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**Regulating Free Speech in a Democracy:
Lysias 10 *Against Theomnestos* and the Law on Slander**

Abstract

Lysias 10 *Against Theomnestos* is the only surviving example of a classical Greek speech on a charge of slander (*dikê kakêgorias*). The case turns on establishing communal consensus in evaluation of meta-discursive claims: assertions as to what the law says about what citizens 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's client are illuminated by means of cognitive narratology's application of Lewisian possible-world logic to the creation of storyworlds 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 (*parrhêsia*) in democratic Athens and about the relationship between individual agency and the collective agency of the *dêmos*, 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.

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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 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, *isêgoria*, of the open invitation whereby 'whoever wishes', *ho boulomenos*, could address the Assembly, and of the valued principle or characteristic of unrestrained speech, *parrhêsia*. 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 orientated 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.

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, *ta idia sumbolaia* in the terminology of fourth-century oratory, furnished the vast bulk of the day-to-day business of the lawcourts and were correspondingly the subject-matter of much of Athenian law. The present discussion focuses on the one area of law which was concerned specifically with interactions between citizens *qua* speech: the law concerning 'speaking ill' of someone, *kakêgoria*.⁴

¹ See Rosen and Sluiter (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 (2010) 16-36. The exact nature of the commitment enshrined in the First Amendment is of course itself a fraught subject.

² Th. 2.40.2 οὐ τοὺς λόγους τοῖς ἔργοις βλάβην ἠγούμενοι ἀλλὰ μὴ προδιδαχθῆναι μᾶλλον λόγῳ πρότερον ἢ ἐπὶ ᾧ δεῖ ἐργῶι 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 e.g. 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 other disputes e.g. concerning verbal contracts the precise relationship between what was said and what was meant is one of the points at issue.

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 what (on this particular occasion) it meant – what kind of proceeding it was – to prosecute someone on a charge of *kakêgoria*. 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 which I apply here is influenced in particular by the work of the philosopher of law Andrei Marmor.⁶ Marmor draws on the philosophy of language, especially 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 problematise this assumption). This assumption makes more obvious sense when dealing with modern codified legal systems than when applied to the different conditions of ancient Athens.⁷ I therefore adapt Marmor's approach to place legal *praxis* itself, the act and performance of taking legal action and engaging in legal dispute, at the centre of analysis.

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) 545-6.

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 the difference is perhaps as much one of professionalisation 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.

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’ interests to assert explicitly and what it may be in their interests to imply.⁸ I hope to demonstrate that recognition of this characteristic of law as defined by Marmor is useful in analysing how law is invoked and contested in the agonistic rhetorical setting of the Athenian lawcourts.

Athenian democratic politics was characterised 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 lawcourts 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 (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 *dêmos* (an problem which has been highlighted in a recent article by Matthew Landauer (2012) to which I will return below), and (iii) how the Athenians understood the identity, agency and responsibility of their *dêmos* itself – a question which has wider implications for the understanding of collective decision-making and thus of democracy itself, in modern as well as ancient societies.

Lysias 10 Against Theomnestos

⁸ As Marmor 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’ (Marmor (2008) 435). 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 of rhetorical *logos eskhêmatismenos*. 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 125-6 on the place of Lys. 10 in the context of this wider social phenomenon).

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, to court on a charge of slander.¹⁰ S claimed that Theomnestos had accused him of killing his own father. Bringing this prosecution was *prima facie* a course of 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 which 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 which 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 apparent impressive record of success, which will be discussed further below.¹¹

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 case of an acquittal was considerably greater.¹² 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

¹⁰ The date is known from the statement at 10.4 that this is the twentieth 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, in 384/3 (Todd (2007) 625). Lys. 10 is widely accepted as being a genuine work of Lysias (Todd (2007) 625-7), 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.

¹¹ 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 e.g. Isoc. 4 (*Paneg.*) 188 on responses to his own speech Isoc. 21 (*Against Euthynous*), the *amarturos* ('speech with no witnesses').

¹² On the question of the penalty (a 500 drachma fine?) 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 *kakêgoria* 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.

the allegation that S killed his father is deflected by means of the affecting story of how, in the terrible year of the Thirty, thirteen-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;¹³ at the end of the speech, in 10.31, S claims that in this case he is as much the defendant as the prosecutor.

The Prior 'History' of S and Theomnestos

The prosecution in 383 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 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.¹⁴

During the rule of the Thirty in Athens in 404/3 BC, S's father was executed by the Thirty.¹⁵ S, then aged thirteen, came under the guardianship of his older brother Pantaleon (10.4-5).¹⁶ Pantaleon deprived S of his share in the estate, a detail which 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

¹³ Todd (2007) 667 points out that the jurors would not necessarily have accepted the implication that a thirteen-year-old was incapable of murder, comparing Antiphon 5.69 (*On the Murder of Herodes*) where a slave boy under the age of twelve 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: οὐδεις γὰρ ἂν ὤϊετο τὸν παῖδα τολμηῆσαι τοῦτο). This is true, but if it seemed unlikely that a twelve-year-old slave would attack his master it must surely have seemed less likely that a thirteen-year-old citizen would kill his father. Innocent children have a stereotypical role in exciting jurors' pity (Ar. *Wasps* 568-74, Aeschin. 2.179). Here Lysias emphasises the young S'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'.

¹⁴ For more detailed discussion see Hillgruber (1988) 1-4, Todd (2007) 627-31, Kästle (2012) 14-21.

¹⁵ For the oligarchic regime's policy of summary execution see e.g. Lys. 12.5-7, 36, 82-3, *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 under the cloak of a moral purge, *Ath. Pol.* an initial purge on moral grounds which got out of hand, driven by the regime's insecurity and desire for money (see Rhodes (1993) 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.

¹⁶ Strictly speaking the text (ὁ γὰρ πρεσβύτερος ἀδελφὸς Πανταλέων) does not specify whether Pantaleon is S's uncle (his father's brother) or his own 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 own brother. The confidence of Hillgruber (1988) 44 ('Pantaleon ist sicher der ältere Bruder des Sprechers') therefore seems justified.

jurors' pity for him, both as a destitute orphan and as a victim of the Thirty (like the *dêmos*, 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). Todd plausibly suggests the Battle of the Nemea River in 394 BC.¹⁷ This group included the defendant Theomnestos, a certain Dionysios, and probably also two other parties to the disputes which would follow, a certain Lysitheos and S himself. This engagement gave rise later to the accusation that Theomnestos showed cowardice by throwing away his shield.

Some years later again, Theomnestos speaks in the Assembly.¹⁸ This results in the first of a series of legal actions (case A): Lysitheos prosecutes Theomnestos for addressing the people (*dêmêgorein*) when, as a coward who had dropped his shield in battle, he was not entitled to do so (10.1). It is not clear what 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).¹⁹

¹⁷ 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.

¹⁸ 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.

¹⁹ See Hillgruber (1988) 1-2, 30-32; Todd (2007) 628, 662-3; Kästle (2012) 14-16. The argument about the verdict is to some extent subjective but also reflects methodological assumptions: 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, who focuses on the animosity underlying the whole dispute ('Athenian litigation is a highly personalised system', (2007) 628), 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 rhetorôn* (cf. Aeschin. 1.28-32), but in that case at 10.1 we would expect to read Θεομνήστῳ ἐπίγγελλε (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. Possibilities are (i) that this was an unusual kind of *eisangelia*, (ii) that it was indeed a *dokimasia rhetorôn* 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 ἐπίγγελλε, 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 relationship between speaker, speechwriter and transmitted text) or was even guilty of deliberate obfuscation, though if so it is not clear to what end.

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 (*dikê pseudomarturiôn*) against Dionysios, presumably for the evidence the latter had given in case A; Dionysios was convicted and suffered the unusually severe penalty of loss of citizen privileges, *atimia* (10.22, 24-25). He also brought (case C) a prosecution for slander (*dikê kakêgorias*) against someone called Theon, mentioned nowhere else, who it seems was also convicted (10.12).²⁰ This brings us to the present case (D): S in turn prosecutes Theomnestos for slander (*dikê kakêgorias*) on the grounds that, in the course of trial (A), Theomnestos said that S killed S's 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 organisation of material in the speech. Lysias 10 may be analysed in terms of the common four-part structure as follows:²¹

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 Th.'s *de dicto* interpretation of the law on slanderous accusations (*aporrhêta*).

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

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

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

²⁰ 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 character 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.

²¹ Such analysis is always to some extent subjective. Mine emphasises structural patterns perhaps at the risk of presenting the speech as more rigidly and explicitly organised (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 Plato *Phaedrus* 266d-267d, Arist. *Rhet.* 1354b16-19, 1414a29-1414b18; for application of the four-part structure to Lysias' speeches in the ancient rhetorical tradition, e.g. D.H. *Lysias* 17-19.

30 Additional refutative *pistis*. Th. 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.²² This is the only part of the account for which witnesses are introduced (10.5 ‘you virtually all know that I am telling the truth; all the same I will provide witnesses for it’). The rest of the past history which I have presented above is not told as a continuous story but divulged piecemeal through 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...’).²³ S clearly makes the claim not to lack (metaphorical) witnesses precisely because he does lack real witnesses for much of what he is going to say – not surprisingly, when 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.

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 of them had witnessed and did have a recollection of 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 for anyone but the parties directly involved, it is highly unlikely (even allowing for the possibility of heightened memory faculties in a society which relied to a significant extent on orality and face-to-face interaction) that many of them retained them in any detail. For its original audience as much as for us, therefore, the journey on which the speech takes us is one of imaginative reconstruction as well as of memory. Conversely, it is the task of the speaker and speech-writer to construct and shape this past for us. In this case as in other Athenian legal disputes, the competition is thus among other things a competition pitting against each

²² ‘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.

²³ There are no exact parallels for this claim; the closest approximations are discussed by Todd (2007) 661-2.

other different possible worlds, between which speakers compel their audiences to choose.²⁴ Let us review, by way of illustration, what opposing possible worlds in this case might look like:

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 them, 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 judgment against Lysitheos, he*

²⁴ On possible worlds (or 'storyworlds', 'narrative universes') in narrative theory, see e.g. Ryan (2012), Palmer (2010). In its terms lawcourt speeches may be seen as offering their audiences two or more possible worlds (PWs) and then marshalling them into adopting the PoV 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 storyworlds 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.

has now inflicted atimia on 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 about him and his father must be confronted before Theomnestos himself 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's relationship with his father which is passed over so quickly by S himself.²⁵ Lysias' characterisation of Theomnestos is systematically designed to make anything like PW1 seem remote while establishing PW2 as the actual world which 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 which a previous court had found slanderous. He is then portrayed as worthless (*phaulon kai oudenos axion*, 2), as a loner who expects unique privileges (*monôî... exaireton*, 3), as shameless (*etolma*, 6), stupid (*anoêtôs diakeimenos*, 14; *skaion*, 15), as having dangerous delusions of power, and above all, of course, as a coward.²⁶

The characterisation of Theomnestos is sharply polarising and undermines any storyworld he may attempt to create while drawing the jurors emphatically into S's own. The fragmentary, jigsaw narrative constructed by the speech also has interesting effects in the construction of time. There are three distinct chronological layers or fields which 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', *mê mnêsikakein*, to

²⁵ The legal arguments were used by Theomnestos in the pre-trial arbitration (10.6) and were thus a matter of record (Hillgruber (1988) 12, 46-47; Todd (2007) 630-1, 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.

²⁶ See below on the increasing prominence in the speech of the missing shield; on the characterisation 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 which is partly explained by the unusual use here of direct address to the individual opponent, 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.

which it gave rise in the following year, the year of the Thirty was a well-remembered year in Athenian public discourse ('well' in the sense of frequently and confidently, not necessarily accurately) and thus provides a firm anchor for S's account; as has been seen, he is at pains to establish his own status as, like the *dêmos* itself, a victim of the Thirty.²⁷ Then a middle past, which may be characterised as a time of testing for Theomnestos: this is (according to S's version of events) when he should have shown his 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 which was done there.

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 which is here presented briefly and schematically.²⁸

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

- the victim is dead (Plutarch *Solon* 21.1, cf. *Lexicon Rhetoricum Cantabrigiense*, s.vv. *κακηγορίας δίκη*);
- the victim is one of the 'tyrannicides' Harmodios and Aristogeiton (Hypereides *fr.* 15b (*Against Philippides*) 2);²⁹

²⁷ On memory of the year of the Thirty see e.g. Forsdyke (2005) 196-204; on the dynamics of social memory in Athenian public discourse, Steinbock (2013), with 236-7 on memory and commemoration of the overthrow of the Thirty as the return of 'the *dêmos*' from exile.

²⁸ 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) 126-9; Todd (1993) 258-62; Carter (2004) 207 (oversimplifying slightly); Todd (2007) 631-5. 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. Law is evidence in Athenian courts and like other evidence subject to interpretation and manipulation.

- the victim is a protected public official (perhaps: Dem. 21.32-33);³⁰
- 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. *Solon* 21.2);
- the offence takes the form of specifically prohibited allegations (*aporrhêta*, ‘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).³¹

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 *aporrhêta*, is at issue.

The *Aporrhêta*

In such cases, 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, *aporrhêta*. Why these things, and just these things? Wallace 1994 suggests a connection between these *aporrhêta* and conduct which could be adduced at a *dokimasia rhêtorôn* in order to disbar a citizen from speaking in the assembly. This certainly applies to the act of abandoning one’s shield, as illustrated by the case of Theomnestos, but as Wallace acknowledges it is unclear whether it applies to all the *aporrhêta*, 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

²⁹ A category which 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 which made them famous.

³⁰ On this type of offence, relevant to the background of Lys. 9, see Todd (2007) 592-3.

³¹ Loomis 2003 and Kästle 2012: 5-10 both attempt to simplify the picture by positing three types of case. For Loomis, these are (i) *aporrhêta*, (ii) offences against agora workers, and (iii) offences in protected spaces; for Kästle, (i) offences against the dead *or* in protected spaces, (ii) *aporrhêta*, 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 how if at all the law on slander was relevant to comic drama, see Halliwell (1991), Henderson (1998), Wallace (2005) and Wohl (2014).

not figure among the *aporrhêta*.³² 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 *kakêgoria*, insofar as we can reconstruct it and insofar as the concept itself is a valid one, do not unduly affect S's case. That case depends on establishing three facts: (i) that to accuse someone of killing someone is one of the *aporrhêta*; (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 *aporrhêta*?

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 with 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 which is unique in surviving forensic oratory but finds a striking echo in Aristotle's discussion of legal 'equity' (*to epieikes*) in the *Rhetoric*.³³ This enables him not only to develop his representation of Theomnestos as being 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' anger against Theon would not

³² On homicide and *dokimasia rhêtorôn*, see Todd (2007) 634; on other offences, MacDowell (1978) 174, Todd (2007) 634 and Kästle (2012) 9.

³³ 10.7 'It would have been a big task for the lawgiver to write all the words which have the same force, but by speaking about one he made it clear about them all'. Cf. Aristotle *Rhetoric* 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 (ὑπολείπει γὰρ ἂν ὁ αἰὼν διαριθμοῦντα, 1373a33). In these latter cases the principle of equity (τὸ ἐπιεικέες) applies, equity being 'that which is just beyond the written law' (τὸ παρὰ τὸν γεγραμμένον νόμον δίκαιον, 1373a27-28). See Hesk (2009) 150-5.

have been any the less if the latter had merely said that he ‘flung away’ his shield rather than ‘lost’ it?³⁴

Theomnestos’ apparent desire to have the law of *kakêgoria* both ways, interpreting it differently as prosecutor and as defendant, reinforces his characterisation 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 which develops throughout the remainder of the speech and to which we will return shortly.

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, 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.³⁵ 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 which 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 *kakêgoria* 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,

³⁴ 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?’

³⁵ See e.g. 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 *aporrhêta* as words of ill-omen’ may have been behind Theomnestos’ strategy.

parrhêsia, which was such a characteristic feature of democratic citizenship.³⁶ 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,³⁷ mini-lecture on the language of archaic law. Because words change, laws come to need glossaries: S is able to provide examples.³⁸ If Theomnestos' view of law was 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 realise by now that while words change, the realities to which they refer remain the same.³⁹

This lecture is topical (in a broad sense) against the background of the extended process of copying and compiling laws which began in Athens in the last decade of the fifth century and continued in the fourth and which was itself part of a wider trend towards an archival and curatorial approach to documents.⁴⁰ 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 being able to speak for the city's benefit when he had previously shown himself unable to act for it.

³⁶ For discussion of what *parrhêsia* meant in practice and what its place was in democratic ideology, see e.g. Carter (2004), other essays in Sluiter and Rosen (2004), and Saxonhouse (2006).

³⁷ 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 *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).

³⁸ S's legal glossary (10.16-19): ποδοκάκκη/ ξύλον *stocks*, ἐπιορκεῖν/ ὀμνύναι *swear*, δρασκάζειν/ ἀποδιδράσκειν *abscond*, ἀπίλλειν/ ἀποκλήρειν *exclude*, στάσιμος/ (ἐπὶ τόκῳ) *at interest*, πεφασμένως/ φανερώς *in public*, πωλεῖσθαι/ βαδίζειν *walk around*, οἰκέυς/ θεράπων *servant*. ποδοκάκκη possibly has pride of place in S's discussion because of its humour 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).

³⁹ 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.'

⁴⁰ On the process of compilation of laws see e.g. Robertson (1990), Gawlinski (2007); on archives and archiving e.g. Thomas (1989) 38-40, Thomas (1992) 96 and Sickinger (1994) 294-5.

The second half of S's argumentation builds this contrast between himself and Theomnestos. First Dionysios, the witness in trial A whose conviction for false testimony in trial B led to 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.⁴¹

S here comes as close as he dares to repeating the original charge that Theomnestos abandoned his shield. This object, the emblem of S's characterisation of Theomnestos as a coward, becomes an ever more conspicuous focal point in the course of the speech:⁴² 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.⁴³ the speaker's an experienced general whom the judges are invited to remember, and who died nobly at the distinguished age of sixty-seven; 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 the temples 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

⁴¹ 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...'

⁴² 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.

⁴³ 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 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.

temples. This inspiring image completes the alignment of the speaker with his father, and of both of them with the victorious Athenian people – and by implication 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.⁴⁴ 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.

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 which 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 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

⁴⁴ 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.'

both for slander and for perjury. The essential facts in this particular case do not, in any case, seem to have been in any serious doubt. What Theomnestos said at arbitration was by now a matter of record and 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.⁴⁵

As Marmor shows, even in modern legal settings the conversational maxims which apply to law are by no means clear; the same applies *a fortiori* to an ancient Athenian setting, where law is less objectively fixed – and thus also potentially more dialogic, more 'conversational'. Conversational maxims are determined by the participants in conversation. S takes his chance, using in particular the appeal to the memory of the Thirty by means of the construction of alternate possible worlds, of convincing 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 *kakêgoria* is correctly understood as targeting a particular type of behaviour: one which he has characterised Theomnestos as exemplifying *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 a rancorous one. It had as its focus access to one of the primary expressions of active Athenian citizenship, the right to speak in the assembly (*dêmêgorein*). It began with

⁴⁵ See Grice (1989), e.g. 27, and Marmor (2008) on the application of such maxims to 'conversations' about legislation.

an attempt to prevent Theomnestos from doing so because he had, apparently, failed in the corresponding performance of active citizenship during military service; the speaker makes play in 10.3 and 10.10 of Theomnestos' inappropriate sense of the correspondence between speech and action.⁴⁶ 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.⁴⁷ 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 which Theomnestos has used as a poison but which the speaker sets out to use as a cure. It is a provision which limits what citizens can say about other citizens 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 *aporrhêta* (murder, shield-dropping, parent-beating) with the process of *dokimasia rhêtorôn* and conducting which provided grounds from excluding a citizen from speaking in the assembly. There is strength in the view that the *aporrhêta* involve accusations of particularly acute dereliction of duty to fellow citizens – physically eliminating a fellow citizen; failure to stand by fellow citizens in acute danger; violent assault on those by virtue of whose existence one qualifies as a citizen in the first place. In the present case, the speaker and his friends have become involved in a conflict with Theomnestos which 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

⁴⁶ 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?', on which Todd (2007) 666 notes that the 'him alone' *topos* is 'in Lysias always negative'; the adjective ἐξάριετος 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 ρῖψαι 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...'

⁴⁷ 10.30 'I hadn't realised then that you punish people who see a crime committed – but forgive people who lose their shields.'

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 (in spite of the unidentifiable action in the Areopagos mentioned in 10.31) restricted in 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.

Conclusions (2): Frank Speech, the Dêmos and Citizen Agency

The availability of recourse to prosecution for *kakêgoria* places a limit (in principle, regardless of how often it was applied in practice) on the frank and open speech, *parrhêsia*, which was valued as a core feature and touchstone of democratic politics. How is this situation compatible with the democratic ethos of the Athenian lawcourts?⁴⁸

Parrhêsia as understood by speakers in the fourth-century courts exists 'for the sake of the city' (Saxonhouse (2006) 96), not primarily for the sake of the individual citizen. It involves a contract between speaker and audience based on 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 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 and devolves not only the benefit but also the risk.

As Matthew Landauer has demonstrated (2012), *parrhêsia* in ancient Greece was by no means exclusively associated with systems of government on the democratic continuum; in fact many ancient writers, Isocrates among them, focus on the importance of *parrhêsia* for tyrannical and other autocratic regimes. Landauer emphasises the fact (central to Foucault's appropriation of the term, see for instance Foucault (2001)) that the very concept of *parrhêsia* 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 *parrhêsia* is a function of the autocratic power, the 'tyranny', of the *dêmos*,

⁴⁸ For the lawcourts as bedrock of democracy see *Ath. Pol.* 9.1.

reflected in the fact that unlike other public authorities in Athens (but like tyrants in the literal sense) the *dêmos* is exempt from another core democratic principle, the principle of *euthunê*, formal accountability for its actions.

An article by Vincent Farenga (2014) provides an interesting counterpoint to Landauer's argument. Farenga construes *parrhêsia* 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 which serves the accumulation of 'democratic knowledge' (in the sense articulated by Ober (2008)) and may also contribute to *homonoia*: like-mindedness and civic harmony. Farenga does not downplay the element of jeopardy implicit in *parrhêsia*, but sees it, in terms very reminiscent of the ideology of Athenian democracy itself, in terms of self-sacrifice in the interests of a collective in which the individual participates and which is constitutive of the point of view from which the individual exercises *parrhêsia* in the first place. *Parrhêsia* 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 *kakêgoria* can be understood as being designed to provide a means for citizens to debate, contest and police the limits of *parrhêsia* itself. Those limits are defined not so much in terms of propositions which may or may not be uttered as in terms of commitment to and participation in the collective citizen body itself as guarantor of *parrhêsia*. The *aporrhêta* are allegations which threaten this collective by placing another citizen outside it as a breaker of its fundamental bonds: as a destroyer of life, of ties of family, or, in the case of the shield-loser, of the vital ethos of reduction of jeopardy in battle by sharing it (in preserving the hoplite shield-line), an ethos which offers an analogue in a different sphere of action to the collectively advantageous, risky sharing represented by democratic *parrhêsia* itself. Recourse to the law on *kakêgoria* is rare and limited 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.

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 Sluiter and Rosen (eds), 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
- 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. (2009) 'Types of oratory', in E. Gunderson (ed.) *The Cambridge Companion to Ancient Rhetoric* (Cambridge) 145-61
- 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', *History of Political Thought* 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 (1978) *The Law in Classical Athens* (Ithaca)
- Marmor, A. (2008) 'The pragmatics of legal language', *Ratio Juris* 21, 423-52
- Marmor, A. (2009) *Social Conventions. From Language to Law* (Princeton)
- Marmor, A. (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
- 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', *the living handbook of narratology*, <http://www.lhn.uni-hamburg.de/article/possible-worlds>
- 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. (eds) (2004) *Free Speech in Classical Antiquity* (Leiden)
- 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)
- Thomas, R. (1992) *Literacy and Orality in Ancient Greece* (Cambridge)
- Todd, S.C. (1993) *The Shape of Athenian Law* (Oxford)
- Todd, S.C. (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
- Wallace, R.W. (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)

Wohl, V. (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)