

<sup>26</sup> I admit that this hypothesis, if correct, weakens my argument that a *γραφὴ τραύματος ἐκ προνοίας* *a fortiori* presupposes a *γραφὴ φόνον ἐκ προνοίας*.

<sup>27</sup> According to Ruschenbusch there was no difference between *aikeia* and *hybris*, but Harrison and MacDowell argue that *hybris* involved some kind of dishonour whereas *aikeia* covered any form of battery. See E. Ruschenbusch, "ΥΒΡΕΩΣ ΓΡΑΦΗ," *ZSav* 82 (1965) 302–09; A. R. W. Harrison, *The Law of Athens I* (Oxford 1968) 168–69; D. M. MacDowell, "Hybris in Athens," *G&R* 23 (1976) 14–31, and *The Law in Classical*

drachmas if he withdrew the action before the hearing or, at the hearing, obtained less than 1/5 of the votes of the jurors. Furthermore, if his opponent was fined, the money would go to the treasury and not to himself. In a *dike aikeias* there was no fine of 1000 drachmas and the prosecutor would recover damages if he won the case. So the alleged masochism in bringing a *graphe hybreos* rather than a *dike aikeias* was even more flagrant than in the case of *trauma* (where even a *dike* would bring the prosecutor no profit). Nevertheless in the forensic speeches we have some well attested examples of the victim mentioning a *graphe hybreos* as a possible alternative to a *dike aikeias*.<sup>28</sup> Admittedly, we have few examples of the application of the *graphe hybreos*,<sup>29</sup> but if the victim's bringing of a *graphe* instead of a *dike* was an unbelievable masochism, no speaker would have mentioned the alternative to the jurors. The explanation may well be that the rules for bringing a *graphe* or a *dike* were more complex than we tend to believe, which leads me to my final observation.

(d) A prosecutor in a *graphe* had to pay a *parastasis* (probably only a nominal fee), but if he withdrew his action or obtained less than 1/5 of the votes of the jurors, he was fined 1000 drachmas. Such a fine did not apply to *dikai*, but in most *dikai* both parties had to pay a fee called *prytaneia*, and the man who lost the suit would have to refund to his opponent the *prytaneia* he had paid. The *prytaneia* were three drachmas in minor and thirty in major cases.<sup>30</sup> So for a prosecutor who lost a major case the *prytaneia* amounted to  $2 \times 30 = 60$  drachmas, a considerable sum for an ordinary Athenian. Thus a prosecutor who was confident that he could persuade more than a fifth of the jurors, but less confident that he would win the case, might find that it was safer to bring a *graphe* than a *dike*. We do not know whether a prosecutor in a *dike traumatos* had to pay *prytaneia* or not, but if he had, all discussion of 'masochism' is futile.

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*Athens* (London 1978) 129–32, who admits, however, that “there is a considerable overlap between the scope of a *graphe* for *hybris* and the scope of a *dike* for battery, violence, slander and so on” (130).

<sup>28</sup> Isoc. 20.2; Dem. 54.1; Lys. fr.126 Sauppe.

<sup>29</sup> According to Theon (Walz I 155, Spengel II 63) both Lysias and Lykourgos had published several speeches in actions for *hybris*: τὰ τε Λυσίου καὶ Λυκούργου ἐκ τῶν τῆς ὕβρεως λόγων. Known (but lost) speeches are Lys. fr.136 κατὰ Καλλίου ὕβρεως, fr.225 πρὸς Σώστρατον ὕβρεως, Is. fr.18–25 κατὰ Διοκλέους ὕβρεως, Din. fr.1viii κατὰ Προξένου ὕβρεως, fr.lix ἀπολογία ὕβρεως Ἐπιχάρει πρὸς Φιλωτάδην (all fragments after Sauppe). Other examples are Is. 8.41 (the action is still pending) and Dem. 45.4 (the action is brought when all *dikai* were suspended).

<sup>30</sup> On the *prytaneia* and the *parastasis* see W. Wyse, *The Speeches of Isaeus* (Cambridge 1904) 330–31, and Lipsius (*supra* n.3) 824–28; for the fine of 1000 drachmas, M. H. Hansen, *Eisangelia* (Odense 1975) 29–30.

I take no position on these questions, but will only emphasize that arguments based on the alleged similarities or differences between a *dike* or a *graphe traumatos* are of no value since we do not have sufficiently reliable and detailed information about the prosecution, the trial, and the penalty, neither generally in relation to *graphai* and *dikai*, i.e., public versus private actions, nor specifically in relation to the *dike* and *graphe traumatos*.

After this discussion of the possible relation between a *dike* and a *graphe traumatos* I return to the four passages which, in my opinion, prove the existence of a *graphe traumatos ek pronoias* heard by the council of the Areopagos and involving a fine to be imposed if the prosecutor withdrew his action before the hearing (Dem. 54.18, Aeschin. 2.93, 3.51, 212). According to Longo, the terminology used in all four passages lacks precision and is open to other interpretations, viz., that *graphe* does not denote a public action, but the written document (in a *dike traumatos*). In order to avoid the recognition of a *graphe traumatos* Longo is almost hunting for other sources in which the use of the terms *dike* and *graphe*, allegedly, lacks precision and is confused. The hunt (over several thousand pages) has resulted in less than a score of passages, and even here the confusion is often created by Longo's interpretation of the source than by the source itself. Furthermore, not a single one of her examples of confused terminology shows that the idioms *γραφὴν γράφεσθαι* and *γραφὴ/γράφεσθαι* + genitive can be used in descriptions of private actions. Apart from Plato's *Laws* (not explicitly describing Athenian institutions), a late rhetorical note (not a reliable source for legal terminology), and a passage in Demosthenes (dealing with international litigation), the sources discussed relate to one of the following idiomatic usages:

(a) Of the antonyms *dike/graphē* (private and public action), *dike* is the word used when the reference is to the whole category. So *dike* regularly has the specific meaning 'private action' but may have the general meaning 'action' (private and/or public), whereas *graphē* always has the specific meaning 'public action'.

(b) *Graphē* is a special type of public action, but, since most public actions were *graphai*, the word *graphē* is sometimes used in the more general sense 'public action', even in references to other types of public action (e.g. *eisangelia* or *apographe*).

(c) Instead of 'public action' and 'to bring a public action', the words *γραφὴ* and *γράφεσθαι* may sometimes mean 'written document' and 'to draw up a document in writing'. In a few cases these terms are even applied in descriptions of private actions, but, first, this usage is

extremely rare and, second, there is no example of this usage when the offence is added as an objective genitive, or when the idiom used is the *schema etymologicum* γραφήν γράφεσθαι.

In conclusion, leaving aside the four passages referring to a *graphe traumatos*, we have several hundred other passages where the terms δίκη/δικάζεσθαι and γραφή/γράφεσθαι are consistently and unambiguously used. Out of the score of sources adduced by Longo I can agree in only three or four cases that the terminology is confusing. On the contrary, my conclusion is that the Athenian legal terminology concerning *dikai* and *graphai* is surprisingly precise, and so I maintain my view that the Athenians allowed both a *dike* and a *graphe traumatos ek pronoias* to be heard by the Areopagos.

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