The Charge of φάσις in Lysias 19
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Abstract

Modern scholars on Lysias 19 “On The Property Of Aristophanes” have been divided about whether the plaintiffs who prosecuted the politician Aristophanes’ brother-in-law charged him by γραφή or ἀπογραφή. This paper argues that they charged him by neither of these procedures, but rather charged him by φάσις. The argument that he faced γραφή is unsupportable because none of the extant γραφαί could have been used against him, even those which, at first glance, seem as if they plausibly could have been used. The plausible γραφαί are γραφὴ ἀγραφίου to force registration as a debtor, γραφὴ κλοπῆς for theft of private property, and γραφὴ κλοπῆς for theft of public property. Although he would have owed a debt if found guilty, the text of the speech provides no evidence that he could have faced γραφὴ ἀγραφίου. γραφὴ κλοπῆς for theft of private property was not used to prosecute theft of public property, so the plaintiffs could not have used it to prosecute the defendant, who was on trial for theft of public property. γραφὴ κλοπῆς for private property could not have been used because, based upon the interpretation of Athenaion Politeia 48.4-5 by Cohen 1983, that charge could only be used at a public official’s εὐθύνα, and Aristophanes’ brother-in-law was not a public official. The theory that he was charged by ἀπογραφή has so far been the most widely accepted, but because Aristophanes’ brother-in-law probably did not face disfranchisement, the plaintiffs probably did not charge him by ἀπογραφή. That the charge was φάσις is the most plausible theory. There are two arguments in favor of this: it was the only other procedure that could be used to confiscate property, and a defendant found guilty by φάσις probably did not faced the penalty of disfranchisement.
I. Introduction

In classical Athens, trials were fundamental to civic life. When Athenians needed to resolve a legal dispute, they went to one of Athens’ courts where a jury would hear and judge their case. The plaintiff in each case would submit one of a number of distinct charges, to each of which the Athenians, as they developed and refined their legal system, gave a distinct name and set of associated procedural requirements. In a number of trials, the use of these charges was documented indirectly in transcriptions of the speeches delivered in court. Of these speeches, a handful provide clear evidence about the charge submitted in the case. Others however do not provide clear evidence, and there is not yet scholarly agreement about which charge was used. Lysias 19, “On the Property of Aristophanes: Defense Speech Against The Treasury,” is one of the latter group. The name of the charge does not appear in the speech, and some scholars have said the charge was a γραφή, while others have claimed it was an ἀπογραφή. Careful analysis though will show that it was in fact probably a φάσις.

Before moving to my main argument, I will provide some clarification of the historical and political background to the speech and the people, events, and circumstances to which it refers. The brother-in-law of the eponymous Aristophanes delivered it between 388 and 386 B.C.¹ during the Corinthian War, which at that time was the major conflict in the Mediterranean and present-day Western Asia. Several city-states in mainland Greece were involved, including not only the old rivals Athens and Sparta, but also less-notable city-states in the Peloponnese,

¹ For more specific information about the date of the trial, see Tuplin, C.J. 1983, 177-178 n.45; and Howan, Vivien 2011, 3 n.13
Boeotia, and northern Greece. Other powers further east, such as the tyranny of Salamis on Cyprus, a few Persian satrapies in Asia Minor, and the Persian Empire itself also took part.\(^2\)

Aristophanes, whose property is the focus of the speech, was a wealthy and politically prominent Athenian who, prior to the trial, involved himself in a diplomatic and military expedition to Cyprus in 391/0. Athens had received envoys from Evagoras, the tyrant of Salamis, who was fighting against a few Persian satraps and their king, Artaxerxes II, and was in need of military support.\(^3\) The Athenians responded to the plea of the envoys by voting to send ten triremes and to provide him financial assistance.\(^4\) Aristophanes helped to collect funds for that expedition and sailed to Cyprus with it as an envoy.\(^5\) At some point after the expedition’s departure for Cyprus, Aristophanes was executed, along with his father Nicophemus, who was stationed in Cyprus.\(^6\) After the executions, the Athenian Treasury confiscated their property in Athens and auctioned it to bring in revenue.\(^7\) Aristophanes and his father had been widely believed to be very rich, so the Treasury had expected the proceeds of the auction to be high; but

\(^2\) Persia’s provincial governors, the satraps, would sometimes act independently of their ruler. For example, see Diodorus of Sicily, *The Historical Library* 14.19-31. This is his account of Cyrus the Younger’s expedition against Artaxerxes II. Cyrus was the commander of the Persian satrapies on the Aegean Sea when he began his rebellion.


\(^5\) There is a significant amount of debate about the way in which Aristophanes reached Cyprus, but that debate is not significant to my paper. See Tuplin 1983, 172 n.13 for earlier sources which deal with the debate; also Stylianou 1988 “How Many Naval Squadrons Did Athens Send To Evagoras,” and Howan 2011, “Three Fleets Or Two?”


\(^7\) ibid. 19.8, 19.31
when counted they fell far below expectations.\textsuperscript{8} Searching for what seemed to be missing revenue, the Treasury suspected that some of the property had been stolen by the deceased Aristophanes’ relatives before the confiscation. A charge was brought against his father-in-law and brother-in-law,\textsuperscript{9} but the father-in-law died, so the brother-in-law was left to stand trial alone.\textsuperscript{10} He hired Lysias to assist him with writing his defense speech, the title of which is “On The Property Of Aristophanes.”

Pseudo-Plutarch and Dionysius of Halicarnassus write about Lysias that he was born in 459/8, but modern scholarship suggests a date of ca. 445 B.C. Despite uncertainty about his birth year, it is commonly agreed that he died ca. 380 B.C.\textsuperscript{11} He spent his early life in both Athens and Sicily, but later when he produced the extant speeches attributed to him, he lived exclusively in Athens. There he worked first as one of the operators of a shield manufactory and later as a professional speech writer, or “logographer.”\textsuperscript{12} Logographers provided assistance to people who wanted help composing speeches.\textsuperscript{13}

The speech Lysias wrote for Aristophanes’ brother-in-law took into account and was a response to the above-described circumstances, one of which was the charge submitted against his client. In general, the charge as it relates to a defense speech can be conceptualized as an

\textsuperscript{8} ibid. 19.11, 19.28
\textsuperscript{9} ibid. 19.56
\textsuperscript{10} ibid. 19.62
\textsuperscript{11} Todd 2000, Introduction to \textit{Lysias}, 3
\textsuperscript{12} Adams, C.D. 1915, \textit{Lysias: Selected Speeches}, 15
\textsuperscript{13} See Dover 1968, 5. “\textit{Client and Consultant}” for the relationship between a logographer and his client.
“inventional constraint.” Loucks 1995 introduced this term but her definition only encompassed part of the term, the notion of invention, or the litigant’s gathering [of] evidence and determining what arguments and appeals will be appropriate for a specific audience and situation.\(^\text{14}\)

An inventional constraint though, in my own use of the term, is a contextual factor that limits the gathering of evidence or that affects the nature of the arguments and appeals which the logographer selects for inclusion in the speech. Such factors can include the logographer’s conception of the jury’s ingrained prejudices toward his client or its knowledge of the dispute, his predictions about the arguments, evidence, or witnesses that the opposing litigant will employ, but also his understanding of the nature of the charge his client faced. This last factor had an observable effect on the content of Lysias 19, despite that it did not induce Lysias to state the charge his client faced.

Commentators on the speech have so far put forward two theories about the nature of the unstated charge: first that it was a γραφή, and the second that it was an ἀπογραφή. The simple meaning of γραφή, in its legal context, is “writing,”\(^\text{15}\) but more specifically it referred to a written charge submitted in a public case, a legal dispute that had a clear and equal effect on every member of the community.\(^\text{16}\) ἀπογραφή on the other hand was a charge used to force the transfer of property from an individual to the state. Tuplin 1983 advanced the theory of γραφή,\(^\text{17}\)

\(^{14}\) Loucks 1995, 7 n.2

\(^{15}\) MacDowell 1978, 57

\(^{16}\) ibid.

\(^{17}\) Tuplin 1983, 171
but despite this he conceded that it would technically be correct to call the case an ἀπογραφή,\textsuperscript{18}
the theory which most scholars have favored.\textsuperscript{19} One issue with both theories is that no one has
considered that the prosecution may have used φάσις. φάσις was similar to ἀπογραφή since it
was also used to transfer property from an individual to the government. The major difference
however was that disfranchisement—the loss of citizens’ rights— was not imposed upon a guilty
defendant.\textsuperscript{20} This difference is essential to determining the nature of the unstated charge. A close
reading of “On The Property Of Aristophanes” and an examination of related sources—ancient
oratory, comedy, and history, and related modern scholarship—show that the plaintiffs could not
have used γραφή, and likely used not ἀπογραφή but φάσις.

II. Arguments against γραφή

First I will examine the theory of γραφή. It has been supported by section 19.55 of “On
The Property Of Aristophanes.”\textsuperscript{21} The brother-in-law is summarizing what he has already said:

περὶ μὲν οὖν αὐτῆς τῆς γραφῆς καὶ ὁ τρόπῳ κηδεσταὶ ἡμῖν ἐγένοντο, καὶ ὅτι οὐκ
ἐξήρκει τὰ εκείνου εἰς τὸν ἐκπλουν, ἀλλὰ καὶ ὡς ἀλλοθεν προσεδανείσατο,
ἀκηκόατε καὶ μεμαρτύρηται ὑμῖν.\textsuperscript{22}

You have heard about the indictment itself, and how we became related by
marriage, and how Aristophanes’ property was not sufficient for the naval

\textsuperscript{18} ibid. n.5
\textsuperscript{19} Osborne 1985, 46; Todd 2000, Introduction to “On The Property Of Aristophanes,” 201
\textsuperscript{20} Osborne 1985, 47
\textsuperscript{21} ibid. 202; Tuplin 1983 171 n.5
\textsuperscript{22} Lysias “Ὑπέρ τῶν Ἀριστοφάνους χρημάτων,” ed. Carey 2007, 19.55
expedition, but he had to borrow from other sources, and witnesses have confirmed all this for you.23

The word “γραφῆς,” which appears in some but not all Greek editions of the speech,24 has been the basis of the theory. Tuplin 1983 and Todd 2000 have argued that it refers to the type of charge made in the trial and thus that the charge was a γραφή.25 This argument fails to fully address the question of the charge however, since γραφή was the name given to a variety of procedures, each of which had a distinct name and use. Todd 1993 gives a comprehensive list of the attested γραφαί:

γραφή άδικως εἰρκτηνα- for false arrest
γραφή ἁγραφίων- to force registration of a debtor to the state
γραφή ἁλογίου- against an official who refuses to submit accounts
γραφή ἁποροσταισίου- against a metic for failing to choose a patron
γραφή ἀργίας- for idleness
γραφή ἁσεβείας- for impiety
γραφή ἀστρατείας- for military desertion
γραφή βουλεύσεως- (against an official) for malicious behavior
γραφή δειλίας- for military desertion
γραφή δώρων- against an official for (accepting) bribes
γραφή δοροχενίας- against someone acquitted though bribery in a γραφή χένιας
γραφή ἐπιμήκτεσσως- for (male) prostitution
γραφή ιεροσυλίας- for temple robbery
γραφή ὑβρίσεως- a form of insulting assault
γραφή κακόσεως- for maltreatment
γραφή κλοπῆς- for theft
γραφή κλοπῆς δημοσίων χρημάτων- specifically for the theft of public property
γραφή κλοπῆς ιερών χρημάτων- specifically for the theft of sacred property
γραφή λιποταξίου- for military desertion
γραφή μοιχείας- for adultery
γραφή νόμον μὴ ἐπιτηδείου θείαν- against the proposer of an improper law
γραφή παρανοίας- for insanity


24 Two of the editions are Reiske 1770-1775, Oratorum Graecorum…quae supersunt monumenta ingenii, and Bake (date and title unknown); cf. Carey 2007, 19.55 n. 22

25 Tuplin 1983, 171; Todd 2000, 201 n.4
Some of these at first glance obviously could not have been the charge in this trial—for example, γραφή ἑταιρήσεως, the charge for male prostitution; γραφή παρανόων, the charge for proposing an illegal decree; or γραφή χενίας, the charge for fraudulently exercising rights belonging to Athenian citizens. Others though, since the charge involves an accusation of theft and owing either money or goods to the state, seem probable, especially γραφή ἀγραφίου to registration of a debtor to the state, γραφή κλοπῆς for private property, and γραφή κλοπῆς for public property. However none of these plausible options could have been used.

IIa.) Argument against the γραφή ἀγραφίου

Ath. Pol. 59.3 attests this γραφή, and Todd writes that it was used “to force the registration of a debtor to the state.” No other information about the procedure is available. It is plausible that this could have been the charge, since the defendant would have been required to pay money to the state if found guilty. However the content of the speech almost completely contradicts this since the defendant never mentions debt or a process of registering as a debtor. It

26 Todd 1993, 105-109
29 Todd 1993, 105
seems very unlikely that the invention of responding to a charge which would force his client to register as a debtor would not motivate Lysias to mention either his client’s alleged debt or the process of registration as a debtor. The absence of these essential topics makes it improbable that the charge was a γραφὴ ἀγραφίου.

IIb.) Argument against γραφὴ κλοπῆς for private property

There has actually been debate about whether γραφὴ κλοπῆς for private property existed. Carey 2004 though successfully argues that the possibility it existed must be considered in the absence of decisive evidence for or against its existence. Assuming it existed still does not add much to our knowledge of it, since there is practically no evidence for the procedure’s requirements. At the very least though two things can probably be said about it. First, it is reasonable to infer from the procedure’s name that if it existed, a plaintiff who used it would only have been able to use it when accusing a person of stealing of private property. If his dispute involved the theft of any other type of property—for example, public property—he would not have been able to use it. Second, the accusation of stealing private property would have been included in the charge that the clerk of the court presented at the start of the trial.

Passages from Aristophanes’ Wasps and Aeschines’ Against Timarchus provide the basis for the idea that an accusation was part of any charge read by the clerk, including the charge brought in a γραφὴ κλοπῆς for private property. The relevant passage in Wasps is lines 894-897.

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31 Cohen 1983, 47-48
32 Carey 2004, 126
These lines are part of the play’s parody trial,\(^3\) and Bdelycleon, one of the characters in the play, delivers them:

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\text{ΒΔΕΛΥΚΛΕΩΝ: άκούετ’ ἣδη τῆς γραφῆς. ἐγράψατο
cόμων Κυδαθηνείᾳς Λάβητ’ Αἴξωνέα,
tὸν τυρὸν ἀδικεῖν ὅτι μόνος κατήσθεν
τὸν Σικελικόν. τίμημα χλωρὸς σύνικος.}^{34}
\]

Bdelycleon: Attention to the indictment! Dog of Cydatheon, charges:
Labes of Aexone transgressed in devouring, all by himself, A Sicilian cheese. Penalty: fig-wood collar.\(^3\)

This is the charge, since, as is evident from later dialogue between Bdelycleon and Philcleon, his father, Bdelycleon is acting as the clerk of the court in this scene. The exchange between them runs

\[
\text{ΦΙΛΟΚΛΕΩΝ: ὁ θεσμοθέτης ποῦ σου; οὗτος, ἀμίδα μοι δῶτω.
ΒΔΕΛΥΚΛΕΩΝ: αὐτὸς καθελοῦ.}^{36}
\]

Phileleon: …Hi, clerk!
Hand me down the pot.
Bdelycleon: Get it yourself.\(^3\)

The characters are still taking part in the parody trial at this point, and since Bdelycleon responds to Philcleon when the latter addresses him as “clerk,” Bdelycleon almost certainly at 894-897 is presenting the charge as the clerk in the parody trial. That charge contains the accusation

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\(^3\) The trial in this section of Wasps might be Aristophanes’ replay of an actual trial, cf. Olson, S. Douglas 1996, 138. But it is still clear that the trial is parody and not the representation of an actual trial; cf. Aristophanes Wasps, trans. Moses Hadas 1981, lines 760-1009.

\(^34\) Aristophanes Σφήκες, ed. Hall, F.W. and W.M. Geldart 1907, 894-897.


\(^36\) Aristophanes Σφήκες, ed. Hall, F.W. and W.M. Geldart 1907, 935-937

\(^37\) ibid. 935-937
“Λάβητ’ Αἰξωνέα, τὸν τυρὸν ἀδικεῖν ὅτι μόνος κατήσθιεν τὸν Σικελικόν,” which serves as evidence that an accusation was part of the charge in actual trials that took place around the time of Wasps’ production. Reeve 2002 makes a useful argument on this point. While interpreting Aristophanes’ satirical portrayal of Socrates in Clouds he writes that

To achieve its comic purpose, Clouds, like all successful satire, had to be based on something. If the Socrates it presented was sufficiently unlike the Socrates the audience knew, it would fail…[T]he basis successful satire needs is not fact, since the audience may be ignorant of that, but the audience’s—possibly false—beliefs and prejudices. In the Apology, Socrates tells us what these were…His young followers imitate his elenctic techniques on others, who, as a result charge him with corrupting the young. Moreover, certain charges were available in Athens against all philosophers, among them the charge of teaching atheistic doctrines and sophist [sic] argument…the fact that Clouds may have been successful satire, then does not entail that its portrait of Socrates be accurate.38

One implication of this argument is that Bdelycleon’s presentation of the charge would not have needed to be based upon the clerk’s to be successfully satirical. If Aristophanes’ audience laughed at it, the laughter might have occurred because they believed that what they heard was based upon the presentation, not because Aristophanes had accurately represented it.

However, there are a few reasons to believe that Aristophanes’ satire is based upon the actual presentation as it happened around 422, the year in which he produced Wasps.39 Passages in Wasps show that Aristophanes had accurate knowledge about many aspects of trial procedure. His parody trial includes typical features of trial, such as a water-clock for timing each of the speeches, a process for calling witnesses, and the conventional order in which speeches were delivered.40

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38 Reeve, C.D. 2002, Introduction to Aristophanes’ Clouds, 86
40 Aristophanes Wasps, trans. Hadas 1981, 850-1008
extant court speeches corroborate the process for calling witnesses and the order in which the speeches were delivered. The accuracy of these suggests that the satirized presentation, with an accusation as part of the charge, was based upon the actual presentation as it existed around 422.

An accusation probably remained part of the clerk’s presentation of the charge throughout the years between the production of *Wasps* and the approximate date of the trial referred to in Lysias 19, 388-386. There are a few reasons for this. First, I have not found evidence which indicates that the practice changed between these dates. This does not imply that there was no change, but it suggests, unless evidence for a change has not survived or I have not come across it, that there is no ground for believing that a change was made.

Second, a change probably would not have been made to the practice unless a problem—for example, some type of corruption—arose with it, but if problems such as these did arise, the Athenians would probably not choose a different person to present the accusation since every possible solution that involved delegating the reading to a different official party within the court would not solve existing problems. These constraints on the Athenians’ ability to reform a theoretically problematic situation inevitably existed because of a basic condition which needed to obtain for a trial to be held, that an accusation be made against a defendant. Someone had to present this accusation so that the jury could judge the dispute, and if the clerk did not present the accusation, one of the other parties participating in the trial—the litigants, the witnesses, one of the jurors, or a presiding magistrate—would have to. There may have been no problem with

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41 For example, the process for calling witnesses appears in Lysias 1 “On the Death of Eratosthenes,” Lysias 3 “Against Simon,” Lysias 7 “Concerning the σήκος,” etc. The conventional ordering of the speeches can be seen in these and many other speeches.
this system much of the time since the clerk had the ability to present the accusation truthfully.
But if, for example, someone favoring one party in a case successfully bribed or threatened him
to present the accusation untruthfully, then the problem may have been noted and solutions that
involved delegating the task may have been considered. None of these solutions though would
have improved the problem. If the task were delegated to a litigant or one of his witnesses, that
person would gain the means to manipulate the accusation to give their side an unfair advantage.
If the task were delegated to a presiding magistrate or a juror, some person who wanted to give
one side an unfair advantage would be able to sway him by the same means he could have used
to sway the clerk. Allowing the clerk to continue presenting accusations without any other
modification to the practice would not have prevented corruption, but a change would be
unlikely since new forms of corruption could develop.

Evidence from Aeschines’ “Against Timarchus,” written in 346, also supports the idea
that the practice persisted through the time of the trial in Lysias 19. Aeschines says

εἰδὼς δ᾿ αὐτὸν ἔνοχον ὄντα ὃς ὀλίγῳ πρότερον ἠκούσατε ἀναγιγνώσκοντος τοῦ
γραμματέως, ἐπήγγειλα αὐτῷ τὴν δοκιμασίαν ταυτηνί.

…knowing that he was liable to the accusations that you heard read a moment ago
by the clerk of the court, I instituted this suit, challenging him to official scrutiny.

This is clear evidence that the clerk presented accusations in this trial. Aeschines does not say
that these accusations are part of the charge; but if the argument made above, that the practice in
which the clerk presented an accusation as part of the charge probably did not change between
422 and 388-386, is extended to 346, then an accusation should have been part of it. If there was
a change in the practice between 422 and 346, a change back to the original practice would also
have needed to occur for the charge to contain an accusation in this trial in 346. I have not seen any evidence of a reversion, which suggests that there also was no change.

The clerk in the trial in which “On The Property Of Aristophanes” was delivered therefore presented an accusation as part of the charge. Section 19.56 in the speech provides evidence that the accusation was that the father-in-law stole public property:

περὶ δὲ τοῦ πατρός, ἐπειδὴ ὁσπερ Ἀδικοῦντος αἱ κατηγορίαι γεγένηται, σθγγνόμην ἔχετε, ἑάν λέγω ἂ ἀνήλωσεν εἰς τὴν πόλιν καὶ εἰς τοὺς φίλους, οὐ γάρ φιλοτίµας ἔνεκα ἄλλα τεκμήριον ποιούμενος ὅτι οὐ τοῦ αὐτοῦ ἔστιν ἰνδρὸς ἀνευ ἃναγκῆς τε πολλὰ ἀναλίσκειν καὶ μετὰ κινδύνου τοῦ μεγίστου ἐμβθμῆσαι ἔχειν τι τῶν κοινῶν.  

…about my father—since the prosecution speeches have treated him as a criminal—please forgive me if I report what he has spent on the city and his friends. I am doing this not from a desire for glory, but as evidence that the same man does not both spend a great deal voluntarily and want to steal part of the public property despite very great danger.

Unless the prosecution had accused his father of stealing public property, there would be no reason for the speaker to make his last statement. The accusation which appeared in the charge must have been that Aristophanes’ father-in-law had stolen public property. If the charge was a γραφὴ κλοπῆς for private property, his father-in-law would have been accused of stealing private property. He was not accused of that, so his son could not have faced that charge.

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43 Lysias Ὑπέρ τῶν Ἀριστοφάνους χρημάτων, ed. Carey 2007, 19.56
44 Lysias On The Property Of Aristophanes, trans. Todd 2000, 19.56
Ilc.) Argument against γραφὴ κλοπῆς for theft of public property

Cohen states that it could be used during an εὔθυνα, the examination of public officials’ conduct while in office. Neither Aristophanes’ brother-in-law nor his father-in-law served in a public office before the trial, so neither could have been prosecuted by γραφὴ κλοπῆς for public property.

Hid.) The word “γραφῆς” at 19.55

Since the charge was neither γραφὴ ἀγραφίου, γραφὴ κλοπῆς for private property, nor γραφὴ κλοπῆς for public property, the word “γραφῆς” at 19.55 in “On The Property Of Aristophanes,” which has been the basis of the theory of γραφὴ, does not refer to the charge. It must refer to something else though, and a plausible intended meaning is “indictment,” referring to the actual charge presented by the clerk rather than the type of charge submitted by the plaintiffs. γραφὴ has this meaning when Bdelycleon presents the charge in Wasps’ parody trial:

ΒΔΕΛΥΚΛΕΩΝ: ἀκούετ’ ἣδη τῆς γραφῆς. ἐγράψατο κύων Κυδαθηνεὺς Λάβητ’ Αἰξωνέα, τὸν τυρὸν ἀδικεῖν ὅτι μόνος κατῆσθιεν τὸν Σικελικόν. τίμημα χλωρὸς σύνικος.

Bdelycleon: Attention to the indictment! Dog of Cydatheon, charges: Labes of Aexone transgressed in devouring, all by himself, A Sicilian cheese. Penalty: fig-wood collar.

45 Cohen 1983, 50
47 Aristophanes Σφήκες, ed. Hall F.W. and W.M. Gerhardt 1897, 894-897.
“γραφῆς” here refers to the charge, or indictment. The charge, or indictment, in addition to containing an accusation, included the prosecutor’s name, the defendant’s name, and, if the law specified one, the penalty to be imposed. The passage above, although it is from a parody trial, supports this. The argument made above, about the basis this satirical passage likely had in fact, is applicable here to support that the prosecutor’s name, the defendant’s name, and the penalty to be imposed if the law specified one, would have been part of the charge in trials that took place around the time that Wasps was produced.

This probably remained the method of reading the charge through the time at which “On The Property Of Aristophanes” was delivered since it is unlikely a change would have been made to the practice. If a problem arose with having the clerk state the litigants’ names— for example, because the clerk had been induced to make calculated changes to the names, it would have been easy for the litigant whose name was incorrectly represented to speak up and correct the clerk. He could correct the clerk immediately or he could wait for his turn to speak. It is also unlikely, that a change was made to the practice in which the clerk stated the penalty. The reason is essentially the same as that which made it unlikely that the practice in which the clerk presented the accusation would have changed. Similar to the the potential problem with the statement of the accusation, one of the litigants might, for his own advantage, induce the clerk to misrepresent the penalty. For example, the defendant, so that he would get off with a lighter penalty if found guilty, might bribe the clerk to state that the penalty was lighter than the law specified. Or the prosecutor, if he feared that the jury might find the penalty specified by law to

49 I have not seen any evidence attesting this kind of corruption, but there is no reason to think it could not happen.
be exorbitant, might also bribe the clerk to state that the penalty was lighter than specified. If a
solution that involved delegating the task to some other party in the court was considered, none
of the other parties in the court could have been trusted more than the clerk to present the penalty
truthfully. If it were delegated to one of the litigants or witnesses, he would gain the means to
misrepresent the penalty without the stipulation that he bribe the clerk. If delegated to a
magistrate or a juror, he would be just as prone to corruption as the clerk.

Since the clerk stated an accusation and penalty when presenting the charge,
“indictment”—meaning charge—is a viable translation for “γραφῆς” at 19.55 since that
meaning allows the statement in which it appears to be true:

\[
\text{περὶ μὲν οὖν αὐτῆς τῆς γραφῆς καὶ ὁ τρόπῳ κηδεσταὶ ἡμῖν ἐγένοντο, καὶ ὁτι οὐκ}
\text{oὐκ ἔξηρκεὶ τὰ ἐκεῖνου εἰς τὸν ἐκπλοῦν, ἄλλα καὶ ὡς ἄλλοθεν προσεδανεῖσαι,}
\text{ἀκηκόατε καὶ μεμαρτύρηται ύμῖν.}
\]

You have heard about the indictment itself, and how we became related by
marriage, and how Aristophanes’ property was not sufficient for the naval
expedition, but he had to borrow from other sources, and witnesses have
confirmed all this for you.

The statement’s position in a list describing other topics he has covered in his speech suggests
the defendant meant that the jury heard about the indictment while listening to his speech. The
jury did hear about it during the speech since, for example at 19.32-33, the defendant refers to
both the plaintiff’s accusation and the penalty he faced:

\[50\] If the task of presenting the charge was delegated to more than one party, the penalty, and also
the accusation, could be misrepresented only if there was collusion. It would probably be clear if
there were any discrepancy between statements.


πρὸς δὲ τούτοις καὶ πρότερον πρὸς τοὺς συνδίκους καὶ νῦν ἑθέλομεν πίστιν δοῦναι, ἣτις ἐστὶ μεγίστη τοῖς ἀνθρώποις, μηδὲν ἔχειν τῶν Ἀριστοφάνους χρημάτων, ὑφείλεσθαι δὲ τὴν προῖκα τῆς ἀδελφῆς καὶ (τὰς) ἑπτὰ μνᾶς, ὡς ἤχετο λαβὼν παρὰ τοῦ πατρὸς τοῦ ἐμοῦ. πῶς ἄν οὖν εἶν ἀνθρώποις, ἢ εἰ τὰ σφέτερ’ αὐτῶν ἀπολωλεκτεῖς δοκοῖεν τὰκεῖν ἔχειν; ὃ δὲ πάτων δεινότατον, τὴν ἀδελφὴν ὑποδέξασθαι παιδία ἐξουσια πολλά, καὶ ταῦτα τρέφειν, μηδ’ αὐτοῦς ἐχοντας μηδέν, ἐὰν ὑμεῖς τὰ ὁντ᾽ ἀφέλησθε.53

In addition, we previously offered before the Revenue Commissioners (σύνδικοι), and we now offer again, to give whatever pledge is most binding on mankind, that we do not possess any of Aristophanes’ property, but that my sister’s dowry, and the seven minas he borrowed from my father when he left, are both owing to us. How could humans be more wretched than if they were to lose what was their own and to be thought to possess the property of those people? Worst of all, we must receive back my sister with her many children, and bring them up—even though, if you confiscate our property, we ourselves will have nothing.54

He refers to the accusation of theft by noting what is presumably the prosecution’s belief that he possesses some of Aristophanes’ property, and he refers to the penalty when saying that the jury will confiscate his property. These are not exact quotations of the accusation and penalty as stated in the indictment, but it would not have been necessary for the defendant, prior to 19.55, to quote the indictment for his statement at 19.55 to be true. He only states that the jury has “heard about the indictment,” not that they heard, for example, a quotation of the indictment. The presence of the word “about” allows that 19.55 would be true even if the earlier references to the indictment were extremely vague. However the references at 19.32-33 are fairly clear, so there is no question that the statement at 19.55 is true. The coherence between 19.55 and 19.32-33 suggests that at 19.55 “indictment” reasonably could be the intended meaning of “γραφῆς.”

53 Lysias “‘Υπὲρ τῶν Ἀριστοφάνους χρημάτων,’” ed. Carey 2007, 19.32-33

III. Argument against ἀπογραφή

So far in the scholarship, ἀπογραφή has been the most commonly accepted theory about the charge. Reiske 1770-1775 seems to have been the first to recommend it, substituting “ἀπογραφῆς” for “γραφῆς” at 19.55; in the 19th century Bake followed him with this emendation. The theory has also been advanced by Tuplin, Osborne, and Todd. The grounds stated for support though have been varied: it is not clear from Carey 2007 how Reiske and Bake justified their textual emendations; Tuplin 1983 states that “ἀπογραφῆ…would be technically correct for state recovery of property from an individual;” Osborne 1985 assumes ἀπογραφή but he does not explicitly state his reasoning; Todd 2000 says that it was “…probably an ἀπογραφή…” but his reasoning is unclear.

A comparison between the procedures ἀπογραφή and the text of the speech shows that this generally-supported theory is probably not accurate. MacDowell 1978 describes ἀπογραφή:

The procedure for confiscation was called ἀπογραφή…Anyone who considered that some man had no excuse for failing to pay off a debt to the state, since he possessed some property which could be used for paying it, could propose that his property be confiscated to pay the debt. The method of initiation was the same as prosecution for γραφή, except that the written charge submitted by the prosecutor consisted of a list (ἀπογραφή) of the land, houses, slaves, and other property which he proposed should be confiscated…At the trial the defendant might maintain that he did not owe any debt to the state, and that his property was therefore not liable to confiscation…If the jury voted that the property was to be confiscated to the state, it was handed over to the πωληταί (the officials who sold state property) and they sold it by auction. The amount which it raised was set against the debt owed to the state. If it was enough to pay off the whole debt, the

55 Carey 2007, 195 n.22
56 Tuplin 1983, 170 n.5; Osborne 1985, 52; Todd 2000, 201 n.4
57 Tuplin 1983, 171 n.4
58 Todd Introduction to “On The Property Of Aristophanes,” 201 n.4
debtor ceased to be disfranchised (sic) and any surplus from the sale was returned to him; but if it was not enough, his debt was merely reduced by that amount and he remained disfranchised.  

This description is useful but not complete. MacDowell mentions only one situation in which a citizen could initiate an ἀπογραφή, if “[he] considered that some man had no excuse for failing to pay off a debt to the state, since he possessed some property which could be used for paying it.” However as Osborne writes there were two other circumstances in which a person could begin a prosecution by ἀπογραφή: first, it could be initiated after a citizen had been either executed or deprived of his property rights. The prosecution would then use it to inventory, confiscate, and sell that citizen’s property; second, it could be initiated to confiscate the property of a resident of Athens whom the plaintiff believed was holding property owned by the state. Within Osborne’s system for categorizing extant ἀπογραφαί these two types are referred to as ἀπογραφή 1 and ἀπογραφή 3; Osborne also accounts for the type described by MacDowell and refers to it as ἀπογραφή 2. ἀπογραφαί 1 and 2 are not important to my argument but I will explain ἀπογραφή 3 more thoroughly.

As in ἀπογραφή 2, the defendant in ἀπογραφή 3 could be penalized with disfranchisement if the jury judged that he held property belonging to the state. Only one of Osborne’s extant cases of ἀπογραφή 3 give support to this, but the others, although they do not give implicit support, do not contradict the idea. At the start of his speech’s epilogue the defendant in Lysias 18 “On The Property Of Nicias” claims that he will lose his civic rights if

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59 MacDowell 1978, 166.

60 Osborne 1985, 54-55. Although I do not believe as Osborne does that Lysias 19 is the defense against a prosecution brought by ἀπογραφή 3, Failing to make Osborne’s assumption does not problematize his system ἀπογραφή since besides Lysias 19 there are several other extant cases of ἀπογραφή 3 which to justify the validity of the category.
found guilty; neither Lysias 29 “Against Philocrates” and Hyperides 4 “On Behalf Of Euxenippus,” mentions disfranchisement, in both cases with no implication about the role of the penalty in ἀπογραφή. In “Against Philocrates” the plaintiff believes that Philocrates has enough money to pay the entire debt he will incur if found guilty, a situation which, as I will show below, meant that the defendant would not be disfranchised. The plaintiff for that reason may have thought there was no reason to discuss disfranchisement. In “On Behalf Of Euxenippus,” Hyperides does not talk about disfranchisement in the short, legal anecdote at 4.34 in which he refers to a previous ἀπογραφή:

καὶ πρῶτον μὲν Τείσιδος τοῦ Αγρυλῆθεν ἀπογράψαντος τὴν Εὐθυκράτους οὕσιν ὡς δημοσίαν οὔσαν, ἢ πλεόνων ἢ ἐξήκοντα ταλάντων ἤν, καὶ μετ᾽ ἐκείνην πάλιν ὑπερχυμομένον τὴν Θελίππου καὶ Ναυσικλέους ἀπογράψειν, καὶ λέγοντος ὡς ἐξ ἀναπογράφων μετάλλων πεπλουτήκασι, τοσούτοι οὔτε ἀπέλπιον τοῦ προσεσθαι τινά τοιούτων λόγων ἢ τῶν ἄλλοτρῶν ἐπιθυμεῖν, ὡστε τὸν ἐγχειρήσαντα συκοφαντεῖν αὐτοὺς ἐυθὺς, τὸ πέμπτον μέρος τῶν ψήφων οὐ μεταδόντες.

In the first place, when Tisis of Agryle submitted an inventory (ἀπογραφή) against the property of Euthycrates, which was worth more than sixty talents, on the grounds that it was public property, and again afterwards when he promised to enter an inventory against Philip’s and Nausicles’ property alleging that they had made their money from unregistered mines, these jurors, far from accepting such an allegation or coveting other people’s property, immediately disenfranchised the man who undertook these false accusations by not giving him one-fifth of the vote.

In telling this anecdote, Hyperides had freedom to describe the trial as he wished; regardless of the procedural requirements of ἀπογραφή he had no obligation to discuss or not discuss disfranchisement. His neglect to mention the penalty here does nothing to contradict the

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argument, supported by “On The Property Of Nicias,” that disfranchisement was part of ἀπογραφή 3.

Disfranchisement had its own set of consequences:

[It] involved loss of more than just the right to vote. A disfranchised citizen was not allowed to enter temples or the Agora. He would not hold any public office, nor be a member of the Boule or a juror. He could not speak in the Ekklesia or in a law-court (though he could still be present in a court without speaking).\(^{64}\)

The law regarding debtors to the state mandated that disfranchisement would occur once the defendant owed money to the state:

…a man who owed money to the state (for example, a man sentenced to pay a fine, or a tax-farmer who failed to pay the price fixed for his tax-collecting privilege on the date when it fell due) was regarded as disfranchised from the moment when he incurred the debt until the moment when he paid it…\(^{65}\)

In ἀπογραφή 3, unless another group of officials had the responsibility, the πωληταί, who calculated the revenue from the sale of the defendant’s confiscated property, probably determined if a guilty defendant was in debt. If they concluded that the amount of money received from the sale of the confiscated property was less than the value of the defendant’s debt, he would remain disfranchised\(^{66}\) until he was able to pay the outstanding amount.

\(^{64}\) MacDowell 1978, 74

\(^{65}\) ibid. 74

\(^{66}\) I am following MacDowell by assuming that the defendant was already disfranchised before the πωληταί counted the revenue from the auction of his property. The assumption is logical since a guilty verdict in ἀπογραφή 3 implied that the defendant owed property to the state, and in accordance with the law regarding debtors to the state, from the moment of the verdict on he would be regarded as disfranchised.
Supposing that Aristophanes’ brother-in-law faced ἀπογραφή 3 and was found guilty, the revenue from the sale of his property would not have been enough to match his debt. He claims that his property had a value of less than two talents:

...εἰ νῦν γε ἐξαιπατηθείτε ύπὸ τούτων καὶ δημεύσασθ’ ἠμῶν τὴν οὐσίαν, οὐδὲ δύο τάλαντα λάβοιτ’ ἄν. 67

...if today you are deceived by these men and confiscate our property, you will not receive even two talents. 68

This is much less than the value that the plaintiffs demanded for confiscation. The defendant never states explicitly what the prosecution believed the value of his father’s property to be, but few passages show they believed it to be at least fifteen or so talents. At 19.30 the defendant rationalizes the surprisingly small size of Aristophanes’ confiscated property:

ἀλλ’ οὐδ’ οἱ πάλαι πλούσιοι δοκοῦντες εἶναι ἄξια λόγου ἔχοιεν ἄν ἐξενεγκεὶν. 69

Even those who are thought to have been wealthy for a long time may not be able to produce personal effects worth mentioning. 70

“Thought to have been wealthy for a long time” and “not able to produce personal effects worth mentioning” are opinions that have been expressed about individuals on the basis of their wealth. The statement does not identify the subject or subjects who expressed these opinions, but it is reasonable to infer that he is referring to the opinion of “everybody” here also, since when he discusses the same subject—men whose actual wealth was surprisingly less than had been believed—at 19.45-48, 52, he cites the opinions that “everybody” had about their wealth:

...people who during their lifetimes were thought rich, but when they died were shown to be very different from your expectations. For example, everybody (as I hear) thought during his lifetime that Ischomachus had seventy talents...Stephanus son of Thallus was said to have more than fifty talents...The household of Nicias was expected to be worth no less than a hundred talents...Callias son of Hipponicus, soon after his father’s death, was thought to have owned the most of any Greek. People say that his grandfather valued his own property at two hundred talents...I believe you know that Alcibiades served as general for four or five years in succession, during which he defeated the Spartans and maintained control, and the allied cities decided to give him twice what they had given to any other general. As a result, some people thought he had more than one hundred talents...72

The deceased Aristophanes, according to the defendant, was at the time of the confiscation of his property one of those men “not be able to produce personal effects worth mentioning,”73 so no one considered him rich for the fifteen talents or slightly less which the defendant claims was the value of his property.74 Any other person who had the same or a lesser amount of wealth would also not have been considered rich, since people who have the same amount of wealth are

73 ibid. 19.27-29
74 ibid. 19.44
considered equally rich. 19.58, a passage in which the defendant describes his father’s reputation, implies that his father, unlike the deceased Aristophanes, was considered rich:

ἐν οὖν τοσούτῳ χρόνῳ δοκοῦντά τι εξ ἀρχῆς ἔχειν οὐδεμίαν εἰκός δαπάνην πεφευγέναι.75

…he had from the start the reputation of being wealthy…76

There is no hint elsewhere that the defendant believed people held mixed opinions about it, so he must have thought that everyone, including the plaintiffs, believed his father was wealthy.

His judgement of the plaintiffs’ opinion is almost certainly correct. If the defendant was uncertain whether the plaintiffs thought his father was rich, to acknowledge this uncertainty he might have adjusted the claim about his father’s reputation. If he made no adjustment then he would make it possible for the plaintiffs to criticize a statement that he could easily have adjusted to avoid the criticism. But he did not qualify the statement about his father’s reputation, so the plaintiffs likely expressed an unambiguous opinion. That unambiguous opinion was almost certainly that his father was rich, and not the opposite. If the plaintiffs expressed that his father was not rich, the defendant probably would have alluded to that to strengthen two of his arguments. The first argument was that the jurors have

…πολλῶν ἐψεύσθητε τῆς οὐσίας, οἱ ζῶντες μὲν πλουτεῖν ἔδοκον, ἀποθανόντες δὲ πολὺ παρὰ τὴν δόξαν τὴν ύμετέραν ἐφάνησαν.77

…been much mistaken about property: people who during their lifetimes were thought rich, but when they died were shown to be very different from your expectations.\textsuperscript{78}

By showing that the jurors and the prosecution held differing opinions about his father’s wealth, Aristophanes’ brother-in-law would have been able to provide even more support for his claim, besides the support he already provides in his account, cited above, of the men discovered to be less wealthy than had been commonly believed.\textsuperscript{79} There is however no support that is based upon an opinion expressed by the prosecution. The second argument is his prediction about the financial future of the jurors:

\[\text{…οὐ μόνον πρὸς δόξαν ἀλλὰ καὶ εἰς χρημάτων λόγον λυσιτελεῖ μᾶλλον ύμῖν ἀποψηφίσασθαι. πολύ γὰρ πλείω ὡφεληθήσεσθ’, ἐὰν ἡμεῖς ἐχωμεν.}\textsuperscript{80}

\[\text{…it is to your advantage to vote for acquittal, not only for your reputation but also for financial reasons: you will derive greater benefit if we continue to possess our property.}\textsuperscript{81}

To support this he claims that he currently has only a small amount of money—two talents, as mentioned above.\textsuperscript{82} Had the plaintiffs expressed to the jury that his father was not rich, he also would have been able to support this prediction by referring to whatever they had said. He does not refer to an opinion of the prosecution though, so they probably unambiguously expressed that his father was rich. A man considered rich had at least fifteen talents or so, they would have claimed that the defendant’s father had at least that much.

\textsuperscript{78} Lysias “On The Property Of Aristophanes,” trans. Todd 2000, 19.46
\textsuperscript{79} ibid. 19.46-48, 51
\textsuperscript{80} Lysias “Ὑπὲρ τῶν Ἀριστοφάνους χρημάτων, πρὸς τὸ δημόσιον,” ed. Carey 2007, 19.61
\textsuperscript{81} Lysias “On The Property Of Aristophanes,” trans. Todd 2000, 19.61
\textsuperscript{82} ibid.
In ἀπογραφή 3 the plaintiffs probably would have expressed this belief by claiming that the defendant’s property was worth at least fifteen or so talents. One reason to think this is that extant ἀπογραφή speeches and speeches which refer to the the process of ἀπογραφή show that the prosecution stated the value of the money or property which they demanded for confiscation. In Lysias 9 “For the Soldier,” the prosecution demands that the defendant pay a summary fine, and they must have stated the value of that fine when making the demand so that if found guilty, the defendant would know how much he would have to pay;\footnote{Lysias “For the Soldier,” trans. Todd 2000, 9.12} in Lysias 17 “On The Property Of Eraton,” the parties that submitted ἀπογραφαί to confiscate Eraton’s property valued it at at one talent;\footnote{Lysias “On The Property Of Eraton,” trans. Todd 2000, 17.7} in Lysias 29 “Against Philocrates,” the prosecution alleges that Philocrates owes thirty talents;\footnote{Lysias “Against Philocrates,” trans. Todd 2000, 29.1-3, 14} in Demosthenes 53 “Against Nicostratus,” Apollodorus, the plaintiff, states that the slaves which he alleges belong to Arethusius, the defendant’s brother, are worth two minas.\footnote{Demosthenes “Against Nicostratus,” trans. Bers 2003, 53.1} In each of these speeches, the prosecution assesses the value of the thing demanded for confiscation, so it seems probable that the prosecution in “On The Property Of Aristophanes” did the same. A second reason for thinking this is that a defendant in ἀπογραφή 3 whom a jury found guilty went into debt to the Treasury as the result of the verdict. The value of the debt must have been specific, and some method for determining that specific value must have been in place. The extant cases cited above involving ἀπογραφή indicate that the value assessment which the prosecution made prior to the trial would probably have been the basis for the determination. No
other party present in court was required by the procedure ἀπογραφή to assess the value of the debt the defendant would owe if found guilty; the defendant himself would have been arguing against the accusation that he owed anything to the Treasury; the jurors and likely the clerk also would have been ignorant of the facts of the case until the time of the trial; the magistrate or magistrates presiding would only have learned the value either after the prosecution had determined it and informed them of it at the ἀνάκρισις, or if the prosecution determined the value between the ἀνάκρισις and the trial, during the trial itself. Their knowledge of the value was dependent upon the prosecution’s claim, so the prosecution’s determination was probably the basis of the stated value of the defendant’s property.

In ἀπογραφή, the stated value of the property would probably be the value of the debt owed by the defendant if found guilty. There does not seem to be any other value that could be used for this purpose. The defendant would have learned of it either at the ἀνάκρισις or at the trial. So in Lysias 19, Aristophanes’ brother-in-law would have been present at the ἀνάκρισις and either at that point or during the trial would have learned that he would owe at least approximately fifteen talents to the Treasury if found guilty. He, or especially Lysias, who likely had much greater knowledge of the law, might easily have realized that he would become disfranchised if found guilty since as he says, he would only be able to pay two of these talents.

Defendants in ἀπογραφή, if a guilty verdict would disfranchise them, sometimes would try to win the pity of the jurors by discussing the prospect of that penalty. There are a few speeches in which it seems that the penalty of disfranchisement, as an inventional constraint,

87 MacDowell 1978, 240-242
motivated Lysias to include this sort of plea for pity in the defense speech. In “For Polystratus”

for example, the man speaking for the defendant says

καίτοι ὡρῶν γ’ ὑμᾶς, ὥσπερ δικασται, ἐὰν τις παιδας αὐτοῦ ἀναβιβασάμενος
κλαίῃ καὶ ἀλοφορίται, τοὺς τε παιδας δ’ αὐτόν εἰ ἀτιμωθῆσονται ἐλεοῦντας, καὶ
ἀφιένεις τὰς τῶν πατέρων ἀμαρτίας διὰ τοὺς παιδας… πεπόνθαμεν δὲ τούναντὶν
τοῖς ἄλλοις ἀνθρώποις. οἱ μὲν γὰρ ἄλλοι τοὺς παιδας παραστησάμενοι
ἐξαιτούμεθα, μὴ ἡμᾶς ἀντὶ μὲν ἐπιτίμων ἀτιμοῖς ποιήσητε, ἀντὶ δὲ πολιτῶν
ἀπολίδας. ἀλλὰ ἐλεήσατε καὶ τὸν πατέρα γέροντα ὑμᾶς καὶ ἡμᾶς. εἰ δὲ ἡμᾶς
ἀδίκως ἀπολεῖτε, πῶς ἡ ὑστος ἡμῖν ἡδέως συνέσται ἡ ἡμεῖς ἀλλήλοις ἐν τῷ αὐτῶ,
όντες ὑμὸν το ἀνάξιοι καὶ τῆς πόλεως; \(^{89}\)

Nevertheless, gentlemen of the jury, we see that if somebody brings forward his children and weeps and laments, you take pity on the children if they are to lose their citizen [sic] rights on his account, and you pardon the father’s crimes on account of the children…Our predicament is the opposite of other people’s: we bring forward our father and ourselves, and beg you not to deprive us of citizens [sic] rights and citizenship. Take pity on our father, who is an old man, and on us. If you destroy us unjustly, how will he take pleasure in our company, or we in each other’s, given that we will have been judged unworthy of yourselves and the city? \(^{90}\)

The speaker here says that he will lose his citizens’ rights—the result of disfranchisement—and follows by asking for the jury’s pity, describing his father and the sufferings that he will experience if disfranchised. The same or a similar type of plea also appears in “On A Charge Of Accepting Bribes” \(^{91}\) and in “For The Solider.” \(^{92}\) If Lysias and not the defendants included these pleas on account of disfranchisement, it seems improbable that if Lysias 19 was an ἀπογραφή and in composing the speech Lysias encountered the same inventional constraint, he did not include the same type of plea. The defendant for whom he wrote “For The Soldier” would not

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\(^{92}\) Lysias “For The Soldier,” trans. Todd 2000, 9.21-22
actually even have been disfranchised if found guilty—there is no hint he will not be able to pay the fine demanded of him—but his speech still includes a passage in which he mentions disfranchisement:

λόγῳ μὲν οὖν περὶ τῆς ἀπογραφῆς ἁγωνίζομαι, ἔργῳ δὲ περὶ πολιτείας. τυχὼν μὲν γὰρ τῶν δικαίων (τιστεύς δὲ τῇ ύμετρᾳ γνώμῃ) μείναιμι ἂν (ἔν) τῇ πόλει ἀποδράιην ἄν. παραχθεὶς δὲ ὑπὸ τῶνδε εἰ ἀδίκως ἀλοίην, ἀποδραίην ἄν. τίνι γὰρ ἐπαρθεντα ἐλπίδι δεῖ με συμπολιτεύσθαι, ἢ τι με χρῆ διανοηθεντα, εἰδότα μὲν τῶν ἀντιδίκων τὴν προθυμίαν, ἀποροῦντα δ´ οθεν χρῆ τῶν δικαίων τινὸς τυχεῖν; περὶ πλείστου οὖν ποιησέμοι τὸ δίκαιον…τοὺς μηδὲν ἀδικήσαντας διὰ τὰς ἐξήθρας μὴ περιδῆτε ἀδίκως τοῖς μεγίστοις ἀτυχήσασι περιεσόντας.93

I am on trial nominally over this ἀπογραφή but in reality over my citizenship. If I obtain justice—and I am trusting in your verdict—I could remain in the city; but if I were unjustly convicted after being brought before you by these people, I would run away. What hope would there be to encourage me to share in the life of the city? What would have to be my aim, given that I would know the eagerness of my opponents and would not know how to achieve any of my rights? You should therefore pay the greatest attention to justice…Do not look on while those who have done no wrong are unjustly ensnared in the greatest misfortunes as a result of personal enmity.94

Whether Lysias or the defendant composed this passage, he made the additional effort to selectively portray the consequences which he predicted would result from the trial so that the defendant’s possible future would seem like disfranchisement. These choices suggest that in Athens’ legal culture the trope of mentioning disfranchisement was considered so useful for eliciting the jury’s pity that the writer chose to include it even when the defendant did not face that actual penalty. If it was Lysias who wrote the passage and those in “For Polystratus” and “On A Charge Of Accepting Bribes,” his work shows a trend of using the trope of disfranchisement. Why, if it was Lysias, did he not mention disfranchisement when it actually

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would be imposed on his client if found guilty? The defendant had an opportune moment to mention disfranchisement when he laments the consequences of a guilty verdict and the confiscation of his property:

ὅ δὲ πάντων δεινότατον, τὴν ἄδελφην ὑποδέξασθαι παιδία ἔχουσαν πολλὰ, καὶ ταῦτα τρέφειν, μηδὲ ἀυτοὺς ἔχοντας μηδέν, ἐὰν ύμεῖς τὰ ὄντ᾽ ἀφέλησθε.  

Worst of all, we must receive back my sister with her many children, and bring them up—even though, if you confiscate our property, we ourselves will have nothing.  

He pleads with the jury at other points in the speech and could have mentioned disfranchisement at those points if he had some reason against mentioning it here. These omissions suggest that the speaker did not face disfranchisement and therefore that he did not face ἀπογραφή.

IV. Argument in favor of φάσις

I have argued that the speaker was only likely not charged by ἀπογραφή; the possibility still remains that he faced ἀπογραφή and for some unknown reason failed to mention disfranchisement. Additional evidence which suggests the defendant was charged by φάσις makes this unlikely though. Harrison gives the best account of φάσις:

…the prosecutor received one-half of the goods forfeited by a convicted defendant or one-half of the penalty imposed on him…[T]he prosecutor had…to deposit a court fee equal to the amount he stood to gain if he proved successful, which he forfeited if he was not. He was also subject…to a penalty of 1,000 drachmai and to partial ἀτιμία if he did not secure one-fifth of the juror’s votes,

97 For example, 19.45, 19.53, 19.54
and to a like penalty if he failed to bring the case before the court after making his denunciation.98

ἀπογραφή and φάσις were the only procedures in which the penalty imposed upon a convicted defendant was confiscation of his property.99 If he was convicted, the property of Aristophanes’ brother-in-law would have been confiscated,100 and if, as is likely, he was not charged by ἀπογραφή, he must have been charged by φάσις.

The likelihood that he was charged by ἀπογραφή is lessened because unlike in ἀπογραφή, disfranchisement was probably not imposed upon a defendant found guilty by φάσις. Sources do not provide any direct proof that disfranchisement was part of the procedure: neither Harrison, MacDowell, nor Osborne write that it was a part of φάσις,101 and the sources they rely upon—Demosthenes’ “Against Theocrines,” and the text of the marble stele on which an Athenian law on silver coinage is inscribed—also contain no description of disfranchisement.102 This is an argument from silence which at best suggests that disfranchisement was not part of the procedure. Besides the argument from silence, there are a few other reasons that it is plausible disfranchisement was not part of the procedure. First, the counterargument sometimes made against an argument from silence, that the desired information is not present because the author

98 Harrison 1968, 116
99 Osborne 1985, 47; Harrison 1968 116. MacDowell does not say about φάσις that a defendant could be penalized with the confiscation of any of his goods. He, like Harrison, cites Dem. 58.13, the controversial passage. However he does not cite Harrison, and Harrison gives a reasonable interpretation of that passage. MacDowell 1978, 159, 270.
101 Harrison 1971, Osborne 1985, 47, MacDowell 1978, 159
could not have known that information, is most likely false. In this instance, the notion that disfranchisement is absent from the two ancient sources because their authors were ignorant of the procedure is not supported by strong evidence. Epichares, the man who delivered “Against Theocrines,” quotes in the course of his argument the denunciation submitted to the magistrate presiding over a φάσις.\textsuperscript{103} His familiarity with the denunciation suggests that he had familiarity with the procedure, enough that had disfranchisement been part of it, he would have had knowledge of the penalty and could have mentioned it in “Against Theocrines.” The Athenian law on silver coinage comes from a marble stele, and the inscriber or inscribers of that law most likely had complete knowledge of or access to a description of the law being inscribed, or else he or they would not have been able to inscribe it. Second, both sources are in sufficiently good condition to refute the notion that damage to the stele could have caused a passage on disfranchisement to disappear. “Against Theocrines” is completely intact and so has not lost a section in which the author may have mentioned disfranchisement. The stele is actually missing eight characters from the lines in which the inscription mentions the procedure of φάσις, however Stroud’s suggestion that the missing word refers to the person initiating the φάσις is sound and excludes the possibility that the word ἀτιµία or a related word could have appeared where the characters are now missing. Third, lines 28-32 in the stele, those in which the inscription states the penalties associated with φάσις, do not mention disfranchisement as a penalty. These are lines from a recognized law, so the omission of a reference to disfranchisement suggests that it was not a penalty in φάσις.

\textsuperscript{103} Demosthenes “Against Theocrines,” trans. Bers 2003, 58.7-8
The penalty of disfranchisement as an inventionally constraint likely had opposite effects in ἀπογραφή and φάσις. In ἀπογραφή it had the capacity and likely the tendency— as it did with Lysias, if he authored the three speeches cited above— to motivate a logographer to include a plea for the jury to pity his potentially-disfranchised client. In φάσις the defendant did not face disfranchisement and it was not possible for him to truthfully claim he would suffer it, so would probably not plead for the jury’s pity on account of potential disfranchisement. He probably would not have been able to lie and claim that he faced disfranchisement since the jury and plaintiffs heard the clerk read the φάσις in which it probably was not stated that he faced that penalty. If he wanted to mention disfranchisement, at best he might be able to present himself as the defendant in “For The Soldier” did— likely if found guilty to have a future which was essentially disfranchisement. The defendant in Lysias 19 though does not present his future as such, and he does not plead for the jury to save him from disfranchisement. He pleads instead for pity because if found guilty he will suffer the penalty of losing his property through confiscation to the state. These features of his defense make it probable that he faced φάσις.

V. Conclusion

Establishing that the charge was φάσις creates a new basis for understanding the political context of the speech, and more broadly, understanding the role these and perhaps other charges had in the relationship between the Athenian citizens and their government. The plaintiffs who, as Loucks writes, may have been representatives of the Treasury, would not have been prevented from charging the defendant by ἀπογραφή instead of φάσις. The Athenian Treasury at

104 Loucks 1995, 125 n.3
that time, as the defendant noted in the speech, was low on funds,\textsuperscript{105} and its financial difficulties may have been the primary cause of the decision to use φάσις in this case. The Treasury may have reasoned that, since a disfranchised citizen could not take on liturgies,\textsuperscript{106} the defendant should be charged by φάσις so that he could retain his citizenship and remain a potential beneficiary to the city. The defendant stated that his father made many contributions to the city:

\begin{quote}

ο τοῖνυν ἐμὸς πατήρ…τὰς χορηγίας ἀπάσας κεχορήγηκε, τετπηράρχηκε δὲ ἐπτάκις, εἰσφοράς δὲ πολλὰς καὶ μεγάλας εἰσενήγορην…πεντήκονταγάρ ἐτη ἔστιν ὁσα ο πατήρ καὶ τοῖς χρήμασι καὶ τῷ σώματι τῇ πόλει ἐλημούργει. ἐν οὖν τοσούτῳ χρόνῳ δοκοῦνται τι εξ ἀρχῆς ἐχειν οὐδεμίαν εἰκὸς δαπάνην πεφευγέναι…τούτων συμπάντων κεφάλαιον ἔστιν ἐννέα τάλαντα καὶ δισχίλιαι δραχμαι.\textsuperscript{107}
\end{quote}

My father…fulfilled all his χορηγίαι, served on seven occasions as trierarch, and made many large contributions to war taxes (εἰσφοραί)…For fifty years [he] performed liturgies for the city, both in person and with his money. Given that he had from the start the reputation of being wealthy, he presumably did not avoid any expenditure in all this time…The total of all these benefactions is nine talents and two thousand drachmas.\textsuperscript{108}

And the defendant himself also contributed to the city:

\begin{quote}

καὶ νῦν ἀπὸ τῶν ὑπολοίπων τριηραρχῷ μὲν ἐγὼ…\textsuperscript{109}
\end{quote}

At the moment, too, I am paying as trierarch out of what is left…\textsuperscript{110}

If the Treasury took all of the defendant’s property but allowed that he retained his citizenship, they would in the short-term gain revenue from the confiscation and in the long-term ensure the

\textsuperscript{105} Lysias “On The Property Of Aristophanes,” trans. Todd 2000, 19.11

\textsuperscript{106} MacDowell 1978, 161

\textsuperscript{107} Lysias “ὑπὲρ τῶν ἀριστοφάνους χρημάτων…”, ed. Carey 2007, 19.57-59


\textsuperscript{109} Lysias “ὑπὲρ τῶν ἀριστοφάνους χρημάτων…”, ed. Carey 2007, 19.62

viability of a source of revenue, once the defendant managed to rebuild his wealth in response to
his pressing need to provide for himself, his family, and Aristophanes’ three children, whom he
would have to care for. The defendant says that the jurors will benefit more if he keeps his
property, but his claim cannot be trusted, and he does not present any calculations. He seems to
have been rich and his father was a benefactor to many people, so it is possible that he was
well-connected enough and had enough people in his debt to either ask for temporary financial
assistance or to “call in favors” from other citizens. The Treasury may have predicted that he
could rebuild his finances using these means, and it may have made a calculation that he would
continue to have positive financial value to them even if the jury voted to confiscate his property.
If this legal practice—of allowing a person to retain his citizenship for his potential to contribute
to the state—existed and was implemented by the Treasury in this case, it may also have been
used in other trials and when there were other charges involved. Economic factors may have
affected the use of the practice, since the Treasury may have tended to use it more often if a
wealthier citizen was on trial. These are reasoned guesses however, and more research would be
needed to gauge their validity.

111 ibid. 19.9
112 ibid. 19.59
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