

# Wounding, Rhetoric and the Law in Lysias IV\*

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## A. Introduction

Lysias 4 concerns the dispute of two men who quarrelled over a woman. The unknown defendant was brought to the court on account of his alleged irruption into the house of the also unknown prosecutor during a lively revel, including unrestrained consumption of wine and pursuit of erotic companions. The prosecutor alleges that his opponent went to his house with the intention of killing him, while the defendant attempts to overturn this allegation by claiming that the prosecutor, ignited by his unbridled passion for the woman, attacked him first and that for this reason he was forced to use a pottery-shard in order to defend himself. Yet, the speaker seems to be unable to produce evidence concerning the quarrel and therefore his argumentation relies heavily upon his opponent's refusal to hand over the woman for *basanos*.

The speech under study is not fully preserved (we have the proof section and the *epilogue*), but the surviving portion of the text allows us to reconstruct the main events of the case, which was brought to the court of the Areopagus. The procedure with which the prosecutor summoned the defendant to the court was *graphe traumatos*, a crime which modern scholars describe with the terms 'wounding' or 'attempted murder'. The only other extant speech concerning a case of *trauma* is *Against Simon*, also composed by Lysias (Lys. 3). It is worth noting that the speech under study presents some individual

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similarities with Lys. 3 and for this reason some scholars thought that Lys. 4 is an exercise modeled on Lys. 3<sup>1</sup>.

This paper offers the first individual treatment of this interesting speech. It aims to examine the basic lines of argument developed by the defendant and attempts to offer a reconstruction of the case.

#### B. The case

The text that we have describes two distinct incidents. The first part, which extends up to the middle of paragraph 5, concerns a challenge to an *antidosis*. The defendant's aim in this portion of the text is clearly to overturn the allegation of the prosecutor that the two men maintained a hostile relation before the incident of violence occurred (5)<sup>2</sup>. According to the defendant's account, he had in the past challenged his opponent to exchange properties<sup>3</sup>. Apparently, the

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<sup>1</sup> S.C. TODD, *Lysias*, Austin, 2000, pp. 53-4 rejects this possibility by presenting the points at which the two speeches diverge. For a general assessment of the speech, see F. BLASS, *Die attische Beredsamkeit*, vol. i, Leipzig, 1887-90, repr. 1962, pp. 583-7, who correctly observes that it is impossible to date it.

<sup>2</sup> The litigants in ancient courts often appealed to feelings of hatred which they cultivated toward their opponents in order to avoid being considered sycophants. It is clear, however, that particularly in cases of murder or acts of violence, the prosecutors had every reason to attribute the attacks they received to the hostile feelings harboured by the perpetrators, and for this reason the defendants often devote an important part of their defence to dispelling this impression. A common feature in speeches of prosecution concerning violence is the description of incidents which preceded the commission of the crime (cp. Ariston's story about the quarrel at Panacton in D. 54.3-6 or the speaker's brief presentation of the litigants' conflict in a wrestling ground in fr. 17 GERNET - RIZOS of Lysias). These narratives usually describe the initial source of the rivalry between the protagonists.

<sup>3</sup> On the *antidosis*, see A.R.W. HARRISON, *The Law of Athens*, vol. ii, Oxford, 1968-1971, pp. 236-8, D.M. MACDOWELL, *The Law in Classical Athens*, London, 1978, pp. 162-3, S.C. TODD, *The Shape of Athenian Law*, Oxford, 1993, pp. 120-21, and especially V. GABRIELSEN, *The Antidosis Procedure in Classical Athens*, *C&M* 38 (1987), pp. 7-38 and M.R. CHRIST, *Liturgy Avoidance and Antidosis in Classical Athens*, *TAPA* 106 (1997), pp. 29-59. The first paragraphs of the text do not make it possible for us to reach safe conclusions about the *antidosis*. GABRIELSEN, *The Antidosis Procedure*, p. 21 takes the speaker to be the challengee, but since the person who ultimately undertook the choregia was him, not the prosecutor (3), it is better to assume that the speaker was the challenger and his opponent, who was excluded from the judges, the challengee. If this is so, the meaning of the phrase καὶ τὴν μὲν ἀντίδοσιν, δι' ἐκείνην φανερός ἐστι ποιησάμενος (2) refers to the prosecutor's decision to exchange his property rather

speaker would at that time have considered that his opponent owned more property and consequently would have to undertake the liturgy. The prosecutor chose to exchange his property with the property of the litigant and according to the version of the speaker this choice of the challengee was due to his interest in a female slave of the speaker whom he coveted (2).

Even though the two men were landowners, the exchange appears to have included solely the movable elements of their property<sup>4</sup>, since the challengee took a yoke of oxen, unspecified agricultural equipment and also an unspecified number of slaves, about whom we will have to conjecture that they worked on his farm. The situation, however, did not obtain for long, because the two men soon reconciled thanks to the intervention of some common friends, and thus the prosecutor returned to the speaker whatever he had taken during the *antidosis*. It seems though that the agreed arrangement between the two men impinged upon a woman who prompted the dispute in the case under review, because, while the terms of the agreement determined that they would share her in common, the prosecutor later violated this agreement.

After the reconciliation, the defendant undertook the liturgy and became a choregos in the festival of the Dionysia, most probably overseeing and subsidizing a chorus of dithyramb<sup>5</sup>. In order to prove that their reconciliation was sincere and that after the *antidosis* the two men cultivated friendly feelings toward one another, the speaker contends that the prosecutor was eager to vote for his tribe in the Dionysia, even though he is unable to support with evidence his opponent's benign intention, because ultimately he was excluded

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than undertake the choregia (see A. BURFORD, *Land and Labor in the Greek World*, Baltimore-London, 1993, pp. 96-7).

<sup>4</sup> On the meaning of the terms φανερά/ἀφανής, see GABRIELSEN, *The Antidosis Procedure*.

<sup>5</sup> We are led to this conclusion by the speaker's reference to his opponent's intention to vote for his tribe. Cp. Dem. 21.5 and see A.W. PICKARD-CAMBRIDGE, *Dithyramb, Tragedy and Comedy*, 2<sup>nd</sup> ed., rev. T.B.L. Webster, Oxford, 1962, p. 52 and R. OSBORNE, *Competitive Festivals and the Polis: a context for dramatic festivals in Athens*, in A.H. SOMMERSTEIN – S. HALLIWELL (et al.), *Tragedy, Comedy and the Polis*, Bari, 1993, p. 31. On the legal procedures regulating the function of the choruses, see D.M. MACDOWELL, *Athenian Laws about Choruses*, in F. NIETO (ed.), *Symposion 1982: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Cologne, 1989, pp. 65-77.

during the allotment of the judges<sup>6</sup>. The speaker maintains that Philinus and Diocles (who are unknown to us) would have corroborated the favourable disposition of his opponent if they were permitted to produce evidence formally as witnesses<sup>7</sup>.

In what follows, the defendant's argumentation refers to the incident for which he was brought to the Areopagus. According to the speaker's version, the prosecutor invited him to his house to join his company, apparently in order to participate in a *komos*. Seeking the companionship of boys or flute-players, he unreservedly accepted the invitation; at some point in the feast, the prosecutor, being drunk and fomented by his love for the woman, attacked the speaker and assaulted him<sup>8</sup>. The speaker, forced to defend himself, returned the blows of his opponent and made use of a pottery-shard (*ostrakon*) which he found at that moment<sup>9</sup>. The speaker claims that he

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<sup>6</sup> On the intriguing issue of the allotment of the judges, see A.W. PICKARD-CAMBRIDGE, *The Dramatic Festivals of Athens*, Oxford, 1968 (rev. J. Gould and D.M. Lewis, 1988), pp. 95-7, M. POPE, *Athenian Festival Judges: Seven, five or how many*, *CQ* 36 (1986), pp. 322-6, D.M. MACDOWELL, *Demosthenes, Against Meidias*, Oxford, 1990, p. 241 and E. CSAPO – W.J. SLATER, *The Context of Ancient Drama*, Ann Arbor, 1994, pp. 157-60, with a brief commentary on the relevant passage, p. 122.

<sup>7</sup> One of the similarities of *graphe traumatos* with *phonos ek pronoias* was that the witnesses as well as the litigants had to take a serious oath known as *diomosia* (see D.M. MACDOWELL, *Athenian Homicide Law in the Age of the Orators*, Manchester, 1963, pp. 90-100). The present context does not reveal if it was impossible for the two persons to swear the oath, or if they simply refused. Moreover, we should take into account that in cases of murder or *trauma* heard by the Areopagus, the litigants were bound to refer only to points related to their case (cp. Arist. *Rh.* 1354a 22-23; see also P.J. RHODES, *Keeping to the Point*, in E.M. HARRIS – L. RUBINSTEIN (ed.), *The Law and the Courts in Ancient Greece*, London, 2004, pp. 137-158 and esp. pp. 141-2, who revises the prevailing view that litigants in ancient courts devoted a major part of their speeches to arguments unrelated to the case).

<sup>8</sup> We have sufficient testimonies at our disposal which confirm that the symposia and the nocturnal revels in the streets of Athens did not always have a happy ending (cp. Lys. 3.6, Lys. fr. 17 GERNET - RIZOS, *Dem.* 54.7). The acts of violence to which these excessively lively parties could result are often associated with *hybris*; on the relation of *hybris* with drunkenness, see N. FISHER, *The Law of hybris in Athens*, in P.A. CARTLEDGE – P.C. MILLET – S.C. TODD (ed.), *Nomos: Essays in Athenian law, politics and society*, Cambridge, 1990, pp. 128-9.

<sup>9</sup> The account of the speaker does not leave room to understand the extent of the injuries that he caused to the prosecutor. In each case, however, we should consider that, as in *dike aikeias* (see MACDOWELL, *Demosthenes*, p. 254), likewise

overpowered the prosecutor and at some point was able to seize the woman from him – it is worth noting here that the woman was residing in the house of the latter. After the quarrel, the prosecutor was, or at least feigned that he was, in a miserable state. Some of the bystanders deposited him on a litter and paraded him in the streets, exposing his battered body to common view<sup>10</sup>.

These events are as much as we learn from the speaker. In the following section I will attempt to locate the basic contours of the litigants' argumentation and reconstruct the facts of the case.

### C. Argument and concealment

We saw that the source of the dispute between the protagonists of the case concerned the speaker's challenge to the prosecutor to exchange properties. This, of course, already constitutes a piece of evidence relating to the economic situation of the two men, as the *antidosis* was one way for a rich Athenian to avoid undertaking a liturgy by maintaining that another citizen was richer than him<sup>11</sup>. The status of the protagonists is illustrated further still by elements concerning their lifestyle as gleaned from the text: the prosecutor, as much as the defendant, organize or participate in symposia and *komoï*; the defendant goes to the house of his present litigant to enjoy the

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in *graphe traumatos* the degree of injuries sustained by the victim was not a criterion by which to assess the guilt of the perpetrator.

<sup>10</sup> Comparable accounts are sufficiently described in speeches concerning cases of violence and should be attributed in part to the fact that the bystanders undertook some of the duties of the modern-day police. In Aeschin. 1.60 we find the formulation ὄχλου δὲ συνδραμόντος, οἷον εἴωθε γίγνεσθαι, which confirms that it was usual in incidents of violence for the bystanders to show interest in the victim. For the role of witnesses in cases of assault, cp. also Lys. 3.15, [Dem.] 53.17, Dem. 54.5-6. W. SCHULZE, *Beiträge zur Wort- und Sittengeschichte II, Kleine Schriften*, Berlin, 1993, pp. 160-89, has shown that the bystanders' responsibility to assist the victim of a wrongdoing is a custom that exists both in Greek and other Indo-European cultures (see also S. HUMPHRAYS, *Social Relations on Stage: Witnesses in Classical Athens, History and Anthropology* 1 (1985), pp. 313-369, V.J. HUNTER, *Policing Athens: Social Control in the Attic Lawsuits, 420-320 B.C.*, Princeton, 1994, pp. 138-9, N. FISHER, *Workshops of Villains: Was there much organised crime in classical Athens?*, in K. HOPWOOD (ed.), *Organised Crime in Antiquity*, London, 1999, pp. 66-8 and E. FRAENKEL, *Aeschylus, Agamemnon*, vols. i-iii, Oxford, 1950, note on 1317).

<sup>11</sup> Another way was *skepsis*, for which see HARRISON, *The Law*, ii, pp. 234-6.

companionship of boys and flute-players, while both men, and this is most important, lay claim to the favour of a woman<sup>12</sup>.

Let us see, then, what we learn about this particular woman. In all the circumstances in which the defendant refers to her, he speaks in pejorative terms to the point of calling her a prostitute (*porne*). However, as most, if not all scholars, have maintained<sup>13</sup>, we will have to exclude the possibility that this woman was actually a cheap prostitute<sup>14</sup>. Already at the beginning of the text (1), the speaker maintains that the only sticking point which remained unresolved between himself and his opponent after their reconciliation was the issue of the use of the woman, and it is significant that at this point the speaker refers to her with the courteous, even if somewhat condescending, expression 'person' (*anthropos*), not with the word prostitute. Moreover, when he refers to the incident of assault, we find her in the house of the prosecutor. This description of her relationship with the two men is not consistent with the image of a street prostitute

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<sup>12</sup> On the activities of the leisure class, see J.N. DAVIDSON, *Courtesans and Fishcakes: The Consuming Passions of Classical Athens*, London, 1997, chs.1-2. We should not doubt that the two men would have provoked a negative impression in the court. The speaker refuses to take up the liturgy to the state, recommending that the prosecutor was suitable to take it instead, thus depriving himself of the possibility of securing the goodwill of the judges by exploiting the *pisteis ek tou biou* widely used by wealthy litigants (see K.J. DOVER, *Greek Popular Morality in the Time of Plato and Aristotle*, Oxford, 1974, pp. 176-77, D. WHITEHEAD, *Competitive Outlay and Community Profit: Philotimia in Democratic Athens*, *C&M* 34 (1983), pp. 55-74, J. OBER, *Mass and Elite in Democratic Athens: Rhetoric, Ideology and the Power of the People*, Princeton, 1989, pp. 226-33). The prosecutor refused to undertake the liturgy, instead preferring to hand over his property to the speaker only as a means of gaining control over the woman.

<sup>13</sup> See HUNTER, *Policing*, p. 74 and K. KAPPARIS, *Apollodoros: Against Neaira* [D. 59], Berlin/New York, 1999, p. 409, who offers examples of courtesans pejoratively described in forensic speeches with the word *porne*. For an individual treatment of the phrase *porne kai doule*, see V. CITTI, *Una coppia nominale in Lisia*, in M. MOGGI – G. CORDIANO (ed.) *Schiavi e dipendenti nell'ambito dell' 'oikos' e della 'familia'*, Pisa, 1997, pp. 91-96.

<sup>14</sup> If she had really been a 'prostitute', this woman would have had to offer to an unspecified number of men, perhaps on a daily basis, her services for money and, of course, in this case she would have been a slave. Consequently, the word 'prostitute' is deliberately chosen to blacken the image of the woman; Apollodorus, as well as other speakers, follows the same tactic (cp. [Dem.] 59.114, with KAPPARIS, *Apollodoros*, note *ad loc.*).

or one working in a brothel, who would accept a large number of men on a daily basis in exchange for money<sup>15</sup>.

As to the particular characteristics of her relation with the two men, the image which we derive from the account of the speaker may be summarized as follows: after the *antidosis* the two men agreed that they would share the woman between them; in order for this to happen, the prosecutor would have to pay to the defendant a certain amount of money (ἐμοὶ ἀποδόντι τὰργύριον)<sup>16</sup>; however, according to what the speaker says, the prosecutor broke his promise and held the woman in his house thereby excluding him from her.

It is quite possible, if not certain, that the defendant distorts the reality. In particular, we should harbour reservations concerning the reliability of the defendant's description of the feelings of the courtesan toward the two men. In order to contrast his own behaviour with that of the prosecutor, the speaker is initially concerned to demonstrate his nonchalant attitude toward the woman (9)<sup>17</sup>, who sometimes showed more interest in his opponent and sometimes in him. The obvious aim of the woman's volatile behaviour, who is depicted as playing a sufficiently active role in the erotic triangle of the case, would have been to keep their interest in her alive, thereby extorting the greatest amount of favour from both<sup>18</sup>. Against his own

<sup>15</sup> An illuminating presentation of the different types of prostitution is provided by KAPPARIS, *Apollodoros*, pp. 4-8. On the common assumption that slave-prostitution was practiced in brothels, see DAVIDSON, *Courtesans*, pp. 90-99.

<sup>16</sup> Given that the purchase of a courtesan was extremely expensive, it was common for two men to share the same woman, each paying half the required amount. This happened for a certain period of time with Neaira, who was bought by Timanoridas and Eucrates for 30 *mnai*. Concerning the value of slaves and courtesans, see KAPPARIS, *Apollodoros*, p. 261 with a comprehensive bibliography. KAPPARIS maintains that both the protagonists of the case under review had a hand in the woman's manumission (but see the treatment of this theme below). For the commercial aspects of prostitution in classical Greece, see the recent study of E. COHEN, *Free and Unfree Sexual Work. An economic analysis of Athenian prostitution*, in C.A. FARAONE – L.K. MCCLURE (ed.), *Prostitutes and Courtesans in the Ancient World*, Wisconsin, 2006, pp. 95-124.

<sup>17</sup> Regarding this position, the speaker resembles that of Lys. 3, who was old and for this reason tried to avoid a possible comical presentation by his opponent of his love for the young Theodotus (see C. CAREY, *Lysias: Selected Speeches*, Cambridge, 1989, p. 93).

<sup>18</sup> The woman's double game may have been designed to secure sumptuous gifts from her two lovers. On the expensive life of courtesans, see KAPPARIS, *Apollodoros*, p. 7 and A. GLAZEBROOK, *The Bad Girls of Athens: The Image and*

emotionally restrained behaviour, the speaker contrasts the unbridled impulsiveness of his opponent who, on account of his passion for the courtesan, fell victim to her desires<sup>19</sup>.

The aim of this contrastive characterization is to neutralize any possible suspicions of the jurors that the attack for which he is being accused was a crime of passion and consequently to exclude the basic motive that the speaker ascribes to him<sup>20</sup>. However, later in the speech, when the speaker attempts to rhetorically exploit the denial of his opponent to hand over the courtesan for torture, he offers a different image of her behaviour toward the two men, because now he maintains that she treated the opponent with more favour than himself (17). According to the defendant, this demonstrates the unwillingness of the prosecutor to allow the truth to be known about what occurred in his house.

The prosecutor attributes his refusal to hand over the woman for torture to the fact that she was free<sup>21</sup>. The speaker explicitly rejects this version with a sufficiently strange formulation which is followed by a still stranger argument (13-14): he maintains that even if the woman was free, he himself had a stake in her freedom, because he

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*Function of Hetairai in Judicial Oratory*, in C.A. FARAONE – L.K. MCCLURE (ed.), *Prostitutes and Courtesans*, pp. 126-30, esp. p. 127.

<sup>19</sup> We should note that the relation of men with courtesans was entirely legal (we know, moreover, many powerful men in antiquity who maintained relations with courtesans), but sufficient evidence reveals the fear that such relations would create financial hardship and thus endanger the well-being of the house (on the courtesans as a possible threat to the *oikos*, see DAVIDSON, *Courtesans*, pp. 194-205).

<sup>20</sup> In a passage from the speech *Against Euergus and Mnesiboulus*, ([Dem.] 47.19) the speaker rejects the accusation that his opponent addressed to him that he aggressively entered his house, alleging that he would have been led to this act only if one or more of the following reasons applied: if he had concluded a contract with Theophemos, if he had participated in a *komos*, if there had been an erotic rivalry, or if he was drunk. All these reasons which would explain the intrusion of an individual into the house of another occur in the speech under review, a fact we should take seriously into consideration in our evaluation of the speaker's credibility.

<sup>21</sup> The standard study of *basanos* is G. THÜR, *Beweisführung vor der Schwurgerichtshöfen Athens: Die Proklesis zur Basanos*, Vienna, 1977; see also E. BUSHALA, *Torture of Non-Citizens in Homicide Investigations*, *GRBS* 9 (1968), pp. 61-68, C. CAREY, *A Note on Torture in Athenian Homicide Cases*, *Historia* 37 (1988), pp. 241-45, HUNTER, *Policing*, pp. 174-6, M. GAGARIN, *Antiphon, The Speeches*, Cambridge, 1997, pp. 21-2.



paid half the amount that was required for her manumission. Immediately, however, he rejects this version, maintaining that his opponent is lying when he claims that the woman was free (13).

The argument that follows aims to support the contention that the woman was a slave. The speaker asserts that if enemies took him prisoner, he would be able to sell her and, with the money collected, buy his freedom<sup>22</sup>, while now that he risks being exiled due to the accusation that he faces, he is prevented from scrutinizing the woman so that the whole truth may come to light. Wishing to render his present condition with the most dramatic of colours, the speaker stretches his argument to the limits of logic: he claims that it would be much more reasonable to torture the courtesan now that he is defending himself in court than to sell her in order to pay his ransom with the money collected from her sale<sup>23</sup>, because in the second instance, he could find money for the ransom from another source, whereas in the present situation he is unable to use the woman in order avoid exile<sup>24</sup>. This argument is at first glance crafty, to the degree that the speaker compares his position to the position of the woman, who according to his account is a slave. With this comparison, he attempts to show that, due to his opponent's refusal to hand over the woman for torture, he has been reduced to a more terrible position even than that of a prisoner-of-war, because if he were a prisoner-of-war, he would be able to win his freedom by paying the ransom to his enemies, while his only hope to avoid exile now that he has been dragged to the court rests in the hands of his opponent.

Despite this, the inability of the speaker to substantiate his claim comes to the surface from the fact that the most that he can capitalize from this argument is a generalization about *basanos* as the unique

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<sup>22</sup> This hypothetical situation to which the speaker refers reinforces the impression that he wants to present about his relation with the woman. The fact that he treats her as a possible source of income in a difficult moment is a brushstroke of Lysias' *ethopoia*, to the extent that the defendant stresses the difference between his own attitude toward the woman and that of his antagonist.

<sup>23</sup> On prisoners of war, see W.K. PRITCHETT, *The Greek State at War*, vol. 5, California, 1991, ch.3.

<sup>24</sup> It is worth noting that, while at the beginning of the speech, the defendant denies that his relation with his opponent was hostile, at this point he refers to his opponent with the word ἐχθροῖς, which he contrasts with the word πολέμιον (13).

credible method of discovering the truth (14). Furthermore, the argument suffers logically because it contains a *petitio principii*: the speaker attempts to prove that the woman was a slave, presupposing in his argument that she was a slave, and with this given, he formulates his contention that if he was a prisoner-of-war, he would eventually be able to sell her in order to raise money for his ransom.

It is, I think, certain, that the speaker is in a difficult position. The fact that he employs the challenge to *basanos* shows that he is unable to prove on the basis of evidence that the woman was a slave. Therefore, I consider it quite possible that the woman was indeed free at the time of the quarrel. We will also have to observe that, while in all the places in which the speaker refers to the arrangement concerning the woman (8, 9), he complains that his opponent did not pay him the agreed amount after the *antidosis*, when he summarizes all the information which the woman would testify under threat of torture, we find an essentially different formulation: the woman, we learn, would reveal whether the speaker paid half the amount or if the prosecutor gave the *full* amount:

καὶ πότερα τὸ ἡμισυ τοῦ ἀργυρίου ἐγὼ συνεβαλόμην ἢ οὗτος ἅπαν ἔδωκε. (10-11)

Here the defendant obviously attempts to refute the prosecutor's claim that he paid the full amount required for the manumission of the woman, a contention which he is unable to reject on the basis of specific evidence or witnesses<sup>25</sup>. But the speaker's inconsistency does not stop here. In his attempt to highlight the credibility of the woman in paragraph 16, he claims that she belonged to both, because they both paid the amount required for her purchase (ὁμοίως ἀργύριον κατατεθηκότων).

Despite the fact that the speaker falls into contradiction, we would perhaps have to believe his contention that the woman showed greater affection to his opponent: this affection would have been due to the fact that the prosecutor was the man who granted her freedom<sup>26</sup>. The

<sup>25</sup> The manumission of a slave did not require a formal contract; for an overview of the available processes in Athens, see KAPPARIS, *Apollodoros*, p. 232.

<sup>26</sup> There is sufficient evidence which proves that the courtesans exploited their owners' feelings with the intention of winning their freedom (see HUNTER, *Policing*, pp. 88-9). KAPPARIS, *Apollodoros*, p. 232 provides evidence showing that the devotion of some men to their courtesans was the most common reason for the manumission of slaves.

most the speaker can do to prove that the woman belonged to both men is to obliquely refer to an agreement to which he consented with his opponent after the property exchange<sup>27</sup>. Admittedly, in cases involving transaction with erotic content, the concerned parties are sometimes revealed to be negligent securing firm testimonies regarding the content of their agreements due to the sensitive nature of these cases;<sup>28</sup> but in the case under study, the speaker does not have this alibi. As he admits, his opponent preferred to exchange properties for the sake of the woman and this was the only thorny issue about which the two men were reconciled by means of the intervention of common friends<sup>29</sup>. The speaker, however, is unable to appeal even to a single testimony of the people who intervened, which would prove that the solution given after the property exchange was to share the woman with his opponent<sup>30</sup>.

Furthermore suspicions about the credibility of the defendant are likewise raised by the way in which he attempts to present the character of his opponent on the basis of his behaviour toward the woman, and thus we should approach with caution the disdainful manner in which he describes her. The word *prostitute*, conjoined with the word slave (δοῦλη καὶ πόρνη) toward the end of the text (19), is intended not only to persuade the jurors that the woman was not free, but constitutes an example of Lysias' *ethopoiia*<sup>31</sup>. By presenting his opponent as being lovesick toward a slave, the speaker attempts to establish a common code of communication with the jurors by appealing to social stereotypes about the proper behaviour of men toward the satisfaction of their sexual desires with women<sup>32</sup>. If he

<sup>27</sup> Contractual agreements concerning prostitutes are discussed by COHEN, *Free and Unfree*, pp. 108-14.

<sup>28</sup> As CAREY, *Lysias*, p. 103 claims, "lovers do not always proceed in a businesslike manner".

<sup>29</sup> We should agree with HUNTER, *Policing*, p. 205 n.14, that the friends in the present case intervened in order to reconcile the protagonists and that for this reason we are not dealing with formal arbitration.

<sup>30</sup> Despite this he appeals – as we saw – to the knowledge of Philinus and Diocles which was strictly speaking irrelevant to his case.

<sup>31</sup> In the beginning of the text in any case the speaker uses the word *anthropos* which conveys some courtesy. Concerning the vocabulary pertaining to domestic slaves, see HUNTER, *Policing*, pp.93-4.

<sup>32</sup> The pompous style of the first part of paragraph 9 with the use of the compound and abstract noun βαρυδαμυνία yields an obviously sarcastic tone which we

succeeded in isolating the prosecutor in that category of men who are unable to restrain their emotions toward a woman<sup>33</sup>, he would have a better chance of persuading them that he was attacked first and that he was simply compelled to defend himself<sup>34</sup>. By presenting elsewhere the woman as a slave prostitute, the speaker aims to prejudice the jurors, since a possible conviction would mean the banishment of a citizen from the city because of a slave<sup>35</sup>.

The issue, however, of the woman's status is closely connected to the speaker's inability to present convincing circumstantial evidence. The dispute of the two men occurred in the house of the prosecutor, which meant that the defendant was unable to secure favourable witnesses for himself, and it is indeed suspicious that he attempts to convince the jurors that he managed to overpower the opponent in his own house (5). The speaker's difficulty to establish circumstantial evidence is reflected in the speech, when we learn that the sole testimony he would accept as credible about the incident was that of the woman, whom, however, the opponent refused to hand over for torture. It is, indeed, particularly notable that he presents as 'proof'

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encounter already in paragraph 8, with the use of the compounds δύσερως and ὀξύχειρ, in a context which abounds with stylistic devices. In other forensic speeches, speakers also adapt the presentation of their relationships with courtesans according to the demands of their cases. In different contexts, we encounter speakers seeking the understanding of the jurors about their inability to resist their erotic desire. However, the speaker of our speech has an interest in presenting himself as restrained and therefore depicts his behaviour as consistent with the precepts of popular morality (J. ROISMAN, *The Rhetoric of Manhood: Masculinity in the Attic Orators*, California, 2005, pp. 38-41 offers examples of those two types of argument; cp. also Anaxim. *Rh. Alex.* 1429a 10-19. On the ideal of self-restraint (*sophrosyne*), see DOVER, *Popular morality*, pp. 208-9, and esp. H. NORTH, *Sophrosyne: Self-Knowledge and Self-Restraint in Greek Literature*, Ithaca/New York, 1966).

<sup>33</sup> With the phrase ἀλλ' οὗτος ἐναντίως τοῖς ἄλλοις δύσερως ἐστὶ (8), the speaker marginalizes his opponent. Euripides puts the word δύσερως in the mouth of Phaedra's wet-nurse (E. *Hipp.* 193); cp. also Xen. *Oec.* 12.13.4. On the common concept of the Greeks that love can stray into something unhealthy, see ROISMAN, *The Rhetoric of Manhood*, p. 168 with n.12.

<sup>34</sup> Particularly inasmuch as the prosecutor preferred in the past to exchange his property with that of the speaker on account of the woman.

<sup>35</sup> The *pathopoiia* of the epilogue (19) is based to a great extent on an *a fortiori* argument, which compares the discrepancy between the severe punishment of exile and the base motives of the prosecutor, namely his erotic desire for a prostitute.

(*tekmerion*) of his sincerity the refusal of his opponent to deliver the woman for torture, while he contrasts to this ‘proof’ his own refusal to accept the opponent’s offer to hand over his own domestic slaves, which he characterizes as a ‘sign’ (*semeion*, 12)<sup>36</sup>. The persuasive weakness of the antithesis between ‘proofs’ and ‘signs’, which is nothing more than verbal gymnastics, comes clearly to the surface, when the speaker determines the content of his own ‘proofs’ against his opponent’s ‘signs’: the testimonies of the prosecutor’s slaves would have been untruthful (and thus detrimental for the speaker), because, on the one hand, they allegedly knew less than the courtesan<sup>37</sup> and, on the other hand, because they would support their master; the woman’s testimony, by contrast, would have been binding because she belonged to both men, and thus would show preference to neither.

Since both protagonists rejected the challenge to a *basanos*<sup>38</sup>, the argumentation of the speaker is based on hypotheses, while the assertion that the woman would wrong him because she showed greater interest in the prosecutor has already been proven false by the speaker, who earlier maintained that she was playing a double game (8). It is clear that the defendant is unable to prove any of his contentions on firmer ground than verbal acrobatics. This, I believe, is also a fundamental reason that explains why he highlights the woman’s credibility. Knowing that the prosecutor had actually bought the woman’s freedom – perhaps in order to keep her away from the defendant – and that for this reason he would be unable to compel her to provide evidence with the threat of *basanos*<sup>39</sup>, the speaker insists that, since the jurors do not possess the basic evidence about the case,

<sup>36</sup> On the antithetical pair *tekmerion/semeion*, cp. Arist. *Rh.* 1357b 1-25 and see S. USHER, *Greek Oratory: Tradition and Originality*, Oxford, 1999, p. 113 with n.200.

<sup>37</sup> HUNTER, *Policing*, pp. 71-5 offers a useful discussion of the slaves’ knowledge about the affairs of the *oikos*.

<sup>38</sup> A fact that should not surprise us, since *basanos* was employed in none of the cases known to us. As a matter of fact, this challenge is always used by the speakers as a way of reinforcing their argumentation and not as a means of discovering the truth (see TODD, *The Shape*, pp. 33-6, who offers an insightful survey of the way in which *basanos* has been treated by modern scholarship).

<sup>39</sup> CAREY, *A Note on Torture*, has persuasively shown on the basis of the speech under review, that the freedmen did not offer testimonies under the threat of *basanos* (see also HUNTER, *Policing*, p. 176).

they would do him wrong by condemning him for a crime punishable by exile.

For reasons other than those of the defendant, we, as readers of the speech, are also in a difficult position. The one-sided presentation of the incidents – particularly as we do not have at our disposal the *narrative* – makes the extraction of safe conclusions difficult with respect to what happened the night the two men came to blows at the prosecutor's house. Let us examine, however, what might have been the prosecutor's line of argument.

The story the prosecutor would have narrated in his own speech would have been diametrically opposed to the defendant's own account, to the extent, of course, that we can reconstruct it from the surviving portion of the speech. From the words of the speaker, we learn that the prosecutor claimed that the defendant went to his house with the intention of killing him (7). Likewise, as happens often in similar cases<sup>40</sup>, the prosecutor may have asserted that he had not invited his opponent and that the latter violently intruded into his house already in a state of drunkenness, which only aggravated the insolence of his assault (11). Furthermore, the prosecutor would surely have mentioned the challenge to property exchange which the defendant had addressed to him in the past, thereby attempting to establish to the jurors the concept that his opponent had harboured hostile feelings toward him (5)<sup>41</sup>. In this way, he would have made more credible the allegation that his opponent had aggressively entered his house and would attribute the attack he received to the desire of the assailant to exact revenge on account of the outcome of their relation with the courtesan, who was residing in his own house. For this reason, he would also have claimed that his opponent – being wronged in his view about the course of events following the property exchange – had been planning the crime beforehand.

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<sup>40</sup> The scenes of violent intrusions into houses, particularly by drunken transgressors, are sufficiently common (cp. for example Lys. 3.6, fr. 17 GERNET - BIZOS, [Dem.] 47.40; see CAREY, *Lysias*, p. 97).

<sup>41</sup> This is shown by the *concessio* that we find in paragraph 5 (ἀλλ' ἦν, εἰ βούλεται, ἐχθρός). R.C. JEBB, *The Attic Orators from Antiphon to Isaeus*, vol. i, London, 1893 (repr. 1962), p. 280 has pointed out that the speech under study evinces that the challenge to property exchange was sometimes due to malevolent intention.

It is also possible, if not certain, that the prosecutor would have maintained that the defendant intruded into his house in order to abduct the courtesan whom the former had by that point freed<sup>42</sup>. In any case, the speaker accepts that, having overpowered his opponent in the midst of the quarrel, he managed to seize the woman (5). The exaggeratedly retired self-presentation of the speaker toward the woman, in contrast with the exaggeratedly irascible character of his opponent, could reasonably lead us to the conclusion that the prosecutor would have described with the darkest of colours his opponent's barbarous behaviour toward the woman, whom he had possibly freed, in order to keep her away from the defendant.

#### D. Argumentation and the law

We saw that we cannot formulate safe conclusions concerning the quarrel between the two men because we lack access to the narrative of the speech. Unfortunately, the charge with which the defendant was led to the court does not help us assess the nature and the intensity of the attack. On the basis of information that we derive both from the speech under review, as well as from other related speeches, it appears that *trauma* is linked to the use of a weapon<sup>43</sup>. However, we are unable to say with certainty that the use of a weapon constituted the distinguishing characteristic between this and other acts of violence. At any rate, the speaker does not explicitly deny that he used an *ostrakon*, an object which one could easily find during a quarrel in classical Athens, or possibly the easiest means with which the victim of a violent attack could bring a *graphe traumatos* against the assailant<sup>44</sup>. But the speaker denies explicitly that his attack on the prosecutor was premeditated (5).

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<sup>42</sup> This is one of the similarities of the speech under review with that *Against Simon* (cp. Lys. 3.6-7), but we should note that the latter pertains to homosexual love.

<sup>43</sup> D.M. MACDOWELL, *Law*, p. 124 locates the difference between *trauma* and *aikēia* in that the former involved blows with a weapon.

<sup>44</sup> See E. CARAWAN, *Rhetoric and the Law of Draco*, Oxford, 1998, p. 224, who rightly observes that the *ostrakon* was “a common object that lay ready to hand, and it is not unlikely that the plaintiff seized upon this allegation when he could point to no weapon more indicative of murderous attack”.

The speaker attempts, of course, as defendants always do in similar cases<sup>45</sup>, to downgrade the intensity of violence and maintains that his opponent attacked him first<sup>46</sup>. In order to show that the quarrel with the prosecutor did not surpass in intensity the usual bounds of low-scale violence, the speaker maintains that his opponent inflated the incident by presenting the blackened eyes as a serious injury (9). Given that the use of an *ostrakon* would in no way have caused the blackening of eyes – which is more consistent with blows – the defendant implies that his attack did not breach the bounds of *aikeia*<sup>47</sup>.

The prosecutor for his part had every reason to emphasize the seriousness of the attack and consequently, following a common practice known to us from other cases of battery, he was careful enough to secure independent witnesses by exposing his maltreated body to common view<sup>48</sup>. We should not doubt that in his speech he would have appealed to the testimonies of the bystanders, stressing that they were ‘independent’ witnesses.

It remains for us to answer a legal question which is linked to the strategy of the prosecutor: why did he choose to bring against the speaker the charge of *graphe traumatos*? The frequency of incidents of violence between members of the so-called ‘leisure class’, which find a fertile ground in symposia and the pursuit of erotic companions (often attributed to *hybris*)<sup>49</sup>, would perhaps have been an important

<sup>45</sup> Cp. Isocr. 20.5, Dem. 54.14.

<sup>46</sup> The fact that the speaker attributes his act to self-defence would not alone be sufficient to secure him acquittal. Cp. the examples of victims’ retaliation in Dem. 21.70-6. On self-defence, see M. GAGARIN, *Self-defense in Athenian Homicide Law*, *GRBS* 19 (1978), pp. 111-20 and the next note.

<sup>47</sup> That the speaker treats the attack as an *aikeia* is reflected in the phrase ἡρχε χειρῶν ἀδίκων (11); this was essentially what a prosecutor had to establish in a case of *dike aikeias* (cp. [Dem.] 47.40 and see MACDOWELL, *Demosthenes*, p. 254), and consequently the speaker implies that his act of violence was a way of defending himself against the assault committed by his opponent. For the formulation ἄρχω χειρῶν ἀδίκων, cp. *IG* I<sup>3</sup> and Ant. *Tetr.* 3.2.1; see also GAGARIN, *Self-defense*, CARAWAN, *Rhetoric*, p. 199 with n.64.

<sup>48</sup> This commonplace is subjected to comical treatment by Aristophanes (cp. *Clouds* 492-496; for relevant passages in New Comedy, see A. SCAFURO, *The Forensic Stage: Settling Disputes in Graeco-Roman New Comedy*, Cambridge, 1997, pp. 101-2).

<sup>49</sup> On this issue, cp. Aeschin. 1.134-5 (with N. FISHER, *Aeschines, Against Timarchos*, Oxford, 2001, notes ad loc); see also K.J. DOVER, *Eros and Nomos (Plato, Symposium 182A-185C)*, *BICS* 9 (1964), pp. 31-42 and his pioneering



reason for us to consider that the prosecutor chose his accusation carefully, in order to vanquish his adversary<sup>50</sup>.

Given the accusation with which he is faced, the speaker attempts to prove that he did not go to his adversary's house having already plotted his murder. On the contrary, he explains that the fight broke out in the house of the prosecutor, in which he had gone after being invited, and also accepts that during the quarrel with his adversary, he managed to take the upper hand (5). The image the defendant wants to give is that of a fight which broke out instantaneously, possibly when he attempted to wrest away the woman<sup>51</sup> or after an exchange of verbal insults. We should not be too ready to dismiss his story.

The prosecutor would have been able to bring his opponent to court with one of the following procedures: *dike aikeias*, *graphe hybreos*, or *graphe traumatos*, and ultimately he chose the latter. The question is why. If he chose the procedure of *dike aikeias* and won the case, he would have been financially compensated by his opponent<sup>52</sup>. If, on the other hand, he brought against the defendant a *graphe hybreos* and managed to persuade the court that he was guilty, he would have had a much better chance of obtaining a stricter punishment for his opponent, but with less of a chance of winning the case<sup>53</sup>. This would be due to the fact that the decision concerning whether the act of violence constituted *hybris* depended upon the subjective judgment of the jurors, who would have had to examine the motivation behind the act<sup>54</sup>. Since *hybris* was primarily related to

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work *Greek Homosexuality*, Cambridge, Mass., 1978, pp. 54-57; J.J. WINKLER, *The Constraints of Desire*, New York/London, 1990, p. 49; D. COHEN, *Law, Violence and Community in Classical Athens*, Cambridge, 1995, pp. 127-8; and N. FISHER, *Workshops*, pp. 73-8.

<sup>50</sup> Note Ariston's cautiousness in the opening paragraph of Dem. 54, where he explains that despite his desire to prosecute Conon with more serious charges than *dike aikeias* his relatives advised him to prosecute his opponent with a charge commensurate with his age (see C. CAREY – R.A. REID, *Demosthenes: Selected Private Speeches*, Cambridge, 1985, p. 76).

<sup>51</sup> This is accepted by the speaker when he claims that he overcame his opponent during the quarrel (ὥστε καὶ τὴν ἄνθρωπον λαβεῖν, 5). We should not doubt that the prosecutor would have blamed the speaker for this act, disputing, of course, any claim of the latter to the woman.

<sup>52</sup> Cp. Isocr. 20.19, Dem. 47.45-47 and see MACDOWELL, *Law*, p. 123.

<sup>53</sup> Moreover, in *graphe hybreos*, the convicted defendant was compelled to remit the fine to the state, not to the opponent personally.

<sup>54</sup> Cp. Dem. 21.72 with MACDOWELL, *Demosthenes*, notes *ad loc.*

cases in which the perpetrator's intention was to wound the honour of the victim, the choice of a *graphe hybreos* by the victim of a potentially lethal attack involving the use of a weapon would have had little chance of success<sup>55</sup>. By choosing the *graphe traumatos*, the prosecutor ran the risk of suffering the consequences also involved in the choice of *graphe hybreos*<sup>56</sup>, but we would have to surmise that he carefully considered the relative advantages of the choice on which he ultimately settled.

The prosecutor's strongest point was that the defendant would have been in no way able to reject the accusation that he was first attacked by his opponent with an *ostrakon* on the basis of evidence. The speaker actually does not explicitly deny the allegation that he used an *ostrakon*, but rejects his opponent's claim that he went to his house with the intent of killing him, because if this were truly his aim, he would have taken a knife with him (6). By means of this probability argument, the speaker tries to address the allegation of his opponent that the attack was premeditated. However, the impression that the speaker gives is somewhat muddled, because initially he maintains that he struck his opponent with his hands (6), while two lines later it appears that he accepts – or in any case he does not deny – that he used an *ostrakon*.

Our incomplete understanding of the nature of the *graphe traumatos*, as well as the fact that the speech does not offer sufficient information about the quarrel, make it difficult to determine whether the prosecutor would have been able to persuade the jurors that the accusation by which he led his opponent to court was suitable to the crime he allegedly committed. The *trauma* is often interpreted by scholars as attempted murder, but this interpretation is not universally accepted<sup>57</sup>. The chief problem concerns the determination of the

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<sup>55</sup> See C. CAREY, *Offence and Procedure in Athenian Law*, in E.M. HARRIS – L. RUBINSTEIN (ed.), *The Law and the Courts in Ancient Greece*, London, 2004, p. 119.

<sup>56</sup> The fine of 1,000 drachmas if he did not manage to secure 1/5 of the judges' votes.

<sup>57</sup> MACDOWELL, *Law*, p. 124 formulates on the basis of Dem. 54.17-19 the view that "deliberate wounding was not necessarily attempted homicide". But the procedural similarities of *trauma* with *dike phonou* favour the interpretation of "attempted murder": they were both tried by the Areopagus, and *diomosia* also applied to both (see CAREY, *Lysias*, p. 100).

minimum circumstantial evidence required to qualify an attack as an act of *trauma* as opposed to *aikeia*<sup>58</sup>.

The use of a weapon is often emphasized in the sources – the most important of which are the speech under review and Lysias' *Against Simon* (Lys. 3) – as perhaps the main criterion to determine whether an act of violence constitutes *trauma*. In addition, the remarks of the speaker in *Against Conon* (Dem. 54.17-19) reinforce the view that the use of a weapon distinguished *trauma* from *aikeia*. If indeed the use of a weapon played such a decisive role in distinguishing *trauma* from *aikeia*, we can more securely conclude that the *trauma ek pronoias* is equivalent to 'attempted murder'<sup>59</sup>. In this sense, the element of *pronoia* of which the speaker is accused assumes the meaning that it has in cases of *phonos ek pronoias*. As Loomis has shown<sup>60</sup>, the word *pronoia* in cases of premeditated murder is to be understood synonymously as *hekousios*, and consequently signifies not only premeditation, but also intention. Therefore, as *Against Conon* reveals, a culprit could be considered responsible for a *trauma* even if his attack was not premeditated, but occurred in the context of a quarrel which broke out on the spur of the moment.<sup>61</sup> We also derive this impression from *Against Lochites* (Isocr. 20.8) in a context where the speaker clearly refers to acts of unpremeditated violence which provoke the rage of the victims to the extent that their counterattacks,

<sup>58</sup> CAREY, *Offence*, p. 119 is right in suggesting that in cases involving minor injuries caused by a weapon the victim would have been able to prosecute his opponent with *dike aikeias*.

<sup>59</sup> Possibly, because the use of a weapon meant that the perpetrator was aware that he could cause the death of his adversary. In any case, the speaker of our speech reveals that he is aware of this danger when he says that if he had gone to his opponent's house with the intention of murdering him, he would have taken a knife in advance, thereby causing the death of the prosecutor more quickly (θᾶττον ἂν ἐγχειρίδιῳ πληγὴς ἀπέθαμεν, 6).

<sup>60</sup> W.T. LOOMIS, *The Nature of Premeditation in Athenian Homicide Law*, *JHS* 92 (1972), 86-95.

<sup>61</sup> We should note that the speaker in Dem. 54.18 appears as well to establish the use of a weapon as the defining characteristic of a *trauma*. In contrast to speeches 3 and 4 of Lysias, the object which the speaker chooses to mention as a chance example of an instrument with which one could commit the particular wrongdoing is a stone, a 'weapon' which was even more readily available than an *ostrakon*. This information strengthens the view, I think, that *pronoia* in cases of *trauma* is related to the knowledge of the perpetrator that his attack could cause the death of his opponent.

involving wounding or murder, result in their exile.<sup>62</sup> This evidence shows, I think, that *pronoia* in cases of *trauma* consisted in the offender's knowledge that his attack with a weapon may result in the death of the victim.

Unfortunately, it is impossible for us to be absolutely certain which of the two protagonists first attacked the other. The speaker in any case is presented as not able to refute the charge that he used an *ostrakon* in order to defend himself. From this perspective, if, as he maintains, he was first attacked by the prosecutor, his own situation may be compared to the description of victims of violent acts in *Against Lochites* (Isocr. 20.8), who are exiled, presumably because they were aware that their violent acts of self-defence could instigate the death of their opponents. The prosecutor in any case would undoubtedly have had a strong motive to choose the *graphe traumatos*. Realizing that the defendant was isolated from witnesses on the night of the quarrel, and capitalizing on their old dispute concerning the exchange of property – which the speaker could in no way refute – he probably played his final hand. If he succeeded in persuading the jurors to convict the defendant, the latter would be exiled, leaving both him and the woman in peace. Thus he would remain the prosecutor's ὑποχέριον<sup>63</sup> forever.

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<sup>62</sup> The relevant passage from *Against Lochites* (Isocr. 20.8) has not been sufficiently explored. The speaker there says that the victims of *aikeia* often lose their temper with the result that they themselves become perpetrators of more serious wrongdoings than the *aikeia* which they sustained. For this reason, they are exiled, a form of punishment commensurate with *trauma* (as well as murder, if the defendant chose this possibility before hearing the jurors verdict). This passage shows that *graphe traumatos ek pronoias* was available even against *victims* of violent acts, who lost their temper and ended up being prosecuted for their counterattack.

<sup>63</sup> I borrow the word from the text (5).