

ATHENIAN HOMICIDE RHETORIC IN CONTEXT

BY

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DECLARATION

I, Christine C. Plastow, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Signed: -----

ABSTRACT

Homicide is a potent crime in any society, and classical Athens was no exception. The Athenians implemented legal methods for dealing with homicide that were set apart from the rest of their legal system, including separate courts, long-established laws, and rigorous procedures. We have, however, limited extant sources on these issues, including only five speeches from trials for homicide. This has fomented debate regarding aspects of law and procedure, and rhetoric as it relates specifically to homicide has not been examined in detail.

Here, I intend to examine how the nature of homicide and its prosecution at Athens may have affected rhetoric when discussing homicide in forensic oratory. First, I will establish what I will call the ideology of homicide at Athens: the set of beliefs and perceptions that are most commonly attached to homicide and its prosecution. Then, I will examine homicide rhetoric from three angles: religious pollution, which was believed to adhere to those who committed homicide; relevance, as speakers in the homicide courts were subject to particular restrictions in this regard; and motive and intent, related issues that appear frequently in rhetoric and, in some cases, define the nature of a homicide charge.

I will suggest that there is a gap between the ideology and the reality of homicide prosecution at Athens, and that the way that Athenians spoke about homicide and its prosecution in rhetoric did not always hold up in practice. I will also argue that the physical courtroom context of the trial and the beliefs and perceptions of those present greatly influenced the rhetoric of homicide. This is particularly noticeable when comparing rhetoric from the homicide courts and from the dikastic courts. As a whole, I hope to approach law and rhetoric as symbiotic forces in the case of homicide, and to show how the rhetoric of homicide can reflect more broadly on classical Athenian society.

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NOTE

Abbreviations follow those in LSJ, apart from the pseudo-Aristotelian *Constitution of the Athenians*, which is abbreviated to *Ath.Pol.* All Greek textual references and quotations are from the Loeb editions, apart from those from Demosthenes, Lysias, Aristotle, Theophrastus, Homer, and *Ath.Pol.*, which are from the Oxford Classical Texts editions. Translations are my own, unless otherwise stated; some translations have been amended for clarity and consistency of language. I have used Anglicised forms of names, but preserved transliterated forms (and other variations) in quotations.

Other abbreviations:

IG: Inscriptiones Graecae

LSJ: Liddell-Scott-Jones Greek-English Lexicon

OED: Oxford English Dictionary

PGM: Papyri Graecae Magicae

I. Cret.: Inscriptiones Creticae

INTRODUCTION

Throughout time, and across a wide variety of cultures, killing unlawfully has been a potent act that disturbs the tenets of civilised society. To take a life disrupts society, contradicting the ideal of civilised people living together peacefully, and does so in a way that is irrefutable, irreversible and unlike any other type of crime.¹ Ancient Greece, and more specifically for our purposes classical Athens, was much like other societies in its distinctive treatment of homicide, both culturally and legally. Although other offences, such as treason, could match or even surpass it in impact, homicide seems to have had a certain hold on the Athenian imagination. Tragedy was littered with unlawful killings portrayed as the loci of social disruption and shame.² Killers were shunned or cast out, and only occasionally allowed back into society after extensive atonement, scrutiny, and purification. Although we cannot

¹ The concept works in several ways. Apart from the idea that civilised people should live together without killing each other, a more basic explanation is possible. Many cultures have an aversion to dead bodies, and view them as possessing properties of power or pollution that they did not have when alive (see e.g. Johnston (1999) for Greek examples.) People who commit homicide create dead bodies, thereby bringing their strange and often dangerous power into society. Where in many societies the killer is contained and excluded from society by law and imprisonment, in other places the exclusion is enacted in a more ritual manner. For example, Watson-Franke (1982) notes the seclusion of killers in Guajira society, amongst other people who have committed acts or undergone events that embody 'the crossing of dangerous boundaries', such as rape, abortion, and adultery. (452) She describes the treatment of the killer, which is heavily ritualised and clearly speaks to an understanding of the danger he creates both socially and spiritually: 'Before the murderer is led away to the spot where he will be secluded, he must swallow a pill made of a *contra* [sacred object]. He will then be taken by a woman of his *eiruku* (matrilineage) to a cave (or hut) where he must remain anywhere from several days up to a month. This is done "so that he will not get accustomed to killing"...He is put in a small hammock that is slung high up close to the roof so that the spirit of the killed person cannot reach him... His food is brought to him by a young girl who has not yet reached puberty. An adult woman would not be able to handle this situation since she most likely has had contacts with the *yoluha*, the spirits of the dead. The girl, on the other hand, does not yet know *yoluha*, and can transmit strength to the murderer. A boy cannot visit the murderer either, because if he did the boy would lose his bravery. While in seclusion, the killer should not have contact with adults in general, and must also be kept away from babies: baby girls might get ill from such contact, and baby boys would die if they were exposed to the presence of a murderer. Thus, the social contacts of a murderer have to be restricted since he is a danger to others (babies, boys), and others might weaken him (adults).' (454)

² The paradigm for this is, of course, Oedipus' killing of his father Laius, the root cause of Theban disruption in Sophocles' *Oedipus Tyrannos*. For more on the disruptive nature of this killing in particular, see below, 92.

know how often homicide occurred in Athens,³ and therefore whether Athenians experienced it as an occasional horror or a part of everyday life, we can be sure from our sources that it held the same conceptual power there as it has elsewhere throughout other cultures and times. This power resulted in the development of a legal treatment of the crime at Athens that was set apart in many ways from the rest of its legal system.

The cultural significance of homicide calls for an enquiry into its rhetoric. Rhetoric has particular value in this instance as a source for Athenian social history. By social history, I mean the study of the ideals, beliefs, experiences, and actions of Athenians on an everyday basis. We should aim to view texts as products of a particular social and temporal context, and also of a human culture, which may account for inconsistencies or unexpected aspects in our sources.⁴ Similarly, we should be wary of an approach that aims to impose an external systematic order onto an inherently human, and therefore unpredictable, society. Surprising and inconsistent results should be embraced as representative of a changeable and very human culture.

The evidence that we do have should be utilised in as many ways as possible, particularly evidence that provides testimony of the thoughts and feelings of Athenian citizens. Forensic speeches are a particularly potent form of testimony, as they naturally make extensive use of persuasive techniques that tap into the deeply-held beliefs and ideologies of the jury members, as well as dealing with a range of private and public legal concerns. They also engage more immediately with everyday people than some other kinds of texts, as anyone could be the victim or the prosecutor of a crime. In these ways, they reflect several crucial aspects of social history. These speeches have regularly been used as sources for legal and political history and procedure, as well as rhetorical and linguistic theory, but they have less frequently been examined for the attitudes, real or perceived, that they reflect. Indeed, there has been a tendency to take the Athenians at their word when using these speeches as sources for social and cultural beliefs. This is despite a clear multiplicity of contrasting beliefs that can be seen in a number of sources. It is in this

³ On the inability to know the frequency with which homicide occurred in classical Athens, see Cairns (2015) 647. On the frequency of violence more generally at Athens, see Herman (1994), who suggests that Athens was unusually peaceful.

⁴ For this approach, espoused by New Historicism, see Veaser (1989) ix-xvi, Hunt (1989) 1-24.

space between projected belief and actual behaviour that we may search for a more nuanced and complex picture of Athenian cultural attitudes. For the purposes of such a cultural enquiry, homicide is an ideal locus; its nature as a social crisis point imbues it with stronger cultural connotations than other types of crimes. Thus, a study of the practical rhetoric of homicide in Athenian forensic texts provides a focused viewpoint on a socially significant part of Athenian cultural history.

Evidence regarding the history and workings of the Athenian homicide laws is patchy: some areas are well-evidenced, while others remain unclear. There are a number of existing debates that should be broached before attempting to draw any new conclusions. This introduction will address several issues of legal history in the study of Athenian homicide that should be clarified as far as possible to make my study of social history through rhetorical practice comprehensible and accessible. This will cover the legislation of Draco, the Athenian homicide courts, and the procedures for homicide that were available to prosecutors in the classical period. I will also examine the nature of my primary sources, namely the forensic speeches, before delineating the scope and approach of this project.

1.1 DRACO'S LAWS AND ATHENIAN HOMICIDE LEGISLATION

The laws for homicide at Athens were believed to have been written by the lawgiver Draco. Prior to Draco, methods of dealing with homicide in Athens were varied, likely unsystematised, and seemingly based mainly around retaliatory killings, exchange of blood money, and voluntary exile.⁵ This system, as Gagarin rightly points out, was unstable:

‘It was almost certainly possible before Draco’s time for killers to be reconciled with their victim’s relatives through the payment of compensation, but the process probably involved considerable uncertainty and many killers may have chosen to go into exile rather than risk dealing with the unpredictable relatives.’⁶

Apart from the attribution of the first written homicide laws in Athens to Draco, little else is known about the lawgiver.⁷ The traditional date for the writing of the laws is

⁵ E.g. organisation of monetary compensation as depicted on Achilles’ shield in *Hom.II.18-497-508*; the retaliatory killing of Aegisthus by Orestes in Euripides’ *Electra*, Sophocles’ *Electra*, Aeschylus’ *Choephoroi*, and *Hom.Od.1.29-43*; the exile of young Patroclus at *Hom.II.23.85-90*. For a detailed discussion of pre-Draconian methods of dealing with homicide, see Gagarin (1981a) 5-18.

⁶ Gagarin (1986) 79.

⁷ For the mythologising of Draco, see Chapter 2.1.1.

621/0, which is widely accepted as accurate.⁸ On the reason for their writing there has been no such consensus. Stroud, amongst others, proposed that the laws were written in direct response to the attempted coup of Cylon in 632, possibly in order to protect the Alcmeonidae, who had led the killing of Cylon's supporters, from the blood vengeance of their families, or to protect the ruling magistrates from prosecution and exile.⁹ No ancient sources directly connect the two events, however, and Gagarin found the link less plausible.¹⁰ I would argue that although the coup may have highlighted the need for formal written law in Athens, it seems more plausible that the growth of Athens in size and status demanded more detailed laws, which had to be written down in order to preserve the detail.¹¹ The pre-Draconian systems for dealing with homicide would not be able to continue to function as Athenian society became more developed and complex. Draco's homicide laws appear to have been relatively extensive and comprehensive, and included retroactivity clauses,¹² and thus probably aimed to right past wrongs or halt ongoing vendettas as well as attempting to cover future eventualities. The laws were partially reflective of traditional means for dealing with homicide, with an emphasis on exile as a punishment, but included added detail and specificity regarding procedure to ensure the stability of the system.¹³ Draco's laws on homicide were said not to have been altered since their first writing, and to have survived the legislative reforms of Solon to become the oldest laws in effect in classical Athens.¹⁴

It is not clear whether the homicide laws of Draco were written as part of a greater collection of laws, and, if so, how coherent and systematic this was. It is probable that there were other laws written by Draco, perhaps including a tyranny

⁸ *Ath. Pol.* 4.1, 41.2; see Stroud (1968) 66-70, Gagarin (2008) 93.

⁹ Stroud (1968) 73-4; Humphreys (1991) 21-2; Carawan (1998) 43; Forsdyke (2005) 84-90.

¹⁰ Gagarin (1981a) 19-21, (2008) 93-109. *Ath. Pol.* merely notes that Draco wrote his laws after the coup, and does not draw a causal link between the two events.

¹¹ Gagarin (2008) 100-1.

¹² *IG I³* 104.19-20.

¹³ Gagarin (1981a) details methods of dealing with homicide as far back as Homer. He also notes (2008): 'All these rules [in Draco's law] reflect traditional practices we can observe in Homer, where a victim's relatives take the lead in pursuing a killer and will kill him if they find him in their territory, but they no longer pursue the killer after he goes into exile. If [the law] granted protection to an accused killer before his trial, then this too reflected traditional practice when the two sides sought a trial; in the scene on Achilles' shield, at any rate, the accused killer is evidently in no danger before his case is heard by the elders.' (98)

¹⁴ For further discussion of the ideology of fixity and antiquity of the laws, see Chapter 2.1.2.

law and a law against idleness.¹⁵ Stroud suggests that a law ‘code’ of Draco can be expected.¹⁶ Hölkeskamp, however, rejects the idea of a law ‘code’ of Draco, stating that Draco’s homicide law and other archaic laws were ‘clearly single enactments, independent, complete... individually framed to meet particular needs... and were never intended to be subordinate parts of general “codifications”.’¹⁷ He attributes this position mainly to the specificity of such laws, and defines a law ‘code’ as ‘a uniform and internally consistent body of statutes, substantive norms and procedural rules.’¹⁸ Hölkeskamp’s definition of a law code, however, is tendentious; generally, a law code need only be ‘a systematic collection or digest of the laws of a country, or of those relating to a particular subject.’¹⁹ ‘Systematic’ is perhaps the key term here, suggesting that a law code is organised and will attempt to cover a variety of legal eventualities. This does not necessarily suggest that it need be ‘uniform and internally consistent,’ however; by Hölkeskamp’s standards, Athens may never have had a real law ‘code.’ In addition, we should not suppose that individually enacted pieces of legislation would not be consistent in their logic and approach. Indeed, Osborne convincingly responds to Hölkeskamp with the assertion that Draco’s law was in fact part of a greater collection of laws that were codified to some extent, citing both the ambiguous opening line²⁰ and the complexity of relationships between parties in the law as grounds for other laws necessarily surrounding it.²¹ We may conclude with some confidence that there were indeed other laws of Draco, and that the collection was internally consistent to an extent, though the corpus was probably not comprehensive regarding a full range of crimes.²² This allows for the existence of laws for which there seems to be some evidence, such as Draco’s tyranny law, but accepts the sparse and often contradictory evidence for other Draconian legislation.

The only extant copy of (part of) the text of Draco’s law is an inscription dated to 409/8, when a decree called for the reinscription of the law on a *stèle* at the

¹⁵ Ostwald (1955) argues extensively for the attribution of the early Athenian law against tyrants to Draco; Gagarin (1981b), however, believes the law is earlier than this. On the idleness law see Lys.fr.40b (below, 42.)

¹⁶ Stroud (1968) 74-83.

¹⁷ Hölkeskamp (1992) 91.

¹⁸ Hölkeskamp (1992) 91.

¹⁹ ‘Code’, Def. 1b. *OED*.

²⁰ See Appendix to Chapter 1.

²¹ Osborne (1997) 41.

²² See Thomas (1996) 26.

Stoa Basilea. No reason for the reinscription is included in the text, but it is probable that it was a democratic response to the oligarchic revolution. The law's reinscription was likely a part of the general revision and reinscription of the laws, which may have aimed to eradicate any oligarchic additions and reassert the power of the democracy.²³ In this case, the perceived old and unchanged nature of Draco's law would fit in with an ideology of re-establishing the way Athens was before the oligarchy.²⁴ Moreover, several scholars have asked what resemblance the reinscribed text of 409/8 bears to Draco's original 621/0 law. Before Stroud, scholars had been largely unable to accept that the reinscription had not also been an act of revision, in spite of the wording of the decree in the inscription.²⁵ Stroud himself believed that it was a straightforward and unaltered republication of the existing law, citing convincing factors such as the inclusion of the two *axon* headings read in his version of the text, and the retroactivity clause, which would have been obsolete by 409/8.²⁶ Gagarin concurs that it is plausible for the law to have been fully reinscribed and not revised in 409/8, though notes that the classical Athenians would probably not have known whether amendments had been made in the archaic period, and therefore if their copy of the law was identical to that originally written by Draco.²⁷ It seems likely that the full law was reinscribed, although we cannot know if the whole law would have been enforced in the same manner as originally intended, or if parts had been superseded by separate legislation.

The inscribed stone is damaged, and large parts of the text of the law are missing completely. The first part of the inscription is the best preserved portion. The inscription begins with details of the decree for the law to be reinscribed, as well as the current archon and various other officials. Then, the 'first *axon*' heading can

²³ On the nature of this revision and/or reinscription, which is debated, see e.g. Clinton (1982), Robertson (1990), Rhodes (1991).

²⁴ For the likelihood that Draco's law was indeed unchanged since its inception, see below, 51 n.39.

²⁵ Stroud (1968) 61.

²⁶ Stroud (1968) 61-4. The presence of the *axon* headings does not rule out the possibility of changes to the law in the archaic period, but this would not alter the perspective from the fifth century. It is also possible that the law makes reference to the 'frontier markets', which are characterised as archaic by D.23.39 in the mid-fourth century. This may be 50 years after the reinscription, but it seems plausible that the phrase had already fallen out of usage in 409/8. Stroud has, however, used Demosthenes for the reconstruction of the text here, and the inscription is badly damaged at this point, so we cannot be certain that the phrase is indeed present. The phrase is also impossible to date accurately, and could feasibly have been a later addition made prior to the 409/8 reinscription.

²⁷ Gagarin (1981a) 21-3.

be read, denoting the position of this portion of text in the original inscription. After this, the following provisions for homicide can be identified:

- 1) A person who kills without premeditation will be punished by exile.²⁸
- 2) A statement probably explaining that those who plot to kill will be punished in the same way as those who kill by their own hand.
- 3) The judgement will be made by the *ephetai*.
- 4) Pardon may be granted in the first instance by father, brothers, or sons of the victim.
- 5) If none of these exist, pardon may be granted by male relative up to cousin's son and cousin.
- 6) All pardoners must agree; a dissenting vote results in no pardon.
- 7) If none of these family members exist and the killing was involuntary, the killer may be pardoned, possibly by members of his phratry elected by the *ephetai*.
- 8) The laws shall be retroactive.

The remainder of the text is badly damaged. Stroud, using text from Demosthenes, attempted to restore further portions of the law, and suggested at least three more sections:

- 9) Proclamation in the agora and prosecution are to be made by the relatives of the victim up to cousin's son and cousin.
- 10) A man who killed an exiled killer who had kept to the conditions of his exile would be tried as if he had killed an Athenian citizen (i.e. in the same way as any other homicide.)
- 11) If a man was caught and killed in the act of forcibly stealing property, his killing would not be punished.

However, these provisions cannot be guaranteed as part of the text here, as the inscription is too badly damaged to be certain.²⁹ Further down the *stèle*, a 'second

²⁸ For a discussion of the opening line of the law, see Appendix to Chapter 1.

²⁹ In Canevaro and Harris' paper 'The Document at [Dem.] 43.57-58 and the Text of Draco's Law about Homicide (*IG* i3 104)' at the 'Aspects of Family Law in the Ancient World – a Cross-Cultural Perspective' conference at University College London in April 2015, Harris persuasively cast doubt on these reconstructions due to the likely inauthenticity of the documents in the Demosthenes speech, as well as the severe damage to the inscription.

axon' heading can be read, suggesting there was much more of the law than is preserved.

Further to these complications within the text of Draco's law, there are other gaps in our knowledge about Athenian homicide legislation. The Athenians claimed with some regularity that the homicide laws had been unchanged since Draco wrote them.³⁰ The reinscription may indeed represent an exact copy of the text that was extant in the classical period, but as noted above, we have no way of knowing if this text was in fact altered in the archaic period; it is likely that the classical Athenians did not know either, which allowed them to maintain their belief in the immutability of the law. Whether the law was unchanged since it was first written or not, we have evidence for procedures that are unmentioned in the preserved portion of the law. The inscription does not provide explicit details of the procedure for dealing with intentional and premeditated homicide, which was certainly a recognised category of homicide at Athens. Furthermore, evidence of categories of lawful homicide are limited to the violent thief in the surviving part of the inscription, whereas it is apparent from Lysias 1 that at least the killing of an adulterer fell under this category, and that there were almost certainly further categories dealing with accidental killing, such as of allies in war, or athletic competition. In speech 23, Demosthenes discusses many Athenian laws pertaining to homicide that must be genuine, and yet the majority of these do not appear in the extant text of Draco.³¹ Naturally, it is to be expected from the poor state of the inscription that it will not contain all of the homicide laws of Athens, or even all of those for which we have evidence, and we must assume that a number of provisions in the attested homicide legislation were a part of Draco's laws and simply have not survived the damage to the *stèle*. We should not, however, completely discount the possibility that there were homicide laws in place in Athens that were not laid down by Draco. This has implications for Stroud's theory that the remainder of the Athenian homicide laws were contained in the destroyed portion of the inscription of Draco's law,³² as any laws developed to deal with later scenarios could not have been written by Draco. This possibility need not necessarily invalidate the Athenian belief that the laws of

³⁰ On the ideological nature of this belief in immutability, see Chapter 2.1.2.

³¹ The laws themselves and the authorial statements discussing them appear to be genuine; some of the documents in the manuscript are more spurious. See Canevaro (2007) 37-76.

³² Stroud (1968) 37-40.

Draco were unchanged since their inception. Separate enactments may have been put in place to account for new and changing situations, which may have introduced new homicide laws and even overridden the tenets of Draco's legislation, without requiring actual alteration of the text of the original laws.³³

1.2 THE COURTS AND THEIR JURISDICTION

Although the extant text of Draco's law does not provide any detail on the range of courts and procedures available for dealing with homicide in the classical period, we do find information in other sources.³⁴ There were five homicide courts at Athens: the Areopagus, the Palladion, the Prytaneion, the Delphinion, and the court at Phreatto. Each court dealt with different categories of homicide. The Areopagus handled cases of intentional and premeditated homicide of citizens, as well as *trauma* ('wounding') cases and apparently certain impiety cases; the Palladion heard unintentional cases, those involving metics and slaves, and probably cases of *bouleusis* ('plotting') of homicide;³⁵ the Prytaneion dealt with killings where the perpetrator was an animal or an inanimate object; the Delphinion was dedicated to trying lawful killings; and the court at Phreatto was designed to allow the trial of a person already in exile for a previous killing, by confining the accused to a boat off-shore for the duration of the trial.³⁶ The attested information for each court varies: in the cases of the Prytaneion and the court at Phreatto, we know little more than the kinds of cases tried there. We have one speech from a trial at the Delphinion, and two that were probably tried at the Palladion. No homicide speeches from the Areopagus survive, though we do have two speeches from trials for *trauma* and a case involving the destruction of a sacred olive or olive stump from that court.

The procedures of the Areopagus are discussed in some detail in the sources, and we know more about it than any other homicide court.³⁷ The Areopagus Council formed the jury at the court, and was comprised of ex-archons, so, although they were by no means a specialist jury, they did have more experience of public life than

³³ The obvious comparison is to the constitutional amendments of various countries: for example, the 21st Amendment to the Constitution of the United States, which repeals the 18th Amendment without physically removing it from the constitution.

³⁴ Most notably Demosthenes 23, which is examined in detail in Chapter 2.2.

³⁵ See below, 21-2.

³⁶ On the obscurity of the court's procedures and the potential for its use in other instances, see Carawan (1990).

³⁷ E.g. D.23.65-70; Paus.1.28.5-7.

the average dikastic jury. Trials were held in the open air. The prosecutor and the defendant both had to swear, on a specific and solemn sacrifice involving the cut pieces of three animals, that they were in the right, and the oaths called down great punishments on perjurers. Witnesses in the trials not only had to swear to the truth of their statements, but also that the defendant was guilty or innocent, depending on for which side they were testifying. Both speakers gave two speeches in turn, and the defendant had the option to flee into exile after his first speech if he foresaw an unfavourable outcome. Speakers were held to a relevance rule that forbade them from speaking *exo tou pragmatos* ('outside of the matters at hand').³⁸ Punishments, usually of execution or exile, seem to have been laid down by law rather than assessable as in many dikastic trials.

The procedures in the other courts are less clear. It is usually assumed that the Areopagus procedures were standardised across the rest of the homicide courts, or at least the Palladion and the Delphinion, but we cannot know this for sure. We can be reasonably certain that all of the courts tried cases in the open air, but other aspects remain unknown. For example, a number of sources state that the juries at the other homicide courts were made up of the fifty-one *ephetai*, a body that certainly goes back to (and presumably beyond) Draco,³⁹ though nothing else is known for certain about this group. We do not know how they were selected, or whether all fifty-one were required for each jury. The issue has been addressed by several scholars. Sealey posits that the *ephetai* came into being as a jury for homicide courts before the Areopagus council were given any jurisdiction in homicide cases.⁴⁰ Carawan rejects this idea, suggesting that the *ephetai* were in fact selected by lot from among the Areopagus council. It was suggested by early 20th century scholars that the *ephetai* had become obsolete by the fourth century and were replaced by a dikastic jury.⁴¹ This seems unlikely, and Carawan presents clear evidence that they were in fact still judging homicide cases well into the fourth century.⁴² It seems plausible that the *ephetai* were selected from among the Areopagites, but as we lack any solid evidence to confirm this, I will here assume

³⁸ See Chapter 4.

³⁹ *IG I*³ 104.13.

⁴⁰ Sealey (1983) 290.

⁴¹ E.g. Smith (1924).

⁴² Carawan (1991) 16.

nothing more than that the *ephetai* had some experience of public life or of judging homicide cases. Beyond this, it is impossible to surmise any further details.

It is also unclear why *trauma* and certain impiety cases fell under the jurisdiction of the Areopagus alongside those for intentional and premeditated homicide of citizens. In the case of impiety, we have evidence that one specific kind of trial took place there: a charge of destroying or removing a sacred olive or olive stump. No certain reason can be determined for the presence of this case at the Areopagus, while other impiety cases, such as the charge of profaning the rites of the Mysteries documented in Andocides 1 and Lysias 6, were tried in the dikastic courts. Carey's suggestion, that 'both trees and stumps were protected by ancient laws, whose enforcement remained in the hands of the Areopagus even after the democratic reforms of the fifth century stripped it of its political power', seems likely, though no reason is given for the court retaining this particular authority.⁴³ The presence of *trauma* cases at the Areopagus may be slightly more easily explained, as this type of severe wounding, which probably had to involve a weapon, was likely to be considered as attempted homicide.⁴⁴ The polluting presence of blood in such violent instances of wounding would also have brought *trauma* within the same sphere of religious concern as *phonos*.⁴⁵ It is apparent that *trauma* cases were conducted in much the same way as those for *phonos*, though it is not known whether these procedural similarities extended to cases involving sacred olives. There is some evidence that the relevance rule may have applied across all cases in the Areopagus.⁴⁶

1.3 HOMICIDE PROCEDURES AND THEIR RESTRICTIONS

It is traditionally believed that the only procedure under which homicide cases were tried in the homicide courts was the *dike phonou*, which covered both intentional and unintentional homicide. There has, however, been some discussion as to whether an alternative *graphe phonou* procedure existed. The existence of a *graphe phonou* would allow for a public action for homicide, tried in a similar way to the private action. Evjen doubts that a *graphe phonou* exists,⁴⁷ as does Gagarin, as

⁴³ Carey (1989) 115.

⁴⁴ Carey (1989) 109. For more on the issue of intent to kill in *trauma* cases, see Chapter 5.1.

⁴⁵ See Chapter 3.

⁴⁶ See Chapter 4.

⁴⁷ Evjen (1970) 414-5.

neither can find any explicit evidence for it.⁴⁸ Hansen disagrees, proposing that both a *dike* and a *graphe traumatos* are attested in the texts,⁴⁹ and *trauma* can be read as a subcategory of homicide, otherwise it would not have been included in homicide laws as seen in Demosthenes 23. Therefore, Hansen infers the existence of a *graphe phonou* from the existence of the *graphe traumatos*, and posits that such a procedure would be tried on the Areopagus along with *dike phonou* procedures.⁵⁰ Hansen is, however, arguing for a procedure that is not attested anywhere in the evidence. He also applies modern legal logic to ancient material, which cannot always yield reliable results due to differences in culture. We must, therefore, conclude that it is doubtful that the procedure existed.

The *dike phonou* was a private action, and generally private actions were open only to the victim of a crime. Of course, in the case of homicide, this was not possible, and so prosecution for homicide became the domain of the victim's family. There has been extensive debate regarding whether the family were the only ones who could legally prosecute a homicide, and whether it was a duty or simply a right. MacDowell argues that the family members of a victim of homicide were the only parties able to bring a *dike phonou*.⁵¹ Gagarin suggests that there would be no sanction for family members who chose not to prosecute, but there was certainly a social expectation that they would; conversely, other parties were not expected to prosecute, but could not be punished for doing so.⁵² MacDowell, however, posits that Demosthenes 22.2 shows that inaction by family members in a case of homicide could lead to prosecution.⁵³ Gagarin's position seems the stronger, as the prosecution for impiety in question is not mentioned as being a direct sanction for failing to prosecute the suspect, but rather a reaction to seeing the defendant associating publicly with his family member who was suspected of homicide.⁵⁴ Hansen, in a reply to Gagarin, disagrees with his position that parties outside of the family could

⁴⁸ Gagarin (1979) 322-3.

⁴⁹ Hansen (1983).

⁵⁰ Hansen (1981) 13-17.

⁵¹ MacDowell (2009) 169 n.55. This is a shift from his original position that prosecution was open to people outside of the family, for which see MacDowell (1963) 17-19.

⁵² Gagarin (1979) 313.

⁵³ MacDowell (1963) 9-10.

⁵⁴ D.22.2: ...καὶ κατασκευάσας ἀσεβείας γραφήν οὐκ ἐπ' ἐμέ, ἀλλ' ἐπὶ τὸν θεῖόν μου, γράψας ἀσεβεῖν ἐμοὶ συνιόντα εἰς ταῦτόν ὡς πεποιηκῶτι ταῦτα, εἰς ἀγῶνα κατέστησεν... 'And he constructed a charge of impiety not against me, but against my uncle, charging him with impiety for associating with me, as if I had done these things set out in the action...'

prosecute, citing among his evidence the fact that *dike* procedures of other kinds could only be brought by the aggrieved party, and that in the case of a homicide the aggrieved party would be the victim's family.⁵⁵ The position that other parties outside the family did have the opportunity to prosecute a homicide seems sensible practically; however, the evidence from Demosthenes 47 and Draco's law appears to point to a restriction to the family.⁵⁶ Indeed, there is no extant example of someone outside the family of the victim prosecuting for homicide. More recent scholarship confirms the notion that only family members could prosecute. Kidd draws on the evidence from Plato's *Euthyphro* to show the extension of the familial bond to slaves and servants in the case of homicide, but that no one outside of this bond could prosecute.⁵⁷ Tulin re-examines the evidence to draw the conclusion that Gagarin was only half-right: there was no legal sanction for family members who chose not to prosecute a homicide, but it was still not legal for parties outside of the family to do so.⁵⁸ These latter arguments examine the evidence closely and are relatively convincing, though there is still some ambiguity in the texts between legal responsibilities and moral ones.

Most recently, Phillips has developed this argument: he bases his understanding of Draco's law on a perceived need to move personal vengeance for killing from the streets to the lawcourts in order to attempt to eradicate retaliatory killings by family members.⁵⁹ His model establishes the family as the key unit in homicide procedure historically, and it is reasonable for this pattern to continue as society became more focused on legislative responses to crime. Although Phillips' argument leaves several other potential motivations for bringing a prosecution for homicide unaddressed, he convincingly argues that the restriction of the responsibility for homicide prosecution to the deceased's family was traditionally a

⁵⁵ Hansen (1981) 13.

⁵⁶ It is worth noting that the provision of Draco's law, listed here as number seven, allows for the pardon of an involuntary killer by officials unrelated to the victim in the event that no family members can be found. It seems that the victim's phratry would be involved in this procedure, as the phratry could be considered a kind of extended kin. This may offer support for the view that people outside of the family could be involved at other points in legal proceedings surrounding homicide. There is, however, a significant difference between instigating proceedings and allowing a pardon, and so this cannot be taken as certain evidence of a role for people outside the family in homicide proceedings.

⁵⁷ Kidd (1990) 220-1.

⁵⁸ Tulin (1996).

⁵⁹ Phillips (2008) 35-57.

matter of societal pressure rather than legal statute.⁶⁰ It shall be assumed here that prosecution for homicide was generally considered to be a private, family matter, and that this social expectation led to the legal restriction of prosecution of *dike phonou* cases to family members only.⁶¹

A subcategory of Athenian homicide charge that should be addressed is *bouleusis*, or ‘plotting’ a killing. This would apply in a case where a killing was the responsibility of someone other than the person who actually carried it out physically. The nature of the charge is not immediately clear from the sources. Gagarin follows a literal interpretation of a line in Draco’s law that appears to mention ‘the one who killed or the one who planned it’ as liable for homicide.⁶² He also notes Andocides 1.94, which states that a person who has planned a crime will ‘be liable in the same way’ as those who commit a crime with their own hand.⁶³ Gagarin believes that this statement in the law means that those who planned homicides were treated in exactly the same way as those who carried out homicides personally, and therefore were tried by the same *dike phonou* procedure and not a separate procedure. Based on this, he suggests that the location of the trial was dependant on the level of intent in the crime and the status of the victim, as in normal cases of *dike phonou*.⁶⁴ MacDowell proposes that *bouleusis* was a separate procedure tried exclusively at the Palladion. I follow MacDowell’s argument, based firstly on the evidence of *Ath. Pol.*:

εἰςὶ δὲ φόνου δίκαι καὶ τραύματος, ἂν μὲν ἐκ προνοίας ἀποκτείνῃ ἢ τρώσῃ, ἐν Ἀρείῳ πάγῳ, καὶ φαρμάκων, ἐὰν ἀποκτείνῃ δούς, καὶ πυρκαϊᾶς ταῦτα γάρ

⁶⁰ Phillips (2008) 237-8.

⁶¹ On issues of personal vengeance and state justice in Athenian homicide cases, see Cairns (2015).

⁶² IG I³ 104.12-13: δ]ικάζεν δὲ τὸς βασιλέας αἴτιο[ν] φόν[ο] E. 17. E [β]ολεύσαντα. Stephen Lambert and P. J. Rhodes suggest the full translation: ‘The kings shall pronounce responsible for homicide [the one who himself killed or the one?] who planned it.’

⁶³ The statement itself does not specifically mention homicide, but Andocides does apply it contextually to a case of alleged homicide: Μέλητος δ’ αὖ οὐτοσί ἀπήγαγεν ἐπὶ τῶν τριάκοντα Λέοντα, ὡς ὑμεῖς ἅπαντες ἴστε, καὶ ἀπέθανεν ἐκεῖνος ἄκριτος. καί<τοι> οὗτος ὁ νόμος καὶ πρότερον ἦν <καὶ> ὡς καλῶς ἔχων καὶ νῦν ἔστι, καὶ χρῆσθε αὐτῷ, τὸν βουλευσαντα ἐν τῷ αὐτῷ ἐνέχεσθαι καὶ τὸν τῇ χειρὶ ἐργασάμενον. Μέλητον τοίνυν τοῖς παισὶ τοῖς τοῦ Λέοντος οὐκ ἔστι φόνου διώκειν, ὅτι τοῖς νόμοις δεῖ χρῆσθαι ἀπ’ Εὐκλείδου ἄρχοντος, ἐπεὶ ὡς γε οὐκ ἀπήγαγεν, οὐδ’ αὐτὸς ἀντιλέγει. [And.1.94] ‘Again, Meletus here arrested Leon in the time of the Thirty, as you all know, and Leon was executed without trial. And the following law not only existed in the past but also exists and is applied even now, because it’s a good one: ‘One who has planned an act shall be liable to the same penalty as one who has committed it with his own hand.’ So the reason why Leon’s sons aren’t allowed to prosecute Meletus for murder is that the laws have to be applied from the Archonship of Eucleides; for not even the man himself denies that he made the arrest.’ (tr. MacDowell)

⁶⁴ Gagarin (1988) 93.

ἡ βουλή μόνα δικάζει. τῶν δ' ἀκουσίων καὶ βουλεύσεως, κὰν οἰκέτην ἀποκτείνει τις ἢ μέτοικον ἢ ξένον, οἱ ἐπὶ Παλλαδίῳ. [*Ath.Pol.*57.3]

‘Trials for killing or wounding, if one kills or wounds with intent, are at the Areopagus, and for poison, if one kills by giving it, and for arson; the council judges only these. But unintentional [killing] and plotting, and the killing of a slave or a metic or a foreigner, these [are tried] at the Palladion.’

This suggests that each type of crime requires a slightly different charge, and clearly demonstrates that *bouleusis* was separate from *autocheir* (‘own-hand’) killing. It seems to me that the evidence of *And.*1.94 can plausibly mean that those who plot homicide will be tried and punished for their crime, just as those who commit homicide with their own hands are, and that the two crimes carry the same punishment, without needing them to be tried under exactly the same procedure. Another piece of evidence is *Antiphon* 1, which seems to be a case for *bouleusis* of intentional homicide. The speaker refers to the jury as simply *andres*, and on one occasion *dikazontes*. If the trial were held in the Areopagus, however, we might expect to see them called members of the *boule*, as in *Lys.*3.1. and 7.1. If *bouleusis* of intentional homicide were simply a subcategory of intentional *phonos*, then we would expect the trial to take place at the Areopagus, but we have no strong evidence that it did.⁶⁵ It will be assumed here that *bouleusis* was a separate charge, and was always tried at the Palladion. It will also be assumed that *bouleusis* could be subcategorised into *bouleusis* of intentional and of unintentional homicide.⁶⁶

Besides the *dike phonou* and the homicide courts, it is apparent that there was also a method for trying homicide cases in the dikastic courts. This was the process of *apagoge* and *endeixis*, summary arrest and trial, which is demonstrated in at least one, and probably two, lawcourt speeches. It appears that there are at least two possible procedures that could be used in addressing a homicide: one used against

⁶⁵ The only explicit mentions of *bouleusis* taking place at the Areopagus are in *Harp.* Βουλεύσεως and *Souda* Βουλεύσεως. Both note that a lost speech of Deinarchus, *Against Pistias* according to *Harpokration*, asserts that *bouleusis* was tried at the Areopagus, though both sources also note the contrast to *Ath.Pol.* and a lost speech of *Isaeus*, both of which assign *bouleusis* to the Palladion. See *Macdowell* (1963) 63, who notes that this evidence ‘could hardly be weaker than it is without ceasing to exist altogether’ and does not accept it as a barrier to the belief that *bouleusis* was tried at the Palladion.

⁶⁶ *Harris* (2006) 391-404 argues that a charge of *dike phonou* would be used in cases where a plot resulted in death, as in *Antiphon* 1 and 6, and that *bouleusis* would be more likely to be used when a plot did not result in death. I would argue that this was certainly possible, but that the choice of charge would have depended on the strength of the prosecutor’s case. I maintain that both *Antiphon* 1 and 6 were tried under charges of *bouleusis* at the Palladion.

kakourgoi as seen in Antiphon 5,⁶⁷ and one that addressed killers caught in the forbidden places, which could be used against known killers who had not been tried or exiled killers who had returned before the end of their exile.⁶⁸ The second type has been called *apagoge phonou*, and MacDowell convincingly posits that the crime addressed in these cases is not homicide so much as behaving in a certain way after committing homicide, namely in a way that is likely to bring pollution to the city.⁶⁹ He concludes, therefore, that *apagoge phonou* could take place if someone could be represented as ‘manifestly’ a killer and was seen in one of the places forbidden by law to someone who had killed another.⁷⁰ It would also presumably apply to an individual indicted in a homicide case that had not yet come to trial. As such, it could be brought by any citizen, rather than being restricted to the family as with cases of *dike phonou*. A charge of *apagoge phonou* may have been used to bypass the Amnesty of 403 through trying the trespass and not the homicide.⁷¹ The penalty in each case was probably fixed at death.⁷² The *apagoge kakourgon* for homicide is only attested in one speech, Antiphon 5, and may have later become obsolete, particularly by Demosthenes’ speech 23 in 352, as it is not mentioned in his list of available homicide procedures.⁷³ This is a convincing conclusion, especially if we consider the simultaneous existence of two *apagoge* procedures for homicide to be unlikely alongside the variety of other procedures.⁷⁴

⁶⁷ On *apagoge kakourgon*, see Hansen (1976) 36-48.

⁶⁸ Gagarin (1979) 319; 321.

⁶⁹ MacDowell (1963) 132.

⁷⁰ MacDowell (1963) 139-40. See also Chapter 5.3.3.

⁷¹ Volonaki (2000) 160-5; see Chapter 5.3.3. Gray (2013) argues that in fact homicide trials were entirely prohibited under the amnesty, based on his analysis of the damaged inscription; (386-7) this seems unlikely, however, in light of the evidence of Lysias 13.

⁷² Gagarin (1979) suggests that in either case, the penalty was assessable. (319) Hansen (1981) disagrees, as all evidence seems to support the death penalty. Hansen also asserts that the procedure in Lysias 13 was not, as Gagarin suggests, an accusation of being in the forbidden places, but of being a *kakourgos*, a procedure that Hansen believes was used more regularly than previously thought. (17-30) Volonaki (2000) contradicts this point, and convincingly shows that the procedure was in fact *apagoge phonou*. (173)

⁷³ It is also plausible that the speaker in Antiphon 5 is correct to protest that the procedure is being employed in an unusual way and has never been used to try homicide before. If this is true, it is possible that this was one of few instances, or perhaps the only instance, of the procedure being used in this way.

⁷⁴ The *apagoge* procedure is not mentioned in the surviving part of the inscription of Draco’s law, nor associated with Draco in any other ancient sources, and when and how the procedure appeared in Athens has been the subject of some debate. Evjen (1970) argues against the prevailing theories, which stated that the procedure used in Antiphon 5 had extended over time to include homicides, or else that the *apagoge* procedure for homicide had been derived from *dike phonou* procedures to allow a quicker prosecution. (412-3) The lack of similarity between the two procedures makes this theory unlikely. Instead, he posits that *apagoge* did not develop after other homicide procedures, but was

We may reasonably ask why Athens maintained a system of specific courts and laws to deal primarily with homicide, and yet also allowed for trials dealing with the consequences of homicide in the dikastic courts. The question speaks to the complexity of the Athenian system for dealing with homicide, and the answer may rely on another unknown factor: how regularly did homicide trials occur in Athens in the late fifth and fourth centuries? Relatively few extant forensic speeches address homicide directly, but, as always, dearth of evidence must not necessarily be taken for dearth of occurrence.⁷⁵ It is possible, to draw on Bers (2000), that the extensive methods of legal redress for homicide were intended to act as a means of controlling the crime. The complexity of the system, however, would not affect individual trials, and as there was only one trial per crime, it would be unlikely to act as a deterrent to potential killers. It is perhaps more likely that, among other things, the complexity of the system for dealing with homicide at Athens was representative of the significance attached to the crime and the seriousness and comprehensiveness that was perceived as being required in dealing with it. What we can be sure of is that homicide, and particularly matters regarding its legislation and trial processes, occupied a specific and separate space, physically and ideologically, in both the Athenian legal system and the Athenian imagination, as shall become clearer over the course of Chapter 2 of this project. I hope that, if the complexity of Athenian homicide procedure cannot be fully explained over the course of this project, it can at least be explored.

1.4 THE SPEECHES

Our largest and most important source of evidence regarding homicide and its rhetoric in classical Athens is, of course, the corpus of forensic speeches of the

rather linked to pre-Draconian ideas of self-help, and that it was allowed to continue once more formal homicide legislation had been established in order to deal with certain extreme situations. (413-4) His theory is largely unaddressed by other scholars, and though theoretically plausible, seems to contradict the ideological notion that the Draconian laws were the oldest homicide laws in Athens. It would also suggest that the speaker at Ant.5.9 is either lying or mistaken when he suggests that the *apagoge* has never been used in such a way to prosecute a killer, which would make for a risky argument and seems unlikely. Volonaki's (2000) theory that the *apagoge* procedures for homicide developed later from other kinds of *apagoge* procedure seems to follow a more convincing timeline, though it remains difficult to prove.

⁷⁵ In a useful appendix to his 2008 chapter, Riess identifies 18 cases of homicide in Athens between 422 and 348 BC (93-4). Some of these had multiple victims, and one of them was the fictional case in Plato's *Euthyphro*. If this number, which equates to roughly one case every four years, seems surprisingly low, we should remember that these are only cases that came to court, and that are attested in the extant sources. The real number is certainly higher, but cannot be usefully estimated (see above, 9 n.3.)

Attic orators. Three speeches deal directly with homicide cases from the homicide courts: Antiphon 1 and 6, and Lysias 1. Two further speeches detail cases of homicide tried in the dikastic courts under *apagoge* procedures: Antiphon 5, and Lysias 13. These will all be referred to as ‘homicide speeches’. This is, of course, a very small sample, and I will be wary of drawing broad conclusions about legal means for dealing with homicide from so few sources. Three speeches of Lysias, 3, 4, and 7, document trials from the Areopagus that are not for homicide, but provide useful comparative material. Several other speeches from the dikastic courts contain valuable material for considering homicide and its rhetoric, including Demosthenes 21, 22, 23, 47, and Lysias 12. These speeches will form the bulk of my primary source material, supplemented with other contemporary sources as well as later ancient sources reflecting on the classical period. The main focus will remain, however, on sources from the classical period in Athens itself, as it is this specific context that is most relevant to my discussion.

There are several factors that must be considered when using forensic speeches as evidence. First, we cannot be certain that the text that has survived is the exact text that was delivered in court, or indeed, whether the speeches were delivered at all. Speeches were almost certainly published after the trials for which they were written, and so logographers would have had the opportunity to edit and improve them if they wished. It is not immediately clear why some of the speeches were published at all, though they may have been used as learning aids for teachers of rhetoric, or as examples to advertise a logographer’s skill. We also do not know the outcome of the majority of the trials, so we cannot say for certain whether or not the rhetoric contained within them is ‘successful’ in the legal sense of having led to a victory in the case at hand. The fact of their publication and survival, however, suggests that we should generally view these speeches as examples of rhetoric that the orators were willing for the public to read, and the reputations of the orators should be taken as representative of their skill. Similarly, extant fragments of speeches were most often quoted in later texts as examples of strong rhetoric. Therefore, the rhetoric contained in these sources may be considered as intended to succeed, or at least to make the best arguments possible in a particular situation. This does not mean that everything contained within them is necessarily true, but it should at least be relatively plausible to an Athenian audience. As the purpose of

forensic rhetoric is persuasion, and persuasion relies on an understanding of the probable thoughts and beliefs of the listeners, then we can confidently use these texts to understand certain perceived notions of Athenian sociology and thought.

Besides these forensic speeches, which are generally considered to have been written with actual delivery in mind, we have another useful, if complicated, source in the *Tetralogies*. These are a series of speeches that are clearly hypothetical, as they include all four of the speeches usually delivered in the homicide court: two from the prosecution, and two from the defence. They are usually presented as the work of the same Antiphon as the forensic speeches transmitted under that name, although this has been doubted by some scholars. One of the major points of dispute is that the *Tetralogies* are very different in style from Antiphon's other speeches, as characterised by Sealey:

‘One can suppose that Antiphon composed speeches for litigants in one manner of argument and language but composed the *Tetralogies*, which were not intended for any actual law-suits, in another manner at the same period of his life. On this hypothesis the Antiphon of the *Tetralogies* need bear no recognisable resemblance to Antiphon of Rhamnous, who composed the undoubted speeches. This hypothesis enables the reader to assign the name, ‘Antiphon of Rhamnous,’ to the author of the *Tetralogies* and attach any date to them, but it achieves this by emptying the name of content... The hypothesis, though tenable, is barren.’⁷⁶

Sealey and others have found it difficult to ascribe the two very different sets of texts to the same author, particularly as the ancient commentary on Antiphon is so scarce.⁷⁷ I, however, do not think that a marked difference in manner between different subgenres of speech need necessarily denote two different authors, as the two types of speech vary significantly in purpose, and certainly require different methods. It is perfectly plausible for one author to vary the manner of his writing between texts; we need only look at those orators who composed not only forensic

⁷⁶ Sealey (1984) 73.

⁷⁷ Sealey makes a point of this lack of evidence: ‘Dionysios of Halikarnassos expressed his respect for Antiphon in general terms without quoting his works. Although Dionysios wrote about some other Attic orators and inquired into questions of authenticity, no treatise of his on Antiphon is preserved; there is no reason to think that he wrote one. The brief note in the *Suda* and the even briefer note of Harpokration on Antiphon of Rhamnous do not name any writings. Pollux the lexicographer is a little more helpful. He has several references to speeches 5 and 6 and to Antiphonic speeches now lost, though none to speech 1, and he twice cites words from the *Tetralogies* (2.119 citing Ant.2.3.1, and 8.21 citing 4.1.4). It follows that the *Tetralogies* existed by the second century A.D., a fact that could not otherwise be taken for granted. Pollux’ attribution of the *Tetralogies* to Antiphon carries little weight.’ (Sealey (1984) 71) Sealey’s dismissal of Pollux seems unfounded.

speeches but also epideictic or symbouleutic works. The uncertainty must remain, though I will continue in the tradition of ascribing the *Tetralogies* to the same Antiphon as authored the forensic speeches, as the name of the author has little bearing on my discussion of rhetoric as representative of ideology and social history.

There is a more crucial aspect of the authorship debate to consider. Although the format of the *Tetralogies* seems to fit the Athenian model, some scholars have debated whether they are in fact Athenian, calling into question their handling of pollution, as well as certain aspects of law. The issue of pollution in the *Tetralogies* will be dealt with extensively in Chapter 3 of this project, and therefore will be passed over here. The most blatant aspect of the *Tetralogies* that seems to counteract Athenian homicide law and its procedures for lawful killing is their references to ‘the law that prohibits killing justly and unjustly’.⁷⁸ At first glance, this seems to be at odds with Athenian law, which provided for categories of lawful killing. I believe, however, that the presence of this statement in the text is driven more by rhetoric than reference to procedure. In three of the four instances in which the phrase appears it is in order to define the nature of homicide and situate the accused’s actions outside of that definition. The use of the phrase ‘justly and unjustly’ promotes a broad definition, to make it appear that the defendant did not merely kill in a justifiable manner, but in fact did not kill at all. The fourth instance is a refutation of one of these claims, which simply repeats the defendant’s rhetoric. If there was in fact procedural weight behind the term ‘justly’, it may be in reference to the fact that retributive killings were illegal in Athens despite potentially being considered ‘just’.⁷⁹ These aspects taken together seem convincingly to explain the presence of these statements in the *Tetralogies*, and justify the argument that they are

⁷⁸ Ant.3.2.9, 3.3.7, 4.2.3, 4.4.8. MacDowell (1963) posits that killing justly and killing lawfully were different, but does not expand on the point. (80-1) Gagarin (1978a) addresses this idea, presenting evidence that the terms ‘just’ and ‘lawful’ seem to be used interchangeably by the orators, and that the issue may not be as clear as MacDowell suggests. (302-4)

⁷⁹ Carawan (1993) 259. In a wider sense, Carawan suggests that this debate may have been present in the *Tetralogies* as a rhetorical response to controversy about the Delphinion’s jurisdiction, and aimed to clarify that only crimes that could be answered by a specific statute in the laws on lawful killings could be tried there. In general, Carawan suggests that the *Tetralogies* were written as a response to growing lack of faith in the traditional procedures for dealing with homicide, which would explain their unusual content with regard to argumentation. (Carawan (1993) 266-8) This is, of course, highly conjectural, and even if it were the case, it seems that any distrust of traditional methods had no effect on legal practice, as the same procedures were still in place by the time of Demosthenes 23. A certain link to the Delphinion would cement the Athenian background of the texts, but the theory can stand without it.

compatible with Athenian procedure and can therefore be used to draw conclusions about Athens, with some necessary caution.

1.5 THE SCOPE, APPROACH, AND STRUCTURE OF THIS PROJECT

Despite the complex issues surrounding Athenian homicide and its sources, the subject has produced few monographs. For many years, the only extended text on Athenian homicide was MacDowell's 1963 book *Athenian Homicide in the Age of the Orators*, which aimed to cover the facts of the legal aspect of homicide in classical Athens in full. Another monograph from Gagarin in 1981, *Drakon and Early Athenian Homicide Law*, was more concerned with the circumstances of the writing of Draco's law, its wording, and the wider legal situation in Greece prior to and after its writing. The work of these two scholars was so thorough that it was not until 2008 that another scholar attempted to tackle the issue of the facts of homicide law. Phillips' *Avengers of Blood: Homicide in Athenian Law and Custom from Draco to Demosthenes* in some ways synthesised the work of MacDowell and Gagarin, by examining the aspects of homicide law in the classical period, but also making more of its history and development, looking for potential catalysts for the writing of the laws in the archaic role of the family and *echthra* in resolving disputes involving killing.

There is only one monograph that attempts to deal with the relation between rhetoric and homicide at Athens. This is Carawan's 1998 book, *Rhetoric and the Law of Draco*. Despite its proposed preoccupation with rhetoric, the majority of the book is in fact still concerned with laying out the procedures and laws surrounding Athenian homicide, and with providing commentaries on the homicide speeches. Carawan pulls out a main rhetorical or legal 'theme' for his discussion of each speech, and aims to examine examples of rhetoric individually, rather than attempting to establish a wider rhetoric of Athenian homicide. It is clear, then, that there is extensive space in the scholarship for a study addressing the rhetoric of Athenian homicide as a whole.

This work intends to explore in depth the issue of the rhetoric of Athenian homicide in its socio-historical context, and identify certain themes running throughout it. It should be clarified here that I am less interested in rhetorical theory than in the practice of rhetoric. Although rhetorical theory is useful for

understanding techniques that were generally considered to make for successful rhetoric, these techniques rely on a generalised view of the hearers of rhetoric, and focus on the skill of the orator. They also assume that logographers worked highly systematically, and tend to ignore the specific needs of each contextual instance of speech delivery. To co-opt Barthes' concept, it is a 'writerly' approach to rhetoric. In this project, I intend to take what might be called a 'listenerly' approach to rhetoric. The focus will generally be less on rhetorical style, and more on the actual words and ideas invoked by the orators in question. I believe that forensic logographers were less systematic, and more flexible and attuned to the needs of different legal situations. Where rhetorical *topoi* play into more general ideas about persuasion, specific ideas are rooted in a close understanding of the psychology of the listeners. If we consider the temporal and social context of these speeches, we can infer that their content is designed to persuade and appeal to the specific jury present at that moment in the courtroom. Thus, by studying practical rhetoric, we can draw more cogent conclusions about the disposition and beliefs of the listeners at the moment of the delivery of a speech, and thus about wider sentiment in Athens. Speeches that were not delivered or were edited after publication do not confound this theory, as it is likely that they were still circulated as examples of successful rhetoric, whatever their purpose, and therefore would have been written with the Athenian courtroom context in mind. Similar can be said for the *Tetralogies*, though their purely hypothetical nature means that we should be more cautious in accepting their contents as representative of Athenian thought.⁸⁰

The extensive work on the historical facts of the issues surrounding Athenian homicide has provided a reasonable understanding of how the system was intended to work. These attempts to recover the facts may tell us much about the ideology of Athenian homicide, but do not reveal the complexity of Athenian thinking about their homicide laws and procedures. The rhetoric employed by successful and renowned orators around these issues can give us much more insight into how homicide and its laws were received in the context of Athenian society. Thus the rhetoric surrounding homicide in the courts of Athens will reflect not only procedure and fact, but perceptions of common beliefs and feelings on the subject. This helps us to expand the picture from the facts of homicide and its laws to the ways in which

⁸⁰ See Chapter 3.2.1.

they fitted into society and were understood and used by Athenian citizens. This, in turn, will tell us more about Athenian values in general, particularly regarding law and morality.

The second chapter will establish an ideology of homicide as can be inferred from oratorical sources. Ideology will be taken to mean a set of beliefs and ideals common to the community regarding a certain institution, underpinning how that institution is perceived.⁸¹ The perceptions of the homicide courts, laws, and procedures that appear in the forensic speeches are rarely presented without the motivation to promote a particular agenda or ideal in order to sway jury opinion. Cataloguing these instances of ideological perception will outline how Athenians understood the foundation and workings of their homicide courts, laws, and procedures. This, when coupled with the historical information established by other scholars and in this introduction, will form a backdrop for a closer examination of certain distinctive features of Athenian homicide rhetoric. Identifying the ideology of homicide at Athens allows us to reinsert the historical facts of homicide legislation and procedure into their cultural context, and to begin to get a sense of how they functioned in practice rather than in theory or intention. This chapter will also examine the flexibility of this ideology through a case study of its use in Demosthenes 23, to show how perceptions of the homicide laws and courts could be manipulated to different rhetorical ends.

Chapters 3, 4, and 5 will turn to examine factors with different degrees of specificity to homicide that could influence homicide rhetoric. Chapter 3 will explore the association of religious pollution with homicide. Pollution was attached to several aspects of life in ancient Greece, but the only crimes to which it adhered were homicide and impiety. This chapter will draw a link between the two by identifying homicide as a specifically religious crime. I will examine the topic through a rhetorical lens, and will challenge the prevailing view that pollution had no place in the minds of the fourth-century Athenian jury. As pollution was intrinsically associated with death in Greek thought, we can expect it to have a potent presence in homicide rhetoric. In fact, it appears in the sources very infrequently. This surprising

⁸¹ 'A systematic scheme of ideas, usually relating to politics, economics, or society and forming the basis of action or policy; a set of beliefs governing conduct. Also: the forming or holding of such a scheme of ideas.' ('Ideology', Def. 4, *OED*) In the case of Athenian homicide laws, courts, and procedures, we may suggest that the ideology is created after the fact.

dearth is worthy of study, and the chapter will propose some potential reasons for it. I will also identify some areas where the rhetoric of homicide pollution may be identified in the texts, and attempt to draw some conclusions about the ways in which this distinctive form of rhetoric could be used.

Chapter 4 will focus on the relevance rule, which was enforced on speakers in the homicide courts, but not to the same extent on those in the dikastic courts. This forms an interesting contextual difference between the two courts, and as it directly affects what speakers can and cannot say, it will surely result in a difference in the kinds of rhetoric that could be employed in each court. I will examine the scope and application of the rule, and justify my argument for its more forceful application in the homicide courts. I will also catalogue some of the specific ways in which it may have affected rhetorical usage in those courts. Definitions of what was and was not relevant to a particular case will be proposed. These rules will reflect on Athenian attitudes towards their legal system and towards homicide trials.

Chapter 5 will examine two separate but related concepts: intent and motivation. Issues of intent distinguished between different types of homicide and the different courts in which they were tried, and so formed a necessary and interesting part of homicide rhetoric. They also may point to the reasoning behind the presence of *trauma* cases at the Areopagus. In spite of this, discussions of intent in the rhetorical sources are far from clear cut, and my analysis will reveal how little factual information can be ascertained from the sources with regard to the role of intent in law. Although issues of motivation are not confined to homicide, it will be profitable to examine homicide rhetoric through this lens, as motive is often tied to killing in the popular imagination. We might expect to see extensive discussion of the topic in speeches from homicide cases, but in fact, again, it appears less often than we would expect. More regular focus is placed on the motivation of the prosecutor, with that motivation generally considered to be unscrupulous, or at least more complex than simple retribution for an unlawful killing. The different kinds of motives, both for killing and for prosecuting homicide, will be catalogued and their rhetorical uses examined.

These features will be explored following three main strands of argument. The first aims to examine how far the ideology of homicide held in practice. This

ideology, though present in many sources, as we shall see, is clearly an idealised view of the homicide laws and procedures. By closely examining rhetoric in practice, we can identify inconsistencies between the ideological presentation of homicide procedure and its actual use in real cases. Through this gap between ideology and reality, we can draw further conclusions about Athenian attitudes towards homicide and its legislation—not just the attitudes they wished to project, but those they actually held. This difference between self-perception and reality is an important facet of a society’s identity, pinpointing their cultural goals and how close they came to achieving them, as well as the beliefs and desires underpinning those goals.

The second strand of argument will focus on the importance of context for successful rhetoric. As Rubinstein has argued in her chapter on dikastic anger, ‘the type of procedure employed by a litigant, as well as the nature of the complaint that formed the basis of his legal action, had a significant influence on his choice of rhetorical tactics and the *topoi* that he employed.’⁸² There was great potential for rhetorical variation in different legal settings. Although the basis of rhetoric is the disposition of the hearer, this disposition can be altered in different contexts of place and time. A listener may find an argument appropriate and persuasive in one setting, but inappropriate in another. Some important work has already been completed regarding how the Athenian courtroom was created as a physical space. Athenian courts were not necessarily defined by their physical location; the court was not a court until certain rituals, both religious and social, had been performed to delineate the space as such. Blanshard suggests that the complicated modes of jury selection in the dikastic courts acted as a ritual that made the courts into what they were:

‘the highly elaborate, performative nature of these preliminaries... go far beyond any practical purpose. Instead, I propose that they served to inscribe the court into the Attic topography. Given the temporary, and variable, nature of the built environment of the law-courts, this inscription was otherwise impossible to achieve. Ritual builds a law-court as strong and clearly defined as one of marble or Portland stone.’⁸³

⁸² Rubinstein (2004) 187.

⁸³ Blanshard (2004) 25-6. Bers (2000) expresses a similar idea: ‘What the jurors seem to have enacted each day the *dikasteria* were convoked is best described as ceremony, a civic ritual carrying an implicit symbolism that responded to distrust of the jury... a means to impress others with the solemnity of the courts and to impress and thereby reassure themselves... Their very *savoir faire* was a sign that they were the living instruments of some settled civil process, one permeated by the specifically democratic legitimacy of the lot. Even if the jurors were suspected of obsession with the

This results in the courtroom being a powerful space with certain inherent attributes necessary to its existence. This project will examine how the specific, specialised context of the homicide courts in Athens may have affected the rhetoric that could be successfully employed there. This examination will aim to explain some of the perceived idiosyncrasies of homicide rhetoric, particularly the apparent dearth of references to pollution that one would otherwise expect to appear often in homicide speeches. I will argue that certain aspects of the homicide court context, which may have been more apparent to the ancient listener than they are to the modern reader, make certain arguments less effective than they may have been in a different setting, and that this may go part of the way towards explaining some of the surprising silences that have been identified in homicide rhetoric.

This forms the basis for the third strand of argument, which will explore the differences found in homicide rhetoric from the homicide courts and from the dikastic courts. This will apply to both the presentation of the ideology of the courts and laws, and the more general rhetoric employed when discussing homicide. I will argue that the differences in courtroom context lead to important and interesting variation in the types of rhetoric successfully employed in the two locations. These differences will not only allow us to draw conclusions about Athenian sociological attitudes to homicide, their flexibility, and the difference that context can have on those attitudes, but also to return to the issues of law and procedure that have been so often discussed regarding homicide. Greater knowledge of how the Athenians understood their own homicide laws and courts, both from within and outside the system, will allow us to draw more informed conclusions about the reasoning behind various aspects of legal recourse for homicide at Athens, and ultimately provide a better understanding of how homicide procedure worked both theoretically and in practice.

At its core, this project is concerned with exploring the separateness and ‘strangeness’ of the sections of the Athenian legal system that dealt with homicide. I will not aim to draw any particularly new conclusions about law or procedure themselves, but rather how they were understood by those who put them in place and used them. In the course of cataloguing the aspects and effects of this separateness, I

triobolon that awaited them at trial’s end, the mode of distribution was designed to maximise orderliness; and orderliness could be seen as a metonymy for legitimacy.’ (557)

hope to shed some light on the potential reasons behind it. Most importantly, I am concerned with the junction of law and rhetoric through the lens of homicide. I believe that the two are intrinsically linked in Athenian legal practice, operating in a symbiotic relationship where each influences the use of the other. One cannot understand the practicalities of Athenian homicide law without studying the rhetoric it inspired; similarly, one cannot grasp the intricacies of homicide rhetoric without understanding the laws that brought it into being. By addressing the two aspects in conjunction, and focusing not on theory, but on the practical context of homicide trials, this project will provide a deeper understanding of both the theoretical and intended purposes of various aspects of Athenian homicide law and procedure, and how they were psychologically and sociologically perceived, and, indeed, manipulated and exploited, in late fifth- and fourth-century Athenian society.

APPENDIX: *KAI* IN DRACO'S LAW

The most developed debate that has arisen from the study of Draco's law concerns the first word of the law text, '*kai*', and its implications regarding provisions about intentional homicide in the law. Stroud was the first to suggest that this '*kai*' could be taken with '*eam*' to mean 'even if', rather than 'and if'.⁸⁴ Previously, the particle was taken as connective: it had been assumed that the law was therefore incomplete at the beginning, and that this phrase was preceded by the provisions on intentional homicide, considered by modern scholars to be most important. Stroud suggested that the text could in fact be complete and plausibly start in this way, comparing it to the conditional form of so many later Athenian laws.⁸⁵ He posited that the provisions on intentional homicide must be later in the text. His argument, though compelling, does present us with very unusual usage. Gagarin agreed that '*kai eam*' must mean 'even if,'⁸⁶ but found the idea of the placement of laws on intentional homicide later in the text unconvincing, citing reasons such as the simple unlikelihood of such an ordering of laws.⁸⁷ Using a thorough study of '*kai*' in Greek law and the suggestion that many of the extant provisions of Draco's law seem to presuppose a context of both unintentional and intentional homicide having already been mentioned, he argued that the first

⁸⁴ Stroud (1968) 37.

⁸⁵ Stroud (1968) 40.

⁸⁶ Gagarin (1981a) 101.

⁸⁷ Gagarin (1981a) 109.

provision of the law in fact relates to both cases.⁸⁸ His argument is partially based on the idea that modern scholars have been approaching Draco's law with different presuppositions about attitudes to killing from the ancient Athenians, suggesting that it is plausible that they would have been able to understand the implied presence of the provision on intentional homicide in this explicit statement about unintentional homicide. The argument as a whole is not entirely convincing. Demosthenes' discussion in speech 23 addresses the jurisdiction of the Areopagus before any other homicide laws, which gives a viable basis for the view that provisions for intentional homicide were one of the most important parts of the law. It seems unlikely that such an important provision would merely be implied in the text of the law and not addressed explicitly. The implied presence of intentional homicide in the opening sentence does not preclude its necessity elsewhere in the text of the law. Moreover, as Gagarin's own argument shows, we should not impose our expectations on Athenian law: Draco may have preferred a different order from that which we would consider 'likely'. Finally, Gagarin's examination of the literary evidence for the '*kai eam*' form shows that although it is possible, it is very unusual, and therefore the meaning may not have been as clear to the Athenians as Gagarin would like it to be. Without further evidence, Stroud's argument remains the more convincing.

⁸⁸ Gagarin (1981a) 80-95.

THE IDEOLOGY OF HOMICIDE: SHAPE AND USAGE

Mytho-historical foundation narratives were ubiquitous in Greek culture.¹ Most often these narratives explained the foundation of cities or communities, but they were also applied to various civic institutions and charters. In many cases, these narratives strongly associated the creation of an institution with a single figure.² Athenian law is no exception, and made use of a variety of mythical narratives, including the ‘single lawgiver’ model.³ The earliest of these figures relating to law at Athens was Draco, whose homicide laws would form the framework of homicide legislation and procedure in Athens for hundreds of years. Draco’s homicide laws were reportedly the only ones to persist through the legislative reforms of Solon.⁴ But despite Draco’s status as the earlier lawgiver, it was Solon who became the epitome of Athenian lawgiving and was said to be the creator of all the laws of Athens. Meanwhile, details of Draco’s life were lost, his reputation and history limited to his surviving homicide laws. Almost nothing is known about Draco as a man, and any surviving anecdotes about him relate directly to his laws and their effects.⁵ Although more is told about the lives of other lawgivers, the mythologising of such figures

¹ For an examination of a variety of Greek foundation myths, with particular attention paid to the plurality of such myths, see Mac Sweeney (ed.) (2015).

² A clear example is seen in *Ath.Pol.*41, where a series of figures, both mythological and historical, are assigned to different ages in the administration of Athens. As time moves forward, administrative changes seem to become understood as the product of groups of politicised figures such as the Areopagus council or the Four Hundred, but the earlier years show clear focus on single figures: Ion, Theseus, Draco, Solon, Pisistratus, and Cleisthenes. Although parts of this ‘story’ of Athens were clearly dependant on more people than just these single figures (for example, the tyranny of Pisistratus and his sons [*Ath.Pol.*13-19]), the single names are the ones which carry the resonance, and are used to sum up entire periods of Athenian history.

³ This model is discussed in detail by Szegedy-Maszak (1978), and is also mentioned by Hölkeskamp (1992) 88, who sums up its main plot points: ‘birth, education, travels all over Greece and personal relations with major figures of early philosophy and with other lawgivers, rise to power, legislation and restoration of *eunomia*, incorruptible integrity and moral steadfastness in power, voluntary resignation, exile and death.’ The model is epitomised by Plutarch’s *Solon* and *Lycurgus*.

⁴ This tradition is most prominent in *Ath.Pol.*7.1, as well as *Plu.Sol.*17.1, and seems to have been accepted by many later scholars (e.g. Gagarin (2006) 270). Carey (2013), however, examines the issue in more detail, and convincingly argues that ‘some of Solon’s intervention was amendment, not annulment’ (50); that is to say, that more of Draco’s laws survived in Solon’s laws, but were rewritten to reaffirm their content, thus becoming subsumed into Solon’s laws. See also Leão and Rhodes (2015) 6.

⁵ The lack of evidence has led some to believe he did not exist; see below, 39 n.13.

means that the facts of the creation of laws are usually lost in the variety of accounts and opinions about the lawgivers themselves.

This chapter is not concerned with the facts of writing law so much as the process of mythologising laws and lawgivers, and the ideologies created on the basis of those myths. The stories told, or not told, about the lives and attributes of lawgivers may have lacked a foundation in history, but they held rhetorical and ideological power. Solon cannot plausibly be connected to every law in Athens; it was enough that his name could be invoked in connection with them, giving them potency and legitimacy.⁶ Similar notions can be identified regarding many lawgivers. Szegedy-Maszak's model regarding the form of these 'legends of the lawgivers' shows how the mythologised figures lead the city 'from *anomia* to *eunomia*'.⁷ Such neat narratives would instil confidence in the laws of a city, and potentially denounce those who would wish to question those laws. The mythologised lawgiver becomes a figure of ideology, representing a city's ideal in terms of a particular way of conducting legal matters. Such ideologies would become a part of the popular consciousness through repetition, constituting a set of tacitly shared beliefs about the laws and the men who wrote them, and would fit in with the wider ideals of Athenian society.⁸

The homicide laws at Athens are no exception to this pattern. There is less evidence relating to Draco as an individual than there is for many of the other attested lawgivers in the Greek world, so the narrative model suggested by Szegedy-Maszak is harder to identify; as we will see, the writing of Draco's laws seems to lack literary and historical context. In spite of this, he still takes on a certain personality in the sources that do mention him. He and his homicide laws become part of a narrative of antiquity, immutability, solemnity, and, to some extent, severity, which sets them apart even from the mythologised Solon and his laws. The

⁶ For a summary of the revision and amendment of Solon's laws, see Leão and Rhodes (2015) 8. On ideological and rhetorical uses of Solon, see Johnstone (1999) 21-45, Thomas (1994).

⁷ Szegedy-Maszak (1978) 201.

⁸ My concept of the ideology of homicide law may fit Freedman's notion of a 'thin-centred ideology', that is, one 'which does not contain the full or broad range of concepts and political positions normally to be found within the mainstream ideological families, but is parasitic on the host ideologies that harbour it, such as liberalism, conservatism or fascism' (Freedman (2001) 203). The generally conservative ideology of homicide law in Athens would be a facet of the larger conservative ideology in Athens that posited that things were better in the past and that change was generally negative. For more on the interaction of history, social memory, and ideology, see Steinbock (2013), particularly 13-29.

sources represent homicide procedure following the Draconian model as a fundamental institution in Athens, and repeatedly insist on the immutability of the laws, quite unlike laws in other areas. By examining those sources closely, we can begin to create an image of how the Athenians understood their homicide laws and procedures, and the ways in which they turned this understanding into an ideological view of the treatment of homicide at Athens. This chapter will undertake a systematic assessment of the opinions presented by ancient authors writing about Draco, the homicide laws, and the homicide courts at Athens, in order to compile a comprehensive image of the ways in which the Athenians professedly viewed these institutions. This will provide a framework for the examination of these ideologies in a variety of rhetorical contexts in later chapters. In addressing the ideology of homicide, one particularly important aspect will appear: the idea of homicide legislation and procedure as set apart from the rest of the Athenian legal system, while still remaining a part of it.

The second half of this chapter will focus on Demosthenes 23, in order to explore some of the ways in which arguments involving strict compliance with law in a *graphe paranomon* case interact with homicide ideology in the Athenian courts. The speech employs eleven quoted laws in its argument against Aristocrates' decree, nine of which have to do with homicide directly; Demosthenes also makes use of a lengthy account of the different courts for homicide and their individual procedures. The speech provides a prime example of the ways in which the ideological view of homicide could be manipulated for rhetorical gain. Specific arguments from homicide ideology tap into a more general ideology about the way the laws should be treated. Furthermore, we may begin to see how far homicide ideology may diverge from real practice concerning the homicide laws, and may have been a means of projecting an ideal. Taking the case study alongside other evidence will allow us to understand the ways in which Athenian behaviours and attitudes towards homicide could differ in practice from their explicitly expressed opinions. Identifying aspects of the Athenian ideology of homicide will also serve to inform and enhance previous research establishing the scope and procedures of Athenian homicide law by analysing the cultural context in which those laws and procedures operated. The homicide laws at Athens did not exist in a vacuum; they were used to try actual cases in the homicide courts, at which juries of officials were present to

witness their workings. These officials, and other Athenians, interacted with the laws and their processes and formed opinions about them. This can tell us how the laws were received in the community, and therefore give us a better understanding of wider Athenian ideals.

2.1 CREATING IDEOLOGIES

Ideologised conceptions of the section of the Athenian legal system that dealt with homicide can be usefully split into two main groups: attitudes towards Draco, the lawgiver who was said to have instituted the homicide laws at Athens, and attitudes towards the laws themselves and the courts in which they were implemented.

2.1.1 DRACO

In our sources, Draco is the sole figure associated with the writing of homicide laws at Athens. Regarding his life outside of the laws, we have very little verifiable information; there was probably little available information even in the classical period.⁹ We can only estimate the date of his laws and extrapolate the dates of his life from there, but there is no indication of how old he was when he wrote his laws.¹⁰ Our sources provide nothing in the way of a career for Draco, which is unusual for Greek lawgivers, whose stories tend to follow a paradigmatic narrative including events before and after the writing of laws.¹¹ Instead, in most sources, he is credited only with the writing of the laws, and occupies no continuous narrative. It is uncertain exactly how many laws he wrote, on which subjects, and how they were connected to each other. It is very likely, however, that he wrote more laws than just those related to homicide, or the statement at *Ath.Pol.*7.1 that Solon did away with the other laws of Draco would make no sense.¹² All that we can be certain about is that the Athenians believed that their homicide laws were written by Draco. In some modern scholarship, the paucity of information even led certain scholars to believe that Draco was not a real man at all;¹³ the name has been taken to suggest a fictional or mythological figure, perhaps even a sacred snake, rather than a historical

⁹ Carey (2013) 29.

¹⁰ Stroud (1968) 66-70.

¹¹ See Szegedy-Maszak (1978), who posits that the legends created around various Greek lawgivers should not necessarily be mined for potential biographical or historically accurate information, as they are clear examples of Greek mythmaking.

¹² On other laws of Draco, see Chapter 1.1.

¹³ Beloch (1912) 350, (1926) 256-262; Sealey (1976) 104.

lawgiver. This chapter is not interested in proving the reality of Draco so much as exploring his myth, though the unanimity of the sources must confirm that he was indeed connected to the writing of the homicide laws. It is possible that he did not write them alone, or even that his name became shorthand for a group of lawgivers, though this possibility comes more from practicality than any existing evidence.¹⁴ Generally, the facts of Draco's life are obscured by the myth of his lawgiving.

The majority of our evidence presents Draco only in direct relation to the homicide laws. The only variation comes from several descriptions of the lawgiver in relation to his lost laws, rather than simply those relating to homicide, or in relation to the other great Athenian lawgiver, Solon. In this way, both the Athenian and our own perception of Draco are entirely extrapolated from opinions on his laws and the comparisons that can be drawn between him and Solon. The characteristics that he is assigned by the Athenians are clearly defined by these relationships. By examining the few sources in which Draco is mentioned, we may get some sense of what these characteristics were and why he was defined in this way. Thus we can begin to understand how classical Athenians saw their oldest lawgiver, and how he fitted in the wider picture of Athenian homicide ideology. It will become clear that his position in this ideology varied between sources portraying Draco in different contexts, and particularly between oratory and sources from outside the courts.

Two major sources that mention Draco come from Aristotle, and both note the perceived severity of his laws:

Δράκοντος δὲ νόμοι μὲν εἰσὶ, πολιτεία δ' ὑπαρχούση τοὺς νόμους ἔθηκεν ἴδιον δ' ἐν τοῖς νόμοις οὐδὲν ἔστιν ὃ τι καὶ μνείας ἄξιον, πλὴν ἢ χαλεπότης διὰ τὸ τῆς ζημίας μέγεθος. [Arist.*Pol.*2.1274b.15-18]

'There are laws of Draco, but he made the laws for an existing constitution; there is nothing unusual about these laws worth mentioning, except their severity in great punishments.'

... καὶ ὡς Κόνων Θρασύβουλον θρασύβουλον ἐκάλει, καὶ Ἡρόδικος Θρασύμαχον “ἀεὶ θρασύμαχος εἶ”, καὶ Πῶλον “ἀεὶ σὺ πῶλος εἶ”, καὶ Δράκοντα τὸν νομοθέτην, ὅτι οὐκ [ἄν] ἀνθρώπου οἱ νόμοι ἀλλὰ δράκοντος (χαλεποὶ γάρ)... [Arist.*Rh.*1400b.19-23]

¹⁴ The model of Solon makes a single Draco possible, at least in the Athenian consciousness, but there are also classical parallels for single legislators and groups of legislators, namely the *anagrapheis* at the end of the fifth century, as seen in Lys.30 and And.1.

‘...As when Conon called Thrasyboulos ‘bold in counsel’, and Herodicus said of Thrasymachus ‘you are bold in battle’, and of Polus ‘you are a colt’, and of Draco the lawgiver, that his laws were not those of a man but those of a dragon, due to their severity...’

The first extract is misleadingly dismissive of the scope and content of the laws, but underlines their severity, though there is no direct link to Draco’s own severity. The second extract, however, draws a more explicit link between the characteristics of the laws and those of the lawgiver by calling him a ‘dragon’ or ‘snake’; the implication is that only a creature of great severity and brutality could write such laws, which are almost too bestial for human use.¹⁵ No evidence for Draco’s severity is given apart from the nature of his laws. The man has been entirely recreated from the corpus of his work.¹⁶ The first extract more explicitly identifies the nature of the severity as being rooted in the belief that Draco prescribed death as the punishment for every crime.¹⁷ This idea is almost certainly exaggerated.¹⁸ The opening of Draco’s law on homicide, for example, shows that the appointed penalty for involuntary homicide was exile; it seems unlikely that this was considered to be a lesser crime than some of those ostensibly punished by death, such as theft or idleness. Nevertheless, the legend of Draco as an excessively harsh lawgiver seems to have been in place by the fourth century, and persisted for many centuries.¹⁹ The lack of other viewpoints on Draco’s character leaves us with a lawgiver who was essentially little more than a representation of early Athenian homicide law hypostasised into a single person.

This representation, characterised by severity, also appears in some sources that present Draco alongside Solon. The longest passage describing Draco is from Plutarch:

¹⁵ This analogy overlooks other aspects of the relationship between the concept of the snake and ideas about the lawgiver that might have been apparent to earlier Athenians, particularly its sacral role, which may have increased the sense of solemnity and awe around the work of Draco. Snakes appear in numerous roles in Greek religion. For the association of Asclepius with snakes, see Aston (2004) 20-2, 28-30; Schouten (1967) 35-40. For snake goddesses in Minoan religion, see Gesell (2010), Panagiotaki (1999), Warren (1972) 85-7, 208-10. For other associations between snakes and Greek religion, see Bailey (2007); Burkert (1987) 30, 195; Parker (2011) 67-9.

¹⁶ A similar effect can be seen elsewhere in the ancient sources, for example in Aristophanes’ construction of Aeschylus and Euripides in *Frogs*, and in Plato’s construction of Aristophanes in *Symposium*.

¹⁷ *Plu.Sol.17*. See also *Lycurg.1.65*, which does not name Draco explicitly, but speaks of the punishments prescribed by early lawgivers.

¹⁸ Gagarin (1981a) 116-121; Carey (2013) 42-47.

¹⁹ The English word ‘Draconic’ (and latterly ‘draconian’) meaning ‘rigorous, harsh, severe, [or] cruel’ is attested throughout the 18th and 19th centuries, as well as later. (‘Draconic’ Def. 1, *OED*)

πρῶτον μὲν οὖν τοὺς Δράκοντος νόμους ἀνεῖλε πλὴν τῶν φονικῶν ἅπαντας, διὰ τὴν χαλεπότητα καὶ τὸ μέγεθος τῶν ἐπιτιμιῶν. μία γὰρ ὀλίγου δεῖν ἅπασιν ὄριστο τοῖς ἀμαρτάνουσι ζημία θάνατος, ὥστε καὶ τοὺς ἀργίας ἀλόντας ἀποθνήσκειν, καὶ τοὺς λάχανα κλέψαντας ἢ ὀπώραν ὁμοίως κολάζεσθαι τοῖς ἱεροσύλοις καὶ ἀνδροφόνοις. διὸ Δημάδης ὕστερον εὐδοκίμησεν εἰπὼν ὅτι δι' αἵματος, οὐ διὰ μέλανος, τοὺς νόμους ὁ Δράκων ἔγραψεν. αὐτὸς δ' ἐκεῖνος, ὡς φασιν, ἐρωτώμενος διὰ τί τοῖς πλείστοις ἀδικήμασι ζημίαν ἔταξε θάνατον, ἀπεκρίνατο τὰ μὲν μικρὰ ταύτης ἄξια νομίζειν, τοῖς δὲ μεγάλοις οὐκ ἔχειν μείζονα. [Plu.Sol.17]

'Firstly he abolished all of the laws of Draco, except for those regarding homicide, because of their severity and the greatness of the penalties. For one penalty was laid down for almost all crimes, namely death, so that even those convicted of idleness were put to death, and those who stole vegetables or fruit were punished in the same way as temple-robbers and killers. Thus, later, Demades was highly esteemed when he said that Draco's laws were written in blood, not ink. And [Draco] himself, it is said, when asked why he had appointed death as the penalty for most crimes, answered that the lesser ones were worthy of it, and nothing worse could be found for the greater ones.'

Although the comparison between the two lawgivers is not made explicit in this passage, it is clear that the digression on Draco is intended to cast light on the character of Solon. Solon's abolition of Draco's severe laws paints him as more moderate; the excursus on their severity emphasises his moderation further. Indeed, in context, this passage says far more about Solon than it does about Draco. A similar effect can be seen in Lysias fragment 40b:

ἀργίας δίκη· Λυσίας ἐν τῷ κατὰ Ἀρίστωνός φησιν ὅτι Δράκων ἦν ὁ θεὸς τὸν νόμον, αὐθις δὲ καὶ Σόλων ἐχρήσατο, θάνατον οὐχ ὀρίσας ὡσπερ ἐκεῖνος, ἀλλ' ἀτιμίαν, ἐὰν τίς ἀλῶ τρίς, ἐὰν δ' ἅπαξ, ζημιοῦσθαι δραχμὰς ἑκατόν. [Lys.fr.40b]

'Suit for idleness. Lysias in his speech Against Ariston says that Draco was the person who passed this law and that Solon too subsequently used it, but not with death as the penalty unlike Draco but loss of rights (*atimia*) if a man was convicted three times and a fine of a hundred drachmas if he was convicted once.'²⁰

Although Draco and Solon are afforded roughly equal priority here, the contrast between the more and less severe punishments is emphasised. To have two distinct foundational lawgivers was unusual in Greece, and so it is particularly interesting that such a clear distinction was drawn between them. In these sources, Draco forms a neat point of comparison for analysing Solon, as Draco provides a model of an

²⁰ Tr. Carey.

older style of lawgiver with the negative attribute of excessive severity, in order to show the need for the later lawgiver and the justice of his reforms.

The fact that Plutarch's biography of Solon contains the longest passage about Draco, intended to highlight aspects of Solon's career, demonstrates how clearly both Athenian and later understanding of Draco was shaped by comparisons to the later lawgiver, and, as Carey has suggested, by Solon's propaganda for his own reforms.²¹ It is common for Draco to appear in the sources alongside Solon, and several times the two names are invoked as the embodiments of Athenian law.²² The two lawgivers stand alone in the story of Athenian legislative history. Solon's life, however, is illustrated in much greater detail by the sources, as can be seen in Plutarch's biography, and particularly by his own poetry, in which he inscribes the record of his career as a statesman and lawgiver.²³ For all that Solon appears in the sources as a wise, just, and moderate lawgiver in relation to his laws, he also demonstrates a life outside of them, and his personality is rounded out with other characteristics. The same cannot be said of Draco, whose narrative role in these texts as either the homicide lawgiver or a foil to Solon reduces his character to severity, with no other identifiable features, despite his important role in Athenian legal history.

This is the picture of Draco that forms in texts of a historical, political, or philosophical nature; within the courts, however, the effect is quite different. In fact, it is rare to see anything that amounts to identification of negative attributes of the lawgiver in oratory. This is not surprising; Draco's homicide laws were, as far as we know, still in use in Athens in the fourth century, and the orator who chose to criticise them or their lawgiver would risk alienating himself from the city's approval of those laws. The fact that they were still in use meant that the Athenians had to believe that he was a just and wise lawgiver, and that the laws were appropriate for the purpose. Indeed, it would make sense in the Athenian mind that their severest lawgiver's legacy dealt with some of the severest crimes in their city. Draco's perceived severity, instead of being seen as excessive, made him the appropriate lawgiver for homicide legislation, and so the fact of his authorship imbued his laws

²¹ Carey (2013) 45.

²² E.g. *D.S.*9.17.1; *Luc.Cal.*8; *Ps.-Luc.Dem.Enc.*45; *D.*24.211.

²³ For Solon's poetry see Noussia-Fantuzzi (2010). Solon appears in far more sources than Draco across a variety of genres; see Nagy and Noussia-Fantuzzi (eds) (2015).

with authority and strength. There is no doubt in the forensic sources that Draco's laws were thought to be excellently created and appropriate to the Athenian ideal of justice; the issue of severity is diminished to the point of non-existence. The sentiment appears more than once in speeches of Demosthenes:

καὶ μὴν εἰ Σόλωνα καὶ Δράκοντα δικαίως ἐπαινεῖτε, οὐκ ἂν ἔχοντες εἰπεῖν οὐδετέρου κοινὸν εὐεργέτημ' οὐδὲν πλὴν ὅτι συμφέροντας ἔθηκαν καὶ καλῶς ἔχοντας νόμους, δίκαιον δῆπου καὶ τοῖς ὑπεναντίως τιθεῖσιν ἐκείνοις ὀργίλως ἔχοντας καὶ κολάζοντας φαίνεσθαι. [D.24.211]

'And if you can justly praise Solon and Draco, although you can say that neither of them did any public service except enacting beneficial and well-conceived laws, it must be just that anyone who enacts laws contrary to these should be met with anger and punishment.'²⁴

ἐν τοίνυν τοῖς περὶ τούτων νόμοις ὁ Δράκων φοβερὸν κατασκευάζων καὶ δεινὸν τό τινα αὐτόχειρα ἄλλον ἄλλου γίνεσθαι, καὶ γράφων χέρνιβος εἶργεσθαι τὸν ἀνδροφόνον, σπονδῶν, κρατήρων, ἱερῶν, ἀγορᾶς, πάντα τᾶλλα διελθὼν οἷς μάλιστα ἂν τινος ᾤετ' ἐπισχεῖν τοῦ τοιοῦτόν τι ποιεῖν, ὅμως οὐκ ἀφείλετο τὴν τοῦ δικαίου τάξιν... [D.20.158]

'Now Draco, in this group of laws, marked the terrible wickedness of homicide by banning the offender from the lustral water, the libations, the mixing bowl, the sacrifices and the market-place; he enumerated everything that he thought likely to deter the offender; but he never robbed him of his claim to justice...'²⁵

It is clear from both of these statements that Draco's laws on homicide were considered to be suitable and judicious with regard to the heinous nature of the crime, and not excessively severe or prescribing too harsh a punishment. Context here is critically important; the delivery of these statements in the courtroom justifies a different view of Draco from that seen in other texts. In this context, his successful and well-enacted laws give him his status as a praiseworthy lawgiver and put him on a par with Solon, despite the fact that any other laws that he wrote were probably replaced by ones considered more suitable. The just nature of the homicide laws made them exempt in court from the negative connotations found elsewhere in Draco's narrative, as in this case, severity of punishment was an entirely fitting response to the crime. Once again, Draco becomes his laws, although in this context they have more positive attributes: the justice of the laws creates an image of a just

²⁴ This passage is strangely silent on Solon's political career, reducing him solely to a lawgiver. This is probably for rhetorical effect in context, rather than reflecting anything particular about Solon's life.

²⁵ Tr. Vince.

lawgiver. Elsewhere, Aeschines presents Draco, amongst other lawgivers, as especially concerned with moderation, and even on a level with Solon in this regard, which seems explicitly opposed to the tradition of his excessive severity and antithesis to the later lawgiver.²⁶ In this case no specific legislation is provided to substantiate the claim, but the implication is surely that all of his extant legislation is just, fitting, and concerned with moderating the behaviour of citizens rather than dealing out excessively harsh punishments for minor crimes.²⁷

From these sources, it is clear that identification of negative attributes of Draco or his laws had no place in forensic rhetoric. Criticisms of laws had to be handled carefully in any case to avoid offending the present court. In the homicide courtroom context, the laws were fitting for the crime, and therefore the lawgiver had filled his role admirably and was just and correct in writing them. Indeed, as we shall see, the homicide laws were often held up as an ideal example of Athenian legislation. Draco's perceived harshness elsewhere did not have to reflect on the quality of the homicide laws as a whole, because by the fourth century, Draco was extrapolated from the laws, and not the other way around. The homicide laws maintained their reputation even when separated from Draco, as their authority was also due to other factors, such as their longevity and the reputation of the courts that enforced them. It is clear that the Athenians were easily able to separate any misgivings about Draco from both their belief in his success as a homicide lawgiver and their feelings about the homicide laws and procedures in general. Most of all, this erasure of negative attributes from the rhetorical image of Draco and his laws was necessary in order to create persuasive arguments in favour of those laws.

²⁶ Aeschin.1.6-7.: σκέψασθε γάρ, ὦ ἄνδρες Ἀθηναῖοι, ὅσῃν πρόνοιαν περὶ σωφροσύνης ἐποιήσατο ὁ Σόλων ἐκεῖνος, ὁ παλαιὸς νομοθέτης, καὶ ὁ Δράκων καὶ οἱ κατὰ τοὺς χρόνους ἐκεῖνους νομοθέται. 'Consider, men of Athens, how much forethought that ancient lawgiver Solon gave to moderation, as did Draco and the other lawgivers of that time.'

²⁷ Several other complimentary references to Draco can be found outside of oratory, though mostly in later sources. They are neatly summarised by Schlesinger (1924): 'Again, Gellius, who, as we have seen, paints Draco's harshness in somber hues, first declares that he "was thought to be a good man, and of much wisdom, skilled in the law of gods and men." [*Noct. Att.* 11.18] Lucian gives Solon and Draco as examples of "the best of the lawgivers." [*On Not Rashly Believing Slander* 8] Maximus of Tyre speaks of "Draco's venerable laws," [iii.5.c] and Athenaeus [xi.508.a] puts him in the canon of famous Athenian lawgivers, together with Solon, and, strangely enough, Plato. Another law, this time one enjoining the worship of the ancestral gods and heroes, is laid, garnished with many complimentary adjectives, at Draco's door by Porphyrius. [*On Abstinence* 4.22] Finally, Hesychius [Par. 22] and Suidas [*S.v.* Draco] tell the yarn that Draco went to Aegina to establish a system of laws, and that the people, enthusiastic over the result, threw cloaks, tunics, and hats on him till he was smothered. The moral of this story seems to be "God save us from our friends," but, however Gilbertian the compliment, we can hardly doubt that it was supposed to be there.' (372-3)

The creation of an ideology around the figure of Draco reflects an Athenian desire for the homicide laws to have a clear and unified starting point in their story. In Draco, we see the beginnings of a pattern that will appear throughout Athenian homicide ideology, namely one of homicide being set apart from the rest of the legal system. The Draconian laws are pushed back beyond contemporary Solonian justice to a time of more intent lawgiving focused on the most serious matters. This separation in time and point of origin gives the homicide laws a distinct potency within the full corpus of Athenian law. The lack of literary and historical context makes Draco an abstract force without specific roots, able to be tied solely and forcefully to the homicide laws. The myth of the homicide lawgiver affords the Athenians a solid base on which to construct the rest of their homicide ideology.

2.1.2 THE LAWS AND THE COURTS

The mythologisation and idealisation of the homicide courts appears most obviously in their foundation myths. The foundation myths of the Areopagus court are perhaps the best known. The court appears several times in mythology and has several origin stories. One myth, relating to the name ‘Areopagus’ (‘hill of Ares’), posits that Ares was the first homicide defendant to be tried there.²⁸ Aeschylus presented his own version of the mythological founding of the court in the *Eumenides*, which portrays the trial of Orestes at the Areopagus as the first homicide trial, and establishes it as a homicide court for Athens.²⁹ It is a mark of the ideological importance of the Areopagus that it can be inserted successfully into a mythic narrative and shown to have the jurisdiction to resolve crimes therein. It is impossible to find any non-mythologised information about the founding or early

²⁸ E.El.1258-63.

²⁹ A.Eu.681-710. The religious connotations of these mythological beginnings are discussed more extensively in Chapter 3.1.3. Although no other version of the founding of the Areopagus in which Orestes features can be found, I follow Costa (1962) in the assertion that ‘strictly speaking Aeschylus’ so-called innovation need not be inconsistent with the older story...No doubt we have lost many other versions of the Orestes story, and among them may well have been one which recorded a trial before the Areopagus.’ (25) On the chronology of these two myths, see Harding (2008) 205-7. On the political implications of Aeschylus’ use of the Areopagus in the Orestes myth, see e.g. Leão (2010), Macleod (2007), Sidwell (1996). On the similarities between Orestes’ trial and actual Athenian procedure, see Sommerstein (2010). Harding (2008) also notes the presence of mythological trials of Cephalus and Daedalus at the Areopagus among the texts of the Atthidographers. (33-5)

role of the Areopagus.³⁰ Instead, the court's origins are based purely in myths that confirm its power, legitimacy, and jurisdiction.

Elsewhere, Pausanias describes foundation myths for the other homicide courts:

ὅποσα δὲ ἐπὶ τοῖς φονεῦσιν, ἔστιν ἄλλα· καὶ ἐπὶ Παλλάδιῳ καλοῦσι καὶ τοῖς ἀποκτείνασιν ἀκουσίως κρίσις καθέστηκε. καὶ ὅτι μὲν Δημοφῶν πρῶτος ἐνταῦθα ὑπέσχε δίκας, ἀμφισβητοῦσιν οὐδένας· ἐφ' ὅτῳ δέ, διάφορα ἐς τοῦτο εἴρηται. Διομήδην φασὶν ἀλούσης Ἰλίου ταῖς ναυσὶν ὀπίσω κομίζεσθαι, καὶ ἤδη τε νύκτα ἐπέχειν ὡς κατὰ Φάληρον πλέοντες γίνονται καὶ τοὺς Ἀργεῖους ὡς ἐς πολεμίαν ἀποβῆναι τὴν γῆν, ἄλλην που δόξαντας ἐν τῇ νυκτὶ καὶ οὐ τὴν Ἀττικὴν εἶναι. ἐνταῦθα Δημοφῶντα λέγουσιν ἐκβοηθήσαντα, οὐκ ἐπιστάμενον οὐδὲ τοῦτον τοὺς ἀπὸ τῶν νεῶν ὡς εἰσὶν Ἀργεῖοι, καὶ ἄνδρας αὐτῶν ἀποκτείνειν καὶ τὸ Παλλάδιον ἀρπάσαντα οἴχεσθαι, Ἀθηναῖόν τε ἄνδρα οὐ προϊδόμενον ὑπὸ τοῦ ἵππου τοῦ Δημοφῶντος ἀνατραπῆναι καὶ συμπατηθέντα ἀποθανεῖν· ἐπὶ τούτῳ Δημοφῶντα ὑποσχεῖν δίκας οἱ μὲν τοῦ συμπατηθέντος τοῖς προσήκουσιν, οἱ δὲ Ἀργείων φασὶ τῷ κοινῷ. ἐπὶ Δελφινίῳ δὲ κρίσις καθέστηκεν ἐργάσασθαι φόνον σὺν τῷ δικαίῳ φαμένους, ὁποῖόν τι καὶ Θησεὺς παρεχόμενος ἀπέφυγεν, ὅτε Πάλλαντα ἐπαναστάντα καὶ τοὺς παῖδας ἔκτεινε· πρότερον δὲ πρὶν ἢ Θησεὺς ἀφείθη, καθειστήκει πᾶσι φεύγειν κτείναντα ἢ κατὰ ταῦτα θνήσκειν μένοντα. τὸ δὲ ἐν πρυτανείῳ καλούμενον, ἔνθα τῷ σιδήρῳ καὶ πᾶσιν ὁμοίως τοῖς ἀσύχοις δικάζουσιν, ἐπὶ τῷδε ἄρξασθαι νομίζω. Ἀθηναίων βασιλεύοντος Ἐρεχθέως, τότε πρῶτον βουὴν ἔκτεινε ὁ βουφόνος ἐπὶ τοῦ βωμοῦ τοῦ Πολιέως Διός· καὶ ὁ μὲν ἀπολιπὼν αὐτῇ τὸν πέλεκυν ἀπῆλθεν ἐκ τῆς χώρας φεύγων, ὁ δὲ πέλεκυς παραντίκα ἀφείθη κριθεὶς καὶ ἐς τὸδε ἀνὰ πᾶν ἔτος κρίνεται. [Paus.1.28.8-10]

‘One of the other courts that deal with killing is called ‘at Palladion’ into which are brought cases of involuntary homicide. All are agreed that Demophon was the first to be tried there, but as to the nature of the charge accounts differ. It is reported that after the capture of Troy Diomedes was returning home with his fleet when night overtook them as in their voyage they were off Phalerum. The Argives landed, under the impression that it was hostile territory, the darkness preventing them from seeing that it was Attica. Thereupon they say that Demophon, he too being unaware of the facts and ignorant that those who had landed were Argives, attacked them and, having killed a number of them, went off with the Palladion. An Athenian, however, not seeing before him in the dark, was knocked over by the horse of Demophon, trampled upon and killed. Whereupon Demophon was brought to trial, some say by the relatives of the man who was trampled upon, others say by the Argive commonwealth. At Delphinion are tried those who claim that they have committed justifiable homicide, the plea put forward by Theseus when he was acquitted, after having killed Pallas, who had risen in revolt

³⁰ *Ath.Pol.*3, 4, 8, 23, 25, 27, 35, and 41 detail various aspects of the Areopagus' duties at different points in Athenian history not immediately related to homicide, though the text does not paint a coherent picture of these duties, and certainly does not address the founding of the court.

against him, and his sons. Before Theseus was acquitted it was the established custom among all men for the killer to go into exile, or, if he remained, to be put to a similar death. The Court in the Prytaneion, as it is called, where they try iron and all similar inanimate things, had its origin, I believe, in the following incident. It was when Erechtheus was king of Athens that the ox-slayer first killed an ox at the altar of Zeus Polieus. Leaving the axe where it lay he went out of the land into exile, and the axe was forthwith tried and acquitted, and the trial has been repeated year by year down to the present.³¹

Although foundation myths of this kind for institutions were not especially unusual, of all the courts at Athens it is only the homicide courts that receive this level of mythologisation. The dikastic courts receive historiographical foundation stories, but were never retrojected into myth.³² By contrast, the beginnings of the homicide courts are clear examples of mythography. These mythological foundations are a crucial aspect of Athenian civic identity: it should be noted that Aeschylus chose the Areopagus as the establishment that represented the creation of law and order, rather than any of the other courts of Athens. If the courts can be shown to be appropriate to resolving crimes on a mythic level, their importance for contemporary Athens is magnified. The foundations of the homicide courts are also the only ones that explicitly connect location and function, establishing the importance of place in homicide trials as well as procedure and ritual.

It is, however, reasonably unusual to see the multiplicity of courts examined in this way. It is interesting that Pausanias is able to locate foundation myths for the Delphinion and the Palladion as well as the more well-known Areopagus. As the source is so late, it is possible that this was a later accretion of myths, representing a cumulative process of collective mythologisation. If so, it is clear that the ideology of the homicide courts was one of thoroughness in allowing each court its own discrete foundation myth. There is a clear pattern of deep structure and differentiation between the courts, suggesting a perception of a fully-rounded and comprehensive legal system for dealing with homicide. It is also apparent that the Greeks were comfortable with indeterminacy and willing to accept more than one

³¹ Tr. Jones. For the ritualization of the 'ox-slayer' myth, see Burkert (1987) 136-143; Parker (2005) 187-191. Interestingly, the myth does not exactly reflect the later use of the court, since in the myth, the axe or knife acts as a substitute for the man accused of killing. In D.23.76, the speaker describes how those inanimate objects tried at the Prytaneion either killed a man by falling on him, that is, accidentally, or were thrown or used by an unknown party. This latter is the closest to the ox-slayer myth, as it is not clear whether the killer was known to those trying the axe/knife or not.

³² See below, 86 n.57.

foundation myth for each institution, which only augments the sense of a distant and unknowable beginning for these courts.³³ This indeterminacy was compounded by the contradictory chronologies provided by the various foundation myths, and it remains unclear exactly when each court was believed to have emerged.³⁴ In fact, a mythological aetiology for the courts pushes their existence back into the distant past, providing a sense of the courts as constants in the Athenian timeline and augmenting their authority. The divine links to the foundation myths also instilled the courts with a sense of religious importance, which provided an important background for the religious aspects of homicide and its legislative procedures.³⁵ This myth-building around the origins of the courts establishes them firmly as loci of Athenian ideology, with roots in the distant past and power acknowledged by gods and heroes.

Several forensic speeches present the homicide courts as a distinctly superior space, where trials are conducted differently and, by all accounts, more thoroughly and with greater rigour. These references appear most commonly in speeches that would have been delivered at the dikastic courts, as they were probably intended to throw the situation of the present court and trial into relief against that of a potential trial held in one of the homicide courts, and to encourage the dikastic jury to act more like a jury in a homicide court. It is perhaps surprising that speakers felt confident enough to use such an argument without fear of repercussions, essentially praising another court more highly than the one to which they were presently speaking. This may be indicative of the amount of respect that Athenians had for the homicide courts, and the Areopagus in particular, since they were willing to hear it praised in and even to the potential denigration of the dikastic courts. This effect is presented most strikingly in Antiphon 5, when the speaker Euxitheus disputes the method of his trial, and argues that he should have been tried in a homicide court, listing its distinctive procedures:

³³ For the indeterminacy and plurality of Greek foundation myths, see above 36 n.1.

³⁴ The Ares foundation myth for the Areopagus suggests that it is the earlier court, and that the other courts for homicide emerged from or later than it. If we follow Aeschylus and Pausanias, however, the Areopagus must have emerged after the Delphinion at least, as Theseus must predate Orestes. The confused timeline only serves to highlight the mythologising of these courts, and does not present a problem for understanding the ideology surrounding them.

³⁵ See Chapter 3.

ἐμοὶ δὲ πρῶτον μὲν, οὗ τοῖς ἄλλοις εἶργεσθαι προαγορεύουσι τοῖς τοῦ φόνου φεύγουσι τὰς δίκας, ἐνταυθοῖ πεποιήκασιν τὴν κρίσιν, ἐν τῇ ἀγορᾷ· ἔπειτα τίμησίν μοι ἐποίησαν, ἀνταποθανεῖν τοῦ νόμου κειμένου τὸν ἀποκτείναντα... ἔπειτα δέ, ὃ πάντα οἶμαι ὑμᾶς ἐπίστασθαι, ἅπαντα τὰ δικαστήρια ἐν ὑπαίθρῳ δικάζει τὰς δίκας τοῦ φόνου, οὐδενὸς ἄλλου ἕνεκα ἢ ἵνα τοῦτο μὲν οἱ δικασταὶ μὴ ἴωσιν εἰς τὸ αὐτὸ τοῖς μὴ καθαροῖς τὰς χεῖρας, τοῦτο δὲ ὁ διώκων τὴν δίκην τοῦ φόνου ἵνα μὴ ὁμωρόφιός γίγνηται τῷ ἀυθέντῃ· σὺ δὲ τοῦτο μὲν παρελθὼν τοῦτον τὸν νόμον τὸναντίον τοῖς ἄλλοις πεποιήκας· τοῦτο δὲ δέον σε διομόσασθαι ὄρκον τὸν μέγιστον καὶ ἰσχυρότατον, ἐξώλειαν σαυτῷ καὶ γένει καὶ οἰκίᾳ τῇ σῆ ἐπαρώμενον, ἢ μὴν μὴ ἄλλα κατηγορήσειν ἐμοῦ ἢ εἰς αὐτὸν τὸν φόνον, ὡς ἔκτεινα, ἐν ᾧ οὐτ' ἂν κακὰ πολλὰ εἰργασμένος ἠλισκόμην ἄλλῳ ἢ αὐτῷ τῷ πράγματι, οὐτ' ἂν πολλὰ ἀγαθὰ εἰργασμένος τούτοις ἂν ἐσωζόμην τοῖς ἀγαθοῖς· ἃ σὺ παρελθὼν, αὐτὸς σεαυτῷ νόμους ἐξευρών, ἀνώμοτος μὲν αὐτὸς ἐμοῦ κατηγορεῖς, ἀνώμοτοι δὲ οἱ μάρτυρες καταμαρτυροῦσι, δέον αὐτοὺς τὸν αὐτὸν ὄρκον σοὶ διομοσαμένους καὶ ἀπτομένους τῶν σφαγίων καταμαρτυρεῖν ἐμοῦ. [Ant.5.10-12]

‘In my case the prosecution have in the first place caused the trial to be held in the Agora, the very place that is proclaimed off-limits for others on trial for homicide; and they have also made the case assessable, when the law stipulates that the killer should be killed in turn... Second, as I think you all know, all courts judge homicide cases in the open air, for the simple reason that the jurors won’t be together with someone with impure hands and so that the prosecutor of a homicide won’t be under the same roof as the killer. You have evaded this law and done the opposite from others. Also, you ought to have sworn the greatest and strongest oath, calling down destruction on yourself, your family, and your entire household and swearing to confine your case to this murder alone. So, I would not be convicted for anything besides this act, even if I had committed many other crimes, and I would not be acquitted for my good deeds, no matter how many I had accomplished. But you have evaded these rules: you invent laws for yourself, you prosecute me without swearing an oath, and your witnesses testify without swearing, though they ought to testify against me only after swearing the same oath as you with a hand on the sacrificial victims.’³⁶

The speaker seeks to invalidate the case made against him by suggesting that his opponents have used the improper indictment for the crime at hand; he is accused of killing, so he should be tried on a *dike phonou*, not an *apagoge kakourgon*. By listing the features of the homicide courts, he shows how they are once again set apart from the court in which he is currently being tried. The focus on oaths particularly reinforces the belief that the homicide courts were more likely to get to the truth of the matter, and avoid the kind of deception that his opponents have allegedly planned in the present case. Rhetorically, the passage aims to undermine his opponents’ choice to prosecute him in the dikastic court, but it also reflects the mythologising of

³⁶ Tr. Gagarin.

the homicide courts as a space intrinsically concerned with truth and rigorous justice. The invocation of divine sanctions in the homicide courts for those who bear false witness and the mention of restrictions related to pollution create an image of a procedure more highly esteemed than the average, and recalls the divine beginnings of the Areopagus and the generally religious locations of the homicide courts.³⁷

The speech also addresses the homicide laws, which the speaker says are more suited to his case than the *apagoge* procedure by which he has been arrested:

καίτοι τούς γε νόμους οἱ κεῖνται περὶ τῶν τοιούτων, πάντας ἂν οἶμαι ὁμολογήσαι κάλλιστα νόμων ἀπάντων κεῖσθαι καὶ ὀσιώτατα. ὑπάρχει μὲν γε αὐτοῖς ἀρχαιοτάτοις εἶναι ἐν τῇ γῆ ταύτῃ, ἔπειτα τοὺς αὐτοὺς ἀεὶ περὶ τῶν αὐτῶν, ὅπερ μέγιστόν ἐστι σημεῖον νόμων καλῶς κειμένων· ὁ γὰρ χρόνος καὶ ἡ ἐμπειρία τὰ μὴ καλῶς ἔχοντα ἐκδιδάσκει τοὺς ἀνθρώπους. ὥστε οὐ δεῖ ὑμᾶς ἐκ τῶν τοῦ κατηγοροῦ λόγων τοὺς νόμους καταμανθάνειν, εἰ καλῶς ὑμῖν κεῖνται ἢ μή, ἀλλ' ἐκ τῶν νόμων τοὺς τοῦ κατηγοροῦ λόγους, εἰ ὀρθῶς καὶ νομίμως ὑμᾶς διδάσκουσι τὸ πρᾶγμα ἢ οὐ. οὕτως οἱ γε νόμοι κάλλιστα κεῖνται οἱ περὶ φόνου, οὐδ' οὐδεὶς πώποτε ἐτόλμησε κινήσαι... [Ant.5.14-5]

‘I think everyone will agree that the laws governing these matters are the finest and most righteous of all laws. They are the oldest established laws in this land, and their main points have always remained the same, which is the best sign of well-enacted laws; for time and experience teach people the faults in things. Therefore, you should not learn from the prosecutor’s words whether the laws are good or not, but rather let the laws instruct you whether or not the prosecutor’s words give an accurate account of the situation. Thus the laws on homicide are the finest, and no one has ever dared change them...’³⁸

This sentiment is repeated in almost exactly the same words at Antiphon 6.2, this time in a speech probably delivered in one of the homicide courts. It is likely that this was reflective not only of a *topos*, at least for Antiphon, but one that he believed would be persuasive both to a *dikastic* jury in speech 5 and a jury of *ephetai* in speech 6, and was therefore a key tenet of Athenian homicide ideology. The passage expresses the view that the laws are long-established, and have never been altered since the time of their writing.³⁹ It also extrapolates from the laws’ endurance that

³⁷ See Chapter 3.1.3.

³⁸ Tr. Gagarin.

³⁹ We should not suppose that the homicide laws were in fact never altered from the time when they were written; as times change, so must the laws, in order to accommodate new possibilities and situations. The incomplete nature of our extant text of Draco’s law makes it impossible to be certain which of the Athenian laws pertaining to homicide were in fact written by Draco, or whether some laws were added or amended by the time of our sources. See Hignett (1952) 308; Gagarin (1981a) 21-26, particularly: ‘If this is an accurate interpretation of Antiphon’s expression, it suggests a simple way to account for both the verbatim preservation of Drakon’s original law in 409/8 and also the

they are well-written, because otherwise they would have been changed since their initial enactment, as time and experience would have exposed any flaws. Such an idea represents not only the Athenian faith in their homicide laws, but also in their lawgiver. It seemed apparent to the Athenians that Draco got it right the first time.

The idea that the antiquity of the homicide laws guarantees their quality is concurrent with general Athenian ideas about antiquity and authority. Several sources present the general belief that things progress from better to worse, rather than from worse to better.⁴⁰ The Athenians were not exempt from the Greek tendency to idealise the past as a place of prosperity and wisdom, and they therefore assumed that anything that had been established in antiquity had to be imbued with those same qualities. As the sources reflect, this was clearly true of the homicide laws. They are generally presented as the oldest laws in Athens, due to the narrative of Solon's abolition of all previous laws except Draco's laws on homicide. Solon's validation of the laws acts almost as a double enactment: they have been established in antiquity and reaffirmed for their excellence in the more recent past.

It is interesting to note that the homicide laws may have been understood to be so immutable and long-lasting because of a clause in Draco's law that prevented the law's change, which is quoted in Demosthenes 23:

ἤκούσατε μὲν τοῦ νόμου λέγοντος ἄντικρυς, ὃ ἄνδρες Ἀθηναῖοι, “ὄς ἂν ἄρχων ἢ ιδιώτης αἴτιος ἢ <τοῦ> τὸν θεσμόν συγχυθῆναι τόνδε, ἢ μεταποιήσῃ αὐτόν, ἄτιμος ἔστω καὶ οἱ παῖδες καὶ τὰ ἐκείνου.” [D.23.62]

probable existence of later provisions in Athenian homicide law. We need only assume that any change in the homicide law was made by an amendment to the law rather than by the revision of the existing procedures. Such a theory would also explain how changes could have been made without violating Drakon's express prohibition against altering his law (D.23.62). An amendment would not directly alter any of Drakon's original provisions, though some amendments may in fact have modified or even negated them. Moreover, as we shall see below, some amendments included specific references to the existing law. These amendments may have been added to the end of Drakon's law or perhaps were published separately.' (23) Presumably Gagarin means 'amendments' in the sense of separate additions to the main text, rather than alterations. Although this argument rationalises the Athenian ability to make alterations to the laws while maintaining a narrative of continuity, it ignores the fact that amendment is still change; ultimately, the inevitable changes to the homicide laws are denied by the tradition in order to maintain the ideology. Cf. the discussion of amendments to Solon's laws in Leao and Rhodes (2015) 8.

⁴⁰ For example, Hesiod's ages of man show a clear sense of decline over the ages with the more heroic ages firmly in the past (*Op.*109-201); for more on Hesiod's view see Currie (2012). The idea is also championed by Isocrates, in speeches 7 and 12, for example. The sophists presented a cross-current to this belief in the fifth century (see O'Grady (2008) 12), but generally, the belief in decline prevailed.

‘You have heard the law stating outright, men of Athens, that whoever, whether archon or private citizen, shall be responsible for confounding this law (*thesmos*),⁴¹ or shall alter it, he will be *atimos*, along with his children and his property.’

Szegedy-Maszak’s model suggests that the introduction of a law against altering the laws was a standard part of the creation of a legend surrounding a lawgiver,⁴² and yet this clause, if genuine, is not mentioned anywhere else in relation to Draco. The immutability of the laws is figured in popular belief as a product of their success, rather than a piece of strict legislation. It is likely that the two attributes each served to shore up the other; the laws were never changed because they were excellent, and excellent because they were never changed.

It is clear, and understandable, that homicide was considered to be one of the worst possible crimes in Athens, and the veneration of the laws and courts that dealt with it reflected that attitude. We can see this summarised in Demosthenes:

φέρε γὰρ πρὸς Διός, τί μάλιστ’ ἂν ἀπευξαίμεθα πάντες, καὶ τί μάλιστ’ ἐν ἅπασι διεσπούδασται τοῖς νόμοις; ὅπως μὴ γενήσονται οἱ περὶ ἀλλήλους φόνοι, περὶ ὧν ἐξαίρετος ἡ βουλή φύλαξ ἢ ἐν Ἀρείῳ πάγῳ τέτακται. [D.20.157]

‘So tell, by Zeus, what should we reject most of all, and what should all of our laws do most zealously? What will it be if not people slaying each other, for which the council of the Areopagus is appointed as our special protector?’

The Areopagus is singled out as *the* body that enforces the homicide laws, and the homicide laws are implied to be the most important in the city. The effect is heightened by the identification of the court as a legal ‘special protector’ against the crime of homicide. Indeed, although there were five separate courts for different kinds of homicide trials, the Athenians when talking about homicide laws in general repeatedly associate them solely with the Areopagus. They are regularly defined by their relation to the court that dealt with the most serious cases of homicide:

ἀνάγνωθι δέ μοι καὶ τοῦτον τὸν νόμον <τὸν> ἐκ τῆς στήλης τῆς ἐξ Ἀρείου πάγου. [‘Νόμος’] ἀκούετε, ὦ ἄνδρες, ὅτι αὐτῷ τῷ δικαστηρίῳ τῷ ἐξ Ἀρείου πάγου, ᾧ καὶ πάτριόν ἐστι καὶ ἐφ’ ἡμῶν ἀποδέδοται τοῦ φόνου τὰς δίκας δικάζειν, διαρρήδην εἴρηται τούτου μὴ καταγιγνώσκειν φόνον, ὃς ἂν ἐπὶ δάμαρτι τῇ ἑαυτοῦ μοιχὸν λαβὼν ταύτην τὴν τιμωρίαν ποιήσῃται. [Lys.1.30]

⁴¹ The word *thesmos* was commonly used instead of *nomos* to describe the laws of Draco; see e.g. *IG I³ 104.20, And.1.82, Ath.Pol.4.1.*

⁴² Szegedy-Maszak (1978) 207.

‘Read me this law also, the one from the *stele* on the Areopagus. [Law.] You hear, gentlemen, how the court of the Areopagus, to which the ancestral right of judging homicide cases belongs, as has been reaffirmed in our own days, has expressly decreed that a man is not to be convicted of homicide if he captures an adulterer in bed with his wife and exacts this penalty from him.’⁴³

In this case the rhetoric of the Areopagus’ influence is particularly striking since the trial, though still concerned with homicide, was taking place at a distance from that court, in the Delphinion. The jurisdiction of the larger and perhaps more well-known homicide court is rhetorically extended over all of the courts dealing with homicide; although they are separate spaces, they are unified in the collective consciousness by the influence of the Areopagus. This passage refers to the ‘*stele* on [lit. ‘from’] the Areopagus’, which seems to have been an inscription of some or all of the homicide laws that was probably separate from the inscription supposedly set up at the Stoa Basilea.⁴⁴ The presence of such an inscription would visibly reinforce the association of the Areopagus with the full body of Athenian homicide laws.

Equally interestingly, Lysias bypasses Draco as lawgiver and implies that the homicide laws were created by the Areopagus court directly, demonstrating how centrally concerned with the enforcement of these laws the court was believed to be. This passage should not necessarily be taken as evidence that the Areopagus court actually had the power to pass laws on homicide or any other subject. Despite the Athenian preoccupation with individual lawgivers, it seems unlikely that the right to enact legislation would be allowed to as small a group as the Areopagus Council, despite their relative civic experience as ex-archons. The fact that some mentions of justifiable homicide appear in the 409 text of Draco’s law suggests that it was possible that the homicide law regarding adulterers could have been a part of it, but we cannot be certain. In this instance, however, it is likely that Lysias ascribes the writing of the homicide law to the Areopagus court in order to rhetorically solidify the link between the two and amplify the importance of the law that he is using to support his case. He also goes on to use the concept of the lawgiver in §31, so he may be using the Areopagus simply to avoid repetition. In any case, he appears comfortable presenting a version of the Areopagus that may run counter to the jury’s experienced reality.

⁴³ Tr. Todd.

⁴⁴ *IG I³* 104. The *stele* mentioned in Lysias may also be the source of the ‘laws of the Areopagus’ quoted in D.23.22. See also Stroud (1968).

Lysias mentions that it is the ‘ancestral right’ of the court to deal with homicide cases, emphasising a sense of continuity from the founding of the court to the present moment, in order to underscore the court’s authority. This is particularly effective in the aftermath of not one but two oligarchic coups and democratic restorations. A similar sentiment can also be found in Demosthenes 23, with explicit reference to the court’s persistence through different regimes.⁴⁵ It is interesting to note that these narratives of continuity gloss over the fact that the jurisdiction of the Areopagus had altered significantly since its instigation. The court had become a council under Solon, gaining notable political powers.⁴⁶ Later, in 462/1, many of these powers were stripped under the reforms of Ephialtes.⁴⁷ When discussing homicide, though, a rhetoric that acknowledged those changes would undermine the force of the argument from antiquity. In this case, the only important aspect is the court’s retention of the jurisdiction over homicide with which the name of the Areopagus became synonymous. By contrast, when discussing the Areopagus’ political power in Isocrates 7, the speaker expounds the virtues of the Areopagus in the past and laments the Council’s loss of power.⁴⁸ Nevertheless, he maintains that the reputation of the Areopagus still exerts a strong, sobering influence over those who enter it.⁴⁹ It is clear that, though the formal power of the Areopagus fluctuated through Athenian history, its authority in the city persisted, and was the root of its ideology. For forensic orators who wished to make use of the court’s ties to homicide, the most important factor was its enduring jurisdiction in this area.

⁴⁵ D.23.66: τὰ δ’ ὕστερον, τοῦτο μόνον τὸ δικαστήριον οὐ τύραννος, οὐκ ὀλιγαρχία, οὐ δημοκρατία τὰς φονικὰς δίκας ἀφελέσθαι τετόλμηκεν... ‘In later times, this is the only court which no tyrant, no oligarchy, no democracy has dared to deprive of homicide trials...’

⁴⁶ Wallace (1989) 48-69.

⁴⁷ *Ath.Pol.*25.2; *Plu.Cim.*15.2, *Per.*9.4. The Areopagus also came under suspicion in 337/6, as evidenced by their inclusion in a decree against tyranny (*IG II³* 1 320). See also Ostwald (1986) 70-3 on Ephialtes’ reforms; Ostwald (2009) 230-44 on the powers of the Areopagus prior to the reforms; Wallace (1989) 70-93 on the changing role of the Areopagus after Solon and under Ephialtes.

⁴⁸ *Isoc.*7.55.

⁴⁹ σημείοις δ’ ἂν τις χρήσαιτο περὶ τῶν τότε καθεστώτων καὶ τοῖς ἐν τῷ παρόντι γιγνομένοις· ἔτι γὰρ καὶ νῦν ἀπάντων τῶν περὶ τὴν αἴρεσιν καὶ τὴν δοκιμασίαν κατημελημένων ἴδοιμεν ἂν τοὺς ἐν τοῖς ἄλλοις πράγμασιν οὐκ ἀνεκτοὺς ὄντας, ἐπειδὴν εἰς Ἄρειον πάγον ἀναβῶσιν, ὀκνοῦντας τῇ φύσει χρῆσθαι καὶ μᾶλλον τοῖς ἐκεῖ νομίμοις ἢ ταῖς αὐτῶν κακίαις ἐμμένοντας. τοσοῦτον φόβον ἐκεῖνοι τοῖς πονηροῖς ἐνεργάσαντο, καὶ τοιοῦτο μνημεῖον ἐν τῷ τόπῳ τῆς αὐτῶν ἀρετῆς καὶ σωφροσύνης ἐγκατέλιπον. [*Isoc.*7.38.] ‘And we may judge what this institution was at that time even by what happens at the present day; for even now, when everything connected with the election and the examination of magistrates has fallen into neglect, we shall find that those who in all else that they do are insufferable, yet when they enter the Areopagus hesitate to indulge their true nature, being governed rather by its traditions than by their own evil instincts. So great was the fear which its members inspired in the depraved and such was the memorial of their own virtue and sobriety which they left behind them in the place of their assembly.’ (tr. Norlin)

In Lysias 1, Euphiletus exploits this unifying effect, hoping to give his own argument the weight of Areopagus legislation. This may have been particularly effective in this instance as the trial took place at the Delphinion, and thus at a distance from the most well-known court for homicide. Language that unified the laws and courts for homicide under the power of the Areopagus would add legitimacy and strength to the speaker's argument by showing that they were all part of the same revered system. A similar effect is found in Lysias 6, which took place in a dikastic court, and thus even further from the homicide courts:

δεινὸν δέ μοι δοκεῖ εἶναι· ἐὰν μὲν τις ἀνδρὸς σῶμα τρώσῃ, κεφαλὴν ἢ πρόσωπον ἢ χεῖρας ἢ πόδας, οὗτος μὲν κατὰ τοὺς νόμους τοὺς ἐξ Ἀρείου <πάγου> φεύξεται τὴν τοῦ ἀδικηθέντος πόλιν... [Lys.6.15]

It seems to me astonishing that if somebody wounds a man physically, in his head, his face, his hands, or his feet, then according to the laws from the Areopagus he will be exiled from the city of his victim...⁵⁰

Once again, the laws are not linked to Draco in any way, but rather to the Areopagus court that enforces them. This time there is no mention of the *stele*, but the laws are simply presented as 'on [i.e. from]' the Areopagus. This may refer to the location of the inscribed laws, and could simply mean the laws under which cases are tried at the Areopagus.⁵¹ The idiomatic use of *ex*, however, may be ambiguously intended to imbue the laws with the authority of the court and imply that the Areopagus is the source of law. Thus the speaker can make his rhetorical point about the importance of the laws relative to the impiety laws with which he is supporting his own case. Once again, we see the rhetorical effect of ideology in contrast with historical reality; in this case a little more is known about the duties of the Areopagus apart from homicide, but at times in the sources the court and the crime become almost synonymous.

The combined effect of all of this mythologising is that the homicide laws, courts, and procedures are repeatedly set apart from the rest of the legal system in the Athenian consciousness. Although the courts were not instigated by Draco, they nevertheless become inextricably and almost exclusively linked to his laws, forming

⁵⁰ Tr. Todd.

⁵¹ Of course, the law in question here is actually for wounding, but the concept is still inextricably tied up with the ideology of the homicide courts, if not the actual laws themselves. As the speaker is comparing wounding a person to damaging a statue of a god, it would not make sense to invoke the homicide laws, as the statue clearly could not be 'killed'.

an institution of homicide laws and procedures. The homicide laws are unique in containing so many provisions for different kinds of homicide and specific locations in which to hold the trials. The Athenians were clearly aware of this unique comprehensiveness, and it compounds the perception of homicide as set apart. The homicide laws are imagined to be unaltered since their inception, despite this being unlikely in reality, and therefore can be perceived as unalterable, as shall be seen in relation to Demosthenes 23. The act of setting apart these diverse and intricate measures for dealing with homicide unifies them as a cohesive group, which can alternatively be referred to under the auspices of certain of its component parts, particularly Draco and the Areopagus. Homicide legislation and procedure becomes a monolithic presence in the world of Athenian law, ideologically if not actually separate, and always defined by and associated with a certain set of characteristics. This ideology was, though, flexible enough to be a valuable rhetorical tool, and capable of surprising variation and nuance. An exceptionally sophisticated example can be found in Demosthenes 23, in which the ideology of homicide is moulded to create a strong foundation for the speaker's argument.

2.2 DEMOSTHENES 23: A CASE STUDY IN THE RHETORICAL APPLICATION AND MANIPULATION OF HOMICIDE IDEOLOGY

Demosthenes 23 is a *graphe paranomon* case against a man named Aristocrates. Aristocrates proposed a decree for the protection of the mercenary general Charidemus, a supporter of the Thracian leader Cersobleptes, who was allegedly trying to oust two other leaders and consolidate his own power.⁵² Charidemus had worked both for and against Athens, and although he was currently in the city's favour and had been awarded citizenship, he also had many enemies. Demosthenes quotes from the decree near the beginning of the speech:

‘ἂν γὰρ ἀποκτείνῃ τις Χαρίδημον’ γράψας καὶ παραβὰς τὸ τί πράττοντα εἰπεῖν, πότερ’ ἡμῖν συμφέροντα ἢ οὐ, γέγραφεν εὐθὺς ‘ἀγώγιμον ἐκ τῶν συμμάχων εἶναι.’ [D.23.16]

Having written, ‘for if anyone kills Charidemus’, and passed over saying what he is doing, whether to benefit you or not, he wrote straight away, ‘he shall be liable to arrest from the place of our allies.’

⁵² On the distinction between *psephismata* and *nomoi*, see Hansen (1978). For the political situation surrounding the case, see Roisman (2006) 95-103; Sealey (1993), esp. 130-143; Waterfield and Carey (2014) 263.

Later in the speech, Demosthenes modifies his quotation of the decree to suggest that the killer will be liable to seizure *pantachothēn* ('from all sides', 'everywhere').⁵³ Demosthenes devotes a chapter of the speech to the word, and it may indeed figure in the original decree. He also suggests that the decree contains sanctions against any individual or city harbouring Charidemus' fugitive killer.⁵⁴ As Demosthenes' argument is centred on the comprehensive nature of Athenian homicide law and the omission of similar comprehensive clauses from the decree, it is not in his interest to provide extensive details of its contents.⁵⁵

The speaker proposes to attack the decree on three bases: that it is illegal, that it will harm Athens, and that Charidemus is not worthy of such privileges.⁵⁶ It is the first of these attacks that will concern us here. Roughly the first third of the speech is devoted to underlining the illegality of Aristocrates' decree by listing a number of laws and examining the ways in which the decree contravenes or disregards them. The case is not particularly strong. Demosthenes' primary argument is that the decree ignores standard homicide procedure, but as Harris notes, Demosthenes' is 'a strained reading of the decree; all the term 'subject to arrest' (*agogimos*) implied was that the killer was subject to extradition so that he could stand trial in Athens.'⁵⁷ It may have been this weakness that resulted in Demosthenes' extensive and detailed engagements with multiple laws in the speech, in order to show a variety of possible ways for the *psephisma* to be unlawful.

Alongside the quoted laws, Demosthenes also includes a summary analysis of the roles of the five homicide courts. Because the decree has to do with Charidemus' potential killer, almost all of the laws invoked concern homicide in some way.⁵⁸ Throughout the discussion of the laws and courts, Demosthenes utilises aspects of homicide ideology to emphasise his point that Aristocrates' decree is both illegal and shockingly out of keeping with Athenian legal ideals. The ideology provides context in which the arguments from compliance are intended to work, mostly providing a strong sense of the rectitude of the Athenian system and, by

⁵³ D.23.34.

⁵⁴ D.23.81, 85.

⁵⁵ As Papillon (1998) notes, decrees of inviolability were not uncommon (12 n.43); D.S.16.92 records a similar decree in favour of Philip.

⁵⁶ D.23.18.

⁵⁷ Harris (2013) 269. On extradition and this phrase in Demosthenes 23, see Lonis (1988).

⁵⁸ For a discussion of the likelihood of the documents preserved in the speech being genuine, see Canevaro (2007) 37-76.

contrast, the lawlessness of Aristocrates' decree. The ideology, however, does not always exactly reflect opinions found in other sources, and, indeed, does not remain constant throughout the speech; Demosthenes shifts his ideological focus in order to promote a version of homicide ideology that will be the most beneficial to his argument.

2.2.1 VIVIDNESS AND THE DIKASTIC CONTEXT

As we find elsewhere, the most sustained exploitations of homicide ideology occur in speeches from the dikastic courts. Here, firstly, the dikastic setting allows Demosthenes to exploit more freely what we can assume were popular beliefs regarding homicide, since the jury was composed of everyday citizens, not ex-archons.⁵⁹ He did not have to fear that the potential expertise of the jurors would render his ideological approach ineffective. Moreover, the physical distance from the homicide courts will have allowed Demosthenes to increase the metaphorical distance between the two institutions. We do not often see homicide ideology presented in speeches delivered in the homicide courts; where it does appear, it tends to be in the form of short phrases that reassert the authority of the Athenian homicide system in relatively simple ways.⁶⁰ Speeches such as this one, which were deeply concerned with the homicide system but had the advantage of viewing it from outside, were able to idealise it in a much more extensive way.⁶¹ It could be viewed as a complete system, rather than being necessarily focused on the particular court or law that governed the case in question. The specific frame of Aristocrates' decree presents the opportunity for this comprehensive approach.

It remains paradoxical that Demosthenes feels able to praise the homicide courts highly and at length while speaking in a dikastic court. Although no direct comparisons are made between the homicide courts and the dikastic courts, as they

⁵⁹ On the social composition of the dikastic jury, see Todd (1990a).

⁶⁰ E.g. Lys.1.30, Ant.6.2; see Chapter 2.1.2.

⁶¹ This may have been a product of the more flexible rules on relevance in the dikastic courts; discussion of homicide laws could be undertaken in homicide courts, but too much focus on the topic could seem like digression (see Chapter 4). In addition, the sources do not provide us with any information regarding time limits for speakers in homicide trials. Measurement was performed by water-clock and appears to have been based on the type of punishment, as seen in *Ath.Pol.*67; punishments for homicide were death or exile, which are listed, but in a highly fragmentary portion of the text. A specific measurement is suggested by the fact that all of our extant homicide speeches are around 50 chapters in length. This may, however, be a result of the fact that speakers in the homicide courts delivered two speeches per trial, resulting in two shorter orations rather than one longer one. See MacDowell (1978) 249-50 for a discussion of the passage in *Ath.Pol.*

are in the bolder Antiphon 5, the extensive passages of praise run the risk of sounding like criticisms of the way the dikastic jury does its job. In this case, we may imagine that the pride in and respect for the homicide courts that Demosthenes hopes to exploit in his listeners will be responsible for dispelling any negative connotations, and that therefore the jury had no problem in hearing other courts praised so highly. As in all cases, however, the speaker's praise of the homicide courts is strategic; this is not simply a matter of conjuring up collective reverence. By presenting the homicide courts as such excellent institutions, but showing that their integrity is threatened by the actions of Aristocrates, Demosthenes casts the present dikastic jury as the protectors of their illustrious homicide laws and courts, thereby providing them with their own sense of righteous justice. This, too, would help to override any possible offence to the present jury.

The distance from the homicide courts grants Demosthenes another opportunity: to engage in passages of *ekphrasis*.⁶² Throughout the discussion of the illegality of the decree, Demosthenes makes the physical existence of the laws and the courts clear to the jurors, and encourages them to see them in their imaginations. In the discussion of the second quoted law, there is a reference to the physical presence of the laws; namely, the *axones* on which they were inscribed. The speaker states:

‘ἐξεῖναι ἀποκτείνειν καὶ ἀπάγειν.’ ἄρ’ ὡς αὐτόν; ἢ ὡς ἂν βούληται τις; πολλοῦ γε καὶ δεῖ. ἀλλὰ πῶς; ‘ὡς ἐν τῷ ἄξονι εἴρηται’ φησίν. τοῦτο δ’ ἐστὶν τί; ὃ πάντες ἐπίστασθ’ ὑμεῖς. [D.23.30-1]

“It is lawful to kill him and to arrest him.” Does he say that they are to be taken to the house of the prosecutor, or as he pleases? No, indeed. How then? “As it is specified on the first *axon*”, it says. What does this mean? All of you know.’⁶³

It is not certain that the *axon* specified here is the first *axon* of Draco's law, but it seems likely.⁶⁴ The assertion that ‘all’ of the members of the jury would know the method prescribed on the *axon* acts as if to create a physical copy of the laws standing in the courtroom, which the jury can read and comprehend. The laws are characterised not as an abstract force in the city, but as a physical presence to which

⁶² On *ekphrasis*, see Webb (2009).

⁶³ Tr. Vince.

⁶⁴ For a discussion of the significance of the phrase ‘*protos axon*’ in the 409 inscription of Draco's law, see Harrison (1961). On the *axones* more generally, see Stroud (1979).

citizens had access, emphasising their importance as a part of the running of the city. Aristocrates' decree, then, is presented as disregarding these important and prominent laws.

The summary of the homicide courts, too, takes the jury on a 'virtual tour' of the ideological spaces that Aristocrates' decree ostensibly ignores. The unusual attention paid to each individual court acts as if to walk the jury through the spaces one at a time. Different aspects of each court are thrown into relief as the speaker moves through the argument, so the extent of Aristocrates' offence is calibrated. As the jury are led through these ideological Athenian spaces, they are shown the almost physical damage that Aristocrates' decree will do. The section establishes the homicide system as not a collection of laws and courts in the abstract, but a physical institution and comprehensive authority in Athens, and therefore a real part of the city. The victim of Aristocrates' crimes grows from the part of the legal system dealing with homicide to the physical fabric of Athens. The damage done by the decree moves out of the realm of the abstract and hypothetical and becomes a more concrete threat.

2.2.2 ANTIQUITY, IMMUTABILITY, AND AUTHORITY

Several of the common aspects of homicide ideology identified in the first part of this chapter are used in the speech to establish the authority of the institutions against which Aristocrates is allegedly offending. One of the most prominent is the motif of antiquity. The antiquity of the homicide institutions⁶⁵ in Athens can be seen in Demosthenes' description of the Palladion court and the procedures for dealing with involuntary homicide:

ταῦτα μὲν δὴ δύο τηλικαῦτα καὶ τοιαῦτα δικαστήρια καὶ νόμιμ' ἐκ παντὸς τοῦ χρόνου παραδεδομένα οὕτως ἀναιδῶς ὑπερπεπήδηκεν. [D.23.73]

'So now there are two courts of great antiquity and customs passed down over time against which this shameless man has transgressed.'

The antiquity of the laws is not merely mentioned, but explicitly demonstrated. In his discussion of the law regarding the inviolability of convicted killers who are properly observing their exile, Demosthenes defines its key terms:

⁶⁵ See above, Ant.5.14-5, 6.2.

...ἔγραψεν ‘ἐάν τις τὸν ἀνδροφόνον κτείνει ἀπεχόμενον’ φησὶν ‘ἀγορᾶς ἐφορίας.’ τί τοῦτο λέγων; τῶν ὁρίων τῆς χώρας· ἐνταῦθα γάρ, ὡς γ’ ἐμοὶ δοκεῖ, τὰρχαῖα συνῆσαν οἱ πρόσχωροι παρά θ’ ἡμῶν καὶ τῶν ἀστυγειτόνων, ὅθεν ὠνόμακεν ‘ἀγορὰν ἐφορίαν.’ [D.23.39]

‘...he wrote “if any man kill a killer” and says ‘frontier market’. What does he mean by this? The boundaries of the country; it was there, I suppose, that borderers from both neighbouring and our own countries would meet, and that is why he speaks of a “frontier market”.’

This is a rather more subtle way of reinforcing the antiquity of the laws than we have seen elsewhere. The approach adds nuance to an argument that could otherwise become cliché through repetition. From Demosthenes’ description, it is clear that the quoted law contained language that was likely not to be familiar to the jury: he finds it useful to provide a definition of ‘frontier market’. This suggests that the quoted law is indeed old, as language usage had begun to change. It also reinforces the idea that the homicide laws had never been altered, even to remove anachronistic references such as this one.

Although Demosthenes does not explicitly address these implications, his explanation of the meaning of the phrase would have reinforced the idea that the jury was dealing with the potential corruption of long-established and immutable laws.⁶⁶ This use of the antiquity of the courts is particularly effective as it is representative of their authority, and therefore directly tied to the purpose of the case. This is a stronger use than that seen above in Antiphon 6, where antiquity is invoked more simply to confirm the grandeur of the present proceedings. Here, as in Antiphon 5, the ideology of antiquity and authority and the opponent’s disregard for it is the key to the speaker’s case. Demosthenes states that Aristocrates is not only subverting Athenian laws, but the oldest Athenian laws. His haste is contrasted with the long-standing laws ‘passed down over time’ to prove their worth. The antiquity of the courts and procedures is taken as a sign of righteousness and suitability; there is no suggestion of outdated laws that need to be changed. The shame of the transgressor is directly proportional to the status of the institutions against which he has offended.

⁶⁶ Cf. the arguments surrounding the archaic language of the legislation in question in Lys.10, especially the comparison with the law of Solon presented at §17-20, which explicitly notes the connection between antiquity of law and archaic language. This case clearly suggests that Athenians were in the habit of continuing to use legislation that employed archaic language and that the language was generally considered to be understood by all. From these cases it does not seem to have been necessary to update the laws with more current language, presumably because they remained in regular use and the meaning of the archaic language was not forgotten.

The more culturally important the courts are made to seem, the more effective is Demosthenes' argument that Aristocrates is a criminal for allegedly disregarding their authority.

The concept of antiquity forms a useful ideological background, but Demosthenes' most focused attention in this regard goes to another common dimension of homicide ideology: immutability. Demosthenes draws particular attention to a law that prescribes the punishment of *atimia* for anyone who frustrates or alters the homicide laws in question [§62].⁶⁷ Demosthenes argues logically that if Aristocrates has transgressed all the previously mentioned laws by proposing an alternative course of action in the case of a homicide, he has also broken this one. Demosthenes' argument hinges on the depiction of Aristocrates as a corrupt lawgiver overriding the established laws of Athens; for such an argument, the immutability of the homicide laws is the key aspect of ideology that will contribute to its success. By exploiting this particular belief, Demosthenes adds even greater weight to the charge of *graphe paranomon*: Aristocrates is accused not only of contradicting laws with his decree, but of contradicting laws that specifically could not be and never had been altered. Aristocrates is not only disrespecting the laws themselves, but the explicit wishes of the lawgiver. Thus, by focusing on the immutability of the laws, Demosthenes intends to make what he characterises as Aristocrates' changes to the law particularly offensive to the Athenian jury and to Athenian law in general.

2.2.3 JUSTICE AND COMPREHENSIVENESS

Once Demosthenes has characterised Aristocrates as a corrupt lawgiver who has attempted to subvert the established homicide laws of Athens with his own decree, he proceeds to attack the nature of that decree. Demosthenes' reading imagines a procedure that is supremely unjust, both in its proposed treatment of Charidemus' potential killer and in its failure to comprehensively account for all possibilities in the event of a killing. This is achieved primarily through characterising the existing Athenian homicide laws and courts as just, fair, comprehensive, and, unusually, generous. The decree is then compared with these traits, and found to be lacking.

⁶⁷ See above, 52-3.

This ideology is present in the background of the entire section of the speech. The homicide laws are regularly described in positive language; thus, the decree is immediately implied to be characterised by the opposite qualities.⁶⁸ The discussion of the Areopagus court concludes by stating that the court was conceived ‘well and lawfully,’ unlike the decree.⁶⁹ The court is idealised as a place of fair and restrained justice, performed in proportion to the crime and with no extra benefits for those who bring a case, except for the satisfaction of seeing the criminal punished in accordance with law. The procedures of exile at the Palladion are praised in similar terms of justice.⁷⁰ The discussion of the Prytaneion emphasises the justice of allowing anyone or anything accused of killing a fair trial, which Aristocrates’ decree has allegedly denied.⁷¹ The *argumentum a fortiori* does of course probably distort the purpose of the law, which is not to provide justice to the perpetrator of the crime but to avoid religious pollution by leaving a ‘killer’ untried. Demosthenes, however, is able to present it as an extreme of fairness, thus making Aristocrates’ decree appear to be wildly unjust. Terms of piety imply that the justice is performed not simply by human standards but by divine ones, thus once again raising the authority of the courts. Impiety, then, is tacitly included in the dimensions of Aristocrates’ crime.

The purpose of the presentation of the just nature of the homicide laws is, of course, to highlight the unjust nature of Aristocrates’ decree. For Demosthenes, this unjustness is rooted in the alleged failure of the decree to legislate comprehensively for all possible situations in which Charidemus could be killed and his killer arrested. If Demosthenes’ account of the contents of the decree is accurate, then Aristocrates has indeed limited his proposal to state only that if Charidemus is killed, his killer should be arrested. Of course, this does not necessarily suggest that the arresting party may do whatever he wishes with the killer, and there is no evidence in the speech of any statement by Aristocrates suggesting that the killer may be imprisoned, tortured, or killed with impunity. Demosthenes, though, takes a hyperbolic approach to this omission, reeling off a list of detailed laws in

⁶⁸ For example, the fourth law is introduced as ‘a humanely and well enacted law’ [νόμος ἀνθρωπίνως καὶ καλῶς κείμενος, §44]. The sixth law, which defines lawful homicide, lays down the different categories for killing ‘piously and well’ [καίτοι σκέψασθε ὡς ὀσίως καὶ καλῶς ἕκαστα διεῖλεν ὁ ταῦτ’ ἐξ ἀρχῆς διελόν, §54].

⁶⁹ καλῶς καὶ νομίμως [D.23.70].

⁷⁰ D.23.73.

⁷¹ D.23.76.

comparison to Aristocrates' seemingly short and vague decree. These laws cover a variety of eventualities, and present Athenian homicide law as truly comprehensive. This comprehensiveness is emphasised by the attention Demosthenes pays to each of the homicide courts in turn, allowing all five a section of discussion and praise. As we have seen, few other sources acknowledge the multiplicity of courts, and fewer still their various features and procedures; often, they are grouped together under the aegis of the Areopagus. But here, it is clear that the multiplicity of courts is essential to Demosthenes' point, as it illustrates extensive, considered legislation for this most serious of crimes. The more laws and courts he lists, the weaker Aristocrates' decree will appear by comparison.

The comprehensive nature of the laws becomes most important as Demosthenes reaches the crux of his argument: that retribution for killing should not be in the hands of private individuals, but of the law. Subservience to law was a crucial tenet of Athenian ideology. In Aeschylus' *Eumenides*, this paradigm was distilled in the court of the Areopagus.⁷² Elsewhere, both Lysias and Demosthenes represent the laws as agents charged with resolving interpersonal conflicts.⁷³ Thus, the ideal of Athenian justice was the substitution of impersonal civic bodies for personal vendettas. By contrast, Demosthenes portrays Aristocrates' decree as a return to the days of blood vengeance, making it seem especially retrograde. This is most apparent in the discussion of the law on arrest of suspected killers:

διαφέρει δὲ τί τοῦτο τοῦ ὡς αὐτὸν ἄγειν; ὅτι ὁ μὲν ἀπάγων, ὃ ἄνδρες Ἀθηναῖοι, ὡς τοὺς θεσμοθέτας, τοὺς νόμους κυρίους ποιεῖ τοῦ δεδρακότος, ὁ δὲ ὡς αὐτὸν ἄγων ἑαυτόν. ἔστι δ' ἐκείνως μὲν, ὡς ὁ νόμος τάττει, δοῦναι δίκην, οὕτω δέ, ὡς ὁ λαβὼν βούλεται. πλεῖστον δὲ δήπου διαφέρει τὸν νόμον κύριον τῆς τιμωρίας ἢ τὸν ἐχθρὸν γίγνεσθαι. [D.23.32]

'And how is this different from taking him to the house of his captor? In that by taking him, men of Athens, to the Thesmothetae, the captor puts the laws in charge, but puts himself in charge if he takes him to his own house. In the former case, justice is given as the laws prescribe, but in the latter, as the captor wishes. It may make a great difference whether it is the laws in charge of vengeance, or a private enemy.'

It is clearly posited here that it is fair that the laws should have full control of homicide, and that no jurisdiction should be in the hands of private citizens. The argument implicitly places Aristocrates in the role of the imagined 'private enemy'

⁷² A.Eu.470-89.

⁷³ Lys.1.26; D.54.17-19.

attempting to subvert the rule of law on behalf of his ‘relative’ Charidemus and revert to more vengeful methods of dealing with homicide. The concept of the complete control of the laws over homicide jurisdiction is placed in direct opposition to the concept of *echthra*, which likely defined early homicide retribution before the laws were put in place, and probably continued as the ideological basis for the belief that prosecuting homicide was a family matter.⁷⁴ Aristocrates’ decree is thus associated with pre-legal methods of dealing with homicide, which were by their very nature less comprehensive and generally associated with unjustness from the classical perspective. By contrast, the comprehensive nature of the homicide laws allows them to limit the potential damage done by those involved in a suit for homicide—for example, by preventing retributive killing.

Demosthenes in this instance clearly favours the idea that the homicide laws have absolute jurisdiction in this regard, which strengthens his argument that Aristocrates is bypassing an essential authority. Although homicide was still believed to be a matter for the family to resolve, in the context of this speech emphasis is placed on the limits delineated by the laws. Resolution could only take place through the medium of the courts, rather than through the extraction of blood money or retributive killing between families. This, the speech suggests, was fairer to the killer, and made it less likely that the severity of his punishment would greatly outweigh his crime, as the agents of the law prescribing it were, at least ideally, impartial. Thus, once again, the exact focus of the ideology of homicide is adjusted to provide the most benefit to Demosthenes’ argument.

2.2.4 THE SHIFTING LAWGIVER

Demosthenes shows the clearest manipulation of the jury’s perception of homicide ideology in his unusual rhetorical use of the homicide lawgiver. Throughout the speech a lawgiver is referred to obliquely several times, though flexibility is seen in terms of specificity of identity and number. The language at §31 clearly suggests a single lawgiver.⁷⁵ A contradictory passage is found in the description of the Areopagus, which places particular focus on the oaths sworn by both parties and their implications for the procedure of the trial [§67-9]. The section ends:

⁷⁴ See Chapter 1.3 and Phillips (2008) 13-32.

⁷⁵ See above, 60.

τί δήποτε, ὧ ἄνδρες Ἀθηναῖοι, τοῦθ' οὕτως ἔχει; ὅτι οἱ ταῦτ' ἐξ ἀρχῆς τὰ νόμιμα διαθέντες, οἵτινές ποτ' ἦσαν, εἴθ' ἥρωες εἶτε θεοί, οὐκ ἐπέθεντο τοῖς ἀτυχήμασιν, ἀλλ' ἀνθρωπίνως ἐπεκούφισαν, εἰς ὅσον εἶχε καλῶς, τὰς συμφοράς. ταῦτα μέντοι πάνθ' οὕτω καλῶς καὶ νομίμως ἔχοντα ὁ γράφων τὸ ψήφισμα τουτὶ παραβεβηκῶς φαίνεται· ἐν γὰρ οὐδ' ὀτιοῦν ἐνι τούτων ἐν τῷ ψηφίσματι τῷ τούτου. [D.23.70]

‘Now why is that so, men of Athens? Because those who arranged these customs in the beginning, whoever they were, heroes or gods, did not take advantage of mistakes, but humanely lessened the misfortune, as much as they rightly could. The writer of this decree has clearly transgressed all of these well-conceived customs, for there is not one mention of them whatsoever in his decree.’

Demosthenes completely bypasses the idea that the procedures of the Areopagus may have been put in place by a human lawgiver at all, and emphasises the links between the foundation myths of the court and ‘heroes’ and ‘gods’, raising the court’s authority to an almost divine level.⁷⁶ It is not unusual for the foundation of the Areopagus to be associated with gods or heroes, as we have seen, but the implication that such figures also put the legal procedures for homicide in place is less common. The divine association allows Demosthenes to distance the homicide laws from any kind of human corruption and make use of the idea that a divine origin, like those of the Areopagus court, instils an automatic level of justice and right in a legal system. It is interesting, however, that in spite of his use of an implied divine originator for the homicide laws, Demosthenes still talks of them being conceived *anthropinos*, ‘humanely’, a clear means of drawing a contrast between the homicide laws and Aristocrates’ implicitly inhumane decree.⁷⁷ This perhaps has the effect of signposting the idea that the laws, whether divine in origin or not, are ideally suited for human use, and do not refer to the divine wrath or vengeance that could be negatively connoted by the mention of gods as originators. Thus

⁷⁶ There are three clear examples of ostensibly divine origins for laws in Greece: Zaleucus, who claimed that his laws were inspired by Athene [Arist. fr. 548 Rose]; the Cretans, who believed that their laws were put in place by the mythical leaders Minos and Rhadamanthys [Pl.Lg.624A-625A]; and Lycurgus, whose laws were said to have come from the Delphic oracle [Plu.Lyc.6.1]. Elsewhere, as Gagarin (1989) asserts, divine origins for laws were rare: ‘The claim of divine or semi-divine origin is not widespread, however, and it certainly does not support Beloch’s argument that all the early lawgivers were in fact mythical, semi-divine figures to whom various cities attributed their laws. It is quite possible that some, perhaps even many, lawgivers sought to lend authority to their laws by obtaining oracles or other stories of divine origin to support and publicize them, but this does not constitute evidence against the historical existence of the lawgivers.’ (60-1) Laws were more likely to receive divine sanction than to have divine origins.

⁷⁷ D.23.44.

Demosthenes achieves a balance between the positive aspects of both a human and a divine legislator, and avoids the possibility for any negative view of the laws.

The first four laws explicitly quoted in the speech come disassociated from any specific lawgivers. As Demosthenes reaches the fifth law, the previously elusive figure is finally named:

ὁ μὲν νόμος ἐστὶν οὗτος Δράκοντος, ὃ ἄνδρες Ἀθηναῖοι, καὶ οἱ ἄλλοι δὲ ὅσους ἐκ τῶν φονικῶν νόμων παρεγραψάμην· δεῖ δ' ἂν λέγει σκέψασθαι.
[D.23.51]

‘This is a law of Draco, men of Athens, just as much as the other laws of homicide that I have already mentioned; and it is necessary to consider what he says.’

Although this is the first direct mention of Draco in the speech, Demosthenes takes care to retroactively attach his name to the previously mentioned laws. There is no immediately apparent reason why this would seem like the opportune moment in the speech to mention Draco; his argument for Aristocrates’ transgression of this particular law does not seem weaker than that of any other, and should not require any extra reinforcement. We may imagine that the jury have now heard several laws examined in detail with relation to the case, often with the same points about their righteous and immutable nature being reiterated each time. The mention of Draco, then, may simply be a device to re-establish the importance of these laws in a new way at a strategic point in the speech when the jury’s interest in the speaker’s rather forceful and repetitive point may be beginning to wane. By introducing the legendary name of the lawgiver Draco, the speaker can conjure up all of the associations explored earlier in this chapter in the minds of his listeners, and encourage them to redouble their attention to the matter of the transgression of these important laws.

What of the strategic avoidance of the name Draco up to this point? As we have seen, it was possible for Draco to be associated negatively with the perceived severity of his laws. Here, connotations of severity would be an obstacle to Demosthenes’ argument. Instead, it is the tolerance and unusual generosity of the laws that is at issue for Demosthenes. Severity, if it is to appear anywhere, should be associated not with the homicide lawgiver, but with Aristocrates, whose decree (on Demosthenes’ reading) is supremely unfair to the accused. It may also be pertinent

that avoiding the name of Draco keeps the specifics of the writing of the homicide laws vague. In this way, the delay contributes to Demosthenes' efforts to capitalise on the 'set apart' nature of the homicide laws and procedures as distinct from the rest of the Athenian legal system, and establish their unity and comprehensiveness, and the strength they provide. This is achieved most successfully by avoiding references to specific historical moments; by doing so, it is easy to make the homicide laws, courts, and procedures appear to all be part of one great and forceful institution, and thus to create a sense of the respect it deserves. There is of course rhetorical gain to be had in mentioning the name of Draco: all of the features of ideology linked to him could be brought into play, particularly as his name conjured up such specific and focused connotations. But this would be most effective once the homicide laws and procedures had already been established as a united force; the name 'Draco' would at this stage only add weight, rather than risk showing fractures in the origins of institutions of homicide. This strategic naming, then, emphasises the ideology of unity and separateness from other laws that pervades not only this speech but many other sources, and also leaves room for the ascription of divine power and the employment of strategic vagueness when necessary in Demosthenes' discussion.

From this analysis, it should be clear that the ideologies discussed at the beginning of this chapter had to exist in the popular Athenian imagination for this kind of rhetoric to be effective in an Athenian dikastic court. The legal section of Demosthenes' argument is not solely based on the fact that Aristocrates' decree has broken or disregarded a number of laws, but on the specific qualities of the laws that it has broken. Almost all of the quoted laws are ostensibly part of Draco's homicide legislation, and those that are not are positioned after the homicide laws in order that they may share some of the importance associated with homicide. The speech is particularly interesting here for the way that it shifts focus onto the aspects of ideology that are the most beneficial for supporting Demosthenes' argument. The grounding of the homicide laws in antiquity, their immutability and comprehensiveness, and the legend of Draco all allow Demosthenes to claim that the homicide laws are superior to all the other laws of Athens, and thus to make Aristocrates' decree appear to be utterly illegal.

Indeed, the strongest idea that Demosthenes promotes in this section of speech 23 is that transgressing the homicide laws in any way was among the worst ways in which a decree could be unlawful. Neither Aristocrates nor any of the other figures involved in the decree has actually broken any of the homicide laws; indeed, it is probable that in the event of Charidemus' killing, few or none of the injustices against which Demosthenes warns would actually occur. There is no indication in the recoverable text of the decree that Aristocrates wishes a potential killer to be treated in any manner other than one that conforms to Athenian law. The omission of an explicit statement on the matter, however, whether by Aristocrates or manufactured by Demosthenes, allows the orator to argue extensively that Aristocrates has indeed disregarded the entirety of Athenian homicide law and failed to comply with its comprehensive tenets. The argument is given force by the focus on the ideological belief that, due to the authority of the homicide laws, they dictate the only way in which homicide can be addressed in Athens. By extension, any corruption of these procedures, such as those implied by Demosthenes' interpretation of Aristocrates' decree, must be viewed negatively. Although the main aim of the decree is clearly to protect Charidemus from being killed, Demosthenes gives roughly equal weight to the idea that the decree goes against the homicide laws and the more predictable argument that Charidemus does not deserve such protection. This is probably a product of the charge being a *graphe paranomon*, and thus reliant on showing the decree to be illegal rather than simply inappropriate. It is clear, however, that Demosthenes feels that he is on solid ground in presenting this specific interpretation of the decree's illegality; if he was not confident that it would appeal to the Athenian dikastic jury, it is unlikely that he would have devoted such a long section of detailed analysis to it.

In general, then, Demosthenes draws out another aspect of the ideology surrounding the homicide laws in Athens: that they had to be followed to the letter. The homicide laws were understood to be excellent the way they were, and an attempt by Aristocrates or any other person to corrupt them in any way could easily be presented as an abomination. Demosthenes' reliance on arguments from compliance in this speech ties the crime very clearly not to general illegality but to specific transgressions, and therefore depends upon rhetorical exploitation of the jury's feeling regarding those specific laws. The listing of laws, as if upon a *stèle*

standing in the courtroom, makes Aristocrates' alleged crime not just a matter of theoretical legal transgression, but a very real and present offence against an Athenian institution.

2.3 CONCLUSIONS

As homicide is set apart from other crimes by the nature of its severity and permanence, so is its treatment in law in popular Athenian perception. It is apparent from a range of sources that the Athenians viewed the part of their legal system that dealt with homicide in an idealised way. They understood homicide law as a system based in mytho-historical memory, both the grander myths of Ares and Orestes and the more local myth of the lawgiver Draco. This allowed them a foundation on which to construct the idea of the homicide laws as ancient and immutable, endowed with a great sense of authority. The homicide laws were received with widespread respect; there is no evidence that it would be acceptable to question them or attempt to have them changed. Draco's severity could be criticised, though not within the courtroom context, but his laws could not. They were beyond reproach, comprehensively suitable for every instance of homicide, and therefore would never need to be sidestepped, adapted, or manipulated for any purpose, whether noble or otherwise. All of this combined into an ideology that positioned the homicide laws, courts, and procedures as a unified institution set apart from the rest of the Athenian legal system.

The ideology of homicide did not stand alone, but was part of a wider ideology: not only one that idealised the past, but one that saw Athens as the paradigm for a law-abiding society. Aeschylus presents the Areopagus not simply as the beginning of Athenian homicide law, but as the beginning of all organised law in Greece. Isocrates posits that Athens was the first city to make use of law: if the homicide laws were widely considered to be the oldest in Athens, then these are likely what he had in mind.⁷⁸ Homicide ideology, then, establishes Athens as a city characterised by its righteous and rigorous use of law, and was certainly a source of pride for the Athenians. The ideology would not necessarily make an impression on outsiders so much as it would reassure Athenians themselves of the superiority of

⁷⁸ Isoc.12.124.

their own city. It was a microcosm of an Athenian ideology that formed a basis for a strong and honourable Athenian identity.

Certain aspects of the ideology of homicide appear to be relatively fixed, appearing in many sources and being regularly identified as defining aspects of homicide law and procedure at Athens. But the nature of the ideology as based primarily in popular belief and mythology allows a certain amount of flexibility to many of its dimensions, particularly in rhetoric. Logographers could employ different aspects of the ideology in different situations to various ends, and downplay others that would be less successful in those specific situations. Within the generally unified institution of homicide law, certain aspects could be brought to the fore and examined in detail, while still carrying the weight of the rest of homicide ideology in argument. Mostly importantly, in rhetoric even the ideological separation from the rest of Athenian law could be narrowed, in order to make the institution of homicide law relevant to the whole of Athens and to other specific legal cases. Apart from this, the great authority of the homicide laws may have helped the Athenians to deal with the anxieties they had about the crime and the danger it could pose to the city.

It would be reasonable to suppose that the Athenians would apply these ideologies in their practical interactions with their homicide laws and procedures, treating them with due respect and reverence, and not abusing the important systems for their own personal gain to the potential detriment of the city. This attitude can be seen clearly in Demosthenes 23, where Aristocrates is reviled for allegedly attempting to bypass the homicide laws, and in Antiphon 5, where Euxitheus sees it as a great injustice that his accusers have not prosecuted him under the homicide laws, as this would be the correct course of action for his alleged crime. The homicide laws do not appear on the surface to be politically charged. They do not seek to control political action, as actions such as the *graphe paranomon* do, which can be more readily expected to play a role in unscrupulous political litigations. They are simply intended to deal with the resolution of wrongful killing, and not to correct or control anyone's political or public behaviour in any other way. They are ancient and important laws dealing with a serious crime, and the Athenian attitude towards them strongly suggests they should be treated as such.

As the following chapters will show, however, evidence suggests that this was certainly not the case, and we will repeatedly see examples of Athenians allegedly or actually manipulating homicide laws and procedures to suit themselves and their own ends.⁷⁹ How and why, then, did this ideology of homicide persist throughout sources contemporary with, and indeed long after, these manipulations? One answer is that the Athenians were quite happy to say one thing and do another; particularly in the world of rhetoric, actions were only meaningful in the ways in which they could be interpreted through words, and a successful orator could put a positive spin on any negative action. Ideologies rarely reflect complete realities; in fact, they often present an ideal that is not being followed, in order to encourage a change in action. An ideal is likely to remain an ideal even if it is not achieved, and as such the Athenians kept repeating their seemingly deeply-held convictions about the properties of their homicide laws and procedures, despite being presented with practical evidence to the contrary. Finally, it is likely that perceived corruptions of the homicide laws would be overlooked as the actions of individuals that would not affect the overall system of laws that governed homicide. How these individuals were allowed to exploit the laws within that system, however, and how this exploitation reflected on the ideology, will be explored in successive chapters.

⁷⁹ See Chapter 5.3.

RELIGION, RITUAL, AND THE RHETORIC OF POLLUTION

Homicide is distinguished from most other crimes at Athens, both in the ancient sources and in modern scholarship, by its relationship to *miasma*, or religious pollution. It is clear that, for the Athenians, killing created an anxiety about the possibility of pollution, both for the individual and the city.¹ Surprisingly, however, the Athenian forensic speeches rarely mention pollution with regard to homicide, something that we may have expected to be a fruitful rhetorical tool. How can we explain this apparent absence? The chapter on the subject in Parker's 1983 monograph argued against the existence of a serious belief in homicide pollution in the courts of the fourth century. He draws a comparison between the Nuer people and pre-legal Greece, and argues:

‘[The sanctions of pollution amongst the Nuer] obviously gave symbolic expression to the social gulf created between the two sets of kin by the act of killing. When the order dislocated by the murder was restored, the pollution ended. They also operated as a discreet pressure towards settlement, since the need to guard against a third party setting the pollution off imposed tiresome restrictions on all concerned. Pollution, therefore, is not so much a rationalisation as a vehicle through which social disruption is expressed... The appropriate context for beliefs of this kind about murder-pollution is surely a society that lacks more formal legal institutions. They express and focus concerns that cannot be discharged through fixed channels of procedure: if Orestes had been taken in charge by a policeman, there would have been no need for the Erinyes... If the proper place for a belief in murder-pollution is in a society without courts, we would expect it to wither away or change in meaning once courts are established.’²

Parker uses this view to explain the fact that Athenian forensic speeches mention pollution infrequently and somewhat erratically, failing to draw explicit links between procedure and belief.

The absence has also been noted by other scholars, including MacDowell, who suggests that the majority of potential references to pollution in homicide law

¹ The overwhelming majority of evidence of belief in homicide pollution comes from or is related to Athens, so it is difficult to ascertain whether or not Athens was typical in this regard. See, though, Salvo (2012) on homicide pollution at Selinous and Cyrene.

² Parker (1983) 121, 125-6.

can in fact be interpreted as aiming towards vengeance for the dead man or deterrence of future crimes, and Gagarin, who minimises the appearance of pollution rhetoric in Antiphon outside of the *Tetralogies*, and suggests that such arguments would have been ineffective and carried little legal weight.³ Eck, too, draws attention to the dearth of references in the real speeches compared to both the *Tetralogies* and tragedy, though he gives rather a different explanation from Parker, suggesting not that law supplants religious punishment but rather that law and religion are incompatible.⁴ Thus, he explains, we have references in the *Tetralogies* to acquittals of killers going against both justice and religion: the two are separate spheres. He adds that pollution, being ‘all-or-nothing’ in its approach, is ‘incompatible avec un fonctionnement convenable de la justice’, as it does not allow for different levels of crime, such as accidental killing, shared culpability, or involuntary killing.⁵ In this chapter, however, I intend not only to show that there was indeed a noticeable religious feeling about Athenian homicide trials, and thus that religion and law could cooperate, but also that there are more references to pollution present in the speeches than may be immediately apparent. Although there are no lengthy and explicit references to homicide pollution in the forensic speeches, certain implicit moments can be found that seem to reflect aspects of belief in pollution. If we examine these extracts without comparing them to what we might expect, we may come to new conclusions about both the use of pollution rhetoric and the wider existence of belief in homicide pollution in fourth-century Athens.

This chapter will argue that the presence or absence of pollution rhetoric in the courts is not dependent on chronology or the society’s instigation of a legal system, but on the physical and social context of trials. I will argue that religious procedures and popular beliefs relating to pollution were still a factor in both the courtroom context and the wider societal context of the fifth and fourth centuries, and that they combined to create an environment in which homicide pollution could be used as a successful rhetorical tool in the same way as any other example of rhetoric. The rhetoric of pollution is an aspect of the wider phenomenon of religious rhetoric, and, like all kinds of rhetoric, it relies on a particular context of reception

³ MacDowell (1963) 141-50; Gagarin (1997) 23, 214-15. See also Arnaoutoglou (1993) 115.

⁴ Eck (2012) 252-9.

⁵ Eck (2012) 254.

amongst hearers to have its persuasive effect.⁶ This context will be examined, with regard to both the religious dimensions of the procedures that governed the homicide courts, and the beliefs about homicide pollution that may have existed in the general Athenian consciousness, for example through the myths and themes explored in tragedies to which many Athenian citizens would have been exposed. These beliefs were brought into the courts and, presumably, influenced the jurors; the level and effect of this influence will be examined. In the second half of the chapter, the ways in which pollution rhetoric was used will be discussed in detail, as well as the effect that the location of the trial at the homicide or dikastic courts may have had on the frequency of use of pollution rhetoric. This chapter will question the ‘silence’ of the orators on the issue of homicide pollution, and propose that it is not in fact a silence, but rather a subtle rhetoric presented in less obvious ways than we might expect.

3.1 THE RELIGIOUS CONTEXT OF HOMICIDE TRIALS

3.1.1 WHY POLLUTION FOR HOMICIDE?

Before we look for traces of pollution rhetoric in the orators, we should address the workings of pollution beliefs with regard to homicide. This will allow us to more accurately identify a physical and cultural context of pollution in the late fifth and fourth centuries.⁷

The simplest concept of pollution is as a stain on the hands of a killer with the power to spread to anything with which the polluted party comes into contact. This contagion had the power to cause the sinking of ships and corrupt sacred rituals, amongst other effects.⁸ Although, as Parker rightly points out, pollution was representative of the social consequences of killing, it was also a clearly religious phenomenon. In *On Greek Religion*, Parker identifies the two main aspects of Greek religion that need to be reconciled in order to understand the phenomenon as a whole:

⁶ Other types of religious rhetoric were also possible; for example, for an analysis of religious argumentation in Demosthenes, see Martin (2009).

⁷ There are, of course, numerous references to pollution from before this period, which establish that the belief in pollution as such was genuine. See, for example, Parker (1983) 130-43 and Eck (2012) 89-210 for lengthy discussions of the attitudes to pollution and purification in Homer. Here, however, the focus will be on the period immediately prior to and concurrent with the orators, as they serve as my rhetorical source in the second half of this chapter.

⁸ See discussion below of Ant.5.81-3, Ant.6.45-6, D.21.114-15, and Lys.13.80-1.

‘on the one hand, the fixed and regulated elements of Greek religion were ritual acts, and on the other... volumes could be filled with Greek stories about the gods, speculations about them, appeals to them, criticisms of them.’⁹

The concept of pollution, both for homicide and in other matters, is mainly defined as a religious phenomenon by the ritual acts intended to avoid or dispel its influence.

The nature of the ritual aspects of homicide procedure shall be examined in due course, but the causal link between homicide and pollution is more difficult to pinpoint. Homicide was not the only crime at Athens that incurred pollution: impiety, as seen in Lysias 6, could also leave a stain on the hands of the offender.¹⁰ But homicide is not a clearly religious offence in the same way as impiety, and yet it is distinguished as a crime that seems to require distinctly religious treatment. Impiety, meanwhile, could generally be tried in a standard dikastic court with minimal attention to religion.¹¹ So what gave homicide this distinctly religious character? The relationship between religion and homicide cannot be compared to that seen in many modern religions. As Parker points out, Greek religious doctrine was not based on a holy book or any other form of revelation from the gods that would inform human moral beliefs about homicide or any other crime. They had no text comparable to the Ten Commandments that contained divinely revealed truth telling them that killing was a sin.¹² Generally, the gods were not a major factor in human legislation.¹³ Mythology presented gods and heroes killing frequently, both

⁹ Parker (2011) 2. Parker distinguishes Greek religion using a distinction from Ibn Khaldûn, namely that it is not one of those religions the followers of which ‘have a (divinely revealed) book and... follow the prophets’. (1) Those features listed above, ritual and myth, form the centre of Greek religion, which otherwise varied greatly between locations and deities. Whether or not the label of ‘religion’ as a cohesive concept can be applied to Greek practices is debatable, particularly as the definition of ‘religion’ itself is problematic (see, for example, Donovan (2003) for an anthropological perspective). It is, however, undeniable that certain practices in Greek culture could be called religious for their concerns with beings or forces beyond human understanding, control, and existence. The definition of these ritual practices as aspects of religion will be sufficient for this discussion.

¹⁰ E.g. Lys.6.9-10, 19.

¹¹ See And.1; Lys.6. It is important to note that certain trials for impiety seem to have been tried at the Areopagus court, which was otherwise solely concerned with homicide and wounding; e.g. Lys.7.

¹² Parker (2011) 1. In Plato’s *Phaedo*, Socrates argues that human beings belong to the gods and that therefore suicide is wrong [62b-c]. Although the argument is not extended to homicide, a connection could plausibly be made between the two. This belief does not, however, appear elsewhere in ancient writings about the gods and killing, and should not be taken as representative of Athenian or wider Greek beliefs.

¹³ For a discussion of Greek lawgivers whose laws were believed to have been divinely inspired, see above, 67 n.76.

on purpose and by accident, and often, especially in the case of gods, without punishment, certainly not (with rare exceptions) through legal measures.

It is apparent, therefore, that Greek (and by extension Athenian) religion contained no core tenet that was opposed to homicide, and that the generally acknowledged pantheon of gods were not the offended party in the case of the religious consequences of an unlawful killing. Nevertheless, both the act of homicide and the act of accusing someone wrongfully of homicide are repeatedly referred to in the orators as ‘unholy’ or ‘impious’.¹⁴ It is clear that piety was not an abstract concept but something that mattered in real, legal terms, or prosecutions for impiety such as those seen in Andocides 1 and Lysias 6 and 7 would not exist. Even accusations of impiety that seem to have been made with a political motivation, such as the *graphe asebeias* directed at Diodorus’ uncle in Demosthenes 22, would not have been effective if impiety did not matter in the real world.¹⁵

It seems pertinent that the language of impiety in particular is chosen to condemn the acts, in light of the apparent religious connotations of homicide. In other crimes of impiety that appear in the forensic speeches of the orators, an offence against the gods can be clearly identified; for example, profaning a religious ritual or destroying or damaging an item with religious significance to a certain god.¹⁶ Homicide does neither of these, but it can be connected with a specific group of gods: the Erinyes. In archaic myth, they are the daughters of the Earth,¹⁷ and have links with a number of other chthonic goddesses.¹⁸ In Homer, they play a role as avengers of ‘a crime or insult that occurs between blood kin’.¹⁹ Despite these earlier roles, it was as avengers of the dead that they were most well-known in classical Athens, particularly in the latter half of the fifth century in the tragedies of

¹⁴ E.g. Aeschin.3.224; Ant.1.5, 1.22, 1.26, 5.93, 6.5, 6.6, 6.33, 6.48, 6.51; D.22.2; Lys.10.22, 12.24. Although Demosthenes and Aeschines frequently use these terms as invective, elsewhere they regularly refer to crimes with a religious element. Every instance of *anosios* in Lysias, Andocides, Lysias, and Isaeus refers to a specifically religious issue (And.1.19, 1.23, 1.116; Is.4.19; Lys.1.77; Lys.6.32; see also Ant.5.84). Of 30 instances of *asebeo* and cognate forms in the orators (excluding Demosthenes for invective), 25 refer directly to specifically irreligious behaviour.

¹⁵ For more on this case, see Chapter 3.2.2.

¹⁶ See the accusation of performing the rites of the Mysteries in a private home at And.1.11-12 and Lys.6.51; the accusation of damaging a Herm at Lys.6.11-12; the accusation of destroying or removing a sacred *sekos* at Lys 7.2.

¹⁷ Hes.*Th.*185.

¹⁸ Dietrich (1967) 91-156.

¹⁹ Johnston (1999) 252; for her discussion of these early roles of the Erinyes, see 251-8.

Aeschylus.²⁰ The Erinyes appear prominently in the *Oresteia* seeking vengeance for the dead.²¹ They appear to Cassandra haunting the house of Atreus in the *Agamemnon*.²² Orestes is threatened by their potential pursuit in the *Choephoroi*, and seems to witness their appearance at the end of the play.²³ They act as the avengers of the dead Clytemnestra and the personification of her anger in the *Eumenides*.²⁴ Though the matricide depicted in the tragedy was one of the most heinous crimes imaginable at Athens, the jurisdiction of the goddesses extends to any victim of homicide.²⁵ Indeed, when they were personified, one of them was said to be named Tisiphone, ‘avenger of *phonos* (‘killing’)’.²⁶ Aeschylus has the Erinyes take on attributes of the cult of the Semnai Theai (‘August Goddesses’) in the *Eumenides*.²⁷ Sommerstein suggests that Aeschylus was probably the first to make the connection, but it may have become part of the Erinyes’ mythology, as Pausanias too posits that the two are merely different names for the same group of goddesses.²⁸ If the connection with the Erinyes is believable, then the location of a shrine to the Semnai Theai so near the main homicide court at Athens makes sense, as does their role in oaths sworn at the trials that took place there.²⁹

The Erinyes, however, were not the only supernatural force associated with homicide pollution in the Athenian consciousness. There were also the spirits of the victims themselves, who had power of their own to seek to avenge their deaths. Both the untimely dead and those who died by violence were believed to be restless, and often angry and vengeful.³⁰ Their body parts were used in magical rituals, including those involving cursing another party;³¹ it is clear from this that they were believed

²⁰ There has been some debate as to whether tragedy reflects real religious practice; Mikalson (1991) suggests that ‘the religion found in Greek tragedy is... a complex hybrid, a hothouse plant which never did and probably never could exist or survive in real life.’ (ix) However, Sourvinou-Inwood (2003) convincingly argues for the representation of real religious practice in tragedy, and it is fair to accept that these interpretations of the Erinyes can be representative of Athenian belief and culture.

²¹ See Brown (1983).

²² *A.Ag.* 1186-93.

²³ *A.Cho.* 278ff, 1048ff.

²⁴ As seen near the beginning of the play, 94-177, when Clytemnestra’s ghost awakens the Erinyes and charges them with pursuing Orestes. For more on the Erinyes in the *Eumenides* and their connection with the Semnai Theai, see Lardinois (1993) 315-22.

²⁵ *A.Eu.* 316-20.

²⁶ Apollod. 1.1.4

²⁷ *A.Eu.* 804-7, 833-6, 854-7.

²⁸ Paus. 1.28.6; Sommerstein (1989) 11.

²⁹ See below, 89-90.

³⁰ For an extensive discussion of this, see Johnston (1999) 127-60.

³¹ E.g. *PGM* IV.2574-2601; IV.1872-1926; IV.1390-1495, XIXa, XIXb. See also Faraone (1997) 3.

to have the power to pursue living people. Some purification rituals involved elements of appeasement of vengeful spirits amongst other kinds of ritual cleansing.³² It is Clytemnestra's vengeful ghost which appears in the *Oresteia* to charge the Erinyes with avenging her death.³³ In the *Tetralogies*, spirits were also represented as pursuing the one who killed them, but if the courts failed to bring that person to justice, it was suggested that they could turn their anger on those who let their killer get away with the crime.³⁴ The vengeful dead also appear in Plato's *Laws* among the laws on homicide.³⁵ Unlike the Erinyes, then, who appear in myth to focus on pursuing only the guilty party, it can be argued that the vengeful spirits of the dead are liable to pursue anyone who associates with the guilty party or facilitates their escape from justice.³⁶

The spirits of the dead were believed to attach themselves to those involved in the crime of killing and its resolution. As a result, they can be interpreted in a similar manner to the traditional view of *miasma* for homicide, being a supernatural consequence of killing. As Parker notes, the vengeful dead are an explicit aspect of pollution beliefs surrounding homicide.³⁷ The two, however, are far from identical, and though their workings are related, *miasma* and the vengeful dead are distinct forces. The spirits of the dead are not themselves pollution. They are not 'contagious' in the same way that *miasma* is, but rather they focus on specific parties who have been infected with *miasma*; by contrast, the dangerous 'blood-stain' on the hands of the killer marks out anything or anyone he interacts with as polluted and a source of pollution. The anger of the spirits of the dead posed a religious threat as

³² A.R.4.695-717.

³³ A.Eu.94-117. Although Agamemnon's ghost does not appear in the *Choephoroi*, he is called upon several times to do so (e.g. 156-7, 459-60, 489.) This clearly shows that the spirit of the dead man had the potential be a potent tool in seeking revenge on his killer, as Electra and Orestes beg him to help them achieve vengeance.

³⁴ Ant.2.3.10, 4.1.4, 4.2.8. For more on pollution in the Tetralogies, see Chapter 3.2.1.

³⁵ Pl.Lg.9.865d-e.

³⁶ Johnston posits that some rituals, particularly the initiation into the Mysteries, seem to have created a particular vulnerability to the spirits of the vengeful dead, which were likely to have been represented as playing a role in the 'frightening' initiation. Thus, people guilty of homicide were excluded from the ritual, and the 'lesser mysteries', with their etiological link to Heracles' purification after killing the centaurs, occurred before the initiation in order to perform purifications which, amongst other things, would ensure the exclusion of the blood-guilty. Even those who had not committed such a crime took part in these purification ceremonies, suggesting that they risked the anger of the dead by their potential association with any people who were guilty of such a crime and at large in the city (See Johnston (1999) 130-3.) Killers were of course excluded from all religious rituals in the city, and the Mysteries are merely one example of this.

³⁷ Parker (1983) 106-8.

real as the anger of the gods, with the ability to mark out individuals for pollution.³⁸ *Miasma* and the spirits of the dead are inextricably linked, or they could not be presented interchangeably as they are in the *Tetralogies*, though they are not quite identical. The polluted killer is the source of pollution, but the spirits of the dead and the Erinyes, amongst other potential divine forces, are a catalyst for and source of some of the danger behind pollution. Thus, when the *Tetralogies* present the sole direct force of pollution as avenging spirits and make no mention of ‘bloody hands’, they ‘unabashedly substitute the thing symbolised for the symbol.’³⁹

The polluted killer, then, risks danger to others by corrupting sacrifices and other religious rituals, as well as bringing down the anger of the gods on, for example, those on a sea voyage. The pollution could also spread to other citizens, and even to the land itself, causing crop failure and plague, at least in mythological versions.⁴⁰ The killer can be imagined as a danger to society not necessarily because he may kill again, as would be figured in modern law, but because his killing has corrupted his ritual purity and has the power to do so to others.⁴¹ The killer has also presumably created a dead body, an inherently polluting object.⁴² If the ‘religious character’ of homicide is the danger it poses to the purity of the city and those in it, then we can begin to understand why so many of the procedures for its prosecution have religious overtones.

3.1.2 WHY THE SILENCE?

In order to address the ‘silence’ of the orators on the issue of homicide pollution, we should first examine the number and nature of our sources. Antiphon's speeches are the earliest extant examples of forensic oratory from Athens. All three are cases for homicide, and two out of three of them contain a reference to behaviour that could be interpreted as a reaction, or failure to react, to potential homicide

³⁸ See, for example, *Ant.*2.3.9, 3.3.11-12 for clear examples of the victim's anger at the culprit being acquitted leading to the pollution of those who acquitted him. Plato notes that the man who does not enforce a killer's ban from the public places or does not prosecute the killer ‘takes on himself the *miasma* and the enmity of the gods’, suggesting that the religious effects of pollution are not limited to the anger of the dead [*Pl.Lg.*9.871b].

³⁹ Parker (1983) 107.

⁴⁰ *S.OT.*22-30.

⁴¹ A comparison can be made with the Orphic idea that the human race, which rose from the ashes of the Titans, was tainted by the Titans' killing and consumption of the young Dionysus. In this case, perhaps because the homicide victim is a god, the pollution is strong enough to taint the entire race of humanity despite humans not having actually committed the original crime (see Wili (1955) 73-75.)

⁴² E.g. *S.Ant.*998-1033, *Thphr.Char.*16.9. See also Parker (1983) 32-48.

pollution, though only one of these is from the homicide courts. All three speeches date from the late fifth century. The only extant homicide speech dated later than this and following procedures that take place in a homicide court rather than a dikastic court is Lysias 1, providing us with a very small sample from which to draw our evidence about pollution rhetoric in the homicide courts in the fourth century. Nevertheless, we should examine the context of the speeches that are silent on the issue of pollution, and raise the question of whether there may be another reason for the absence besides lack of belief in pollution. The purpose of homicide speeches is not to prove the presence of pollution, nor could it be, if pollution is merely a ‘vehicle through which social disruption is expressed’, as Parker asserts.⁴³ Although the aspects of procedure that address pollution run throughout Athenian legal processes for homicide, to mention pollution within the speeches is as much a rhetorical device as any other, and therefore dependant on the specifics of the case and the setting of the speech in order to be successful. We do not find the same rhetorical arguments in all speeches of a particular type of case, and we should not expect to find references to pollution in all homicide speeches.

Firstly, we should look briefly at the two homicide speeches that are silent on the issue of homicide pollution. Antiphon 1 is a speech for the prosecution against the prosecutor’s stepmother for poisoning his father. There is no mention of pollution anywhere in the speech, either in reference to *miasma* or the anger of the dead man, despite several calls to avenge him. The image of the father on his deathbed is in this instance more powerful than an image of his restless spirit pursuing his killer, particularly because of the time that has elapsed since the original crime. Lysias 1 is the only extant example from a trial at the Delphinion for a case of lawful killing. Lawful killing still incurred pollution at some level: if one must be purified after a funeral or birth, it is reasonable that even a lawful killing would require at least a basic level of purification too.⁴⁴ In spite of this, no explicit mention

⁴³ Parker (1983) 121

⁴⁴Plato’s *Laws* suggest that certain forms of accidental killing incur pollution and therefore require purification, despite being unintentional (9.865a-b). In spite of this, Plato does not mention a need for purification after certain killings: killing a thief in one’s home by night, killing a rapist of a free woman or boy (as long as the killing is performed by the victim or their family members), killing an adulterer, or killing a person while defending one’s family members (9.874b-d). In all of these cases, the killer is described as *καθαρός*, ‘clean’, after having killed, presumably due to the element of reciprocity in the crimes. These laws were only hypothetical, but nevertheless, no mention is made of pollution or purification in actual extant laws on lawful homicide at Athens (see D.23.72 for the only reference to purification in the context of legal provision). Our sources are of course limited, and we

of pollution is made. Euphiletus characterises himself as an agent of the law, carrying out a deserved execution; assigning pollution to such an act may have undermined his attempt to present it as righteous and just.

There is, however, a hint that the *Lysias* 1 may implicitly acknowledge the danger of pollution. Euphiletus mentions at §27 that his opponents have accused him of having killed Eratosthenes as he ‘took refuge at the hearth’. Hearths, both of the *polis* and of individual households, were sacred to Hestia.⁴⁵ The hearth in a Greek home was the centre of household religion, and the site of numerous rites of passage.⁴⁶ Fire from the *polis* hearth was also ritually used in the establishment of new colonies.⁴⁷ Most importantly, the hearth was also interpreted as a sanctuary at which a suppliant could seek protection.⁴⁸ During the trial of Theramenes, after he was sentenced to death for subverting the Thirty, Theramenes sought sanctuary at the hearth of the *boule*; according to Diodorus Siculus, this was to ensure that ‘those taking him would be involved in impiety against the gods’.⁴⁹ If Euphiletus had killed Eratosthenes at the hearth, he would not only be potentially violating the legal requirement that the adulterer be caught and killed in the act for the killing to be lawful, but would also have violated and polluted the sanctuary.⁵⁰ There is no

must assume that all killings required at least some level of ritual purification. As Parker notes, ‘either the lawgivers thought the position on purification self-evident, or they knew nothing of pollution, or they felt that it lay outside the province of the law.’ (Parker (1983) 366) It is also possible that references to purification in the laws have simply been lost. Logically, it would seem that any homicide that involved the shedding of blood could be believed to incur the stain of that blood on the killer, whether or not the crime was intentional, and would therefore require ritual purification even if it did not require legal redress. Proximity to a corpse would also compound the threat of pollution.

⁴⁵ *h.Ven.*21-32 tells the story of Hestia’s vow of virginity and subsequent instigation as goddess of the hearth. Both *h.Hom.*24 and 29, to Hestia, call for her to come into the *oikos*. On Hestia and hearth cults, see Kajava (2004).

⁴⁶ *A.Th.*275 portrays the hearth as a site of victory sacrifice. The household hearth was the location of the rite of accepting a new child into the family; see *Ar.Lys.*757 and Hamilton (1984). Fire from the hearth was carried from a bride’s house to that of her husband in wedding ceremonies; see Oakley and Sinos (1993) 34-5. On archaeological remains of hearths, see Tsakirgis (2007).

⁴⁷ Malkin (1987) 114-88. On the prytaneion hearth as the ‘home’ of the city, see Miller (1978) 19-20.

⁴⁸ E.g. *Hom.Od.*14.159. On supplication and the law, see Naiden (2004), especially 76-80 on the removal of the suppliant from the sanctuary.

⁴⁹ ὁ δὲ φθάσας ἀνεπήδησε μὲν πρὸς τὴν βουλευαίαν Ἑστίαν, ἔφησε δὲ πρὸς τοὺς θεοὺς καταφεύγειν, οὐ σωθήσεσθαι νομίζων, ἀλλὰ σπεύδων τοῖς ἀνελοῦσιν αὐτὸν περιποιήσασθαι τὴν εἰς τοὺς θεοὺς ἀσέβειαν. [D.S.14.4.7] ‘They were going to arrest him, but, forestalling them, Theramenes leaped up to the altar of Hestia of the Council Chamber, crying out, “I flee for refuge to the gods, not with the thought that I shall be saved, but to make sure that my slayers will involve themselves in an act of impiety against the gods.”’ (Tr. Oldfather) See also *X.HG.* 2.3.52 and Rhodes (1985) 34-5 on hearths as sanctuaries.

⁵⁰ Interestingly, Parker (1983) 227 suggests that hearth fire may have had the power to cleanse pollution as part of a purification ritual, though this would not prevent the hearth from being able to be polluted itself. On the phrasing of the law on lawful homicide, see below, 168 n.29.

specific reference to polluting the hearth in the speech, but it may plausibly have been one of the dimensions of the prosecution's accusation of wrongful killing. Even if it was not, the text reaches out to the cultural knowledge that killing one who had taken refuge at the hearth was an act of impiety. This conclusion would be implicit to the jurors, even if it was not made explicit in the prosecutor's speech.

Although, as we shall see in the second half of this chapter, one out of the other four of the homicide speeches from homicide courts does make some rhetorical reference to pollution, the fact remains that the reference is confined to only a few chapters of the speech. This does indeed seem like a dearth of references to the phenomenon, particularly in the light of the wealth of explicit references to pollution in the *Tetralogies*.⁵¹ It is these texts, though, that allow us to argue most strongly against the decline of pollution rhetoric by the time of the orators. The *Tetralogies* must have been roughly contemporary with the rest of Antiphon's work, and therefore his choice to use pollution rhetoric so prominently in the hypothetical texts and not in the real forensic speeches must have been dependent on factors other than time.

It is through comparison with the two homicide prosecution speeches from cases in the dikastic courts that we may begin to draw a conclusion as to what those factors might be. Antiphon 5 was delivered in the late fifth century, contemporary to Antiphon's other work. The procedure is an *apagoge kakourgon*, which was tried in the dikastic courts; the speaker states very clearly in his argument that he believes that such a charge is inappropriate. He also makes a clear reference to the danger of pollution.⁵² Lysias 13, one of the latest speeches in a trial expressly for homicide, also mentions pollution.⁵³ This speech was probably delivered no earlier than 399,⁵⁴ several years after the overthrow of the Thirty, during whose rule the defendant Agoratus had allegedly been an informer for the oligarchs. The trial was likely to have had a relatively high profile, as it addressed a serious political situation only a few years in the past. Regardless of profile, it is explicitly stated as being a case of *apagoge* for homicide, and therefore was also tried before a standard Athenian

⁵¹ See Chapter 3.2.1.

⁵² See Chapter 3.2.4.

⁵³ See Chapter 3.2.5.

⁵⁴ Todd (2000a) 138-9.

dikastic jury.⁵⁵ Antiphon and Lysias' use of narrative details that rely on belief in pollution for their rhetorical effects in these speeches demonstrates that they believe such a strategy will be effective, which means that they are relying on the jury having a certain pre-existing awareness of the danger of pollution generated by homicide. The date of Lysias 13 clearly shows that homicide pollution was still a living element of collective belief at the very beginning of the fourth century. Whether or not this belief was of the same strength as in previous centuries is beside the point. For the orators, it was only necessary for there to be enough belief amongst the jury for their rhetorical statements to be well-received. Some belief in pollution, however unspecific or lacking in ritual observance, must have persisted in order to make arguments based on pollution possible. Lysias would be unlikely to employ an argument that he did not think would be favourably received. It is clear that pollution was still an argument worth making, if one that was perhaps used less regularly than it might have been.

If the passage of time and the establishment of a legal system do not lead to the eradication of pollution rhetoric, then there must be other factors at work. It is here that we must consider the implications of the loss of the performance context of these trials for our understanding of the trial dynamic and thus the most appropriate rhetoric. When we read the speeches, we do not hear them delivered in the space in which they would originally have been performed; we do not take part in the rituals of the trial; we do not see the courtroom; and we do not bring to them the contemporary social knowledge that those present at the trial would have had. If we attempt, however, to recover a sense of this physical and social performative context, we may be able to answer the question of the silence of the orators on the topic of pollution. Both Antiphon 1 and Lysias 1 take place in homicide courts: Antiphon 1 at the Palladion, and Lysias 1 at the Delphinion. Two of the three homicide speeches that do refer to pollution, and indeed the two that mention it most explicitly, Lysias 13 and Antiphon 5, come from trials that took place in dikastic courts. I propose, then, that the social and physical context of belief in pollution in the homicide courts was strong enough to render arguments from pollution less useful, and that this accounts for the infrequency of their appearance in the extant sources. In contrast, the dikastic courts lacked a physical context of anxiety about pollution, and so the

⁵⁵ Lys.13.85.

orators had more freedom and impetus to explore arguments from pollution. In order to test this theory, we must attempt to recover the nature of the physical context of religious anxiety regarding pollution in the homicide courtroom, as well as examining evidence for belief in pollution in wider classical Athenian society.

3.1.3 CREATING RELIGIOUS CONTEXT

The religious overtones of homicide prosecution begin in the foundation myths and locations of the various homicide courts at Athens.⁵⁶ The most famous of these courts, the Areopagus, had a noticeably divine flavour from its beginnings in two major foundation myths.⁵⁷ In the version of the myth that describes the trial of Ares, the gods themselves sat in judgement.⁵⁸ In Aeschylus' version, Athena, Apollo, and the Erinyes are all present at the trial of Orestes, and Athena decrees that the Areopagus will always be a court at Athens.⁵⁹ Pausanias also refers to Orestes' trial at the Areopagus, and suggests that on his acquittal he set up a shrine to Athena there.⁶⁰ There was also a shrine to the Semnai Theai near the Areopagus, and an oath was sworn to those goddesses by anyone acquitted in a homicide trial there;⁶¹ they were also named in pre-trial oaths.⁶²

Outside of the Areopagus, the other courts for homicide also had religious dimensions. The Delphinion and Palladion courts each seem to have been located at temples. Although some locations for convening dikastic courts have also been found in proximity to religious sites, their locations were not as consistently religious as those of the homicide courts.⁶³ The dikastic courts were multi-purpose, and individual sites were not dedicated to a small range of crimes in the same way as the homicide courts, so religion cannot be explicitly tied to any particular crimes tried in the dikastic courts. Although the religious sites of dikastic courts (where relevant) will have offered religious authority and solemnity to the proceedings, the dikastic

⁵⁶ See Chapter 2.1.2.

⁵⁷ The dikastic courts at Athens did not have such religious beginnings, but rather were interpreted as having a more political mythology: for example, *Ath. Pol.* suggests that the institution of appeal to the courts was founded by Solon (9.1) with changes or additions being made later by other Athenian leaders (25.2, 27.2). In the testimonia regarding all of the Athenian courts compiled by Boegehold (1995), no foundation myths of this type can be seen; no associations with myth via nomenclature can be found except at Ardetos and the court at Lykos (150-192.)

⁵⁸ *E.El.*1258-63.

⁵⁹ *A.Eu.*681-710.

⁶⁰ *Paus.*1.28.5.

⁶¹ *Paus.*1.28.6.

⁶² *Din.*1.46-7.

⁶³ See Blanshard (2004) 20-1

courts lacked the close and constant relationship with religion that can be clearly seen in the locations of the homicide courts. As well as the Areopagus, the other homicide courts also had their own foundation myths, which lacked direct links to the gods, but nevertheless featured heroic figures from mythology.⁶⁴ The proximity to religious sites, and particularly to the shrine of the Erinyes in the case of the Areopagus, allows for the greatest possible divine authority at the trial without actually polluting religious sites. It is probable that none of the trials took place within the temples, but instead were convened nearby.⁶⁵

The religious foundations, and especially the sites of the courts, provide underlying mythographical and physical religious contexts for crimes that were tried at them. This context would have been apparent to all present at the court, as the location and nearby shrines would provide visual reminders that there was a religious aspect to the proceedings. But scholars have, for the most part, acknowledged that legal procedures in homicide cases at Athens had a pronounced religious aspect too.⁶⁶ Ritual aspects of homicide trials may have served to reinforce the setting and create a greater sense of religious solemnity overall. No single one of the procedures or locations involved in trying homicide cases would necessarily stand out as unusually religious, but the combination of all of the religious aspects together serves to create a strong sense that there is a need for a greater level of religious control than in other types of crimes. This religious overengineering suggests that homicide is disruptive of human relations with the divine, which in turn is best explained by the supernatural forces set in motion by the taking of human life.

⁶⁴ See Chapter 2.1.2.

⁶⁵ The exact location of the courts, particularly in relation to the *temenos* of each temple, is difficult to pinpoint, as the sources merely state that the courts were located 'at' the temples. Presumably the courts would have to be outside the *temenos* of the temple to avoid polluting sacred ground. Boegehold (1995, 47-8) suggests that there may have been two sanctuaries called 'Palladion', the first near Ardetos Hill to the east of the Acropolis, and the second near Phaleron. Travlos (1971, 412-3) identifies a building at the first site as the lawcourt. Boegehold, however, suggests that the latter was probably the site of the homicide court, and speculates on the location's relation to pollution: 'If the Palladion were situated in Phaleron, then the prescribed route [of an exiled homicide leaving the city] would start at Phaleron rather than at Athens. A convicted homicide would in that case reach the sea, which is to say, pass beyond Athens' border, sooner than he would if he had started from the city. He would accordingly represent a possible threat to the health of the community for a shorter time.' (48) The location of the court at the Delphinion seems more secure: Travlos (1971, 83-90) identifies a building excavated in 1939 as the court, which lies to the southwest of a temple building excavated in 1962 and identified as that of Apollo Delphinios. Whether or not the lawcourt fell within the *temenos* of the temple cannot be ascertained, but the two locations seem to have been separated by a wall, with the buildings at a distance of perhaps ten metres from each other (see Travlos (1971) 90 fig. 113.)

⁶⁶ See for example Phillips (2008) 62-3, 115; Martin (2009) 38.

Cases against homicides were registered with the Basileus, the archon who dealt with religiously significant matters.⁶⁷ Once a case was registered, the accused was henceforth banned from certain public places until the time of the trial. Demosthenes lists these places as the lustral water, libations, mixing vessels, sacrifices, and the agora.⁶⁸ Antiphon shows that those accused of homicide were also banned from the lawcourts.⁶⁹ References to the ban also appear elsewhere in the sources.⁷⁰ In part, this ban acted as a social sanction to the killer, depriving him of any kind of public existence; many of the places included in the ban were also off-limits to those subject to *atimia*.⁷¹ But it should be stressed that the religious element of the ban exists alongside this social element. As the majority of the locations included in the ban had overt religious significance, it seems certain that this was understood as a way of preventing a polluted person from corrupting the city's rites. The agora and the lawcourts also had religious and ritual characteristics, but the ban from these locations may have doubled as a means of keeping the polluted person from interacting with others, and therefore spreading pollution, as much as possible. This is corroborated by the fact that the ban may have applied not only to homicides, but to those accused of other forms of impiety, and who were therefore polluted in different ways, too.⁷² This duality of social and religious sanction is also seen in the fact that trials for homicide were always convened in the open air.⁷³ Although being in an enclosed space with a killer will have also carried negative social connotations, Antiphon explains the procedure as a way of preventing the jurors and those prosecuting the killer from having to be *homorophios* ('under the same roof') with a killer 'whose hands are unclean'.⁷⁴

The procedures of the court 'at Phreatto' described by Demosthenes were perhaps the most obviously and heavily ritualised. The court dealt with a convicted killer returning to Attica to stand trial for a further killing by making that killer stand off-shore on a boat while the jury judged him from the land.⁷⁵ Although this

⁶⁷ See Mirhady and Avilés (2013) 210-11.

⁶⁸ D.20.158 (see above, 44.)

⁶⁹ Ant.6.36.

⁷⁰ E.g. Ant.3.3.11; Pl.Lg.9.871a.

⁷¹ See Todd (1993) 142-3.

⁷² Lys.6.9-12.

⁷³ Ant.5.11; Ath.Pol.57.4.

⁷⁴ Ant.5.11.

⁷⁵ D.23.77.

ritualisation does not explicitly indicate the presence of a religious element, it does clearly show a desire to keep the killer away from the land of Attica. This is, of course, in line with the punishment of exile that the killer had received for his previous crime, and he would be liable to summary execution if he re-entered Attic land. But the procedure also keeps the accused (as in all homicide cases) at a physical remove from his judges, which suggests that this is also a way of preventing his polluting influence from spreading through Attic land. In this case, even a brief return to Attic land to stand trial for a new crime would be unacceptable.

These religious procedures were compounded during the process of the trial by special oaths, sworn both before the trial by the prosecutor, defendant, and witnesses, and by the victorious party after the trial.⁷⁶ Although oaths were sworn at all Athenian legal proceedings, those sworn at homicide trials are indicative of a greater level of religious solemnity than those attested in the dikastic courts.⁷⁷ The homicide oaths not only involved a strong self-curse like other court oaths, but were also sworn on the cut pieces of a specific set of victims, which set them apart from the simpler oaths sworn in the dikastic courts.⁷⁸ The cut pieces came from three different sacrificed animals, and the swearer had to stand over or on the pieces, and possibly handle them too.⁷⁹ This emphasised the importance and solemnity of the occasion, as oaths of this sort were the most forceful,⁸⁰ provided a greater sense of

⁷⁶ D.23.67-8; Aeschin.2.87; Ant.5.11, 6.16, Lys.10.11. Witness oaths in the homicide courts were complicated by the fact that the witness not only had to swear that his testimony was true, but that the accused was either innocent or guilty depending on for which side he was speaking (Ant.1.8, 1.28, 5.12; see MacDowell (1963) 98-100). Presumably, witnesses would sometimes be discouraged from giving evidence about certain events if they were not sure about the particulars of the killing itself, as they would be liable to perjure themselves while swearing to the truth of their testimony.

⁷⁷ The oath referred to most often by the orators is the dikastic oath. For the general use of the dikastic oath in the Athenian courts, see Harris (2013) 101-137, Mirhady (2007). References to the dikastic oath can be found many times in the orators, as Harris catalogues in an appendix (353-356). The oaths sworn by dikastic jurors contained general clauses referring to fairness, relevance, and compliance with Athenian law. For an example of the dikastic oath, see *Ath.Pol.*67.1.

⁷⁸ MacDowell (1963) 92; Torrance (2014) 140. Ant.6.6 suggests that the oaths set the homicide courts apart from the dikastic courts. The animals sacrificed were a boar, a ram and a bull (Dem.23.67.) For more on the oaths in the homicide courts, see Sommerstein and Bayliss (2013) 111-15. On the self-curse in oath-swearing, see Konstantinidou (2014). Although explicit self-curses were not limited to homicide litigants' oaths, and appear in several other contexts, particularly Greek tragedy, Konstantinidou notes that 'self-cursing by *litigants* is attested exclusively in homicide trials' (my emphasis), setting these oaths apart within the Athenian legal context. (39)

⁷⁹ Ant.6.6, Aeschin.2.87, D.23.67-8. For the potential translation 'on' rather than 'over', see Faraone (2002) 81 n.11. Konstantinidou (2014) notes how the handling of such pieces 'represent[s] the potential activation of the self-curse': that is, the death of the swearer. (22)

⁸⁰ Faraone (2002) 82-3.

ritual, and were seen in very few other contexts in the Classical period.⁸¹ Faraone has shown how oaths of this nature were usually invoked when there was a danger threatening the city in which the oath was being sworn, suggesting here that the killer poses a threat to the city, perhaps through pollution.⁸² The swearing of the oaths on such a specific sacrifice also gives them potency, and the handling of the bloody cut pieces (*tomia*) forms a powerful metaphor for the control of the killer's bloody hands by the legal system, as well as conjuring up images of aversion of pollution by handing the victim's blood in certain ways.⁸³

The swearing of oaths and performance of sacrifices in a certain space can also be interpreted as a way of designating or 'marking off' that space for a specific ritual use. Although such delineation occurs to some degree in all Athenian courts, these are not the simple rituals that create the dikastic courts.⁸⁴ The nature of the oaths goes over and above standard formulae for legal matters, explicitly involving the gods in the process and tying the proceedings very closely to religious matters. The great significance of such oaths would have been immediately apparent to those who witnessed their swearing at the trial; the loss of the performative context of the trial makes the significance less obvious to the modern scholar. The force and quantity of oaths sworn in the homicide courts suggests a stronger than average desire to delineate and control the space for a certain purpose. These measures aimed to prevent the trials performed there from spilling over into the spaces of everyday life. Blanshard suggests that such rituals of delineation may have made Athenians uneasy, as they exemplify 'the ease with which these boundaries [between public and private spaces, lawcourts and the rest of the city] can be elided.'⁸⁵ If this was the case in dikastic courts, then we can assume an extra level of anxiety in the homicide courts where these additional measures were performed. The act of a homicide trial, therefore, has a feeling of religious danger about it that needs to be contained, and that is easy to associate with the corruptive and contagious nature of *miasma*.

⁸¹ The arbitrators at the selection of a new group of archons (and perhaps the archons themselves, though the text is unclear) took an oath and declared their decision upon the cut pieces of multiple sacrifices (*Ath.Pol.55.5*); an oath against bribes and cheating was sworn by various participants and adjudicators at the Olympic games (*Paus.5.24.9-11*.)

⁸² Faraone (2006) 152-3

⁸³ Cf. A.R.4.699-717, 477-9. Faraone (2002) also suggests that this use of the cut pieces, as well as that seen elsewhere, replicated the tearing apart by the gods of one who broke the oath being sworn. (83)

⁸⁴ See above, 32 n.83.

⁸⁵ Blanshard (2004) 23.

All of these religious and ritual aspects combine to ‘create’ the space of religious anxiety and significance in which homicide trials were enacted. Many of these factors were physical, and thus would have been witnessed by those present at the trial. This would have created a physical, visual rhetoric of pollution, which would have resonated with those present but was not preserved in the texts of the speeches. But for this physical rhetoric to be successful, a prior belief in the connection between homicide and pollution would have to exist in the minds of those present. This would be brought into the court from events experienced by Athenians in wider society. Numerous links between religion, pollution, and homicide can be seen outside of the homicide courts and procedures, both in public institutions and literary sources. Athenians would have been aware of this, and would have carried such knowledge into both the homicide and the dikastic courts when judging trials, allowing them to more fully experience the physical rhetoric of pollution implied by the courtroom space. The existence of this knowledge can be clearly seen in numerous contemporary and later sources.

In the realm of Athenian public life, Demosthenes gives us an account of a consultation of the *exegetai* after the killing of a freedwoman.⁸⁶ The *exegetai* were interpreters of religious law, and appear in a number of legal cases with some religious element.⁸⁷ The speaker in D.47 refers to an earlier conflict with his opponents, when the two men came into his home and attacked an old freedwoman of his household, causing wounds that later resulted in her death. He then consulted the *exegetai* for advice on how to proceed after the death. The speech depicts the *exegetai* explaining the proper rites for the woman’s burial, stating that a relative of the dead woman should carry a spear to her tomb, make a proclamation (presumably against the killers), and guard the tomb for three days. This is clearly a ritual requirement, but the *exegetai* are also able to offer advice on the ways in which the speaker should proceed legally. The burial rites and the legal matters are kept somewhat separate here: the *exegetai* first ‘expound’ (*exegeomai*) the religious law regarding the burial rites, which is their area of expertise, and then less formally

⁸⁶ D.47.68-70.

⁸⁷ The *exegetai* of the Eumolpidae appear in Lys.6.10, as interpreters of the ‘unwritten’ (*agraphoi*) laws dealing with the impious. *Exegetai* also appear at Is.8.39 in order to provide advice to the speaker on the most pious and proper method for his arrangement of his grandfather’s burial rites. Both of these speeches, as well as D.47, suggest that the role of the *exegetai* was to disseminate their knowledge of rite and ritual, according more to custom than to formal law. See also Garland (1984) 82-3, 114-16; Garland classifies the various *exegetai* as ‘religious experts’.

‘give advice’ (*sumbouleuo*, *paraineo*) on what to do regarding the potential prosecution of the killers.⁸⁸ It is apparent that, although legal matters are not strictly their primary professional domain, they nevertheless have the knowledge necessary to provide the advice. This suggests that the knowledge of the *exegetai* about the more overtly religious aspects of a killing, such as burial rites, also gave them a much greater than average knowledge of legal procedures for homicide. Although the speaker also consults his friends and his own judgement in this case, he does not approach any other officials for advice, which suggests that he considered the *exegetai*, expounders of specifically religious law, to be the best official parties to advise him on his potential instigation of a homicide suit.

As far as literary sources are concerned, tragedy provides us with the richest array of links between pollution and homicide.⁸⁹ Apart from the instances concerning the Erinyes discussed above, pollution plays a key role in the plots of several plays, while others are rife with the language of pollution. Orestes is both pursued by the Erinyes and accused of having *cheiras phonias* (‘bloody hands’), encompassing both the true sense of *miasma* and the idea of danger through divine pursuit.⁹⁰ Oedipus is the cause of the *miasma* that has plagued the land of Thebes and is preventing crop growth, and though he is not pursued by the Erinyes, he remains *asebes* (‘impious’) and a *miastor* (‘pollutor’).⁹¹ Heracles’ slaying of his children incurs *musos* (‘defilement’) and *anosion miasma* (‘unholy pollution’).⁹² Even one who is not directly responsible for a certain killing can be called *miastor*.⁹³ These myths are of course all presented in drama, which must allow for a certain distortion of real, everyday practices.⁹⁴ It seems unlikely, however, that such ideas could be presented to an Athenian audience successfully if they did not have some basis in actual religious belief. If we may read the Athenian theatre as a space for discussing and debating religious ideas that replicated much in terms of real contemporary rituals

⁸⁸ D.47.68-9.

⁸⁹ For an in-depth discussion of the role played by both homicide pollution and other kinds of *miasma* in Greek tragedy, see Meinel (2015).

⁹⁰ A.Eu.317. Apollo claims that he has purified Orestes at 576-8.

⁹¹ S.OT.1382, 353. For an analysis of Oedipus’ killing of Laius in relation to Athenian homicide law, see Harris (2010).

⁹² E.HF.1155, 1233.

⁹³ E.Andr.615.

⁹⁴ Mikalson (1991) notes that most of the homicides committed in tragedy are between family members, a fact that naturally augments the disruption of social norms and the likelihood of pollution (168).

and cult locations, rather than a purely hypothetical world of gods and spirits with no basis in actual religious practice, we can easily accept that *miasma* for homicide was a valid belief throughout the mid- and late fifth century.⁹⁵

Perhaps one of our richest late fourth-century literary sources for pollution is Theophrastus' *Characters*. In Chapter 16, the 'superstitious man' expresses fear about all kinds of pollution that he might encounter in his everyday life. No mention is made in the text of fear of homicide pollution, but this should not lead us to conclude that homicide pollution had vanished from the public consciousness. Firstly, it seems highly unlikely that one form of superstition would die out while so many others could still be discussed easily, particularly others relating to death, such as the avoidance of graves and dead bodies, as all of these aspects fit into the same complex of beliefs.⁹⁶ It is true that homicide as such does not figure, but the absence of homicide pollution from the description of the superstitious man can be explained by the fact that his actions are avoidances of mundane and regular sources of pollution, which a person could hardly avoid during everyday life. Homicide was an unusual event, and therefore excluded from the account of the superstitious man's daily routine. It could be argued that the portrait of the superstitious man suggests that fear of pollution is unusual or strange, and thus that it could still fit in with a model of waning pollution beliefs in the fourth century. Theophrastus himself, however, defines superstition as 'cowardice regarding supernatural powers', suggesting that it is the unusually excessive precautions that the superstitious man takes against pollution that are ridiculous, rather than the belief in pollution itself.⁹⁷ The text is reliant, then, on the fact that pollution beliefs still exist.⁹⁸

The world of Plato's *Laws*, written in the mid-fourth century, is also littered with the belief that homicide incurs *miasma*.⁹⁹ Although the laws themselves are far from being replicas of Athenian laws, the Athenian milieu in which they were written is likely to have imbued them with Athenian sensibilities. Many aspects of his homicide laws reflect beliefs about homicide pollution seen elsewhere in the

⁹⁵ See above, 79 n.20.

⁹⁶ Thphr.*Char.*16.9.

⁹⁷ Thphr.*Char.*16.1-2.

⁹⁸ This is solidified by the fact that other aspects of superstition continued through the fourth century into later periods, such as the use of curse tablets; see Gager (1992) for many examples, including, interestingly for this project, many discussing legal matters.

⁹⁹ On pollution in Plato's *Laws* see Saunders (1991) 252-7, who argues that Plato's focus is on 'demon-driven' pollution, i.e. pollution based in the anger of the dead.

sources. Throughout his explanation of the homicide laws that should be enacted, the Athenian speaker repeatedly mentions purification from pollution as a necessary measure alongside the enactments of justice. He shows that purification is necessary even in cases where legal redress is not, for example killing in an athletic contest or war.¹⁰⁰ This suggests that legal action itself cannot remove pollution, but merely identifies and controls it, and that purification will always be necessary in the case of a killing. The text clearly demonstrates the belief that killing attracts pollution, and may also counter Parker's assertion that a society with a functioning legal system has no use for pollution. Plato's laws on homicide do not set down the exact procedures to be followed when prosecuting homicide, and therefore we cannot seek aspects of religion or pollution there. As we have seen, there are no extant homicide laws from Athens that mention religious aspects that appeared to be present in the procedures, though it is likely that laws did exist that described proper procedure.¹⁰¹ As Plato's *Laws* do, however, explicitly mention the presence of pollution after homicide, we may surmise that the hypothetical procedures to enforce these laws would also aim to minimise the spread of pollution.

Homicide procedures with religious overtones remained in place from their instigation all the way through the age of the orators, as we see in Demosthenes, who is able to discuss them in the mid-fourth century.¹⁰² As they remained, they reinforced the religious context of pollution for homicide trials indicated by the foundation myths and religious locations of the courts. Jury members, prosecutors, defendants and witnesses in the homicide courts would have been aware of this religious context through their prior socio-cultural knowledge and when they witnessed its enactment in ritualised court procedures. Therefore, logographers saw little need to draw verbal attention to that which was made clear by the visual rhetoric of the setting of the trial. The ritualisation, oath-swearing, and other potent procedures performed by the participants in the trial made it clear enough that the

¹⁰⁰ Pl.Lg.9.865a-b. Certain cases of 'legal' killing seem not to require purification; see 9.874b-d.

¹⁰¹ The possibility remains that other laws may have contained evidence of pollution; see D.23.72 for evidence that a killer's return from exile legally required purification. Although Demosthenes appears to be paraphrasing rather than directly quoting a law, he does frame the purification requirement as law (*nomos*) rather than a religious custom or unwritten rule. This suggests that some acknowledgment of the danger of pollution may have been formally codified in the homicide laws.

¹⁰² D.23.

trial was a serious situation involving the potential danger of pollution. Although certain oaths and aspects of ritual were still present in the dikastic courts, the specific religious context of homicide was absent from these trials, and so the danger of pollution was not immediately obvious in the procedures taking place. Therefore, the logographers and speakers discussing homicide in the dikastic courts may have thought it more pertinent to make explicit reference to this factor in their speeches in order to impress the importance of the case on all present in the courtroom. When the immediate context of pollution was less obvious, it may have been both easier and more necessary to manipulate the jury's beliefs about pollution in order to fit a certain case or argument. The relative expertise of the Areopagus council and the *ephetai* may have diminished their receptiveness to rhetoric about pollution, but a dikastic jury comprised of everyday Athenian citizens may have been easier to convince that a certain person posed a religious danger to their city because of his crime.

Pollution rhetoric may also have been affected by the standards of relevance in different courts. The dikastic courts appear to have had less strict regulations and procedures enforcing relevance in litigants' speeches than the homicide courts.¹⁰³ The Areopagus court in particular is reported as insisting that speakers stick to the point of their case at all times. Again, it is significant that the two speeches that most explicitly address pollution were from trials held in dikastic courts. Talking about pollution may have been perceived as too irrelevant to the facts of a case to be acceptable in the homicide courts, but could have been used more freely in the dikastic courts. This idea is further supported by the fact that pollution is never used as a main justification for prosecution in the extant speeches; no speaker suggests that the jury should convict *because* the accused poses a threat of pollution. Instead, pollution arguments are used to support the likelihood of the accused's guilt or innocence. In this way, pollution is similar to other kinds of arguments most commonly included in issues of relevance, such as lists of a person's previous benefactions to the city or details of the opponent's past unscrupulous behaviour. Pollution would seem particularly irrelevant in a homicide court if it was heavily implied by the religious aspects of the court setting. A dikastic court devoid of the additional religious context might have been more likely to accept pollution as an

¹⁰³ For more extensive discussion, see Chapter 4.

argument, as its implications for the case would not necessarily be immediately apparent. The active acknowledgement by speakers of the dangers of pollution in the dikastic courts may also, on occasion, have been a means of imaginatively recasting the dikastic court as a homicide court, thereby increasing the sense of the importance and solemnity of the trial.

3.2 THE RHETORIC OF POLLUTION

Almost every statement presented in court is intended to have a persuasive effect, and each piece of rhetoric requires a certain context of understanding and belief in order to be successful. Rhetoric about homicide pollution is very unlikely to be used where homicide is not an issue. The vast majority of our extant forensic speeches are not from homicide cases, and therefore the vast majority of our source material has no reason to mention the theme of homicide pollution. But when we narrow our scope to those cases where we can reasonably expect to find some talk of homicide pollution that can inform our understanding of how pollution can be used rhetorically, we may find that it appears more often than previously thought.

While references to homicide pollution can be found in three of the five speeches from homicide cases of various kinds, pollution rhetoric can also be found in other cases that are not direct prosecutions of homicide but refer to previous events or court cases, for example in Demosthenes 21 and 22. By examining these rhetorical references to pollution, and comparing them to the cases where pollution is not mentioned or is mentioned in a different context, I intend to show that talking about pollution within the courts was just as much a rhetorical device as any other kind of argument. It only required a certain basic level of belief from the jury in the premise to have its effect, as the rest of its power relies on the religious principles underlying homicide prosecution combined with more common rhetorical techniques. I will also examine the various ways in which these instances of pollution rhetoric worked, drawing on different aspects of the concept of pollution for different persuasive purposes.

3.2.1 THE TETRALOGIES

We may begin an analysis of oratorical uses of homicide pollution with a source that presents rhetoric in a theoretical setting rather than a real one. The *Tetralogies*' use of pollution rhetoric is distinctive amongst the ancient sources. As

we have seen in Chapter 1, there is no reason to doubt that the *Tetralogies* originate in an Athenian context and are compatible with Athenian practice. They are, however, entirely hypothetical, rather than examples of real forensic argument. In light of this, how useful can they be for exemplifying homicide pollution rhetoric? Carey has identified these texts as ‘straddl[ing] the boundary between epideictic and judicial,’ as they are ‘display pieces... [whose] main purpose is to demonstrate the writer’s skill.’¹⁰⁴ This origin as a set of hypothetical case studies gives them a detached quality, which may not necessarily closely resemble actual rhetorical practice. The additional fact that these speeches were designed for publication as a set introduces an element of self-conscious artistry, which encourages further elaboration of details otherwise not found in court. This is clearly demonstrated in the way in which the *Tetralogies* handle pollution. These texts present the most emphatic and explicit version of pollution rhetoric seen anywhere in the orators, but in forms unlike any rhetoric seen elsewhere. For this reason, they are of limited value for establishing practice in real forensic speeches. Nevertheless, they can still provide insights into ways of viewing homicide and they may still offer some corroborative evidence for conclusions drawn from the analysis of actual cases. Parker suggests that, because the *Tetralogies* explore both sides of each argument, ‘the full potential of the argument from pollution is here displayed as in no other text.’¹⁰⁵ We should therefore take a more careful approach to the evidence offered by these texts: they do not represent something that we should expect to see, but do not, in the real speeches. Instead, they propose a variety of theoretical means of rhetorically engaging with pollution. A similar effect can be seen in the wide variety of (often implausible) *eikos* arguments employed by the *Tetralogies*: the texts do not intend to construct real rhetoric, but rather to experiment with rhetorical theory. Our use of them should, therefore, be cautious.

First and foremost amongst the unusual uses of pollution in the *Tetralogies* is the interchangeable use of vengeful spirits and the traditional view of *miasma*. Indeed, in these texts, pollution is never described as being a blood stain on the hands of the killer. All three *Tetralogies* present the dead man as an avenging spirit, and almost every reference to pollution involves a mention of this supposed agent.

¹⁰⁴ Carey (2007) 246.

¹⁰⁵ Parker (1983) 104.

The two concepts are tied together as if they were the same force.¹⁰⁶ The dead man takes on an almost physical presence in the rhetoric, inhabiting the space of the courtroom as an angry ghost created by the accusations of one party or the other. As will be seen, in real cases it can be more useful to imagine the dead as victim rather than agent and as a force without power, relying on his family to avenge him.¹⁰⁷ The pathos created by such an image would evoke an emotional reaction from the jury for the real relatives of the dead man present in court. In the world of the *Tetralogies*, though, where the presence of the litigants is only imagined, there are no scruples with presenting the dead man as a powerful and dangerous force, whose attack on all those in his path can be halted only by the justice of the court.

All of the *Tetralogies* make extensive rhetorical use of the contagious nature of pollution. Specifically, these texts focus on the ability of pollution, or the anger of vengeful spirits, to spread to anyone who facilitates the failure to justly punish the killer. Both the first and third *Tetralogies* make reference to divine anger turning on the prosecutors. In the first *Tetralogy*, this will happen if they push for an unjust conviction of the ‘innocent’ defendant in the first speech for the defence on a charge of premeditated killing:

οἱ δὲ διώκοντες μὲν ἐμὲ τὸν ἀνάιτιον, τὸν δ’ αἴτιον ἀφιέντες, τῆς τε ἀφορίας αἴτιοι γίνονται, ὑμᾶς τε ἀσεβεῖς εἰς τοὺς θεοὺς πείθοντες καταστήναι πάντων ὧν ἐμὲ ἄξιόν φασι παθεῖν εἶναι δίκαιοί εἰσι τυγχάνειν. [Ant.2.2.11]

‘But the prosecution, who charge me, an innocent man, but let the guilty one go free—they are ones to blame for the failure of harvests.¹⁰⁸ They urge you to commit impiety against the gods, and they should suffer all the punishment they say I deserve.’¹⁰⁹

The argument deflects the blame for any pollution that affects the city after the trial onto the prosecution, which presents not only the killer as a potential source of pollution, but the possibility of pollution (particularly in the form of vengeful spirits) adhering to anyone who attempts to prevent a just conviction. A potential miscarriage of justice poses a threat of pollution for the whole city. This argument acts as a response to the recognised warning that the killer will pollute the city if he

¹⁰⁶ E.g. Ant.2.3.9-10.

¹⁰⁷ See Ant.1, Chapter 3.1.2.

¹⁰⁸ Failed crops are also presented as a result of homicide pollution in S.O.T.22-30.

¹⁰⁹ Tr. Gagarin.

is allowed to go free, which is also used in the first speech for the prosecution in the first *Tetralogy*.¹¹⁰

But the vengeful dead will also pursue the prosecutors if they fail to provide enough information to convict a guilty man, as we can see in the third *Tetralogy*:

ἀδίκως μὲν γὰρ ἀπολυθείς, διὰ τὸ μὴ ὀρθῶς ὑμᾶς διδαχθῆναι ἀποφυγῶν, τοῦ μὴ διδάξαντος καὶ οὐχ ὑμέτερον τὸν προστρόπαιον τοῦ ἀποθανόντος καταστήσω... [Ant.4.2.8]

‘If I am unjustly acquitted and get off because you were incorrectly informed, then I will set the dead man’s spirit of vengeance on the person who did not inform you, not on you...’¹¹¹

The rhetoric is particularly interesting in this instance as it implies, by speaking in the first person, that the defendant himself can control the dead man’s anger and direct it at whomever he chooses. This ‘controlling’ of the direction of a polluting spirit by an individual is not attested anywhere else in pollution belief, and was probably not widely believed to be possible, as the only thing that would direct or dissipate the pollution would be conviction or acquittal followed by purification.¹¹² But in this instance, the speech diminishes what is generally considered to be the contagious nature of *miasma*, and has the angry spirits of the dead double as a rhetorical tool of the living man’s anger. The intention is probably to make the defendant seem more concerned with achieving a just decision than his own safety. In reality, it seems unlikely that a guilty defendant would punish those who failed to convict him. The rest of this passage widens the scope of the living man’s power:

μὴ ὀρθῶς δὲ καταληφθεὶς ὑφ’ ὑμῶν, ὑμῖν καὶ οὐ τούτῳ τὸ μήνιμα τῶν ἀλιτηρίων προστρέψομαι. [Ant.4.2.8]

‘...but if I am wrongly convicted by you, I will inflict the wrath of his avenging spirits on you, not on him.’¹¹³

In this case, the polluting spirit has the potential to infect the jury specifically if they convict the wrong man. Again, the defendant figures the power in question as being that of the dead man, but he presents it as something that is directed by the outcome of the trial. In practice, this is a way of dramatising the consequences of the trial for

¹¹⁰ Ant.2.1.10-11.

¹¹¹ Tr. Gagarin.

¹¹² Gagarin notes in his commentary on the text that ‘the idea that the defendant can direct the dead man’s revenge is novel.’ (Gagarin (1997) 167)

¹¹³ Tr. Gagarin.

the jury. Although he configures the power of directing pollution as his own, he in fact implies that it is the jury who hold the power over their own fate.

This becomes a distinctive version of a more common rhetorical threat of pollution infecting the jury. This kind of argument appears in every one of the *Tetralogies*:

οὕτω δὲ φανερώς ἐκ τῆς αὐτοῦ ἀπολογίας ἐλεγχθεὶς διαφθείρας αὐτόν, οὐδὲν ἕτερον ὑμῶν δεῖται ἢ τὴν αὐτοῦ μιρίαν εἰς ὑμᾶς αὐτοὺς ἐκτρέψαι. [Ant.2.3.9]

‘Since from his own defence it is clearly proven that he killed the man, his plea is nothing more than a request that you transfer his pollution onto yourselves.’¹¹⁴

ἀδίκως δ’ ἀπολυομένου τούτου ὑφ’ ὑμῶν, ἡμῖν μὲν προστρόπαιος ὁ ἀποθανὼν οὐκ ἔσται, ὑμῖν δὲ ἐνθύμιος γενήσεται. [Ant.2.3.10]

‘If you acquit him wrongly, the dead man’s spirit will not seek revenge from us but will weigh on your consciences.’¹¹⁵

πάσης δ’ ὑπὲρ πάντων τῆς κηλίδος εἰς ὑμᾶς ἀναφερομένης, πολλὴ εὐλάβεια ὑμῖν τούτων ποιητέα ἐστὶ· καταλαβόντες μὲν γὰρ αὐτόν καὶ εἴρξαντες ὧν ὁ νόμος εἴργει καθαροὶ τῶν ἐγκλημάτων ἔσεσθε, ἀπολύσαντες δὲ ὑπαίτιοι καθίστασθε. [Ant.3.3.11]

‘Since the entire defilement of everyone will come on you, you must exercise great caution. If you convict him and ban him from the places restricted by law, you will remain clean of the charges, but if you acquit him, you are guilty.’¹¹⁶

αὐτοὶ τε μὴ μεταλάβητε τῆς τούτου μιρίας [Ant.3.3.12]

‘Do not share in this person’s pollution yourselves’¹¹⁷

The fact that this kind of language does not recur in speeches written for delivery in court may be explained by its nature as a potentially dangerous argument. Although the practice of threatening the jury with certain consequences if they do not make the right decision (that is, a decision in the current speaker’s favour) can be found in oratory,¹¹⁸ it could risk alienating them and driving them to support the opposition if presented in such forceful language as found here. This is likely to be even more of a

¹¹⁴ Tr. Gagarin.

¹¹⁵ Tr. Gagarin.

¹¹⁶ Tr. Gagarin.

¹¹⁷ Tr. Gagarin.

¹¹⁸ Perhaps the best-known example appears at [D.]59.109-11, when Apollodorus charges the jury with considering how they would explain Neaira’s acquittal to the female members of their families.

danger when the consequences with which they are threatened are religiously dangerous, and not merely social, as this could be interpreted as a threat to their physical safety.¹¹⁹

It is clear that, in the world of the *Tetralogies*, a rhetorical charge of pollution could come from either side of the case depending on their actions. Such antithetical arguments are common in fifth-century rhetorical texts and teaching, including the *Tetralogies*: for example, the crucial argument in the second *Tetralogy* debates whether guilt for the killing of a boy struck by a javelin lies with the thrower or with the boy himself.¹²⁰ It seems, therefore, that arguments from pollution can appear in a manner similar to other arguments in these texts. If the *Tetralogies* are indeed a learning tool, the implication is that rhetoricians should prepare to counter arguments from pollution as well as any other kind of argument. Although their lack of courtroom context prevents them from exemplifying a paradigm in terms of frequency and nature of references to pollution, they nonetheless open the possibility that pollution could be a topic for rhetorical exploitation in homicide cases, however different in form and emphasis. This in turn allows us to detect more confidently less sustained or explicit uses of the topos.

3.2.2 ANTIPHON 6

The defendant in Antiphon 6 is a *choregus* accused of plotting the death of one of his chorus boys by poison. The trial was probably conducted in the court at the Palladion. The narrative tells how the *choregus* was absent at the time of death because he was involved in another court case, and that he has been accused of giving the container of poison to one of the men he left in charge of the boys to give to the victim. He claims that he neither provided poison, ordered the boy to drink it,

¹¹⁹ The religious implications of judgement are found elsewhere in forensic oratory, for example in Lysias 6: τίνα χρή ταῦτα ἀνασχέσθαι; ποῖον φίλον, ποῖον συγγενῆ, ποῖον δημότην χρή τούτῳ χαρισάμενον κρύβδην φανερώς τοῖς θεοῖς ἀπεχθέσθαι; νῦν οὖν χρή νομίζειν τιμωρουμένους καὶ ἀπαλλασσομένους Ἀνδοκίδου τὴν πόλιν καθαίρειν καὶ ἀποδιοπομπεῖσθαι καὶ φαρμακὸν ἀποπέμπειν καὶ ἀλιτηρίου ἀπαλλάττεσθαι, ὡς ἐν τούτων οὗτός ἐστι. [6.53] ‘Who should tolerate such things? What friend or relative or deme member needs to do a favour secretly for my opponent and publicly incur the hatred of the gods? You should realise that by punishing Andocides and getting rid of him, you are purifying the city and freeing it from pollution, driving away the scapegoat, and getting rid of something accursed—because this man falls into that category.’ (Tr. Todd) The suggestion that letting Andocides go free would incur divine wrath is not, however, phrased as a direct warning to the jury, but rather an open question of who would do such a thing. In this way it is far less forceful than the language seen in the *Tetralogies*. Any negative effect is counteracted by immediately following the passage with an explanation of the positive effects for which the jury would be directly responsible in convicting Andocides.

¹²⁰ See below, 163.

nor ordered anyone else to get him to do so. Moreover, the *choregus* alleges that the prosecution have ulterior motives, and are trying to prevent him from carrying out the court case in which he was previously involved by banning him from certain public places, including the dikastic courts, with an accusation of homicide.¹²¹ This is the first time pollution is mentioned in the speech, and though the argument is more from procedure than pollution, it allows us insight into the ways in which belief in pollution can be exploited. By presenting one's opponent as a danger to the city, one can ensure that their movements are restricted, whether or not they actually committed the homicide. We can imagine that the *choregus'* prosecutors may have explained to the jury the danger that allowing him to go free would pose to the city.

But the *choregus* is also able to justify his argument that the prosecution's case is suspicious by using arguments from pollution. He relates an incident in which, after initially trying to register the homicide case with the Basileus, but being turned down as there was not enough time before the Basileus' term ended, his opponents reconciled with him and returned to normal behaviour for a period:

...καὶ μετὰ τοῦτο συνῆσάν μοι καὶ διελέγοντο ἐν τοῖς ἱεροῖς, ἐν τῇ ἀγορᾷ, ἐν τῇ ἐμῇ οἰκίᾳ, ἐν τῇ σφετέρᾳ αὐτῶν καὶ ἐτέρωθι πανταχοῦ. τὸ τελευταῖον, ὃ Ζεῦ καὶ θεοὶ πάντες, Φιλοκράτης αὐτὸς οὕτωσιν ἐν τῷ βουλευτηρίῳ ἐναντίον τῆς βουλῆς, ἐστὼς μετ' ἐμοῦ ἐπὶ τοῦ βήματος, ἀπτόμενος ἐμοῦ διελέγετο, ὀνόματι οὗτος ἐμὲ προσαγορεύων, καὶ ἐγὼ τοῦτον, ὥστε δεινὸν δόξαι εἶναι τῇ βουλῇ, ἐπειδὴ ἐπύθετο προειρημένον μοι εἶργεσθαι τῶν νομίμων ὑπὸ τούτων, οὓς ἐώρων μοι τῇ προτεραίᾳ συνόντας καὶ διαλεγομένους. [Ant.6.39-40]

'Afterwards we spent time together and talked in temples, in the Agora, at my house, at their house, and everywhere else. To top it all off, by Zeus and all the gods, in the Council-house in front of the Council Philocrates here joined me on the podium, and with his hand on my arm he talked with me, calling me by name, and I did the same. Naturally, the Council thought it pretty strange when the later learned that a proclamation banning me from the places prescribed in the law had been issued by the same people they has seen talking with me the day before.'¹²²

In this passage, Antiphon lists sites where the *choregus* and his accusers socialised together. There is clearly a social element at play in the argument here. These details are presented as if it would be inappropriate for the dead boy's relatives to spend time socialising with someone who they believed to be his killer, and to allow him to

¹²¹ For more on this aspect of the case, see Chapter 5.3.2.

¹²² Tr. Gagarin.

go about his everyday business in public life with no restrictions on his movement. Such activities would be disrespectful to the dead, and would be likely to incur social opprobrium for the family members engaged in them. It follows that if the family members allowed these activities, then they cannot have truly believed that the *choregus* killed the boy. It would be a mistake, however, to focus solely on the social dimension. There is a clearly religious element that exists alongside the social and ethical aspect. The list of places where the men spent time together is not just a random collection of opportunities for social interaction; the list—‘in temples, in the Agora, at my house, at their house, and everywhere else’—recalls the places from which an accused killer was banned, in part in order to prevent the spread of pollution. Antiphon also refers explicitly to this ban in the passage. It is crucial that he leads the list with two places of religious significance, the temples and the Agora. This would call to mind the danger of corrupted sacrifices and sacred spaces, establishing pollution as a primary concern that would not be lost on the jury. The second layer of the argument is then added in the reference to both parties’ homes: the act of speaking together in these locations indicates that the parties were content to be ‘under the same roof’ (*homorophios*) as each other. The social element is clear here, but as the words immediately follow references to sacred spaces, listeners with contemporary cultural knowledge would also be reminded of the danger of spreading pollution by being in an enclosed space with a killer.¹²³ Finally, generating a rhetorical crescendo with the phrase ‘to top it all off’ (*to teleutaion*), Antiphon presents the most potent argument from pollution: direct address and physical contact between the two parties. The image of Philocrates speaking publicly with the *choregus*, touching his arm and addressing him by name is very potent. It represents not only personal intimacy between the two parties but a lack of fear of contagious pollution spreading from the alleged killer. If simply being in the same enclosed space as a killer could allow pollution to spread, then physical contact was even more dangerous.¹²⁴

Several sections later, the *choregus* expands further on the ways in which the ban from the prescribed places was not applied to him:

¹²³ See Chapter 3.1.3.

¹²⁴ The danger of being near or in an enclosed space with a killer, as well as being evidenced in the open-air trials and the restriction of the movement of a killer, can also be seen in tragedy, e.g. *E.Or.* 75ff, *IT.* 1218, and in *Pl.Euthphr.* 4c.

οὔτοι δ' ἐπιστάμενοι μὲν τοὺς νόμους ἅπαντας, ὀρῶντες δ' ἐμὲ βουλευόντα καὶ εἰσιόντ' ἐς τὸ βουλευτήριον—καὶ ἐν αὐτῷ τῷ βουλευτηρίῳ Διὸς βουλαίου καὶ Ἀθηνᾶς βουλαίας ἱερόν ἐστι καὶ εἰσιόντες οἱ βουλευταὶ προσεύχονται, ὧν κἀγὼ εἷς ἦ, ὃς ταῦτ' ἀπράττων, καὶ εἰς τᾶλλα ἱερὰ πάντα εἰσιὼν μετὰ τῆς βουλῆς, καὶ θύων καὶ εὐχόμενος ὑπὲρ τῆς πόλεως ταύτης, καὶ πρὸς τούτοις πρυτανεύσας τὴν πρώτην πρυτανείαν ἄπασαν πλὴν δυοῖν ἡμέραιν, καὶ ἱεροποιῶν καὶ θύων ὑπὲρ τῆς δημοκρατίας, καὶ ἐπιμηφίζων καὶ λέγων γνώμας περὶ τῶν μεγίστων καὶ πλείστου ἀξίων τῇ πόλει φανερός ἦ· καὶ οὔτοι παρόντες καὶ ἐπιδημοῦντες, ἐξὸν αὐτοῖς ἀπογράφεσθαι καὶ εἶργειν ἐμὲ τούτων ἀπάντων, οὐκ ἤξιον ἀπογράφεσθαι· καίτοι ἱκανά γ' ἦν ὑπομῆσαι καὶ ἐνθυμηθῆναι, εἴπερ ἡδικοῦντο, ἀμφοτέρα καὶ σφῶν αὐτῶν ἔνεκα καὶ τῆς πόλεως. διὰ τί οὖν οὐκ ἀπεγράφοντο; δι' ὃ τι συνῆσαν καὶ διελέγοντο· συνῆσαν τε γάρ μοι οὐκ ἀξιοῦντες φονέα εἶναι, καὶ οὐκ ἀπεγράφοντο τούτου αὐτοῦ ἔνεκα, οὐχ ἡγούμενοί με ἀποκτεῖναι τὸν παῖδα οὐδ' ἔνοχον εἶναι τοῦ φόνου, οὐδὲ προσήκειν μοι τούτου τοῦ πράγματος οὐδέν. [Ant.6.45-6]

‘But these men knew the law well and saw me entering the Council-house as a Councillor—and in the Council-house there stands a shrine to Zeus of the Council and Athena of the Council, and the Councillors go and pray in it, and I was one of the ones who did this, and I entered all the other shrines with the Council, and I sacrificed and prayed on behalf of this city; and furthermore, I served as a member of the first Prytany for all but two days, supervising the sacred rites and offering sacrifices for the democracy, and I directed the voting on issues and stated my views on the highest and most important public matters, and all this was done in public view. These men were in town and present at these events; they could have registered the case and banned me from all these events, but they decided not to. Surely if they had really been wronged, it was a serious enough matter that they would remember and be concerned about it, for their own sake as well as the city. Then why didn't they register it? Why were they spending time talking with me? They were spending time with me because they didn't think I was a murderer, and they did not register the case for the same reason, that they didn't think I had killed the boy or was liable for a charge of homicide, or that I had anything to do with this matter.’

Here, Antiphon moves from the private social interactions between the two parties to the public life of the *choregus* after the initial accusation was withdrawn. If the places and acts mentioned in the previous passage represent the potential spread of pollution on a personal scale, namely to the *choregus*' accusers, this later passage widens the scope to consider the danger to the whole city. One again, there is a sense that the accused killer should be denied a social existence, in a similar way to someone who is punished with *atimia*. As Antiphon details the *choregus*' public service, however, he draws particular attention to the religious aspects of each role. He does not merely mention that he served on the *boule*, but emphasises the presence of specific shrines in the *bouleuterion* and the acts of prayer and sacrifice in which

the *choregus* took part at those shrines. Similarly, when describing his role in the Prytany, equal weight is given to the civic acts of voting and stating political views, and taking part in religious sacrifices and rites. He makes no comment as to the outcome of these events, but it is clear from Antiphon (5.82-3) that a person guilty of homicide could easily cause such rituals to be corrupted; the gods would be angered by the presence of a polluted person at their sacred rites in ritual spaces. This could prove damaging for the whole of Athens, since the sacrifices and rites were a means of protecting and benefiting the city. It would be unacceptable to allow an inappropriate person to conduct such rites; a similar effect can be seen in [Demosthenes] 59, where the implications of having a person such as Phano involved in sacred rites are made clear.¹²⁵ At the culmination of this section, Antiphon states that if the *choregus*' accusers had really believed him to be a killer, they should have been concerned 'for their own sake as well as the city'. This affirms that the issue here goes far beyond social propriety between the family of a victim and his killer, to invoke anxiety about wide-reaching potential danger that must be religious in nature. It is apparent, therefore, that Antiphon is basing his argument on pollution beliefs.

The argument at this point has a dual purpose. It is, of course, mainly focused on the *choregus*' innocence: as he explicitly states, the prosecutors must know that he did not really commit the crime, otherwise they would not have let him go around the city for so long potentially corrupting religious rites. But this simultaneously makes the *choregus*' opponents seem careless of the city's purity, and almost impious themselves: if they truly believed that he *was* guilty of the crime, then they should have done everything in their power to prevent him from spreading pollution. The prosecutors become selfish sykophants, trying to prosecute the *choregus* at a convenient time for their own benefit with no thought as to the danger that homicide pollution could pose to the city if left unchecked.

The potential for pollution by association is clear when we compare with a passage from Demosthenes 22, where the speaker, Diodorus, has been previously accused of killing his own father, and his uncle has been tried for impiety for associating with him:

¹²⁵ [D.]59.73.

αἰτιασάμενος γάρ με, ἃ καὶ λέγειν ἂν ὀκνήσειέ τις, εἰ μὴ τύχοι προσόμοιος ὢν τούτῳ, τὸν πατέρα ὡς ἀπέκτονα ἐγὼ τὸν ἑμαυτοῦ, καὶ κατασκευάσας ἀσεβείας γραφὴν οὐκ ἐπ’ ἐμέ, ἀλλ’ ἐπὶ τὸν θεῖόν μου, γράψας ἀσεβεῖν ἐμοὶ συνιόντα εἰς ταῦτόν ὡς πεπονηκότι ταῦτα, εἰς ἀγῶνα κατέστησεν· ὃν εἰ συνέβη τόθ’ ἀλῶναι, τίς ἂν ἀθλιώτερός ἐμοῦ πεπονθὼς ἦν ὑπὸ τούτου; τίς γὰρ ἂν ἢ φίλος ἢ ξένος εἰς ταῦτό ποτ’ ἐλθεῖν ἠθέλησεν ἐμοί; τίς δ’ ἂν εἶασε πόλις που παρ’ ἑαυτῇ γενέσθαι τὸν τὸ τοιοῦτο ἀσέβημα δοκοῦντα εἰργάσθαι; οὐκ ἔστιν οὐδὲ μία. ἐγὼ τοίνυν ταῦτα μὲν οὐ παρὰ μικρὸν ἀγωνιζόμενος παρ’ ὑμῖν ἀπελυσάμην, ἀλλ’ ὥστε τὸ πέμπτον μέρος μὴ λαβεῖν τούτους τῶν ψήφων... [D.22.2-3]

‘He accused me of a crime that anyone would be reluctant to mention (unless he happened to be the same sort of person as this man), killing my own father. Then after trumping up a charge of impiety not against me but against my uncle for having associated with me when I was allegedly guilty of this crime, he brought him to trial. If that had resulted in his conviction, who would have suffered a more miserable fate at his hands than I? What friend or guest-friend would have been willing to come near me? What city on earth would have allowed me to live in its territory if I were thought to be guilty of such an act of impiety? Not even one. When I was tried in your court on these charges, I was acquitted and not by a narrow margin but so decisively that this man here did not gain one-fifth of the votes...’¹²⁶

This passage demonstrates the possibility of taking someone to court for associating with a known homicide. The most important detail here is that the action in the case of Diodorus’ uncle is a *graphe asebeias*, an accusation of impiety. The force of the impiety is likely to be in the danger of spreading pollution to religious sites around the city, as well as other unknowing individuals. Thus by associating with the killer, the victim’s family member is sharing in the killer’s impiety and pollution and facilitating further contamination of the city. Although this passage suggests that pursuing the associating family member rather than the actual alleged killer would be unusual, nevertheless it shows that it was possible to bring a case against a victim’s family member in those circumstances. In Antiphon 6, then, it may have entered the minds of the jurors that Philocrates, as the brother of the victim, could in theory be making himself liable to prosecution by a third party by associating with the *choregus* publicly and also accusing him of homicide. He certainly leaves himself open to accusations of pollution.

The case of Diodorus also demonstrates the results of a jury being unconvinced by an accusation of pollution. It is clear from the passage that Diodorus’ uncle was not convicted on the charge of impiety. We can presume that it

¹²⁶ Tr. Harris.

would have been relatively easy for Androtion to present witnesses to the fact that Diodorus and his uncle had been associating in the period after Androtion made his initial accusation of patricide against Diodorus. Therefore we must assume that the jury that acquitted Diodorus' uncle was unconvinced that Diodorus was guilty, and therefore believed that there was no pollution to spread and that the uncle had committed no impiety by associating with him. Diodorus' mention of his own acquittal may refer to a separate trial, but it is more likely that he is treating his uncle's acquittal as his own.¹²⁷ He posits a link between the perception of his uncle's innocence and his own: that a jury had already acquitted his uncle on charges of impiety clearly demonstrated their belief that Diodorus had not killed his father. Presumably the converse would also have been true: if the jurors had convicted Diodorus' uncle, it would be on the basis of their belief in Diodorus' own guilt. It is interesting that the *graphe asebeias* could be brought without a prior formal accusation of or conviction for homicide, as a matter purely of innuendo and political motivation.¹²⁸

The *choregus*' argument in Antiphon 6 reflects a comparable perspective on events and actions. There is no evidence that any accusation was made against Philocrates for impiety, but the *choregus* makes it clear that his behaviour was deemed *deinon* ('strange', §40) by the *boule* when they became aware of the accusation that Philocrates had made. It may have seemed to them that Philocrates was opening himself up not only to pollution, but also to social censure. As he did not face these consequences, we may infer that no one believed that Philocrates was spreading pollution by his actions. The speaker invites us to believe that, if this is true, it must also have been generally believed that the *choregus* was not guilty of planning the killing of Philocrates' brother. The argument utilises the power of belief in the danger of pollution, but in reverse: if the jury can be convinced that there is no

¹²⁷ It seems likely that if there had been a separate homicide trial in which he had been found innocent, either before or after his uncle's trial for impiety, it would have bolstered Diodorus' argument to mention it more explicitly. It would only be detrimental to mention the case if he had been found guilty, in which case he would likely either be in exile or dead, and therefore obviously unable to deliver the present speech. It would also be nonsensical for him to argue his innocence on the charge by way of his uncle's innocence if he had been found guilty in his own trial. It seems unlikely that Androtion or his allies would proceed to prosecute Diodorus on this charge after his uncle had been found innocent of impiety by associating with him, especially in light of the charge incurred by a prosecutor who failed to secure at least a fifth of the votes. If in fact there was a real and separate trial, it was clearly not tried in a homicide court, as Diodorus notes that he was 'tried in your court', referring to the dikastic court in which he is speaking.

¹²⁸ For more on this case, see Chapter 5.3.1.

pollution endangering the city, then they will be convinced that the accused is innocent.

Antiphon 6 is the only example of a speech delivered in a homicide court that draws on pollution at length; neither Lysias 1 nor Antiphon 1 makes explicit reference to it. As discussions of homicide were not limited to homicide courts, though, or even solely to trials for homicide, we may look elsewhere for further examples of pollution rhetoric.

3.2.3 DEMOSTHENES 21

Demosthenes' speech 21 offers us our first example of how homicide pollution rhetoric could be used outside of homicide trials, and presents an argument that closely resembles one seen in Antiphon 6, albeit in an extended and more intricate form. Speech 21 is a prosecution speech against Meidias for *hybris*;¹²⁹ Demosthenes accuses Meidias of having hit him at the Dionysia with the intent to humiliate him publicly. The case is one of several in what seems to have been an ongoing quarrel between the two parties.¹³⁰ One of Meidias' previous attempts to prosecute Demosthenes as part of this quarrel was an accusation of homicide. The accusation never got as far as a trial, as a man named Aristarchus had already been accused of the same homicide, and the parties involved were not convinced by Meidias to revoke that accusation and accuse Demosthenes instead. The passage (21.104-22) aims to vilify Meidias because of this affair, and includes extensive references to his apparent disregard for the spread of pollution:

οὕτω τοίνυν οὗτός ἐστιν ἀσεβῆς καὶ μιαρὸς καὶ πᾶν ἄν ὑποστάς εἰπεῖν καὶ πρᾶξαι... ὥστ' ἐπαιτιασάμενός με φόνου καὶ τοιοῦτο πρᾶγμα ἐπαγαγών, εἴασε μὲν με εἰσιτητήρια ὑπὲρ τῆς βουλῆς ἱεροποιῆσαι καὶ θῦσαι καὶ κατάρξασθαι τῶν ἱερῶν ὑπὲρ ὑμῶν καὶ ὅλης τῆς πόλεως, εἴασε δ' ἀρχεθεωροῦντα ἀγαγεῖν τῷ Διὶ τῷ Νεμείῳ τὴν κοινὴν ὑπὲρ τῆς πόλεως θεωρίαν, περιεῖδε δὲ ταῖς σεμναῖς θεαῖς ἱεροποιὸν αἰρεθέντα ἐξ Ἀθηναίων ἀπάντων τρίτον αὐτὸν καὶ καταρξάμενον τῶν ἱερῶν. [D.21.114-5]

¹²⁹ The charge in the speech has been disputed. I agree with Harris (1989) that the charge is *graphe hubreos*. Harrison (1971) has suggested that the charge was *graphe asebeias*, while MacDowell (1990) proposed that *probole*, the preliminary procedure, was also the legal charge in the main case (see also de Brauw (2001-2) 166 n.20.)

¹³⁰ For a discussion of the issue of whether or not the trial actually took place, see Harris (1989). His conclusion that Aeschines was probably lying about the settlement is convincing, and it is probable that the speech was delivered in court. The matter does not, however, greatly affect the argument of this project, since whether or not the speech was actually delivered in court, it can still reasonably be said to be a sample of rhetoric, and therefore reflective of the kind of language that would or could be used in Athenian forensic argumentation.

‘This man is so impious, so polluted, so ready to stoop to say or do anything... that even after accusing me of murder and bringing such a serious charge, he still allowed me to conduct the inaugural rites for the Council and to conduct the sacrifice and to preside over the rituals for you and the entire city, then allowed me to head the sacred delegation sent out on behalf of the city and lead it to Nemean Zeus, and did not stop me from being elected out of all Athenians along with two others to serve as *heiropoios* for the Semnai Theai.’¹³¹

Demosthenes also addresses Meidias’ interaction with Aristarchus, before and after he had spoken out against him in court as a killer:

καὶ ταῦτ’ ἔλεγεν ἢ μιὰ καὶ ἀναιδῆς αὕτη κεφαλὴ, ἐξεληλυθὼς τῇ προτεραίᾳ παρ’ Ἀριστάρχου, καὶ χρώμενος ὡσπερ ἂν ἄλλος τις τὰ πρὸ τούτου... εἰ δὲ λαλῶν μὲν καὶ ὁμωρόφιός γινόμενος ὡς οὐδὲν εἰργασμένῳ φανήσεται, λέγων δὲ καὶ κατατιώμενος ταῦθ’ εἵνεκα τοῦ συκοφαντεῖν ἐμέ, πῶς οὐ δεκάκις, μᾶλλον δὲ μυριάκις δίκαιός ἐστ’ ἀπολωλέναι; ἀλλὰ μὴν ὡς ἀληθῆ λέγω καὶ τῇ μὲν προτεραίᾳ ὅτε ταῦτ’ ἔλεγεν, εἰσεληλύθει καὶ διεύλεκτο ἐκεῖνῳ, τῇ δ’ ὑστεραίᾳ πάλιν (τοῦτο γάρ, τοῦτο οὐκ ἔχον ἐστὶν ὑπερβολὴν ἀκαθαρσίας, ἄνδρες Ἀθηναῖοι) εἰσελθὼν οἴκαδε ὡς ἐκεῖνον καὶ ἐφεξῆς οὕτως καθεζόμενος, τὴν δεξιὰν ἐμβάλων, παρόντων πολλῶν, μετὰ τοὺς ἐν τῇ βουλῇ τούτους λόγους, ἐν οἷς αὐτόχειρα καὶ τὰ δεινότατ’ εἰρήκει τὸν Ἀρίσταρχον, ὦμνε μὲν κατ’ ἐξωλείας μηδὲν εἰρηκέναι περὶ αὐτοῦ φλαῦρον, καὶ οὐδὲν ἐφρόντιζεν ἐπιρκῶν, καὶ ταῦτα παρόντων τῶν συνειδόντων, ἡξίου δὲ καὶ πρὸς ἐμὲ αὐτῷ δι’ ἐκείνου γίνεσθαι τὰς διαλύσεις, τούτων τοὺς παρόντας ὑμῖν καλῶ μάρτυρας. καίτοι πῶς οὐ δεινόν, ὃ ἄνδρες Ἀθηναῖοι, μᾶλλον δὲ ἀσεβές, λέγειν ὡς φονεύς, καὶ πάλιν ὡς οὐκ εἴρηκε ταῦτα ἀπομύνα, καὶ φόνον μὲν ὀνειδίζειν, τούτῳ δ’ ὁμωρόφιόν γίνεσθαι; [D.21.117-20]

‘This is what this polluted, shameless creature was saying. Yet he had just left Aristarchus’ house the previous day and prior to that dealt with him the same way anyone else would have... But if it becomes obvious that Meidias chatted with him under the same roof as if he did nothing wrong but also slanders and accuses him with the aim of maliciously prosecuting me, does not justice demand that he die not ten, but ten thousand times? So then to prove that I am speaking the truth and that he had entered his house and spoken with him the day before he said these things and then on the following day he went to his house again (nothing, men of Athens, nothing is filthier than this behaviour) and sat as close to him as this and took his right hand in front of many people—after that speech in the Council in which he called Aristarchus a murderer and other most appalling things!—and he kept swearing oaths, calling down curses on his head that he had said nothing damaging about him and not caring about committing perjury even in the presence of people who knew the facts, and then asked him to bring about a settlement between me and himself, for all these events I am going to call for you witnesses who were present at these events. Yet how is it not shocking, men of Athens, or rather impious, to call him a murderer, then turn around

¹³¹ Tr. Harris.

and deny on oath that he said this, to blame him for murder and share the same roof with him?¹³²

Demosthenes' arguments in these two passages reproduce several pollution motifs already seen in Antiphon 6 and Demosthenes 22. Once again, although there are references that reflect a belief that those accused of homicide should be excluded from social and public life, there is a clear emphasis on the religious element implied by the sanction on an accused killer. Throughout the passage Demosthenes calls Meidias *miaros* ('polluted'), *asebes* ('impious'), and accuses him of *akatharsia* ('uncleanness'); Meidias' actions are not merely socially shameful, but actively irreligious. Demosthenes also lists a number of roles that he occupied and from which he should have been banned as an accused killer, emphasising their religious nature in a very similar way to that seen in Antiphon 6. Like the *choregus*' accusers, Meidias enters under the same roof as a supposed killer, addresses him, and touches him physically. The duality of social stigma and religious danger is once again the implicit foundation of the argument here, and would have been clear to those present at the trial who lived in the culture of belief in pollution. Meidias' accusations against Demosthenes, and, to an extent, Aristarchus, become less credible when evidence is presented that he undertook these activities with both parties and did not enforce the requisite bans on Demosthenes. If he is not worried about these men spreading pollution, even to himself, then it is unlikely that he really believes that either of them is the killer. He had spoken out publicly against both of them, so he would not be able to defend himself by claiming that he was unaware of the accusations.

This passage is particularly interesting in the slippery way in which it deals with pollution. The trial is, of course, for Meidias' *hybris*, rather than the previous homicide. Demosthenes obviously rejects the charge previously made against himself, and does not strongly place the blame on Aristarchus either, as minimising details of the previous case allows him to keep the focus on his effort to revile Meidias.¹³³ Yet in the passage quoted, Meidias himself becomes polluted through his interactions with Aristarchus and Demosthenes. Despite the fact that Demosthenes

¹³² Tr. Harris.

¹³³ Demosthenes seems to suggest that exiling Aristarchus was or would be as unjust as exiling Demosthenes [D.21.122]. Of course, he can only rescue Aristarchus from blame so far as it supports his argument against Meidias, and he surely does not aim to prove anything about Aristarchus' guilt or innocence here.

and Aristarchus are the accused parties, and therefore the potential sources of pollution, Demosthenes' language places all the responsibility for spreading pollution on Meidias. The language of pollution is never used to describe himself or Aristarchus, as even if it is apparent to the jury that Aristarchus was in fact guilty of the killing, he is not the focus here. Aristarchus is presented as passive throughout the passage, while Meidias actively goes to his house, speaks with him, and takes his right hand. Demosthenes is the model citizen, performing his civic and religious duties, and Meidias is presented as negligent of the danger of pollution for not stopping him despite the accusations and the ban they ought to bring with them. Demosthenes and Aristarchus appear to exist in this passage in an ambiguous state of being potential sources of pollution but not actually polluted; the potentiality of their polluted state becomes realised in Meidias' interactions with them. The pollution is metaphorically transferred to Meidias himself because of his false allegations, and thus he is portrayed as a facilitator of the spread of pollution without Demosthenes and Aristarchus necessarily needing to be seen to be polluted themselves. This makes Meidias' crimes of duplicity and lax enforcement of laws seem more abhorrent and religiously dangerous than the initial killing, which is almost forgotten in the midst of Demosthenes' attack on Meidias' piety.

It is piety that is crucial throughout this passage, and the presence of pollution rhetoric is bolstered by the appearance of another religious crime committed by Meidias.¹³⁴ At 21.119 Meidias is shown swearing false oaths that he had not spoken in court against Aristarchus, when witnesses had testified that he had. This compounds the idea of his impiety, and is likely to make jury members more receptive to the idea that he is polluted. Although the whole passage is primarily an attempt to characterise Meidias as an enemy of Demosthenes, someone without scruples of any kind, and therefore the type of person likely to commit an act of *hybris* against him, Meidias' irreligious nature is a major part of this attack. Meidias does not need to be shown to be ritually unclean *sensu stricto*, and no evidence is presented that he has ruined sacrifices or been barred from religious events, as seen in other speeches. The key to the success of Demosthenes' rhetoric here is that Meidias is presented as dangerous, in this case owing to his disregard for the spread of pollution. Demosthenes' rhetoric creates a dilemma for Meidias: either he believes

¹³⁴ For a full discussion of the religious aspects of this passage, see Martin (2009) 37-47.

Demosthenes and/or Aristarchus are killers, and is therefore recklessly careless of pollution, or he does not believe it, and his acts prove his hypocrisy.

The arguments in Demosthenes 21 and Antiphon 6 are similar, but that in Demosthenes is much longer and more developed. Here, we can clearly see the effect of context at work. The case against Meidias is not a homicide suit, and so does not take place in a dedicated homicide court, unlike Antiphon 6, allowing Demosthenes greater freedom to expand within the rules of relevance.¹³⁵ This also means that the dikastic courtroom in which Demosthenes 21 was tried was not enclosed in the multi-layered religious frame of the homicide courts discussed in the first half of this chapter. But there is an additional contextual level here: not only does the trial not take place in a homicide court, but it is not a trial for homicide at all. Because of this, Demosthenes has even greater freedom to emphasise pollution; the context of pollution for homicide is missing entirely from the trial, and therefore even less likely to be present in the minds of the jurors. This means that Demosthenes must bring the issue to the fore in his rhetoric if he is to be able to use it successfully, as well as allowing him more freedom in his manipulation of the jury's understanding of the issue.

To further confirm my argument that context was the key to the presence or absence of pollution rhetoric in a forensic speech, we now turn to those speeches from homicide trials that take place in front of dikastic juries.

3.2.4 ANTIPHON 5

Antiphon 5 is a speech from an *apagoge kakourgon* case against a man named Euxitheus. The narrative tells how Euxitheus was travelling by sea with another man, Herodes, from Mytilene to Aenus. During the course of the journey, bad weather forced the boat to put in at Methymna, where Euxitheus and Herodes transferred to a roofed boat and commenced drinking. Later that night, Herodes presumably left the boat, and by the morning he was missing. Once the roofed boat had returned to Mytilene and been examined by Herodes' relatives, they accused Euxitheus of having killed Herodes in Methymna.

¹³⁵ See Chapter 4.

Euxitheus' statements regarding pollution are made to bolster his case for his innocence. He discusses how he has taken part in activities that, if he had been polluted by killing Herodes, would have gone awry:

ὅσα μὲν οὖν ἐκ τῶν ἀνθρωπίνων τεκμηρίων καὶ μαρτυριῶν οἷά τε ἦν ἀποδειχθῆναι, ἀκηκόατε· χρὴ δὲ καὶ τοῖς ἀπὸ τῶν θεῶν σημείοις γενομένοις εἰς τὰ τοιαῦτα οὐχ ἥκιστα τεκμηραμένους ψηφίζεσθαι. καὶ γὰρ τὰ τῆς πόλεως κοινὰ τούτοις μάλιστα πιστεύοντες ἀσφαλῶς διαπράσσεσθε, τοῦτο μὲν τὰ εἰς τοὺς κινδύνους ἦκοντα, τοῦτο δὲ εἰς τὰ ἔξω τῶν κινδύνων. χρὴ δὲ καὶ εἰς τὰ ἴδια ταῦτα μέγιστα καὶ πιστότατα ἠγεῖσθαι. οἶμαι γὰρ ὑμᾶς ἐπίστασθαι ὅτι πολλοὶ ἤδη ἄνθρωποι μὴ καθαροὶ τὰς χεῖρας ἢ ἄλλο τι μίasma ἔχοντες συνεισβάντες εἰς τὸ πλοῖον συναπόλεσαν μετὰ τῆς αὐτῶν ψυχῆς τοὺς ὁσίως διακειμένους τὰ πρὸς τοὺς θεοὺς· τοῦτο δὲ ἤδη ἑτέρους ἀπολομένους μὲν οὐ, κινδυνεύσαντας δὲ τοὺς ἐσχάτους κινδύνους διὰ τοὺς τοιοῦτους ἀνθρώπους· τοῦτο δὲ ἱεροῖς παραστάντες πολλοὶ δὴ καταφανεῖς ἐγένοντο οὐχ ὅσοι ὄντες, καὶ διακωλύοντες τὰ ἱερὰ μὴ γίνεσθαι τὰ νομιζόμενα. ἐμοὶ τοίνυν ἐν πᾶσι τούτοις τὰ ἐναντία ἐγένετο. τοῦτο μὲν γὰρ ὅσοις συνέπλευσα, καλλίστοις ἐχρήσαντο πλοῖς· τοῦτο δὲ ὅπου ἱεροῖς παρέστην, οὐκ ἔστιν ὅπου οὐχὶ κάλλιστα τὰ ἱερὰ ἐγένετο. ἂ ἐγὼ ἀξιῶ μέγала μοι τεκμήρια εἶναι τῆς αἰτίας, ὅτι οὐκ ἀληθῆ μου οὔτοι κατηγοροῦσι. [Ant.5.81-3]

‘You have now heard everything that can be demonstrated by human evidence and witnesses; but before casting your vote you should also look just as much to the evidence of signs from the gods. You rely on these especially in managing the public affairs of the city safely, in times of danger and other times too; you should also consider these signs important and reliable in private affairs. I think you know that before now many who have embarked on a ship with unclean hands or with some other pollution have themselves perished together with others who led devout lives and fulfilled all their obligations to the gods. Others who did not perish were subjected to life-threatening dangers because of such people. And many others attending sacrifices were shown to be unholy and were prevented from completing the proper rites. With me, however, it’s just the opposite in every case. Those I sailed with have enjoyed the finest voyage, and at the sacrificial rites I have attended, the sacrifice has never been anything but the finest. I think this is important evidence that the prosecution’s accusations against me are untrue.’¹³⁶

Euxitheus' statements here describe typical beliefs about the dangers of letting pollution go unchecked. The argument depicts well-known features of pollution; it is very similar to one used in Andocides 1 to justify the defendant's innocence, though in the Andocides case, the crime in question is not homicide but impiety.¹³⁷

¹³⁶ Tr. Gagarin.

¹³⁷ And.1.137-9. Andocides' opponents reject the idea that his failure to die at sea means that he is not guilty, and suggest that the gods have delayed his punishment in order for him to be punished in court instead (see Lys.6.19.)

The argument here is from probability. Euxitheus is working from the general principle that he cannot have committed the crime in question if he has not been punished for it by the gods. When he states, however, that he has finished with human evidence and will now move on to divine evidence, he demonstrates the belief that humans and gods may have different perceptions of events: for example, that the gods may know about a killing carried out in secret for which there was no ‘human evidence’.¹³⁸ His argument implies that the fact that the gods do not treat him as a killer is indisputable proof of his innocence, and therefore he does not deserve to be punished by human justice. He notes that ‘evidence of signs from the gods’ is usually consulted in public matters that concern the safety of the city. Although there is no indication in the speech that the prosecutors have discussed pollution, by using this language he counteracts the possible belief that the jury would be endangering the religious purity of the city if they were to acquit him; he presents himself as posing no danger to public sacrifices or other citizens. He suggests that the gods have provided this divine evidence in the past: sunken ships and corrupted sacrifices are not merely part of the folklore of pollution here, but actual events that have happened in the past as a result of a killer roaming free. Of course, he provides no information about specific instances of such events, and indeed may be drawing more on mythic story patterns than historical events in his discussion.¹³⁹ But the point is still clear: if he were a killer, the gods would have extracted real, quantifiable vengeance on him. It is thus suggested that the speaker believes that this jury will accept pollution as an actual phenomenon with real consequences.

The passage demonstrates how the ambiguity of pollution can provide interesting rhetorical opportunities. The evidence pollution provides is tricky and can be manipulated by either side, as is the case with many *eikos* arguments. Euxitheus is able to provide witnesses that the ships on which he travelled did not sink and that the sacrifices he attended were successful. These events may be interpreted as proof of his innocence by the members of a mass popular jury who believed that supernatural forces intervened regularly in human action. Of course, we cannot assume that such forces did so, or that the gods were always believed to act

¹³⁸ This omniscience of the gods is seen in the plots of numerous tragedies: for example, in *S.O.T* the gods are aware of Oedipus’ crimes when no mortals are, and punish him accordingly with *miasma*.

¹³⁹ On the use of ‘tragic’ stories in the orators, see Wilson (1996), especially 317-24.

immediately and not delay their vengeance.¹⁴⁰ It is entirely possible that Euxitheus was in fact guilty of the killing of Herodes,¹⁴¹ but his sea voyages and sacrifices went well anyway. If he had attended a sacrifice that had gone awry, this fact could have been exploited by his prosecutors, even if he was innocent; such things could be claimed even if they did not happen. The power of this kind of statement in court lies in the jury's reaction, and the degree to which they believe in *miasma*. It is perhaps for this reason that Euxitheus introduces the pollution argument towards the end of his speech as a supporting statement, rather than relying on it as a main portion of his argument. He cannot be sure that all of the jurors will implicitly believe that his apparent lack of pollution guarantees his innocence, just as orators cannot know that probabilities will be as persuasive as witnesses and other kinds of evidence.

From this we can conclude that, as with many aspects of religion, evidence was not as crucial as shared belief in unseen supernatural factors and agents operative in the world, and the infallibility of divine in contrast to human knowledge. The witnesses called by Euxitheus at this point are simply confirming that when Euxitheus took part in certain activities, nothing out of the ordinary happened. If Antiphon did not believe that a significant portion of the jury would accept these events as signs that Euxitheus was not polluted and therefore not guilty of the killing of Herodes, there would be no point in presenting the argument from *eikos*; the space devoted to the argument is proportional to how seriously it is expected to be taken by

¹⁴⁰ Indeed, the opposite is more often true, and Greek divine vengeance is regularly delayed or stretched out over a long period of time; for example, the curse of the house of Atreus or the ten-year torment of Odysseus on his return to Ithaca. Delayed vengeance was a prominent enough theme in myth that it was the subject of an entire essay in Plutarch's *Moralia*, the *De sera numinis vindicta*, which discusses several questions on the subject while providing historical and mythological examples. Most relevantly, Lysias mentions the divine tendency to delay vengeance in his speech against Andocides: ἐλπίζω μὲν οὖν αὐτὸν καὶ δώσειν δίκην, θαυμάσιον δὲ οὐδὲν ἂν μοι γένοιτο, οὔτε γὰρ ὁ θεὸς παραχρῆμα κολάζει (ἀλλ' αὕτη μὲν ἐστὶν ἀνθρωπίνη δίκη) πολλαχόθεν δὲ ἔχω τεκμαιρόμενος εικάζειν, ὁρῶν καὶ ἑτέρους ἡσεβηκότας χρόνῳ δεδωκότας δίκην, καὶ τοὺς ἐξ ἐκείνων διὰ τὰ τῶν προγόνων ἀμαρτήματα· ἐν δὲ τούτῳ τῷ χρόνῳ δέη πολλά καὶ κινδύνους ὁ θεὸς ἐπιπέμπει τοῖς ἀδικοῦσιν, ὥστε πολλοὺς ἤδη ἐπιθυμησάμενοι τελευτήσαντας τῶν κακῶν ἀπηλλάχθαι. ὁ δὲ θεὸς τέλος τούτῳ λυμηνάμενος τῷ βίῳ θάνατον ἐπέθηκε. [6.20] 'I predict that he will indeed pay the penalty, and that would in no way surprise me. The god does not punish instantaneously; that sort of justice is characteristic of humans. I find evidence for this in many places: I see others who have committed impiety and have paid the penalty much later, and their children paying the penalty for the crimes of their ancestors. In the meantime the god sends much fear and danger to the criminals, so that many of them are keen to die prematurely and be rid of their sufferings. In the end, the god imposes an end on their life, after ruining it in this way.' (Tr. Todd)

¹⁴¹ See Gagarin (1989) for a detailed study of the text which concludes that Euxitheus was probably guilty.

the jury. In this speech, then, pollution mainly works by its absence, and the rhetorical linking of this absence with innocence.

3.2.5 LYSIAS 13

Lysias 13 is the prosecution speech from a homicide case brought in about 399 against a man named Agoratus, tried by the *apagoge* procedure in front of a dikastic court. The prosecution maintains that Agoratus committed homicide by informing against Dionysodorus, the prosecutor Dionysius' cousin and brother-in-law, amongst others, to the Thirty Tyrants. At 13.85-7 the prosecution faces an issue in the wording of their case: the *apagoge* procedure in question seems to require that the defendant be accused of being a killer *ep' autophoroi* ('manifestly', 'self-evidently', '[caught] in the act').¹⁴² It is likely that the procedure was meant to be used in the apprehension of a killer who was widely known to have killed, perhaps with witnesses, and had breached the restriction on the movement of killers. As Agoratus was an informant rather than an *autocheir* ('own-hand') killer, it must have been difficult for the prosecutors to describe his being a killer *ep' autophoroi*: many people may have known that he provided information, but there is no evidence that he ever actually killed anyone personally.

It is in order to support this idea of the 'manifest' nature of Agoratus' crime that pollution for homicide is mentioned. The passage describes how Agoratus was received by certain officials while in Phyle and Piraeus:

ἀλλ' ἕτερον· οὔτε γὰρ συσσιτήσας τούτῳ οὐδεις φανήσεται οὔτε σύσκηνος γενόμενος οὔτε <ό> ταξίαρχος εἰς τὴν φυλὴν κατατάξας, ἀλλ' ὥσπερ ἀλιτηρίῳ οὐδεις ἀνθρώπων αὐτῷ διελέγετο... ἐπειδὴ δὲ <αἰ> διαλλαγὰς πρὸς ἀλλήλους ἐγένοντο καὶ ἔπεμψαν οἱ {πολιῖται} ἐκ Πειραιῶς τὴν πομπὴν εἰς πόλιν, ἠγεῖτο μὲν Αἴσιμος τῶν πολιτῶν, οὗτος δὲ οὕτω τολμηρὸς καὶ ἐκεῖ ἐγένετο· συνηκολούθει γὰρ λαβὼν τὰ ὄπλα καὶ συνέπεμπε τὴν πομπὴν μετὰ τῶν ὀπλιτῶν πρὸς τὸ ἄστυ. ἐπειδὴ δὲ πρὸς ταῖς πύλαις ἦσαν καὶ ἔθεντο τὰ ὄπλα, πρὶν εἰσιέναι εἰς τὸ ἄστυ, ὁ μὲν Αἴσιμος αἰσθάνεται καὶ προσελθὼν τὴν τε ἀσπίδα αὐτοῦ λαβὼν ἔρριψε, καὶ ἀπιέναι ἐκέλευσεν ἐς κόρακας {ἐκ τῶν πολιτῶν.} οὐ γὰρ ἔφη δεῖν ἀνδροφόνον αὐτὸν ὄντα συμπέμπειν τὴν πομπὴν

¹⁴² See Chapter 1.3 for a discussion of the implications of the phrase *ep' autophoroi* on *apagoge* cases. For the phrase's presence in this case, Todd (2000) suggests that 'the Eleven, who were the public officials in charge of prisons and executions and who were responsible for accepting cases of *apagoge* and bringing them to trial, had themselves been dubious about the legal validity of the prosecution (13.85-87); we do not know why they had insisted on Dionysius rephrasing his *apagoge* to include the words *ep' autophoroi*... but part of their reason may have been a wish to cover their backs against future charges of illegal behaviour in office by throwing the responsibility for creative use of language onto the speaker.' (139)

τῆ Ἀθηνᾶ. τούτῳ τῷ τρόπῳ ὑπὸ Αἰσίμου ἀπηλάθη... τούτῳ τῷ τρόπῳ, ὃ ἄνδρες δικασταί, καὶ ἐπὶ Φυλῆ καὶ ἐν Πειραιεῖ πρὸς τοὺς ὀπλίτας διέκειτο· οὐδεὶς γὰρ αὐτῷ διελέγετο ὡς ἀνδροφόνῳ ὄντι, τοῦ τε μὴ ἀποθανεῖν Ἄνυτος ἐγένετο αὐτῷ αἴτιος. [Lys.13.79-82]

‘But there is another point: it is clear that nobody shared his food or his tent with the defendant, and the Taxiarch did not assign him to his tribe. Instead, no human being spoke to him—it was as if he were accursed... When the peace settlement took place between the two sides, and those from Piraeus held their procession up to the Acropolis with Aesimus leading, the defendant behaved just as outrageously. He took up arms and tried to accompany the procession up to the town, joining in with the hoplites. When they were in front of the gates, standing at arms before entering the town, Aesimus noticed him. He came up, seized his shield and tore it away, and told him to go to hell. He said that Agoratus, as a murderer, could have no part in the procession to Athene. That is how he was driven away by Aesimus... These, gentlemen of the jury, are the dealings he had with the hoplites at Phyle and in Piraeus. Nobody spoke to him, since he was a murderer, and only Anytus kept him from being killed.’¹⁴³

Because of the belief that he was a killer, the hoplite soldiers were not willing to eat or share quarters with Agoratus; as Lysias states, they act ‘as if he were accursed (*aliterios*)’¹⁴⁴ and fear that he will spread the pollution to them if they are *homorophios* with him. The word *aliterios* conveys the sense of his offence against the gods, and contextually suggests that this offence makes him dangerous to be around.¹⁴⁵ In §77, he is also called *miaroteros*. The name Aesimus (meaning literally ‘appointed by the will of the gods’ or ‘destined’) may also have resonated with hearers, implying that Agoratus goes against divine will. The taxiarch is also not willing to assign him to a *phyle*, suggesting a similar risk of spreading pollution. The mention of the procession is particularly crucial, as it explicitly demonstrates Agoratus’ exclusion from a religiously significant event. In the words of Aesimus, Lysias draws an explicit link between Agoratus’ status as a known killer and his inability to take part in sacred rites. This is clearly more than simple social exclusion, but an acknowledgement of the religious danger posed by a killer.

Instead of relying on physical evidence of pollution (or the lack of it, as seen in Antiphon 5) the rhetorical effect relies on the perception of people interacting with

¹⁴³ Tr. Todd.

¹⁴⁴ As Neil (1901) notes in his commentary on Aristophanes’ *Knights* at 455, ‘ἀλιτήριος is always a grave word, implying pollution and danger to the community.’ (68)

¹⁴⁵ The only other instance of the word in the corpus of Lysias is at 6.52-53, where it is used twice to describe Andocides’ status after committing impious crimes; specific reference is made to his being banned from the temples and the need to eject him from the city.

Agoratus. Although he has not been caught in the act, everyone knows he is responsible for the killings, and treats him accordingly. Thus his guilt becomes ‘manifest’, though perhaps here the better translation is ‘evident’, as Lysias’ rhetoric aims to manipulate the definition in the minds of the jury to mean obvious or apparent, distancing the phrase from the notion of the culprit being caught in the act. Lysias’ argument relies on the implication that a known killer will be treated in a certain way, and therefore that if a man is treated in that way, he must be a killer. If Agoratus’ guilt is obvious enough to the men in the narrative that they take precautions against his involvement in the rites, then—it is implied—it should be obvious to the jury that they should convict him for homicide. It is not necessary for Agoratus to have taken part in the rituals and for them to have gone badly as a result; it is sufficient for rhetorical purposes for him to have been barred from taking part in the first place.

Here, the belief in pollution becomes equated with the belief in guilt and Lysias uses it with the aim of countering a potential trump card from Agoratus. From §77 it is clear that Lysias expects Agoratus to use his presence at Phyle in his defence, in order to represent himself as a committed opponent of the Thirty.¹⁴⁶ The soldiers and Aesimus have said that Agoratus is polluted; the witnesses have affirmed that they said so; if the jurors believe the witnesses, then they believe the soldiers, and believe that Agoratus is, indeed, polluted. If he is polluted, then he must have committed homicide, and the question of the manner in which the crime was committed becomes less important. This is by no means an unusual style of argument in forensic oratory, and it follows the same pattern as much of the invective found in court speeches. The orator denounces his opponent with an allegation, particularly by stating or implying that ‘everyone knows’ this fact about his opponent.¹⁴⁷ The aim is to adjust the jurors’ perception of an opponent by planting a seed of doubt in his mind about his character or actions. The pollution

¹⁴⁶ See *X.HG.2.4*.

¹⁴⁷ For example, Aeschines states outright that everyone in the jury should already know that Timarchus was a prostitute (*Aeschin.1.80, 130*); he presents no witnesses to this fact, instead repeatedly calling for the jury to be witnesses to hearsay (*Aeschin.1.71-2, 89-90, 92, 130*). Note that at 1.100 Aeschines presents witnesses to Timarchus’ squandering of his father’s estate, but never to his prostitution. He clearly believes that swaying the jury’s perception of Timarchus by telling them how he is viewed by others, for example, those who laughed at him in the assembly, will be enough for them to judge him guilty of the crime and convict him. See also Chapter 5.3.1 for other examples, particularly that of Aeschines’ accusations of homicide against Demosthenes.

argument in Lysias 13 is intended to have the same effect: to make the jurors believe that other people believe that Agoratus is a killer, and therefore they should too.

Lysias 13 once again demonstrates a forceful application of pollution rhetoric in a speech that is delivered in a dikastic court rather than a homicide court. Indeed, Lysias' wording works to establish a more obvious causal link between homicide and pollution. Antiphon's approach in speech 6 seems to assume that the pollution spread by contact is obvious, and therefore he does not need to state it outright. It should be clear from these examples, then, that in general the speeches that are delivered in dikastic courts, whether from homicide trials or that simply refer to homicide, make more of pollution rhetoric than those speeches that are delivered inside the homicide courts.

3.3 CONCLUSIONS

Several procedures were in place at the homicide courts in Athens that had religious aspects to them. These, along with the cultural understanding of pollution for homicide in mythology, drama, and religious ritual, reflect and reinforce a belief that religious pollution adhered to homicide. The religious solemnity and importance of a homicide trial would certainly have been apparent to those taking part in it, to whom the cultural significance of procedures involving religion would be obvious. Pollution for homicide was most specifically the concept of a stain on the hands of the killer, but was also given force by the idea of 'polluting' spirits of vengeance pursuing him. Its most potent attribute, however, was its contagious nature, having the potential to affect anyone who stood in the way of justice for the victim, or even innocent bystanders and citizens who came into contact with the killer, whether they knew he was a killer or not.

The religious procedures themselves played a certain 'rhetorical' role. They implied that the trial was dangerous, and that it needed to be contained. They also made it clear that the danger could affect people within the trial setting, and took precautions to avoid this, such as performing the trials in the open air and delineating the court space purposefully with powerful oaths. The procedures set homicide trials apart from other kinds of trials at Athens, giving them an individual status that was reinforced by the ideologically-perceived age and importance of the laws governing them. Prosecuting homicide, and therefore containing pollution, was crucial. But the

religious procedures present in the dedicated homicide courts were absent from the dikastic courts, and thus we notice a difference in the frequency of the use of pollution rhetoric. As a religious setting makes the danger of a homicide case clear in a homicide court, the use of rhetoric relating to pollution may have seemed less urgent to the orator, and its effectiveness as an argument may have decreased. The dikastic courts had nowhere near such a strongly religious context, and thus orators talking about homicide could choose to provide a context of their own, by emphasising the polluting danger posed by killers and those who chose to interact with them freely. The room for this emphasis grew even further when the case in question was not directly concerned with homicide.

I suggest that the orators are not silent on the matter of pollution, but rather subtle. The arguments that the orators employ when discussing pollution are not as forthright as those seen in the hypothetical *Tetralogies*. They often seem not to mention pollution explicitly or refer to its established tenets, but nevertheless describe behaviours and interactions that are clearly a result of the belief that homicide incurs pollution. These speakers rely not on the religious context provided or not provided by the trial setting, but on the belief of the jury in the link between the act of homicide and the verifiable presence of pollution. This belief is encouraged through several means in the extant speeches. The speaker may rely directly on physical evidence, or the lack of physical evidence, of a person's polluted state, providing witnesses to this, in order to support a claim of guilt or innocence. They may also rely on witnesses to the reactions of others to the accused party, as seen in *Lysias 13*; attested belief in someone's polluted state by one group of people should encourage the same belief in another group, and therefore foster belief in that person's guilt. A third rhetorical approach involved addressing the accused's interactions with others, particularly the family members of the victim, and manipulating the jury's view of these interactions to suggest either innocence or conspiracy. Some orators using pollution rhetoric may have intended it to work in much the same way as any other insulting slight on the character of an opponent used in court: only an unsavoury person would have such an attribute, and therefore the jury should show him no favour. This last strategy removes almost all need for belief on the jurors' part in the details of homicide pollution. They merely need to perceive it as something negative, and the orator needs to be able to present some

link between this negative attribute and his opponent's behaviour. In general, pollution would not be introduced as an argument for its own sake, but in order to support the speaker's case for guilt or innocence, or their characterisation of their opponent, as any successful rhetorical argument should aim to do.

Finally, we may return to Parker's assertion that the rise of legal means of dealing with homicide in Athens led to a decline in belief in homicide as a source of pollution. The contexts of cultural belief and religious setting were not the only necessary prerequisites for successful pollution rhetoric, and the absence of pollution rhetoric from certain speeches should not necessarily be taken as evidence of lack of belief in pollution for homicide. The rest of the speaker's argument also formed necessary context, and if an argument based on pollution would undermine or simply not fit in with a speaker's other arguments, it would be passed over in favour of other rhetorical strategies. A defendant may choose not to mention pollution at the risk of drawing attention to the potential danger he posed if he was acquitted unjustly, thus perhaps encouraging an overly-cautious attitude on the part of the jury in favour of the prosecution. Other speakers may have seen fit to emphasise the absence of the figure of the dead person in order to present him as a passive victim, rather than using him as a vengeful figure of pollution. Still other speakers may have feared alienating the jury by mentioning the risk that the pollution may spread to them if they judged poorly. It is difficult to tell why orators chose to use certain arguments instead of others without being aware of all of the facts of each case, but it is clear that when orators did choose to use an argument based on belief in pollution for homicide, it could be employed successfully.

Instead, the law and belief in pollution with its consequent social exclusion worked together to control homicide. Although the rhetoric of pollution alone could not lead to the conviction of a killer, it could be used to support such a conviction. The fact that purification seems to have been a part of the legal requirement for return from exile for killing suggests that the legal process punished the killer but did not remove the stain on his hands.¹⁴⁸ Pollution could only be contained by law, not eradicated, and therefore the rise of law would not necessarily lead to the decline of pollution belief. It is because of this containment that pollution rhetoric could be

¹⁴⁸ D.23.72.

effective: it provided another motivation for the jury to make the right decision in a homicide case.

RHETORIC AND RELEVANCE

Athenian forensic oratory from the dikastic courts is littered with material that, by modern standards, would be considered clearly irrelevant to the case at hand. There are a number of obstacles that must be overcome when attempting to make sense of the subject of relevance in the Athenian courts. One might take at face value *Ath.Pol.*67.1, which states that litigants took an oath to keep to the point, at least in private cases. There is also a statement in the jurors' oath as reported in Demosthenes 24 that jurors would judge only the matter named in the prosecution: this implies that they would disregard any material that was irrelevant to the charge at hand.¹ Both pieces of evidence suggest an insistence on relevance in the dikastic courts. The evidence of oratory, however, demonstrates that speakers often deviated from the point and included material neither directly nor indirectly relevant to the case, particularly invective.² It would be easy to conclude, therefore, that whether a restriction on irrelevant material existed or not, speakers got away with presenting much that was not necessarily directly concerned with the matters at hand.

More recently, scholars have begun to reassess that material that could be considered 'irrelevant'. Rhodes' survey of instances of 'irrelevance' in the orators leads him to conclude that irrelevant statements were not as common as previously thought. He has suggested not only that rules about relevance did indeed exist in the dikastic courts, but that most of the material that we would consider 'irrelevant' by modern standards was in fact relevant to the 'larger story' of each case. Speaking specifically about Lysias, he writes:

'A few speeches do depart from the issue formally before the court and concentrate on the character of the litigants, the good or harm that they have done to Athens and the sympathy or hatred that they deserve from the court; some other speeches have short passages of that kind; but most speeches are

¹ D.24.151. The oath is also referred to at D.45.50

² E.g. the digression on Agoratus' brothers at Lys.13.67-9; the digression on Nicomachus' father at Lys.30.2; an account of good deeds to the city at Is. 4.27; proposed good deeds for the city at Is.5.45; a long passage of invective against Aeschines and his family at D.18.127-130; a comparison of Demosthenes' and Meidias' public service at 21.153-4; the digression on Timarchus' father at Aeschin.1.101-104.

devoted wholly or largely to the issue before the court—with one proviso. This is that frequently the particular episode which has given rise to the formal charge is part of a larger story, a man's involvement with the oligarchy of the Thirty, or a family feud in which each party has a number of complaints against the other(s), and then it is clearly considered legitimate not to concentrate on the episode which has given rise to the particular charge which is being tried in this particular case but to review the whole of the larger story.³

By Rhodes' reckoning, such statements would therefore be accepted by the jury as not contravening the restriction. He offers us the useful idea of the 'larger story' when considering irrelevance, though his application of the term is rather liberal. His suggestion that only 'a few' speeches contain irrelevant material is an understatement, as many speeches make references of the kinds he mentions, even if only briefly.

Lanni also suggests that more of the 'irrelevant' material would have been considered allowable than previously thought, though she differs from Rhodes in suggesting that this is due to an equitable Athenian legal system pursuing a wider sense of justice than the strict rule of law would permit. She does still identify a quantity of potentially irrelevant material in the speeches,⁴ however, which she divides into three useful main categories that are more specific than the 'larger story' posited by Rhodes:

'(1) the expansion of the litigant's plea beyond the strict limits of the event in question to encompass the broader background of the dispute, (2) defense appeals for the jury's pity based on the potential harmful effects of an adverse verdict, and (3) arguments based on the character of the parties.'⁵

She sums up her views on the issue by saying that 'a wide variety of extralegal material was considered relevant and important to reaching a just verdict tailored to the particular circumstances of the individual case.'⁶ She largely discounts, however, the statement in the *Ath.Pol.* and posits that 'if in fact [the relevance restriction in the dikastic courts] existed, it appears to have had no effect'.⁷ Lanni's specific categories of irrelevant statement are useful, and I agree that, although some seemingly irrelevant material would in fact be admissible, other statements preserved in the

³ Rhodes (2004) 141.

⁴ Lanni (2000) 320-1, n.28.

⁵ Lanni (2005) 114.

⁶ Lanni (2005) 127-8.

⁷ Lanni (2005) 113.

speeches would indeed have been considered irrelevant. It would be going too far, though, to say that there were no expectations of relevance in the dikastic courts.

Nonetheless, these expectations do not have a significant presence in the sources. Speakers in the dikastic courts rarely refer to the expectation of relevance, and when they do, they make no reference to law or custom.⁸ There does not appear to have been any formal enforcement of relevance beyond the speaker's time constraints. It is probable that there was only informal enforcement of relevance by *thorubos* from the jury. Vocal dissent from the jury will have influenced speakers' rhetoric, and would probably have applied in cases of obvious irrelevance, as can be seen, for example, at Demosthenes 57.63-5 and Hyperides 4.31.⁹

One point on which scholars generally agree is that the homicide courts were held to a higher standard of relevance than the dikastic courts.¹⁰ A number of ancient sources either suggest or state outright that litigants in the homicide courts had to keep to the point, and indeed, Antiphon 5 suggests that an oath was sworn to this effect.¹¹ The rationale for the difference is never explained explicitly. On the rationalisation of relevance more generally, Aristotle presents his ideal view:

...ἅπαντες γὰρ οἱ μὲν οἴονται δεῖν οὕτω τοὺς νόμους ἀγορεύειν, οἱ δὲ καὶ χρωῶνται καὶ κωλύουσιν ἔξω τοῦ πράγματος λέγειν, καθάπερ καὶ ἐν Ἀρείῳ πάγῳ, ὀρθῶς τοῦτο νομίζοντες· οὐ γὰρ δεῖ τὸν δικαστὴν διαστρέφειν εἰς ὀργὴν προάγοντας ἢ φθόνον ἢ ἔλεον· ὅμοιον γὰρ κἂν εἴ τις ᾧ μέλλει χρῆσθαι κανόνι, τοῦτον ποιήσῃε στρεβλόν. ἔτι δὲ φανερόν ὅτι τοῦ μὲν ἀμφισβητοῦντος οὐδέν ἐστιν ἔξω τοῦ δεῖξαι τὸ πρᾶγμα ὅτι ἔστιν ἢ οὐκ ἔστιν, ἢ γέγονεν ἢ οὐ γέγονεν· εἰ δὲ μέγα ἢ μικρόν, ἢ δίκαιον ἢ ἄδικον, ὅσα μὴ ὁ νομοθέτης διώρικεν, αὐτὸν δὴ πού τὸν δικαστὴν δεῖ γινώσκειν καὶ οὐ μανθάνειν παρὰ τῶν ἀμφισβητούντων. [Arist.*Rh.*1354a.21-31]

⁸ D.57.33, 59, 63, 66; Lys.9.1.

⁹ See also Bers (1985) 11, and below, 127 n.18.

¹⁰ Recently, Harris has argued that there was no difference in relevance restriction between the dikastic courts and the homicide courts (Harris (2009/10) 325-8, (2013) 114.) He successfully shows that some instances of seemingly irrelevant material can be shown to be relevant to the specific case at hand: for example, that the accusation of previously violent behaviour in D.54 *Against Conon* may be relevant if the charge is a *graphe hubreos*, and therefore tied to the character of the offender. He goes too far, though, in asserting that this means that all instances of apparently irrelevant material are in fact relevant. He also asserts that the mention of the dikastic relevance rule quoted in *Ath.Pol.* means that there was no irrelevance, implying that the existence of a rule means that it was followed at all times by all litigants. This seems to give the litigants, and the jurors, too much credit. It is easily believable that, if the rule did in fact exist, speakers would attempt to, and indeed succeed in, bending or breaking this rule in order to introduce irrelevant material that they believed would help their case. Examples of this will be discussed throughout this chapter.

¹¹ See the cases examined below; also Poll.8.117.

‘...for everyone thinks the laws ought to require this, and some even adopt the practice and forbid speaking outside the subject, as in the Areopagus too, rightly so providing; for it is wrong to warp the jury by leading them into anger or envy or pity: that is the same as if someone made a straightedge rule crooked before using it. And further, it is clear that the opponents have no function except to show that something is or is not true or has happened or has not happened; whether it is important or trivial or just or unjust, in so far as the lawmaker has not provided a definition, the juryman should somehow decide himself and not learn from the opponents.’¹²

Antiphon takes a similar view of the importance of the rule in speech 5, stating that a defendant should only be convicted for the crime for which he is on trial, and not any other crimes or behaviour, just as no good behaviour should let him off the hook.¹³ This concern for focusing the trial on the facts of the alleged crime and not on emotional pleas may explain the Athenian understanding of the need for relevance regulations, but does not explain why the strict rule is specifically associated with the homicide court. We may assert, though, that relevance from the speakers was generally considered to be conducive to a just decision by the jury,¹⁴ and that the solemnity and seriousness of homicide trials, both for the parties involved and for the city, insisted on a level of rigour not necessarily seen elsewhere in the Athenian courts.

It can be assumed that the relevance restrictions applied across all of the homicide courts, particularly on the evidence of Antiphon 6, which probably took place at the Palladion and seems to conform to the restriction. Nevertheless, the majority of the explicit references to the rule relate to the Areopagus, and we cannot know for certain whether the rule was applied in the same way across all of the homicide courts, or if the rules in the Areopagus more generally stood for all of the other homicide courts. The sources are similarly uninformative as to how the relevance restriction in the homicide courts was formulated, whether by law or simply through tradition or custom. In the passage from the *Rhetoric*, Aristotle suggests that relevance ‘must’ or ‘ought to’ be required by law, but does not state clearly that it actually *is* required. The oratorical sources are no clearer. At Antiphon 6.9, the word *nomos* distinguishes the power that enforces the restriction, a word that

¹² Tr. Kennedy.

¹³ Ant.5.11; see below, 143.

¹⁴ Lycurg.1.11-13.

generally denotes law for Antiphon, but can signify custom.¹⁵ At Lysias 3.46, however, it is *ou nomimos* to speak on irrelevant matters, which more often implies custom, at least in the Lysianic corpus.¹⁶ Both terms, however, remain ambiguous. The discrepancy in terminology probably reflects a difference in authorial intention. Antiphon's speech intends to sanction his opponent, and therefore finds it beneficial to suggest that they are breaking a law. Lysias, meanwhile, is framing his own potential transgression, and therefore prefers the less forceful term. The jury in each case was unlikely to quibble with the exactitude of terms mentioned so briefly, and so we cannot know for certain which more accurately reflects the reality of Athenian homicide procedure.¹⁷ As lack of evidence leaves us unable to convincingly define the nature of restrictions on irrelevance in the homicide courts, it will be referred to here as 'the relevance rule', and I will assume that it carried more weight than the looser expectations of relevance in the dikastic courts.

More importantly for our present purposes, there is no extant evidence contemporary to the orators as to how the relevance rule was enforced. It is possible that the *thorubos* ('clamour') of the jury or the *periestekotes* ('bystanders') would override any speaker who attempted to deviate from the point at hand.¹⁸ This would

¹⁵ The word is used many times in the corpus of Antiphon, and generally seems to carry the weight of law: for example, the law under which a specific case is being tried (e.g. 3.2.9, 3.3.9, 3.4.10, 4.2.5, 5.9) or the law that restricted the movement of those accused of homicide (e.g. 3.1.2, 3.3.11).

¹⁶ Forms of the word are used six times in the corpus of Lysias: four times in the speeches, including this instance, and twice in the fragments. The two instances in speech 6, at §17 and §51, refer to the religious rites corrupted by Andocides and would more reasonably carry the meaning of custom than law. The third instance occurs in speech 13, where the speaker advises the jury that it would be neither *hosios* nor *nomimos* to acquit Agoratus after their dead friends had implored them to seek vengeance on him. It is more rhetorically forceful in this instance for the word to carry the weight of law, but the negated form would probably mean simply that failing to pursue the killer of a friend was 'not upholding the law/custom' rather than actually punishable by law. The same association with *hosios* is made in fragment 128, though the text is too corrupted to be sure of the meaning. Fragment 195 states that dying in a *nomimos* manner is common to us all, and must mean 'customary' or 'usual'. In the case of 3.46 we cannot insist on a meaning of 'illegal', and must settle for 'not in line with custom' with the caveat that custom here must be long-established, and with equivalent seriousness to law, if without actual basis in legislation.

¹⁷ Either a separate law or a long-standing custom would support the ideology of homicide established in Chapter 2.

¹⁸ A number of instances can be found of litigants exhorting the jury to shout out during the trial, e.g. D.19.75, 23.18-19, 41.17, 49.63. For more on dikastic *thorubos* see Bers (1985). For the role of bystanders in producing *thorubos*, see Lanni (1997) 188-9. It appears that there were bystanders in the homicide courts: Ant.6.14 refers to bystanders who know of the events of the case (πολλοὶ τῶν περιεστώτων τούτων τὰ μὲν πράγματα ταῦτα πάντα ἀκριβῶς ἐπίστανται), and at Lys.10.11-12 the speaker berates Theomnestus for not having gone to the Areopagus to learn about the use of law (οὐτοσί γάρ μοι δοκεῖ ὑπὸ ῥαθυμίας καὶ μαλακίας οὐδ' εἰς Ἄρειον πάγον ἀναβεβηκέναι). Travlos (1967) 508 identifies evidence of posts at the site that he believes to be the Palladion; Lanni (2012) takes this to be evidence for 'a series of poles connected with rope or light wooden barriers that would separate the spectators from the jury but would not prevent them from seeing and hearing the

not differ, however, from the likely situation in the dikastic courts, and does not account for the emphasis that the procedure received in the homicide courts. Two late sources suggest the presence of a *keryx* ('herald') in the Areopagus, and that his duties may have extended to enforcing the relevance rule:

οἱ δὲ ἔστ' ἂν μὲν περὶ τοῦ πράγματος λέγωσιν, ἀνέχεται ἢ, βουλὴ καθ' ἡσυχίαν ἀκούουσα· ἦν δέ τις ἢ φορτίμιον εἶπη πρὸ τοῦ λόγου, ὡς εὐνουστέρους ἀπεργάσαιτο αὐτούς, ἢ οἴκτον ἢ δεινῶσιν ἔξωθεν ἐπάγη τῷ πράγματι οἷα πολλὰ ρητόρων παῖδες ἐπὶ τοὺς δικαστὰς μηχανῶνται παρελθὼν ὁ κῆρυξ κατεσιώπησεν εὐθύς, οὐκ ἔῶν ληρεῖν πρὸς τὴν βουλήν καὶ περιπέττειν τὸ πρᾶγμα ἐν τοῖς λόγοις, ὡς γυμνὰ τὰ γεγενημένα οἱ Ἀρεοπαγῖται βλέποιν. [Luc.*Anach.*19]

'As long as they [the litigants] spoke to the issue, the Council tolerated them and listened quietly. If someone either delivered a proem prior to his argument in order to make them [the judges] more well-disposed, or dragged into the issue an extraneous appeal to pity or a rhetorical exaggeration—which are the sort of things that the students of rhetoricians devise against the judges—the *keryx* came forward and immediately silenced him, forbidding him from talking nonsense to the Council and disguising the issue with his words, so that the Areopagites could look at the events unadorned.'¹⁹

...ἐν τῷ δικαστηρίῳ τῷ ἐν Ἀρείῳ πάγῳ οὐ χρήσις ἦν προοιμίου· κῆρυξ γὰρ ἐκήρυττε προσφωνῶν καὶ παρεγγυώμενος τῷ εἰσιόντι· μὴ προοιμιάζου μηδὲ ἐπίλεγε... [Anon. scholiast to Hermog.*Inv.*7.64.10-13]

'...in the court of the Areopagus the *prooimion* was not used; for the *keryx*, addressing and exhorting those coming in, announced, 'do not speak a *prooimion* or an epilogue'...

The latter passage can be taken with Pollux 8.117 to suggest that a *prooimion* was a likely location for irrelevant material. The fact remains that both of these texts were written at least 500 years after the orators, and therefore we cannot be sure that they accurately reflect classical Athenian practices. In some respects they are clearly idealising and inaccurate. Most importantly, we do find *prooimia* in both extant speeches from the Areopagus.²⁰ We also find them in homicide speeches from the other homicide courts.²¹ We should not discount the possibility that the *keryx* acted

litigants.' (5) This cannot be confirmed but is plausible. Lanni also notes that 'the requirement that all homicide trials be conducted under the open sky may have also made it easier for bystanders to hear the litigants.' (5)

¹⁹ Tr. Lanni.

²⁰ Lys.3.1-4, 7.1-3.

²¹ Lys.1.1-5 presents a classic *prooimion*. The structures of Antiphon 1 and 6 are more unusual, but there are aspects of *prooimia* in the opening chapters of both speeches.

as an enforcer of relevance, but we should be cautious; no solid conclusion can be drawn.²²

This chapter does not intend to revisit these aspects of the rules in place regarding relevance in much detail, though some of the debated issues will be discussed when pertinent to my analysis of the speeches in question. Generally, it will be accepted that relevance was a particular concern in the homicide courts of Athens, and it was likely that the need for relevance was made explicit at the beginning of the case in the form of oaths sworn by the litigants, and reinforced by the ritualised trial process. Instead of focusing on the workings of the procedure, this chapter will aim to explore the relationship between principles of relevance and rhetorical practice, and the degree of elasticity in implementation. The mentions of relevance in both the dikastic courts and the homicide courts have been examined at great length for their evidence of the procedures in place in these courts, but little has been said systematically of their role as rhetorical arguments. I will begin by following the pattern of Rhodes and Lanni in attempting to define what kinds of material might be considered irrelevant by an Athenian homicide jury. Then I will explore how the concept of relevance in homicide speeches interacts with the ideology of separateness established in Chapter 2, and how conceptions of it vary between the homicide courts and the dikastic courts. I will also examine some areas where the boundaries imposed on homicide rhetoric by relevance seem to become visible, and will draw some conclusions about the effect that these may have had. In this way, relevance will be presented not only in terms of its legal significance, an issue already covered in the scholarship, but in terms of its rhetorical significance.

4.1 WHAT WAS ‘IRRELEVANT’ IN AN ATHENIAN HOMICIDE COURTROOM?

In order to adequately discuss the rhetorical uses of irrelevance, we should first aim to define ‘relevant’ and ‘irrelevant’ as categories of statement in the Athenian homicide courts. There is no extant ancient catalogue of material that was classed as *exo tou pragmatos*, or even an indication as to whether this was a category

²² Lanni (2006) also posits the *keryx* as a potential enforcer of the rule, but writes: ‘It is unlikely that the herald would be entrusted with the responsibility for determining when a litigant’s arguments strayed from the point. If the herald did enforce the relevancy rule, he presumably took his cue from the reaction of the more experienced homicide judges.’ (99) It is unknown whether the *keryx*, if he existed at the Areopagus, would in fact have been less experienced than the judges, as the post could have been professional rather than elected. If so, the *keryx* may indeed have been able to make the decision for himself.

that could be imposed across the board, rather than decided on a case-by-case basis. In light of this, it remains challenging to attempt to justify any individual statement or class of statements as relevant or irrelevant.²³ Such attempts have been examined in the introduction to this chapter, but our distance from the ancient context makes it impossible to know exactly what would have been considered relevant and irrelevant by any particular jury in any particular case in the classical period. The categories proposed by Lanni, and Rhodes' insistence on a broad picture of the case, give us a framework for a relatively broad definition of relevance even in the homicide courts. But if the rule existed, it must have existed to ban particular types of material, and we are at a loss as to the specific kinds of statements to which Areopagite and ephetic juries might have objected. Aristotle's direction to avoid provoking the jury's emotions, as well as his and Antiphon's desire for a focus on the facts of the specific crime on trial, may give us a little more information, but still leave much open to interpretation. There is, however, some evidence in the homicide speeches that may tell us more about what kinds of statements were actually considered irrelevant by juries in practice. In search of greater specificity, then, we may start from the moments when speakers in the homicide courts acknowledge a potential contravention of the rule, either on their own part or that of their opponent. This method can give us a clearer view of standards of relevance than externally imposed categories.

The speaker in Lysias 3 invokes the relevance rule to cushion his attempt to present information about Simon's previous violent behaviour:

ἐβουλόμην δ' ἂν ἐξεῖναι μοι παρ' ὑμῖν καὶ ἐκ τῶν ἄλλων ἐπιδειῖσαι τὴν
τούτου πονηρίαν, ἵνα ἠπίστασθε ὅτι πολὺ ἂν δικαιότερον αὐτὸς περὶ θανάτου
ἡγωνίζετο ἢ ἑτέρους ὑπὲρ τῆς πατρίδος εἰς κίνδυνον καθίστη. τὰ μὲν οὖν

²³ By comparison, in modern UK law, there are provisions regarding the introduction of evidence in terms of relevance. The issue is most pertinent with regard to evidence of bad character. The Criminal Justice Act 2003 §98-113 establishes the provisions for introduction of evidence of bad character. For example, evidence of the defendant's bad character may only be introduced if: '(a) all parties to the proceedings agree to the evidence being admissible, (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it, (c) it is important explanatory evidence, (d) *it is relevant* to an important matter in issue between the defendant and the prosecution, (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant, (f) it is evidence to correct a false impression given by the defendant, or (g) the defendant has made an attack on another person's character.' (§101, Criminal Justice Act 2003, my emphasis)

ἄλλα ἐάσω· ὃ δ' ἡγοῦμαι ὑμῖν προσήκειν ἀκοῦσαι καὶ τεκμήριον ἔσεσθαι τῆς τούτου θρασυτήτος καὶ τόλμης, περὶ τούτου μνησθήσομαι. ἐν Κορίνθῳ γάρ, ἐπειδὴ ὕστερον ἦλθε τῆς πρὸς τοὺς πολεμίους μάχης καὶ τῆς εἰς Κορώνειαν στρατείας, ἐμάχετο τῷ ταξιάρχῳ Λάχητι καὶ ἔτυπτεν αὐτόν, καὶ πανστρατιᾷ τῶν πολιτῶν ἐξελθόντων, δόξας ἀκοσμότατος εἶναι καὶ πονηρότατος, μόνος Ἀθηναίων ὑπὸ τῶν στρατηγῶν ἐξεκηρύχθη. ἔχοιμι δ' ἂν καὶ ἄλλα πολλὰ εἰπεῖν περὶ τούτου, ἀλλ' ἐπειδὴ παρ' ὑμῖν οὐ νόμιμόν ἐστιν ἔξω τοῦ πράγματος λέγειν, ἐκεῖνο ἐνθυμεῖσθε· οὗτοί εἰσιν οἱ βία εἰς τὴν ἡμετέραν οἰκίαν εἰσιόντες, οὗτοι οἱ διώκοντες, οὗτοι οἱ βία ἐκ τῆς ὁδοῦ συναρπάζοντες ἡμᾶς. [Lys.3.44-6]

‘I wish I were allowed to demonstrate his wickedness by referring to other events. That way, you would recognise that it would be far more just for him to be on trial for his life than to put other people in danger of exile. I shall omit everything else, but mention one episode I think you should hear about, as evidence of his outrageous audacity. At Corinth, arriving after the battle against the enemy and the expedition to Coronea, he had a fight with Laches his commander and beat him up. When the army marched out in full force, he was judged an insubordinate criminal and was the only Athenian to be publicly censured by the generals. I could tell you many other things about him, but since it is not in line with custom to mention irrelevant material in your court, please bear this point in mind: my opponents are the ones who enter our houses by force; they are the ones who pursue us; they are the ones who drag us off the street by force.’²⁴

At §5-9, the speaker has detailed his earlier conflicts with Simon leading up to the fight that provoked the trial at hand. It cannot, therefore, be the discussion of previous behaviour in general that is considered irrelevant. The details of the ongoing feud between the two men are a legitimate part of Rhodes’ ‘larger story’ and provide background to the current case. It must be that this specific detail about Simon’s propensity to violence has nothing to do with his confrontational relationship with the speaker. It is purely a comment on character, intended to suggest that Simon has a habit of starting fights with just about anyone, and so would be likely to start one with the speaker. Indeed, when narrating the events of the previous disputes between the men, the speaker says that the jury ‘should hear the offences he committed against me personally’.²⁵ A clear contrast appears between previous affairs involving both litigants ‘personally’—which Rhodes would classify as part of the ‘larger story’—and those involving only the opponent’s previous behaviour, including those only obliquely referred to in Lysias’ *praeteritio*. The latter, though framed as evidence for habitual violence on Simon’s part, seems

²⁴ Tr. Todd.

²⁵ ...ὄσα δὲ εἰς ἐμὲ αὐτὸν ἐξημάρτηκεν, ἡγοῦμαι ταῦθ' ὑμῖν προσήκειν ἀκοῦσαι [Lys 3.5].

to speak mainly to defamation of character.²⁶ Lysias' reticence when presenting this kind of character-based argument suggests that it would be considered irrelevant by the homicide courts.

The difference in this regard between the homicide courts and the dikastic courts is corroborated by comparative evidence from Lysias 13. The speech includes a digression about the characters of Agoratus' brothers.²⁷ He gives no indication that the men were working together, and appears to be attempting to rhetorically conflate the crimes of the brothers with those relevant to the trial. The eldest brother was executed for colluding with the enemy during the Sicilian expedition; the second for smuggling slaves between Athens and Corinth; and the third for clothes-snatching. The section is rhetorically framed as a point of comparison regarding the proposed punishment for Agoratus: if his brothers were each executed for a single offence, then Agoratus should certainly also face execution for his numerous crimes. The explicit intention is to provide precedent, but there is clearly another aspect at play. The offenders are closely related to Agoratus, so there is also a sense that he comes from a family of habitual criminals, and that, therefore, it should not be doubted that he committed this crime. The effect is intended to be similar to that of the statement in Lysias 3, but this time, Lysias does not feel the need to bracket the information with deference to the relevance rule. We may, then, tentatively conclude that one category of irrelevant statement that formed part of the procedural difference between the homicide and the dikastic courts was evidence of character or behaviour with no direct link to the case at hand or to the other litigants involved in that case.

Lysias 7 provides a further example of irrelevant material:

...πατρίδος δὲ τοιαύτης ἐπ' αἰσχίσταις στερηθεὶς αἰτίαις, πολλὰς μὲν ναυμαχίας ὑπὲρ αὐτῆς νεναυμαχηκῶς, πολλὰς δὲ μάχας μεμαχημένος, κόσμιον δ' ἑμαυτὸν καὶ ἐν δημοκρατίᾳ καὶ ἐν ὀλιγαρχίᾳ παρασχόν. ἀλλὰ γάρ, ὧ βουλή, ταῦτα μὲν ἐνθάδε οὐκ οἶδ' ὅ τι δεῖ λέγειν... [Lys.7.41-2]

'...I would be deprived, on charges that bring extreme shame, of the fatherland which is so dear to me, for which I have fought many battles on land and at sea, and have behaved well under both democracy and oligarchy.

²⁶ The presentation of evidence for previous bad character towards the victim can also be seen in Ant.1.3, with the speaker's assertion that the stepmother had previously attempted to kill the speaker's father, but again, this seems to speak to the larger story.

²⁷ Lys.13.67-9.

But I do not know, members of the council, what need there is to speak of these matters here...'²⁸

Again, the speaker checks his own digression into irrelevant territory as he starts to speak of the good that he has done for the city, particularly in the form of fighting to defend it. Similar passages can be found scattered throughout the corpus of Athenian forensic oratory, and it seems that, at least in the dikastic courts, it was acceptable to attempt to defend oneself on the ground of a generally good character and devotion to the city, particularly when the charge had some public resonance.²⁹ The passages we find in the dikastic courts tend to run to several chapters of the speech.³⁰ The speaker's hesitation here, by contrast, suggests that such passages were not welcome in the homicide courts. Once again, a comparison with a homicide case in the dikastic courts will show a clear divide between the two institutions: in Antiphon 5, Euxitheus defends his father and gives examples of his good character, since he was also implicated in the case. Other examples can also be seen in matters not related to homicide.³¹ It seems that both denigrating the opponent's character and improving one's own in ways unrelated to the crime at hand was not permissible in the homicide courts.

If these examples show irrelevant material, then we may tentatively conclude that *to pragma* in a homicide case is understood to refer to matters directly linked to that case. This may have varied slightly depending on the details of the case at trial, and was certainly not defined in law, but by the shared understanding of the jury on a case by case basis.³² Background material could be provided as long as it referred specifically to the narrative of the case, including prior enmity between the specific parties involved in the current homicide dispute. Some standard rhetorical formulations often found in the *prooimion* and *epilogos* must also have been permissible, due to their appearances in the speeches without deference to the relevance rule. For example, the speaker at Antiphon 1.1's assertion that he is young

²⁸ Tr. Todd.

²⁹ E.g. Ant.5.77; And.1.141, 1.147-9; Lys.7.31, 18.3-4, 18.21, 18.24, 19.57-9, 19.62-3, 26.10; Isoc.8.59-67; Is.2.42, 4.27-31; D.45.85, 52.26; Hyp.1.16-18. Harris (2013) 387-99 provides a comprehensive list of all of the mentions of public service in the orators that he has discovered, whether positive or negative, though his justification of all mentions as relevant is unconvincing.

³⁰ E.g. Lys.20.24-29, 21.1-11; D.21.154-7.

³¹ For example, Andocides account of his ancestors' good behaviour at 1.141 (on Andocides' family see also MacDowell (1962) 1-2); the assertion that Callias is more deserving of reward than punishment at Lys.5.2. For more on the use of previous good deeds, particularly liturgies, as persuasive rhetoric, see Johnstone (1999) 93-108.

³² Arist.*Rh.*1354a.21-31.

and inexperienced, or the *choregus*' praise of the laws at Antiphon 6.2 would probably have been permissible; such statements would be more problematic if they appeared as part of the narrative or proofs, thereby carrying more weight in the case. Potentially unacceptable statements would be those that had absolutely no bearing on the case beyond hypothetical assertions of patterns of criminal behaviour. This particularly concerned character assassination involving behaviour of or towards people not concerned in the current trial, or positive actions performed by the speaker or his associates in the past. These were evidently admissible in the dikastic courts, but not in the homicide courts.

One final category of statements that should be addressed is appeals to pity. These appear in a number of homicide speeches and other kinds of speeches from the homicide courts, and are not couched in language deferential to the relevance rule as are the statements seen above.³³ This would suggest that they were indeed admissible, as Lanni asserts.³⁴ In defence speeches, such as the three speeches of Lysias in which they are used, these statements appear towards the end of the speech, and are probably intended to leave the jurors with a lasting sense of compassion towards the allegedly unjustly prosecuted speaker.³⁵ Although these appeals were not strictly concerned with the case at hand, Lanni is probably correct in her assertion that 'under the stress of such a serious charge litigants could not maintain composure and refrain from appeals for pity, and... such appeals were allowed a degree of forbearance.'³⁶ It does not seem likely that the effects of the outcome of the trial were considered directly relevant to the jury's decision.³⁷ They did not provide evidence against guilt, even in the form of an *eikos* argument regarding good character. They merely referred to the potential consequences of a case, rather than the actual matters at hand. An argument for their relevance may hold if the jury were voting on a punishment rather than a verdict of guilt or innocence, but it seems from Draco's law that the punishments for various kinds of homicide were already prescribed by law.³⁸ Such appeals must simply be a standard rhetorical strategy, like appeals regarding the speaker's inexperience, which would aim to speak to the

³³ Lys.3.48; 4.20; 7.41; Ant.1.3, 21, 25.

³⁴ Lanni (2005) 125-6 and (2006) 96-105.

³⁵ For the rhetorical link between innocence and pity, see Konstan (2000). For more on the rhetorical workings of pity, see Johnstone (1999) 109-125.

³⁶ Lanni (2006) 104.

³⁷ As proposed by Lanni (2006) 104-5.

³⁸ See Chapter 1.3.

litigants' humanity. The appeals to pity that appear in Antiphon 1 are slightly more directed towards the matters at hand, as they encourage the jury to take pity on the dead man in punishing his killer. This would presumably be the predominant way in which appeals to pity were applied in speeches for the prosecution.

These are the definitions of *pros to pragma*, 'relevant', and *exo tou pragmatos*, 'irrelevant', which I will use in this chapter.

4.2 THE RELEVANCE RULE AS RHETORIC

Throughout the corpus of Athenian forensic oratory, five more or less explicit references are made to the relevance rule in the homicide courts. All five trials take place under different circumstances: Lysias 3, though delivered in the Areopagus, is in fact a trial for intentional wounding and not for homicide; Lysias 7 is a trial for impiety through uprooting or otherwise disturbing a sacred olive or olive stump, an offence also tried at the Areopagus; Antiphon 5 is a homicide trial conducted in a dikastic court; Antiphon 6 is a homicide trial probably carried out in the Palladion; and Lycurgus 1 is entirely unrelated to homicide: a trial for treason by unlawfully leaving the city, tried in a dikastic court. The diversity of these trial situations will allow us to examine a selection of ways in which the relevance rule could be invoked rhetorically. When the rule was mentioned, it was not simply to reinforce its existence, but, as with all statements made in a forensic context, was intended to carry at least some rhetorically persuasive force. The specificity to the homicide courts of the enforcement of the relevance rule means that all mentions of it will automatically make a rhetorical link with homicide, whether they occur within the homicide courts or not. All of these references will prove useful in an analysis of the role of relevance in specific relation to homicide rhetoric.

4.2.1 LYSIAS 3 AND 7

Lysias 3, a trial for intentional wounding, took place in the homicide court of the Areopagus. By the point in the speech at which relevance is mentioned, §44-46, the speaker has laid out all of his arguments relating to the case at hand, and is now attempting to blacken his opponent's character by making him appear to be the kind of man who is habitually quarrelsome and violent.³⁹ This digression is bookended by two references to the relevance rule. The first line refers more obliquely to the fact

³⁹ See above, 130-1.

that it is not allowed for the speaker to mention his opponent's previous unacceptable behaviour to support his current case, despite the fact that he goes on to do just that. At §46, the rule is made more explicit, and indeed it is specified that it is not only not 'possible' to speak on other matters, but not 'in line with custom.'

The relevance rule here is being used as a framing device to present an argument that would probably be considered irrelevant by jurors. The speaker wishes to make an irrelevant statement about his opponent's character or previous behaviour that is related to the case only dubiously, or not at all, in order to present a negative view of his opponent to the jury. He does not, though, wish to damage his own chances of success by flagrantly digressing from the point, showing no deference to the rules of the court. He maintains a measured tone and does not present the relevance rule as a problem, but his words imply that he sees it almost as a restriction of his access to justice, since it prevents him from 'exposing' his opponent's 'wickedness'. This makes it seem more reasonable when he goes on to bend the rule by exposing the wickedness anyway. He then checks himself, and as he has already transgressed the relevance rule and has no further need of doing so, he is able to invoke it more specifically and use the stronger language of custom over permissibility. This technique not only seeks to excuse his one digression into irrelevant territory, but also, in a typical example of *praeteritio*, conjures up an extensive, though unmentioned, list of Simon's other offences in the minds of the jury, simply by stating the fact that he cannot 'go on to relate many other things'. The psychology of this technique is important, and the imagination of the jury might have been receptive to the speaker's persuasion. The jury are encouraged to see themselves as the morally upright judges of only relevant information, the owners and controllers, as it were, of the Areopagus court, as implied when Lysias says that it is not permitted to speak irrelevantly '*par' humin'*'. Lysias' technique here is very deferential, and suggests in the minds of the listeners an idea of a jury who will not let even the simplest irrelevant statement creep into the speeches. Of course, this is exactly what they are encouraged to do by his phrasing.

Even in the dikastic courts, where relevance restrictions were looser and speakers could get away with attacking their opponent's character and previous behaviour more openly, it is possible to find a similar treatment of expectations of

relevance when a speaker wishes to present ‘irrelevant’ information about character or behaviour. We can compare with the passage from Lysias 3 two passages that view the issue from the other side: these speakers anticipate or have been subject to their opponent adducing irrelevant information to diminish the jury’s feeling of sympathy. They wish to respond directly to the irrelevant material, but find the relevance restrictions in their way:

μηδενὶ δὴ τρόπῳ καθ’ ὑμῶν αὐτῶν γέλωτα τῷ σοφιστῇ καὶ διατριβῆν παράσχητε, ἀλλ’ ὑπολαμβάνεθ’ ὄραν εἰσεληλυθότα ἀπὸ τοῦ δικαστηρίου οἴκαδε καὶ σεμνυνόμενον ἐν τῇ τῶν μειρακίων διατριβῇ, καὶ διεξιόντα, ὡς εὖ τὸ πρᾶγμα ὑφείλετο τῶν δικαστῶν· ‘ἀπαγαγὼν γὰρ αὐτοὺς ἀπὸ τῶν περὶ Τίμαρχον αἰτιῶν, ἐπέστησα φέρων ἐπὶ τὸν κατήγορον καὶ Φίλιππον καὶ Φωκέας, καὶ φόβους ἐπήρτησα τοῖς ἀκροωμένοις, ὥσθ’ ὁ μὲν φεύγων κατηγορεῖ, ὁ δὲ κατηγορῶν ἐκρίνετο, οἱ δὲ δικασταί, ὧν μὲν ἦσαν κριταί, ἐπελάθοντο, ὧν δ’ οὐκ ἦσαν, περὶ τούτων ἤκουον.’ ὑμέτερον δ’ ἐστὶν ἔργον πρὸς ταῦτα ἀντιτετάχθαι, καὶ πανταχῇ παρακολουθοῦντας μηδαμῇ παρεκκλίνειν αὐτὸν ἔαν, μηδὲ τοῖς ἐξαγωνίοις λόγοις δυσχυρίζεσθαι· ἀλλ’ ὡσπερ ἐν ταῖς ἵπποδρομίαις εἰς τὸν τοῦ πράγματος αὐτὸν δρόμον εἰσελαύνετε. [Aeschin.1.175-6]

‘Under no circumstances must you allow this sophist to laugh and amuse himself at your expense. No, you must imagine you are seeing him back home from the court, preening himself in the company of his young men and telling them how successfully he stole the case from the jurors: “You see, I led them away from the charges against Timarchus; I guided them toward the accuser, Philip, and the Phocians and fixed their attention there, and I dangled fears before the eyes of my listeners; the result was that the defendant became prosecutor and the prosecutor found himself on trial, while the jurors forgot the case they were trying and listened instead to a case they were not trying.” Your duty is to resist these attempts firmly, to follow everything assiduously, and at no point to allow him to deviate or to press arguments irrelevant to the case. Just like in chariot races, you must keep to the actual track of the subject at issue.’⁴⁰

τί ποτε διανοηθέντες οἱ ἀντίδικοι τοῦ μὲν πράγματος παρημελήκασι, τὸν δὲ τρόπον μου ἐπεχείρησαν διαβάλλειν; πότερον ἀγνοοῦντες ὅτι περὶ τοῦ πράγματος προσήκει λέγειν; ἢ τόδε μὲν ἐπίστανται, ἡγούμενοι δὲ λήσειν περὶ τοῦ παντὸς πλείω λόγον ἢ τοῦ προσήκοντος ποιοῦνται;... ὧμην μὲν οὖν, ὧ ἄνδρες δικασταί, περὶ τοῦ ἐγκλήματος, οὐ περὶ τοῦ τρόπου τὸν ἀγῶνά μοι προκεῖσθαι· διαβαλλόντων δέ με τῶν ἀντιδίκων ἀναγκαῖόν ἐστι περὶ πάντων τὴν ἀπολογίαν ποιήσασθαι. [Lys.9.1-3]

‘What on earth did my opponents have in mind when they ignored the point at issue and sought to defame my character? Are they unaware that they are supposed to keep to the point? Or do they recognise this, but devote more

⁴⁰ Tr. Carey.

attention to other matters than they should, thinking that you will not notice?... I had expected, gentlemen of the jury, that I would face trial on the basis of the indictment and not of my character. Since, however, my opponents are defaming me, I am forced to make my defence on the basis of all of these topics.’⁴¹

Aeschines warns the jury not to accept the kind of argumentation from Demosthenes that we see from the speaker in Lysias 3. We might imagine that Simon would make a similar argument, that the speaker is attempting to make him the object of the prosecution and deflect attention from the charges against himself. The speaker in Lysias 9 has already been attacked with what he considers irrelevant information, but uses his opponent’s digressions as a means of justifying his own.⁴² His questions as to whether his opponents are ‘unaware’ of the rule or believe that their behaviour will not be noticed by the jury suggests that they have not framed their digressions as deferentially as in Lysias 3. This is likely due to the looser restrictions in the dikastic court, making digression perhaps less likely to cause uproar from the jury. Nevertheless, it is clear to see that Lysias 3 is not out of the ordinary in its half-acknowledged dance around the relevance rule. Drawing attention to the opponent’s digressions can also work to justify the speaker’s own, couching potentially irrelevant statements in a more acceptable realm. Although speakers in the dikastic courts would not face the same potential sanctions for irrelevance that the speaker of Lysias 3 would in the Areopagus, all irrelevant statements ran the risk of alienating the jury. It is possible that, by explicitly mentioning the rule, rather than presenting irrelevant material with no self-reflection, Lysias hopes to avoid a rhetorical comeback from the opponent in the style of those seen in Aeschines 1 and Lysias 9.

Lysias 3 also brings us to the question of whether the relevance rule was linked only to trials for homicide or to any trials that took place in the homicide courts. The fact that the relevance rule is being invoked in a matter of *trauma* suggests that an ideology of separateness is not linked solely to homicide, but to the Areopagus court more generally. For Lysias, the use of irrelevant material in this case is unacceptable, rather than simply unwelcome. We expect strict restriction in

⁴¹ Tr. Todd.

⁴² Regarding this kind of reactive *diabole*, Carey (2004) emphasises the importance of marking the difference between a speaker and his opponent: ‘It is obviously important that he can present himself as reactive, not aggressive. But he uses a kind of argumentation which he himself regards as *diabole*, though unsurprisingly he does not use the term to describe his own character assassination. *Diabole* is what you do, not what I do.’ (6)

this case as much as in other homicide cases, and more so than in dikastic cases. On this evidence alone we could conclude that the prosecution of *trauma* closely approached that of *phonos*, and was perhaps even identical.⁴³ The similarities between the two crimes could still allow the relevance rule to be tied closely to homicide. Evidence from Lysias 7.41-2, however, suggests that the relevance rule in fact extended to all cases tried in the Areopagus, no matter their subject. The trial concerns damage, destruction, or removal of a *sekos*. The key word in the passage is *enthade*. Literally ‘here’, Todd goes so far as to translate ‘in your court’, and notes that ‘there may be a hint here’ of the enforcement of the relevance rule generally in the Areopagus court.⁴⁴ It seems probable that Lysias is indeed referring to the location of his speech, rather than a more abstract meaning such as ‘at this point’.⁴⁵ The prominence of the Areopagus in homicide ideology cements this idea further. And yet the formulation is undeniably oblique; Lysias speaks of there being ‘no need’ to talk of his good deeds, rather than no allowance for it. This may be flattery of the jury, intended to justify his irrelevant statement. The suggestion is that there is no need to talk of his accomplishments, because the experienced jury will be able to make a just decision based on the facts alone. Another explanation may be that the brevity of the digression allows for a milder formulation, by comparison, for example, with the greater detail and length of the digression in Lysias 3, which requires a stronger reference to the rule. Elsewhere the speech does seem to deviate from the point, as Rhodes suggests, by mentioning the speaker’s previous public services, specifically his roles as *trierarch* and *choregus*, as well as contributions to an *eisphora*.⁴⁶ These statements, however, may be acceptable, due to the fact that they reflect the speaker’s public behaviour, focusing on the ‘zeal’ (*prothumos*) with which the tasks were completed. He is on trial for impiety, but the charge suggests a form of public crime, namely the destruction of a *sekos* that can be understood as

⁴³ See Chapter 1.2, 1.3, 5.1.

⁴⁴ Todd (2007) 540.

⁴⁵ There are 29 uses of the word *enthade* in the corpus of Lysias; 22 can be taken unambiguously to mean ‘here at this location’. For example, Lysias repeatedly refers to τῶν ἐνθάδε κειμένων, ‘those lying here’, in his Funeral Oration; we may imagine him gesturing to the dead or their burial site, firmly situating the speech in its physical location. Elsewhere in Lysias, *enthade* is used to denote ‘here’ as opposed to ‘there’, usually Athens in contrast with another location. The full list of references is as follows: 2.1, 6, 20, 22, 26, 54, 60, 64, 66, 75, 76; 6.4, 6, 16, 28, 29; 13.12, 44, 68; 19.37; 20.28; 33.2.

⁴⁶ Lys.7.31; Rhodes (2004) 142.

belonging to the city.⁴⁷ The reference to liturgies is an *eikos* argument proposing that it was unlikely for someone with a history of positive behaviour towards the city to suddenly act in a way that would damage the city. It is intended to make the charge seem less plausible and promote the defendant's innocence.

It seems, then, that there is certainly a case to be made for the application of the relevance rule across all trials in the Areopagus. If we can take Antiphon 6, a speech from the Palladion which will be examined in more detail below, as providing enough evidence that the relevance rule applied across all of the homicide courts and not simply the Areopagus, then this reasserts a strong link with homicide itself. Why, then, are other crimes tried in the Areopagus clearly subject to the same stricture? It is arguably the case that the seriousness of homicide means that the procedures governing it are extended to any other crimes tried in the space in which those procedures are enacted. The importance of dealing with homicide in a particular way and at particular sites instils those sites with a certain power, and overrides the possibility of other crimes being tried at the same site under different procedures. It is the space associated with homicide trials that must be treated with solemnity, rather than simply the individual trials. This meant that all speeches delivered in the Areopagus, whether for homicide or not, were subject to the rhetorical rules governing homicide speeches. By deviating from the point, speakers risked disrespecting or appearing to discredit the court that dealt with homicide. The distance of the trials from the actual crime of homicide may have allowed them some manoeuvrability, and it may be for this reason that we find these two minor transgressions on the Areopagus' relevance rule in speeches that are not from homicide cases, though they are, of course, the only two extant speeches from that court. The rules were still best acknowledged in non-homicide Areopagite cases, but could perhaps be bent, if not actually broken, in rhetorical practice.

4.2.2 ANTIPHON 6 AND 5

Antiphon 6 provides the only other reference from within the homicide courts to the relevance rule. The speaker believes that his opponents have ulterior motives in prosecuting him:⁴⁸

⁴⁷ At Lys.7.7, both 'private' and 'sacred' olives are mentioned. There is the suggestion of an antithesis between the two types of olive, therefore identifying the sacred olive as a public possession.

⁴⁸ For further discussion of motivation in this case, see Chapter 5.3.2.

...ἐπεὶ τοί γε καὶ δεινόν, ὦ ἄνδρες, ἵνα μὲν ἐξῆν αὐτοῖς, εἴ τι ἠδίκουν ἐγὼ τὴν πόλιν ἢ ἐν χορηγίᾳ ἢ ἐν ἄλλοις τισίν, ἀποφύνασι καὶ ἐξελέγξασιν ἄνδρα τε ἐχθρὸν τιμωρήσασθαι καὶ τὴν πόλιν ὠφελῆσαι, ἐνταῦθα μὲν οὐδεὶς πώποτε οἷός τε ἐγένετο αὐτῶν οὔτε μικρὸν οὔτε μέγα ἐξελέγξαι ἀδικοῦντα τόνδε τὸν ἄνδρα τὸ πλῆθος τὸ ὑμέτερον· ἐν δὲ τούτῳ τῷ ἀγῶνι, φόνου διώκοντες καὶ τοῦ νόμου οὕτως ἔχοντος, εἰς αὐτὸ τὸ πρᾶγμα κατηγορεῖν, μηχανῶνται ἐπ' ἐμοὶ λόγους ψευδεῖς συντιθέντες καὶ διαβάλλοντες τὰ εἰς τὴν πόλιν...καίτοι αὗται αἱ κατηγορίαι οὔτε χάριτος ἄξια οὔτε πίστεως. οὔτε γὰρ δὴ οὐδ' ἡ πόλις ἐλάμβανεν ἂν δίκην εἴ τι ἠδίκητο, ἐνταῦθα τὴν κατηγορίαν ποιεῖται, ὥστε χάριτος ἄξιον εἶναι τῇ πόλει· οὔτε ὅστις [οὐκ] ἄλλα κατηγορεῖ ἢ ἃ διώκει ἐν πράγματι τοιούτῳ, πιστεῦσαι δήπου αὐτῷ ἀξιώτερόν ἐστιν ἢ ἀπιστῆσαι. ἐγὼ δὲ σχεδὸν ἐπίσταμαι τὴν ὑμέτεραν γνώμην, ὅτι οὐτ' ἂν καταψηφίσαισθε οὐτ' ἂν ἀποψηφίσαισθε ἐτέρου τινὸς ἕνεκα μᾶλλον ἢ αὐτοῦ τοῦ πράγματος· ταῦτα γὰρ καὶ δίκαια καὶ ὅσια. [Ant.6.8-10]

‘It’s a terrible thing indeed, gentlemen: if I had done any wrong to the city in training the chorus or in anything else, they had the opportunity to make this known and prove it, punishing one of their own enemies and helping the city at the same time, but none of them was ever able to prove that I had committed any crime, large or small, against you, the people; on the other hand, in this trial, when they are prosecuting me for homicide and the law requires them to stick to the crime itself, they are conspiring against me by inventing falsehoods and slandering me for my public activities...For these accusations they don’t deserve to be thanked or trusted: they are not earning the city’s thanks by prosecuting a crime for which the city would gain satisfaction, if it had been wronged; and surely he does not deserve your trust, but rather your disbelief, when in a case like this he directs his accusation to charges other than those that are the subject of his prosecution. I am fairly certain you would not convict or acquit someone for any reason other than the crime itself, which is the only way consistent with righteousness and justice.’⁴⁹

The speaker alleges that his opponents are prosecuting him on a homicide charge as a means of punishing him and gaining personal redress for some other, more political crime. His statements suggest that they have attacked his personal and public life to some extent in their prosecution speech, and he now implores that the jury ignore these irrelevant charges.

The idea that the prosecutors should not be ‘thanked or trusted’ for their irrelevant charges is not a surprising argument. It is reasonable to suggest that whenever an opponent introduced irrelevant material into their argument, a speaker would be likely to draw attention to it in this way, particularly if the irrelevant statements would be damaging to the speaker’s character and reputation in the eyes of the jury. Indeed, it is striking that the speaker does not say anything stronger than

⁴⁹ Tr. Gagarin.

this regarding the irrelevance if the court was strict. It may be that his opponents have found a way to make their accusations seem relevant, making a strong refutation appear over-zealous. Instead of addressing the statements themselves as the speaker suggests he will do in Lysias 9.3, and risking distraction from the main argument as well as potentially facing accusations of irrelevance himself, the speaker chooses simply to mention his opponents' irrelevance, and remind the jury that extraneous material has no place in the homicide courts and that they should by no means be persuaded by it. Once again, this provides an example of how tricky the use of irrelevant material can be. The speaker's comments here cannot erase the irrelevant statements made by his opponents, and he understands the risk that the jurors will take the statements into account anyway, in spite of their irrelevance.

In this case, Antiphon has chosen a flattering tactic rather than an admonition to address the problem. The section closes with the assertion that the jurors themselves have no desire to take irrelevant material into account, rather than a suggestion that they should not do so. This naturally asserts that the jurors *should* desire to avoid irrelevance. The defendant presents an idealised version of the present jury, men who would indignantly reject all attempts at irrelevance. This flattery would aim to ingratiate the speaker with the jury by promoting the idea that he believes in their intelligence and probity. He places all of the guilt for any problems caused by irrelevant material squarely onto his opponent.

Still, there is an interesting extra dimension to the speaker's response to his opponents' irrelevant statements here that is specific to the private nature of homicide trials. He suggests that in their irrelevant arguments his opponents are accusing him of some crime or crimes against the city that are clearly not linked to the alleged killing. Antiphon presents this as a way for the *choregus*' opponents to punish him for a public crime but reap the rewards themselves by doing so in a private trial. In this we see a potential dimension of the anxieties at play behind the imposition of the relevance rule on the homicide courts. The case at hand should be the focus not only because it deals with a very serious crime, but also to prevent attempts to win homicide cases with evidence drawn from other crimes for one's own gain.⁵⁰ It is this framing of the prosecutors' potential ulterior motives that

⁵⁰ For further discussion of ulterior motives in homicide accusations, see Chapter 5.3.

allows Antiphon to present their irrelevant evidence as not to be believed without having to directly counter their arguments.

The closing statement of this passage is perhaps the most effective. By speaking in the first person and asserting his knowledge of their opinion, the *choregus* aligns himself with the jury, and thus with a sense of justice and right. Moreover, he presents the need for relevance in the homicide courts not as a rule or law imposed externally, but as a direct desire of the present jury. This is a potent formulation, and allows him to imply that by speaking *exo tou pragmatos* his opponents are not simply transgressing a rule of the court, but aiming to offend this particular jury. A clear attempt to alienate his opponents from the jury is established, which will by default aim to ingratiate the speaker himself with the jury.

A further mention of the rule can be seen in Antiphon 5. This particularly interesting example comes from a trial for homicide that does not take place in the homicide courts, a fact which the accused feels is unjust and which he addresses quite extensively at the beginning of his speech. One part of his objection refers directly to the relevance rules of the homicide courts:

...τοῦτο δὲ δέον σε διομόσασθαι ὄρκον τὸν μέγιστον καὶ ἰσχυρότατον, ἐξώλειαν σαυτῷ καὶ γένει καὶ οἰκίᾳ τῆ σῆ ἐπαρώμενον, ἢ μὴν μὴ ἄλλα κατηγορήσειν ἐμοῦ ἢ εἰς αὐτὸν τὸν φόνον, ὡς ἔκτεινα, ἐν ᾧ οὔτ' ἂν κακὰ πολλὰ εἰργασμένος ἠλισκόμην ἄλλῳ ἢ αὐτῷ τῷ πράγματι, οὔτ' ἂν πολλὰ ἀγαθὰ εἰργασμένος τούτοις ἂν ἐσωζόμην τοῖς ἀγαθοῖς· ἃ σὺ παρελθὼν, αὐτὸς σεαυτῷ νόμους ἐξευρών, ἀνώμοτος μὲν αὐτὸς ἐμοῦ κατηγορεῖς, ἀνώμοτοι δὲ οἱ μάρτυρες καταμαρτυροῦσι, δέον αὐτοῦς τὸν αὐτὸν ὄρκον σοὶ διομοσαμένους καὶ ἀπτομένους τῶν σφαγίων καταμαρτυρεῖν ἐμοῦ. ἔπειτα κελεύεις τοὺς δικαστὰς ἀνωμότοις πιστεύσαντας τοῖς μαρτυροῦσι φόνου δίκην καταγῶναι, οὓς σὺ αὐτὸς ἀπίστους κατέστησας παρελθὼν τοὺς κειμένους νόμους, καὶ ἡγῆη χρῆναι αὐτοῖς σὴν παρανομίαν κρεῖσσω γενέσθαι αὐτῶν τῶν νόμων. [Ant.5.11-12]

‘Also, you ought to have sworn the greatest and strongest oath, calling down destruction on yourself, your family, and your entire household and swearing to confine your case to this murder alone. So, I would not be convicted for anything besides this act, even if I had committed many other crimes, and I would not be acquitted for my good deeds, no matter how many I had accomplished. But you have evaded these rules: you invent laws for yourself, you prosecute me without swearing an oath, and your witnesses testify without swearing, though they ought to testify against me only after swearing the same oath as you with a hand on the sacrificial victims. And then you ask the jurors to convict me of homicide on the evidence of unsworn witnesses, though you have proven them untrustworthy by your own violations of the

established laws. You must think your illegal conduct should take precedence over the laws themselves!’⁵¹

The speaker Euxitheus draws attention to the fact that, by prosecuting him for killing outside of the homicide courts, his opponents are purposefully avoiding the relevance rule and aiming to introduce irrelevant material to more successfully gain a conviction. This is framed as an active intention on the prosecution’s part, in direct defiance of the law.

In contrast to the previous passage, here we see the relevance rule directly framed as a part of the procedure of the homicide courts, rather than any personal desire on the part of the jury. This may stem from the fact that, unlike in speech 6, the speaker is now addressing an ordinary *dikasterion*. Within the confines of the homicide court, Antiphon is able to flatter the specialist jury and promote the idea that they hold the power over the speakers’ relevance; here, in the dikastic courts, it is perhaps safer to defer to the idea of the authority of law and strictly legislated legal procedure. In the dikastic courts, the context of the relevance rule for homicide is not present, and therefore its force must be emphasised. Furthermore, Antiphon constructs an extensive argument in this section regarding the legal impropriety of the prosecution, and thus it makes sense for him to focus on the relevance rule as a legal restriction. Attention is particularly drawn in this section to the strength of the oaths sworn with regard to relevance, both by the litigant and the witnesses. In this way, a direct connection is drawn between the homicide courts as a legal body, their religious significance, and the relevance rule. This is consistent with Antiphon’s statement in 6.10 that conformity with the relevance rule is *hosios*, religiously correct, as well as *dikaios*, legally just. The religious nature of the homicide courts is invoked to demonstrate the necessity of the relevance rule, and also to indirectly ‘curse’ Euxitheus’ opponents for their avoiding it. The assertion that the oath was sworn not only by the main litigant but by the witnesses too allows all of the prosecution’s evidence to be subject to disbelief. This disbelief itself is rooted in the sense that if the prosecution’s arguments were legitimate, they would have taken the trial to the homicide courts and presented their arguments, if indeed they were relevant, under the auspices of the oath.

⁵¹ Tr. Gagarin.

Antiphon is careful to play both sides of the issue of relevance here. He not only focuses on the prosecution's likely strategy—presenting Euxitheus' other alleged crimes or misdeeds as evidence for his guilt in the killing of Herodes—but also exploits the potential for Euxitheus to present arguments about his own good behaviour to support his claim to innocence. Thus the issue is not limited to the prosecution's actions, but is extended to the more general cause of justice in the case of a potential homicide. More broadly, this statement indirectly justifies any irrelevant statements in his own defence that Euxitheus may make later in his speech, which, though not directly prohibited by the dikastic court, had the potential to alienate the jury.⁵²

More broadly, Antiphon's argument here bears some comparison to those seen in Demosthenes 23.⁵³ The same sense of the importance of compliance with the homicide laws is invoked, along with the accompanying sense of outrage that the opponent has not seen fit to do so. Compliance with the relevance rule is framed as an intrinsic part of compliance with the traditional means of prosecuting homicide, namely the *dike phonou* performed in one of the designated homicide courts. In this way, although none of the sources clearly present it as a matter of law, the relevance rule takes on some of the force of the full corpus of Draco's homicide laws. Thus when the speaker states that the prosecution have invented their own laws, relevance becomes an intrinsic part of the laws that have been cast aside. The assumed importance in this passage of relevance restrictions in ensuring a fair and rigorous trial, as well as true testimony from all involved, makes relevance the glue that holds together the whole set of homicide laws and the courts that enforce them. Without enforced relevance, there can be no true honour done to the homicide laws.

4.2.3 LYCURGUS 1

The final reference to the relevance rule is found in Lycurgus 1, and is perhaps the most direct discussion of the rule. The trial is for treason: Leocrates is accused of leaving the city of Athens in contravention of the law passed after

⁵² Indeed, in this case Antiphon does not present any examples of Euxitheus' own good behaviour, but does focus on that of his father [5.74-9] specifically in relation to his role (or lack of) in the revolt of Mytilene; this suggests that the allegedly irrelevant material being introduced by the prosecutors relates to Euxitheus' family background and any possible motive which it presents for his alleged killing of Herodes. In this way, of course, Euxitheus' defence of his father is in fact a defence of himself.

⁵³ See Chapter 2.2.

Chaeronea. Lycurgus opens with a discussion of the importance of justice in general in Athens and in this trial in particular. He calls upon the jury to enforce strict standards of relevance, even in the dikastic court in which this particular trial occurs:

ποιήσομαι δὲ κἀγὼ τὴν κατηγορίαν δικαίαν, οὔτε ψευδόμενος οὐδέν, οὔτ' ἔξω τοῦ πράγματος λέγων. οἱ μὲν γὰρ πλεῖστοι τῶν εἰς ὑμᾶς εἰσιόντων πάντων ἀτοπώτατον ποιοῦσιν· ἢ γὰρ συμβουλεύουσιν ἐνταῦθα περὶ τῶν κοινῶν πραγμάτων ἢ κατηγοροῦσι καὶ διαβάλλουσι πάντα μᾶλλον ἢ περὶ οὗ μέλλετε τὴν ψῆφον φέρειν. ἔστι δ' οὐδέτερον τούτων χαλεπὸν, οὔθ' ὑπὲρ ὧν μὴ βουλευέσθε γνώμην ἀποφύνασθαι, οὔθ' ὑπὲρ ὧν μηδεὶς ἀπολογήσεται κατηγορίαν εὐρεῖν. ἀλλ' οὐ δίκαιον ὑμᾶς μὲν ἀξιοῦν δικαίαν τὴν ψῆφον φέρειν, αὐτοὺς δὲ μὴ δικαίαν τὴν κατηγορίαν ποιεῖσθαι. τούτων δ' αἴτιοι ὑμεῖς ἐστε, ὧ ἄνδρες· τὴν γὰρ ἐξουσίαν ταύτην δεδώκατε τοῖς ἐνθάδ' εἰσιούσι, καὶ ταῦτα κάλλιστον ἔχοντες τῶν Ἑλλήνων παράδειγμα τὸ ἐν Ἀρείῳ πάγῳ συνέδριον, ὃ τοσοῦτον διαφέρει τῶν ἄλλων δικαστηρίων ὥστε καὶ παρ' αὐτοῖς ὁμολογεῖσθαι τοῖς ἀλισκομένοις δικαίαν ποιεῖσθαι τὴν κρίσιν. πρὸς ὃ δεῖ καὶ ὑμᾶς ἀποβλέποντας μὴ ἐπιτρέπειν τοῖς ἔξω τοῦ πράγματος λέγουσιν· οὔτω γὰρ ἔσται τοῖς τε κρινομένοις ἄνευ διαβολῆς ὁ ἀγὼν, καὶ τοῖς διώκουσιν ἥκιστα συκοφαντεῖν, καὶ ὑμῖν εὐορκοτάτην τὴν ψῆφον ἐνεγκεῖν. ἀδύνατον γὰρ ἔστι ἄνευ τοῦ λόγου τοὺς μὴ δικαίως δεδίδαγμένους δικαίαν θέσθαι τὴν ψῆφον. [Lycurg.1.11-13]

‘The charge I am about to bring is just and contains no lies or irrelevant material. Most of the men who come before you act in the strangest way: they either give you advice about public business or make charges and accusations about everything except the issue about which you are going to cast your vote. Neither of these—giving an opinion about matters you are not discussing and finding an accusation to make about crimes no one is on trial for—is hard to do. But prosecutors have no right to ask you to vote for justice when they themselves bring charges that are without justice. You are the ones, gentlemen, who are responsible for this situation. You have allowed those who come into court to do this, although you have in front of you the splendid example of the Areopagus Council. This court is so superior to all other courts that even the men convicted by it agree that its verdicts are just. It is their example you should follow and not give in to those who do not keep to the relevant issues. This way, defendants will not be tried on the basis of slander, prosecutors will not bring baseless charges, and you will cast a vote completely true to your oath. For if men are not correctly instructed about a case, they will not be able to make a correct decision.’⁵⁴

Lycurgus suggests that speakers commonly deviate from the point in the Athenian dikastic courts, but that it is the jury’s role not to allow them to do so. Although Lycurgus’ aim is to manipulate his hearers, and, therefore, the statement may be exaggerated, it does seem to counteract Rhodes’ suggestion that there is little basis in the speeches for the modern conception that the Athenians regularly deviated from

⁵⁴ Tr. Harris.

the point.⁵⁵ Here, Lycurgus is able to say that *pleistoi*, ‘most’, of the speakers who come before the dikastic jury are indulging in irrelevant material. At this early point in his speech, and speaking as he is about general principles of justice, it would seem unlikely that he is introducing a non-standard argument, and thus we can assume that this is a reasonable, if slightly exaggerated, assessment of the actions of the speakers in the dikastic courts.

In any case, Lycurgus feels justified in establishing a model of relative laxity with regard to relevance in the dikastic courts at the time of the trial of Leocrates, and wishes to place the present trial in opposition to it. He takes the rhetorical risk of blaming the jury for the speakers’ digressions, namely for allowing them to speak on irrelevant matters without admonishment. It is at this point that he directly refers to the relevance rule in place in the homicide courts, and specifically in the Areopagus. He holds the Areopagus court up as a model of insistence on relevance, a clear aspect of the ideology of the homicide courts. In doing so, he risks alienating the present jury by comparing them unfavourably to another judicial body, blaming them explicitly for allowing the persistence of irrelevance and ignoring the example of the Areopagus. The potential insult is perhaps countered by a call to follow the model, and thus to ensure justice for all litigants, as well as by the passing of some of the blame onto the fact that uninformed or misinformed juries cannot make informed decisions. He does not present his audience as irrevocably committed to their pattern of flawed behaviour, but makes it apparent that they can improve.

Taken as a group, what do these mentions of the rule tell us about the rhetoric of homicide? In tone, they generally reinforce the ideology of homicide laid out in Chapter 2, as they suggest a perception that the homicide courts engage with cases more seriously and rigorously. The relevance rule in the homicide courts appears to have been generally obeyed, or at least not blatantly flouted, at least as far as our sources show, and speakers feel the need to defer to it when their speeches edge too close to irrelevance for rhetorical effect. Interestingly, it is at these moments when the acknowledgment of the relevance rule seems to become strongest, as if the

⁵⁵ It is important to note that Lycurgus’ argumentation in this speech is generally unusual; for more on this see Allen (2000), who calls the speech one ‘of the most idiosyncratic and non-representative texts in the classical Athenian oratorical corpus.’ (6)

speakers believe that by openly admitting how close they are to breaking the rule, they will be forgiven by the jury and allowed to continue with their speech unhindered. This suggests that the jury did indeed take the rule seriously, and would be likely to protest against any speaker who attempted to transgress the rule without deference to it.

Of course, these extracts also make it clear that, as with other aspects of homicide rhetoric, the Athenians had no qualms about exploiting aspects of their homicide legal system for their own rhetorical gain. The relevance rule is here employed as a persuasive device repeatedly and unapologetically. Although rhetorical bending and stretching of the relevance rule does not seem to be as widespread as some of the other devices that this project examines, it does fit the emerging pattern: the Athenians hold their homicide system in high esteem, but also allow it to be subjected to manipulation and become a locus of nearly as much deceptive rhetoric as the dikastic courts. In spite of restrictions like the relevance rule imposed on the homicide courts, the extant speeches which mention homicide both within those courts and elsewhere regularly both exploit and undercut the popular ideology of those courts in order to attempt to persuade individual juries and win their own cases.

Apart from this dichotomy of solemnity and rhetorical exploitation, two main points arise from the survey of references to the relevance rule. The first is that in each oration it is clearly in the speaker's interest to stretch or contract the limitations imposed by the relevance rule depending on the case and his position in it. In the extant speeches, speakers naturally impose harsher restrictions on their opponents than they do on themselves, and tend to condemn their opponent's transgressions while simultaneously using them as justification for their own. This suggests not only that the category of irrelevant statements was not hard and fast, but that it varied from speech to speech, dependant not so much on the context of the case as the individual speaker's rhetorical ability. The talented orator could present an opponent's character assassination of him as irrelevant, while making his own character assassination of the opponent a necessary and relevant part of the case.

The second, and perhaps more pertinent, point is that a clear difference emerges between the homicide relevance rule as rhetoric in the dikastic courts and in

the homicide courts. In the rhetoric which we meet in surviving speeches from the homicide courts, the rule is treated with apparent reverence and deferred to when a speaker attempts to present material that might be deemed irrelevant. It can also be used as a strong point against an opponent who has made irrelevant accusations, as in Antiphon 6, since it does not just malign the opponent's rhetorical style but actively accuses them of breaking the rules of the court. The rule is variously styled in the homicide courts as a matter of law or longstanding custom, built into the fabric of the court as an institution, or the strong preference of the specific jury presiding in the case. This latter use works mainly as flattery of the jury, turning what is in fact a requirement of their conduct into a characteristic of their individual concern for justice. By contrast, in speeches from the dikastic courts the relevance rule is most often invoked as a point of comparison for the present jury, specifically as a rule that they should be, though are not, compelled to follow. Every existing mention of the rule in the dikastic courts presents it as a matter of strict procedure in the homicide courts, and is used to promote the ideology of the homicide courts and encourage the dikastic jury to embody that ideology. The relevance rule is almost aspirational for the dikastic jury, at least in the words of the dikastic litigant, and whether or not they are dealing with homicide matters, they are implored to follow the model of the homicide courts.

4.3 TRACING THE EFFECTS OF THE RELEVANCE RULE

It is apparent that the relevance rule in the homicide courts impacted on the rhetoric that could be used in speeches there. Orators had fewer options open to them, as they could not readily exploit techniques such as character assassination of their opponent unrelated to the current charge, or manipulation of the jury through accounts of the speaker's own good deeds. This would seemingly impose a limit on homicide rhetoric, forcing it to take a shape fundamentally different from rhetoric employed in the context of the dikastic courts. There are very few extant homicide speeches on which to test this theory. Of those that do exist, the majority are quite short; arguably, only three can have been delivered in the homicide courts; and the majority of each work focuses explicitly on the matter at hand in the case. The other speeches dealing with homicide were delivered in the dikastic courts, and thus were not subject to the same relevance restrictions. From these facts, we can assume that the relevance restrictions in the homicide courts were effective, at least in the case of

homicide trials.⁵⁶ Apart from certain examples already discussed in this chapter, scholars have asserted that homicide speeches largely keep to the point at hand, but if we look closely at the speeches, it is possible to find several points where the rhetoric blurs the boundary of relevance. Here, I identify three strategies used to legitimise rhetoric that approaches that boundary in the extant speeches.

The first strategy is brevity. A detail of dubious relevance that is kept brief, perhaps only a few words, is unlikely to stand out as a major breach of the relevance rule. Antiphon 1 offers our best example. The speech generally remains relevant: it presents a standard *prooimion* on the speaker's personal situation, a discussion of the relevant matter of the potential torture of the slave in question, a straightforward narrative of events, and a reasonable exhortation to the jury to vote in favour of the dead man. The mention of the stepmother's alleged previous attempt to kill her husband is of questionable relevance, but could be framed as relevant due to being indicative of an ongoing poor relationship between the two and a potential sign of premeditation.⁵⁷ But in spite of this, Antiphon still manages to attack the character of the defendant. In the midst of the narrative, he potently names the stepmother 'Clytemnestra.'⁵⁸ This is clearly an attempt to tarnish her reputation in the mind of the jury by invoking the well-known myth of the adulterous woman who premeditatedly kills her husband. We can imagine that the few words devoted to the moment of rhetoric would not be enough to prompt objections of irrelevance from the jury, herald, or any other party who was entrusted with enforcing the rule. Comparisons between the parties involved in the trial and mythological figures cannot be said to be strictly relevant to the case at hand, and yet it is likely that brief attacks such as this one would have passed unremarked.

The second strategy combines brevity with another factor: embedding details of questionable relevance within the narrative. If an irrelevant detail can be made to seem a necessary part of the story of the case, it is more likely to pass the scrutiny of the court. Once again, an example can be drawn from Antiphon 1. The detail that Philoneos went to Piraeus to carry out a sacrifice paints him as a pious and good man, and in doing so augments the sense of injustice that he was killed along with

⁵⁶ Lysias 3 and 7 take place in the Areopagus but do not deal with homicide directly; both seem to transgress the boundaries of relevance to some degree, as seen above.

⁵⁷ Ant.1.3.

⁵⁸ Ant.1.17.

the father.⁵⁹ As the detail is contained within the narrative, however, it would be seen to be essential background information and not an irrelevant attempt to improve the character of the victim in the mind of the jury. The effect can be seen even more clearly in Lysias 1. The speech digresses from the narrative of events only to quote relevant laws and to rebuff the presumed arguments of the prosecution, such as Euphiletus' lack of previous enmity with Eratosthenes, which remains relevant to the case. The narrative, however, contains certain details that seem to serve dual purposes. Euphiletus takes care to note how good his wife was at the beginning of their marriage.⁶⁰ This places the onus for the crime squarely on Eratosthenes and avoids the issue of his wife potentially colluding with either the adulterer or her husband in order to carry out the killing. It also denigrates Eratosthenes' character to suggest that he would seduce a woman of such good repute. Euphiletus also takes care to characterise himself as naïve throughout his narrative, to make it seem improbable that his attack on Eratosthenes was planned. This does not quite approach the trope of irrelevant self-aggrandisement seen elsewhere in forensic oratory, but it does seek to characterise the speaker as unlikely to have committed the crime in the way in which he has been accused. Most interestingly, Euphiletus' report of the advice of the old woman who reveals the seduction to him includes the detail that Eratosthenes had apparently committed adultery with many other men's wives too.⁶¹ At first glance the detail appears relevant: it offers precedent for this kind of behaviour, as does the accusation of the stepmother's previous attempt to kill in Antiphon 1. But in Antiphon 1, the stepmother is on trial. In Lysias 1, Euphiletus' argument is constructed as if Eratosthenes is on trial for adultery, but this is not in fact the case. It is not Eratosthenes' guilt that is the issue, but Euphiletus', and therefore Eratosthenes' pattern of adultery is hardly relevant. But Lysias' construction of a speech that acts as if to determine the guilt of Eratosthenes conceals this detail. The effect is compounded by the fact that the information is not delivered

⁵⁹ Ant.1.16.

⁶⁰ Lys.1.6-7: *ἐπειδὴ δέ μοι παιδίον γίγνεται, ἐπίστευον ἤδη καὶ πάντα τὰ ἐμαυτοῦ ἐκείνη παρέδωκα, ἡγούμενος ταύτην οἰκειότητα μεγίστην εἶναι· ἐν μὲν οὖν τῷ πρώτῳ χρόνῳ, ὃ Ἀθηναῖοι, πασῶν ἦν βελτίστη· καὶ γὰρ οἰκονόμος δεινὴ καὶ φειδωλὸς {ἀγαθὴ} καὶ ἀκριβῶς πάντα διοικοῦσα..* 'But from the moment my son was born, I began to have full confidence in her and placed everything in her hands, reckoning that this was the best relationship. In those early days, men of Athens, she was the best of women: a good housekeeper, thrifty, with a sharp eye on every detail.' (Tr. Todd)

⁶¹ Lys.1.16: *ἔστι δ'* ἔφη *Ἐρατοσθένης Ὁῦθεν ὁ ταῦτα πράττων, ὃς οὐ μόνον τὴν σὴν γυναῖκα διέφθορεν ἀλλὰ καὶ ἄλλας πολλὰς· ταύτην γὰρ {τὴν} τέχνην ἔχει.* "It is," she continued, "Eratosthenes of the deme Oe who is doing this. He has seduced not only your wife but many others as well. He makes an art of it." (Tr. Todd.)

directly by Euphiletus, but through the words of the old woman. The speaker could hardly be blamed for the irrelevance of the words of his characters, however likely they were to be fictionalised. In this way, another irrelevant detail is concealed from view and made to appear relevant.

The third strategy for legitimising potential irrelevance is choosing arguments with a dual purpose. In Antiphon 6, the speaker presents a brief discussion of the nature of the homicide laws.⁶² The comparable passage in Antiphon 5.11, when the speaker details the procedures of the homicide courts, is relevant because the speaker is aiming to draw a comparison between this correct legal route and the incorrect one his opponents have chosen in prosecuting him in the dikastic courts. The trial in Antiphon 6, however, is already taking place in one of the homicide courts, and so there is no need for a sense of comparison. The speaker justifies the section as an emphasis on the importance of obtaining a correct verdict in this case. This would surely not be specific to this case, and is not strictly related to the matter at hand, but rather a general assertion about the importance of justice. The section also reads as a veiled attempt to flatter and ingratiate himself with the jury, by hailing their importance and the ways in which they are different from the average dikastic jury. This section would probably have been accepted as a relevant means of addressing the specificities of the case and the value of justice, but it does seem to sit on the very edge of relevance. Similarly, it is worth noting the passage at Lysias 7.5-8, in which the speaker discusses the possibility that the *sekos* was removed from the land prior to his owning it, and compares his situation to that of other people whose land was ravaged by the Spartans, but who had not been punished for the improper removal of a *sekos*, as they had not done it themselves. The passage is framed as a means for the speaker to state that there was never a *sekos* on his land for him to remove, and he cannot be punished for its removal before his acquisition of the property. This portion of the argument could be relevant to the charge by providing an *eikos* argument against his removal of the *sekos*, but the comparison with other property owners who had sacred olive trees destroyed by enemies stretches the boundaries of relevance, due to the difference in the situation of the speaker and these other people. Whether people were accused or convicted in other cases, however similar, has little to no bearing on the present situation. The

⁶² Ant.6.6.

main force of the argument appears to be in making the opponents' charge seem ridiculous and unfounded. It may also hope to inspire pity in the jury by reminding them of the plight of those who had their land ravaged by Spartan enemies, and thus perhaps encourage them towards greater sympathy for the speaker. Once again, the rhetoric used in this speech does not strictly depart from the rules of relevance. It does, however, hope to achieve some of the same aims as irrelevant material could.

By comparison with the speeches from the homicide courts, we can see that surviving cases that discuss homicide in the dikastic courts contain much more material that would be considered irrelevant by the standards discussed earlier in this chapter without the necessity of employing these strategies. Antiphon 5's relatively extensive discussion of the injustice of his case not being tried under a *dike phonou* could be considered irrelevant in that the trial has already begun, and so it would seem to be too late to change the indictment. Thus, all this passage achieves is a rhetorical attack on the prosecution's reliability and honour. Lysias 13 discusses several matters that are not directly related to the charge.⁶³ Both speeches are roughly twice as long as the longest speech from the homicide courts. The issue of length may be pure coincidence, variety in rhetorical technique, or a result of differing timing restrictions, but the fact that all of these speeches come from the same two logographers suggests that it would not be unreasonable to draw a link between the relevance rule and this phenomenon. No other restriction appears to be preserved in the speeches that would have had a similar effect on depth of rhetoric and discussion.⁶⁴

It should be apparent, then, that the expectations of relevance in the dikastic courts were far more elastic than those in the homicide courts. As a result, the relevance rule had an effect on the content of homicide court rhetoric, and orators had to be inventive and subtle in order to create the most persuasive homicide speeches. We can find several instances of borderline relevance in the homicide speeches, which show that orators still wished to achieve the effects that came from

⁶³ For example 13.43-8, where Lysias blames Agoratus for many other things that befell Athens during the rule of the Thirty; 13.58-61, on the behaviour of some of Agoratus' acquaintances compared to his own; 13.65-68, on the behaviour of Agoratus' brothers and his own previous behaviour in other court cases. This speech alone seems to provide enough evidence against the idea of a strictly-followed oath of relevance in the dikastic courts to question the evidence of *Ath.Pol.*

⁶⁴ We must consider, though, the effect of the two speeches given per side in the homicide courts, which may result in our extant speeches not containing all of the arguments which a speaker intended to make in a particular case.

irrelevant statements. In order to make these attempts at transgression more palatable to the court, orators employ a variety of strategies intended either to slip irrelevance past the jury unnoticed, or exploit the irrelevant effects of otherwise relevant material. The fact of verbal delivery made these strategies more successful: listeners would be unlikely to have the time to fully analyse the manipulations of the rhetoric.

For a final pertinent point of comparison, we turn to the *Tetralogies*. Since these texts are hypothetical, they are not linked directly to any of the Athenian homicide courts, and therefore are not subject to the relevance rule or any other restrictions, besides a hypothetical concept of successful rhetoric. Thus, although the arguments used in the *Tetralogies* can be assumed to be persuasive at least in theory, this does not mean that they would have been equally persuasive, or relevant, to Athenians judging in the homicide courts. In this case, it is useful to apply our established framework of what was irrelevant in the homicide courts to the *Tetralogies* in order to see how far the lack of homicide court context allows them to deviate from expectations of relevance.

One of the main differences between the rhetoric of the *Tetralogies* and that seen in the authentic forensic speeches is the extensive use of arguments about pollution. As has already been touched upon in my discussion of pollution, religious material such as this might be reasonably considered to be outside of the matter at hand due to the religious context inherent in procedures conducted at the homicide courts. The hypothetical nature of the *Tetralogies* may have allowed their author to explore the rhetorical potential of pollution more fully.⁶⁵ Similarly, the extensive arguments from probability in the *Tetralogies* may have been a product of their hypothetical nature, but this kind of argument used to such an extent in the homicide courts may have been seen as a digression and a distraction from the facts. Both the first and second *Tetralogies* make use of arguments regarding the defendant's positive behaviour or good deeds in the city, material that would clearly have been irrelevant in the homicide courts.⁶⁶ There is also use of exhortations for pity from the jury.⁶⁷ The aim was to show a full range of plausible arguments and to examine their workings, without necessarily requiring that they be acceptable in an actual Athenian homicide trial.

⁶⁵ See Chapter 3.2.1.

⁶⁶ Ant.2.2.12, 3.2.3.

⁶⁷ Ant.3.2.10-11.

The *Tetralogies* provide us with an example of what homicide rhetoric could possibly look like when freed from the constraints of the relevance rule. These speeches are not obviously hindered by expectations of relevance, though presumably their hypothetical dikastic setting would require that they generally keep to the point. Comparison with the real speeches from both the homicide courts and the dikastic courts demonstrates that relevance clearly did have a marked effect on the shape of rhetoric in the homicide courts. As we have seen, orators who wanted to use techniques such as character assassination or self-aggrandisement needed to be strategic, inserting these details into the narrative of their speech in a way that would not stand out as irrelevant, but would appear to be an integral part of the story of the crime. Here, we can see a clear split between homicide rhetoric enacted within the separate space of the homicide courts, and that which took place in the dikastic courts or elsewhere in rhetorical writing. These latter speeches could be much freer with the relevance of their rhetoric, and thus were able to employ very different tactics.

4.4 CONCLUSIONS

The relevance rule played a role in shaping the rhetoric of Athenian homicide in two major ways. The first was the use of the rule as a rhetorical topos in its own right. It is invoked in several instances as a means of persuasion, often by holding up the homicide courts as paradigms of justice, and the rule as an example of this quality. This shows that Athenian litigants and juries were clearly aware of this aspect of the differentiation between their homicide courts and dikastic courts. The relevance rule also outlined the kind of rhetoric that could be used within the homicide courts. Orators had to conform to the rule when speaking within the courts, but also still wished to use effective oratory, which often played on the emotions and opinions of the jury. To do this, homicide rhetoric enacted within the homicide courts could make use of subtler means of persuasion, often embedded within narrative or bracketed by deference to the relevance rule. Orators were clearly still able to write successful homicide speeches despite these restricted criteria.

This phenomenon is consistent with the other ways in which homicide is unique in the Athenian legal system. The fact that the relevance rule can only reasonably be said to be a defining factor in the homicide courts, and not in the dikastic courts, emphasises the unique status of the offence and the courts that dealt

with it in Athenian thinking. We may speculate that the relevance rule was seen as a way of maintaining the context of efficacy and solemnity of trials for this especially serious crime. Additionally, the higher standing of the Areopagus jury, and by extension the juries of *ephetai* in the other homicide courts, may have led to a desire not to waste their time with irrelevant material, combined with an ideological notion that their experience of public life as former archons would make them less likely to be swayed by such material anyway. It was probably seen as reasonable for Antiphon in speech 6 to frame the relevance rule as the jury's own desire in the pursuit of justice, reminding them of their duty and suggesting that their prior experience may not always be a guarantee against skilled orators. The web of ideological beliefs about these courts would have tied together the notion of relevance, the experienced jury, the physical space of the court, and the concept of homicide jurisdiction, combining them all to compound the sense of a solemn and effective trial. That being the case, it is particularly interesting that the Areopagus cases that were not rooted directly in homicide were still rhetorically affected by their presence in this ideological context.

The relevance rule provides a framework to which rhetoric in the homicide courts has to conform, and that consequentially makes homicide speeches from those courts unique amongst forensic speeches. Furthermore, there continues to emerge a pattern of marked differences in the style of homicide rhetoric enacted within the context of the homicide courts and outside of them in the dikastic courts, which both serves to emphasise and is influenced by the ideological divide between the two parts of the system. Trials conducted in the homicide courts were not only subject to different procedures and enacted in a physically and ritually different space; litigants also had to speak differently in line with those procedures. It seems that, in spite of its effects often being difficult to perceive in the extant texts, relevance was one of the more potent forces affecting rhetoric related to homicide.

HOWS AND WHYS: INTENT AND MOTIVE AS RHETORIC

In a narrative of homicide, after the initial events of the killing have been established, two questions often arise: did the killer mean to do it, and, if so, why? In legal terms, these two separate but related concepts are the killer's intent and his motive. In modern UK law, these factors can affect the parameters of a homicide trial: the intent of the killer influences the classification of a killing as murder or manslaughter, and the killer's motive can have an effect on sentencing.¹ Intent also partially defined categories of homicide at Athens, helping to decide whether a killing was tried at the Areopagus or the Palladion.² Motive, too, could have probative value in an Athenian trial.

We might expect, then, that intent and motive would play a key role in the rhetoric of homicide at Athens. Indeed, both appear in the sources with rhetorical roles to play, though motive perhaps does not feature as prominently as we might expect. Surprisingly, rhetorical focus was more regularly placed on the motivation of those prosecuting the killing than of the alleged killer. Much recent scholarship on homicide law has focused on the role of the family as prosecutors.³ The prevailing opinion that the family was probably the only party entitled to prosecute an alleged killer frames homicide prosecution as an issue of personal retribution. This, combined with the religious implications of homicide discussed in Chapter 3, would, on the surface, seem to suggest that all those who accused another of homicide or brought a homicide case to court had the sole intention of punishing the accused for the alleged crime. An examination of extant cases, however, makes it clear that this was not necessarily the case. As with many other kinds of indictment in Athens, a homicide accusation could be used for purposes other than to right the wrong of a killing.

¹ Criminal Justice Act 2003, Schedule 4, Part 1, 1-4a. For examples of the influence of motive on sentencing, see Loveless (2012) 94-96.

² D.23.67-71. Homicide suits, and the courts at which they were tried, were also distinguished by the status of the victim, and whether the killer was accused of *autokheir* ('own-hand') killing or of plotting the death.

³ See for example Tulin (1996), Phillips (2008), MacDowell (2009) 169 n.55.

This chapter will examine the rhetorical angles on these issues of intent and motivation. The first part of the chapter will focus on intent as a means of rhetorically defining the case at hand. An attempt will be made to define ‘intent’ as it relates to homicide in the Athenian courts, though such an attempt faces a major obstacle. This obstacle is the fact that there is often a great difference between reality and the content of rhetoric. I will attempt primarily, then, to identify the rhetorical uses of intent, rather than any exact legal requirements in different kinds of homicide charge. Intent could be over- or under-emphasised depending on the requirements of the case and the tactics of the individual orator. This kind of rhetoric is particularly interesting as it is specific to the homicide courts, since homicide trials tried in the dikastic courts were not subject to variation based on intent.

I will then turn to examine the variety of motives for killing that appear in the forensic speeches. As previously stated, there are far fewer references to killers’ motives than we might expect to find in the homicide speeches. There are, however, some references that, though brief, should be considered an intrinsic portion of the rhetoric of homicide. Often, mentions of motive will appear in the form of denials of motives in defence speeches. The nature of the various motives of killers that appear in the homicide speeches can also be useful in reflecting on attitudes towards the crime of homicide itself, namely in pinpointing the nature of Athenian understanding of why killings were committed.

The remainder of the chapter will explore rhetorical attacks on the motivation of those who make accusations of homicide. I will discuss the range of alleged motivations, from character assassination and political manoeuvring to a means of putting one’s political opponents out of action for good. Certain specific procedural aspects of homicide law, as well as the way in which homicide figured in the Athenian consciousness as a private matter, made the accusation of killing a potent tool in a man’s litigious interactions with his enemies. The examination of these accusations will serve a dual purpose. It is meant to provide a greater understanding of Athenian attitudes towards homicide and its procedures and prosecution, and to supplement modern analysis to encompass a wide variety of possible motives for prosecuting a person for homicide, beyond the expected cases of enmity and

retribution.⁴ Moreover, it will aim to exemplify the contrast between Athenian ideology of homicide and actual forensic practice. The ideology of solemnity and antiquity identified in Chapter 2 suggests that the Athenians viewed their treatment of homicide as set apart from the rest of the legal system in some ways. The combination of the familial nature of homicide procedure, the antiquity of the laws, the existence of slander laws against false homicide accusations, and rigorous procedures for homicide, such as religious restrictions and specific courts and juries, creates an image of homicide as a crime to be treated in a uniquely serious manner. One would suppose that this would also bring serious social implications for anyone perceived to have abused the process. Although this must be true at one level, as the distinctive procedures do have the effect of added solemnity in homicide cases, in this chapter it should become apparent that there was a notable gap between the ideology of homicide law and procedure, and the way it was treated in reality.

5.1 DEFINING AND REDEFINING INTENT

There are several words that appear in Athenian legal texts that have troubled scholars with regard to the legal treatment of (what we would call) intent and premeditation. Draco's law makes use of two terms relating to intent in the extant portion of the text. The first line presents the first ambiguous term, *ek pronoias*:

καὶ ἐὰμ μὲ ᾿κ [π]ρονοί[α]ς [κ]τ[ένει τίς τινα, φεύγ]ε[ν]. [IG I³104.11]

‘Even if someone kills without premeditation, he shall be exiled.’⁵

The second, *akon*, is found several lines below:

[ἐὰν δὲ τούτον μεδὲ *hēs* εἶ, κτ]ένει δὲ ἄκο[ν], γνόσι δὲ *hoi* [πε]ντ[έκοντα καὶ *hēs* *hoi* ἐφέται ἄκοντ]α κτεῖναι, ἐσέσθ[ο]ν δὲ *h*[οι φ]ρ[άτορες ἐὰν ἐθέλοσι δέκα] [IG I³ 104.16-18]

‘And if not even one of these is alive, and he killed unintentionally, and the fifty-one *ephetai* decide that he killed unintentionally, then let ten members of the Phratry admit him [to the country] if they are willing.’⁶

⁴ Phillips (2008) focuses on *echthra* as a ‘predictable’ and ‘valid motive’ for prosecution, and does not consider other motives. He suggests that without *echthra* ‘the amount of litigation would have decreased considerably.’ (20-3). In fact, none of the extant cases for homicide explicitly posit *echthra* as a motive for prosecution, with greater focus either on the legitimate motivations of justice and retribution, or the unscrupulous motives of personal gain. *Echthra* was certainly an acceptable motive in other cases (e.g. [D.]59.1, 15), but there is little evidence for it having played anything more than an average role in homicide prosecution, or at least in the rhetoric of homicide prosecution.

⁵ Tr. Stroud.

⁶ Tr. Stroud.

The exact significance of the words *pronoia* and *akon* in these contexts is hard to ascertain.⁷ As Stroud points out, ‘unpremeditated’ or ‘without forethought’ does not necessarily mean ‘unintentional’; a killing can be carried out intentionally without having been planned beforehand.⁸ But the meaning of ‘intention’ can be debated: does it denote intention to kill, to harm, or simply to act? The term clearly marked an important legal distinction, namely that between cases tried at the Areopagus and those tried at the Palladion.⁹ Both *Ath.Pol.* and Draco’s law complicate our understanding of *akon* and its cognates by contrasting it with *ek pronoias*, rather than the perhaps more logical *hekon* or *hekousios*, terms that appear nowhere in either source.¹⁰

There are two main possibilities for the definition of intent in the homicide law. The first has been suggested by Loomis, who posits that the Athenians made no distinction between killing *ek pronoias* and *hekon*, and that any killing that was planned beforehand, intended at the moment of commission, or resulted from the performance of an act that caused harm would be counted as intentional and therefore tried at the Areopagus.¹¹ Thus, he suggests that intent in the case of Athenian homicide law should be defined as ‘harmful intent’.¹² This would limit the class of unintentional homicides to those committed accidentally, which would be tried at the Palladion.¹³

This definition is useful for understanding the concept of intent in homicide cases alone. The issue is complicated, however, by the presence of the term *ek pronoias* in *trauma* cases. At a glance, there is no reason why *trauma ek pronoias* should not mean ‘wounding with harmful intent’. We should, though, consider the fact that *trauma* cases were tried at the Areopagus. The shared location suggests that wounding was treated similarly to homicide cases, separate from simple battery or

⁷ It is worth noting that Athenian law was often (though not always) more procedural than substantive, for which see Carey (1998). Regarding adultery law, Carey notes that ‘the law is interested in the legal action to be taken by the volunteer prosecutor rather than in the features which classify an act as subject to the law and the procedures in question.’ (96) Similar could be said of the wording of Draco’s homicide laws.

⁸ Stroud (1968) 44.

⁹ *Ath.Pol.* 57.3, D.23.67-71.

¹⁰ See Appendix to Chapter 1 for the implications of this absence on our understanding of Draco’s law on intentional homicide.

¹¹ Loomis (1972).

¹² Loomis (1972), followed by Gagarin (1981a).

¹³ Loomis (1972) 92.

hubris cases tried in the dikastic courts. Indeed, as Todd notes, ‘several texts (D.23.22; *Ath.Pol.*39.5, 57.3) speak as if *trauma* was a subset of *phonos* (‘homicide’).¹⁴ In order for this to be the case, then it is reasonable to assume that *trauma* would have to involve some potential to kill. This potential could have been in the intent of the perpetrator: that is, that *trauma ek pronoias* denoted ‘wounding with intent to kill’. There is no need for *ek pronoias* to mean the same thing for wounding and killing, but nevertheless, it would perhaps be less likely for intentional homicide only to require intent to harm if intentional wounding required intent to kill.

The second possibility is that both crimes required intent to kill. The concept of intent to kill, however, must be defined carefully. This can be achieved more easily by turning to Rickert’s linguistic study of *akon* and *hekon*. Her analysis suggests that the main difference between *akon* and *hekon* is the presence or absence of willingness or voluntariness.¹⁵ With regard to homicide law, this would mean that the ‘intentional’ killer acted willingly or voluntarily in the knowledge that his actions would or could kill. Two possibilities exist for the ‘unintentional’ killer: either he acted unwillingly or involuntarily (perhaps under duress) in the knowledge that his actions would or could kill, or, more commonly, acted willingly in the mistaken belief that his action would not kill.¹⁶ This same definition could apply neatly to cases of *trauma*: the accused wounded his victim willingly in the knowledge that his actions had the potential to kill.¹⁷ In practice, this may have been defined by the use of a weapon or the spilling of blood.¹⁸

The main opposition to this theory is provided by Demosthenes 54. The speaker notes that, if he had died as a result of Conon’s beating, Conon would have been tried before the Areopagus.¹⁹ On the surface, this would appear to suggest that an act with harmful intent that resulted in death would be classified as intentional homicide, supporting Loomis’ theory. If intent to kill was necessary to classify a

¹⁴ Todd (2007) 283.

¹⁵ As summarised in Rickert (1989): ‘In effect, *hekon* and *akon* express the agent’s or victim’s attitude towards what is happening: if *hekon*, a strong positive attitude or commitment; if *akon*, a strong negative attitude or divorcement.’ (128)

¹⁶ An example used by Aristotle is the person who gives a love potion hoping to augment their lover’s affection, but instead poisons and kills them (*Arist.MM.*1188b 30-8).

¹⁷ This definition is accepted by Spatharas (2006) 106.

¹⁸ Todd (2007) 282-3, Phillips (2007) 74-83. See also Chapter 1.2.

¹⁹ D.54.28.

homicide as intentional, then the speaker's death, which resulted only from intent to harm, would have been tried at the Palladion. This case, however, brings us to our greatest challenge in attempting to understand the meaning of 'intent' to the Athenians. It is possible that the speaker in Demosthenes 54 is accurately representing the workings of the Athenian legal system with regard to intentional homicide, but it is just as likely that he is using rhetoric to manipulate the facts. By saying that Conon's crime would have been tried at the Areopagus, the speaker may hope to imply that Conon and his collaborators did in fact intend to kill him, augmenting the seriousness of his injuries. Such an implication would aim to increase the sense of Conon's guilt in the minds of the jurors, thus making the speaker's case against him more persuasive. As it stands, we have no way of knowing whether the text offers us a reliable picture of Athenian law, or simply the manipulations of rhetoric.

As a result, a guide is all that theoretical interpretations of intent can offer when we turn to the reality of forensic rhetoric. Phillips, writing in support of the view that *trauma ek pronoias* denoted wounding with intent to kill, writes:

‘[t]he implication suggested by the speaker of Lysias 3... namely, that the Areopagus will have hesitated to convict a *trauma* defendant who had not inflicted a serious injury and therefore presumably lacked an intent to kill, reflects (if true) the casuistic application of the *trauma* law by the Areopagite jury, not the wording or intent of the law itself. In fact, the content of the speaker's comment at §41...shows that the *trauma* law did not define *pronoia* as intent to kill: if it did, the speaker would have cited the relevant statutory language rather than merely offering a professed interpretation of the law which clearly serves his own immediate interests; and the speaker fails to cite the *trauma* law not only here but anywhere in Lysias 3.’

We might expand Phillips' point somewhat: not only did the *trauma* law not define *pronoia* as intent to kill, but neither it nor the laws on homicide defined *pronoia* or any other terms regarding intent at all. The only sources with which we are left in order to ascertain the contemporary meaning of such terms are the forensic speeches, where the absence of definition in the law leaves room for manipulation. In the remainder of this section, I will examine how the orators rhetorically adjust the meanings of premeditation and intent in homicide cases in order to alter the jury's impression of the case.

A prime theoretical example is to be found in the second *Tetralogy*, where, in a lengthy and rather sophistic argument, the speaker argues that a boy killed by a thrown javelin caused his own death:

ἀκουσίου δὲ τοῦ φόνου ἐξ ἀμφοῖν ὑμῖν ὁμολογουμένου γενέσθαι, ἐκ τῆς ἁμαρτίας, ὁποτέρου αὐτῶν ἐστίν, ἔτι γε σαφέστερον ἂν ὁ φονεὺς ἐλεγχθεῖη. οἱ τε γὰρ ἁμαρτάνοντες ὡς ἂν ἐπινοήσωσί τι δρᾶσαι, οὗτοι πράκτορες τῶν ἀκουσίων εἰσίν· οἱ τε ἐκούσιόν τι δρῶντες ἢ πάσχοντες, οὗτοι τῶν παθημάτων αἴτιοι γίνονται. τὸ μὲν τοίνυν μεράκιον περὶ οὐδένα οὐδὲν ἤμαρτεν. οὔτε γὰρ ἀπειρημένον ἀλλὰ προστεταγμένον ἐξεμελέτα, οὔτε ἐν γυμναζομένοις ἀλλ’ ἐν τῇ τῶν ἀκοντιζόντων τάξει ἠκόντιζεν, οὔτε τοῦ σκοποῦ ἁμαρτῶν, εἰς τοὺς ἀφροσύνας ἀκοντίσας, τοῦ παιδὸς ἔτυχεν, ἀλλὰ πάντα ὀρθῶς ὡς ἐπενόει δρῶν ἔδρασε μὲν οὐδὲν ἀκούσιον, ἔπαθε δὲ διακωλυθεὶς τοῦ σκοποῦ τυχεῖν. ὁ δὲ παῖς βουλόμενος προδραμεῖν, τοῦ καιροῦ διαμαρτῶν ἐν ᾧ διατρέχων οὐκ ἂν ἐπλήγη, περιέπεσεν οἷς οὐκ ἤθελεν, ἀκουσίως δὲ ἁμαρτῶν εἰς ἑαυτὸν οἰκείαις συμφοραῖς κέχρηται, τῆς δ’ ἁμαρτίας τετιμωρημένος ἑαυτὸν ἔχει τὴν δίκην, οὐ συνηδομένων μὲν οὐδὲ συνθελόντων ἡμῶν, συναλγούντων δὲ καὶ συλλυπουμένων. [Ant.3.2.6-8]

‘Since, as you know, both sides agree that the killing was unintentional, the killer can be determined even more clearly by establishing which of the two made the mistake. Those who because of a mistake fail to accomplish what they have in mind to do are the agents of unintentional acts, and those who do or experience anything unintentional are responsible for their sufferings. Now the young man made no mistake affecting anyone, for he was practising what was assigned, not what was prohibited; he was throwing his javelin on the throwing field, not where others were exercising; and he did not hit the boy because he missed his target and threw toward the bystanders; rather, he did everything he intended to do correctly, did nothing unintentional, and suffered by being prevented from hitting his target. The boy, on the other hand, wished to run out but mistook the right moment to run out without being hit and fell into unwanted misfortune. By his unintentional mistake against himself he experienced his own misfortune, but he has punished himself for his mistake and thus has his just deserts. It’s not something we want or enjoy, for we share his pain and his suffering.’²⁰

The speaker argues that because the killing was agreed by both parties to be unintentional (*akousios*), and it was the boy who was killed who performed an unintentional action, it was his own fault that he was killed. His emphasis, to apply our above formulation of intent, is on the fact that the *victim* acted willingly in a way that had the potential to kill. Obviously this is an extreme and hypothetical example, but it clearly demonstrates the way in which issues of intent could be refocused by the orator in order to favour his client’s argument. Here, the speaker redefines unintentional homicide from a killing committed unintentionally by the killer to a

²⁰ Tr. Gagarin.

killing that was the result of an unintentional action by any involved party. In presenting this definition, he is able to distance the defendant from the crime; his definition of guilt for unintentional homicide does not include the voluntary commission of acts that the killer did not expect would result in death. The shifting of responsibility was a rhetorical strategy that was certainly possible for orators in the courts, particularly in less straightforward cases such as this one.

Although the number of extant speeches from real homicide trials is relatively small, we are able to examine the rhetorical manipulation of intent in practice across a variety of cases. This rhetorical manipulation, though, makes it impossible to ascertain whether or not there was an expectation that speakers would attempt to persuade the jury of the presence of the different levels of intent required in different cases in their arguments. For example, in a case tried at the Areopagus, we might expect that the prosecution would aim to persuade the jury that there was conscious commission of an act likely to result in another's death, whereas in theory a prosecutor at the Palladion would not need to discuss the same level of willingness or knowledge of the potentially lethal effects of the action. In practice in the forensic speeches, however, the distinction is not so obvious, as there is clearly a perceived benefit in overemphasising intent and premeditation in all prosecution cases, to minimise or entirely exclude any possible doubt that the defendant is guilty.

In Antiphon 1, the issue of intent arises almost immediately:

[...]ἐὰν ἐπιδείξω ἐξ ἐπιβουλῆς καὶ προβουλῆς τὴν τούτων μητέρα φονέα οὕσαν τοῦ ἡμετέρου πατρός, καὶ μὴ ἅπαξ ἀλλὰ καὶ πολλάκις ἤδη ληφθεῖσαν τὸν θάνατον τὸν ἐκείνου ἐπ' αὐτοφώρῳ μηχανωμένην[...] [Ant.1.3]

‘If I can show that, with plotting and forethought, this man's mother killed our father, and that not once but many times before she has been caught red-handed in contriving his death...’

It is clear that the speaker wants to emphasise that the crime was committed with the full intent and desire to kill his father. If the trial was for *bouleusis* of intentional homicide, we can assume that this was a necessary factor to prove. But the speaker does not simply focus on the issue of intent in the sense of willingness to kill. His arguments are far more strongly concerned with the issues of plotting (*epiboules*) and forethought (*proboules*), in an aim to describe a premeditated plot on the dead man's life. The speaker's seemingly incidental mention of previous attempts to kill

his father at §3 receives no further treatment in the text, but it is a potent claim to make so near the beginning of the speech. The phrase refers not just to one attempt to kill, but several instances. No timescale is presented, allowing the jury to imagine a long-conceived plot on the dead man's life. Each detail in this brief accusation builds economically but powerfully on the allegation of the stepmother's malicious premeditation. It not only suggests that she desired to kill him in this instance, but that she was likely to use the same *modus operandi*, namely a premeditated plot, that she had before. It is probable that the speaker has no evidence or witnesses to support the allegation, and the statement is not elaborated beyond this point.²¹ Yet the statement is given a place in the speech, probably with the sole purpose of emphasising the idea that the stepmother intended to commit this crime. If she had attempted to kill him before, then it would be all the more likely that it would be her intention when he actually died. This manipulation of simple intent into long-planned premeditation would minimise the possibility of doubt about the killer's guilt and thereby augment the jury's hostility towards her. This rhetoric would be particularly potent as cases of *bouleusis* were tried at the Palladion, which also heard cases of involuntary killing, as the case would be set apart from those usually heard by the court and made to appear more serious.²²

By focusing on the stepmother's premeditated intent to kill, the speaker casts her as a plotting murderess, and even goes so far as to compare her to Clytemnestra.²³ Including the example mentioned above, the speaker reiterates his view of the stepmother's intentions three times:

ἐγὼ δ' ἡγοῦμαι πολὺ ἀνοσιώτερον εἶναι ἀφεῖναι τοῦ τεθνεῶτος τὴν τιμωρίαν,
ἄλλως τε καὶ τοῦ μὲν ἐκ προβουλήs ἀκουσίως ἀποθανόντος, τῆs δὲ ἐκουσίως
ἐκ προνοίας ἀποκτεινάσης. [Ant.1.5]

²¹ It could be argued that the accusation of previous attempts to kill would be irrelevant to the current charge, but as we have seen in Chapter 3, relevance is flexible based on the case, and the accusation includes both parties in the current case (that is, the alleged killer and her alleged victim.) This combined with the fact that the accusation is brief rather than extensive would make it unlikely to be dismissed as irrelevant.

²² On *bouleusis*, see Chapter 1.3.

²³ Ant.1.17. The use of the name may point obliquely to a motive for killing, that is, vengeance for a past wrong, but it is likely that the speaker simply meant to invoke the woman most famous for betraying and killing her husband. See also Chapter 4.3.

‘I think it is much more of a sacrilege to abandon vengeance for the dead man, especially since he died as the unintentional victim of a plot, whereas she killed with full intention and premeditation.’²⁴

ἡ μὲν γὰρ ἐκουσίως καὶ βουλεύσασα τὸν θάνατον <ἀπέκτεινεν>, ὁ δ’ ἀκουσίως καὶ βιαίως ἀπέθανε. [Ant.1.26]

‘She killed him intentionally and with plotting, but he died unintentionally and violently.’²⁵

Both of these phrases make use of a technique similar to that used in the second *Tetralogy*: they state that one party acted intentionally and that the other acted unintentionally. In this case, the party who acted intentionally is presented as the guilty one. By use of the terms *akousios* and *hekousios*, a dichotomy is set up between the two parties, at once emphasising the role of the stepmother as an active, conniving killer and painting the father as a passive, innocent victim, and making her crime seem all the more monstrous. This would likely have been very effective in the performance of the speech, as the verbal resonance of the two similar-sounding terms would have made a potent impact on the listening jury. The speaker probably vocally emphasised these terms in performance, making the dichotomy between the two parties even more pronounced for the jury.

It is difficult to draw a direct comparison between the use of intent in prosecution speeches and in defence speeches, as we have so few extant speeches, and all are from different types of procedure. By examining the speeches we do have, however, we can make some cautious comparisons. Antiphon 6 seems to be a trial for *bouleusis* of unintentional homicide. The defendant naturally denies having anything to do with the boy's death. His strategy is to distance himself from the crime, and therefore he has no reason to address issues of killing with or without intent. From certain references to the claims made by his opposition, however, it would appear that they have mentioned the issue of his intent in their speech. The *choregus* states:

διωμόσαντο δὲ οὗτοι μὲν ἀποκτεῖναι με Διόδοτον βουλεύσαντα τὸν θάνατον [Ant.6.16]

'They swore that I killed Diodotus by plotting his death.'

²⁴ Tr. Gagarin.

²⁵ Tr. Gagarin.

Later, the *choregus* claims that his opponents have admitted that the boy did not die through *pronoia* or *paraskeue*, which must be incompatible with a charge of intentional plotting.²⁶ As the trial is for unintentional killing, we would expect that the prosecution would merely need to prove that the *choregus* administered or caused to be administered to the boy the drink whose nature allowed the possibility that death might have been the outcome. Their full statement, and indeed their formal charge, may have been that the death was not a result of intent or design, but that it was nevertheless the result of the *choregus*' actions.

Whether the speaker represents his opponents' words correctly or not, he seizes upon their rejection of premeditation to his rhetorical advantage. He rhetorically configures all cases of *bouleusis* as intentional, suggesting that 'plotting' (*bouleusis*) must require premeditation (*pronoia*). He is then able to claim that his opponents, the very people prosecuting him, have stated that the killing was not intentional. In his rhetorical configuration, this means that the killing was not planned at all, and that he is therefore innocent:

ὅποσα μὲν γὰρ λάθρα πράττεται καὶ ἐπὶ θανάτῳ βουλευθέντα, ὧν μὴ εἰσι μάρτυρες, ἀνάγκη περὶ τῶν τοιούτων ἐξ αὐτῶν τῶν λόγων τῶν τε τοῦ κατηγοροῦ καὶ τοῦ ἀποκρινομένου τὴν διάγνωσιν ποιεῖσθαι καὶ θηρεύειν καὶ ἐπὶ σμικρὸν ὑπονοεῖν τὰ λεγόμενα, καὶ εἰκάζοντας μᾶλλον ἢ σάφα εἰδότας ψηφίζεσθαι περὶ τῶν πραγμάτων· ὅπου δὲ πρῶτον μὲν αὐτοὶ οἱ κατήγοροι ὁμολογοῦσι μὴ ἐκ προνοίας μηδ' ἐκ παρασκευῆς γενέσθαι τὸν θάνατον τῷ παιδί, ἔπειτα τὰ πραχθέντα φανερώς ἅπαντα πραχθῆναι καὶ ἐναντίον μαρτύρων πολλῶν, καὶ ἀνδρῶν καὶ παίδων, καὶ ἐλευθέρων καὶ δούλων, ἐξ ὧν περὶ καὶ εἴ τις τι ἠδίκηκε, φανερώτατος ἂν εἴη, καὶ εἴ τις μὴ ἀδικοῦντα αἰτιῶτο, μάλιστα ἂν ἐξελέγχοιτο. [Ant.6.18-19]

'Now when a murder is planned in secret and there are no witnesses, you are forced to reach a verdict about the case on the basis of the prosecutor's and the defendant's words alone; you must be suspicious and examine their accounts in detail, and your vote will necessarily be cast on the basis of likelihood rather than clear knowledge. But here, in the first place the prosecution themselves admit that the boy's death did not result from any forethought or preparation, and second, the entire event occurred openly in front of many witnesses, men and boys, free and slave, who would have made it very clear if anyone had committed a crime and would have provided a sure test if someone should accuse an innocent man.'²⁷

The speaker's language here is crucial in providing his own definition of premeditation. Firstly, he uses the words *ek pronoias* in the middle of his discussion

²⁶ Ant.6.19.

²⁷ Tr. Gagarin.

rather than in introducing the topic, in the hope of drawing equivalence between any form of *bouleusis*, and *pronoia* and forethought (*paraskeue*). Then, he presents a contrast between plots, which he defines as occurring in secret, and his own actions, which have ‘occurred openly’. The speaker distorts the definition of the charge, equating *bouleusis* solely with an intentional and premeditated secretive plan to kill, and then describing his own actions as in opposition with such a definition. The rhetoric eliminates any middle ground in intent: killings are either wholly intentional and premeditated long in advance, or entirely unintentional and accidental. In Antiphon 6, then, the speaker uses his opponents’ denial of intent as a denial of the whole charge. Any legal requirements regarding proof of intent in this case are completely obscured by the speaker’s rhetorical manoeuvring.

Lysias 1 provides a different kind of scenario in which to explore the rhetoric of intent. As the trial is for lawful killing, there is no dispute that the killing happened, or, indeed, that the defendant Euphiletus intended it to happen. He argues that it was his legal duty to kill the adulterer Eratosthenes when he found him with his wife, and that this is exactly what he did.²⁸ It makes sense in this context for Euphiletus to explain his motivations for committing the killing. A portion of his argument, however, is dedicated to rebutting an accusation presumably made by his prosecutors that he had planned the homicide in advance. It is easy to imagine that the prosecutors would make much of this argument, as it is clear from the narrative that Euphiletus was aware that the adultery was taking place for at least a day or two before the killing, and had probably considered that he would kill the man if he could. This raises the possibility that the legislation on lawful killing included some statements regarding the necessity that the killing be performed in the moment of discovery, rather than being premeditated, or that there must be no entrapment of the adulterer, as this would invalidate the legality of the killing.²⁹

²⁸ This is, in fact, a dishonest argument and a distortion of the charge, as the law does not demand the killing of an adulterer, but only provides indemnity for a man who does kill him.

²⁹ The sense of being caught in the act is present in the law, which states that the adulterer should be caught ‘with’ the defendant’s wife or other woman of his *oikos* (... ἂν ἐπὶ δάμαρτι τῆ ἑαυτοῦ μοιχὸν... ποιήσῃται. Lys.1.30, cf. D.23.53.) A comparable piece of legislation is found in the Law Code of Gortyn, which allows for accusations of trickery and entrapment against one who kills an adulterer, who must then refute the charge in front of witnesses and on a solemn oath (*I.Cret.*4.72.II.36-45). It may have been unacceptable to drag the adulterer away from the place where he was captured, for example out into the street, or to plot to capture him, but the law would probably not have to detail extensive conditions such as this; it may have merely stated that the killing had to be, for example, *me*

His argument is a lengthy one. His opponents have accused him of sending a slave girl to bring Eratosthenes to his house. He counters that he did not, and that this would only have been wrong if the adultery had not already been committed previously [1.37-8], an evasive argument that suggests a belief that the prosecution may have the stronger point here. He goes on to say that he had met a friend, Sostratus, on the night of the killing, and invited him to dinner, after which Sostratus left; he argues that if he had wanted to entrap Eratosthenes he would have been unlikely to invite another man into the house as this would put the adulterer off, and that he would not have sent away a man who could have helped him carry out the punishment [1.39-40]. Further, he suggests that if he had planned the attack, he would have sent messages to his friends in advance in order to ensure their presence, rather than going out at night and finding that many of them were not at home [1.41]. Finally, he protests that he would have recruited as many witnesses as possible, including slaves, if he had planned the killing in advance [1.42]. He presents all of this as evidence that he must not have known that Eratosthenes would be in the house that night, and that therefore the killing could not have been premeditated. The arguments are not particularly strong for the reader of the text, as Euphiletus could easily have planned the killing in advance and simply waited for the opportune moment to carry it out. In order to demonstrate his innocence, though, he must emphasise the idea that he did not plan the killing in advance, and the arguments may have been more effective as the jury heard them only once, and may not have had time to assess them fully. The notion of intent is refocused rhetorically once again, with Euphiletus representing his own intent as only present in the moment of killing, divorced from any idea of premeditation or plotting. As intent to kill is agreed by both sides, the argument must be about the circumstances that motivated that intent in Euphiletus, and the circumstances immediately surrounding the killing.³⁰

Further evidence comes from Lysias 3. The trial is for *trauma ek pronoias*, and *pronoia* is clearly at issue. The defendant cannot deny that a fight occurred between the two men, but presents the conflict in a manner that makes him appear

dolosanta. If such conditions existed and were broken, it is likely that the killer's plea of legal justification would be denied and he would be found guilty of intentional homicide.

³⁰ Appropriate argumentation in this case can be identified through *stasis*-theory: the question is not one of fact, but of evaluation of those facts. See Heath (1994).

not to be at fault. Several times he suggests that he happened to go to the locations of the fights by chance (§12, 17), and defines exactly what would constitute *pronoia*:

λέγει δ' ὡς ἡμεῖς ἤλθομεν ἐπὶ τὴν οἰκίαν τὴν τούτου ὄστρακον ἔχοντες, καὶ ὡς ἠπειλοῦν αὐτῷ ἐγὼ ἀποκτενεῖν, καὶ ὡς τοῦτό ἐστιν ἡ πρόνοια. ἐγὼ δ' ἠγοῦμαι, ὃ βουλή, ῥάδιον εἶναι γινῶναι ὅτι ψεύδεται, οὐ μόνον ὑμῖν τοῖς εἰωθόσι σκοπεῖσθαι περὶ τῶν τοιούτων, ἀλλὰ καὶ τοῖς ἄλλοις ἅπασιν. τῷ γὰρ ἂν δόξειε πιστὸν ὡς ἐγὼ προνοηθεὶς καὶ ἐπιβουλεύων ἤλθον ἐπὶ τὴν Σίμωνος οἰκίαν μεθ' ἡμέραν, μετὰ τοῦ μειρακίου, τοσοῦτων ἀνθρώπων παρ' αὐτῷ συνειλεγμένων, εἰ μὴ εἰς τοῦτο μανίας ἀφικόμην ὥστε ἐπιθυμεῖν εἰς ὧν πολλοῖς μάχεσθαι, ἄλλως τε καὶ εἰδὼς ὅτι ἀσμένως ἂν με εἶδεν ἐπὶ ταῖς θύραις ταῖς αὐτοῦ, ὃς καὶ ἐπὶ τὴν ἐμὴν οἰκίαν φοιτῶν εἰσήει βία, καὶ οὔτε τῆς ἀδελφῆς οὔτε τῶν ἀδελφιδῶν φροντίσας ζητεῖν με ἐτόλμα, καὶ ἐξευρὼν οὐ δειπνῶν ἐτύγχανον, ἐκκαλέσας ἔτυπτέ με; [Lys.3.28-9]

‘He says that we came to his house carrying a piece of broken pottery and threatened to kill him—and that this constitutes ‘premeditation’. In my opinion, however, members of the Council, not only you (who are experienced in examining cases like this) but everybody else can easily see he is lying. Would anybody think it credible that in a premeditated plot I came to Simon’s house in daytime with the young man, when so many people were gathered there?—unless of course I had so lost my mind that I was eager to fight alone against so many, particularly when I knew he would be pleased to see me at his door. This is the man who came to my house and entered it by force, who dared to search for me without consideration for my sister or my nieces, and who called me out and attacked me after discovering where I was dining.’³¹

He later suggests that by putting himself in such a dangerous, unprepared situation, he would only be premeditating against himself.³² The argument is based on the idea that premeditation requires preparation, and is very similar to one seen in Lysias 4:

καὶ μὴν οὐδεὶς γε ὑμῶν ἀγνοεῖ ὅτι θάττον ἂν ἐγχειριδίῳ πληγεὶς ἀπέθανεν ἢ πῦξ παιόμενος. φαίνεται τοίνυν οὐδ' αὐτὸς αἰτιώμενος τοιοῦτόν τι ἔχοντας ἡμᾶς ἐλθεῖν, ἀλλ' ὄστράκῳ φησὶ πληγῆναι. καίτοι φανερόν ἤδη ἐξ ὧν εἴρηκεν, ὅτι οὐ πρόνοια γεγένηται. οὐ γὰρ ἂν οὕτως ἤλθομεν, ἀδήλου ὄντος εἰ παρὰ τούτῳ εὐρήσομεν ὄστρακον ἢ ὅτῳ αὐτὸν ἀποκτενοῦμεν, ἀλλ' οἴκοθεν ἔχοντες ἂν ἐβαδίζομεν. [Lys.4.6-7]

‘And indeed there is not one of you who does not know that he would have been killed more quickly with a dagger than with blows from the fist. And so it is apparent that he does not accuse us of having come with such a thing, but says that he was struck with a potsherd. And so already it is clear from what he has said that there was no premeditation. For we would not have gone in

³¹ Tr. Todd.

³² ...ὥσπερ κατ' ἑμᾶντοῦ τὴν πρόνοιαν ἐξευρίσκων, ἵν' ὡς μάλιστα ὑπὸ τῶν ἐχθρῶν ὑβρισθεῖν; [Lys.3.34] ‘...as if I were premeditating against myself, so that my enemies would be able to carry out their aggravated assault?’ (Tr. Todd)

that manner, unsure if we would find there a potsherd or something with which to kill him, but would have brought it from home when we set out.’

Lysias 1, too, follows the same concept. All three speeches suggest that *pronoia* would be characterised by the desire to prepare in advance in order to carry out the crime in the most beneficial setting possible, rather than the circumstances under which it actually occurred. This would include a large number of witnesses and preparation of a weapon in advance in order to carry out the crime most effectively. Indeed, here, the speaker refers to *pronoia* and a plot (*epiboule*) in quick succession, hoping to suggest the equivalence of the two terms. If there is no evidence of such clear planning, but in fact the attack occurred in adverse circumstances for the perpetrator, then premeditation and therefore guilt can be shown to be less likely.

The key to this rhetorical technique is in defining the exact nature and form of *pronoia* in a way chosen by the orator, rather than one necessarily representative of law, and then distancing the defendant’s actions from it. The idea of prior preparation is transmuted by the speaker of Lysias 3 into a plot a long time in the making, narrowing his definition of *pronoia* even further:

ἔπειτα δὲ καὶ οὐδεμίαν ἡγούμην πρόνοιαν εἶναι τραύματος ὅστις μὴ ἀποκτεῖναι βουλόμενος ἔτρωσε. τίς γὰρ οὕτως ἐστὶν εὐήθης, ὅστις ἐκ πολλοῦ προνοεῖται ὅπως ἔλκος τις αὐτοῦ τῶν ἐχθρῶν λήψεται; ἀλλὰ δῆλον ὅτι καὶ οἱ τοὺς νόμους ἐνθάδε θέντες, οὐκ εἴ τινας μαχεσάμενοι ἔτυχον ἀλλήλων κατάξαντες τὰς κεφαλὰς, ἐπὶ τούτοις ἠξίωσαν τῆς πατρίδος φυγὴν ποιήσασθαι· ἢ πολλοὺς γ’ ἂν ἐξήλασαν· ἀλλ’ ὅσοι ἐπιβουλεύσαντες ἀποκτεῖναί τινας ἔτρωσαν, ἀποκτεῖναι δὲ οὐκ ἐδυνήθησαν, περὶ τῶν τοιούτων τὰς τιμωρίας οὕτω μεγάλας κατεστήσαντο, ἡγούμενοι, ὑπὲρ ὧν ἐβούλευσαν καὶ προὐνοήθησαν, ὑπὲρ τούτων προσήκειν αὐτοῖς δίκην δοῦναι· εἰ δὲ μὴ κατέσχον, οὐδὲν ἦττον τό γ’ ἐκείνων πεποιῆσθαι. [Lys.3.41-2]

‘I also thought there could be no premeditation in wounding if somebody wounded without intent to kill: for who is so naïve that he premeditates long in advance how one of his enemies will be wounded? Clearly our lawgivers also did not think they should prescribe exile from the fatherland for people who happen to crack each other’s heads while fighting—or else they would have exiled a considerable number. On the other hand, they did establish such severe penalties for those who plot to kill others, and wound but do not succeed in killing. The lawgivers thought that those who have plotted and premeditated ought to pay the penalty: even if they did not succeed, nevertheless they had done their best.’³³

³³ Tr. Todd. Todd (2007) points out that the subject of this last phrase is unclear, and could relate to the lawgivers or the potential killers. (338)

Once again, the speaker’s rhetoric excludes all possibility of middle ground: there is either long-term premeditated plotting or no intent at all. He then presents a *reductio ad absurdum* by suggesting that no one would ‘premeditate long in advance how one of his enemies will be wounded.’ In doing so, the speaker seeks to change the frame of the case in the minds of the jury. If he can convincingly argue that intent is limited to premeditated planning, and then make the concept of premeditated planning in wounding appear to be ridiculous, he distances himself from the charge and makes his innocence of any crime apparent. He then avoids having to argue against other, broader interpretations of intent, particularly one that would characterise his attack as intentional for being voluntary in the moment of the crime and having the potential to kill. This is very similar to the *choregus*’ argument in Antiphon 6.18-9: both cases define the requirements of the indictment perhaps more specifically than is reasonable with regard to intent, in order to position their own actions as far away from those requirements as possible.

Lysias 13 contains a reasonably extensive discussion of the intent of the alleged killer, which contrasts the defendant’s protestations of unwillingness with the prosecution’s accusations of wilful intent. We are nowhere told that the *apagoge* procedure for homicide required an acknowledgement of intent; it appears that the requirement that the killer be caught *ep’ autophoroi* breaching the rules of exclusion was the only condition to be met. Nevertheless, the prosecutor suggests that Agoratus will possibly claim in his defence that he ‘did all this damage unwillingly’.³⁴ His response is to claim that Agoratus deserves to be punished regardless of intent, and that he probably acted intentionally anyway:

ἐγὼ δ’ οὐκ οἶμαι, ὧ ἄνδρες δικασταί, οὐδ’ ἐάν τις ὑμᾶς ὡς μάλιστα ἄκων μεγάλα κακὰ ἐργάσῃται, ὧν μὴ οἶόν τε γενέσθαι ἐστὶν ὑπερβολήν, οὐ τοῦτου ἕνεκα οὐ δεῖν ὑμᾶς ἀμύνεσθαι. εἶτα δὲ καὶ ἐκείνων μέμνησθε, ὅτι ἐξῆν Ἀγοράτῳ τουτῶν, πρὶν εἰς τὴν βουλὴν κοιμισθῆναι ὅτ’ ἐπὶ τοῦ βωμοῦ ἐκάθητο Μουνιχίασι, σωθῆναι· καὶ γὰρ πλοῖα παρεσκεύαστο καὶ <οἱ> ἐγγυηταὶ ἔτοιμοι ἦσαν συναπιέναι. [Lys.13.52]

‘But in my view, gentlemen of the jury, when a man has done you such unsurpassable evil—even if it is totally against his will—you still have a duty to defend yourselves on this account. And remember also that this man Agoratus could have been rescued before he was taken before the Council,

³⁴ ἀλλ’ ἴσως φήσει ἄκων τοσαῦτα κακὰ ἐργάσασθαι [Lys.13.52]

when he was sitting at the altar in Munychia. Boats had been prepared, and his guarantors were ready to leave with him.³⁵

We can assume here that Agoratus may be hoping that the extenuating circumstances of the situation surrounding the Thirty may make unwillingness to act a powerful argument here. The Athenians were aware that the oligarchic regime had implicated a great number of ordinary people, often acting in fear for their safety and that of their families. There were also possible instances of coercion, which drove people to do things that they would not do under normal circumstances. The Athenian people preferred to punish the leaders of the oligarchy, rather than the citizens who had acted under duress. In a case such as that against Agoratus, where the means of killing was through providing information rather than by direct physical intervention, it may have been an even more pertinent issue, and one that was likely to be exploited by the defence.³⁶ Coercion was almost certainly mentioned by Agoratus as a mitigating factor in his alleged crime.³⁷

Whether or not the law had room to excuse coercion, however, in this passage, Lysias' rhetoric overpowers this to suggest that unwillingness to act should be meaningless in the face of a crime on the scale of those allegedly committed by Agoratus, and that the city deserves retribution for what happened regardless of the circumstances. Although the action in this case is *apagoge*, Lysias is essentially arguing from homicide cases tried by *dike phonou*, where unwillingness to commit the crime was not a mitigating factor but merely one of legal definition. The idea that a homicide should be punished even if it was committed unwillingly is consistent with the rest of what we know about Athenian homicide law.³⁸ The argument offers

³⁵ Tr. Todd.

³⁶ Further evidence that acting unwillingly may have been considered an adequate defence in cases where the oligarchy was concerned can be found in Lys.12.92-3, when Lysias addresses those citizens present at the trial who were forced to fight on the side of the oligarchs, and calls upon them to take vengeance on the men who oppressed them; there is no implication in this passage that Lysias places blame on the men who acted unwillingly.

³⁷ Lys.13.52.

³⁸ This issue is summed up by Loomis (1972): 'I think the answer is that the Athenians considered all unnatural deaths to be matters of extreme gravity. MacDowell points out that three purposes were served by the Athenian homicide laws: vengeance for the wrong to the deceased, cleansing of the pollution to the state, and deterrence to future killers. How does this apply to accidental homicides? Insofar as they are accidental, there is not much deterrent value. But there is vengeance and cleansing. This vengeance and cleansing were not optional. [The victim]'s relatives could not say, 'Oh, it was just an accident', and let the matter rest. They had to prosecute. At the conclusion of the trial, [the defendant] was sentenced to exile. Then, and only then, could [the victim]'s relatives step in and pardon [the defendant]. This took care of vengeance, but what about cleansing pollution to the state? Demosthenes [23.72] tells us: ...“And what does the law ordain? That the man convicted for

a fallback position for Lysias' case: even if the jury accept that Agoratus acted under duress, this should not stop them from believing him guilty of homicide and therefore of breaching the restriction.

Lysias, though, not only denies the power of coercion to attenuate Agoratus' circumstances, but emphasises that he believes that Agoratus did in fact act with full intent and willingness. He claims that Agoratus had a means of escape that he did not use. Lysias probably intends this to imply either that Agoratus was happy to provide information and had no qualms about betraying the democrats, or that he did not fear death at the hands of the Thirty because he was aware of the plans they had for him. By this point in the speech the argument had already been laid out more extensively at §19-31, with the added detail that Agoratus has claimed that he was dragged away from the altar, though the prosecutors assert that in fact he got up willingly to go with the Council's representatives. Throughout the speech, it is ensured that the speaker says nothing that would make it appear that Agoratus was compelled against his will to inform against the democrats, as this would potentially undermine the prosecution's case. Instead, it is repeatedly asserted that Agoratus was somehow involved with the Thirty's plan, and that he complied with it of his own accord. This emphasis on his intent to inform against these men and therefore kill them characterises him as a ruthless killer and supporter of the oligarchs, rather than the helpless victim of circumstance that Lysias suggests Agoratus is likely to present himself as in order to win the jury's favour.³⁹

A similar refutation of a defendant's claims of coercion and unwillingness in killing can be found in Lysias 12. It appears that Eratosthenes has pleaded unwillingness in the homicides of which he is accused, though Lysias rejects the defence wholeheartedly:

εἴτ' ὃ σχετλιώτατε πάντων, ἀντέλεγεσ μὲν ἵνα σώσειας, συνελάμβανες δὲ ἵνα ἀποκτείνῃς; καὶ ὅτε μὲν τὸ πλῆθος ἦν ὑμῶν κύριον τῆς σωτηρίας τῆς ἡμετέρας, ἀντιλέγειν φῆς τοῖς βουλομένοις ἡμᾶς ἀπολέσαι, ἐπειδὴ δὲ ἐπὶ σοὶ μόνῳ ἐγένετο καὶ σῶσαι Πολέμαρχον καὶ μή, εἰς τὸ δεσμωτήριον ἀπήγαγες;

unintentional homicide shall depart within a certain specified period by a fixed route, and shall remain in exile until one of the relatives of the dead man pardons him...Then it allows him to return in a particular manner, not just at random; it specifies sacrifice, cleansing, and certain other actions which he must perform." In this way, all unnatural deaths were, in a sense, put right.' (95)

³⁹ For an analysis of the interplay between Agoratus' alleged willingness to act and the rules of the Amnesty, see Carawan (2013) 131-5.

εἶθ' ὁ μὲν, ὡς φήσ, ἀντειπὼν οὐδὲν ὠφέλησας, ἀξιοῖς χρηστὸς νομίζεσθαι, ὅτι δὲ συλλαβῶν ἀπέκτεινας, οὐκ οἶει ἐμοὶ καὶ τουτοισὶ <δεῖν> δοῦναι δίκην; [Lys.12.26]

‘Do you mean to say, you shameless villain, that you spoke against the proposal in an attempt to save our lives but joined in the arrest with the aim of getting us killed? That you spoke against those who wanted to kill us when the majority of your colleagues were in control of our fate, but that when it was in your hands alone to rescue Polemarchus or not, you summarily dragged him off to prison? Do you really deserve to be regarded as an honourable man because (so you say) you spoke against the proposal without achieving anything, but do not deserve to pay the penalty to me and to the jury for having arrested and murdered him?’⁴⁰

Eratosthenes has clearly claimed that he was only carrying out the orders of the Thirty when he arrested Polemarchus, and had previously resisted the idea of arresting the ten metics in question. Lysias argues that Eratosthenes himself was one of the Thirty, and therefore should not be allowed to claim in his defence that he was acting on their orders [§29]. Lysias allows for various conclusions, all of which are damning to Eratosthenes: his argument is inconsistent and therefore untrue, and even if it is true, it condemns him as someone unable to keep to his own convictions. The series of three rhetorical questions repeatedly emphasises the gap between what Eratosthenes said and how he acted. This rhetoric surrounding the killing reflects Eratosthenes’ attempts to appear to support the democracy and want to help its citizens, and then his failure to act on that desire when the opportunity could be easily seized. Here, Eratosthenes’ apparent willingness to help the democracy is overshadowed by the fact that he arrested the men anyway, whether unwillingly or not.

Intent was clearly important in a legal sense, as it was one factor that could distinguish between charges for homicide and the courts at which they were tried. We might assume that a prosecutor in a case for intentional homicide would need to argue for intent as well as guilt in committing the homicide, whereas a prosecutor in a case for unintentional homicide would only need to argue for the accused’s responsibility for the killing. In practice, though, rhetoric was not this clear-cut. Several speeches address issues of intent in cases where it may not have been legally expected to do so. This manipulation in the sources makes it difficult to define the concept of intent in homicide in popular understanding, if indeed there was one

⁴⁰ Tr. Todd.

definition. It also obscures actual legal requirements with regard to proving intent, if there were any. These speeches do, however, illustrate the interesting ways in which intent could be used rhetorically. It is clear from these examples that over- or under-emphasising a person's intent in committing a crime, rhetorically redefining what intent means, or denying that unwillingness has the power to mitigate action, can all be useful rhetorical tools in the courts. Where intent and premeditation were exaggerated, they aimed to deny all possibility of innocence, regardless of the exact nature of the charge. The explicit denial of intent and premeditation, as in Lysias 1, serves to present the crime as having no ulterior motive. The rhetorical manipulation of intent allowed speakers to distance their own actions from the charge, at least by their definition of the charge. The specificity of intent in defining homicide and wounding charges made it a distinctive part of homicide rhetoric.

5.2 MOTIVES FOR KILLING

Modern conceptions of homicide often include the idea of the motive. The suggestion that there is a reason for the killing, however unjustified that reason may be, makes the fact of the killing more comprehensible, and in some cases can help to demonstrate the plausibility of the alleged killer's guilt by providing proof beyond probable doubt.⁴¹ We might expect to see a similar effect in the Athenian courts, particularly in prosecution speeches. In the ancient courtroom, however, there were no such standards of proof, rendering discussion of motive less useful.⁴² A plausible motive would probably only prove valuable in an attempt to prove guilt for killing through arguments from probability. Nevertheless, discussions of motives for killing are not especially prominent in the rhetoric of homicide. Some speeches make no mention of the alleged killer's motivation at all, and in certain instances it is possible that doing so would have damaged or undermined the speaker's case. For example, Antiphon 6 is silent on the issue of motive, only making reference to his opponents' accusation of plotting; if they alleged a motive, it is not preserved in the defence speech. Indeed, the speaker generally distances himself from the crime, and discussing motive under these circumstances would not serve his strategy well, as it

⁴¹ See, for example, the trial of Dr John Bodkin Adams as described in *Easing the Passing* by Patrick Devlin (1986), in which two motives were proposed for the doctor's alleged killings of elderly patients: firstly, that he wished to ease their suffering, which also happened to shorten life (establishing the legal doctrine of double effect), and secondly, that he had encouraged many of his patients to bequeath him gifts or money shortly before their deaths.

⁴² On the issue of proof and evidence in the Athenian courts, see Todd (1990b).

would have the potential to invite jury scrutiny of the nature of the death and possibly shift the balance of favour towards the prosecution. Extensive and detailed denial may also look like the defendant protesting too much. In other speeches, though, some brief references to motive can be found.

This section will examine the types of motives for killing that are mentioned in the forensic speeches and the ways in which they are used rhetorically. Our evidence is limited, as relatively few mentions of motive exist in the few homicide speeches that survive. We can, however, recover a larger picture through analogy: motives denied in defence speeches may have been alleged in prosecution speeches, and vice versa. This approach does have its limitations; as we will see, motives appear to have been treated quite differently in prosecution and defence speeches. This, then, will be an analysis of those motives that are attested, to a greater or lesser extent, in the forensic speeches, and some suggestions about their potential uses, rather than an exhaustive list of possible motivations as perceived by Athenians.

Our extant defence speeches unsurprisingly only mention motives for killing when denying them. Mentions of motive tend to be relatively brief, denying that the defendant had reason to kill and then moving onto other matters. In their brevity, though, they remain comprehensive about the range of possible motives and the factors in each. This may be in an attempt to leave no motive unaddressed for the prosecution to exploit. For example, the defendant in Antiphon 5 lists a number of possible motives, all of which he denies:

τίνος γε δὴ ἔνεκα τὸν ἄνδρα ἀπέκτεινα; οὐδὲ γὰρ ἔχθρα οὐδεμία ἦν ἐμοὶ κάκείνω... ἀλλὰ δείσας περὶ ἑμαυτοῦ μὴ αὐτὸς παρ' ἐκείνου τοῦτο πάθοιμι; καὶ γὰρ ἂν τῶν τοιούτων ἔνεκά τις ἀναγκασθεῖη τοῦτο ἐργάσασθαι. ἀλλ' οὐδέν μοι τοιοῦτον ὑπῆρκετο εἰς αὐτόν. ἀλλὰ χρήματα ἔμελλον λήψεσθαι ἀποκτείνας αὐτόν; ἀλλ' οὐκ ἦν αὐτῷ... πότερα ὡς ἐγὼ μὲν ἢ τῷ σώματι ἐπιτήδειος διακινδυνεύειν, ἐκείνος δὲ χρήμασι τὸν ἐμὸν κίνδυνον ἐκπρίασθαι; οὐ δῆτα· τῷ μὲν γὰρ οὐκ ἦν χρήματα, ἐμοὶ δὲ ἦν... [Ant.5.57-63]

‘Indeed, because of what did I kill the man? For there was no enmity at all between me and him... But did I fear that he would do such a thing to me? For on account of such a thing one might be forced to such a deed. But I had no such fear for myself towards him. But was I likely to receive money by killing him? But he had none... So was either I fit to risk my life, or he [Lycinus] to pay me money to do so? Not at all; for he had no money, and I did.’

The section of the speech denying motives is quite long, but the denial of each motive in itself is brief, closing down space for discussion of the motive and distancing the speaker from the charge. Thus, the jury are presented with a list of motives that the alleged killer did not have, but without the time to think for too long about each.

Antiphon 5 presents three motives that also appear elsewhere in the sources: enmity, self-defence, and financial gain. Enmity and financial gain both also appear in Lysias 1, as well as the intimation that the killer may have had a guilty secret about which the victim knew:

τῶν μὲν μαρτύρων ἀκηκόατε, ὧ ἄνδρες· σκέψασθε δὲ παρ' ὑμῖν αὐτοῖς οὕτως περὶ τούτου τοῦ πράγματος, ζητοῦντες εἴ τις ἐμοὶ καὶ Ἐρατοσθένει ἔχθρα πώποτε γεγένηται πλὴν ταύτης. οὐδεμίαν γὰρ εὐρήσετε. οὔτε γὰρ συκοφαντῶν γραφάς με ἐγράψατο, οὔτε ἐκβάλλειν ἐκ τῆς πόλεως ἐπεχείρησεν, οὔτε ἰδίας δίκας ἐδικάζετο, οὔτε συνήδει κακὸν οὐδὲν ὃ ἐγὼ δεδιώς μὴ τις πύθηται ἐπεθύμουν αὐτὸν ἀπολέσαι, οὔτε εἰ ταῦτα διαπραξαίμην, ἤλπίζόν ποθεν χρήματα λήψεσθαι· ἔνιοι γὰρ τοιούτων πραγμάτων ἔνεκα θάνατον ἀλλήλοις ἐπιβουλεύουσι. [Lys.1.43-4]

‘You have heard the witnesses, gentlemen; but consider this matter in this way for yourselves, inquiring whether any enmity ever existed between Eratosthenes and me except this. For you will find none. For he neither brought sykophantic indictments against me, nor tried to have me thrown out of the city, nor brought a private suit, nor knew of any wrongdoing for which I, fearing its discovery, desired to destroy him, nor, if I accomplished these things, had I hope of receiving money from somewhere; for there are some who, on account of such things, will plot death against each other.’

It is clear from these denials that each of these motives would be seen as potentially enough reason to kill someone. We can presume that proof of pre-existing enmity between two parties could contribute to a guilty verdict. It would be especially powerful to provide such a reason in cases for intentional homicide, as is probably the crime alleged in Antiphon 5. It is interesting to note that this is one area where the rhetoric of the *Tetralogies* comes close to that of the real forensic speeches:⁴³ Antiphon’s first *Tetralogy*, too, catalogues such an accusation in detail. There, the prosecutor places the full weight of motive on the enmity between the two parties, and it dominates his first speech.⁴⁴ The defendant’s response confirms the weight of an accusation of enmity: he states that his enmity with the victim was so well known

⁴³ This may be due to the fact that, although the situations in the *Tetralogies* are hypothetical, they presumably had to be relatively plausible, and therefore based on believable motives.

⁴⁴ Ant.2.1.5-8.

as to make him *less* likely to kill him, due to the increased likelihood of his being blamed for the death.⁴⁵ Similarly, it must have been believable that someone would kill for money. This could either be in the form of payment by a third party, as seen in the references to Lycinus in Antiphon 5, or theft from the victim, which appears as a possible motive in the first *Tetralogy*.⁴⁶ As Gagarin shows, the fact that self-defence existed as a motive for the defence suggests that ‘the possibility existed that a plea of self-defence could lead to the killer’s acquittal.’⁴⁷ This form of ‘simple self-defence’ would not be classified as a form of lawful killing, but rather a motive that could potentially excuse the defendant in a case of intentional homicide.⁴⁸ Some forms of self-defence, though, would not only be a motive for killing, but an argument for lawful homicide and avoidance of any charge. As far as we know, this would only apply in cases of lawful killing where the defendant pleaded that his victim had been a violent robber.⁴⁹ Other motives for killing are also found in the sources, though less frequently. The widest array appears in the *Tetralogies*, which list drunkenness twice, accidents twice (not including those classed as lawful), and an argument getting out of hand once.⁵⁰

As all these motives are considered worth denying, we might expect that they would have been used in prosecution speeches if orators could find persuasive evidence for their application. For example, if a point of enmity could be proven between the two parties, the alleged killer’s guilt would appear much more likely to the jury. In practice, though, we have only two extant homicide prosecution speeches, and they are both interesting for the subtle and imprecise way in which they use allegations of motive. Antiphon 1 makes no major attempt to allege that the stepmother had a motive in killing her husband; as we have seen, the rhetorical focus is far more on the issues of premeditation and intent. It is worth noting, however, that the speaker’s narrative contains a detail that hints towards a form of enmity between the two parties, and suggests that the stepmother may have believed she had reason to kill him:

⁴⁵ Ant.2.2.2.

⁴⁶ Ant.2.1.4

⁴⁷ Gagarin (1978b) 111.

⁴⁸ Gagarin (1978b).

⁴⁹ *IG I*³ 104.37-8. See Chapter 1.2 for categories of lawful killing. Motivation would not be a necessary part of the defence in other forms of lawful killing, such as killing in athletic competition, which can be classified as accidental and therefore without any motivation.

⁵⁰ Drunkenness: Ant.2.1.4, 4.1.6; accidents: Ant.2.1.4, 4.1.6; argument: Ant.2.1.4.

αἰσθομένη δ' ὅτι ἀδικεῖσθαι ἔμελλεν ὑπὸ τοῦ Φιλόνεω, μεταπέμπεται, καὶ ἐπειδὴ ἦλθεν, ἔλεξεν αὐτῇ ὅτι καὶ αὐτὴ ἀδικοῖτο ὑπὸ τοῦ πατρὸς τοῦ ἡμετέρου...[Ant.1.15]

‘On realising the wrong which Philoneos intended to do [the *pallake*], she sent for her, and when she came, told her that she too was being wronged by our father...’

The speaker does not say what the wrong allegedly done to his stepmother may have been, as this would have the potential to incite sympathy for the woman he is prosecuting. It is also possible that he includes this detail as a means of displaying the stepmother’s duplicity, and that it is only intended to be interpreted as a way that she may have tricked the *pallake* into helping her. But Antiphon does not clarify this, and the *pallake* is dead, so the whole narrative is likely a creation of the orator, and we cannot be sure whether this is an actual mention of a potential motive. The only other hint of motive might be found in the speaker’s calling the stepmother ‘Clytemnestra’, but nothing conclusive can be drawn from this, as it is likely to be simply an invective term in this instance. The aim may not have been strictly to assert that the stepmother had a motive in killing her husband, but to suggest it subconsciously to the jury. If this strategy was effective, the jurors would have found themselves more willing to believe that it was likely that the stepmother was guilty, without the speaker having to actively make a relatively unfounded accusation of motive and risk making it seem like there were mitigating circumstances surrounding the killing.

A similar effect can be seen in Lysias 13 with the motive of personal financial gain. Lysias addresses Agoratus’ motivations in providing information to the Thirty, suggesting during the narrative that Agoratus will argue that he was in danger of torture if he did not inform on the democrats:

...λέγοντες ὅτι, εἰ κομισθεῖη εἰς τὴν βουλὴν, βασανιζόμενος ἴσως ἀναγκασθήσεται ὀνόματα εἰπεῖν Ἀθηναίων ὧν ἂν ὑποβάλωσιν οἱ βουλόμενοι κακόν τι ἐν τῇ πόλει ἐργάζεσθαι. [Lys.13.25]

‘...saying that, if he were brought before the council, he would be tortured and perhaps forced to give the names of such Athenians as were suggested by those who wished to do wrong in the city.’

In fact, Lysias argues, Agoratus’ motive for informing was not primarily fear for his own safety, but personal financial gain:

καίτοι εἰ ἐκείνοις ἐπίθου καὶ ἠθέλησας ἐκπλεῦσαι μετ' ἐκείνων, οὔτ' ἂν ἐκὼν οὔτε τοσοῦτους Ἀθηναίων ἀπέκτεινας· νῦν δὲ πεισθεὶς ὑφ' ὧν τότε ἐπίσθης, εἰ τῶν στρατηγῶν καὶ τῶν ταξιάρχων τὰ ὀνόματα μόνον εἶποις, μέγα τι ὄου παρ' αὐτῶν διαπράξεσθαι. οὐκ οὖν τούτου ἕνεκα δεῖ σε παρ' ἡμῶν συγγνώμης τινὸς τυχεῖν, ἐπεὶ οὐδὲ ἐκεῖνοι παρὰ σοῦ οὐδεμιᾶς ἔτυχον, οὐς σὺ ἀπέκτεινας. καὶ Ἰππίας μὲν ὁ Θάσιος καὶ Ξενοφῶν ὁ Κουριεύς, οἱ ἐπὶ τῇ αὐτῇ αἰτία τούτῳ ὑπὸ τῆς βουλῆς μετεπέμφθησαν, οὗτοι μὲν ἀπέθανον... διότι οὐκ ἄξιοι ἐδόκουν τοῖς τριάκοντα σωτηρίας εἶναι (οὐδένα γὰρ Ἀθηναίων ἀπώλλυσαν). Ἀγόρατος δὲ ἀφείθη, διότι ἐδόκει ἐκείνοις τὰ ἥδιστα πεποιηκέναι.[Lys.13.53-4]

'If you, Agoratus, had been persuaded by them and had been willing to sail with them, you would not have killed all these Athenians, willingly or otherwise. But in fact you were persuaded by people who won you over at the time, and you believed that you would win a substantial reward from them if only you mentioned the names of the generals and of the taxiarchs. This excuse does not entitle you to any mercy at our hands, because the men you killed did not receive any mercy from you either. Hippias of Thasos and Xenophon of Curium, who were summoned by the Council on the same charge as you, were both put to death... They were executed because they did not seem to the Thirty to be worth rescuing, since they had not killed any Athenians. Agoratus, however, was let off, because they thought he had done very well for them.'⁵¹

Lysias makes it clear that he believes that Agoratus was in no danger, and that self-advancement was his true motive. Lysias wants the jury to believe that Agoratus not only betrayed the democracy, but did so for his own selfish gain. He constructs an implied narrative of Agoratus being bribed into betraying the democracy while his contemporaries remained loyal and lost their lives. Once again, the effect is probably intended to be largely subconscious for the jury: the narrative builds a picture of a self-serving man betraying his city which may have been more effective than an outright accusation of bribery or payment. This would stir up ill-feeling against Agoratus amongst the jury and, once again, make his guilt seem more likely.

Cases of lawful killing give us one final interesting angle on the issue of the killer's motive. The only extant case is, of course, Lysias 1. Euphiletus claims that he killed lawfully, and so naturally his defence relies heavily on explaining his motivation to kill. His justification that he killed Eratosthenes because he had seduced Euphiletus' wife allows him to argue that the killing was lawful. Although, as we have seen, this case hinges on the circumstances rather than the fact of the killing, here circumstances become synonymous with the killer's motivation. That is

⁵¹ Tr. Todd.

to say, the circumstances—discovering Eratosthenes in bed with his wife—give Euphiletus the motivation and the justification to kill Eratosthenes in order to punish him, or, in his rhetorical configuration, to act as the agent of the laws in punishing him. Although this is our only extant example of a speech from a homicide trial in which the defendant makes this claim, we can reasonably assume that many such cases would have relied on a similar model. The existence of a lawful motive to kill becomes central to the argument, rather than something to be denied by a defendant.

From these sources, it is clear that there were several ways in which the alleged killer's motive could potentially be used rhetorically. Defendants in the extant speeches often list motives for killing that they themselves lacked as arguments from probability in favour of their own innocence. Our two existing prosecutors found it more persuasive to make motive implicit in their characterisation of the alleged killer, rather than stating outright that they killed for a reason. Circumstance as motive is most prominent in the extant case of lawful killing where the killing acts as a kind of punishment of the victim, as it allows the defendant to explain exactly why his killing was lawful, and therefore why he should not be punished for it. It is striking, however, how little attempt is made to tease out the issues of motive in detail in the speeches. It cannot be determined whether this is a product of our small range of sources, or due to some other factor that rendered the use of motive in rhetoric unproductive or unattractive. What can be said, and perhaps most interestingly, is that these sources all suggest that an Athenian jury would accept motive for killing as an argument in favour of guilt, and lack of motive as an argument in favour of innocence. A final observation is that none of the homicide speeches suggests the possibility of a killing without any reason behind it; there are no random acts of violence. This may be due to the difficulty of building a case in such a situation. But the fact remains that Athenians seem to have believed that killing always had some purpose, either to punish the victim, or benefit the killer.

5.3 THE ACCUSER'S MOTIVATION

Now that we have established some of the workings of the rhetoric of the killer's motive in homicide speeches, we can move onto another facet of the issue of motivation: the motivation of the accuser in making a homicide accusation or bringing a suit for homicide. This section has a dual focus on the issue of the

accuser's motivation. The first two parts will deal with ways in which the accuser's motivation figures in the rhetoric within the speeches; that is, where some motivation other than the desire to seek retribution for homicide is alleged in the ancient sources. The third part will address a case study in how motivation could figure in trials more broadly, and how this relates to the ideology of homicide that emerges from the rhetoric as a whole.

5.3.1 HOMICIDE ACCUSATION AS CHARACTER ASSASSINATION

Despite time limits and provisions regarding relevance that may have been designed to curtail such content, passages of invective and character assassination in the speeches of the orators from the dikastic courts are relatively frequent.⁵² Often they refer to a person's alleged public behaviour, even extending to crimes that they have committed, such as prostitution, whether they have been tried for them or not. Some false allegations, however, could be prosecuted as slanderous. This included homicide, as shown by Lysias 10. Although in this instance the speaker has been accused specifically of patricide, his argument makes it apparent that any accusation of killing is slanderous.⁵³ It seems that the list of *aporrheta* ('prohibited words') lists the slanderous term as *androphonos* ('man-slayer'), but the speaker argues that the slander should not be limited to the single term.⁵⁴ The speech makes it clear that the accusation in question was made during the course of a speech in another trial, and did not in itself constitute a malicious prosecution brought against the speaker, as it was likely meant to defame him in conjunction with Theomnestus' opponent during that trial. It is clear from this instance that the courts were not a privileged place as

⁵² Numerous invective or insulting terms can be found in Lysias [e.g. Lys.3.1, 5, 21; 5.4; 6.6, 53; 7.23; 12.26, 41, 67, 75]. Demosthenes 22 contains vocative attacks and abusive language [e.g. D.22.47, 22.66, 22.73]. The most elaborate passages of invective come from Demosthenes and Aeschines. Aeschines calls Demosthenes a '*kinaidos*', and says that there is not a 'single part of his body that he has not sold.' [Aeschin.1.181, 2.88, 2.151; 2.23]. He impugns Demosthenes' birth, calling him 'the bastard son of Demosthenes the knife-maker', and making reference to the alleged non-Athenian status of his mother [Aeschin.2.93, 2.22-3]. Demosthenes attacks Aeschines for his pretensions to grandeur in his style of speaking despite being 'a sponger, a common scoundrel, a damned clerk' [D.18.127]; he insults Aeschines' background, alleging that his father was a slave and his mother a cheap prostitute, and accusing Aeschines of trying to cover up the truth by changing their names [D.18.129-30]. He perhaps takes most delight in repeatedly calling Aeschines a *tritagonistes*, the lowest-ranking actor in an Athenian drama, perhaps implying an actor of 'third-rate' quality [D.18.129, 18.262].

⁵³ For the purposes of differentiation in this section, 'accusation' or 'allegation' will generally be used to denote an accusation that is not a direct prosecution for homicide (for example an accusation made in the *agora* or during the course of a separate court case.) Those accusations that were taken to court will be referred to as 'indictments' or 'prosecutions'.

⁵⁴ Lys.10.6-7.

modern courts are, and that certain statements made in the courts could still be actionable as slanderous.⁵⁵ It is conceivable that any false allegation of homicide could be legally deemed slanderous and brought to trial, though actual indictments for homicide were probably exempt. In practice, slander cases may have been unusual: the speaker in Lysias 10 seems uncomfortable with bringing such a case.⁵⁶ But in legal terms the possibility of being prosecuted for slander existed, and yet, as we shall see, there is evidence that some Athenians used homicide accusations to defame an enemy or as a rhetorical tool in a litigious feud. In some cases, the effects of enmity went beyond slanderous statements to alleged malicious prosecutions for homicide. Here too our evidence is partial: the majority comes from the perspective of the accused rather than those making the accusations,⁵⁷ and therefore a rhetorical examination will mainly draw attention to ways of identifying and denouncing unscrupulous motives.

Demosthenes 22 is a supporting speech in a *graphe paranomon*. The speaker makes reference to Euctemon, the main prosecutor, who has already spoken and detailed his suffering at the hands of the defendant, Androtion. The supporting speaker, Diodorus, opens his attack on the defendant by claiming that he has in fact suffered greater wrongs at the hands of Androtion, namely a false accusation of patricide:

οὗτος μὲν γε εἰς χρήματα καὶ τὸ παρ' ὑμῶν ἀδίκως ἐκπεσεῖν ἐπεβουλευθή· ἐμὲ δὲ οὐδ' ἂν ἐδέξατο τῶν ὄντων ἀνθρώπων οὐδὲ εἷς, εἰ τὰ κατασκευασθέντα ὑπὸ τούτου παρ' ὑμῖν ἐπιστεύθη. αἰτιασάμενος γάρ με, ἃ καὶ λέγειν ἂν ὀκνήσειέ τις, εἰ μὴ τύχοι προσόμοιος ὦν τούτῳ, τὸν πατέρα ὡς ἀπέκτονα ἐγὼ τὸν ἐμαυτοῦ... [D.22.1-2]

‘While [Euctemon] was the victim of a plot against his property and an attempt to have him unjustly thrown out of the office to which you appointed him, no one on earth would have received me, if you had been taken in by the charges Androtion fabricated against me. He accused me of a crime that

⁵⁵ Defamation Act 1996, 14(1)-(3)

⁵⁶ ...οὐδ' εἴ τι ἄλλο τῶν ἀπορρήτων ἤκουσα, οὐκ ἂν ἐπεξῆλθον αὐτῷ (ἀνελευθέρου γὰρ καὶ λίαν φιλοδίκου εἵναινομίζω κακηγορίας δικάζεσθαι)... [Lys.10.2] ‘..nor if I heard any other of the *aporrheta* would I have taken steps against him, for I consider it mean and excessively litigious to bring a case for slander...’ Usher suggests that the characterisation of slander cases as excessively litigious meant that such cases were uncommon (Edwards and Usher (1985) 230.) Todd (2007), however, notes that ‘criticisms of litigiousness... are by no means incompatible with litigation.’ (666) On excessive litigiousness, see Christ (1998) 48-71.

⁵⁷ An exception to this is the repetition of the homicide charges against Demosthenes in the speeches of Aeschines; these appear to be relatively straightforward examples of character assassination, aiming to discredit Demosthenes as a litigator and a law-abiding citizen. See below, 186 n.63.

anyone would be reluctant to mention (unless he happened to be the same sort of person as this man), killing my own father...'⁵⁸

Although this accusation is specifically of patricide and not simply homicide, it carries many of the same connotations, albeit magnified.⁵⁹ Diodorus is concerned that he would have been rejected by his friends if they believed he was guilty of such a crime, and the accusation led to the attempted prosecution of his uncle for associating with a known killer [§2].⁶⁰ The allegation is not examined in detail in this speech, so it remains unclear whether or not there were any grounds for it. The anecdote, however, is presented as an attempt made by Androtion to tarnish Diodorus' reputation, and possibly put him out of action in Athenian politics—temporarily or for good. The fact that the homicide accusation is not a prosecution of the speaker directly, and is made almost in passing by way of Androtion's action in prosecuting the uncle rather than the man himself, would be intended to inflame negative public opinion rather than have actual legal effects, but would still be likely to have a powerful effect on Diodorus' reputation. It certainly seems that Diodorus considers the allegation sufficient grounds for his acting as a supporting speaker in this case.

It is worth pausing to note that there is no hint of a slander case here. This may be because the present charge of *graphe paranomon* against Androtion is a stronger case than one of slander might be. Diodorus' role as *synegoros* in this case allows him to align himself with the force of the *graphe paranomon* and Euctemon's own injuries at the hands of Androtion, while distancing himself from the possibility of accusations of excessive litigiousness that might accompany a slander case. A charge of *graphe paranomon* would inflict more reputational damage, and, if successful, may have inflicted more financial damage against Androtion than one of slander. The fact of the 'team' of prosecutors also gave the case added weight.⁶¹ The situation may be similar in [Demosthenes] 59, and in the case of Aeschines'

⁵⁸ Tr. Harris.

⁵⁹ For example, the use of the *kakegoria* law in Lysias 10 draws no distinction between homicide and patricide; although the specific slanderous accusation was that the speaker had killed his father, the speech makes it clear that he need only have been accused of killing at all for the accusation to be considered slanderous. Although an accusation of patricide would come with a certain extra level of censure due to Athenian laws and traditions relating to treatment of parents, it is apparent that an accusation of simple homicide was enough to damage a person's reputation to the extent that legislation was put in place against false accusations.

⁶⁰ See Chapter 3.2.2.

⁶¹ See Rubinstein (2000).

accusations against Demosthenes. We may conclude that vengeance for a false accusation of homicide should be taken in the strongest form possible, which may not always be a *dike kakegorias*. This may explain some of the speaker in Lysias 10's discomfort with bringing a slander case. It may have been seen as a last resort in a litigious feud, and representative of a litigant having run out of other, more persuasive legal options.

A more detailed account of an allegedly unscrupulous accusation of homicide is found in Demosthenes 21. Demosthenes himself was involved in a long-standing feud with Meidias, expressed through both litigation and, in the catalyst for this speech at least, physical attacks. In giving an account of his previous dealings with Meidias, Demosthenes explains how his opponent attempted to have him implicated in a homicide of which another man had already been accused:

τῷ γὰρ ἀθλίῳ καὶ ταλαιπώρῳ κακῆς καὶ χαλεπῆς συμβάσης αἰτίας Ἀριστάρχῳ τῷ Μόσχου, τὸ μὲν πρῶτον, ὃ ἄνδρες Ἀθηναῖοι, κατὰ τὴν ἀγορὰν περιῶν ἀσεβεῖς καὶ δεινοὺς λόγους ἐτόλμα περὶ ἐμοῦ λέγειν, ὡς ἐγὼ τὸ πρᾶγμ' εἰμὶ τοῦτο δεδρακώς· ὡς δ' οὐδὲν ἦνυε τούτοις, προσελθὼν τοῖς ἐπ' ἐκεῖνον ἄγουσι τὴν αἰτίαν τοῦ φόνου, τοῖς τοῦ τετελευτηκότος οἰκείοις, χρήμαθ' ὑπισχνεῖτο δώσειν εἰ τοῦ πράγματος αἰτιῶντο ἐμέ, καὶ οὔτε θεοὺς οὔθ' ὀσίαν οὔτ' ἄλλο οὐδὲν ἐποιήσατ' ἐμποδὼν τοιούτῳ λόγῳ, οὐδ' ὤκνησεν. [D.21.104]

'After the wretched and miserable Aristarchus, the son of Moschus, found himself facing a pernicious and difficult charge, men of Athens, at first Meidias went around the marketplace and dared to tell blasphemous and terrible stories about me, that I was the one who committed this crime. When he was getting nowhere with this tactic, he approached the men who were bringing the charge of murder against him, the relatives of the deceased, and promised to give them money if they were to charge me with the crime. Not letting the gods or a sense of piety or anything else stand in his way, he showed no hesitation at all in making this allegation.'⁶²

Despite initially making a simple accusation, Meidias did also attempt to initiate a formal prosecution against Demosthenes. Whether or not Demosthenes was actually involved in the death of the man in question, Nicodemus, cannot be resolved.⁶³ Of course, Demosthenes' rhetoric here makes the accusation appear to be a complete fabrication. It is clear that the accusation against Demosthenes did not stick, at which

⁶² Tr. Harris.

⁶³ Aeschines repeatedly accused Demosthenes of having been involved in the death of Nicodemus; he alleged that Demosthenes was Aristarchus' lover, and persuaded him to kill Nicodemus for him, possibly as revenge for an accusation of desertion that Nicodemus had previously made against Demosthenes. See Aeschin.1.170-3, 2.148, 2.166.

point Meidias apparently turned his attention towards supporting the case against Aristarchus.

Had the planned charge against Demosthenes been successful and gained a conviction, it would probably have been the end of the feud between the two men, as Demosthenes would have been executed, or at least certainly exiled. It is likely, though, that the public accusations were intended to have a more insidious effect, and one that would be useful in the event that formal proceedings against Demosthenes were instigated. Claiming that Demosthenes was a killer in public, even if no case against him had been made, would be enough to begin to foster doubt about Demosthenes' character amongst some citizens and perhaps damage his social relations; this, in turn, would be intended to compromise his political connections. Although these claims were made in the *agora*, they certainly parallel those made by Aeschines in the courts about the same events.⁶⁴ Again, in Aeschines' case, no formal proceedings were being brought against Demosthenes for homicide, and the accusations of homicide were made during cases prosecuting other crimes. Meidias' plan may have been to damage Demosthenes' reputation, which could have had repercussions on Demosthenes' success in the courts and the assembly if those present were aware of the accusations.

These extracts not only detail the ways in which the accused parties were affected by the accusations, but also give clear examples of the ways in which homicide accusations and indictments could be distorted and used against those who made them, without resorting to legal prosecution for slander. The mentions of homicide accusations in Demosthenes 21 and 22 have in common the fact that they appear in prosecution speeches brought against the person who made the homicide accusation, though neither of the cases is a *dike kakegorias*. Thus, we see a duality at play. These examples display not only the original attempt made by the accuser, but also the accused party or his supporters using the fact of the accusation against the man who initiated the process. In Demosthenes 22, the supporting speaker establishes his interest and feels justified in providing his support to the primary speaker in part because he was previously accused of homicide by the defendant. Indeed, in this case, he states that he has in fact suffered even more than the primary

⁶⁴ Aeschin.1.170-3, 2.148.

speaker because of that very accusation. The overarching effect is to reflect the character attack intended or allegedly intended when the original accusation was made back on the person who made it. By presenting one's opponent as the kind of person who goes around making false or flimsy accusations of homicide, his reputation is tarnished. This is used to the greatest effect in the extract from Demosthenes 21, where the aim of the case is to make Meidias appear to be the kind of person who would strike Demosthenes publicly with the intent to humiliate him, and therefore convict him on a charge of *hubris*. By using the example of a previous attempt to damage Demosthenes' reputation, Demosthenes damages Meidias' own reputation with regard to this sort of humiliating action.

Making a passing accusation of homicide to tarnish a person's character was probably the weakest form of abuse of the procedure, not that it would be without force. The serious nature of the alleged crime would have the potential to do serious damage to an opponent's reputation. As the accusation against Demosthenes shows, a well-executed accusation could be brought up several times in a person's political career to discredit him. But the serious nature of the accusation and the specific procedures it entailed not only made homicide a useful rhetorical tool, but could have more tangible effects on a citizen's political and legal career. The damage to a person's reputation might be temporary, forgotten by other citizens once it had been refuted by the accused party. More lasting effects could be achieved by employing the homicide accusation in other ways.

5.3.2 HOMICIDE ACCUSATION AS POLITICAL OR LEGAL MANOEUVRE

If carried through to the stage of litigation, an unscrupulous accusation of homicide could potentially be very dangerous. A successful conviction could lead to a political rival being exiled from Athens at the very least, and in more serious cases even executed. This clearly goes beyond simple character assassination to a desire to put one's political rivals out of action for good. An example of this use of a homicide accusation as a political manoeuvre is implicitly detailed in Apollodorus *Against Neaira*. Apollodorus seems to have been involved in a political rivalry in which Stephanus became involved with his enemy. The primary speaker, Theomnestus, introduces Apollodorus as the secondary speaker in the case against Neaira and Stephanus, who has allegedly been passing Neaira off as his citizen wife despite her being a prostitute, by referring to Stephanus' wrongful accusation:

καὶ γὰρ οὐ μόνον ταύτη ἐζήτησεν ἀνελεῖν ἡμᾶς, ἀλλὰ καὶ ἐκ τῆς πατρίδος αὐτὸν ἐβουλήθη ἐκβαλεῖν. ἐπενέγκας γὰρ αὐτῷ αἰτίαν ψευδῆ ὡς Ἀφιδναζέ ποτε ἀφικόμενος ἐπὶ δραπετήν αὐτοῦ ζητῶν πατάξειε γυναῖκα καὶ ἐκ τῆς πληγῆς τελευτήσειεν ἢ ἄνθρωπος, παρασκευασάμενος ἀνθρώπους δούλους καὶ κατασκευάσας ὡς Κυρηναῖοι εἶψαν, προεῖπεν αὐτῷ ἐπὶ Παλλαδίῳ φόνου. καὶ ἔλεγεν τὴν δίκην Στέφανος οὕτως, διομοσάμενος ὡς ἔκτεινεν Ἀπολλόδωρος τὴν γυναῖκα αὐτοχειρία, ἐξώλειαν αὐτῷ καὶ γένει καὶ οἰκίᾳ ἐπαρασάμενος, ἃ οὐτ' ἐγένετο οὐτ' εἶδεν οὐτ' ἤκουσεν οὐδενὸς πώποτε ἀνθρώπων. ἐξελεγχθεὶς δ' ἐπιορκῶν καὶ ψευδῆ αἰτίαν ἐπιφέρων, καὶ καταφανῆς γενόμενος μεμισθωμένος ὑπὸ Κηφισοφῶντος καὶ Ἀπολλοφάνους ὥστ' ἐξελάσαι Ἀπολλόδωρον ἢ ἀτιμῶσαι ἀργύριον εἰληφώς, ὀλίγας ψήφους μεταλαβὼν ἐκ πεντακοσίων, ἀπῆλθεν ἐπιωρκηκῶς καὶ δόξας πονηρὸς εἶναι. [D.]59.9-10]

‘For not only in this way did Stephanus seek to bring us ruin, but he even wished to drive Apollodorus from his fatherland. He brought a false charge against him that, having once gone to Aphidna in search of a runaway slave of his, he had there struck a woman, and that she had died of the blow; and he procured some slaves and set them up as men of Cyrene, and made a proclamation of homicide against Apollodorus at the Palladion. This man Stephanus prosecuted the case, swearing an oath that Apollodorus had killed the woman with his own hand, calling down destruction on himself and his children and his house, about that which had never taken place, which he had never seen or heard from any person. As he was proved, however, to have committed perjury and brought a false accusation, and was shown to have been hired by Kephisophon and Apollophanes to arrange the exile or disfranchisement of Apollodorus for pay, he received few votes out of five hundred,⁶⁵ and went away a perjurer and a known rogue.’⁶⁶

Theomnestus makes it explicitly clear that the charge made against Apollodorus was false, asserting that Stephanus was shown to have lied in court.⁶⁷ Stephanus was probably not originally Apollodorus’ main rival, as it appears that Kephisophon and Apollophanes were the enemies of Apollodorus who wished to see his reputation damaged to the extent that he was excluded from public life. Although the other men wanted either exile or *atimia* for Apollodorus, Stephanus brought a homicide indictment tried at the Palladion, which could only have resulted in exile. Rather than making simple public proclamations in the *agora* about the accused party’s guilt, Stephanus went so far as to actually bring the case to court, and make his false

⁶⁵ Rennie (1949) may be right to suggest the addition of δραχμῶν after πεντακοσίων, emphasising the bribery involved in the case. This would give a translation of ‘few votes for his five hundred drachmas.’

⁶⁶ Tr. Bers.

⁶⁷ The term *exelegcho* does not make clear the distinction between being ‘shown to be’ a liar and actually convicted as a perjurer. Stephanus may have been convicted of perjury in a separate indictment which is not discussed in detail here, though as he was the prosecutor rather than a witness this is unlikely; it is more reasonable that he was simply ‘shown to be’ lying during the case on the evidence of his involvement with Kephisophon and Apollophanes.

declarations in front of the jury and gods. His indictment goes beyond a character attack, and becomes an attempt on Apollodorus' rights as a free citizen. Clearly the case against Apollodorus was unsuccessful, and Stephanus himself became an enemy of Apollodorus, leading to Apollodorus' involvement in the present case against him. Theomnestus uses the previous indictment against Apollodorus as part of his reasoning for bringing the current suit against Neaira and Stephanus, and also as justification for presenting Apollodorus himself as a secondary speaker in the case. The false homicide accusation calls for retribution, and the current charge allows the two men to carry it out. Moreover, the justification of revenge allows for the minimisation of any potential accusation of sykophancy motivated by the prosecutors' greed.

But it was not only the result of a wrongful trial for homicide that could be used to attack a political opponent: Antiphon 6 demonstrates another, more surprising usage. The bulk of the argument made by the defendant, the *choregus*, against his opponents is devoted to the allegation that they are not prosecuting him simply to avenge the death of the boy, but have planned the prosecution in order to prevent the *choregus* from bringing a previous suit to trial:

κατηγορήσειν ἔμελλον Ἀριστίωνος καὶ Φιλίνου καὶ Ἀμπελίνου καὶ τοῦ ὑπογραμματέως τῶν θεσμοθετῶν, μεθ' οὗπερ συνέκλεπτον, περὶ ὧν εἰσήγγειλα εἰς τὴν βουλήν. καὶ αὐτοῖς ἐκ μὲν τῶν πεπραγμένων οὐδεμία ἦν ἐλπὶς ἀποφεύξεσθαι—τοιαῦτα ἄρ' ἦν τὰ ἡδίκημένα—· πείσαντες δὲ τούτους ἀπογράφεσθαι καὶ προαγορεύειν ἐμοὶ εἶργεσθαι τῶν νομίμων, ἠγγήσαντο ταύτην σφίσι βλάψασθαι σωτηρίαν καὶ ἀπαλλαγὴν τῶν πραγμάτων ἀπάντων. [Ant.6.35]

'I was about to go to trial before the Council in my *eisangelia* case against Aristion, Philinus, Ampelinus, and the scribe of the Thesmothetae, who was their partner in embezzlement. Given the facts in the case and the seriousness of their crimes, they had no hope of acquittal, but they thought if they could persuade these men to register their case and make a proclamation banning me from the places prescribed in the law, this would make them safe, and they would be rid of the whole affair.'⁶⁸

The *choregus* goes on to explain that his opponents' alleged plan fell through, since the Basileus could not take on their case when they first brought it, as he was less than three months from the end of his term of office, and so lacking the necessary time in which to process the case. The *choregus* went on to complete his prosecution

⁶⁸ Tr. Gagarin.

of the men in question, but the present homicide suit was brought anyway, which may suggest that the prosecution was in fact not, or not entirely, malicious.

As the *choregus* goes on to explain, his opponents' alleged plan would have worked, since a person accused of homicide but not yet tried was excluded from certain places in the city, including the lawcourts.⁶⁹ This rule was understood as a method of stopping the religious pollution incurred by killing from spreading around the city, and also as a means of placating the spirit of the dead man, which would be angered by seeing its killer walking freely around the city. This would be an effective way of barring a person's access to the lawcourts. The trial would still go ahead, but as the *choregus* explains, he was the one who knew the 'facts' that were necessary to convict his opponents, and he would not be present to provide them.⁷⁰

The *choregus* does not present any witnesses to his allegation against his opponents. His argument is based solely on an examination of their behaviour before and after they made the accusation against him. His first point is that they did not make any accusation, formal or informal, immediately after the boy was buried, and indeed spoke with the *choregus* [§34], suggesting that there was no enmity between them.⁷¹ When they did try to lodge the accusation with the Basileus, they did so on the day when the first of the *choregus'* *eisangelia* cases was coming to trial. This was before the dead boy's funeral rites had been fully completed [§37], a fact that suggests that they were more focused on the prosecution for its own sake than for the sake of their dead relative, as they saw no need to prioritise the customary rituals of mourning. Once the Basileus had refused their case, the *choregus* states that his opponents attempted to reconcile with him: in his words, they wanted to 'make amends for their mistakes' [§38]. After this, they appeared to be on friendly terms with the *choregus*, talking with him in public and interacting normally [§39]. Later, when they had the opportunity to lodge the case with the new Basileus, they did not do so until 'more than fifty days' into his term of office [§44]. Meanwhile, the *choregus* was going about his public business as usual, unimpeded by the restrictions on the movement of those accused of homicide.

⁶⁹ See Chapter 3.1.3.

⁷⁰ Ant.6.36. In this way, the restriction more generally meant a temporary ban from public life, similar to the more permanent ban sought with some regularity by political figures against their opponents in the form of the punishment of *atimia*, for examples in Aes. 1.

⁷¹ For the religious implications of this, see Chapter 3.2.2.

We have no way of knowing whether the *choregus*' account of these events is correct. He claims that they have used a similar plot against one Lysistratus previously as a way of compounding their guilt, though no details of this matter are preserved in the speech.⁷² He provides no explanation as to why his opponents lodged their complaint with the new Basileus when they did; there is no mention of a further court case in which he was involved that they may have wanted to prevent, or any other persuasion or bribery by Philinus and his friends or any other party. He claims to be able to provide witnesses to his opponents' interactions with the outgoing Basileus [6.41-3], but seems to be relying on the jury's trust in the truth of his statements to support the rest of his argument. It may be the case that too much detail about these events would play into the *choregus*' opponents' hands by making their case seem more justified, or by inviting scrutiny as to the long-term value of the alleged plot and therefore the validity of the *choregus*' allegation. It is in the interest of the *choregus*' own case to emphasise the delay only, since procrastination is often seen as a reason for suspicion about the seriousness of a prosecution in the Athenian courts.⁷³ It is entirely possible, of course, that the *choregus* simply has no evidence to present to support his claim. It is also possible that the relevance rule may have come into effect if the *choregus* attempted to present a set of depositions not related to the main charge, rather than a simple accusation of malicious prosecution.

If, in fact, this was the prosecution's motivation for bringing the case, it would have to have been contrived after the boy's death, and indeed the *choregus* asserts that it must have been on the third day after the boy died, since for the first two days they made no accusation.⁷⁴ Therefore he is not only accusing them of bringing a false prosecution, but also of exploiting their relative's death for their own gain. The *choregus* says that they were 'persuaded', using the verb *peitho* often employed in contexts of bribery, which is surely the implication here. This is a very

⁷² The phrase ὡς αὐτοὶ ὑμεῖς ἠκούσατε [6.36] is very vague. If this matter had already been discussed in another speech in the case, perhaps if this is the second speech for the defence, or if the speaker is referring to a previous case tried in the homicide court on an accusation made by these men, we might expect more precision in the reference. The speaker may only be referring to hearsay rather than a formal accusation. This is, of course, similar to the accusation of previous attempts to kill the father in Antiphon 1, again used to compound the likelihood of the accused party's guilt.

⁷³ E.g. Lys.3.39; 7.20-22, 42; D.18.5, 21.112; And.1.132. See Alwine (2015) 113-5.

⁷⁴ ...τῇ δὲ τρίτῃ ἡμέρᾳ ἣ ἐξέφερετο ὁ παῖς, ταύτῃ δὴ πεπεισμένοι ἦσαν τινες ὑπὸ τῶν ἐχθρῶν τῶν ἐμῶν, καὶ ἀρεσκευάζοντο αἰτιᾶσθαι καὶ προαγορεύειν εἴργεσθαι τῶν νομίμων. [Ant.6.34] 'But on the third day, the day of the boy's burial, they were persuaded by my enemies, and prepared to bring a charge and declared me to be under the legal restrictions.'

serious allegation that would demonstrate a corruption of the idea that it was the duty of the family to avenge the death of one of its members.⁷⁵ The allegation that a family had exploited the death of a boy for the sake of money would likely be taken as seriously in Athens as it would today. Not only did the boy belong to a vulnerable category, but his status as a relative of the prosecution meant that by abusing the procedure they were directly contravening the familial ideology of homicide procedure.

For us, though, the truth of the matter is not the key to the *choregus*' argument so much as successful rhetoric. By focusing on the matter of the alleged false prosecution, he diverts the focus from his alleged crime to that of his opponents. Indeed, Antiphon devotes roughly nineteen of the speech's 51 chapters to the matter; it dominates the end of the speech, and was likely intended to be the main impression with which the jury were left.⁷⁶ He formulates the matter as one designed specifically to deceive the jurors [6.49, 51] in order to make his opponents appear to be attacking not only him but the whole court. In his reckoning, this deception naturally relates to his innocence, and he expects the jury to be persuaded that his opponents' financial and political motives for bringing the case mean that he did not commit the crime. Although he never states it explicitly, the speaker wants the jury to infer that this was the prosecution's only reason for bringing the case, and not to entertain the possibility that they might believe he actually killed the boy as well. Of course, it is plausible that the prosecution's motives could be unscrupulous and that the *choregus* could still be guilty too. The argument aims, however, to cut to the heart of the prosecution's credibility in everything, and avoid any further questioning of the *choregus*' innocence, by turning the scrutiny against his opponents.

The *choregus*' rhetorical strategy sets himself up as the sole honourable party against a cast of unscrupulous characters. His allegation of his opponents' ulterior motives not only serves to promote his innocence, but also makes them appear greedy and dishonourable. His opposition appears to comprise a group of several

⁷⁵ Cf. Demosthenes' treatment of his own accusation of homicide by Meidias; he notes that Meidias attempted to bribe the family of the dead man in question to accuse Demosthenes of the crime, but from the presence of the family as witnesses and the fact that Demosthenes states that Meidias' plan did not succeed, we can assume the family did not agree to do so. See D.21.104, 106.

⁷⁶ We might question whether allegations of abusive procedure were considered relevant in the homicide courts. As this argument is of such great length and weight, we must assume that Antiphon thought it would be acceptable to the jury. Whether or not such arguments would generally be accepted cannot be ascertained, as such matters were decided on a case by case basis (see Chapter 3).

people: at least two members of the dead boy's family; Philinus; Aristion; Ampelinus; and the scribe. Conversely, the *choregus*' speech does not go into detail regarding his own allies, and to all intents and purposes he would appear to be alone in his fight. This disparity would lend credence to the idea that his opponents were conspiring against him, and the 'unfair' nature of the situation would make his pleas for mercy from the jury more justified. This speech, therefore, provides us not only with a prime example of a potential way of exploiting the specificities of the homicide procedure, but also displays another way in which the allegation of bringing a false homicide accusation can be used against the accuser.

5.3.3 LYSIAS 13: POLITICAL KILLING, POLITICAL PROSECUTION

Sometime after the oligarchy of the Thirty was overthrown in the democratic revolution, an amnesty was put in place.⁷⁷ Amongst other clauses, it stated that any crimes that had taken place before 403, during the period in which the Thirty were in power, would not be prosecuted, unless they were committed by the Thirty themselves. The exception to the rule was homicide, though the amnesty specified that homicide cases could not be brought against anyone who was not an *autocheir* ('own-hand') killer.⁷⁸ In spite of this amnesty, Lysias 13 gives us a speech for the prosecution from the trial of Agoratus for killing one Dionysodorus, amongst others, through informing on their democratic activities. Agoratus was not himself one of the Thirty, and, indeed, Lysias' rhetoric seems to present him as something of a turncoat, betraying the democrats despite being one of them initially. How the trial came to court in spite of the amnesty is unclear, and Agoratus may have challenged the case on this basis.⁷⁹ Lysias' own justification is that the amnesty was agreed between the men in the city and the men at Piraeus; that is, between the oligarchs and the democrats. As Agoratus was one of the democrats who betrayed his own side, he is not protected by the amnesty [13.89-90]. Elsewhere, it has been suggested that the prohibition against the prosecution of all but the *autocheir* killer for homicide only applied to *dike phonou* cases, and not to those brought by *apagoge*.⁸⁰

⁷⁷ *Ath.Pol.*38-40; *And.*1.73-80. For an extensive discussion of the sources, terms, and implications of the amnesty, see Carawan (2013).

⁷⁸ This exemption probably aimed to reduce the overwhelming number of potential cases to be brought, given the strategy of the Thirty of using ordinary citizens to make arrests, thereby implicating a huge number of Athenians indirectly after the regime was overthrown.

⁷⁹ *Lys.*13.88.

⁸⁰ Carawan (2013) 118.

Although such a rule is not mentioned explicitly in any of the sources, it is conceivable that the homicide rule may have been interpreted in this way, particularly as *apagoge* cases for homicide seem to have often involved a charge not of killing directly, but of failing to adhere to the restrictions placed on a killer's movement in the city. In this case, the crime in question—breaching the restrictions on the movement of a killer—would not have been committed under the Thirty, but after. The fact that the amnesty restricted homicide prosecutions to cases of *autocheir* killing combined with this use of the *apagoge* procedure may have contributed to the magistrates' demand that the prosecution alter their accusation to include the phrase *ep' autophoroi* to describe the situation of the killing. This would mean that the person arrested under *apagoge* would have to be 'manifestly' a killer—that is, widely known by all to be responsible for homicide.⁸¹ Agoratus presumably could not have been indicted on the grounds that he was breaking the ban from the prescribed places if he was not 'manifestly' a killer. The fact of his status as such must be proven in order to legally condemn him for violating the ban, and therefore may provide the basis for a case that bypasses the Amnesty.⁸² In any case, it is apparent that the trial came to court despite this obstacle.

Although the killing of Dionysodorus is at the root of the charge, it is not the only issue at play in the speech. Lysias uses the crime of homicide as a focal point for discussion of wider, more public issues arising from the rule of the Thirty. If we consider the norms and expectations that dictated that prosecution for homicide was the province of the deceased's family, even in a case of *apagoge* where this was surely not a legal requirement, then we can assume that it was rhetorically profitable to make Dionysodorus the focus of the case, even if Agoratus' prosecutors also had wider intentions in attacking him. In spite of this, the victim is rarely mentioned. The focus of the speech is much more squarely on Agoratus' actions under the oligarchy and their consequences both for individuals and for the wider democratic community. In fact, the rhetorical strategies used in the speech may suggest that the present speaker is a cat's-paw for a larger group who wish to punish Agoratus more generally for his betrayal of the democratic party and to hold him responsible for the

⁸¹ Cohen (1983) 52 and Harrison (1971) 224 translate 'in the act', but this would be meaningless in the case of Lysias 13, as he was clearly not arrested in the act of informing; see Harris (2006) 373-90 and Macdowell (1963) 132-3 for arguments in favour of a translation of 'manifest'.

⁸² See Carawan (2013) 125.

deaths of all those against whom he informed, as well as Dionysodorus specifically. The very first line of the speech makes it clear that Dionysodorus may be the focal point of the case, but that the prosecution is also concerned with exacting punishment for the killing of a large number of people:

προσῆκει μὲν, ὧ ἄνδρες δικασταί, πᾶσιν ὑμῖν τιμωρεῖν ὑπὲρ τῶν ἀνδρῶν οἱ ἀπέθανον εὖνοι ὄντες τῷ πλήθει τῷ ὑμετέρῳ, προσῆκει δὲ κάμοι οὐχ ἥκιστα κηδεστῆς γάρ μοι ἦν Διονυσόδωρος καὶ ἀνεψιός. [Lys.13.1]

‘Gentlemen of the jury, it is fitting that you should all take vengeance for the men who are dead, because they supported your democracy. But it is particularly fitting that I should do so, because Dionysodorus was my cousin and brother-in-law.’⁸³

The jury are encouraged to view the trial as a mass family homicide case in which they all have a stake in seeking vengeance. Dionysodorus is presented as one among many of Agoratus’ alleged victims, an idea that is consistent throughout the speech. In the narrative portion of the speech, he is listed among the ‘generals and taxiarchs’ who protested against Theramenes’ terms of peace on his return from Sparta, but Dionysodorus does not stand out as anything more than one of a group.⁸⁴ The longest section of the speech relating to Dionysodorus is §40-42, the account of his summoning his wife to prison, making arrangements for his household and, believing her to be pregnant, charging her with telling his son that Agoratus had killed him and he should be avenged. This section is less than half-way through the speech, but it is the last reference made to the victim specifically, though far from the last reference to Agoratus’ alleged killings. There are many further references to the multiple people against whom he informed, and whom he therefore killed.⁸⁵ It is fair to assume that although Dionysodorus’ killing is the legal focus of the case and an important part of it, there are other events to be considered outside of the present charge.⁸⁶

⁸³ Tr. Todd.

⁸⁴ προσιώντες δ’ αὐτῷ τῶν τε στρατηγῶν τινες καὶ τῶν ταξιάρχων, ὧν ἦν Στρομβιχίδης καὶ Διονυσόδωρος, καὶ ἄλλοι τινὲς τῶν πολιτῶν εὖνοοῦντες ὑμῖν, ὡς γ’ ἐδήλωσαν ὕστερον, ἠγανάκτουν σφόδρα. [Lys.13.13] ‘Some of the generals and the taxiarchs—among them were Strombichides and Dionysodorus, and several other citizens who supported you, as they later showed—went to see him and protested vigorously.’ (Tr. Todd)

⁸⁵ E.g. Lys.13.43, 51, 62-4, 86, 92.

⁸⁶ It has been suggested that the reason for drawing the focus away from Dionysodorus and the other alleged victims in the speech was due to the precariousness of the charges against Agoratus, particularly since he did not kill the victims himself, but merely informed against them (see Carawan (2013) 116.) The argument that dominates the speech, however—that Agoratus essentially single-

In fact, the case is not even solely focused on the killing of the group of men against whom Agoratus informed. It is apparent from rhetoric used throughout the speech that the prosecutors may have been motivated by a wider sense of anger at Agoratus for his involvement in the rise of the oligarchy. From early in the speech, Agoratus becomes a rhetorical symbol of all those who caused the fall of the democracy. In order to make the charge of *apagoge* for homicide compatible with the additional accusations, Lysias moves between public and private rhetoric throughout the speech, combining the two approaches. Lysias's rhetoric makes it clear that the rise of the oligarchy cannot be separated from Agoratus' crimes:

δεῖ δ' ὑμᾶς, ὧ ἄνδρες Ἀθηναῖοι, ἐξ ἀρχῆς τῶν πραγμάτων ἀπάντων ἀκοῦσαι, ἵν' εἰδῆτε πρῶτον μὲν ὧ τρόπῳ ὑμῖν ἡ δημοκρατία κατελύθη καὶ ὑφ' ὅτου, ἔπειτα ὧ τρόπῳ οἱ ἄνδρες ὑπ' Ἀγοράτου ἀπέθανον... [Lys.13.3-4]

'You need to hear the entire story from the beginning, men of Athens, so that you can understand, first, how and by whom your democracy was overthrown, and then how these men were killed by Agoratus...'⁸⁷

Lysias connects the two events in a way that makes Agoratus appear to be intrinsically involved with the fall of the democracy. The speech aims to exploit the lingering resentment in Athens against the oligarchs; Lysias wants to remind the jury of the crimes committed against their democracy, and make Agoratus the focus of their anger.

The narrative of events in the speech is quite extensive, and contains much information regarding the prelude to Agoratus' provision of information to the Thirty. The speaker details the rise of the anti-democratic Theramenes as envoy to Sparta [§9-11]; the execution of the democratic demagogue Cleophon [§7-8, 12]; and Theramenes' return from Sparta and the harsh terms of the peace [§13-16]. The oligarchs knew that the democratic leaders would oppose the terms in the Assembly, and wanted to block them. It was at this point that Agoratus allegedly became useful [§17-18]. He would inform against the democratic generals and taxiarchs, amongst other prominent figures, so they could be tried and executed, leaving no further barrier to the oligarchic takeover. This is all clearly a public matter, and the events

handedly destroyed the democratic resistance and allowed the oligarchs to rise to power—is still based on the idea that Agoratus killed these men. Although the speech discusses the wider implications of Agoratus' alleged crimes at length, at no point does Lysias attempt to disguise the fact that the killing of the men was, in his rhetorical model, the most important event and the catalyst for the rise of the Thirty.

⁸⁷ Tr. Todd.

would likely be well known to the jury. The introduction of Agoratus to the narrative at this point serves to make it appear that he was the cause of the destruction of the only men who could have halted the rise of the Thirty. As the speech progresses, the speaker goes so far as to state outright multiple times that Agoratus is the cause of the rise of the oligarchy:

...ὡς τοίνυν ἀπάντων τῶν κακῶν αἴτιος τῇ πόλει ἐγένετο καὶ οὐδ' ὑφ' ἑνὸς αὐτὸν προσήκει ἐλεεῖσθαι, ἐγὼ οἶμαι ὑμῖν ἐν κεφαλαίοις ἀποδείξειν. [Lys.13.33]

'...but I think I should demonstrate to you briefly that he was responsible for *all* the evils suffered by the city and does not deserve anybody's pity.'⁸⁸

οὔτοι μὲν τοίνυν, ὧ ἄνδρες Ἀθηναῖοι, ὑπ' Ἀγοράτου ἀπογραφέντες ἀπέθανον· ἐπειδὴ δὲ τούτους ἐκποδὼν ἐποίησαντο οἱ τριάκοντα, σχεδὸν οἶμαι ὑμᾶς ἐπίστασθαι ὡς πολλὰ καὶ δεινὰ μετὰ ταῦτα τῇ πόλει ἐγένετο· ὧν οὗτος ἀπάντων αἰτίος ἐστὶν ἀποκτείνας ἐκείνους. [Lys.13.43]

'These, men of Athens, were the men who were denounced and killed by Agoratus. I suspect you know full well that when the Thirty had removed them, many terrible things immediately happened to the city, and this man is the cause of all those things, because he killed them.'⁸⁹

These statements are clearly hyperbolic.⁹⁰ Agoratus was far from the only person involved with the oligarchy and, as the speaker himself states, probably had no knowledge of the oligarchs' wider plan in employing him as an informant (§18-19). Such statements betray the prosecution's apparent desire to punish Agoratus for far more than just the death of Dionysodorus, or even the deaths of all of the people against whom he informed; they want to pin *all* of the crimes against democracy committed by the regime of the Thirty on him. The emphasis on the suffering caused to the whole city also compounds the likelihood of his guilt in the case of the killing of Dionysodorus, at least in the eyes of the jury.⁹¹ If he was willing to cause the city as a whole so much suffering, it is more plausible that he was willing to cause suffering to individuals too. Here, the public rhetoric expands the scope of Agoratus' crimes, and sends the message that his crime is an expressly political one.

⁸⁸ Tr. Todd.

⁸⁹ Tr. Todd.

⁹⁰ See Volonaki (2004) 39-44.

⁹¹ This is the main conclusion of Volonaki's (2004) analysis of the speech, focusing on the assignment of guilt for the deeds of the Thirty to individuals; she rightly suggests that the otherwise tenuous case against Agoratus is strengthened by the emphasis on his alleged oligarchic affiliations.

But the explicit identification of Agoratus' crime as homicide also allows for a clearly private angle in the rhetoric. As we have seen, in homicide trials the act of prosecution is often figured in rhetoric as a way of avenging the dead man,⁹² and can be interpreted as a way of settling *echthra* between families. This case is not only a private vengeance but a public one; the wrong has not only been done against the speaker's relative, but against the city. The speech, however, approaches the issue as if it were a private matter in which all of the jury members should be personally concerned. In the midst of his account of the events of the oligarchy, Lysias makes an emotional appeal to the jury to consider those left behind by the people killed by the regime, particularly older family members, children, and unmarried sisters in their care [§45]. The section ends by reiterating that Agoratus was the cause of these events because he caused the deaths of the men who could have stopped them, and calling on the jury to remember the events and 'take vengeance on the man who caused them' [§48]. The description of the family members left behind during this section addressed directly to the jury asks what decision these people would have made in this case [13.46]. This encourages the jury to act as the family of those killed, and to avenge the crimes that have affected them all personally. The Athenian citizen jury are essentially asked to react as any family would if one of their members was killed. In this instance, though, they are imagined to be a political family, and the victim of Agoratus' crimes was the democracy that they fought so hard to protect. Through this rhetoric, Lysias transforms the usual acceptable motive of personal retribution against the killer for bringing a homicide suit into one of political retribution, and makes the jury complicit in his imagining of the city as a wronged family.

This family motif is made more explicit towards the end of the speech, and the opportunity is taken to compound the seriousness of Agoratus' crimes against Athens:

...ὅστις φησὶ μὲν ὑπὸ τοῦ δήμου <πεποιῆσθαι>, τὸν δὲ δῆμον, ὃν αὐτὸς φησὶ πατέρα αὐτοῦ εἶναι, φαίνεται κακώσας, καθυφείς καὶ προδοῦς ἐξ ὧν ἐκεῖνος μείζων καὶ ισχυρότερος ἐγένετο. ὅστις οὖν τὸν τε γόνῳ πατέρα τὸν αὐτοῦ ἔτυπτε καὶ οὐδὲν παρεῖχε τῶν ἐπιτηδείων, τὸν τε ποιητὸν πατέρα ἀφείλετο ἃ ἦν ὑπάρχοντα ἐκείνῳ ἀγαθὰ, πῶς οὐ καὶ διὰ τοῦτο κατὰ τὸν τῆς κακώσεως νόμον ἄξιός ἐστι θανάτῳ ζημιωθῆναι; [Lys.13.91]

⁹² E.g. Ant.1.3-4, 2.3.10.

‘He claims to have been adopted as a citizen by the *demos*, but it is the *demos*, whom he describes as his father, that he is shown to have wronged, and he treacherously betrayed those who were making the *demos* greater and stronger. If a person struck down his natural father and failed to provide him with the necessities of life, or if he robbed his adoptive father of the things he already possessed—surely such a person deserves the death penalty for this reason, according to the law on maltreatment of parents.’⁹³

Lysias’ rhetoric puts Agoratus on trial not only for the literal killing of Dionysodorus or the other citizens against whom he informed, but for the figurative ‘killing’ of the *demos* as a whole. The familial rhetoric pushes the audacity of Agoratus’ crimes even further: he not only attacked the *demos*, but he attacked the city as his metaphorical adoptive father. As seen in a number of other rhetorical mentions of homicide in court speeches, killing one’s father was viewed as one of the worst possible crimes in Athens, and accusing someone of it was a very serious matter indeed.⁹⁴ By abusing the situation to equate the crimes that Agoratus has allegedly committed with patricide, Lysias gives this public case all the trappings of a private one, keeping the rhetorical focus on homicide, while clearly aiming to punish Agoratus for the activities of the Thirty too.

It is the *apagoge* procedure for homicide that affords Lysias this interesting rhetorical opportunity. His speech does not address an exclusive group, such as the Areopagus council or the *ephetai*, but a jury that can be presumed, at least ideologically, to be a cross-section of the democratic people. Thus he can assume that they are more likely to be swayed by appeals to the people at large, and by the presentation of Agoratus as a criminal who has offended against not only the speaker’s family, but the democracy in general and the families of all Athenian citizens. Such a strategy would be arguably less successful in a homicide court, where the experience of the Areopagus council and the *ephetai* and the smaller jury size would minimise the usefulness of such appeals.⁹⁵ Thus, even if he had been able

⁹³ Tr. Todd.

⁹⁴ E.g. Lys.10, D.22.2.

⁹⁵ Nevertheless, it is important to note that an attempt is made to appeal to public values in Lysias 1, when the speaker calls on the jury to consider the message his killing of Eratosthenes could send: ἐγὼ μὲν οὖν, ὦ ἄνδρες, οὐκ ἰδίαν ὑπὲρ ἑμαυτοῦ νομίζω ταύτην γενέσθαι τὴν τιμωρίαν, ἀλλ’ ὑπὲρ τῆς πόλεως ἀπάσης· οἱ γὰρ τοιαῦτα πράττοντες, ὁρῶντες οἷα τὰ ἄθλα πρόκειται τῶν τοιούτων ἀμαρτημάτων, ἤττον εἰς τοὺς ἄλλους ἐξαμαρτήσονται, ἐὰν καὶ ὑμᾶς ὁρῶσι τὴν αὐτὴν γνώμην ἔχοντας. [Lys.1.47] ‘Therefore I, gentlemen, do not consider this retribution to have occurred for my own self, but for the whole city; for those who practice such things, seeing the reward laid down for such transgressions, will offend against others less, if they see that you also hold the same opinion.’ (Tr. Todd) A similar argument is seen at §36. This argument, however, is more focused on the idea of

to bring the case to a homicide court, the dikastic court was probably a more effective environment in which to make his anti-oligarchic point. Lysias is able to imagine that the jury is, in fact, representative of the wronged city in its entirety, and to reflect the power of this image in his rhetoric. The dikastic jury is at once a public entity, representing the city's concerns and in this case the wronged democracy, and a group of private individuals with families of their own, who may have been directly affected by the oligarchy's killings, and would be likely to respond sympathetically to accounts of the personal suffering of others, and understand the desire for vengeance against the killers.

By combining public and private rhetoric in a public case, then, Lysias uses the charge of homicide as a core around which to construct the more political aspects of the case, and to give the entire speech more weight. A comparable technique is used in Lysias' speech 12 against the oligarch Eratosthenes. The speech is probably taken from his *euthunai*, an accounting of the way a person behaved while in office, which in the case of the Thirty was used as a way of categorising the crimes they committed and having them punished accordingly. In this case, it may provide a means of essentially prosecuting Eratosthenes for homicide, as the *apagoge* procedure may have done in the case against Agoratus.⁹⁶ Like Lysias 13, the speech focuses on a specific death amongst many, that of Lysias' brother Polemarchus, before moving on to the wider crimes of the oligarchy. Roughly the first third of the speech is dedicated to the account of how the death of Polemarchus came about. The narrative mainly focuses vividly on Lysias' own experiences; only two sentences are devoted to the fact of Polemarchus' death at §17, followed by several chapters describing the hardship of attempting to provide him with proper burial rites after the confiscations performed by the Thirty.

§37 marks a movement in the speech from the discussion of the homicide to accounts of the other crimes of Eratosthenes and his colleagues. Lysias introduces this section by announcing that he believes the account of his brother's killing should be enough to condemn Eratosthenes, and that a prosecutor should only continue until

preventing future wrongs against the public than punishing those who have already committed crimes against the city. Such an argument is perhaps made less directly in the speech when Euphiletus refers to the old woman's intimation that Eratosthenes has committed adultery before (§16).

⁹⁶ It would possibly have been difficult to build a homicide case against Eratosthenes under the terms of the Amnesty, as Polemarchus was ordered to drink hemlock, and therefore Eratosthenes was not technically an *autocheir* killer.

it is clear that the defendant deserves to be punished with death [§37]. Of course, he does continue, listing many other crimes committed by Eratosthenes and several of his oligarchic colleagues. It is clear, though, that homicide is considered to be the most serious of his crimes. Even though the discussion of the killing does not dominate the speech, its presence in the opening chapters is powerful enough to have led some to propose that Lysias 12 is actually a speech from a homicide trial, though this is unlikely to be the case.⁹⁷ At §37, Lysias states that, in theory, the homicide is the only crime that need necessarily be mentioned in order to secure a conviction.⁹⁸ In this way Lysias 12 mirrors Lysias 13, where the fact that the trial was for homicide presumably meant that the homicide was the only necessary and relevant topic of discussion. In spite of this, both speeches clearly undertake extensive discussion of other issues relating to the effects of the oligarchy on the democracy.

Both speeches use homicide as the springboard for a discussion of a wider array of alleged crimes, though in speech 12, the homicide ties the broader matters of the *euthunai* case together and gives them greater weight. Lysias' initial establishment of Eratosthenes' worst crime and declaration that he certainly deserves punishment allows him to discuss the rest of his and his colleagues' crimes more freely, without such concern for the necessity to secure a conviction. As a result, the other crimes listed have the effect of compounding Eratosthenes' guilt: it was not enough for him to kill Polemarchus, Lysias says, but he had to commit other crimes against the democracy as well. Eratosthenes' offence expands from targeting one family to the whole city. The effect is similar in Lysias 13. Agoratus' guilt as an informer having been rhetorically established, Lysias expands the focus to show how his crimes affected the entire city. Although in this case the anti-democratic crime is directly linked to the homicide, they appear, rhetorically, as separate events: Agoratus is guilty of killing, and he is guilty of bringing down the democracy's defences. In both cases, the homicide is the strong point in the prosecutor's case,

⁹⁷ See Todd (2000) 113-4. Todd rightly points out that the speech was unlikely to be from a homicide case, as such a trial could not have taken place after Eratosthenes was either acquitted or exiled in a *euthunai*, and the case would not fit the parameters for homicide trials defined by the Treaty. The fact that Lysias 13 is similar and explicitly comes from a homicide trial means that it cannot be completely ruled out, but the phrasing of 12.37 suggests that it is probably a *euthunai*, as it seems to refer to the possibility of listing a variety of crimes up to a maximum penalty, as would fit the *euthunai* model.

⁹⁸ The *euthunai*, of course, did not necessarily only focus on homicide, though it was probably a common accusation. On *euthunai* and *eisangelia*, see Todd (1993) 112-16.

whether required by the procedure or not. The mentions of further crimes or effects of that crime are meant to put the defendant's guilt beyond doubt.

In summary, then, the necessary focus on homicide in Lysias 13 allows the orator a solid, personal centre point around which to compile his more general, political, and public accusations. This is highlighted by the optional focus on homicide in Lysias 12. The personal accusation of killing Dionysodorus and the political one of causing the destruction of the democratic resistance work to reinforce each other. The homicide accusation itself would be weak without the alleged dramatic repercussions his acts had on the democratic resistance, as Agoratus was an informant rather than an *autocheir* killer. Conversely, the political crimes, for which the speaker may believe Agoratus deserves to be punished just as vigorously, would not hold up in light of the Amnesty unless a solid case for his involvement in the killing of the democrats could be built. Lysias expands the personal nature of the crime to include the whole democratic 'family', and makes it a personal, as well as political, attack on all of them.

5.4 CONCLUSIONS

Categories of homicide at Athens were defined by intent, which gave rise to sometimes lengthy discussions of an alleged killer's intent in committing the crime at hand. In prosecution speeches, the rhetorical exaggeration of an alleged killer's intent to kill allowed prosecutors to strengthen their cases, even when persuading the jury of intent may not have been necessary to secure a conviction. The rhetoric of intent tends to eliminate any middle ground, establishing two extremes: premeditated, intentional plots or the complete lack of intent. Unsurprisingly, prosecution speeches tend towards the former, and defence speeches the latter. The exaggeration or minimisation of intent is often implicitly focused on acting in general, rather than acting to kill. The rhetoric used to manipulate the jury's understanding of a person's intent was clearly considered to be a powerful means of persuasion. Although it could be used in the dikastic courts, it was perhaps most powerful in the homicide courts, where levels of intent were crucial to defining the crime at hand.

Alongside intent, the killer's motive could also be exploited rhetorically in order to support a speaker's case. This occurs most regularly and explicitly in extant

defence speeches, where often several potential motives at a time were stated clearly and denied immediately. These mentions are kept brief, closing down the possibility for further discussion or contemplation by the jury. In contrast, extant prosecution speeches tend to handle the issue of motive more subtly, constructing implied motives within narrative and characterisation. This will have had a more subconscious effect on the jurors, increasing the probability in their minds that the defendant did indeed commit the crime in question.

Perhaps surprisingly, the killer's motive was discussed less frequently than the motive of the prosecutor. It was not unusual at Athens for lawsuits to be used as a means of attacking one's enemies, both political and personal. Some 'feuds' between litigants could span the course of several court cases. The types of charges involved were often those regarding public or political offences, such as the *dike pseudomarturion* and the *graphe paranomon*. These trials would be exploited as a means to attempt to have one's opponent punished in some way, often to the point of *atimia*, exile, or even death, to prevent the feud from carrying on any longer. The trials would also provide a public forum in which one orator could damage the reputation of another, not only with the accusation at hand in the trial, but with other assertions about their bad behaviour and character, ostensibly presented in order to show the jury what kind of a person they were dealing with. Although such trials could provide revenge for certain criminal acts, they could also express enmity through false allegations and unscrupulous manipulation of procedure.

A homicide accusation came with a specific set of ways in which it could be exploited by a political or personal enemy. The first and perhaps most obvious of these was the restriction that it placed on the accused party's free movement around the city. As shown by the *choregus*' allegation in Antiphon 6, a homicide accusation could be used to deny a person access to a trial in which they were involved, thereby affecting the outcome of that trial. As the accusation of homicide was considered slanderous if untrue, its use as a strategic device surely carried a lot of weight, as it suggested that a man's enemies were willing to do anything to see his good name tarnished. From its traditional prosecution by *dike*, and a potential history in resolving *echthra* between families, homicide appears to have been thought of as a personal crime. This could be utilised as a way of giving weight to more political accusations, as well as exploited as a means of drawing attention away from the

potentially less scrupulous reasons for bringing a homicide suit. It could also be turned against malicious prosecutors, who would be portrayed as not displaying genuine concern for their dead kin, and thus generating ill-feeling amongst the jurors.

Besides those dubious motives for homicide prosecution that figure in the rhetoric within the speeches, other examples can be found that emerge more implicitly from the circumstances surrounding whole cases. Politically, the accusation of homicide could form a strong centre around which to build a case addressing a whole collection of transgressions, particularly anti-democratic activity in the period after the restoration of the democracy. In Lysias 12 and 13, the focus on the death of the speaker's relative forms a very strong personal element in a case that is nevertheless also concerned with serious public matters. In Lysias 13 in particular, the rhetorical casting of the jury as a family who have all lost relatives to the oligarchy, whether literally or figuratively, allows for the employment of potent private rhetoric to heighten the urgency and emotional depth of the accused's political crimes. The Thirty are cast as killers whether they killed with their own hands or not. Indeed, in both Lysias 12 and 13, the killers in question are not technically *autocheir* killers, but in Lysias' rhetoric they become slaughterers of innocent, well-meaning democratic Athenians and metics. In both speeches, homicide is presented as the root of a wide variety of anti-democratic crimes, and thus the prosecution of homicide, or at least the rhetorical focus on it, leads to punishment for a greater number of transgressions.

Examining the variety of possible motivations for making a homicide accusation, and for bringing such an accusation to trial, allows us to understand a little more about potential Athenian attitudes towards homicide and its prosecution. It is clear from the status of the word *androphonos*, and possibly its synonyms, as *aporrheta* that homicide was one of the most potent and shocking things one person could allege against another. It would also seem from the instances where homicide accusations were abused to a greater or lesser extent that they may not have always been regarded with the kind of solemnity implied by some sources. The Athenians apparently found it easy to imagine that people could abuse the ancient and unchanging procedures regarding homicide. Such accusations of abuse were clearly not taken lightly, yet neither were they beyond belief. In some instances, it seems

that a homicide accusation could be considered as successful a political tool as accusations of other, less serious crimes. Perhaps surprisingly, accusations of unscrupulous homicide prosecution appear in both the homicide and dikastic courts, comprising one of few areas of rhetorical overlap between the courts on issues of homicide. It is clear, then, that homicide prosecution, although in essence a private action, was not solely concerned with private matters. The fact that almost all the accusations of homicide seen in the orators come from a family member of the deceased does not necessarily prove that homicide procedures were used solely to resolve inter-familial conflicts. Several instances show allegedly unscrupulous activities by families, both attempted and actual; once again, it was clearly not beyond belief, or the accusations could not have been successfully argued in court. In the speeches of Lysias in particular, we see the personal aspect of the case used as a focal point, around which a more political and publicly resonant case could be built. This in turn may have reflected on the polis as a community of families, as even more clearly political accusations of homicide became portrayed as a personal affront to every member of the jury.

CONCLUSION

The preceding chapters have identified and discussed some of the forces that shaped the rhetoric of homicide at Athens and made it distinctive from other kinds of forensic rhetoric. First and foremost, this singular rhetoric was the result of a singular crime. Homicide was physically, ideologically, and procedurally set apart in both the Athenian legal system and the Athenian imagination. Homicide trials took place in specialised courts, the ideological foundation myths of which had tied their location and purpose together since the mythic past. The homicide laws themselves were laid down by a separate and severe lawgiver, Draco, and were believed to have remained unchanged since their implementation. These details reflected a popular Athenian ideology that posited homicide as a grave and religiously dangerous matter, and viewed the part of the legal system that dealt with it as the most authoritative, enduring, and comprehensive in Athens. The ideology of homicide was rooted in aspects of wider Athenian civic ideology that idealised the past and viewed Athens as a centre of jurisprudence.

This ideology was not fixed, however, and was liable to rhetorical bending and stretching to suit the orator's purpose in forensic speeches. In Demosthenes 23, we have seen a particularly sophisticated example of the manipulability of homicide ideology. It is clear that a jury, particularly a dikastic jury, could be relied upon to hold these ideological beliefs about homicide and its prosecution, and that therefore aspects of ideology were invoked regularly when discussing homicide in the courts. In practice, this often resulted in the concealment of certain aspects of belief, such as the severity of Draco, or even of historical fact, such as the changing role of the Areopagus in Athens.

Specific aspects of the ideology of homicide, particularly the association of homicide with religious pollution, were not only part of the social and cultural knowledge of those present at court, but were also represented physically in the performance of the trial. Overtly religious aspects of procedure, such as particularly solemn sacrifices and oaths, consistently religious locations for the courts, and

restrictions on the movements of one accused of homicide confirmed the religious anxiety surrounding the homicide trial. These ritual factors spoke for themselves, producing a visual rhetoric that reached out to cultural knowledge and would have been apparent to those Athenians present at the trial. The result of this is that concepts like pollution appear less frequently than we may expect in the textual sources. As the physical ritual aspects of homicide trials were not preserved in the speeches, it can be difficult to recover the effect they had on listeners. Here, however, I have attempted to do so through comparisons of homicide speeches delivered within the context of the ritually distinctive homicide courts and those delivered in the less solemn dikastic courts where listeners did not witness the same rhetorically-charged procedures. As has become clear, despite what has often been asserted, pollution is in fact represented in surviving homicide speeches to some degree, and is more firmly foregrounded in homicide-related cases that were brought before the dikastic courts, and that therefore lacked the physical pollution rhetoric of the homicide courts.

The specific procedures enacted in the homicide courts did not only have ideological and rhetorical force, however; certain procedures had a more concrete effect on rhetoric. The relevance rule restricted speakers from making irrelevant statements in the homicide courts, whereas in the dikastic courts there was more freedom to bend the expectations of relevance. This did not prevent speakers in the homicide courts from exploiting the effects of irrelevant material, but merely required that they be more creative in presenting such statements to the jury. Explicit acknowledgements of the relevance rule in the homicide speeches are some of our most valuable data when examining exactly what kind of material would have been considered irrelevant in the Athenian courts.

A further effect on the rhetoric of homicide was the definition of different kinds of homicide, which raised the issues of intent, premeditation, and direct involvement with the crime. The law, however, did not define *pronoia* and similar terms, which opened up space in practice for extensive rhetorical manipulation. In the case of intent, the meaning of the term varies from speech to speech depending on the requirements of the speaker's case. Thus, although intent was a factor in defining different categories of homicide, it is almost impossible to establish whether it had a fixed legal meaning for the Athenians. Orators used the concepts of intent,

premeditation, and plotting very flexibly in order to build the most persuasive case. The killer's motive could also be used as a rhetorical device, and a variety of potential motives for homicide are attested in the sources. They appear more clearly in the extant defence speeches, though are often passed over quickly; in the prosecution speeches the issue is dealt with more subtly, working motive into their characterisation of the defendant and their crimes.

In spite of the distinctive nature of homicide and its prosecution, it was not immune from the same kind of exploitation that occurred with other legal charges at Athens. On a number of occasions, allegedly false accusations of homicide played a crucial role in ongoing litigious feuds between parties. Due to the distinctive procedures of prosecuting homicide, an indictment could also be used to place restrictions on the movements of an enemy, as alleged in Antiphon 6. Besides those ulterior motives for accusation or prosecution that are explicitly alleged in the sources, we can also locate implicit manipulation of accusations of homicide in the workings of certain cases. The familial nature of homicide could be exploited to give a strong personal core to broader political accusations, as in Lysias 12 and 13. Ultimately, the solemn and religiously significant nature of homicide was most valuable when it could be exploited to produce powerful rhetoric.

We are left with a rhetoric of homicide that is distinctive, ideological, and, most crucially, context-dependent. Visual rhetoric, socio-cultural knowledge, and singular procedures combined to influence the nature of successful homicide rhetoric in the homicide courts and in the dikastic courts. Thus, the Athenian rhetoric of homicide was not fixed, but flexible, and was not contained solely within the forensic speeches, but was part of the physical and procedural context of delivery. The significance of homicide as a crime was prominently reflected in the particularity of its rhetoric.

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