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RESEARCH ARTICLE

Regulating free speech in a democracy: Lysias 10 *Against Theomnestos* and the law on slander

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Abstract

Lysias 10 *Against Theomnestos* is the only surviving example of a classical Greek speech on a charge of slander (*dikē kakēgorias*). The case turns on establishing communal consensus in evaluation of meta-discursive claims: assertions as to what the law says about what citizens can say about their fellow citizens. I adapt Marmor's account of the pragmatics of legal discourse to illuminate the litigants' strategies as they seek to control interpretation of the legal question in this much-discussed case from 380s BC Athens. We see how each party used different assumptions about the law's implicatures as well as its declarative meaning and presented these assumptions as grounded in common sense. The persuasive methods used by Lysias' client are illuminated by means of cognitive narratology's application of Lewisian possible-world logic to the creation of story-worlds and the relationships they generate between narrator and reader/audience. So understood, Lysias' speech helps answer questions about the role and limits of free/frank speech (*parrhēsia*) in democratic Athens and about the relationship between individual agency and the collective agency of the *dēmos*, questions crucial to an understanding of the place of legal discourse and legal conflict in the ideology and day-to-day praxis of the democratic city.

Keywords: Athens; democracy; law; rhetoric; slander

I. Introduction

Ancient Athenians were famously talkative and outspoken. Talk was the fuel of democracy: the running of the city required citizens to talk a great deal, in assemblies, council, courts and on numerous other occasions for meeting and debate. It was also central to its values, in the form of the ideal of equal opportunity to speak, *isēgoria*, of the open invitation whereby 'whoever wishes', *ho boulomenos*, could address the assembly, and of the valued principle or characteristic of unrestrained speech, *parrhēsia*. This did not in itself mean that Athens had a commitment to freedom of speech comparable to that enshrined in the First Amendment to the United States Constitution.[1] The three concepts mentioned have in common the fact that they are oriented towards protecting, not the rights of individual citizens, but the openness of the public sphere and its accessibility in principle to any citizen (not necessarily in practice to every citizen). What they do express, in different ways, is the idea that freedom of speech in a broad, negatively defined sense (the absence of systematic constraints on who could speak and what they could say) was important to the foundations of democratic freedom itself.

[1] See Sluiter and Rosen (2004) 1–4 and other essays in that collection, and the survey of modern thinking on free speech and its engagements with classical antiquity in Saxonhouse (2006) 16–36. The exact nature of the commitment enshrined in the First Amendment is of course itself a fraught subject.

Alongside celebration of speech as a touchstone of freedom there was recognition of its potential to harm. The bold claim of Thucydides' Pericles that Athenians regard speech not as harmful to action but as essential to its effectiveness is placed under severe scrutiny throughout the rest of the History.[2] Speech may displace action, and may also be deceitful, violent or generally corrupting.[3]

Speech is the medium of the daily transactions between citizens, formal and informal, which in turn are the medium of social relations within the democratic city. These transactions furnished the vast bulk of the day-to-day business of the law courts and were correspondingly the subject matter of much of Athenian law. The present discussion focuses on the one area of law that was concerned specifically with interactions between citizens *qua* speech: the law concerning 'speaking ill' of someone, *kakēgoria*.[4]

In this study I present a re-examination of the one ancient text directly concerned with a prosecution on this charge, Lysias 10 *Against Theomnestos*.[5] Where previous discussions have focused in particular on questions of substantive law (what the law actually was and what rights it accorded to the parties concerned) or of legal procedure (the means available for parties to obtain or defend those rights), I will interpret the speech from the point of view of the pragmatics of law: its significance as and within the context of social and political practice. In other words, I will attempt to answer the question of what it meant (on this particular occasion), what kind of proceeding it was, to prosecute someone on a charge of *kakēgoria*. As will be seen, I do not mean to concede that the substance of the law is in fact separable, in historical situations, or even conceptually, from its pragmatics, merely that it has sometimes been treated as being so.

The concept of the pragmatics of law that I apply here is influenced in particular by the work of Andrei Marmor, the philosopher of law.[6] Marmor draws on the philosophy of language, especially Paul Herbert Grice's theory of implicature, to illuminate how law functions semantically in practical situations. The centre of Marmor's attention is the language of law and its explication in terms of what is declaratively meant and contextually implicated by lawmakers on the one hand and by parties in legal disputes on the other. His approach thus takes as its starting point an assumption of the primacy of substantive law (though it goes on systematically to problematize this assumption). This assumption makes more obvious sense when dealing with modern codified legal systems than applied to the different conditions of ancient Athens.[7] I therefore adapt Marmor's

[2] Thuc. 2.40.2 οὐ τοὺς λόγους τοῖς ἔργοις βλάβην ἡγούμενοι ἀλλὰ μὴ προδιδαχθῆναι μᾶλλον λόγωι πρότερον ἢ ἐπὶ ἃ δεῖ ἔργῳ ἐλθεῖν, 'believing that what harms action is not speeches [*logoi*, plural], but rather failure to gain instruction through speaking [*logos*, singular] before progressing to act as required'). For the tension between this claim and the tenor of Thucydides' work as a whole, see Yunis (1996) 59–86 and the neat formulation of Barker (2009) 246: 'Thucydides does more than demonstrate the dangers of political rhetoric; his text performs the danger of that rhetoric'.

[3] See especially Hesk (2000) on deceitful speech, Too (1995) 91–92 on the violence of the 'loud voice' and Worman (2008) on Athenian anxieties about the corruptive potentialities of the mouth itself as the organ of the body which (among other functions) produces speech.

[4] I say '*qua* speech' because uniquely in these cases it is the act of speaking itself that constitutes the alleged offence. Obviously, as this case shows, in cases of slander just as in disputes concerning verbal contracts, the precise relationship between what was said and what was meant is one of the points at issue.

[5] *P.Oxy*. 2537 = Lys. *fr*. 308 Carey groups hypotheses of Lys. 10, its epitome Lys. 11, Lys. 9 and Lys. 8 under the category heading κακηγορίας, 'for slander' (line 6), but the grouping is a loose one; Lys. 9 relates to an unpaid fine for a slander offence, while Lys. 8 concerns an obscure dispute (involving slanderous allegations) between members of an association (and is in any case of uncertain but probably third-century or later date). See further Todd (2007) 545–46.

[6] See especially Marmor (2008), (2009) 106–30, (2014) 35–59. For a range of critical responses to Marmor's approach, see the other contributions (besides Marmor's own) in Capone and Poggi (2016).

[7] See especially Todd (1993) 64–73; 'at Athens, procedural gives rise to substantive law' (70). It is, of course, no less easy to overstate than to understate the differences between ancient and modern law, and Harris (2000) has

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approach to place legal praxis itself, the act and performance of taking legal action and engaging in legal dispute, at the centre of analysis.

I make use in particular of insights Marmor offers into what he terms the 'strategic' nature of legal discourse, in the sense that legal contexts create situations in which there is a systematic mismatch between what it is in communicators' interest to assert explicitly and what it may be in their interest to imply.[8] I hope to demonstrate that recognition of this characteristic of legal discourse is useful in analysing how law is invoked and contested in the agonistic rhetorical setting of the Athenian law courts.

Athenian democratic politics was characterized by ceaseless competition between groups of citizens united by ties of family or friendship but also by shared enmities in relation to other groups.[9] These contours of friendship and enmity shaped the community, fixing social identities but also providing a framework within which they could develop and adapt to circumstances. Litigation and verbal performance in the law courts provided an important locus for such competition between friendship groups. At stake was power in a variety of forms: status and prestige, the solidarity of the group and ability of its members to exert influence on each other's behalf, and more concrete assets of wealth, personal security and access to public office.

By re-examining how the law of slander was used within this competitive social context, I hope to contribute to our understanding of (i) how, specifically, Athenians understood the freedom to speak as central to their democracy; (ii) how this freedom related to the quasi-autocratic power of the *dēmos* (a problem that has been highlighted in a recent article by Matthew Landauer,[10] to which I will return below); and (iii) how the Athenians understood the identity, agency and responsibility of their *dēmos* itself, a question that has wider implications for the understanding of collective decision-making and thus of democracy itself, in modern as well as ancient societies.

II. Lysias 10 *Against Theomnestos*

In around 384 BC, an Athenian citizen in his early thirties whose name is not known (Lysias' client and the speaker of this speech, henceforth 'S') brought a case against an enemy of his, Theomnestos, on a charge of slander.[11] S claimed that Theomnestos had accused him of killing his own father. Bringing this prosecution was *prima facie* a course of

argued that the Athenian legal system paid close attention to substantive issues. The difference is perhaps as much one of professionalization as of codification: modern legal systems have established institutional and disciplinary protocols for determining what the substantive law is in a way which Athens and other ancient Greek cities did not.

[8] As Marmor (2008) 435 puts it, legal discourse is problematic from the point of view of implicature because 'the enactment of law is not a cooperative exchange of information'. It is not, of course, by any means unique in this respect. Non-cooperative communicative situations are common; they include instances of deceitful speech in general, as well as, for example, the specific cases of irony and rhetorical *logos eskhēmatismenos*. I take it to be Marmor's point that legal discourse is unusual because it is structurally or systemically non-cooperative; its non-cooperative quality is not reducible to participants' failure to observe, or decision to subvert, standard communicative conventions.

[9] See Alwine (2015) on the sociology of feuding in democratic Athens (with 125–26 on the place of Lys. 10 in the context of this wider social phenomenon).

[10] See Landauer (2012).

[11] The date is known from the statement at 10.4 that this is the 20th year since the restoration of democracy after the rule of the Thirty in 404/3. Depending on whether democracy was thought of as being restored at the end of the official year 404/3 or at the beginning of 403/2, this places the trial (by standard inclusive reckoning) either in 385/4 or, more likely, 384/3 (Todd (2007) 625). Lys. 10 is widely accepted as being a genuine work of Lysias (Todd (2007) 625–27), and I follow this near-consensus in referring to its writer as Lysias; there are, however, no major consequences for my argument if it is in fact the work of another speechwriter, or indeed of S himself. On Lys. 11 (not really a separate speech but a précis of Lys. 10), see Todd (2007) 640.

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action beset with risks. In the first place there was, as S acknowledges (10.2), the risk of appearing to be small-minded and litigious, and thus incurring ridicule and potentially permanent reputational damage. There was also a significant risk of handing power directly to his opponent Theomnestos by reminding people of the hurtful words he had spoken and acknowledging that they had achieved their hurtful purpose; in so doing, he gives importance to an accusation that need not have been taken seriously and might otherwise soon have been forgotten, and elevates a possible throwaway remark to the status of efficacious hostile action. Finally and most seriously there was a significant risk of losing the case: a setback in itself, but more importantly, as S eventually acknowledges (10.31), something his enemies could easily present as tantamount to a conviction on a charge of patricide. These risks were all the greater in the light of Theomnestos' considerable experience as a litigant and apparently impressive record of success, which will be discussed further below.[12]

The outcome of trials in Athens was seldom if ever entirely predictable. If convicted, Theomnestos probably faced a substantial fine, but the real jeopardy for S in the event of an acquittal was considerably greater.[13] This is reflected in the speech's rhetorical strategy of seeking sympathy by transferring attention from Theomnestos to S himself. Thus in 10.4–5 the allegation that S killed his father is deflected by means of the affecting story of how, in the terrible year of the Thirty, 13-year-old S lost both his father and his father's estate (presumably including his home) and was left in the hands of an unscrupulous guardian;[14] at the end of the speech, in 10.31, S claims that in this case he is as much the defendant as the prosecutor.

III. The prior 'history' of S and Theomnestos

The prosecution in *ca.* 384 has its roots in a rather complex sequence of earlier events. Lysias' speech refers back to them frequently and they are crucial both to its persuasive technique and to the interpretation of the significance of this prosecution itself. They must therefore be presented here briefly in order to begin with the sequence of events of which Lys. 10 is, among other things, a carefully crafted narrative.[15]

During the rule of the Thirty in Athens in 404/3 BC, S' father was executed by the Tyrants.[16] S, then aged 13, came under the guardianship of his older brother Pantaleon

[12] These factors may, of course, have made the case all the more attractive to Lysias as *logographos*, as a challenge and as an opportunity to display his rhetorical and legal know-how (regardless of the outcome). A speech which took up a difficult brief could achieve celebrity and attract (welcome or unwelcome) attention from rivals: see Isoc. *Paneg.* 188 on responses to his own speech Isoc. 21 (*Against Euthynous*), the *amarturos* ('speech with no witnesses').

[13] On the question of the penalty (a 500 drachma fine? Isoc. 20.3; *cf.* Lys. 10.12), see Todd (2007) 633. As usual, we do not know the outcome of the trial. It is of course conceivable that S was using the prosecution for *kakēgoria* to head off a prosecution for murder against himself, but there is no indication of such a possible prosecution or of who might have initiated it.

[14] Todd (2007) 667 points out that the jurors would not necessarily have accepted the implication that a 13-year-old was incapable of murder, comparing Antiph. 5.69 (*On the Murder of Herodes*) where a slave boy under the age of 12 is reported as having stabbed his master (though, as Todd acknowledges, this is reported as something of which no one would have thought the child capable: οὐδεὶς γὰρ ἂν ὤιετο τὸν παῖδα τολμῆσαί ποτε τοῦτο). But if it seemed unlikely that a 12-year-old slave would attack his master, it must surely have seemed less likely that a 13-year-old citizen would kill his father. Innocent children have a stereotypical role in exciting jurors' pity (Ar. *Vesp.* 568–74; Aeschin. 2.179). Here Lysias emphasizes the young S' naivety (*cf.* the Aeschines passage) and also subtly suggests that his innocence is aligned with a 'natural' democratic outlook: 'at that age I did not understand what oligarchy is'.

[15] For more detailed discussion see Hillgruber (1988) 1–4; Todd (2007) 627–31; Kästle (2012) 14–21.

[16] For the oligarchic regime's policy of summary execution, see Lys. 12.5–7, 36, 82–83; Xen. *Ath. pol.* 35.4; Xen. *Hell.* 2.3.13–14, 2.4.21. Sources refer to both political and financial motives; Lysias in speech 12 describes greed

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(10.45).[17] Pantaleon deprived S of his share in the estate, a detail that is mentioned ostensibly to show that S had nothing to gain from his father's death (though it is hard to see how he could have anticipated this development) but perhaps more importantly to arouse the jurors' pity for him, both as a destitute orphan and as a victim of the Thirty (like the *dēmos*, itself the victim of dispossession by the oligarchy).

The next important incident took place some years later and involved a group of men serving together on campaign as hoplites in an engagement where significant casualties were sustained (10.25). Stephen Todd plausibly suggests the Battle of the Nemea River in 394 BC.[18] This group included the defendant Theomnestos, a certain Dionysios and probably also two other parties to the disputes that would follow, a certain Lysitheos and S himself. This engagement later gave rise to the accusation that Theomnestos showed cowardice by throwing away his shield.

Some years later again, Theomnestos speaks in the assembly.[19] This results in the first of a series of legal actions (case A): Lysitheos prosecutes Theomnestos for addressing the people (*dēmēgorein*) when, as a coward who had dropped his shield in battle, he was not entitled to do so (10.1). It is not clear which legal procedure Lysitheos used, or what the outcome was, though it seems overwhelmingly likely that Theomnestos was acquitted (since otherwise Lysias would surely have advised S to exploit a previous verdict against his opponent).[20]

Theomnestos then took two legal actions of his own (it is not clear in what order). He brought (case B) a prosecution for false witness (*dikē pseudomarturiōn*) against Dionysios, presumably for the evidence the latter had given in case A; Dionysios was convicted and

under the cloak of a moral purge, Xenophon in *Ath. pol.* as an initial purge on moral grounds which got out of hand, driven by the regime's insecurity and desire for money (see Rhodes (1992) 446, with further references). It is slightly surprising that S attributes the loss of his father's estate entirely to Pantaleon and not to the Thirty (see Todd (2007) 668 n.21). This suggests (but does not prove) that in his father's case the motive for execution was political; the property might then not have been confiscated either because it was too insignificant to merit attention or because the inheritor Pantaleon was himself an ally of the regime.

[17] Strictly speaking, the text (ὁ γὰρ πρεσβύτερος ἀδελφὸς Πανταλέων) does not specify whether Pantaleon is S' uncle (his father's brother) or his brother. The latter is the more obvious assumption, however, and in addition to the considerations about the advanced age of the putative uncle advanced by Todd (2007) 668, it seems overwhelmingly likely that jurors would take πρεσβύτερος as correlating with discussion of the speaker's own age in the preceding sentences and thus as referring to his brother (*cf.* Hillgruber (1988) 44).

[18] Todd (2007) 690. The battle is described in Xen. *Hell.* 4.2.9–26. *Pace* Todd (2007) 340, it was not in any obvious sense an Athenian victory; it did give rise to accusations of cowardice between Athenians, *cf.* Lys. 16.15.

[19] On the time intervals see, Todd (2007) 690. It seems plausible, as Todd suggests, that S and Theomnestos were near-contemporaries and thus rivals within the same peer group.

[20] See Hillgruber (1988) 1–2, 30–32; Todd (2007) 628, 662–63; Kästle (2012) 14–16. Debate about the verdict is to some extent subjective but also reflects methodological assumptions: Michael Hillgruber, focusing on the legal substance of the outcome, argues for a conviction on the grounds that Theomnestos' subsequent legal proceedings would otherwise have been unnecessary; I am more persuaded by Todd (2007) 628, who focuses on the animosity underlying the whole dispute, in view of which the ensuing prosecutions can easily be understood as the victor gleefully pursuing his advantage. The argument about procedure turns on philological and legal questions and depends largely on the text of 10.1. The procedure we would expect is a *dokimasia rhētorōn* (*cf.* Aeschin. 1.28–32; MacDowell 2005), but in that case at 10.1 we would expect to read Θεομνήστωι ἐπήγγελλε (δοκιμασίαν) instead of MSS Θεόμνηστον εἰσήγγελλε. The MSS text suggests an *eisangelia* or impeachment, which does not seem appropriate. Emendation of the verb (Gernet) is relatively easy but to emend the noun ending as well seems a stretch. The possibilities are (i) that this was an unusual kind of *eisangelia*; (ii) that it was indeed a *dokimasia rhētorōn* and that the verb *eisangellein* is used here in a 'non-technical' sense; (iii) that the text is corrupt. Todd's very tentative suggestion ((2007) 663 n.11) that, with Gernet's emendation ἐπήγγελλε, we might have a slightly unusual use of ἐπαγγέλλειν plus acc. and inf. ('Lysitheos gave summons [for a *dokimasia*, on the grounds] that Theomnestos …') is attractive. It is also conceivable that S simply made a mistake and used the wrong legal terminology here (a suggestion which raises, of course, the perennial questions about the relationships between speaker, speechwriter and transmitted text) or was even guilty of deliberate obfuscation, though if so it is not clear to what end.

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suffered the unusually severe penalty of loss of citizen privileges, *atimia* (10.22, 24–25). He also brought (case C) a prosecution for slander (*dikē kakēgorias*) against someone called Theon, mentioned nowhere else, who it seems was also convicted (10.12).[21] This brings us to the present case (D): S in turn prosecutes Theomnestos for slander (*dikē kakēgorias*) on the grounds that, in the course of trial A, Theomnestos said that S killed his own father.

The story presented here is entirely reconstructed from the speech itself; we have no external corroboration for any of it, as is often the case with speeches from Athenian private trials. It is also worth noting the organization of material in the speech. Lysias 10 may be analysed in terms of the common four-part structure as follows:[22]

1–3 PROEM. Reasons for prosecuting.

4–5 NARRATIVE. S did not kill his father.

6–39 PROOFS (*pisteis*).

6–14 First refutative *pistis*. Refutation of Theomnestos' *de dicto* interpretation of the law on slanderous accusations (*aporrhēta*).

15–21 Second refutative *pistis*. Didactic *epideixis* on interpretation of law.

22–26 First confirmative *pistis*. Comparison of Theomnestos and Dionysios as defendants. Dionysios deserved pity, Theomnestos does not.

27–29 Second confirmative *pistis*. Comparison of S and Theomnestos as citizens. Like his father, S is brave; like Theomnestos, Theomnestos' father was a coward.

30 Additional refutative *pistis*. Theomnestos will claim he spoke in anger: that is no defence.

31 CONCLUSION. S, who prosecuted the Thirty, is effectively on trial for murder.

As this analysis indicates, the narrative section is very short, confined to swift dismissal of the idea that S killed his father.[23] This is the only part of the account for which witnesses are introduced (10.5 'virtually all of you know that I am telling the truth; all the same, I will provide witnesses for it'). The rest of the history that I have presented above is not told as a continuous narrative but divulged piecemeal by means of references scattered through the speech. This is to be connected by the unusual device of telling the jurors at the very beginning of the speech that they themselves are to serve S as witnesses (10.1 'I think I shall have no lack of witnesses, men of the jury, since I see many among you serving on this jury who were present at the time').[24] S clearly makes the claim not to lack (metaphorical) witnesses precisely because he does lack real witnesses for much of what

[21] The fact that Theon appears only here has tempted editors to emend the passage, but the proposed emendations are not easy and do not seem necessary. Slightly careless introduction of names is a characteristic of this speech; Todd (2007) 629 n.19 compares the sudden appearance of the new figure Dionysios at 10.24, and the marginal ambiguity over 'the older brother' Pantaleon at 10.5 is perhaps another case in point. Carey's OCT rightly prints the MS text.

[22] Such analysis is always to some extent subjective. Mine emphasizes structural patterns perhaps at the risk of presenting the speech as more rigidly and explicitly organized (more overtly 'rhetorical') than it is; Lysias is a master of concealing his own art. For a different but not incompatible account, see Todd (2007) 661, 666, 669, 686, 693. For early rhetorical thinking about the *partes orationes*, see Pl. *Phdr.* 266d–267d; Arist. *Rh.* 1354b16–19, 1414a29–1414b18. For application of the four-part structure to Lysias' speeches in the ancient rhetorical tradition, Dion. Hal. *Lys.* 17–19.

[23] 'Lysias' client passes swiftly—suspiciously swiftly—over the fact [*sic*] that he was too young to have killed his father himself or to have been an oligarchic conspirator' (Hesk (2009) 153). Obviously there are two diametrically opposed possible reasons for S not to appear to take this allegation seriously.

[24] There are no exact parallels for this claim; the closest approximations are discussed by Todd (2007) 661–62. For discussion of the 'as you all know' *topos* (the so-called 'lying *topos*'), see Hesk (2000) 227–31.

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he is going to say (unsurprisingly, since he is bringing a prosecution against someone who has been successful in securing a conviction for perjury against at least one witness in a previous case).

IV. Imagining and shaping the past

The appeal to the jurors' memory should thus be treated with some scepticism. It is of course possible that some had witnessed and remembered some or even all of the events in question, but in view of the random element in Athenian jury selection, the passage of time, the sheer volume of public and private business generated by the democracy and the lack of saliency of most of these events to anyone but the parties directly involved, it is highly unlikely that many of the jurors would have recalled them in any detail. It is the task of the speaker and speechwriter to construct and shape this past. In this case as in other Athenian legal disputes, the competition is thus among other things a competition pitting against each other different possible worlds, between which speakers compel their audiences to choose.[25] Let us review, by way of illustration, what opposing possible worlds (PW) might look like in this case:

> **PW1:** Theomnestos was a dutiful citizen who had the bad luck on hoplite service to find himself surrounded by men who were or became his enemies. Some time afterwards, back in Athens, he exercised his right to speak in the assembly. At this point these enemies, motivated by sheer malice or by the desire to prevent him from taking an active part in politics, concocted the story that Theomnestos was a coward who had left his shield and run away in battle. One of these men, Lysitheos, turned this story into a public accusation of cowardice, and enlisted associates to back up his false assertions. Theomnestos was, of course, vindicated when the matter came to trial, and made it his business to protect others from the same gang of bullies by taking every legal opportunity he had to impress on them what a serious matter it was to call a fellow citizen a coward or to stand in the way of his democratic rights.
>
> **PW2:** A group of friends including Lysitheos, Dionysios, Theon and S himself were on campaign as hoplites, and had the misfortune to find themselves serving alongside Theomnestos. Theomnestos was loud but always mysteriously absent when there was danger or hard work, and when it came to the battle itself it was no great surprise to see him leave his place in the line and drop his shield in order to save his skin. All the same, none of them took any action against him until, back in Athens, they saw with alarm that he was putting himself forward as a speaker in the assembly and potential political leader, at which point Lysitheos had no choice but to denounce him as unfit. Naturally the others supported Lysitheos in the ensuing legal inquiry by testifying to what they had seen. Theomnestos, evidently aware that his only hope was to silence the witnesses to his cowardice, instantly turned on his accusers. Not content with winning an unfair judgement against Lysitheos, he has now inflicted *atimia* on

[25] On possible worlds (or 'story-worlds', 'narrative universes') in narrative theory, see, for example, Ryan (2012) and Palmer (2010). In these terms, law court speeches may be seen as offering their audiences two or more possible worlds (PWs) and then marshalling them into adopting the point of view of the speaker and thus identifying the speaker's actual world (AW) as their own AW. Gagarin (2014) provides a study of arguments from probability (*eikos*) in Athenian rhetoric in terms of counterfactual suppositions, but the narratives presented explicitly or implicitly in forensic speeches are just as much concerned with multiple versions of 'reality' as are such probabilistic arguments. The variant story-worlds created by a speech as a whole are on a continuum with the common rhetorical device of small-scale hypotheses and counterfactuals, as in this speech at 10.10 'if you became one of the Eleven'; on a particularly striking ('far-fetched') example at Lys. 6.4, see Todd (2007) 405, 442.

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> Dionysios and won a verdict against Theon as well. Not for nothing, then, has our speaker S concluded that Theomnestos needs to be stopped, and that the grotesque accusations against him and his father must be confronted before Theomnestos turns them into legal proceedings.

Some version of PW1 presumably figured in Theomnestos' speech, though it must also have featured the arguments about the law addressed by S in 10.6–21 and probably devoted some space to the question of S' relationship with his father, which is passed over so quickly by S himself.[26] Lysias' characterization of Theomnestos is systematically designed to make anything like PW1 seem unlikely while establishing PW2 as the actual world that S and the jurors inhabit. Our first image of Theomnestos is as a coward who lost his shield (1): the participle *apobeblēkota* is usefully insinuating, because it offers the sense 'because he had dropped' as well as 'on the grounds that he had dropped', without explicitly repeating the allegation that a previous court had found slanderous. He is then portrayed as worthless (2 *phaulon kai oudenos axion*), as a loner who expects unique privileges (3 *monōi … exaireton*), as shameless (6 *etolma*), stupid (14 *anoētōs diakeimenos*; 15 *skaion*), as having dangerous delusions of power and, above all, of course, as a coward.[27]

The characterization of Theomnestos is sharply polarizing and undermines any story-world he may attempt to create while drawing the jurors emphatically into S' own. The fragmentary, jigsaw narrative constructed by the speech also has interesting effects on the construction of time. There are three distinct chronological layers or fields that form the background to the current situation. First, a historical past, the year of the Thirty, when the speaker was still a child and his father, like so many citizens, perished. This year provides a fixed chronological reference point, for the speaker and his audience as well as for us (10.4). In spite of the Amnesty or prohibition 'against reminding of wrongs', *mē mnēsikakein*, to which it gave rise in the following year, the year of the Thirty was well-remembered in Athenian public discourse ('well' in the sense of frequently and confidently, not necessarily accurately) and thus provides a firm anchor for S' account. As has been seen, he is at pains to establish his own status as, like the *dēmos* itself, a victim of the Thirty.[28] Then there is a middle past, which may be characterized as a time of testing for Theomnestos: this is (according to S' version of events) when he should have shown courage in battle but failed to do so, and when, conversely, he showed his shamelessness by coming forward to speak in the assembly although he had failed that previous key test. Finally, there is the recent past, dominated by litigation initiated by Theomnestos. To this litigation S now makes his own unwilling contribution (the fourth in the sequence of trials A to D): but does so, as will be seen, only in order to effect a return to that first pristine historical time, and right the wrong that was done there.

[26] S presumably responds to the legal arguments that have been used by Theomnestos in the pre-trial arbitration (10.6; Hillgruber (1988) 12, 46–47; Todd (2007) 630–31, 669). It appears that Theomnestos had not relied, and was not expected by S to rely, on the defence that his allegation was true (*cf.* 10.30, and on this defence see Dem. 23.50 and Todd (2007) 634, correcting Todd (1993) 260), but he need not have missed any opportunity to suggest that this was the case without directly saying so.

[27] See below on the increasing prominence of the missing shield in the speech; on the characterization of Theomnestos, Todd (2007) 636. At 10.13 ('are you so powerful that you think those wronged by you will never get redress?'), δύνασαι is the only instance in the Lysiac corpus of this second person singular form, a fact partly explained by the unusual use of direct address of the individual opponent here, but which nonetheless suggests a rather fierce emphasis; the absolute use of the verb δύνασθαι ('be powerful' as opposed to 'have the power (to do X)') is itself slightly unusual.

[28] On memory of the year of the Thirty, see Forsdyke (2005) 196–204; on the dynamics of social memory in Athenian public discourse, Steinbock (2013), with 236–37 on memory and commemoration of the overthrow of the Thirty as the return of 'the *dēmos*' from exile.

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V. Slander: the shape of the law

But this is a trial for slander, and it is to the charge of slander that the speaker's arguments are, at least overtly, directed. I turn now to Athenian law on slander. This is a complex subject that is here presented briefly and schematically.[29]

Slander or defamation (literally 'speaking badly of' someone: *kakōs legein*, *kakēgoria*) is a subset of the wider category of insulting or abusive language (*loidorein*, *loidoria*). It is actionable (by *dikē kakēgorias*) only if at least one of the following is true:

- the victim is dead (Plut. *Sol.* 21.1, cf.*Lexicon Rhetoricum Cantabrigiense*, *s.vv.* κακηγορίας δίκη);
- the victim is one of the 'tyrannicides' Harmodios and Aristogeiton (Hyp. *fr.* 15b (*Against Philippides*) 2);[30]
- the victim is a protected public official (perhaps Dem. 21.32–33);[31]
- the victim works in the agora and the offence takes the form of a slighting reference to this fact (Dem. 57.30);
- the offence takes place in a protected public space (Plut. *Sol.* 21.2);
- the offence takes the form of specifically prohibited allegations (*aporrhēta*, 'unsayable things': Isoc. 20.3), which include at least accusations of murder (Lys. 10.6), beating a parent (Lys. 10.8) or abandoning one's shield (Lys. 10.9).[32]

The legal situation was complex, and it is perhaps unsurprising that our one surviving speech from a prosecution using the law on slander also stands out as one unusually dominated by technical legal discussion, even though only one strand of this law, the category of *aporrhēta*, is at issue. Lysias' speech nonetheless helps us to understand how the law on *kakēgoria* could be used to police the limits of free or frank speech (*parrhēsia*) in democratic Athens.

VI. The *aporrhēta*

Where slander is defined by its content rather than by the person addressed or the place where it happens, it is defined in terms of a limited list of unsayable things, *aporrhēta*. Why these things, and just these things? Robert W. Wallace suggests a connection between these *aporrhēta* and conduct that could be adduced at a *dokimasia rhētorōn* in order to disbar a citizen from speaking in the assembly.[33] This certainly applies to the act of abandoning

[29] This outline describes the law in the form in which it seems to have been in force at the time of the prosecution of Theomnestos. At least some elements of it (in particular, the provision against speaking ill of the dead) were believed in antiquity to have originated with Solon; many details, including the chronology of the law's development and the penalties for offenders, are controversial. See MacDowell (1978) 126–29; Todd (1993) 258–62; Carter (2004) 207 (oversimplifying slightly); Todd (2007) 631–35. I present 'the law' schematically for the sake of clarity, but there is an underlying methodological problem in view of the observation made earlier that in Athens substantive law does not have primacy over legal procedure but is rather in dialectic with it. The law was one of the forms of evidence presented by litigants in Athenian courts and, like other forms of evidence, was subject to interpretation and manipulation.

[30] A category that can be (but evidently was not, entirely, in people's minds) subsumed into the previous one, since neither of the pair long survived the incident that made them famous.

[31] On this type of offence, relevant to the background of Lys. 9, see Todd (2007) 592–93.

[32] Loomis (2003) and Kästle (2012) 5–10 both attempt to simplify the picture by positing three types of case. For Loomis, these are (i) *aporrhēta*, (ii) offences against agora workers and (iii) offences in protected spaces; for Kästle, (i) offences against the dead or in protected spaces, (ii) *aporrhēta* and (iii) offences against agora workers. In each case the simplification comes at the expense of selecting or eliding evidence in rather arbitrary ways and results in anomalies of its own. On the vexed question of how if at all the law on slander was relevant to comic drama, see Halliwell (1991), Henderson (1998), Wallace (2005) and Wohl (2014).

[33] See Wallace (1994).

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one's shield, as illustrated by the case of Theomnestos, but as Wallace acknowledges it is unclear whether it applies to all the *aporrhēta*, for example homicide. Conversely there are a number of offences, including other forms of military desertion besides shield-loss, mistreatment of parents falling short of physical violence, neglect of one's property and self-prostitution, which would be grounds for failing a *dokimasia* but do not figure among the *aporrhēta*.[34] There is a connection, but it is not one of equivalence. I will return to this question below.

The puzzling aspects of the substantive law on *kakēgoria*, insofar as we can reconstruct it and insofar as the concept itself is a valid one, do not unduly affect S' case. That case depends on establishing three facts: (i) that to accuse someone of murder is one of the *aporrhēta*; (ii) that Theomnestos accused S of killing his father; and (iii) that S did not kill his father. His prosecution, and (so far as we can tell) Theomnestos' defence, rests on the first of these, the question of law: was the allegation that S killed his father one of the forbidden utterances, the *aporrhēta*?

S deals with this point in his first two *pisteis*. Theomnestos apparently maintained in the pre-trial arbitration (10.6), and is expected to maintain again in court, that the law of slander applies specifically to the word *androphonos*, 'man-killer' or 'homicide'. This defence provides S the opportunity to give an entertaining disquisition on the polyvalence of language and the difference between the letter of the law and its intent, a disquisition that is unique in surviving forensic oratory but finds a striking echo in Aristotle's discussion of legal 'equity' (*to epieikes*) in the *Rhetoric*.[35] This enables S not only to develop his representation of Theomnestos as absurdly dense but also to turn the tables on him by returning to the accusation of cowardice with which the whole sequence of litigation represented by trials A to D began. Surely Theomnestos would not have been any less angry with Theon if the latter had merely said that he had 'flung away' his shield rather than 'lost' it?[36]

Theomnestos' apparent desire to have the law of *kakēgoria* both ways, interpreting it differently as prosecutor and as defendant, reinforces his characterization from the start of the speech as someone with a sinister (from a democratic point of view) aspiration to exceptionalism and personal power (10.3, 10.13). This shift in focus from the present trial for slander to a previous one also obviously refocuses the judges' attention on Theomnestos' alleged cowardice; at the same time, it sets in train a comparison of character between S and his opponent that develops throughout the remainder of the speech and to which we will return shortly.

VII. The strategies of the litigants

Lysias' speech makes Theomnestos' defence, that the law applied *de dicto* not *de re* and thus prohibited the use of certain words rather than the allegation of certain forms of conduct,

[34] On homicide and *dokimasia rhētorōn*, see Todd (2007) 634; on other offences, MacDowell (1978) 174, Todd (2007) 634 and Kästle (2012) 9.

[35] 10.7: 'It would have been a big task for the lawgiver to write all the words that have the same force, but by speaking about one he made it clear about them all'. *Cf.* Arist. *Rh.* 1374a11–1374b1, on what is omitted from written law (τοῦ ἰδίου νόμου καὶ γεγραμμένου ἔλλειμμα): such omissions are either unintentional (things the lawgivers did not think of) or intentional (when precision is impossible and it is necessary to make a general statement of broad application). For example, a law against wounding with an iron instrument cannot specify how big or what kind because it would take forever to enumerate the possibilities (ὑπολείποι γὰρ ἂν ὁ αἰὼν διαριθμοῦντα, 1373a33). In these latter cases the principle of equity (τὸ ἐπιεικές) applies, equity being 'that which is just beyond the written law' (τὸ παρὰ τὸν γεγραμμένον νόμον δίκαιον, 1373a27–28). See Hesk (2009) 150–55.

[36] 10.9: 'If someone were to say that you flung away your shield, when in the law it says that if someone makes a claim about losing one they are subject to prosecution, would you not prosecute him, but be content to have flung away your shield and say it was no concern of yours?'

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seem like a gift to the prosecution. This has been regarded as a puzzle, even as the central puzzle of this speech, especially in view of the fact that it seems likely that the pre-trial arbitration was decided in Theomnestos' favour.[37] The basic fact of course is that we do not know what form Theomnestos' defence took; it must have borne some relationship to what S says about it, but not necessarily a close one. One possibility we can rule out is that either litigant adopted a course of action that was simply naive or obviously ill-advised. Both knew what they were doing, in the sense and to the extent that Theomnestos had already been successful in securing a conviction for *kakēgoria* and S was clearly, if not a friend, at least a close enough associate of the defendant in that previous case to have had the opportunity to inform himself about it. It seems likely that Theomnestos did indeed exploit the oddly specific nature of the law on slander and the fact that it clearly was not intended to, and did not in practice, act as any systematic curb on the frank speech, *parrhēsia*, which was such a characteristic feature of democratic citizenship.[38] As I have suggested, another advantage of this defence was that it would have allowed him to be liberal with insinuations that S was indeed materially implicated in his father's death without going so far as to rest his case on the literal truth of what he said.

Returning to the prosecution, S goes on to illustrate his general point about the meaning of the law with an especially fascinating, and most unusually didactic,[39] mini-lecture on the language of archaic law. Because words change, laws come to need glossaries: S is able to provide examples.[40] If Theomnestos' view of the law were correct, when words lost their force laws would simply perish. But he is surely not such a 'man of iron' that he has failed to realize that while words change, the realities to which they refer remain the same.[41]

This lecture is topical (in a broad sense) against the background of the extended process of copying and compiling laws that began in Athens in the last decade of the fifth century and continued in the fourth and that was itself part of a wider trend towards an archival and curatorial approach to documents.[42] It also obviously gives S the opportunity to cast himself as the mouthpiece of the law and, more importantly, as someone who understands the proper relationship between word and action. Theomnestos, meanwhile, is cast as the dull pupil. But we are also reminded that, in the speaker's version of events, this whole saga began because Theomnestos presented himself as able to speak for the city's benefit when he had previously shown himself unable to act for it.

The second half of S' argumentation builds this contrast between himself and Theomnestos. First Dionysios, the witness in trial A whose conviction for false testimony in

[37] See Hillgruber (1988) 12, asking how Theomnestos could have persuaded the public arbitrator '[m]it solch einem kindischen Argument'; Todd (2007) 635, suggesting that 'some lingering sense of *aporrhēta* as words of ill-omen' may have been behind Theomnestos' strategy.

[38] For discussion of what *parrhēsia* meant in practice and its place in democratic ideology, see, for example, Carter (2004), other essays in Sluiter and Rosen (2004) and Saxonhouse (2006).

[39] 10.15: 'I want to teach him about this from other laws, too, in the hope that even now, here on the platform, he can be instructed …'. As Todd (2007) ad loc. notes, the use of the verb διδάσκω, 'teach', is not unusual in itself but it is very unusual for a speaker in court to claim to teach his opponent (as opposed to the judges).

[40] S' legal glossary (10.16–19): ποδοκάκκη/ξύλον, 'stocks'; ἐπιορκεῖν/ὀμνύναι, 'swear'; δρασκάζειν/ἀποδιδράσκειν, 'abscond'; ἀπίλλειν/ἀποκλήειν, 'exclude'; στάσιμος/(ἐπὶ τόκῳ), 'at interest'; πεφασμένως/φανερῶς, 'in public'; πωλεῖσθαι/βαδίζειν, 'walk around'; οἰκεύς/θεράπων, 'servant'. ποδοκάκκη possibly has pride of place in S' discussion because of its humorous value (probably from *ποδοκατοχή, 'foot-detention', but suggesting ποδο-κάκκη, 'foot-crap'), but if so this is not overtly exploited. Jokes are unusual in Lysias and in Attic oratory in general; see Todd (2007) 580, commenting on a rare example at Lys. 8.20 (also on the subject of slander, but not by Lysias and of later date).

[41] 10.20: 'But if he is not made of iron, I think he has now got it into his head that things are the same now as they were in the past, but some of the names we use for them are not the same as they were in the past'.

[42] On the process of compilation of laws, see Robertson (1990) and Gawlinski (2007); on archives and archiving, Thomas (1989) 38–40, Thomas (1992) 96 and Sickinger (1994) 294–95.

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trial B led to his loss of citizen rights (*atimia*), is used as a proxy (10.21–26), standing for S and for the group of friends whose brave service is contrasted with Theomnestos' desertion. Already Dionysios' courage has been punished while Theomnestos' cowardice has been rewarded: an acquittal now would compound this injustice.[43]

S here comes as close as he dares to repeating the original charge that Theomnestos abandoned his shield. This object, the emblem of S' characterization of Theomnestos as a coward, becomes an ever more conspicuous focal point in the course of the speech:[44] a kind of negative exhibit, since its absence from view since the time of the speaker's first encounter with Theomnestos is the very point of contention. This focus on Theomnestos' shield combined with comparisons between the (justified) charge of losing a shield and the (monstrous) charge that the speaker killed his father prepares us for the climax of the argument, a direct comparison between the speaker and Theomnestos (10.27–29). Here comparison between the two litigants leads us back to comparison between their respective fathers, just as the earlier technical discussion of law took us back to discussion of laws from a previous generation.

Not surprisingly, the two fathers cut very different figures:[45] the speaker's an experienced general whom the judges are invited to remember, and who died nobly at the distinguished age of 67; Theomnestos' father, by contrast, a cipher, a mere shadow of his son's cowardice. At this climactic moment the puzzle of the missing shield is resolved: it is out of sight because it hangs in a temple of the Athenians' enemies, a monument of shame, where it keeps company with similar contributions from his father! By contrast, trophies of the speaker's own father's bravery can be seen where they should be, in the Athenians' own temples. This inspiring image completes the alignment of the speaker with his father, and of them both with the victorious Athenian people, and by implication that of Theomnestos and his father both with the city's external enemies and with the Thirty. It is thus the perfect way to launch the double emotional thrust of the speaker's conclusion.[46] The trial is here revealed as simultaneously political and personal, and in both respects of existential importance: a chance to defend democracy one more time against the arbitrary violence of the Thirty, and a chance to acquit the speaker on a charge of killing his own father.

VIII. Conclusions (1): the law of slander, the pragmatics of law and the citizen community

Thus Lysias' speaker develops a prosecution for slander into something of far more profound significance, both for him personally and for the city. But why use the law of slander at all? And what does this tell us about slander in Athens? I conclude with some brief suggestions, returning to the observations about the pragmatics of law that were made in the Introduction.

One reason to use the law of slander against Theomnestos was of course that Theomnestos had used it himself. This clearly made it an easier step to take. It meant that S was able to anticipate and defuse prejudice against slander charges as small-minded and

[43] 10.24–26: 'Who could not pity Dionysios, who received such a disastrous verdict when his courage in times of danger had been exemplary …? So do not pity Theomnestos if he has been insulted in a way he deserved …'.

[44] There are seven instances in the speech of the noun ἀσπίς, 'shield' (10.9 *bis*, 10.12 *bis*, 10.21 *bis*, 10.22) in addition to indirect references like the one in the previous note.

[45] 10.27–28: '… [my father,] who served many times as general, and endured many other dangers at your side … the monuments of whose courage hang even today in your sanctuaries, whereas those of his worthlessness and his father's are in those of our enemies: that's how congenital cowardice is in their family …'. On this allegation of 'congenital' cowardice and the collective democratic ideology to which it appeals, see Hesk (2009) 154.

[46] 10.31: 'Now I am bringing a prosecution for slander, but in the same vote I am standing trial for my father's murder: I, who on my own, as soon as I passed my *dokimasia*, took action in the Areopagos against the Thirty'.

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litigious without fear that his opponent would make any serious attempt to exploit this prejudice against him (10.2). It was also an effective pre-emptive strike in case S was in line to follow Dionysios and Theon in Theomnestos' campaign of litigation, and it gave a convenient opportunity, as has been seen, to revive the allegation of cowardice against him without shouldering an awkward burden of proof.

More fundamentally, though, I suggest that S (perhaps in consultation with Lysias) deliberately chose this case as an opportunity to confront a potentially deadly opponent directly on an issue of law. The sequence of trials so far had exhausted the possibilities of arguments about individual technicalities or questions of fact; it was also, presumably, becoming increasingly difficult to enlist witnesses, both because of the passage of time and because of the natural fears resulting from Theomnestos' success in securing convictions for slander and perjury.[47] The essential facts in this particular case do not, at any rate, seem to have been in any serious doubt. What Theomnestos said at arbitration apparently included the argument about the word *androphonos*, and there would have been no point in using this argument if he had never said anything about S killing his father; if, on the other hand, there was any prospect of this allegation being shown to be true, the risk taken by S in the present trial becomes unbelievably high.

S therefore had a motive to take a different risk: the risk of pitting his own version not of the declarative content of the law but of its implicature against that offered by his opponent. As Marmor argues, the understanding of law (even in modern systems where substantive law is paramount) depends on dialogues: between lawmakers, between the lawmaker and the parties to legal disputes, and between the parties themselves. The outcome of these dialogues is determined by the participants' assumptions not just about what the law means in isolation but about its implicatures, what the law means for us in this particular communicative situation: in other words, on 'conversational maxims' in the Gricean sense.[48]

As Marmor shows, even in modern legal settings the conversational maxims that apply to law are by no means clear; the same applies *a fortiori* to an ancient Athenian setting, where the law is less objectively fixed, and thus also potentially more dialogic, more 'conversational'. Recognition of this characteristic of legal discourse is useful in analysing how the law is invoked and contested in the agonistic rhetorical setting of the Athenian law courts more generally, but it also has a particular relevance to Lysias 10, because S explicitly makes an argument about the implicature of the law central to his case. Using in particular his appeal to the memory of the Thirty by means of constructing alternate possible worlds, S tries to convince a jury of his fellow citizens that they would rather be members of his conversational community than his opponent's and thus adopt his rules for the interpretation of the law. If they do so, they will conclude with him that the law on *kakēgoria* is correctly understood as targeting a particular type of behaviour: one of which he has characterized Theomnestos as an exemplar *par excellence*.

This brings us back to the wider question of the significance of the law of slander at Athens. The hostility between Theomnestos on the one hand and S and his associates on the other was clearly very rancorous. It had as its focus access to one of the primary expressions of active Athenian citizenship, the right to speak in the assembly (*dēmēgorein*). It began with an attempt to prevent Theomnestos from doing so because he had apparently failed in the corresponding performance of active citizenship during his military service; the speaker makes play in 10.3 and 10.10 of Theomnestos'

[47] This is something S addresses at the very beginning: 10.1, 'I think I shall have no lack of witnesses, men of the jury, since I see among you serving on this jury many who were present at the time …'.

[48] See Grice (1989) 27 and Marmor (2008) on the application of such maxims to 'conversations' about legislation.

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inappropriate sense of the correspondence between speech and action.[49] If we accept, for the sake of argument, that the speaker's version of Theomnestos' story is true, then the toxic consequences of the failure of Lysitheos' initial attempt to disbar him from speaking become very apparent.

On this view, Theomnestos is an intruder among the body of citizens, appropriating an active political career to which he is not entitled. Worse still, having taken his illicit place in the assembly, his only means of preserving it is by depriving others, like Dionysios, of citizen rights to which they are entitled, by systematically eliminating all those who have seen him for what he really is.[50] It is in this context that the law of slander, a relatively rare and limited way of restricting what one citizen may say about another, finds its application: a silencing measure that Theomnestos has used as a poison but which the speaker sets out to use as a cure. It is a provision that limits what citizens can say about each other, particularly when what is said has an impact on their capacity to function together as citizens.

At this point we may return to Wallace's theory connecting the *aporrhēta* (murder, shield-dropping, parent-beating) to the process of *dokimasia rhētorōn* which provided grounds for excluding a citizen from speaking in the assembly. There is strength in the view that the *aporrhēta* involve accusations of particularly acute dereliction of duty against fellow citizens: physically eliminating a fellow citizen; failure to stand by fellow citizens in acute danger; violent assault on those through whom one qualifies as a citizen in the first place. In the present case, the speaker and his friends are involved in a conflict with Theomnestos that has become in effect a zero-sum game: his citizen rights or theirs. It is in such situations that prosecution for slander becomes a credible means of warding off imputations against an individual's standing as a citizen. It is thus a way of protecting the collective integrity of the citizen body, something which (rhetorically and perhaps also in reality) is of particular importance to S. Orphaned and disinherited at a young age, quite probably (despite the unidentifiable action in the Areopagos mentioned in 10.31) prevented from achieving any redress by the terms of the post-war Amnesty, he uses the current case as one step in the process of reasserting himself both as the inheritor of his father's reputation and as a legitimate member of the citizen community.

IX. Conclusions (2): frank speech, the *dēmos* and citizen agency

The possibility of prosecution for *kakēgoria* places a limit (in principle, regardless of how often it was applied in practice) on the frank and open speech, *parrhēsia*, that was valued as a core feature and touchstone of democratic politics. How is this situation compatible with the democratic ethos of the Athenian law courts?[51]

Parrhēsia as understood by speakers in the fourth-century courts exists 'for the sake of the city',[52] not primarily for the sake of the individual citizen. It involves a contract between speaker and audience based on a shared perception of frank speech as socially beneficial, an act of solidarity. It also involves implied subordination of the interests of the individual to the interests of the collective, but this subordination is based on the principle

[49] See 10.3: 'Or is it an exclusive privilege for him and no other Athenian to do and say whatever he wants, in defiance of the laws?' Todd (2007) 666 notes that the 'him alone' *topos* is 'in Lysias always negative'; the adjective ἐξαίρετος occurs only here in the Lysiac corpus, *cf.* Hillgruber (1988) 39; and 10.10 ἡδέως γὰρ ἂν παρὰ σοῦ πυθοίμην (περὶ τοῦτο γὰρ δεινὸς εἶ καὶ ποιεῖν καὶ λέγειν)· εἴ τίς σε εἴποι ῥῖψαι τὴν ἀσπίδα …, 'I would be delighted if you would tell me (since you are an expert on this in both deed and word): suppose someone were to say that you threw your shield away …'.

[50] 10.30: 'I hadn't realized then that you punish people who see a crime committed, but forgive people who lose their shields'.

[51] For the law courts as bedrock of democracy, see Xen. *Ath. pol.* 9.1.

[52] Saxonhouse (2006) 96.

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that such frankness itself is the expression of the individual's free and equal participation in the interests of the collective. The individual speaks for shared benefit and at personal risk, but through membership of the community shares not only the benefit but also the risk.

As Matthew Landauer has demonstrated, *parrhēsia* in ancient Greece was by no means exclusively associated with systems of government on the democratic continuum;[53] in fact many ancient writers, Isocrates among them, focus on the importance of *parrhēsia* for tyrannical and other autocratic regimes. Landauer emphasizes the fact (central to Foucault's appropriation of the term)[54] that the very concept of *parrhēsia* is predicated on an element of danger, of jeopardy, without which there would be no need for, or consciousness of, such 'frankness' in the first place. On this basis he argues that democratic *parrhēsia* is a function of the autocratic power, the 'tyranny', of the *dēmos*, reflected in the fact that, unlike other public authorities in Athens (but like tyrants in the literal sense), the *dēmos* is exempt from another core democratic principle, the principle of *euthunē*, formal accountability for its actions.

Vincent Farenga provides an interesting counterpoint to Landauer's argument.[55] He construes *parrhēsia* in fourth-century Athens as an almost physical opening of one's mind, and of the limited perspectival understandings and perceptions it contains, to one's fellow citizens, thus breaking down the barriers of individual subjectivity in a way that serves the accumulation of 'democratic knowledge' (in the sense articulated by Josiah Ober)[56] and may also contribute to *homonoia:* like-mindedness and civic harmony. Farenga does not downplay the element of jeopardy implicit in *parrhēsia* but sees it in terms very reminiscent of the ideology of Athenian democracy itself, as self-sacrifice in the interests of the collective in which the individual participates and that is constitutive of the point of view from which he exercises *parrhēsia* in the first place. *Parrhēsia* thus becomes the hinge between individual and collective agency.

My reading of Lysias 10 supports Farenga's argument. The configuration of the Athenian law on *kakēgoria* can be understood as providing a means for citizens to debate, contest and police the limits of *parrhēsia* itself. Those limits are defined not so much in terms of propositions that may or may not be uttered as in terms of commitment to and participation in the collective citizen body itself as guarantor of *parrhēsia*. The *aporrhēta* are allegations that threaten this collective by placing another citizen outside it as a breaker of its fundamental bonds: as a destroyer of life, of family ties or, in the case of the shield-loser, of the vital ethos of reducing jeopardy in battle by sharing it (in preserving the hoplite shield line), an ethos that offers an analogue in a different sphere of action to the collectively advantageous, risky sharing represented by democratic *parrhēsia* itself. Recourse to the law on *kakēgoria* is rare and limited in the surviving speeches because it is confined to the relatively few real grounds (as opposed to specious or fantastical ones) on which an opponent might be represented as wholly outside the democratic process, unfit to be an opponent at all.

Acknowledgements. (William Mack). Niall Livingstone died suddenly on 30 July 2019, at the age of 52. Niall was born in Ann Arbor, Michigan, and educated at King Edward VI Camp Hill Boys Grammar School, Birmingham, and subsequently at Christ Church, Oxford, where he wrote his doctoral thesis, a commentary on Isocrates' *Busiris,* which was published in 2001. In his detailed study of this often overlooked speech, Niall demonstrated its importance for understanding the pedagogy of Isocrates and established his expertise in the study of Attic oratory and education which later bore fruit in his monograph *Athens: The City as University* (2016). After lectureships at Oxford and St Andrews, Niall returned to Birmingham to join the Classics department at the University of Birmingham in 1999, where he was a highly valued colleague for 20 years. He was known for his erudition, his intellectual breadth and above all for his gentleness and his dedication to his students. A longer tribute, written by

[53] Landauer (2012).
[54] See for instance Foucault (2001).
[55] Farenga (2014).
[56] Ober (2008).

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his long-term colleague and close friend Elena Theodorakopoulos, was published in the *Council of University Classical Departments Bulletin* 48 (2019).

This article was accepted for the *Journal of Hellenic Studies* by Douglas Cairns in 2016. Niall's poor health, however, prevented him from subsequently revising the text for final publication. This has now been undertaken at the request of Liz Clements, Niall's partner, and I am very grateful for the encouragement of Douglas Cairns to see this article published and the practical help which Lin Foxhall gave in accomplishing it. I am sure that Niall himself would have wished to make more extensive changes in response to the helpful comments of his readers than I have felt able to make on his behalf. Instead, I have proceeded with a light touch, preferring deletions to insertions and, as far as possible, making use of Niall's own words where insertions were necessary.

The article as it stands here is, in essence, as Niall left it, and illustrates his characteristic intellectual breadth. Niall draws Lewisian possible-world analysis and recent developments in the theory of legal pragmatics into his analysis of an often overlooked speech, Lysias 10. With surprising clarity and no pretension, he shows how these tools enrich our reading of ancient oratory. The most important contribution that this article makes, however, is in demonstrating how this apparently minor speech relating to the law on slander, with its curious antiquarian digression on the evolution of legal language, bears on a central issue in the study of Athenian democracy. This is the issue, which all democracies share, of the regulation of open speech and its limits, and in particular of the policing of accusations intended to exclude opponents from legitimate participation in the political sphere.

Bibliography

Alwine, A. (2015) *Enmity and Feuding in Classical Athens* (Austin)

Barker, E. (2009) *Entering the* Agon*: Dissent and Authority in Homer, Historiography, and Tragedy* (Oxford)

Capone, A. and Poggi, F. (eds) (2016) *Pragmatics and Law: Philosophical Perspectives* (Perspective in Pragmatics, Philosophy and Psychology 7) (Dordrecht)

Carter, D.M. (2004) 'Citizen attribute, negative right: a conceptual difference between ancient and modern ideas of freedom of speech', in I. Sluiter and R.M. Rosen (eds), *Free Speech in Classical Antiquity* (Leiden) 197–220

Farenga, V. (2014) 'Open and speak your mind: citizen agency, the likelihood of truth, and democratic knowledge in archaic and classical Greece', in V. Wohl (ed.), *Probabilities, Hypotheticals and Counterfactuals in Ancient Greek Thought* (Cambridge) 84–100

Forsdyke, S. (2005) *Exile, Ostracism and Democracy: The Politics of Expulsion in Ancient Greece* (Princeton)

Foucault, M. (2001) *Fearless Speech* (Los Angeles)

Gagarin, M. (2014) '*Eikos* arguments in Athenian forensic oratory', in V. Wohl (ed.), *Probabilities, Hypotheticals and Counterfactuals in Ancient Greek Thought* (Cambridge), 15–29

Gawlinski, L. (2007) 'The Athenian calendar of sacrifices: a new fragment from the Athenian agora', *Hesperia* 76, 37–55

Grice, H.P. (1989) *Studies in the Way of Words* (Cambridge MA)

Halliwell, S. (1991) 'Comic satire and freedom of speech in classical Athens', *JHS* 111, 48–70

Harris, E.M. (2000) 'Open texture in Athenian law', *Dike* 3, 27–79

Henderson, J. (1998) 'Attic Old Comedy, frank speech, and democracy', in D. Boedeker and K.A. Raaflaub (eds), *Democracy, Empire, and the Arts in Fifth-Century Athens* (Cambridge MA) 255–73

Hesk, J. (2000) *Deception and Democracy in Classical Athens* (Cambridge)

— (2009) 'Types of oratory', in E. Gunderson (ed.), *The Cambridge Companion to Ancient Rhetoric* (Cambridge) 145–61

https://doi.org/10.1017/S0075426923000642 Published online by Cambridge University Press

Hillgruber, M. (1988) *Die zehnte Rede des Lysias. Einleitung, Text und Kommentar mit einem Anhang über die Gesetzesinterpretationen bei den attischen Rednern* (Berlin and New York)
Kästle, D.J. (2012) 'Recht und Rhetorik in der *Rede Gegen Theomnestos* (Lysias 10)', *RhM* 155, 1–40
Landauer, M. (2012) '*Parrhesia* and the *demos tyrannos*: frank speech, flattery and accountability in democratic Athens', *HPTh* 33, 185–208
Loomis, W.T. (2003) 'Athenian slander: a common law perspective', in G.W. Bakewell and J.P. Sickinger (eds), *Gestures: Essays in Ancient History, Literature and Philosophy Presented to Alan L. Boegehold* (Oxford) 287–300
MacDowell, D.M. (1978) *The Law in Classical Athens* (Ithaca)
— (2005) 'The Athenian procedure of *dokimasia* of orators', in R.W. Wallace and M. Gagarin (eds), *Symposion 2001: Akten der Gesellschaft für griechische und hellenistische Rechtsgeschichte* (Vienna) 79–87
Marmor, A. (2008) 'The pragmatics of legal language', *Ratio Juris* 21, 423–52
— (2009) *Social Conventions: From Language to Law* (Princeton)
— (2014) *The Language of Law* (Oxford)
Ober, J. (2008) *Democracy and Knowledge: Innovation and Learning in Classical Athens* (Princeton)
Palmer, A. (2010) 'Storyworlds and groups', in L. Zunshine (ed.), *Introduction to Cognitive Cultural Studies* (Baltimore) 176–92
Rhodes, P.J, (1992) *A Commentary on the Aristotelian* Athenaion Politeia (Oxford)
Robertson, N. (1990) 'The laws of Athens, 410–399 BC: the evidence for review and publication', *JHS* 110, 43–75
Ryan, M.-L. (2012) 'Possible worlds', in *The Living Handbook of Narratology* https://www-archiv.fdm.uni-hamburg.de/lhn/node/54.html
Saxonhouse, A.W. (2006) *Free Speech and Democracy in Ancient Athens* (Cambridge)
Sickinger, J.P. (1994) 'Inscriptions and archives in classical Athens', *Hesperia* 43, 286–96
Sluiter, I. and Rosen, R.M. (2004) 'General introduction', in Sluiter and Rosen (eds), *Free Speech in Classical Antiquity* (Leiden) 1–19
Steinbock, B. (2013) *Social Memory in Athenian Public Discourse: Uses and Meanings of the Past* (Ann Arbor)
Thomas, R. (1989) *Oral Tradition and Written Record in Classical Athens* (Cambridge)
— (1992) *Literacy and Orality in Ancient Greece* (Cambridge)
Todd, S.C. (1993) *The Shape of Athenian Law* (Oxford)
— (2007) *A Commentary on Lysias,* Speeches *1–11* (Oxford)
Too, Y.L. (1995) *The Rhetoric of Identity in Isocrates: Text, Power, Pedagogy* (Cambridge)
Wallace, R.W. (1994) 'The Athenian laws against slander', in G. Thür (ed.), *Symposion 1993: Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Cologne) 153–64
— (2005) 'Law, Attic Comedy, and the regulation of comic speech', in M. Gagarin and D. Cohen (eds), *The Cambridge Companion to Ancient Greek Law* (Cambridge) 357–73
Wohl, V. (2010) *Law's Cosmos: Juridical Discourse in Athenian Forensic Oratory* (Cambridge)
— (2014) 'Comedy and Athenian law', in M. Revermann (ed.), *The Cambridge Companion to Greek Comedy* (Cambridge) 322–35
Worman, N. (2008) *Abusive Mouths in Classical Athens* (Cambridge)
Yunis, H. (1996) *Taming Democracy: Models of Political Rhetoric in Classical Athens* (Ithaca)

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