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TORTURE AND RHETORIC IN ATHENS

IN a short article published one hundred years ago, J.W. Headlam presented the thesis that in Athenian law the function of the challenge to torture slaves was to propose an alternative method of trial outside the *dikastêrion*, a kind of ordeal.[1] The thesis met immediate opposition and—despite a brief rejoinder by Headlam to his first critic[2]—it has been rejected by those writing on Athenian law up to now,[3] including G. Thür, whose monograph is by far the most important work on the subject.[4] However, the significance of the issue compels us not to let it drop. For it touches not only upon the use of torture, which affects our understanding of the position of slaves, but also upon the Athenian rules of evidence, indeed, their entire method of dispute resolution. The purpose of the present paper is, first (I) to revive Headlam's thesis in a modified form and (II) to answer the criticisms against it. I shall argue that Headlam was essentially correct with regard to the judicial function of the challenge, but his association of it with the trial by ordeal was misplaced. Finally, (III) I shall touch upon the influence of rhetoricians in Athens, for they appear responsible for some of the disagreement.

I

In the surviving speeches of the Athenian orators there are many reports of challenges (*proklêseis*) to torture (*basanos*). The challenges were made generally before the dispute reached the *dikastêrion*, where the speeches are delivered. According to the usual report, a litigant proposed to his opponent to have a slave interrogated by torture: the owner would have brought the slave to his opponent for torture, but would have maintained a control over how it was done. The slave, the speaker argues, knows the truth of the disputed point, and torture, had it been applied, would have secured the truth.[5]

However, in almost all of the reports the challenge was refused, and in no reported case has a *basanos* actually been completed as the result of a challenge. In view of this evidence, Headlam asks the question, 'What happened if the challenge was accepted ... [and] the torture really came off?'[6] His answer is that a torture that was performed in these circumstances would resolve the dispute, that there would be no recourse then to a *dikastêrion*, and thus that there would then be no speeches to report a completed *basanos*. In fact, as Headlam knew, he was not the first to propose the thesis; in the second century AD, the lexicographer Pollux also said that the function of the challenge, whether to some defined oath or testimony or *basanos* or to something else of that sort, was the resolution of the suit.[7] Many cases were not so straightfor-

[1] J.W. Headlam, 'On the πρόκλησις εἰς βάσανον in Attic law', *CR* vii (1893) 1-5.

[2] See C.V. Thompson, 'Slave torture in Athens', *CR* viii (1894) 136 and Headlam 136-7.

[3] See e.g. R.J. Bonner, *Evidence in Athenian courts* (Chicago 1905) 72, J. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig 1905-15) 889 n. 91, A.R.W. Harrison, *The law of Athens* ii (Oxford 1971) 147-50.

[4] G. Thür, *Beweisführung vor den Schwurgerichtshöfen Athens. Die Proklesis zur Basanos* (Vienna 1977). Thür's conclusions have been followed recently by M. Gagarin, 'The nature of proofs in Antiphon', *CP* lxxxv (1990) 22-32, and S. Todd, 'The purpose of evidence in Athenian courts', in *Nomos. Essays in Athenian law, politics and society*, P. Cartledge, P. Millet & S. Todd, eds. (Cambridge 1990) 19-40, esp. 34-5. Sympathy with the views of Headlam and those expressed here has now been expressed by the social historian, V. Hunter, *Policing Athens. Social control in the Attic lawsuits 420-320 BC* (Princeton 1994) 70-95.

[5] I am in complete agreement with Thür 181 when he argues that it was the function of the *basanos* either to affirm or to deny a statement formulated in the challenge. The torturer would not fish for new information.

[6] Headlam 1.

[7] Pollux vii 62: πρόκλησις δ' ἐστὶ λύσις τῆς δίκης ἐπί τινι ὡρισμένῳ ὅρκῳ ἢ μαρτυρίᾳ ἢ βασάνῳ ἢ ἄλλῳ τινὶ τοιούτῳ. The Suda, s.v., mentions private arbitration as well. *Cf.* Dem. xlv 15-16.

ward, for the statement of a slave might render only circumstantial evidence. Here the Athenian legal process gave protection to the slave (even if not intentionally). If a litigant wished to torture a slave with credibility, he had to make an agreement with his opponent and be willing to let the point, even the whole case, rest on the outcome. Sometimes this decision was a close call (see Dem. xxxvii 41). The mistake of many scholars, including Headlam, has been to emphasize the torture itself, while ignoring the challenge. Few would dispute that the Athenians agreed through challenges to end disputes by private arbitration or the swearing of prescribed oaths.[8] But the irrationality of resolving disputes by torturing a third party, as well as some obfuscated passages in the orators, has prevented Headlam's view from receiving wider acceptance.

The *basanos*-challenge functioned only for private disputes. Where state security was threatened, for instance in a case of treason, no private settlement was possible. On the other hand, in private disputes where exile or the death penalty was possible, for a homicide for instance, despite Thür's concerns,[9] it does not seem problematic that after privately surrendering the dispute through a *basanos* procedure an accused party would go into exile and leave the case judicially uncontested. Alternatively, if through the *basanos* he were shown to be innocent, the prosecutor would have little ground for continuing the prosecution. In either case, the validity of the *basanos* as a dispute-ending procedure would be guaranteed by sufficient witnesses from both sides.

Headlam offers several passages in support of his thesis; in each the *basanos* is portrayed as an alternative method of dispute resolution. In Isocrates' *Trapezeticus*, *basanos* and 'being put on trial' are pitted as alternatives: '(instead) he submitted both to being put on trial and to having the other accusations (made against him), so that there would be no *basanos* concerning this matter'.[10] In Lycurgus, the *basanos* is contrasted with the dicasts and so with the court, where, it is claimed, it is possible to mislead: 'What people was it impossible to lead astray through cleverness and the devices of the speech? According to nature, as you know, those tortured, the male and female slaves, were going to tell the entire truth concerning all the injustices'.[11] In [Dem.] xlvii, a suit for false testimony, acceptance of the *basanos* would involve release from the affair and the 'risk' from the dicasts: 'for while it was possible for them to be released of the matter and not to run the risk of coming before you by certifying in deed that the testimony was true, they have not been willing to surrender the person'.[12] In the *Tetralogies*, there is an informal challenge made before the court to let the case stand on an alibi that is to be supported by *basanoi*: 'for I surrender all of my male and female slaves for torture; and if I appear [as a result of the torture] on that night not to have been at home asleep or to have gone out somewhere, then I agree that I am a murderer'.[13]

In Dem. xxxvii 40-2 there is mention of an accepted challenge to torture that then broke down. But in section 40 the dispute-ending purpose of the *basanos* is clear: 'he read to me a great challenge demanding to have a slave tortured who, he claimed, knew these things and if

[8] See recently D.C. Mirhady, 'The Oath-Challenge in Athens', *CQ* xli (1991) 78-83.

[9] Thür 211-14.

[10] Isoc., *Trap.* xvii 55: ὑπέμεινε καὶ δίκας φεύγειν καὶ τὰς ἄλλας αἰτίας ἔχειν, ὥστε μηδεμίαν βάσανον περὶ τοῦ πράγματος τούτου γενέσθαι.

[11] Lyc., *Leocr.* i 32: τίνας ἀδύνατον ἦν τῇ δεινότητι καὶ ταῖς παρασκευαῖς ταῖς τοῦ λόγου παραγαγεῖν; κατὰ φύσιν τοίνυν βασανιζόμενοι πᾶσαν τὴν ἀλήθειαν περὶ πάντων τῶν ἀδικημάτων ἔμελλον φράσειν οἱ οἰκέται καὶ αἱ θεράπαιναι.

[12] [Dem.], *Ev.* xlvii 5: ἐξὸν γὰρ αὐτοῖς ἀπηλλάχθαι πραγμάτων καὶ μὴ κινδυνεύειν εἰσιόντας εἰς ὑμᾶς, ἔργῳ βεβαιώσαντας ὡς ἀληθής ἐστιν ἡ μαρτυρία, οὐκ ἠθελήκασι παραδοῦναι τὴν ἄνθρωπον.

[13] [Ant.], *Tetr.* i 4.8: πάντας παραδίδωμι βασανίσαι· καὶ ἐὰν μὴ φανῶ ταύτῃ τῇ νυκτὶ ἐν οἴκῳ καθεύδων ἢ ἐξελθών ποι, ὁμολογῶ φονεὺς εἶναι.

they were true, I should pay the statutory debt, and if they were false, the torturer Mnesikles would assess the value of the slave'.[14] In [Dem.] lix, a challenge expressly includes the condition that the litigant, Apollodorus, discontinue litigation if the *basanos* goes against him: 'and if it should appear from the torture that this man Stephanus had married a citizen wife, and that these children are his by another wife and not by Neaera, then I was willing to withdraw from the contest and not to pursue this charge'.[15] (The challenge is made so explicit because formally, as a *graphê*, the charge should not have been settled privately.) In Lysias vii the litigant indicates that whichever way the interrogation had turned out, the dispute would have been decided: 'for if (the slaves) said what this man wanted concerning me, it would not have been possible for me to make a defense, but if they did not agree with him, he was liable to no penalty'.[16] In *On the Embassy*, Aeschines challenges Demosthenes before the court and demands that the entire dispute be resolve by *basanoi*: 'if the slaves when tortured say that I slept away from my messmates, don't spare me, men of Athens, but rise up and kill me. But if you are disproved and lying, Demosthenes, then pay this sort of penalty'.[17] (It is a mock challenge, like *Tetr.* i 4.8, because the *basanos* cannot take place before the dicasts.)[18] In Dem. xxix, although many witnesses are offered on circumstantial points, the *basanos*-challenge relates to the point on which the whole case depends: 'since I knew that you would cast your votes concerning this issue, I thought it necessary to do nothing else before testing this man through a challenge'.[19] It could have carried the weight of the entire suit.

Thür raises the concern that in several speeches (e.g. Lys. iv 10-11, Is. viii 9 & 17 and Dem. xxx 26-7 & 35) the challenge deals with several questions and not simply the one that would decide the dispute.[20] However, it seems to me that in all of the passages every one of the questions could have decided the case by forcing an admission that would have been decisive. As Thür makes clear,[21] part of the preliminary strategy of a dispute was to elicit admissions (*homologiai)* on circumstantial issues. Regardless of the irrelevance of some point to the central issue, as may be the case in Dem. xxxvii 27, the parties could embarrass each other with the refused challenges. If a litigant knew his opponent would refuse the challenge anyway, why not offer to let the case depend on it?

Headlam bolsters his thesis by comparing the *basanos*-challenge to the oath-challenge, whose

[14] Dem., *Pant.* xxxvii 40: ἀναγιγώσκει μοι πρόκλησιν μακράν, ἀξιῶν, ὃν φησιν οἰκέτην ταῦτα συνειδέναι, βασανίζεσθαι, κἂν μὲν ᾖ ταῦτ' ἀληθῆ, τὴν δίκην ἀτίμητον ὀφλεῖν αὐτῷ. ἐὰν δὲ ψευδῆ, τὸν βασανιστὴν Μνησικλέα ἐπιγνώμον' εἶναι τῆς τιμῆς τοῦ παιδός.

[15] [Dem]., *Neaera* lix 121: καὶ εὰν φαίνηται ἐκ τῆς βασάνου γήμας Στέφανος οὑτοσὶ ἀστὴν γυναῖκα, καὶ ὄντες αὐτῷ οἱ παῖδες οὗτοι ἐξ ἑτέρας γυναικὸς ἀστῆς καὶ μὴ Νεαίρας, ἤθελον ἀφίστασθαι τοῦ ἀγῶνος καὶ μὴ εἰσιέναι τὴν γραφὴν ταύτην.

[16] Lys., *Olive-Stump* vii 37: περὶ ἐμοῦ μὲν γὰρ εἰ ἔλεγον ἃ οὗτος ἐβούλετο, οὐδ' ἂν ἀπολογήσασθαί μοι ἐξεγένετο· τούτῳ δ' εἰ μὴ ὡμολόγουν, οὐδεμίᾳ ζημίᾳ ἔνοχος ἦν.

[17] Aesch., *Emb.* ii 127: κἂν βασανιζόμενοι φῶσιν ἀπόκοιτόν με τουτωνὶ πώποτε τῶν συσσίτων γεγονέναι, μὴ φείσησθέ μου, ὦ ἄνδρες 'Αθηναῖοι, ἀλλ' ἀναστάντες ἀποκτείνατε. ἐὰν δ' ἐξελεγχθῇς ψευδόμενος, Δημόσθενες, τοιαύτην δίκην δός.

[18] See Dem. xlv 16. *Cf.* Harrison 149 n. 4. Thür 190-2 is inclined to accept the legal, if not the practical possibility of a *basanos* before the dicasts in private disputes. In public disputes, moreover, where a whole day was allocated to the disputing positions, he sees the completion of Aeschines' challenge as more practically possible. I am more persuaded by Demosthenes's simple denial of the possibility in xlv 16. The rhetorical flash of Aeschines' challenge seems little diminished by the fact that its fulfilment was a legal impossibility. Andocides i 25-6 and 35 makes analogous mock challenges.

[19] Dem. *Aph.* 3 xxix 11: καὶ περὶ τούτου τὴν ψῆφον ὑμᾶς οἰσαντας ἐπιστάμενος, ᾠήθην δεῖν μηδὲν ἄλλο τούτου πρότερον ἢ τοῦτον προκαλούμενος ἐλέγξαι. See also xxix 38 and 51-3 and xxx 35.

[20] Thür 211-13.

[21] Thür 152-8.

function as an extra-judicial means of settling a dispute is supported by strong evidence.[22] But he also makes other remarks, and it is with them that I wish to take issue. First, he suggests that the *basanos* procedure was very rarely, if ever, used during the age of the orators.[23] About this view we do not have sufficient evidence. If it was used and if it always led to resolution of the dispute, we would not expect to see it mentioned in speeches before the *dikastêrion*, which was the court of last resort. (We do hear of one case, Dem. xxxix-xl, in which the less commonly mentioned oath-challenge was used to resolve a dispute.) Certainly the arguments we see concerning *basanos*, for and against, do not suggest that it is moribund or obsolete. Rather, they suggest the opposite: the great number of speeches that mention the possibility of slave torture suggests that its employment continued to be an actual possibility in many disputes. If the dicasts had not heard of its use in private disputes in fifty or more years, the challenge would have become a very transparent, and thus ineffective, tactic. I imagine that some forms of torture were used to settle disputes within an *oikos* with some regularity (see e.g. Lys. i 16, 18-19 and Dem. xlviii 16-18). and certainly torture, albeit different in function, continued in use where state security was in jeopardy (see Dem. xviii 133, Dein. i 63 and other passages cited by Thalheim in *RE* iii, 1 [1899] s.v. βάσανοι).

Headlam also wishes to liken the *basanos* to an 'ordeal'. He argues, 'if we knew more about the early history of Attic law, we should find that the effectiveness of the *basanos* depended very little on whether or not the man who was submitted to it knew anything at all about the matter on which he was questioned, and that it is really a vicarious ordeal, altered and wrested until it has become little distinguishable from ordinary evidence'.[24] Headlam is right that we know little of the early history of Attic law, but it is an integral part of the arguments that favour the *basanos* that they say that the slave 'knows the truth' of the matter.[25] It always appears as a way of eliciting truthful information, or, more precisely, of affirming or denying a proposed statement.[26]

II

Critics of Headlam want to make a distinction between those challenges that are to lead to resolution of a dispute—which all admit that there are—and those that simply have an evidentiary purpose. My view, like that of Pollux (see above, n. 7), is that they are all meant to lead to resolution, since that is the nature of the formal challenge. Criticism has centered on three points.[27] First, there are texts that appear to indicate that the results of *basanoi* could be employed before the *dikastêrion*. The *basanos*-challenge would then not be an alternative means of settling a dispute, but only a means for securing a piece of non-binding-evidence. Second, there are texts in which the *basanos* is compared to other forms of evidence that come before the courts, such as the testimony of free witnesses, with the implication that they share a similar status. Finally, there are texts according to which, it is claimed, the *basanoi*, had they taken place, would have come to court. All of these criticisms can be met.

[22] See Mirhady (n. 8) and Thür 205-6.

[23] The assumption that the *basanos* procedure was not employed during this period is shared by Thür, who makes that assumption the basis of his sixth chapter.

[24] Headlam 5.

[25] Thür 111-31 affirms the integral presence of the verb (συν)εἰδέναι in reference to the slaves.

[26] There are several passages in Attic literature in which a speaker expresses a willingness to undergo fire, voluntarily, in order to demonstrate good faith: Soph. *Ant.* 265-6, Xen., *Symp.* 4.16, Ar., *Lys.* 133 and Dem., *Conon* liv 40. But in these situations the pain to be endured is not meant to elicit any information or to act as a test. They also appear, accordingly, to illustrate something different from the mediaeval ordeal.

[27] I follow here the arguments of Thür 207-11.

In the first group there are nine texts. The first is Lys. vii 37: 'mind you, I was so solicitous because I thought that it was to my benefit that you learn the truth about the matter from *basanoi*, from testimonies and from sure signs'.[28] Here, as elsewhere, despite the most natural reading, the litigant means not that he would produce the *basanoi* themselves for the dicasts. Rather, he means only that he will produce the challenge to *basanoi* that he presented to his opponent. Since the opponent refused the challenge, the litigant feels justified in mentioning *basanoi* as if they had taken place and as if they had been in his favour, as is suggested by the reversal argument in vii 36: 'if I did not submit the people when Nicomachus was demanding them, I would appear to be conscious of my own guilt; accordingly, since he was not willing to accept [them] when I was submitting, it is right to form the same thought about him'.[29] In Isoc. xvii 54 there is also a suggestion that the dicasts should have the results of a *basanos* read before them: 'Pasion, since he knew these things, wished you to conjecture about the matter rather than to know clearly'.[30] The nature of this *basanos*-challenge as an alternative proposal is made clear in section 55 (see above, n. 10). The emphasis of the passage quoted here is that the dicasts decide by conjecture, not with clear knowledge. The words μᾶλλον ἢ σαφῶς εἰδέναι reveal a conceit: since they have no direct knowledge of a dispute, dicasts always decide by conjecture. The 'clear knowledge' stemming from a *basanos*—clear to both disputing parties as well as to other witnesses to the torture—would have obviated the need for the dicasts' decision. The more appropriate verb for the second-hand knowledge of the dicasts, as in Lys. vii 37, is πυθέσθαι.

[Dem.] xlvii 35 provides what might be seen to be the strongest evidence against Headlam: 'although I have demanded (this slave), I am not able to get her, so that you may learn the truth'.[31] However, in sections 7-8 it appears the *basanos* could have 'released' (ἀπηλλάχθαι) the allegedly false witnesses from the trial. Again, the speaker makes a presumptive point, as if the results of the *basanos* would have come before the dicasts, when in fact he can only refer to his own willingness for the procedure with the assumption—based on his opponents' refusal of the challenge—that the *basanos* would have been in his favour. Dem. xxix 11 (quoted above, n. 19) provides a clearer sense of how this presumptive argument is made. There the *elenchos*, the test, is achieved not by the *basanos* but by the challenge and its refusal. The implication is that through the refusal the opponent reveals that he knows he is in the wrong. In Dem. xxx 27 a similar scenario is described: 'since I wished to make these things clear to all of you, I deemed it right to disprove him'.[32] Demosthenes goes on to reveal that he challenged Onetor before witnesses, whereupon Onetor refused the *basanos* on one point and admitted to the other.[33]

In [Dem.] xlix 57 there is mention of a *basanos*-challenge over one of several points. Disagreement arises over the status of this point, had the *basanos* occurred. The key phrase is

[28] Lys., *Olive-Stump* vii 37: ἐγὼ τοίνυν εἰς τοῦτο προθυμίας ἀφικόμην, ἡγούμενος μετ' ἐμοῦ εἶναι καὶ ἐκ μαρτύρων καὶ ἐκ τεκμηρίων ὑμᾶς περὶ τοῦ πράγματος τἀληθῆ πυθέσθαι.

[29] vii 36: εἰ Νικομάχου ἐξαιτοῦντος τοὺς ἀνθρώπους μὴ παρεδίδουν, ἐδόκουν ἂν ἐμαυτῷ συνειδέναι· ἐπειδὴ τοίνυν ἐμοῦ παραδιδόντος οὗτος παραλαβεῖν οὐκ ἤθελε, δίκαιον καὶ παρὶ τούτου τὴν αὐτὴν γνώμην σχεῖν. The 'reversal argument' (*hypothetische Rollentausch*) is common; it is discussed by Solmsen, *Antiphonstudien* (Berlin 1929) 10-14 and Thür 269-71.

[30] Isoc., *Trap.* xvii 54: ὃ οὗτος εἰδὼς ἠβουλήθη εἰκάζειν ὑμᾶς περὶ τοῦ πράγματος μᾶλλον ἢ σαφῶς εἰδέναι. See Thür 294-6.

[31] [Dem.], *Ev.* xlvii 35: ἐγὼ δὲ ἐξαιτῶν οὐ δύναμαι παραλαβεῖν, ἵν' ὑμεῖς τὴν ἀλήθειαν πύθησθε.

[32] Dem., *On.* I xxx 27: βουλόμενος δ' ἐμφανῆ ποιῆσαι ταῦτα πᾶσιν ὑμῖν, ἐξελέγχειν αὐτὸν ἠξίουν. *Cf.*, Dem. xlv 62.

[33] On such partial admissions and the procedural consequences of them, see Thür 152-8.

the following: 'and to exploit this sure sign before you that I am lying also with respect to the other matters'.[34] The 'sure sign' (τεκμήριον) is the unrealized eventuality that the *basanos* had gone against him. Thür argues that the passage can only be understood to mean that the *basanos* should serve both as a *Beweismittel* concerning the one point and as the basis for further conclusions, that is, whether or not the speaker is lying about other matters as well.[35] But 'that I am lying also with respect to other matters' can only mean that the speaker would have had to admit lying on the point tested by the *basanos*, if it had gone against him. Dem. xxxiii 13-14 shows it was possible to put aside some charges in a litigation through an accepted challenge: in that case it is an oath-challenge.

In [Dem.] lix 120 there is again reference to a challenge: 'I tendered him a challenge ... through which you might have known all the true facts'.[36] Thür puts emphasis on ὑμῖν ('for you') and argues that the *basanos* would come before the dicasts. But it is through the challenge (δι' ἧς), not the *basanos*, that Apollodorus proceeds to argue: 'and he himself will disprove himself because he is saying nothing sound after being unwilling to surrender the servants for torture'.[37] Lycurgus i 28 also mentions the dicasts' knowing the truth: 'I think that it is necessary that about such great matters you do not vote by conjecture, but by knowing the truth'.[38] In i 29 the source of 'the truth' is again revealed as his opponent's refusal of the challenge: 'for by fleeing the test by those who know, he has agreed that the charges are true'.[39] Finally, there is Lys. iv 11: 'Each of these points, as well as others, would have been nothing other than easy to make clear in other ways and especially by these means'.[40] Thür and many others translate τούτοις as *die Geschworenen*, the sworn judges ('make clear to these men'). But elsewhere in the speech the Areopagites, who are acting as judges, are always referred to in the second person. For this reason it seems better to translate the word as an instrumental dative referring to the *elenchoi*, that is, the *basanoi*. In iv 14 the test of the *basanos* and argumentation before the Areopagites appear as alternatives: 'he thought that after putting aside so accurate a test, it would be easy to deceive you'.[41] The test does not quite indicate that the *basanos* would have obviated an appearance before the Areopagus, but that is clearly the suggestion. Sections 12 and 17 of the speech give further indications of the decisiveness of the *basanos*.

The second group of texts shows the *basanos* compared to other forms of evidence, either as confirming them or opposing them.[42] In the first three the *basanos* is to serve as an *elenchos* for witnesses. First, Is. viii 10: 'since I wished in addition to the existing witnesses to have an *elenchos* done concerning them from *basanoi*—in order that you might believe them, not as (witnesses) who were yet to undergo an *elenchos*, but as having already undergone it concerning the matters about which they are testifying—I thought it right that they hand over their slave

[34] [Dem.], *Tim.* xlix 57: καὶ τεκμηρίῳ τούτῳ καταχρήσασθαι πρὸς ὑμᾶς, ὅτι ἐγὼ καὶ τἆλλα ψεύδομαι.

[35] Thür 208 n. 12.

[36] [Dem.], *Neaera* lix 120: πρόκλησιν αὐτὸν προὐκαλεσάμην...δι' ἧς ἐξῆν ὑμῖν πάντα τάληθῆ εἰδέναι.

[37] [Dem.], *Neaera* lix 125: καὶ ἐξελέγξει αὐτὸς αὑτὸν ὅτι οὐδὲν ὑγιὲς λέγει, οὐκ ἐθελήσας παραδοῦναι εἰς βασάνους τὰς θεραπαίνας.

[38] Lyc., *Leocr.* i 28: οὐ γὰρ οἶμαι δεῖν ὑμᾶς ὑπὲρ τηλικούτων ἀδικημάτων εἰκάζοντας ἀλλὰ τὴν ἀλήθειαν εἰδότας ψηφίζεσθαι. Here the verb for the judges' 'knowing' is εἰδέναι since they can have direct knowledge of the refused challenge, which can be removed from the evidence jar and read aloud.

[39] i 29 ὁ γὰρ τὸν παρὰ τῶν συνειδότων ἔλεγχον φυγὼν ὡμολόγηκεν ἀληθῆ εἶναι τὰ εἰσηγγελμένα. *Cf.* i 35-6 and Thür 268-9.

[40] Lys., iv 11: τούτων καθ' ἓν ἕκαστον καὶ τῶν ἄλλων οὐδὲν ἦν ὅ τι οὐ ῥᾴδιον τοῖς τε ἄλλοις ἐμφανὲς καὶ τούτοις ποιῆσαι.

[41] iv 14: παραλιπὼν ἔλεγχον οὕτως ἀκριβῆ ἐξαπατήσειν ὑμᾶς ῥᾳδίως ᾠήθη.

[42] Thür 209; *cf.* 178-81.

women and men'.[43] As in several other passages, it is consistent with this text that the *elenchos* that was intended and that actually occurred derived not from *basanoi*—as is claimed—but from the challenge. The speaker goes on to note that his opponent has witnesses also, so the two groups of witnesses would cancel each other out. Whichever side loses could bring a *dikê pseudomarturiôn* against his opponent's witnesses, which would supply an *elenchos*, but only after the dicasts' decision. What the speaker argues in section 11 is that the dicasts must conclude from his opponent's refusal of the *basanos* that his witnesses are lying. The speaker's own witnesses have then, in a sense, already passed an *elenchos*, even if it is not in fact the one he implies. At viii 45 he refers back to the *basanoi* as if they had taken place. Lyc. i 28, discussed above (n. 28), presents a similar picture. According to the argument, the opponent who refuses to test the testimony of his witness through *basanos* admits that it is untrue. Is. vii 28 and fr. 23 Thalheim (= DH, *Is.* 12) illustrate the commonplace character of this argumentation. In both passages the *basanos* is initially mentioned as a support for witnesses that is purportedly analogous to the witnesses' support for the litigant's original statements. But when the speaker goes on to argue against the credibility of his opponent's statements, he can mention only the *refusal* of the *basanos*-challenge.[44]

Thür presents Dem. xlv 59 and lii 22 as similarly showing the speakers planning to refute a witness through a *basanos*. But in xlv 59 it is again not the *basanos* but the challenge that provides the refutation: '(the clerk) will read to you the challenge, from which you will catch them in the very act of false swearing'.[45] In lii 22 the refutation of witnesses through the *basanos* is mentioned as an unrealized possibility, for not even a *basanos*-challenge took place: 'they knew very well that there would be a test through torture of the slaves, if they told any such lie as this'.[46] The witnesses here did not in fact testify to the point about which a *basanos* might have taken place. The speaker claims that the possibility of a *basanos*-challenge dissuaded them.[47]

Two texts suggest that *basanoi* should buttress speeches. Demosthenes xxx 35 seems at first a clear case: 'so that there would be not only *logoi*, but also *basanoi* concerning these matters'.[48] But the *logoi* are not the speeches to be delivered before the court, but only preliminary discussions held before witnesses. Onetor, it is explained in the next section, was not willing at those discussions 'to have recourse' (καταφυγεῖν) to the precision of the *basanos*. Antiphon i 7 demonstrates how selective quotation can mislead. In Thür's (admittedly very rapid) critique of Headlam, only the following is quoted: 'if the slaves did not agree (that she is a murderer), he would have defended her with good knowledge'.[49] So much certainly speaks against the Headlam thesis, since the Greek word for 'defending' (ἀπολογέομαι) is the term used for making a defense in court. But what follows is left out: 'and his mother would have

[43] Is., *Ciron* viii 10: βουλόμενος οὖν πρὸς τοῖς ὑπάρχουσι μάρτυρσιν ἔλεγχον ἐκ βασάνων ποιήσασθαι περὶ αὐτῶν, ἵνα μᾶλλον αὐτοῖς πιστεύητε μὴ μέλλουσι δώσειν ἔλεγχον ἀλλ' ἤδη δεδωκόσι περὶ ὧν μαρτυροῦσι, τούτους ἠξίουν ἐκδοῦναι τὰς θεραπαίνας καὶ τοὺς οἰκέτας.

[44] Dem., *Aph.* 3 xxxix 21 also presents such a situation, but the argumentation is slightly different. In III, below, I shall discuss how Is. viii is notable for its confusion of the functions of *marturia* and *basanos*.

[45] Dem., *Steph.* I xlv 59: πρόκλησιν ὑμῖν ἀναγνώσεται, ἐξ ἧς τούτους τ' ἐπιορκοῦντας ἐπ' αὐτοφώρῳ λήψεσθε.

[46] [Dem.], *Call.* lii 22: εὖ εἰδότες ὅτι διὰ βασάνου ἐκ τῶν οἰκετῶν ὁ ἔλεγχος ἤδη ἔσοιτο, εἴ τι τοιοῦτο ψεύσοιντο.

[47] Thür 212 mentions three other passages that he says are predicated on the *Beweisfunktion* of the *basanos*, Isoc. xvii 54, Is. viii 10 and Dem. xxx 37. None of these affects Headlam's thesis in any way that has not already been dealt with. The parallel employment of the *basanos*-challenge and the oath-challenge in Dem. xxix 25 ff. underlines that the function of both challenges is the same, to propose an alternative means of settlement.

[48] Dem., *On* I xxx 35: ἵνα μὴ λόγοι μόνον, ἀλλὰ καὶ βάσανοι περὶ αὐτῶν γίγνοιντο.

[49] Ant., *Stepmother* i 7: μὴ γὰρ ὁμολογούντων τῶν ἀνδραπόδων οὗτος τ' εὖ εἰδὼς ἂν ἀπολογεῖτο...

been released from this charge'.[50] This subsequent wording clearly supports Headlam: if the tortured slaves had disagreed, the stepmother would have been off the hook legally. The prosecuting son could have continued to carry a grudge, but against that grudge his stepbrother would have had a vigorous reply (καὶ ἀντέσπευδε πρὸς ἐμέ).[51] A reason for confusion seems partly to be that two possibilities for torture are suggested: the defending son could have had the torture performed within the context of the challenge, or he could have performed it unilaterally, since he owned the slaves. If he had performed the torture unilaterally, the case might have proceeded and he might have claimed 'good knowledge'. But if the torture resulted from the challenge, his mother might have been freed of the trial.[52]

Lastly, there are texts in which it appears that evidence adduced in a *basanos* would come to a *dikastêrion*. In [Dem.] liii 22-4 there are counter-challenges to *basanoi*. The defendant in the *apographê*, Nicostratus, wishes the prosecutor, Apollodorus, to conduct *basanoi* on two slaves. But Apollodorus claims that the state owns the slaves and that he, as a private individual, cannot take responsibility for torturing them. According to his counter-challenge, the *basanos* should be conducted 'publicly' (δημοσίᾳ) by the Eleven. The evidence derived would then be produced before a *dikastêrion*. Headlam points out that what is suggested by Apollodorus is not the usual challenge, but the procedure to be followed where the state is itself one of the parties. However, Thür rejects the argumentation as highly suspect. Nicostratus, he argues, by agreeing to the public *basanos* would admit that the slaves belonged to the state and so concede the case. Perhaps that is true. Certainly Nicostratus would have argued along these lines, and Apollodorus was at any rate in no mood to achieve an extra-judicial settlement. But we really cannot say what rules there were regarding such situations, so that Thür's outright dismissal of Headlam's reading is not justified. What matters for the present is whether *basanoi* resulting from challenges resolved disputes or could serve merely as evidence. This text shows at most that *basanoi* conducted by the Eleven or some other delegated body could serve as evidence. Headlam's thesis, which concerns disputes between private parties, remains to that extent unshaken. Unlike private parties, where its interests were directly involved, the Athenian state seems not to have abrogated its decision-making prerogative to any arbitrary procedure. It selected officials to carry out the torture and have the results written down and sealed. On hearing the results of the *basanos*, the dicasts would have voted *however they saw fit*.[53] In general, I believe, the dicasts would have accepted the evidence of the *basanos*, conducted by the Eleven, as true (*cf.* And. i 64), but their voting might have included other considerations.

Dem. liv 27 is introduced with the suggestion that statements of slaves also are to be put into the evidence jars: 'they make a challenge—with a view to delay and preventing the evidence jars from being sealed—that they are willing to hand over their slaves concerning the assaults'.[54] Again it is not the *basanoi* that are to go into the evidence jars. Only the challenges, whose wording would have to be worked out in a time-consuming process, went into the collection.

[50] *ibid*: ...καὶ ἡ μήτηρ αὐτοῦ ἀπήλλακτο ἂν ταύτης τῆς αἰτίας. Thür quotes the passage fully several times elsewhere.

[51] This text suggests an interesting complication. The fact that there is more than one slave, as well as the fact that the verb used of the slaves' statements under torture is 'to agree' (ὁμολογέω), allows either that the slaves as a group would not have agreed with the prosecutor or that they would not have agreed with each other. Although in this case the first alternative is the only one possible, the second would clearly present difficulty for the Athenian view of torture.

[52] Thür 210 also mentions three texts in which he understands the terminological distinction between *marturia* and *basanos* to be blurred. They are [Dem.] xlvii 8, liii 22 and lix 122. The second is not problematic: the *marturia* is not identified with the *basanos* in liii 22. I shall discuss the other two in section III (nn. 75-6).

[53] [Dem.], *Nicostr.* liii 24: ἀκούσαντες ἐκ τούτων ἐψηφίσαθε ὁποῖόν τι ὑμῖν ἐδόκει.

[54] Dem., *Conon* liv 27: προκαλοῦνται ἐπὶ διακρούσει καὶ τῷ μὴ σημανθῆναι τοὺς ἐχίνους, ἐθέλειν ἐκδοῦναι περὶ τῶν πληγῶν παῖδας.

It appears that the slaves were not present at the arbitration and immediately available to be tortured, since, as the speaker alleges, time was taken even to write down their names.[55]

The result of the foregoing is that the criticisms levelled against Headlam's thesis are not insuperable: it is an economical way of dealing with the evidence, and there are no texts that cannot be adequately explained through it. Whether or not it was a procedure formally prescribed in Athenian law, the *basanos*-challenge appears to have been a traditional practice having *de facto* decisiveness for the parties. On the other hand, a key point of scholars like Thür, that the dicasts had the ability independently to evaluate the credibility of all forms of evidence that came before them (*freie Beweiswürdigung*) also appears confirmed. The *basanos* resulting from a challenge does not bind the dicasts since it never comes before them.[56]

In Ant. v a slave is tortured privately by the family of the murder victim and then killed. Euxitheos, the defendant, says to the prosecutors, 'you thought it right that [the dicasts] become judges of his words [under torture], while you yourselves became dicasts of his actions'.[57] The implication is that the prosecutors reversed their roles with the dicasts. Just as it was not the place of the prosecutors to judge and execute the slave for the murder of Herodes, it was not normally the place of the dicasts to assess the statements of a slave under torture. An owner was always free to torture his slaves and to report what was revealed in court, but such reports could scarcely have persuaded anyone but himself, since he had complete control over his slaves; they would have been almost useless before the dicasts.

The requirement of the Athenian court that dicasts decide a case after only hearing brief presentations from the opposing sides entails that their judgements could only ever be based on opinion and conjecture, on at best second-hand information.[58] The litigants recognize that it would have been far better had they themselves—who had direct knowledge—resolved their dispute, or, alternatively, had they resolved it with the help of a private arbitrator, who would have had more intimate knowledge of the circumstances than the dicasts can achieve. Demosthenes xxvii 1 makes just this point: 'this man has fled those who have clear insight into our affairs determining anything about them, but has come to you, who have no accurate knowledge of our affairs'.[59] According to the Athenians, the *basanos*-challenge, like the private arbitration, afforded the opportunity to resolve the dispute based on 'accurate knowledge' or 'the entire truth'.[60] However, this view is not based on any division between 'technical' and 'non-technical' modes of argumentation, to which I shall return in the next section, or on a division between archaic and classical Athenian law. It is based on a recognition of the imperfect quality of the democratic *dikastêrion*, which lacked powers of independent investigation. A resolution of a dispute based on accurate knowledge had to stem from the resources of the parties themselves. The *basanos*, conducted through the agreement of both parties, represented one such resource.

[55] In [Dem.] xlvii 13-15 the speaker uses as evidence against the good faith of his opponent that, despite allegedly offering his slave for torture, he did not have her available immediately to hand over.

[56] Much of Thür's analysis of the tactical use of the *basanos*-challenge is unaffected by the correctness of Headlam's thesis. However, his hypotheses that in every case the challenge was only a trick and that the speeches we possess contain an unrepresentatively high number of *basanos*-challenges seem to me unnecessary.

[57] Ant., *Her.* v 47: καὶ τῶν μὲν ἄλλων λόγων τῶν ἐκείνου τουτουσὶ κριτὰς ἠξιώσατε γενέσθαι, τῶν δὲ ἔργων αὐτοὶ δικασταὶ ἐγένεσθε.

[58] See Thür 294-5.

[59] Dem., *Aph.* I xxvii 1: οὗτος τοὺς μὲν σαφῶς εἰδότας τὰ ἡμέτερ' ἔφυγε μηδὲν διαγνῶναι περὶ αὐτῶν, εἰς δ' ὑμᾶς τοὺς οὐδὲν τῶν ἡμετέρων ἀκριβῶς ἐπισταμένους ἐλήλυθεν. *Cf.* Dem. xlviii 40 and lv 35. On the role of the private arbitrators, see Thür 33 n. 36 and 228-31.

[60] Thür 294 gathers the relevant passages: Ant. vi 18, [Ant.], *Tetr.* i 4.8, Lys. vii 43, Isoc. xvii 54, Dem. xxx 35, Lycurgus i 28-9.

III

Now of course this is all rhetoric and the Orators were not serious in it.

Many legal scholars are tempted to dismiss the role of rhetoric as something extrinsic and bothersome to their study of legal procedures. Statements like Headlam's, above, are common in the literature. But it is my view that rhetoric is an essential part of ancient legal discourse and that an appreciation of it can be extremely helpful, even essential, for dealing with legal questions. In the period from which we have Athenian forensic writings, the late-fifth and fourth centuries BC, there were developments in two areas that greatly affected the rhetorical strategies used in litigation, including those directed toward the torture of slaves.

The first was the increasing use of written documents in court, which replaced the use of direct oral testimony. It is generally agreed that the transition to the use of written testimony was completed before Isaeus, perhaps by about 390 and at any rate not later than 378.[61] Accordingly, while the speeches of the earlier orators, Antiphon, Andocides, Lysias and Isocrates, employ oral testimony, those of Isaeus, Demosthenes, Lycurgus, Dinarchus, Demades and Hyperides use only written testimony. In the speeches themselves, this transition is most noticeable in that, in general, the speakers no longer say 'call the witnesses' but 'read the testimony'. In private suits, which came before a public arbitrator, written testimony may have been used right from the inception of public arbitration, about 403.[62] Certainly writing was used earlier, as is indicated at Ant. i 10, and the formulas by which evidence of various sorts was used did not change substantially. But the procedural changes made *c.* 380 must have forced a new examination of writing and written documents by those who were composing speeches to be used in court (*cf.* Dem. xlv 44-5).

The second development that affected rhetorical strategies resulted from the prodigious activity of the professional rhetoricians, both as speech writers and teachers. These rhetoricians served to canonize lines of argumentation in new ways. However, the process by which they did so could result in arguments based on an incomplete understanding of the legal procedure. As sophists, theirs was not a mode of thought that was informed simply by traditional conceptions or even by the law. The freedom with which they approached problems of law and legal procedure allowed them to see rationality in procedures where none existed, or where a quite different reasoning was at work. Our most direct evidence for the role of professional rhetoricians in categorizing forensic arguments consists of the accounts of Aristotle (*Rhet.* 1.15) and Anaximenes (*Rhet. Alex.* 14-17) on the *atechnoi pisteis*, the documentary evidence used in court. Rather than *atechnoi*, Anaximenes uses the term *epithetoi* ('supplementary') *pisteis*, which indicates that, like Aristotle, he sees them as somewhat extrinsic to the speech and the rhetorician's *technê*. These were the documents that could, for instance, be read aloud by the court secretary at the request of the speaker. Aristotle includes five sorts, laws, testimony of witnesses, contracts, *basanoi* and oaths, while Anaximenes has what he calls 'the opinion of the speaker' and then witnesses, *basanoi* and oaths.

Despite their superficial differences, both handbooks rely on a common precursor.[63] Although there are times when they differ in specific language, the arguments they recommend are essentially the same, the similarity being especially striking in the sections relating to *basanos*. Aristotle and Anaximenes composed their handbooks in the period 350-330 BC. If, as

[61] See Bonner 46-54 and G.M. Calhoun, 'Oral and written pleading in Athenian courts', *TAPA* i (1919) 177-93; *cf.* F. Pringsheim, 'The transition from witnessed to written transactions in Athens', in *Festg. Simonius* (1955) 287-97 and *Gesammelte Abhandlungen* (Heidelberg 1961) 2.401-9, and Thür 89-90.

[62] See R.J. Bonner, 'The institution of Athenian arbitrators', *CP* xi (1916) 191-5, and H.C. Harrell, *Public arbitration in Athenian law* (Columbia, MO 1936) 27-8.

[63] See D. Mirhady, 'Non-technical *pisteis* in Aristotle and Anaximenes', *AJP* cxii (1991) 5-28.

seems likely, the original handbook was composed specifically as a result of the changes made in judicial procedure that required the use of written testimony, about 378 BC, then it was probably written sometime between 378 and 360. That would put it one generation before the *technai* of Aristotle and Anaximenes.

However, the sequence in the handbooks 'laws, witnesses, *basanoi* and oaths' reveals an important difference between the judicial and rhetorical methods of categorization. In *Ath. Pol.* 53.2-3 it is said that the documents placed in the evidence jar after a public arbitration—which are the only ones that can be used before the court—are the 'laws, challenges and testimonies (of witnesses)'.[64] The rhetorical handbooks thus follow this judicial scheme, by including laws and witnesses, but they replace challenges with *basanoi* and oaths. Like the *Ath. Pol.*, the speeches of the orators give indications only for the court secretary to read challenges to *basanoi* and oaths, not *basanoi* or oaths directly. The substitution in the handbooks resulted perhaps from the economy of not having to deal with the challenge twice, first in terms of the *basanos* and then of the oath. In his treatment of oaths, Aristotle preserves the idea of the challenge, but in their treatments of the *basanos* both Aristotle and Anaximenes refrain from any suggestion of the challenge. On the other hand, as was observed throughout section II, the orators commonly speak of the *basanos* as if it had taken place, when in fact they can refer only to a challenge.

The consequences of the substitution, whatever its rationale, are more than superficial, for the handbooks take one further and very misleading step: with the procedural distinction of the challenge seemingly forgotten, they identify the *basanos* as a form of testimony (*marturia*). Aristotle calls *basanoi* a kind of testimony (μαρτυρίαι τινές), while Anaximenes calls a *basanos* 'an agreement of someone who knows, but is involuntary'; for him the only difference between a *marturia* and a *basanos* is whether the 'agreement' is voluntary or not.[65] Through this identification the rhetoricians put the *basanos* on a par with the testimony of free males. The identification comes easily to the modern perspective, as it must have to a sophist. Since we live in a slaveless society, we see little difference between the statement of a slave and that of a free person. Moreover, our difficulty in translating *basanos* adds to the confusion: the word is often rendered as 'the testimony of a slave under torture' and so the word 'testimony' is used of both *marturia* and *basanos*. The sophist must likewise have emphasized the parallel between the statements of free and slave involving 'those who know' the truth (οἱ συνειδότες). In Antiphon vi 22-5, where the speaker is emphasizing how he sought to settle his dispute amicably, there is close connection made between the two. But in Antiphon, unlike the handbooks, there is no confusion of *marturia* and *basanos*. In fact, in vi 25 Antiphon is at pains to emphasize the close parallel between *basanos* and oath.

If in the first part of this paper I had argued that Thür and the other legal scholars who have rejected Headlam's thesis are right and that the results of a *basanos* could come before a court, which would evaluate its credibility, then it would hardly matter that the handbooks identify it as a form of testimony. But if the *basanos* is actually an out of court means of settling a dispute, then what the handbooks say is quite misleading. The *marturia* and the *basanos* are in

[64] *Ath. Pol.* 53.3: οὐκ ἔξεστι δ' οὔτε νόμοις οὔτε προκλήσεσι οὔτε μαρτυρίαις ἀλλ' ἢ ταῖς παρὰ τοῦ διαιτητοῦ χρῆσθαι ταῖς εἰς τοὺς ἐχίνους ἐμβεβλημέναις. No particular weight should be put on the order. In 53.2 'laws' and 'testimonies' are reversed. *Cf.* Harpocration, s.v. διαιτηταί and *SIG*[3] 953.20-3. Thür 132-48 argues in great detail against identifying the challenge as an *atechnos pistis* on the grounds that since its authenticity must be supported by *marturiai*, its evidentiary force is reducible to the *marturiai*. However, while it is correct not to make this identification—because the substitution made by the rhetoricians would cause us to label the *basanoi* and oaths as *atechnoi pisteis* twice—Aristotle supports the authenticity of contracts through *marturiai* and yet recognizes them as *atechnoi pisteis* (1376b2-5).

[65] Aristotle, *Rhet.* i 15 1376b31: αἱ δὲ βάσανοι μαρτυρίαι τινές εἰσι. Anaximenes, *Rhet. Alex.* 16.1: βάσανος δέ ἐστι μὲν ὁμολογία παρὰ συνειδότος, ἄκοντος δέ. Cf. *Rhet. Alex.* 36-18 and 31.

no way similar from a judicial point of view.[66] The *marturia* is the statement of a free male that is made in order to support the credibility of something said by the litigant in court. By making the statement, the man takes a share of the risk run by the litigant (*cf.* Arist. *Rhet.* 1.15 1376a8). The *basanos*, on the other hand, is an extra-judicial means of securing 'the truth' concerning a disputed point. Its function is to decide a dispute, just as would the decision of a private arbitrator or the agreed-upon swearing of an oath.

As was mentioned in section II, there are several texts in which speakers compare the *basanos* to the *marturia*.[67] Some understand the texts to be an indication of their judicially parallel status. However, they appear instead to indicate that the orators briefly took over a misleading step from the rhetoricians. In the speeches of Antiphon, Andocides and Lysias there is no suggestion that the *basanos* and the *marturia* are parallel. Isocrates (*c.* 393 BC), however, argues at one point that '[while the judges believe that] it is possible to suborn witnesses of things that have not occurred, *basanoi* demonstrate clearly which side is telling the truth'.[68] In so doing, he actually preserves the judicial distinction between the *basanos* and *marturia* since he does not quite suggest that they are parallel. At the same time he intimates a point of comparison. Isaeus (before 364) and Demosthenes (*c.* 363) take this point further. They connect another argument, which also appears in the handbooks, that the existence of a suit against false testimony (*dikê pseudomarturiôn*) implies the suspect nature of the *marturia* (cf. *Rhet.* i 151376a20-1, *Rhet. Alex.* 15.6) and argue as follows: 'you know that of those who have testified in the past some appeared not to testify truly, but none of those tortured has ever been proven to have said what was not true as a result of the tortures'.[69] This comparison is absurd from a judicial point of view, since slaves were tortured partly because they were not liable to prosecution for false testimony.[70] It was procedurally impossible for them to be caught saying what was untrue. One of the conditions necessary for an accepted *basanos*-challenge was that both parties believed the slave would tell the truth under torture.[71]

Another commonplace linking Isocrates, the rhetorical handbooks and Isaeus and Demosthenes is found in an argument used together with the identification of *basanos* and *marturia*. Isocrates says to the judges, 'I see that you think that concerning both private and public matters there is nothing more credible or truer than the *basanos*'.[72] Aristotle abbreviates the argument, but Anaximenes gives it in full: 'private people concerning the most serious matters and cities concerning the most important affairs take credence from *basanoi*'.[73] Isaeus

[66] See Thür 210 and Todd (n. 4) 27-31. See also G.R. Morrow, *Plato's law of slavery in its relation to Greek law* (Urbana 1939) 82 n. 48, on *Laws* 11.937b: 'Plato uses the word μαρτυρεῖν ... in its precise legal sense ... In the strict sense of the word neither the slave-informer nor the slave put to the torture could be called a μάρτυς'. *Cf.* [Ant.], *Tetr.* 1.2.7, 1.3.4 and 1.4.7, Lys., vii 37, Isoc., xxi 4, Dem., xxx 36, and Hyperides, fr. 5 Jensen.

[67] See Thür 209-10.

[68] Isoc., *Trap.* xvii 54: καὶ μάρτυρας μὲν ἡγουμένους οἱόν τ' εἶναι καὶ τῶν μὴ γενομένων παρασκευάσασθαι, τὰς δὲ βασάνους φανερῶς ἐπιδεικνύναι, ὁπότεροι τἀληθῆ λέγουσιν.

[69] Isaeus, *Ciron* viii 12: σύνιστε γὰρ ὅτι τῶν μὲν μαρτυρησάντων ἤδη τινὲς ἔδοξαν οὐ τἀληθῆ μαρτυρῆσαι, τῶν δὲ βασανισθέντων οὐδένες πώποτε ἐξηλέγχθησαν ὡς οὐκ ἀληθῆ ἐκ τῶν βασάνων εἰπόντες. Dem. xxx 37 follows Isaeus almost verbatim.

[70] Plato, *Laws* xi 937a-b, allows slaves to testify (μαρτυρεῖν) and to speak in court only at trials for murder and only on the condition that they be made accountable through the *dikê pseudomarturiôn*. Attic law had no such provisions. Thür 309 calls the comparison of *basanos* and *marturia* hollow.

[71] *Cf.* Ant., *Stepmother* i 8, *Chor.* vi 25, Lyc., *Leocr.* i 29. Thür 227-34 points out that, in those disputes that refer explicitly to the dispute-ending quality of the *basanos*, the references to *aphesis* and *apallagê* correspond to the other methods of mutually ending disputes.

[72] Isoc., *Trap.* xvii 54: ὁρῶ δὲ καὶ ὑμᾶς καὶ περὶ τῶν ἰδίων καὶ περὶ τῶν δημοσίων οὐδὲν πιστότερον οὐδ' ἀληθέστερον βασάνου νομίζοντας.

[73] Arist., *Rhet.* i 15 1376b30-31: ἔχειν δὲ δοκοῦσι τὸ πιστόν. Anax., *Rhet.Alex.* 16.1: οἵ τε ἰδιῶται περὶ τῶν σπουδαιοτάτων καὶ αἱ πόλεις περὶ τῶν μεγίστων ἐκ βασάνων τὰς πίστεις λαμβάνουσι. *Cf.*, Lyc. 1.29.

(viii 12) and Demosthenes (xxx 37) rehearse nearly the same argument. Demosthenes' verbatim copying of Isaeus reflects a lack of intellectual commitment on the part of the young orator that may have guided Isaeus himself in this instance as well. It seems likely that Isocrates inspired this part of the original handbook, even if he did not have a role in writing it himself.[74] The comparison between the *basanos* and the *marturia*, which was irrelevant in terms of the law, was useful rhetorically. Isaeus and his student Demosthenes, who compose speeches only after all testimony is being committed to writing, appear to be influenced by the sort of handbook that inspired Aristotle. The chronology fits this pattern.

Basanos and *marturia* are directly identified in only two speeches. The first, [Dem.] xlvii, was composed *c.* 355, but the thrust of the argument, a paraphrase of the opponent, closely follows Isoc. xvii 54 with its suggestion of suborning witnesses: 'for [my opponent] said in the suit for assault that the witnesses who had been present and were testifying about what had happened—in writing according to the law—were false and had been suborned by me, but that the [slave] woman who had been present would speak the truth, testifying not in writing, but from the strongest testimony, while being tortured'.[75] The speaker reports a stock argument from the handbooks that his opponent (mis)used in order to deceive the judges in a previous suit (*cf.* xlvii 40). He reports the opponent's identification of the *basanos* as *marturia* ironically, since, even if this argument were persuasive at one time, it now appears a transparent deception as more importance is placed upon writing and conformity to the law. The irony suggests that this particular influence of the rhetoricians on the orators was short-lived. As influential (and misleading) as the passages that identify *basanos* as *marturia* have been for modern scholarship, they did not catch on among the orators. The only other occurrence [Dem.] lxix 122, is equivocal: '[Stephanus] might have made a demonstration from the most accurate testimony, by handing over these servants'.[76] Apollodorus is certainly referring to the *basanos*, but he also refers, metaphorically, to Stephanus' possible 'testimony' in simply acceding to the challenge and producing the servants (*cf.* Is. viii 14 for this metaphor of *marturia*.)

Since the rhetorical handbooks that we possess from the fourth century were composed after the speeches that survive, or at any rate after those who wrote the speeches were mature and unlikely to be interested in handbooks, it is often difficult to discern where systematic rhetorical thought has directly influenced the orators. But in the case of the *atechnoi pisteis*, where the general structure of what appears in our handbooks was probably already in circulation a generation before Aristotle composed his *Rhetoric*, it is plausible to search for such influences. Because the status accorded the *basanos* in the handbooks, as a form of *marturia*, differs so markedly from its judicial status, the influence of the handbooks becomes clearly apparent. It still remains to delve more deeply into the Athenian rationale for using torture as they did, but that must await another study.[77]

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[74] See Plut. *Dem.* 5.5 and Mirhady, *'Pisteis'* (n. 63) 6-7.

[75] [Dem.], *Ev.* xlvii 8: ἔφη γὰρ ἐν τῇ δίκῃ τῆς αἰκείας τοὺς μὲν μάρτυρας τοὺς παραγενομένους καὶ μαρτυροῦντας τὰ γενόμενα ἐν γραμματείῳ κατὰ τὸν νόμον ψευδεῖς εἶναι καὶ ὑπ' ἐμοῦ παρεσκευασμένους, τὴν δ' ἄνθρωπον τὴν παραγενομένην ἐρεῖν τάληθῆ, οὐκ ἐκ γραμματείου μαρτυροῦσαν, ἀλλ' ἐκ τῆς ἰσχυροτάτης μαρτυρίας, βασανιζομένην.

[76] [Dem.] lix 122 ἐξὴν αὐτῷ ἐκ τῆς ἀκριβεστάτης μαρτυρίας ἐπιδεῖξαι, παραδόντι τὰς θεραπαίνας ταύτας. *Cf.*, n. 36 above.

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