GERHARD THÜR

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# The Jurisdiction of the Areopagos in Homicide Cases

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gerhard.thuer@oeaw.ac.at
http://www.oeaw.ac.at/antike/index.php?id=292

Gerhard Thür (Leopold Wenger-Institut, Munich)

# The Jurisdiction of the Areopagos in Homicide Cases*

## I.

One of the most significant discoveries in legal history during recent years is to be credited to Michael Gagarin. His thesis, amazingly simple, states that at the time of Drakon, scarcely any distinction between "premeditated" and "unpremeditated" homicide had been made.[1] Also quite plausible seems his view that the structure of Athenian homicide law had remained largely unchanged since the days of Drakon.[2] In view of the important role oaths played in archaic procedure,[3] it may furthermore be supposed that the five different homicide courts originated from early oath-places.[4] On these assumptions, however, it is hard to believe that the competence of the Areopagos in the age of the orators should have been based on whether the defendant is accused of "premeditated" killing. This would require a substantial alteration of Athenian homicide law. Such a reform may have taken place, yet we have no direct knowledge of it. Presuming, however, the greatest possible continuity, the question arises whether our sources from the time of the orators have been interpreted correctly so far: in other words, is φόνος ἐκ προνοίας really the criterion for the judicial competence of the Areopagos? I doubt it.

On the issue of the judicial competence of the Athenian courts for homicide there are authentic statements from the most distinguished authors of Greek classical literature: Demosthenes and Aristotle. In my opinion, Plato has also commented, indirectly, upon that matter. Modern studies[5] have paid appropriate attention only to the first two authors mentioned—not to Plato. My rather hypothetical contribution to the subject tries to separate the rules on the competence of Athenian homicide courts from those determining the sanctions to be imposed there. Or, more precisely: in determining the competence of the Areopagos, it could have been relevant whether the perpetrator had

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* A preliminary German version, entitled "Die Zuständigkeit des antiken Areopags als Blutgerichtshof" (from 1987) will be published at Athens in a commemorative volume for the 150th anniversary of the (modern) Areios Pagos—hopefully without further delay. My paper at the Symposion for the most part complied with that German version. The discussion, however, has produced some new aspects, which I have partially included in the text, partially summarized in my Additional Note (below). In first place, I have to thank my respondent, Prof. Wallace. I am also indebted to Mr. M. Barth for his assistance in preparing the English text version and to my colleagues, Prof. Wallace and Prof. Gagarin, for revising my translation. All responsibility, of course, is mine.

1 Gagarin (1981) 60 and 111ff, followed by Thür (1985) 510-514 and (1990) 146f, rejected by Wallace 16f (more critical remarks are listed there in n.61; see also Maffi 112-115). The sophisticated differences between "premeditated" and "intentional" will turn out to be insignificant to my investigation, cf. on this matter recently Wallace 98-100.

2 Gagarin (1981) 22-29; however Sealey 291-294.

3 Thür (1989) 57 and (1990) 151f.

4 On the other hand, Sealey 290 assumes a gradual historical development in three stages.

5 Lipsius 121ff, Busolt-Swoboda 530ff and 811ff, MacDowell (1963) 44, Sealey 276f, Nörr (1983) 645-649, Wallace 97f.

killed by his own hand; the sanctions to be inflicted in a homicide trial, however, could have been dependent on whether the killing was premeditated or unpremeditated.

At first sight, the ancient testimonia seem to show a somewhat different picture. Let us begin with the report on the five Athenian homicide courts given by Demosthenes in his speech delivered against Aristokrates in 352 B.C. (23.65-79). Only the council convening on the Areios Pagos and the court meeting at the temple of Pallas Athene, the Palladion, are of interest for us here (65-70, 71-73).[6] Only the competence of the Palladion, viz. to hear cases of unpremeditated homicide, is reported by the orator (71): Δεύτερον δ' ἕτερον δικαστήριον τὸ τῶν ἀκουσίων φόνων . . . , τοὐπὶ Παλλαδίῳ . . . Any corresponding statement, e.g. concerning φόνος ἐκ προνοίας, is missing in 65-70 which deal with the Areopagos; by this description, however, the reader almost inevitably gets the impression that charges of premeditated killing fell within the jurisdiction of the Areopagos. To be exact, however, 23.73 merely tells us in rather general terms that a lesser degree of guilt causes less severe punishment.[7]

Only one single court speech links the words ἐκ προνοίας φόνος with the Areopagos: Deinarchos, *Against Demosthenes* (1.6; 323 B.C.).[8] Yet this passage also mentions "killing by violence," indicating direct killing by one's own hands. Whether the first term was pertinent to the sanction, i.e. the death penalty, and the other one to the competence of the court, certainly cannot be decided on the basis of this text alone. Anyway, in the context of his speech the orator had no reason for giving more precise details.

On the other hand, premeditation as a criterion for judicial competence of the Areopagos is clearly expressed in Aristotle's *Athenaion Politeia* (57.3; about 325 B.C.): εἰσὶ δὲ φόνου δίκαι καὶ τραύματος, ἂν μὲν ἐκ προνοίας ἀποκτείνῃ ἢ τρώσῃ, ἐν Ἀρείῳ πάγῳ, . . . τῶν δ' ἀκουσίων καὶ βουλεύσεως κἂν οἰκέτην ἀποκτείνῃ τις ἢ μέτοικον ἢ ξένον, οἱ ἐπὶ Παλλαδίῳ. What Demosthenes describes with conclusive clearness becomes blurred by the material empirically gathered. The Palladion is said to be competent for cases of 1) unpremeditated killing, 2) indirect killing,[9] and 3) killing a non-citizen. Remarkably, the latter two crimes may be committed either with or without premeditation. On the other hand, Demosthenes (23.71) is logically consistent in

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6 In the following, I will argue *e silentio* so that reading both passages in context would be advisable.

7 Dem. 23.73: καὶ γὰρ τὸ τῶν ἀκουσίων ἐλάττω τὴν τιμωρίαν ἢ τῶν ἑκουσίων τάξαι δίκαιον . . .

8 Dein. 1.6: καὶ ἡ τῶν ἐκ προνοίας φόνων ἀξιόπιστος οὖσα βουλὴ τὸ δίκαιον καὶ τἀληθὲς εὑρεῖν, καὶ κυρία δικάσαι περί τε τοῦ σώματος καὶ τῆς ψυχῆς ἑκάστου τῶν πολιτῶν, καὶ τοῖς μὲν βιαίῳ θανάτῳ τετελευτηκόσι βοηθῆσαι, τοὺς δὲ παράνομόν τι τῶν ἐν τῇ πόλει διαπεπραγμένους ἐκβαλεῖν ἢ θανάτῳ ζημιῶσαι . . . Wallace 98 draws from the term ἐκ προνοίας rather one-sided conclusions.

9 The term βουλεύειν comprises more than "planning"; even "planning or instigating," Gagarin (1990) 82, is an interpretation too narrow (see below notes 13 and 14). Gagarin (1990) 97f quite properly shows—against MacDowell (1963) 61-69—that it is not correct to infer a δίκη βουλεύσεως in Athenian homicide law from the ambiguous term βούλευσις, as used by Aristotle; βουλεύειν τὸν θάνατον always led to a δίκη φόνου.

referring solely to cases lacking premeditation. But logical stringency is a somewhat weak argument against apparently good evidence. More emphasis therefore should be placed on an inconsistency regarding the Areopagos. Aristotle, in the passage quoted above, varies the wording of a law cited by Demosthenes on a different occasion (23.22): Δικάζειν δὲ τὴν βουλὴν τὴν ἐν 'Αρείῳ πάγῳ φόνου καὶ τραύματος ἐκ προνοίας. A fairly literal paraphrase of this provision is presented by Pollux.[10] At first glance—possibly influenced by a preconception raised by the *Athenaion Politeia*—ἐκ προνοίας in this law seems to refer to both τραύματος and φόνου. But it is equally possible to interpret πρόνοια as applying only to the second word, meaning "wounding with intent to kill." With regard to *phonos*, then, πρόνοια would not necessarily be the relevant criterion for the competence of the court. Both offenses, *phonos* as well as *trauma*, could have one element in common: the direct use of one's own hands. *Phonos*, originally, means killing by violence and bloodshed;[11] charges of that kind of *phonos* may fall within the competence of the Areopagos, regardless of the perpetrator's intent. If the victim survives physical assault, he as plaintiff must additionally claim the perpetrator's intent to kill in order to try the case on the Areopagos. Even in classical times the plaintiff proves πρόνοια to the court by the evidence of external circumstances: had the perpetrator, for example, brought along a knife or did he merely use a clay pot, incidentally grasped, to hurt his victim (Lys. 4.6).

So the meaning of the law cited in Dem. 23.22 remains ambiguous. Anyway, it is certain that the *Athenaion Politeia* by paraphrasing verbally (ἄν μὲν ἐκ προνοίας ἀποκτείνῃ ἢ τρώσῃ) interprets the text in a sense according to which premeditation was the decisive criterion for the competence of the Areopagos. Correspondingly, Aristotle also lists—fairly confusingly—the term ἀκουσίων on top of the competences of the Palladion. Modern scholars unanimously agree on the view conveyed by Aristotle: cases of premeditated homicide were to be tried on the Areopagos, those of unpremeditated killing at the Palladion.[12]

## II.

Plato's *Nomoi* (written about 350 B.C.) will lead us on a different track. This work in fact does not describe the positive law of Athens, but one may suppose that the philosopher has not left the frame of certain fundamental principles and ideas of the law of his native city. Therefore, a closer look at the structure of his chapter on homicide offenses could be instructive. There, a basic classification for the proposed legal

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10 Pollux 8.117: Ἄρειος πάγος· ἐδίκαζε δὲ φόνου καὶ τραύματος ἐκ προνοίας . . . , see Wallace 97.

11 MacDowell (1963) 45, Wallace 106.

12 Lipsius 123, Cantarella 111, Rhodes 641, Nörr (1983) 642, Wallace 98, Heitsch (1989) 71, Gagarin (1990) 82. Not quite logically, MacDowell (1963) 45, 66, 68f finds πρόνοια and βουλεύειν as the criteria. Though Sealey sticks to the conventional view on 277, on 290 he comes quite close to my hypothesis with his phrase "killing an Athenian citizen intentionally with one's own hands."

regulations distinguishes between "killing by one's own hand" and "killing not by one's own hand": ἐὰν δὲ αὐτόχειρ μέν, ἄκων δὲ ἀποκτείνῃ . . . (865b; cf. also 866d, 867c)[13] or ὃς ἐκ προνοίας . . . αὐτόχειρ κτείνῃ, . . . (871a) and ἐὰν δὲ αὐτόχειρ μὲν μή, βουλεύσῃ δὲ θάνατόν τις ἄλλος ἑτέρῳ καὶ τῇ βούλησει τε καὶ ἐπιβουλεύσει ἀποκτείνας αἴτιος ὤν, καὶ μὴ κάθαρος τὴν ψυχὴν τοῦ φόνου ἐν πόλει ἐνοικῇ (871e-872a).[14] Although appearing antiquated, this scheme which is so easy to apply in court sets up the framework within which the philosopher develops his highly sophisticated theory of guilt (which I will not deal with here). Consequently, for Plato the degree of penalty in both cases is dependent upon the degree of guilt and not upon external circumstances of the deed. Any logically compelling reason for classifying homicide offenses according to exterior facts cannot be perceived. Plato only permits the premeditating perpetrator who has not used his own hands to kill (as opposed to the one who did) to be buried in his home land (872a); but this cannot have been the reason for extending the opposition αὐτόχειρ / βουλεύειν over the entire chapter (cf. also 872b-c).

Using this distinction Plato apparently follows a differentiation well-known from Athenian legal practice. The philosopher, on the one hand, refines the system of sanctions in comparison with Athenian law. On the other hand, he widely simplifies the sophisticated rules on the competence of the homicide courts. One can make a good argument that this differentiation, completely insignificant to him in substance, has been derived from Athenian regulations on jurisdiction. The *Nomoi* therefore should encourage us to reconsider the confusing provisions on competence the *Athenaion Politeia* provides for killing an Athenian citizen: possibly not lack of premeditation (ἄκων), but solely indirect action (βουλεύειν) was the criterion crucial for assigning a case to the Palladion. In consequence, the Areopagos should be regarded as competent for cases of "killing by one's own hand" (αὐτόχειρ or similar terms).

## III.

Consequently, we have to examine the evidence for the opposition χείρ / βουλεύειν in Athens' legal practice: Ant. 6.16 and *IG* I$^3$ 104.12; Arist. *Ath. Pol.* 39.5 and Andok. 1.94. All four texts will turn out to be connected with the competence of the homicide courts.

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13 For quite plausible reasons the opposite, killing not by one's own hands, is missing in Plato's passages on killing unintentionally or in the heat of passion; theoretically, such a situation may look somewhat far-fetched. Antiphon (6.19), however, gives evidence of a strange case of a βουλεύειν without πρόνοια. Indeed, real life seems to offer much more than philosophers or jurists commonly are able to conceive. For βουλεύειν in Ant. 6, see Maschke 92ff, MacDowell (1963) 63f, Nörr (1983) 646; insufficiently Gagarin (1981) 42, on which see Heitsch (1984) 17, Thür (1985) 510; cf also Maffi 113f who takes βούλευσις as "préméditation."

14 In using the terms χείρ, βουλεύειν and αἴτιος, this passage obviously follows the law of Drakon (as restored, see below, n.19). The schematic opposition reveals that the principal classification is based on direct and indirect killing. Yet literally taken, as Ant. 6 shows, the term βουλεύειν (to plan, to devise) does not cover each and every case of killing "without using one's own hands" (see Heitsch [1984] 20, Nörr [1986] 76f); but this is due to Drakon, not to Plato. With his paraphrase βούλησις (purpose) and ἐπιβούλευσις (plotting) the philosopher particularly emphasizes the interior facts of the deed.

1) In his speech *On the Choreutes* (412 B.C.) Antiphon quotes a passage from the wording of the *diômosiai*, the oaths to be sworn by both parties at the preliminary proceedings (6.16): διωμόσαντο δὲ οὗτοι μὲν ἀποκτεῖναί με Διόδοτον βουλεύσαντα τὸν θάνατον, ἐγὼ δὲ μὴ ἀποκτεῖναι, μήτε χειρὶ ἀράμενος μήτε βουλεύσας. The plaintiff and his witnesses charged the speaker with killing by βουλεύειν, but admitted that the accused had not acted ἐκ προνοίας (19). Following Aristotle (*Ath. Pol.* 57.3), the competence of the Palladion—the speech doubtless was held there—would have been determined by either of these two reasons. Remarkably enough, only the exterior aspect of committing the crime is affirmed by oath, but not the issue of guilt. Because of the absence of premeditation, the accused is not facing the death penalty, but only banishment (6.4, 7; cf. Dem. 23.72). What sense could the plaintiff's *diômosia* have made under those circumstances? It is reasonable to assume that the plaintiff's pre-procedural oath determined the competence of the court.[15] Accordingly, βουλεύειν and not lack of premeditation (ἄκων) may have been crucial for the jurisdiction of the Palladion.

Like the accuser, the accused in his *diômosia* did not remark upon the issue of guilt. He denies killing "mit der Hand, die er darum geregt"[16] as well as indirect homicide. The alternative cannot refer to any difference in punishment;[17] in Athenian law, there is no indication of any different penalties to be imposed for killing by one's own hand and for killing not by one's own hand. Whether homicide was to be punished with death or exile was solely dependent on whether the crime had been committed with or without πρόνοια (Dem. 21.43). The alternative "with one's own hand or not" seems to refer to the competence, just like the plaintiff's *diômosia* does. With the jurisdiction of the Palladion already determined by the term βουλεύειν, the fact of killing "by one's own hand" seems to be the appropriate criterion for the competence of the Areopagos.

But for what reason does the speaker in his oath deny both types of committing homicide, despite being accused of only one? As the defendant he is urgently interested in getting rid of the homicide charge once and for all. If acquitted, the comprehensive words of his oath protected him against any further judicial challenge, no matter if it should take place at the Palladion or on the Areopagos. Besides, he is following the law of Drakon, as will be shown below.

Realizing the central role the *diômosia* played in initiating homicide trials, the brief remarks in Antiphon's sixth speech offer good reason to conclude as follows about the competency of the courts for charges of killing an Athenian citizen: for cases of βουλεύειν the Palladion, for cases of killing by one's own hand the Areopagos; πρόνοια

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15 Thür (1990) 151f.

16 This is how Wilamowitz (1900) has translated the strange term ἀράμενος. Harmonizing this term with Andok. 1.94 (χειρὶ ἐργασάμενος, Dobree) is inappropriate for the antiquated wording of the oath; see however Heitsch (1980) 52 n.38, with doubts Gagarin (1990) 95.

17 MacDowell (1963) 66, Gagarin (1990) 95.

was pertinent only to sentencing.

2) Also referring to the formulation of *diômosiai* is, in my opinion, a passage from Drakon's law on homicide, of which I have suggested the following restoration[18] (*IG* I³ 104.11-13): [. . . Δ]ικάζεν δὲ τὸς βασιλέας αἴτιο[ν] φόν[ο] ἐ[ναι ἒ χειρὶ ἀράμενον] ἒ [β]ολεύσαντα.[19] The term δικάζειν here must not be interpreted as a court decision or "pronouncing judgment." It means the act of authoritatively formulating the oaths that lead to a final verdict.[20] In accordance with the charge the plaintiff had put forward, the *basileis* imposed on him to swear that the accused was guilty[21] of homicide either by killing with his own hands or by participating. The plaintiff, of course, had to decide on one of the alternative charges; in his oath, the accused was to deny the accuser's allegations.[22] As already at the time of Drakon direct and indirect killing had led to different oaths, so too the existence of different oath-places might be suggested accordingly. Thus already the seventh century might have known different court-places, long before the council of the Areopagos became engaged in trying homicide cases, and even before the introduction of an "element of guilt" into the homicide law.[23] The issue of πρόνοια, already at the time of Drakon, had been mentioned only in connection with sanctions.[24]

But those were the early days. It is certain that the law of Drakon, of the inscription—unfortunately preserved only in poor condition—provides no answer to questions on the competence of certain courts. Looking for those reports would be in vain anyway. However, combining the text with Ant. 6 allows us to infer that χείρ and βουλεύειν as criteria for the competence may, in accordance with the traditional character of Athenian homicide law, be traced back to the earliest times.

3) It will also help us get a better understanding of the two remaining texts if we interpret them as jurisdictional clauses. Excluded from the amnesty of 403/2 B.C. were homicide offenders (and those officials who were most incriminated), see Arist. *Ath. Pol.* 39.5: Τὰς δὲ δίκας τοῦ φόνου εἶναι κατὰ τὰ πάτρια, εἴ τίς τινα αὐτόχειρ ἀπέκτεινεν ἢ

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18 Thür (1990) 152.

19 Former restoration attempts are listed by Lewis (*IG* I³); see also Thür, *ZSS* 102 (1985) 776.

20 Thür (1989) 56f and (1990) 152.

21 As shown by Ant. 6.17, also the term αἴτιος supposedly was included in the wording of the *diômosia*.

22 Verdict was rendered simply by a vote of the court on the two parties' opposite procedural allegations (cf. Ant. 6.3, 16); see Thür (1987) 478.

23 In my opinion, (1990) 149, 156, the factor of guilt, combined with the death penalty, became relevant only from Solon on. As for the early history of the Areopagos see Wallace 8-22. He seems to be right in pointing out that in Drakon's time not the entire "council meeting on the Areios Pagos" (founded by Solon), but only 51 *ephetai* judged homicide trials on the "solid rock" (as he [213f] explains the etymology of Areios Pagos). Misinterpreting the evidence (see the following note), however, Wallace links up the jurisdictional competence of this archaic court with πρόνοια.

24 At least this is clearly expressed in the first sentence of the law of Drakon (*IG* I³ 104.11): καὶ ἐὰμ μὲ 'κ [π]ρονοί[α]ς [κ]τ[ένει τίς τινα φεύγ]ε[ν· . . . ]. Further problems cannot be dealt with here; see Wallace 16ff, Thür (1990) 145f. Also the term ἄκων (l.17) refers to sanctions (the exile), not to competences; see Thür (1990) 146 n.15.

ἔτρωσεν.[25] Why is premeditation not referred to in this case? The fact that the law covers a group of homicide offenders who had used their own hands suggests the existence of such a category already in homicide law. Obviously, the perpetrator who had used "his own hands" appeared to be more significant than the one who had acted ἐκ προνοίας: those were the cases belonging to the Areopagos.[26] As the combination of killing and wounding plainly shows, the clause refers to this court; the word ἔτρωσεν will certainly correspond to the term τραῦμα ἐκ προνοίας we have already met in Dem. 23.22. Remarkably, the text of the official document reported by Aristotle omits the phrase ἐκ προνοίας, while the term "by one's own hand," characterizing both offenses, precedes. The words εἴ τίς τινα αὐτόχειρ . . . therefore are to be regarded as an authentic interpretation of the law on jurisdiction reported by Demosthenes (23.22): offenses carried out with one's own hands fall within the competence of the Areopagos. Reference to "ancestral tradition" suggests the same results, as from the time of Drakon killing by one's own hand had been linked with certain particular oath- and court-places. So Aristotle, in placing the term ἐκ προνοίας instead of αὐτόχειρ in front of the two verbs "killing" and "wounding" (*Ath. Pol.* 57.3), presents an incorrect report on Athenian law.

Completely different words are used in an amnesty decree proposed by Patrokleides in 405/4 B.C. (Andok. 1.78) to show an idea quite similar to the reconciliation act reported in *Ath. Pol.* 39.5. Whoever has been punished with exile for committing homicide by the Areopagos, the Ephetai, the Prytaneion or the Delphinion, shall be excluded from permission to return to Athens.[27] In this list the Palladion (disregarding the insignificant Phreatto) is missing—properly, as we will see. Indicated by the term σφαγεῦσιν, offenders who had killed by their own hands shall be excluded from amnesty. These offenders are to be tried on the Areopagos, or, if pleading lawful killing, at the Delphinion (the Prytaneion may be ignored here). So the Palladion would be competent only for cases of indirect killing. Any idea that jurisdiction of the different courts had been dependent on the issue of premeditation can certainly be ruled out here.

Possibly both provisions on amnesty express a certain feeling of religious aversion against the social reintegration of a citizen with "unclean" hands (cf. Ant. 5.11). One who had not raised his own hand against the victim, who is "unclean" only "in his soul" (Plat. *Nom.* 872a; see above sec. II), apparently could be accepted more easily. Plato even allows him to be buried in home soil. It is well known how deeply Athenian homicide law is rooted in the religious sphere. So the above distinction should offer

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25 For the problems with the text, see Rhodes 468, Chambers 318.

26 Clearly recognized by Loening 40; yet his argument in n.61 is still based on "premeditated murder."

27 Andok. 1.78: . . . πλὴν ὅποσα ἐν στήλαις γέγραπται τῶν μὴ ἐνθάδε μεινάντων, ἢ ⟨οἷς, ἢ⟩ ἐξ Ἀρείου πάγου ἢ τῶν ἐφετῶν ἢ ἐκ πρυτανείου ἢ Δελφινίου δικασθεῖσιν ὑπὸ τῶν βασιλέων, ἢ ἐπὶ φόνῳ τίς ἐστι φυγή, ἢ θάνατος κατεγνώσθη ἢ σφαγεῦσιν ἢ τυράννοις . . . Text according to MacDowell (1962), who in his commentary (118) points out the parallels with Solon's amnesty decree (Plut. *Sol.* 19.4).

sufficient reasons for accusing offenders who had acted directly and those otherwise involved before different courts of justice.

4) Consequently, the amnesty did apply to indirect offenders—whose cases, to my mind, belonged to the Palladion. This is proved by the last of the passages to be reviewed, the case of Meletos in Andokides' speech *On the Mysteries* (1.94), held in the autumn of 400 B.C. By order of the Thirty (Tyrants), Meletos had a certain Leon executed by a procedure of *apagôgê*, but, as we are told, at the time he could not be prosecuted for homicide, in spite of a law ordaining the same treatment for planning and committing homicide by one's own hand: τὸν βουλεύσαντα ἐν τῷ αὐτῷ ἐνέχεσθαι καὶ τὸν τῇ χειρὶ ἐργασάμενον. Obviously, Andokides does not dare to claim that this clause is directly applicable to Meletos; explicitly, he only says that Meletos at the time could not be prosecuted any more by way of a δίκη φόνου, due to the amnesty for offenses committed before the year 403/2 B.C. Therefore, to determine the scope of application of that law, one has to rely on assumptions. Nowhere in homicide law does killing with or without one's own hands result in different sanctions. Penalties being imposed in homicide trials depend on the perpetrator's guilt. The recently proposed view that the law quoted had ordained the same punishment for indirect killing and for killing by one's own hands,[28] is without any foundation. It would be much more reasonable to regard this provision, too, as a jurisdiction clause:[29] The indirect offender is to be tried before the same court as the one who has committed homicide with his own hands—on the Areopagos, in my opinion.

This provision, however, by no means could be applied generally. It would have virtually deprived the Palladion of its judicial competence at all. Most probably, it was confined to a certain category of cases. Without such a restriction the law quoted by Andokides would contradict the amnesty regulations of *Ath. Pol.* 39.5. If offenders who acted indirectly in general had faced the same legal consequences as those who committed homicide with their own hands, I see no reason why they should not have been excluded from the amnesty. Yet Meletos, according to Andokides' evidence, doubtless did benefit from the amnesty regulations. This observation, regardless of any discussion of the judicial competence of the criminal courts, also leads to the result that the law quoted by Andokides might not have been generally applicable to each and every case of indirect offense.[30] Carrying out a killing not by one's own hands, but by βουλεύειν, above all pertains to a special group of persons, the magistrates of the polis.[31]

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28 So explicitly MacDowell (1963) 66, Wallace 101.

29 Already Lipsius 125 has related the law to "the same forum"; similarily Gagarin (1980) 93-98: "according to a rule as old as Draco, the legal procedure, including the court and the penalty, was the same for the planner as for the actual killer." What Gagarin fails to realize is that Andokides is quoting the law in close connection with the amnesty; we shall come back to this matter immediately.

30 MacDowell (1962) 133, though pondering how to combine the law cited by Andokides with the amnesty, is not aware of the basic contradiction: Why should Andokides in this context quote a law that was not even in the least applicable?

31 Loening 72 is right in pointing out that after 403/2 the main perpetrators hardly could be

A jurisdiction clause ordaining the same treatment for them and for those who committed homicide by their own hands would make good sense. Restricted to those cases the law, consequently, provided that magistrates who had ordered the killing of a citizen were to be accused before the Areopagos, even though they had not raised their own hands against the victim. Cases of indirect killing under official authority were to be tried at the most qualified and best reputed court of justice.[32] This special jurisdiction clause inferred from the amnesty regulations and from Andok. 1.94 probably could have been the reason why, after 403/2 B.C., several cases were tried on the Areopagos that otherwise should have been sent to the Palladion because of the factor βουλεύειν of the deed.[33] Also Harpokration's inconclusiveness on which court was competent to deal with cases of βουλεύειν,[34] may easily be explained by a transfer of jurisdiction established especially for magistrates.

In any case, Meletos as a private person was not directly affected by this provision. For the killing of Leon, those magistrates, even after 403/2 B.C., were liable who had ordered his arrest and execution; only they—but not Meletos—could be held responsible as βουλεύσαντες regardless of the amnesty. In 1.94 Andokides points out that it was solely the amnesty that protected Meletos from homicide charges, yet Meletos' act is called reprehensible[35] and might, under certain circumstances, be prosecuted (as every Athenian citizen was able to gather from the *nomos* even incompletely quoted). In the passage cited, Andokides chiefly deals with the scope of the amnesty regulations, that is with the admissibility of certain law suits. He focuses on the

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prosecuted for "killing with one's own hands," because "few of the oligarchs are likely to have committed homicide directly."

32 The clause of Aristot. *Ath. Pol.* 39.5 provided that all offenders with "blood-stained hands" were to be excluded from the amnesty; so the relatives of the killed could later on prosecute the perpetrators by a private δίκη φόνου. The following provision (*Ath. Pol.* 39.6) especially excluded from the amnesty the most incriminated oligarchic magistrates (the Thirty, the Ten, the Eleven, and the archons of Piraeus). As they had committed their political killings not with their own hands, the law cited in Andok. 1.94 was necessary to enable the relatives of the executed to prosecute the βουλεύσαντες by a δίκη φόνου despite the amnesty. The political importance of these cases justified a deviation from the conventional distribution of competence and assigned the decision to the Areopagos.

33 The texts have been thoroughly discussed by Lipsius 125-127 and MacDowell (1963) 65-69. Three cases remain problematic. The first two deal with trials against oligarchic magistrates. The speaker of Lysias 10 (held in 384/3 B.C.), whose father had been put to death by the Thirty (10.10), says he had "proceeded against the Thirty on the Areopagos" (31). In Lys. 26 (delivered 382 B.C.), Euandros, who had been selected for appointment as *basileus*, is attacked, because he had held office under the Thirty and deserved to be charged before the Areopagos himself (26.12). The third case also regards a magistrate, however one of later times. According to Harpokration, s.v. βουλεύσεως, a (lost) speech of Deinarchos against Pistias was held on the Areopagos because of βούλευσις. From Dein. 1.53 Pistias is known as an Areopagite, viz. as a former magistrate (see Kirchner *PA* 11823). Loening 69-84, though recognizing the problem connected with αὐτόχειρ, only gives the explanation that "presiding magistrates and dikasteries were willing to contemplate a less rigid interpretation of direct homicide" (84). This is not quite convincing.

34 Harpokration, s.v. βουλεύσεως, contrasts two lost speeches: the one of Isaios against Eukleides, said to be held before the Palladion, and one of Deinarchos against Pistias, before the Areopagos (on the latter see above n.33). If the competence of the court was not contested, the speakers had no reason to refer to this matter in their pleadings.

35 Andokides fails to notice that Meletos would have risked his own life if he had not obeyed the order of the Thirty. Together with Meletos and another three citizens Sokrates had been delegated to arrest Leon. Only Sokrates dared to withstand the Thirty (Plato. *Apol.* 32c-d; see Loening 81f).

matter of judicial competence, not on the possibly different sanctions for direct and indirect killing.

Following this outcome, the assumption that a jurisdictional reform, as postulated by Lipsius, took place in the fourth century is rendered dispensable. Lipsius suggests that almost up to the time when the *Athenaion Politeia* was composed all cases of intentional homicide were tried on the Areopagos, including all those of *bouleusis* of intentional homicide; then cases of βουλεύειν, as *Ath. Pol.* 57.3 showed, were assigned exclusively to the Palladion.[36] MacDowell, however, regards all those cases tried on the Areopagos as cases of killing by one's own hand.[37] For that reason, he states, those perpetrators had been excluded from amnesty, with the judicial competence of the Areopagos being based on the offender's πρόνοια; there was no evidence for a jurisdictional reform. This latter argument is doubtless true. Yet the homicide offenses should, in accordance with Lipsius, rather be interpreted as acts of βουλεύειν. Since the accused were magistrates, they fell within the scope of the law quoted in Andok. 1.94. The killings they had inflicted were to be treated as if "committed by their own hands." For this reason—and not for the πρόνοια also implied—the Areopagos was the competent court.

## IV.

If my interpretation of the five passages just reviewed is correct, a combination of the various aspects will produce a relatively simple and unsophisticated scheme: the Areopagos was the court for cases of killing a citizen with one's own hand, the Palladion for cases of indirect killing. The only exceptions to this rule were the cases of magistrates who had a citizen put to death under official authority, i.e. who had acted indirectly: they fell, like cases of killing by one's own hand, within the jurisdiction of the Areopagos. For cases of killing a non-citizen, whether committed with one's own hand or not, the Palladion alone was competent. This simple principle that judicial competence is allocated in accordance with the external facts of committing the deed apparently is determined by a religious aversion against "unclean," blood-stained hands. This religious attitude required, as far as blood of a member of the sacred community was concerned, specific oath-places, and this led to specific court-sites accordingly.

In legal practice this criterion was an extremely simple and convenient one to apply. The plaintiff's charge indicated in which way the killing was perpetrated and determined decisively whether the case was to be remitted to the Areopagos or to the Palladion. The external facts of committing the crime—by one's own hand or in an

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36 Lipsius 126f.

37 MacDowell (1963) 66-68. Lys. 10.4, 31 provides no indication for killing with one's own hands; the "unclean hands" of Lys. 26.8, for which Euandros as magistrate under the Thirty would deserve to be tried by the Areopagos (26.12), could also be meant in a figurative sense (cf. Ant. 5.11, where all homicide offenders are designated in this way). Improperly, MacDowell puts the case of Pistias aside (see above n.33).

indirect way—made up an essential part of the plaintiff's *diômosia.*[38] The *basileus* formulated the oath according to the allegations submitted by the plaintiff; in doing so he assigned the decision to one of the two courts. The defendant had no need to protest against his case being allocated to one of the two courts. If charged with killing by his own hand, the defendant could only make a plea of lawful killing (in this case the Delphinion was competent), but he could not claim that he had acted indirectly. With punishment in both cases depending on πρόνοια, judgment by the Palladion and by the Areopagos resulted, as we shall see, in identical consequences anyway. In this situation, the accused could only deny having committed the deed at all. He had to swear his *diômosia* contrary to the plaintiff's and stand trial. Whether the decision was passed by the Areopagos or by the Palladion was of little significance to him.

If, however, the competence had been dependent on whether the plaintiff submitted charges of premeditated killing or not, an essential point in dispute which only the court could decide would have been raised in the preliminary stage. In this case, one would have to grant the *basileus* the competence of deciding upon guilt already in preliminary proceedings.[39] Yet we have no evidence of the *basileus*' authority reaching this far; in fact, his tasks were to fix the date of the trial and to formulate the *diômosiai* in accordance with the parties' allegations. There is no room for substantive decision. The second alternative, that the *basileus* determined the court according to the plaintiff's allegation, with the jury, if appropriate, having to disclaim its competence during the trial, would be by no means practicable.[40] The application of the law in court-practice provides a strong argument against the view that judicial competence of homicide courts should have been dependent on the issue of guilt. Assigning a case to a certain court was rather determined by the uncomplicated criterion of whether the deed had been committed "with one's own hand," "with one's own hand but lawfully," or "not with one's own hand."

In homicide trials the act of killing seems to have been consistently classified into two different categories: the first aspect separated killing by one's own hand from indirect acting; this issue, as shown above, determined the competent court, either the

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38 See Ant. 6.16 (above III.1). Even prosecution for killing a non-citizen, which was to be tried solely by the Palladion, did not fail to mention a perpetration by one's own hand (Dem. 59.10), probably for religious reasons. Only brief details are reported in Lys. 10.11 on the contents of the *diômosia.*

39 Indeed, this conclusion is drawn by Heitsch (1989) 86f, but on the basis of what I think is a wrong assumption: jurisdiction of homicide courts was, in his view, dependent on the issue of guilt.

40 A case related by Aristotle (*Eth. Megal.* 1188b) is usually referred to in this context: The accused woman was charged with δοῦναι of poison ἐκ προνοίας. She denied any intention to kill and declared she only wanted to administer a love-philtre. She was acquitted on the Areopagos. This court, in my opinion, was competent solely because of δοῦναι (Dem. 23.22). To reach a verdict of guilty—with exile as sanction—it would have been necessary for the plaintiff to classify his deed as μὴ ἐκ προνοίας, just like the plaintiff in Ant. 6.19 did. As the court could only vote by "yes" or "no," a homicide trial being a δίκη ἀτίμητος (see below n.42), the Areopagitai automatically had to acquit the accused woman, if they denied her πρόνοια. In doing so, the Areopagos by no means denied its competence—it rather rendered a decision on the merits. On this passage see Maschke 100f, MacDowell (1963) 46f, Nörr (1983) 659 n.53, Sealey 282, Heitsch (1989) 71f.

Areopagos or the Palladion. Secondly, the plaintiff had to state whether the accused had killed with or without πρόνοια; this issue was pertinent to sentencing, either death or temporary exile. This latter is to be inferred from Dem. 21.43;[41] Demosthenes reports no difference in regard of sentencing, whether the Areopagos or the Palladion is competent to render judgment.

As far as we have knowledge of the mechanisms leading to judgment in Athenian legal procedures, the plaintiff had to summarize his *petitio* in one single phrase. By voting, the jury was only able to affirm or deny this phrase, leading directly to either condemnation or acquittal.[42] In homicide law both the plaintiff's charge and the defendant's denial were expressed in the *diômosiai*. As shown by Ant. 6 (3, 16), the court decided simply by voting on the two contradictory oaths. Also from Ant. 6 (16, 19) it may be inferred with virtual certainty that the issue of πρόνοια was not included in the wording of the *diômosia*, unless the plaintiff reproached the accused with this particular item. If he did, however, charge the accused with πρόνοια, the claimant and his witnesses, most probably, had to take an oath on it—after all, the death penalty would be dependent on this special issue.[43]

## V.

Reviewing all sources, it should be possible to find two proper examples of extremely situated cases in order to verify the double classification of homicide offenses, first according to χειρί or βουλεύσας, and subsequently (if required) according to πρόνοια. A case of unpremeditated killing committed with one's own hands being tried on the Areopagos, on the one hand, and a case of indirect yet premeditated killing of a citizen being tried at the Palladion, on the other, would provide corroborative support for the thesis just presented. Both cases would contradict the allocation of jurisdiction as reported by Aristotle in his *Athenaion Politeia* (57.3). Moreover, the second case would require the Palladion to have been competent to impose the death penalty.

1) The first case, the Areopagos trying an unpremeditated killing committed with one's own hands, may be inferred only indirectly from Dem. 54.25, 28.[44] The speaker,

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41 Dem. 21.43: . . . ἔπειθ' οἱ φόνικοι (νόμοι) τοὺς μὲν ἐκ προνοίας ἀποκτιννύντας θανάτῳ καὶ ἀειφυγίᾳ καὶ δημεύσει τῶν ὑπαρχόντων ζημιοῦσι, τοὺς δ' ἀκουσίως αἰδέσεως καὶ φιλανθρωπίας πολλῆς ἠξίωσαν. Similar ideas are expressed in Dem. 23.49-50 (see below n.55). If in addition only the Areopagos had been competent in cases of killing ἐκ προνοίας this certainly would have been mentioned as a further argument.

42 Thür (1987) 475f.

43 Although not expressed in Aristotle's report, I would suggest that the plaintiff's *diômosia* in the case of the "love-philtre killing" (see above n.40) did include the term ἐκ προνοίας; perhaps the plaintiff swore the woman was "guilty of homicide by giving poison with the intent to kill." Completely uncertain is how the accused woman may have formulated her *diômosia*: Did she deny the allegation in general, or only the intention to kill? Her fate may have been dependent on this formulation. Did she face the possibility of another trial before the Areopagos, or did the acquittal prevent any further charges? Or did the acquittal mean banishment for her?

44 Dem. 54.25: καὶ μὴν εἰ παθεῖν τί μοι συνέβη, φόνου καὶ τῶν δεινοτάτων ἂν ἦν ὑπόδικος. 54.28: εἰ γὰρ ἀπέθανον, παρ' ἐκείνοις (the Areopagitai) ἂν ἦν ἡ δίκη.

Ariston, had been beaten by Konon. Ariston, however, does not charge Konon with "wounding with the intent to kill," but sues him only for "violent assault," by means of a δίκη αἰκείας (54.1). Had he died from the injuries, Konon says, the case would have been tried on the Areopagos (28). These words exclude πρόνοια as a criterion for the judicial competence of the Areopagos. To my mind, it seems inadmissible in any way to infer from this passage "that homicide was intentional whenever death resulted from an act which was intended to cause harm."[45] Interpreted this way, the passage certainly cannot be brought into accord with what we are told in *Ath. Pol.* 57.3. A solution to this problem rather would be to acknowledge that the competence of the Areopagos is already based on the fact of killing with one's own hands. Premeditation was not relevant to this question. Unfortunately, the speaker fails to mention the penalties Konon would have faced in case of being found guilty.[46]

2) The second example to prove my hypothesis should be a case of indirect but premeditated killing. This leads to the discussion before which court the first speech of Antiphon (*Against the Stepmother*) might have been delivered. The accused woman is charged with poisoning her husband with the help of an—unaware—third person. The charge is one of βουλεύειν (1.26), committed ἐκ προνοίας (6, 22, 25); the punishment is death (27). The court, however, is not addressed βουλή as the council on the Areopagos would be entitled,[47] but merely ὦ ἄνδρες (3, 19, 30). Formerly, scholars concluded from the factors of premeditation and the death penalty that the speech had been held before the Areopagos.[48] Recent studies, however, favour the Palladion as the appropriate court.[49] They are quite right in emphasizing βουλεύειν as the criterion crucial for the judicial competence. Yet they comment neither on the question of πρόνοια nor on the sanction, the death penalty.[50] In view of the further evidence, a clear indication on the double classification emerges: βουλεύειν was pertinent to the competence of the Palladion, premeditation (as elsewhere; cf. Dem. 21.43) solely to sentencing, the death penalty. Therefore, contrary to the impression gained from Dem. 23.71-73, the death

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45 MacDowell (1963) 60.

46 In all probability, Konon would have risked banishment—the fate the "father of the priestess from Brauron" had suffered. This case reported in 54.25 cannot be classified without assuming several facts omitted in the text. Without raising his own hand, the man had instigated someone else to beat a victim who afterwards died. Death was the penalty for premeditated killing. Sealey 280—without evidence—assumes the plaintiff to have enforced the trial before an incompetent court. According to Gagarin (1990) 97 and others, the defendant voluntarily went into exile; yet the term ἐξέβαλεν is inconsistent with this view. Wallace 102 believes that it was indeed the Areopagos that imposed exile instead of death; in homicide proceedings, however, there is no *timêsis*. Entirely wrong is MacDowell (1963) 68 when interpreting the charge as a δίκη τραύματος ἐκ προνοίας. Is it really certain that we are dealing with a homicide trial? The relatives, for example, could have directed the δίκη φόνου against the actual offender; the priestess' father, however, could have been tried on the Areopagos for religious sacrilege. But for this assumption, too, substantial evidence is missing. Anyway, this case should be excluded from our further discussion.

47 See Wallace 101 and 104.

48 Lipsius 126, L. Gernet, Antiphon (1965) 33f, Heitsch (1984) 24 n.55, Gagarin (1990) 94.

49 MacDowell (1963) 62-64 and 66, Wallace 101 and 103f.

50 MacDowell (1963) 45f omits Ant. 1 from evidence for the allegedly crucial for the Areopagos.

penalty could well be imposed by the Palladion.

## VI.

At this point a general objection may be expected: a double classification of the homicide act would be an unnecessary juristic complication of what had seemed to be a clear and simple matter so far. What should have led Athenians to create such a sophisticated system for their homicide trials? Two arguments provide some reasons to reject such an objection. First of all, a "double classification" resolves all those problems caused by taking πρόνοια as criterion for the competence of the courts. Athenian homicide proceedings became unnecessarily sophisticated only if the council of the Areopagos appointed by the *basileus* had to decide by a single vote both the issue of fact and the question of πρόνοια, the latter being the crucial factor for determining its own competence. Apart from that, the double classification fits excellently the picture given by the outlines of historical development—with all due caution in respect to certain details:[51]

Presumably, Drakon did not ordain different consequences for premeditated and unpremeditated killing; exile was the only one. Yet different oath- and court-places for cases of killing by one's own hand and not by one's own hand may have existed on the Areios Pagos[52] and at the Palladion, the sanctuary of Pallas Athene. At first, the panels for both sites supposedly were made up by 51 Ephetai. By a later reform jurisdiction over cases of killing by one's own hand was shifted to the entire council meeting on the Areios Pagos and (probably simultaneously) the death penalty as a sanction to be executed by official authorities was introduced into Athenian homicide law: he who has killed ἐκ προνοίας is to be executed if convicted by the court; exile, however, remained the punishment for unpremeditated killing.

Considering the allocation of competence to the various homicide courts rooted in a religious attitude towards "unclean hands" as a former stage, and recognizing the death penalty dependent on πρόνοια as a result of later judicial reform, would provide a historical explanation for the double classification proved by the classical sources: an archaic, sacred system of jurisdiction found unalterable and indispensable was updated by adding a more "modern" system of sanctions onto the "old-fashioned" framework.

## VII.

The subject of this study, however, is not the history of Athenian homicide law in a diachronic view, but the legal order as it emerges from the sources of the time of the orators. Our reasoning so far raises the question of what value a single source may have for studying Athenian law. How far may we trust general statements? Any general

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51 On the following see Thür (1990) 155f.

52 See above n.23.

statement contradicting certain known relevant details and causing results inconsistent with the set of procedural institutions must be regarded with suspicion. In such cases we should try to correct a principle inconsistent with legal practice by combining numerous details of information. This is the approach I have tried to pursue. The conclusion drawn from Dem. 23.65-73 and Arist. *Ath. Pol.* 57.3 stating the competence of the Areopagos as dependent on πρόνοια, surely cannot be maintained. The criterion is rather based on the way the deed was committed, i.e. on the fact of killing χειρί.

Looking back to the results gathered so far calls for another serious investigation into the value of general statements. Their alleged general scope is either to be restricted by their specific context, or—as *ultima ratio*—we must admit that even a seemingly well-informed author may, to some extent, report incorrectly on Athenian law.

1) The information Demosthenes supplies in his speech *Against Aristokrates* (23) may be misleading, albeit certainly not wrong. Properly viewed, the report of sections 65-73 may, without further difficulties, be found to be consistent with the results presented above. The speech was delivered by a certain Euthykles in a γραφὴ παρανόμων.[53] Euthykles is accusing Aristokrates for a public decree that the latter had proposed in favour of the mercenary commander Charidemos (91): whoever kills Charidemos shall be ἀγώγιμος (subject to *apagôgê*). In 19-87 the speaker tries to show that the decree contravened any provisions of the existing homicide law (which makes the text important evidence for our subject yet by no means being free from tendentiousness); above all, neither the different sanctions normally provided for homicide nor certain guarantees for a fair trial were ensured.[54] Remarkably, the speaker in 49-50 does mention ἐκ προνοίας but not in context with the competence of the Areopagos, only in connection with certain further regulations that link premeditation with a more severe punishment.[55]

Demosthenes, describing the five Athenian homicide courts (65-79), focused on procedural guaranties. Since the preconditions required for this purpose (*diômosia*, pleadings, voting) do not differ between the Areopagos and the Palladion (70), Demosthenes especially emphasizes the different sanctions he alleges the two courts would impose. In a somewhat delicate formulation he assigns the death penalty to the Areopagos (69) and banishment to the Palladion (72). In doing so he alludes to the opposition ἐκ προνοίας / ἄκων mentioned already in 50, now adding some further explanations. As we have seen, however, either of the two courts was capable of imposing both sanctions.[56] Demosthenes, therefore, must have assigned the sanctions arbitrarily in order to present a most vivid picture of both the procedural warranties and the different sanctions.

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53 Wolff 50ff; Nörr (1986) 65f.

54 Koch 554f makes clear that Demosthenes' arguments are not always compelling.

55 Cf. Dem. 21.43 (above n.41).

56 See above V.2.

As the only legal criterion for separating the two courts φόνος ἀκούσιος (71, 72) is mentioned. The criterion βουλεύειν, which is definitely pertinent to the competence of the Palladion, is completely concealed. Understandably, he also fails to indicate "commission by one's own hand" as relevant to the Areopagos—the entire passage (65-70) does not mention φόνος ἐκ προνοίας even once, certainly not without intent. For reasons of rhetorical composing Demosthenes ranked the matter of sanctions higher than the issue of competence. Any thought of a double classification required by homicide proceedings would only have complicated unnecessarily his line of reasoning. In order to praise the prevailing provisions there was no need to list every detail of jurisdiction on homicide scrupulously. Demosthenes has chosen deliberately, but without explicitly forging. The passage on homicide courts is a piece of "Weltliteratur," yet not of the juristic one.

2) The sober book on the "Athenian State" is, from its beginning, confined to an account of the competence of the Archons and the courts. What Demosthenes suggests for rhetorical purpose now appears as a report on Athenian jurisdictional organization. Apparently, Aristotle had used Demosthenes' speech—as far as basic ideas are concerned—as a guideline for the truly sophisticated Athenian homicide law which was sometimes even confusing for the Athenians themselves; a special board of *exêgêtai* was necessary to supply information on certain cases of doubt (Dem. 47.68). It is understandable that the philosopher was more attracted by the issue of will than by any questions of archaic criteria for committing a crime "with one's own hands." In legal practice, however, the system of court procedures could never have worked in the way that Aristotle (*Ath. Pol.* 57.3) has distributed jurisdiction to the Areopagos and the Palladion respectively. Perhaps unintentionally, Aristotle himself, in *Ath. Pol.* 35.5, presents the key to a workable system of allocating competence when he quotes the amnesty regulations. Not ἂν μὲν ἐκ προνοίας ἀποκτείνῃ ἢ τρώσῃ (*Ath. Pol.* 57.3), but εἰ τίς τινα αὐτοχειρίᾳ ἔκτεινεν ἢ ἔτρωσεν (*Ath. Pol.* 33.5) is what properly determines the competence of the Areopagos. Supported by numerous further indications the official document from 403 B.C. may be regarded as an authentic interpretation of a law possibly derived from the time of Solon:[57] δικάζειν . . . φόνου καὶ τραύματος ἐκ προνοίας (Dem. 23.22).

## VIII.

Finally, the following conclusions on the positive law of Athens at the time of the orators are to be drawn. Regarding the killing of an Athenian citizen, the Areopagos is competent for cases of homicide committed by one's own hand, the Palladion for those of indirect killing. In both cases the criterion of premeditation is pertinent only to the sanctions inflicted by a verdict of guilty.

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57 Thür (1990) 153.

## ADDITIONAL NOTE[58]

It is not surprising to find an outstanding expert in Athenian homicide law keeping to a view taken over from preceding scholars without further questions. Methodologically, two approaches to this subject situated between juristic and historic scholarship are competing. The one—in a positivistic way—sticks strictly to philological terms: ancient evidence is confined to its direct literal wording, with its range kept as narrow as possible and its deeper meaning not disputed. As far as real-historic problems are concerned, this method seems to work; once, however, juristic issues are involved, it comes to its limits very soon. The other method is trying to understand ancient testimonia within their entire juristic circumstances: actually, the same texts are studied, but they are brought into context with further material that may appear not even related at first glance. Sometimes, supporters of this way of approach seem to come into conflict with certain firm statements of classical authors.

The crucial question of our present matter is to explain the meaning of the opposition αὐτόχειρ / βουλεύειν. Taking this distinction as a "recognized aspect" of Athenian homicide law, as my respondent Wallace suggests, is not satisfying at all. Not a single author has reported any concrete consequences this division had on Athens' legal practice. Strangely enough, no scholar has found it necessary so far to admit that the positive evidence is by no means sufficient for gathering the proper sense of this explicit division.

For that reason, either of the objections against my four passages on "killing by one's own hand" may have, by itself, a certain measure of probability. But such objections fade in an overall view. The composition of Plato's *Nomoi* provides a splendid opportunity for vivid dispute: as for killing, we find several degrees of guilt and two different ways of commitment; which one is a fundamental division, which one a subdivision? Wallace corrects me by proposing not to start off with 865b, but 865a. If we, however, begin with 864b, we will find five εἴδη of homicide offenders, each of which fall into two γένη: τὸ μὲν διὰ βιαίων . . . τὸ δὲ . . . λαθραίως (864c). This could easily be tantamount to αὐτόχειρ and βουλεύειν. Inferred from this phrase, the external way of committing homicide seems to be the fundamental criterion.

In juristic discussions, usually the most compelling arguments may be drawn from borderline cases. They allow to test how far a principle sustains. Wallace has enriched my modest but nevertheless significant collection by two more examples: Dem. 21.71-75 and Aristoph. Fr. 585. Actually, neither of the two counts in his favour.

1) According to the account of Demosthenes (21.71) Euaion had killed his drinking-mate Boiotos in "self-defense." He was convicted, however by a majority of

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58 In reply to Wallace's **Response**, which follows.

only one vote. Before which court? Gagarin suggests[59] before the Areopagos due to "intentional homicide." The jurors being called δικασταί leads Wallace to assuming the Palladion; πρόνοια certainly is not involved in this case. Two reasons, however, make it more probable to presume it was the Areopagos. The jurors here are not addressed directly, but only described in pursuit of their duty. Therefore, we may not expect βουλή or, more precisely, οἱ βουλεῦται, but, as in Ant. 5.11, rather the term δικασταί. Even more important, however, is another observation. Euaion gained this narrow vote without crying or begging (21.75). In fact, this does not indicate a noble self-restraint on Euaion's side; particularly on the Areopagos such digressions of a defendant were generally prohibited (Lys. 3.46; cf. also Lyk. 1.12f., Arist. *Rhet.* 1.1.5, 1354a), contrary to the Palladion (cf. MacDowell [1963] 93).

2) However tempting the fragment from Aristophanes (fr. 585) quoted by MacDowell ([1963] 59) may appear, no proper conclusion can be inferred from it anyway. It is derived from Eustathios' *Commentary on the Odyssey* (ed. Weigel). Eustathios remarks on the *lemma* ὄρνις (a320), referring to (Pallas) Athene (1419.55): Ἀριστοφάνης. ἄκων κτενῶ σε τέκνον. ὅ δ' ὑπεκρίνατο. ἐπὶ παλλαδίῳ, παρ' ᾧ πάτερ δώσεις δίκην (*app.*: ὑπεκρίνετο. τἄρ', ὦ πάτερ). As shown by the insertion ὑποκρίνειν the words have been torn out of their immediate context. We cannot reconstruct from this Byzantine source what the point of the joke was. Announcing an "unintended killing" may have caused further nonsense. It cannot be ruled out that only the authority of the *Athenaion Politeia* has led to direct linking of the two verses.

After all, a sound and solid case contradicting my hypothesis has not been found yet: *nil obstat.*

59 Gagarin (1978), 112, 120.