THE TORTURE OF SLAVES IN ATHENIAN LAW

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ONE OF THE MOST criticized features of classical Athenian law is the bizarre institution of βάσανος, usually translated "torture" or "interrogation under torture." A well-known rule held that in most cases[1] the testimony of slaves was only admissible in court if it had been taken under torture, and in the surviving forensic speeches the orators frequently describe the rules governing βάσανος and praise the practice as most effective and even "most democratic" (Lycurg. 1.29). It was a topos that information from a βάσανος was preferable to the testimony of free witnesses; as one speaker puts it (Dem. 30.37):

> Indeed, you [jurors] consider βάσανος the most accurate of all proofs in both private and public cases; and when slaves and free persons are both available and you need to discover some fact under investigation, you do not use the testimony of the free persons, but you subject the slaves to βάσανος, in this way seeking to discover the truth. And this is quite reasonable, gentlemen of the jury, for you know well that in the past some witnesses have seemed to testify untruthfully, whereas no one subjected to βάσανος has ever been proven to speak untruthfully in a βάσανος.[2]

By contrast, modern scholars are nearly unanimous in their condemnation of βάσανος as cruel ("cet usage barbare") or irrational ("the only case of real *stupidity* I can bring against the Athenians") or both ("dark not only as cruelty, but as irrational").[3]

The discrepancy between the orators' praise for βάσανος and its condemnation by modern scholars suggests that something may be wrong with our whole approach to the issue. The purpose of this paper is to examine how βάσανος really functioned in Athenian law and forensic oratory. From a narrowly legal perspective, βάσανος can indeed appear cruel and irrational, but I will argue that in the period of the orators the institution of βάσανος had become predominantly a legal fiction and must be evaluated as such.[4]

1. Commercial cases may have been an exception, since "slaves appear to have had full court access, as parties and as witnesses, in cases involving commercial matters" (E. Cohen 1992, 96; cf. ibid. 96–101, Gernet on Dem. 34.5, E. Cohen 1973, 116–21); but cf. Todd 1994, 135–36.

2. Similar wording in Isae. 8.12, Isoc. 17.54; cf. Thür 1977, 290–98.

3. The citations (to which many more in the same vein could be added) are from Beauchet 1897, 2:427, Mahaffy 1890, 241 and Harrison 1968–71, 2:147.

4. The importance of legal fictions was first noted by Sir Henry Maine, who in his influential and still important *Ancient Law* argued that they constitute one of the three means by which the law undergoes change (Maine [1861] 1917, esp. pp. 15–17), the other two are equity and legislation.

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A full understanding of βάσανος in Athenian law must begin with the realization that an Athenian trial was in an important sense a staged competition (the Athenians themselves called it an ἀγών), whose goal was only partly the determination of a set of facts and their legal consequences. The forensic ἀγών consisted almost entirely of two opposing λόγοι, one of which would be voted the winner. Thus, the function of any "legal" institution in Athens must be understood in terms of its contribution to a litigant's forensic strategy, which consisted primarily of his single λόγος delivered at the trial.[5] When understood in this context, βάσανος will be seen to be a rational and effective institution allowing the evidence of slaves to be brought before the court, while doing little physical harm to the slaves themselves. For this reason it survived and was praised by the orators to the end.[6]

I begin with the word βάσανος, which originally means a touchstone to test gold, and then any test to determine the genuineness of someone or something.[7] In the orators it sometimes retains the simple sense of a "test" (Andoc. 1.30, Isae. 9.29) but more often designates a means of confirming information by an interrogation, normally, but not always, accompanied by the infliction of physical pain.[8] βάσανος also can refer to the evidence that results from such an interrogation, including (as we shall see) the evidence resulting from a challenge to interrogate a slave, even if the interrogation never occurs.

Clearly βάσανος, in some uses at least, is not the same thing as its common modern translation, "torture," which I understand to refer to the act of inflicting pain on someone, often in order to obtain information.[9] We sometimes distinguish two kinds of torture, penal and judicial (though some would restrict the term to the latter of these). Penal torture is the use of torture for punishment, often in conjunction with execution; it was common in England into the seventeenth century, sometimes in the form of "drawing and quartering" a convicted criminal. The Athenians probably used penal torture against slaves[10] and perhaps even against citizens,[11] but they never called it βάσανος. Judicial torture, on the other hand, refers to the torture of suspects or material witnesses, usually in a criminal investigation; it was (and still is) practiced in many societies but was traditionally banned in common law (in contrast to continental law); nonetheless, it was occasionally used in England, usu-

5. I use the term "forensic" in an attempt to bridge the traditional division between legal and rhetorical considerations. The sharp separation of rhetoric from dialectic, truth from persuasion, etc. advanced by Plato in the *Gorgias* is misleading (at best) in understanding Athenian forensic oratory.

6. I.e., until at least the 320s, when evidence from the orators gives out; it may, of course, have lasted and been praised longer.

7. duBois 1991, 9–34 has an extensive review of the meaning of βάσανος in poetry.

8. In Isoc. 17.15 Pasion is said to have agreed to a βάσανος but wanted the interrogation to be verbal (λόγῳ); if this were impossible, the speaker would presumably say so.

9. See Peters 1985, esp. 1–4.

10. Comedy regularly portrays slaves being beaten for small offenses; see Hunter 1992, 284–87. The παλλακή in Ant. 1.20, who is probably a slave (so Carey 1988; contra Bushala 1969), is said to have been "put on the wheel and handed over to the executioner" (τῷ γὰρ δημοκοίνῳ τροχισθεῖσα παρεδόθη); it is not clear whether she was tortured as part of an interrogation or as punishment, or both.

11. A certain Antiphon was racked and executed (στρεβλώσαντες αὐτὸν ἀπεκτείνατε, Dem. 18.133) though again, it is not absolutely clear whether the torture took place before or after conviction (or both).

ally in cases with significant political implications.[12] The Athenians allowed judicial torture of slaves and perhaps free non-citizens,[13] but not normally citizens.[14]

My concern in this paper, however, is not with these two types of torture, which are common elsewhere, but with a special type of judicial torture that is unique to Athens,[15] which I call "evidentiary torture." This is the torture of an innocent slave (never a free witness[16]) for the purpose of verifying information, usually of a rather mundane sort in a civil suit: for instance a slave may be asked to confirm a family relationship in an inheritance dispute. Most references to βάσανος in the orators are to evidentiary torture, and this is the kind that is most severely criticized by modern scholars, as for example in Douglas MacDowell's clear and (as usual) common-sensical assessment of the three kinds of torture:

> To torture a person as punishment for an offence is logical, even if undesirable; to torture a person to make him confess an offence of his own or of an accomplice is understandable, though deplorable; but to torture an innocent man or woman in order to check the truth of information about someone else's offence appears to us an act of wanton and purposeless barbarity.[17]

MacDowell's characterization of evidentiary torture errs in limiting it to cases concerning an offense (whereas it may be used in cases like inheritance disputes where no offense is alleged) and, more seriously, in ignoring the one feature that most clearly distinguishes evidentiary torture, namely the "challenge" or πρόκλησις, which preceded the actual interrogation. Recognition of the importance of the challenge is but one of the many virtues of Gerhard Thür's systematic and thorough review of βάσανος, a review that is the starting point of my own and all future work on the subject.[18]

Since evidentiary βάσανος always resulted from a challenge, it always involved two parties, in contrast with judicial torture where normally only one party (the victim or his representative, or a public official) carried out

12. Judicial torture was officially sanctioned in most European countries until the eighteenth century; for its unofficial use in England see Langbein 1977, 81–90.

13. The argument of Bushala 1968, that non-citizens could be tortured in homicide investigations, is challenged by Carey 1988. For the judicial torture of slaves see Hunter 1992, 283–84.

14. The decree of Skamandrios, which may date from the late sixth century (see MacDowell on Andoc. 1.43), prohibited torturing Athenian citizens, but the Athenians apparently suspended the decree after the affair of the mysteries in 415. Bushala 1968, p. 63, n. 10 cites other examples of citizens who were tortured in connection with public criminal investigations.

15. We have no evidence for evidentiary βάσανος in any other Greek city (Thür 1977, 25–27). The famous fifth-century law code at Gortyn allows slaves to testify under oath, apparently under the same general conditions as free persons, and in one case even gives a slave's sworn testimony priority over that of a free man (*ICret* 4.72.2.15–16). Under Roman law slaves gave evidence under torture in criminal and certain civil investigations, but never as a result of a challenge (see Watson 1987, 84–89).

16. None of the cases discussed by Bushala 1968 involves evidentiary torture, with the possible exception of the reference in Lys. 3.34 to the hypothetical torture of a Plataean boy (who may have been a slave).

17. MacDowell 1978, 246. MacDowell's three categories are the same as mine (penal, judicial, evidentiary) though he does not name them.

18. I will not refer to Thür every time I draw on his indispensable study, without which this paper would not exist. Besides Thür, Turasiewicz has a full, but rather mechanical survey of passages in the orators. Hunter 1994, 89–94 introduces some interesting new perspectives on the relations of slaves and masters.

the interrogation; Thür calls this a "one-sided βάσανος" (43–57). The procedure of the challenge to βάσανος was controlled by rules that apparently remained constant throughout the century of our evidence (ca. 420–320).[19] If a litigant wanted to introduce the evidence of servants[20] into court, he first issued a challenge offering his own or requesting his opponent's slaves for interrogation; slaves belonging to a third party were rarely proposed (Ant. 6.23). The challenge would often give specific details about when and where the interrogation would occur and exactly what questions would be asked. The slave's testimony was limited to giving yes or no answers to questions, and these answers could apparently be cited later or read aloud in court. The challenge was regularly written down and observed by witnesses. The other party could accept or reject the challenge, or accept it with modifications, or make a counter-challenge involving different slaves or different conditions. When the two parties had reached agreement, the slave was normally interrogated in the owner's presence by the litigant who was not his owner; occasionally a third party, referred to as a βασανιστής, was chosen to conduct the interrogation. If the slave's testimony was decisive, the two sides might come to some agreement so that the case would be settled out of court, but, as we shall see, a βάσανος almost certainly did not automatically settle a case.

Such, in brief, are the rules for βάσανος, or at least such are the rules as modern scholars deduce them from remarks in the orators; but these rules do not tell us everything about how βάσανος worked in practice. Here we must first confront the fact that although the orators mention dozens of challenges to βάσανος,[21] we do not know of a single instance where the interrogation was actually carried out. We are told of at least two cases[22] where a challenge was accepted, but in both instances one of the parties later raised objections and in the end refused to participate. Thus, we have no direct evidence that any slave was ever subjected to evidentiary torture. The orators mention several actual instances of both penal and (one-sided) judicial torture (Ant. 1.20, 5.30; Dem. 48.16–19, etc.) but none of evidentiary torture.[23] Is it possible that this procedure, so frequently mentioned in the ora-

19. See Thür 1977, who gives full details (59–203) based primarily on the accounts in surviving speeches. These rules were probably not formally enacted, or even expressed, and not every litigant necessarily followed them to the letter, but we may accept them as a valid description of common practice.

20. In almost all cases the slave in question is a household or personal servant, usually designated as οἰκέτης, παῖς or θεράπαινα. The general term δοῦλος is rarely used except in generalizations about βάσανος, where there is usually a contrast (explicit or implicit) with ἐλεύθερος.

21. Thür 1977, p. 59, n. 1 lists twenty-three cases with forty-two instances of πρόκλησις to βάσανος; the number is repeated by Todd 1990, 33 though a firm count is impossible. In some cases (e.g., Dem. 27.50–52) the challenge may have asked for something other than βάσανος; in others it is not clear whether several separate mentions of βάσανος in a speech refer to the same or a different βάσανος. Thür does not treat Antiphon's *First Tetralogy* (2.4.8) but notes that it is fully consistent with the other evidence. Hunter 1994, 93–94 gives a shorter list.

22. Dem. 37.40, Isoc. 17.15. Thür 1977, p. 149, n. 76, pp. 229–31 wants to exclude Isoc. 17.15 as arbitration not βάσανος, but this is splitting hairs. In a third case, Dem. 47.6–17, it is not clear whether the slave's owner actually made a challenge, but the speaker implies that there once was an agreement on a βάσανος, though the owner kept saying that the woman in question was not available.

23. In Lys. 7.35 the speaker is clearly referring to one-sided judicial interrogations when he generalizes that slaves either accuse themselves and are executed or endure torture on behalf of their masters.

tors, was never actually carried out? Scholars have been reluctant to accept this conclusion, but no convincing explanation has been offered why, if evidentiary βάσανος was practiced, we should hear of no actual instances of it.

A simple and elegant solution to this dilemma was proposed a century ago by J. W. Headlam but was quickly rejected and has won little support from scholars since.[24] Headlam proposed that a βάσανος that was carried to conclusion automatically settled the issue, so that no case in which a βάσανος was carried out ever came to court, with the result that no evidence for the actual practice of βάσανος is preserved in the orators. In rebuttal scholars have noted that in several passages (e.g., Dem. 53.24) the orators speak of introducing the evidence of a βάσανος into court, and although some of these instances may be questioned, taken together they make a strong case.[25] But even if these are not conclusive, there are other objections to Headlam's view that are worth elaborating.

First, even if some cases might be settled by a βάσανος, this possibility does not amount to a rule, let alone a law, that a βάσανος automatically settles the case. Thür notes that the nature of Athenian legal procedure would make it impossible for the evidence of a βάσανος to bind the litigants or jurors.[26] If, as Thür thinks, the evidence of an accepted challenge was normally decisive in the jurors' minds, a βάσανος may often have led to a settlement out of court, but without a legal mechanism for enforcing this settlement, some litigants would surely persist in their claims and some cases would still end up in court. Even a litigant who had previously agreed to abide by the result of a βάσανος could not legally be prevented from continuing the case. Thus, βάσανος may at times have led directly to an out-of-court settlement, but it cannot have done so every time.

Second, the way orators talk of the consequences of a βάσανος confirms that it was not automatically decisive. Orators often assert that a specific βάσανος would have been decisive had their opponent not been so cowardly as to refuse it, but they never speak of this consequence being automatic. Statements to the effect that "If the βάσανος had gone against me, I would have had no case" (e.g., Lys. 7.37) clearly seek to persuade the jurors of the decisive importance of the information being sought; but even if the speaker is not exaggerating (and in most cases he surely is), the fact that he must argue for the decisiveness of this βάσανος is telling. If a βάσανος were necessarily or automatically decisive, he would surely state this explicitly even if he then embellished the point further.[27] When it suits his

24. Headlam 1893 was answered by Thompson 1894, with a brief rebuttal by Headlam 1894; for more recent scholarship see Todd 1990, 34. Mirhady 1991b suggests that Headlam was right, but discusses only the similar challenge to swear an oath (cf. below n. 49); he concludes that an accepted oath-challenge effects an out-of-court settlement. Mirhady 1991b, 79 cites Pollux' statement (8.62), πρόκλησις δ' ἐστὶ λύσις τῆς δίκης, calling it "one of the strongest pieces of evidence," but even if Pollux means the same thing as Headlam (he could mean "πρόκλησις is a resolution of the case," i.e., is one way of resolving it), he is a very unreliable source for Athenian law (see Thür 1977, 36). I plan to consider the question of oaths in a separate paper.

25. Thür 1977, 207–11.

26. Thür 1977, 213–14; cf. 302.

27. In the only preserved text of a challenge, Apollodorus says that if the βάσανος goes against him, he is willing to drop the case against Neaira (Dem. 59.124); such a statement would be superfluous if a βάσανος were automatically decisive.

purpose, moreover, a litigant can argue the opposite, that the βάσανος would not have settled anything. For example, in Dem. 53.25 the speaker maintains that if he had accepted his opponents' challenge and interrogated their slaves himself (rather than delivering them to public officials for questioning, as he wanted to do), his opponents would have disputed everything.[28] Clearly he envisions a βάσανος that would not be decisive.

A third objection to the theory that a βάσανος was automatically decisive is the relative insignificance of the information sometimes sought.[29] For example, Aeschines (2.126–28) proposes a challenge to Demosthenes for a βάσανος on the spot, offering slaves to testify as to where he slept on certain nights. This point has virtually no relevance to the main issue and it seems very unlikely that, if the βάσανος was actually carried out and Aeschines' claim was confirmed, the case would automatically be settled in his favor. Aeschines confirms this, moreover, by proposing that if the slaves testify against him, the citizens should rise up and kill him, but if they testify against Demosthenes, he should admit in public to being an androgyn and not a free man. There is certainly an element of ridicule in this whole passage and the offer is probably not serious,[30] but it implies that the litigants could agree on whatever consequences they wished, and that a βάσανος would not decide a case unless both litigants agreed on this.[31]

Fourth, in the *Rhetoric* (1.15, 1376b31–77a7) Aristotle treats βάσανος as a proof (πίστις) in the same category with witnesses and other non-artistic proofs, concentrating in each case on how a speaker should use the proof in his speech in court.[32] His presentation of the alternatives—either the βάσανος is in your favor or it is against you—clearly envisages the result of a βάσανος being discussed in court by a litigant. Aristotle's advice thus presumes that a βάσανος does not automatically settle the case.

Fifth and most important, even if Headlam were correct about the automatic decisiveness of a βάσανος, we would still expect the orators to refer to previous instances of a completed βάσανος. An Athenian trial was often just one case in an ongoing series of disputes between the two litigants and their allies, and orators frequently refer to verdicts in earlier trials or informal settlements reached at earlier stages. Thus, if the Athenians actually used evidentiary torture with any regularity, we could expect to hear of several earlier instances of a completed βάσανος, whether or not it settled the case. Although the orators mention challenges to swear an oath much less often than challenges to a βάσανος, we do hear of one instance of a challenge to swear an oath that was accepted and led (not necessarily automatically) to a

28. ἰδίᾳ μὲν γὰρ βασανιζομένων τῶν ἀνθρώπων ὑπ' ἐμοῦ ἀντελέγετ' ἂν ἅπαντα ὑπὸ τούτων.

29. Thür 1977, 211–13.

30. Thür 1977, 190–93 argues that although a βάσανος would not normally have been allowed in court (see Dem. 45.16), it might have been possible in this case.

31. Headlam 1893, 2 agreed that a βάσανος would only be decisive if both litigants agreed to this, but he argued that if the litigants did not agree to make the βάσανος "a verdict on the whole case" then no βάσανος took place.

32. Anaximenes in the *Rhetorica ad Alexandrum* (16, 1432a13–33) presents a rather similar discussion of βάσανος as providing evidence for a speaker to use in court. See Mirhady 1991a, 17–20; Thür 1977, 287–90.

temporary settlement in a dispute that the speaker is now reviving.[33] In this same way we should expect to hear of earlier βάσανοι, even if they automatically led to a settlement of the dispute.

In sum, if a challenge to βάσανος was accepted and carried out, it almost certainly would not have settled the case automatically, as Headlam proposed, unless the two sides agreed to this consequence. Moreover, if there were cases in which a βάσανος led directly to an out-of-court settlement, these would sometimes be mentioned in later speeches. Thus, the absence of any mention of evidentiary βάσανος in the orators is good evidence that such cases must have been rare, and most scholars have rightly accepted the conclusion that evidentiary βάσανος rarely, if ever, occurred in practice[34] and have sought other explanations. Currently the most common view seems to be that the procedure was too uncertain and litigants did not want to risk their case in this "high-stakes game."[35] But even if the chance of success was small, we would expect at least a few litigants to take the risk. Moreover, if there were little or no chance of success, or if many challenges were considered contrived or deceitful, we would expect to find the orators raising objections to βάσανος, as Aristotle and Anaximenes do when they list arguments to use if the evidence of a βάσανος is against the speaker. But although litigants are careful to avoid βάσανος in practice, in their speeches they continually sing its praises and never once dispute the effectiveness of evidentiary βάσανος in general.

To be sure, most handbooks and commentaries report that orators argue on both sides of this issue depending on the needs of their case,[36] but this view is probably inspired by Aristotle and fostered by the modern conviction, virtually an article of faith, that torture is not generally effective (so

33. This challenge and oath are briefly referred to at Dem. 39.3–4 and 40.10–11. The challenge was made (we are told) on the basis of an understanding that it would be rejected, but after the challenge was made, the other party reneged on the understanding and accepted it. As usual, there is much about this episode that we are not told; the most recent study is Mirhady 1991b.

34. Finley 1980, 94 asserts that there is no ground for this conclusion, but he does not elaborate. MacDowell 1978, p. 246, with n. 559 cites Andoc. 1.64, Lycurg. 1.112 and *POxy* 2686 as cases where torture of witnesses was carried out, but all these cases involve public investigations—one-sided not evidentiary torture (cf. Todd 1990, p. 34, n. 26). Hunter 1994, 92 (cf. Gernet 1955, 112) thinks Dem. 47.12 describes a place where slaves are actually tortured, but the speaker refers only to slaves being offered for torture. He is disputing his opponents' claim that they offered a slave woman for interrogation during an earlier arbitration hearing, since (47.11) they only presented two witnesses to this offer, both close relatives (as was normal). They could have presented more witnesses, he argues (47.12), because the arbitration took place at the Heliaia. To quote Gernet's Budé translation: "En pareil cas, lorsqu'une partie amène un esclave qu'elle offre de livrer pour la question, il y a beaucoup de gens qui assistent à la lecture des sommations" (τῶν δὲ τοιούτων προκλήσεων, ὅταν τις τὸ σῶμα παραδιδῷ κομίσας, πολλοὶ προσίστανται ἐπακούοντες τῶν λεγομένων—for παραδίδωμι = "offer," not "hand over," see Thür 1977, 64–65). The presence of the slave does not imply that interrogations were actually carried out at arbitration hearings, since one would often bring one's slave in person when making a challenge, probably to heighten the effect. Of course, the βάσανος could probably be carried out on the spot, if both sides agreed.

35. Thür 1977, 285: "ein Spiel mit hohem Einsatz"; cf. Todd 1990, 36: "litigants are afraid of being stuck with whatever evidence comes up."

36. So Lipsius 1905–15, 888–89, Harrison 1968–71, 2:147, MacDowell 1978 (by implication from p. 246 with n. 557), Edwards on Ant. 5.29 (p. 90), Carey-Reid on Dem. 37.41, Carey on Lys. 7.35, Carey on [Dem.] 59.122 (p. 149), Dover on Ar. *Ran.* 616f. I can find the correct view only in Gernet (on Ant. 5.31): "le principe même que la *question* [i.e., βάσανος] constitue un mode de preuve décisive est toujours admis (sauf une protestation timide et isolée dans Dém., XXXVII, 41)"; cf. Thür 1977, 282: "Praktisch nie finden sich in der Argumentation um die Proklesis Äusserungen, die Basanos sei generell zur Wahrheitsfindung untauglich."

how could the Athenians think it was?). Some scholars also fail to bear in mind the important distinction between one-sided judicial torture, the conduct of which was entirely in the hands of the examiner, and evidentiary torture, which was controlled by strict rules agreed to by two parties; the potential for abuse derives entirely from features of one-sided torture not present in evidentiary torture, such as a slave being offered his freedom to testify against his master.

Of the three passages from the orators generally cited as critical of βάσανος in general (Lys. 5.3–5, Ant. 5.31–32, Dem. 37.41),[37] the first two concern one-sided torture.[38] In the first the criticisms are too vague to be of help, but in Antiphon 5.31–32 the speaker explicitly links the abuses he criticizes to the procedures of judicial torture and implies that these abuses would have been eliminated and the βάσανος would have been effective if the rules of evidentiary torture had been followed.[39] If anything, this criticism of judicial torture reinforces the sense that a properly conducted evidentiary βάσανος would produce valid results. In Dem. 37.41 Nicobulus explains that he accepted a challenge proposed by his opponent and adds, "not that it was fair; for how is it fair that my owing two talents or this συκοφάντης receiving no punishment depends on the body and life of a slave?" Nicobulus' vagueness on many aspects of this challenge makes it difficult to know just what transpired,[40] but the fact that he accepted it implies that his complaint is less a protest against the effectiveness of βάσανος in general than a way to emphasize by contrast the great significance of the issue being decided; he is casting doubt not on the validity of the βάσανος but on the significance of the testimony it is intended to elicit.

Thus, not until the rhetorical works of Aristotle and Anaximenes do we find arguments against the general validity of βάσανος.[41] Although these works were perhaps not given their final form until ca. 330, their views on βάσανος were probably early enough to be known at least to the later orators, and yet the orators persist in praising βάσανος.[42]

37. Another passage sometimes adduced, Ant. 1.10, may suggest a slave's natural inclination to lie but makes clear that a properly conducted βάσανος will overcome this inclination and lead to the truth. In Lys. 4.15–17 the speaker suggests that slaves belonging to his opponent might have lied on their master's behalf but this suggestion is only a foil to the speaker's assertion that the woman he wished to have interrogated would certainly have told the truth despite her greater attachment to his opponent.

38. Cf. Lys. 7.35, where the speaker maintains that slaves tell the truth despite hostility toward their masters. His self-serving generalization, that slaves either accuse themselves and are executed or endure torture on behalf of their masters, clearly refers to one-sided judicial interrogations.

39. The speaker criticizes his opponents in particular for not waiting until he was present before torturing the slave, as the rules of evidentiary torture would require; if he had interrogated the slave, the outcome would have been different (Ant. 5.32, 35).

40. Carey-Reid (ad. 37.40) suggest that some of the terms Nicobulus recounts may refer to his own counter-challenge rather than to the original challenge.

41. It is worth noting that Aristotle devotes less than two lines to advice for someone who has βάσανος on his side, whereas he spends ten lines explaining how to challenge the evidence of a βάσανος, presumably because the former arguments are well known but the orator will need help with the latter (1376b33–77a1 vs. 77a1–77a7d; even if the last four lines are a later addition, they indicate that a later scholar saw a need to expound more arguments against βάσανος, probably because these were not to be found in the orators). In Anaximenes the discrepancy is less marked but he still devotes nearly twice as much space to arguments against βάσανος.

42. Plato omits βάσανος from his ideal code in the *Laws* (written ca. 347), where slaves apparently testify directly in court without undergoing βάσανος (Morrow 1939, 80–82).

We find further evidence of the orators' approval of βάσανος in the fact that, whereas on the one hand speakers often explain at length why they issued a challenge to βάσανος and denounce their opponent for rejecting it, on the other hand they rarely offer any excuse or explanation for their own rejection of a challenge. Only four times does a speaker even mention that he rejected a challenge by his opponent,[43] and in three of these (Lys. 4.15–17, Dem. 29.38, 53.22–25) the speaker explains his rejection by arguing that his opponent's challenge was inferior to one he himself issued that was in turn rejected by his opponent. In the fourth case (Dem. 54.27) the speaker mentions a challenge Conon made at the last minute, allegedly for the sole purpose of delay; he then (54.28) explains the challenge Conon should have made at an earlier time if he had been serious about it. In all four cases, then, the speaker only mentions his own rejection of a challenge as part of an argument that there was a better challenge available.

In contrast to these four instances where a speaker mentions that he has rejected a challenge, we have nearly forty reports of challenges a speaker says were rejected by his opponent. This disproportion is far too high to have resulted from the accident of survival. It indicates rather that in at least some (and probably many) cases in which a speaker makes no mention of any challenge to βάσανος issued by his opponent, the opponent did in fact issue a challenge that the speaker rejected and is now ignoring. In some of these cases, moreover, the speaker must know that his opponent has already made, or will make, an issue of this rejection, and yet he still remains silent about it. Thus a speaker normally does not try to explain or justify his own rejection of a challenge; he simply ignores it. Jurors might wonder at his silence on the matter and might draw their own conclusions about the truth of the other side's claims, but the litigant who rejected the challenge is probably willing to concede the point it raises, relying on other arguments instead.

We may speculate that this was the case in Lysias 1, where critics have often noted that Euphiletus presents no testimony from his wife's maid who conveyed messages to the adulterer Eratosthenes. Euphiletus does not need her testimony since he has free witnesses to support the main arguments in his case, but Eratosthenes' relatives, who apparently argued that he was entrapped, would surely have wanted to ask her about her role as an intermediary; and she might have been compelled to answer "yes" to a question like, "Did you or did you not bring a message to Eratosthenes that he should visit your mistress that night?" If the opponents did challenge Euphiletus to this βάσανος and he refused to hand over the woman (perhaps claiming she was free), they probably made much of this refusal in their own speech but he ignores it, concentrating instead on the points supporting his own side.[44]

43. Cf. Lys. 7.35, where the speaker claims that his opponent rejected a challenge, saying "servants are not trustworthy." These may not have been the opponent's actual words.

44. Dover 1968, 188 argues that whether or not Euphiletus offered the woman for torture, we should expect him to say something about her; Dover suggests that whatever was said about her in court may have been omitted from the published version of the speech. If one resorts to such explanations, however, almost any reconstruction of a speaker's argument is possible. For a better account see Carey on Lys. 1 (p. 63).

Even if we cannot be certain about individual cases, however, we must still conclude that, whereas on the one hand litigants commonly issue challenges to βάσανος and dwell at length on their opponent's refusal to accept their challenge, on the other hand they almost always reject a challenge to βάσανος issued by their opponent and they rarely mention this rejection in their speech in court. So once again we must ask why an institution that is praised so highly in the forensic speeches is, as far as we can tell, avoided in practice? We need to probe further into the details of the procedure.

I begin with what Thür has called the "contrived rejection" (*die kalkulierte Ablehnung*),[45] and some of the techniques he has noted (233–61) for constructing a challenge to βάσανος that one's opponent would be almost certain to reject. One could pose a question about a fact of which one was certain, or combine several questions in such a way that the desired answer, yes or no, would be virtually guaranteed. Or one could issue a challenge concerning an insignificant or even irrelevant issue; of course, every litigant strives to make his own challenge appear highly significant and central to the case, but in many instances the evidence sought in a challenge would certainly by deemed irrelevant or at least misleading by the opponent. Other tactics, such as requesting the interrogation of an opponent's trusted servant, who might thereby be injured, may also have been used.[46] Whether a challenger used these tactics or not, in most cases he was probably quite certain that under torture the slave would give the desired testimony confirming the evidence he was seeking; in some cases (e.g., Ant. 6.23) he also had free witnesses who would testify on the same points.

Thür concludes (261) that since the orators do not expect their challenges to be accepted, they make them primarily in order to obtain a rhetorical advantage in court rather than in the hope of obtaining evidence from an actual interrogation, as would be proper. This conclusion is essentially correct; but Thür still has difficulty explaining why the orators almost never point out their opponent's deviousness to the jurors. In the end (284–86) he blames the low intelligence of the jurors in the popular courts, ignoring the fact that several examples come from speeches before the Areopagus (Ant. 1, Lys. 3, 7). He also speculates that the logographers indulged in this deception more often than ordinary litigants who wrote their own speeches (which are not preserved, of course, so this theory cannot be tested). And he argues that it gave the logographers an advantage to be able to manipulate the challenge to βάσανος without their less sophisticated opponents realizing it and without the knowledge of the jurors, who tended naïvely to accept the evidence of a rejected βάσανος without thinking.

45. Thür is following up an observation first made by Wyse 1905 (398–99, repeated in Wyse-Adcock 1963, 486–87) but rarely noted since: "Challenges were not serious attempts to reach a settlement, but were designed to influence the dicasts. The aim of a challenger was to construct such a proposal as would be refused, in order to be able to denounce his opponent in court for concealing the truth from fear of revelations; the opponent sought to turn the tables by an inconvenient counter-challenge, and both sides recited to the judges commonplaces on the use of torture as an instrument to elicit truth. It is not likely that freemen were in the habit of staking important interests on the word of a slave on the rack."

46. The example of Pasion's trusted slave Cittus (Isoc. 17) is discussed below. Thür probably makes too much of some of the tactics he notes, such as requesting that physically weak slaves be tortured.

Thür's explanation of βάσανος presumes that Athenian law was shaped by the (democratic) political need for large juries and was thus not conducive to the free evaluation of evidence (*die freie Beweiswürdigung*) or the determination of truth. βάσανος originated, in his view, in an archaic procedure of automatic proof but, under the influence of the sophists, it developed into what we might call a "trade secret" of the logographers, who manipulated the challenge to βάσανος in such a way that they could gain rhetorical advantage from their opponents' rejection of it; they thereby rendered the procedure of βάσανος in practice "meaningless" (309). Not until Aristotle did anyone understand the real effects of torture or question the validity of evidence obtained thereby; lacking this understanding the orators continue to praise βάσανος without question (310–11).

Thür's analysis of the rhetorical use of βάσανος by the orators is often very perceptive, but I cannot entirely accept his conclusions about its nature and function. We have evidence from nearly a century before Aristotle (Ant. 5) that at least one orator realized the potential for abuse of judicial torture, and it is hard to believe that every later orator believed that the rules of evidentiary torture would guarantee a truthful result. If βάσανος was indeed a method of obtaining evidence by the interrogation of slaves under torture that was misused during the entire period of our evidence, it is very difficult to imagine why no one before Aristotle objected to it. The implication that the logographers formed a kind of guild concealing their trade secret from other Athenians hardly seems likely given the rivalries among them. Thür asks the wrong question when he seeks to determine what role βάσανος might play as "an instrument for discovering the truth," as if this were the only or primary goal of the Athenian legal system.

An Athenian trial clearly raised a broader set of issues than modern law deems proper and was less concerned with separating rhetorical and legal concerns.[47] Each side had much more freedom in choosing its own issues than in modern law, where legal rules enforced by a judge impose restrictions that narrow the scope of a trial; each litigant, moreover, would have needed to prepare his entire presentation before the trial, and if he were using a logographer, his arguments would need to be put in writing before the trial. This process would have encouraged litigants to concentrate on developing their own arguments into a coherent and persuasive whole. To be sure, a litigant would need to respond to major arguments raised by the other side, but he would not need to worry about answering every point his opponent might make and could safely ignore a challenge he had rejected. His primary task in presenting his case was to control the issue—to turn the jurors' attention to those questions whose answers would likely

47. D. Cohen 1993, 12 observes that the courts "appear to have rendered judgment in regard to representations about the totality of the transaction of which that particular act was a part. This process by its very nature focused upon judgments about the political, social, and moral context of the relations of the parties and, therefore, upon what sort of person each of the parties was. On this view, much of the judicial rhetoric which has been too readily dismissed as 'irrelevant' or a 'perversion of legal process' is really central to the process of judgment as the Athenians conceived it." Of course modern litigation does not always exclude considerations that are, strictly speaking, non-legal.

favor his position.[48] The few rules that existed regarding a speaker's arguments (such as that one should stick to the point in a homicide case) could not be enforced except by the jurors' verdict, which was based, of course, on the full speeches of both parties. Thus each litigant selected whatever issues he wanted to emphasize, gathered witnesses and other evidence to support these issues, and then constructed his arguments from this material. By issuing a challenge to βάσανος regarding one of his issues, a litigant could be confident his opponent would refuse it, not just because the result of the interrogation would be likely to favor the challenger but also because to accept one's opponent's challenge would be to grant the importance of one of his main issues, thereby drawing attention away from one's own issues.

To illustrate the process, let us say that one point in a litigant's case is that on a certain day one of his slaves delivered a letter. Before the trial he could challenge his opponent to interrogate his slave on the specific question, did he deliver a letter that day? He could be confident this challenge would be refused, not only because the letter was in fact delivered by this slave but also because his opponent was probably building his case on a different set of issues and would not be concerned to deny delivery of the letter. The litigant would then describe the rejected challenge in his speech to the jurors, and might have the text of the challenge read out in full and affirmed by witnesses who were present when it was made. He might add that his βάσανος is more reliable than the evidence of a free witness. For the jurors the evidence of a βάσανος might carry about the same weight as the evidence of a free witness; in both cases they would need to decide not only whether the testimony was true but also what it amounted to in the context of the speaker's entire case. They might also have to weigh this litigant's βάσανος against a different βάσανος proposed by his opponent that either involved different slaves or the same slave on a different point.

It should be apparent that in the last paragraph I have gradually slipped into using "βάσανος" as equivalent to "challenge to βάσανος." The orators make the same move, most clearly in Isaeus 8 (*On the Estate of Ciron*). Early in the speech the speaker sets forth facts concerning his mother's life that will be crucial to his argument that she was the legitimate daughter of Ciron (8.8). He found a way, he says, to prove these facts, since the household servants of Ciron must know them, and he thus decided to obtain proof from βάσανοι in addition to his free witnesses (πρὸς τοῖς ὑπάρχουσι μάρτυσιν ἔλεγχον ἐκ βασάνων ποιήσασθαι, 9–10). He issued a typical challenge to his opponents, that they should hand over Ciron's servants, but they refused, which the speaker naturally takes as evidence that his wit-

48. For example, in Ant. 6 the defendant, a choregus accused of unintentional homicide in the death of a boy who was training for a choral performance in his house, emphasizes two issues: his own absence at the time of the death and his opponents' ulterior motives in prosecuting him. The prosecution, however, almost certainly focused on different issues and asked different questions; their main argument probably concerned the overall responsibility of the choregus for those in his charge, and they probably emphasized emotional aspects: the awful circumstances of the death, the poor family deprived of such an outstanding young boy who was fulfilling his civic duty, the threat this posed to everyone's (every juror's) child, etc.

nesses are more credible than theirs (10–11). The speaker then presents a μαρτυρία, a "deposition" that is read in court, in which (he says) witnesses who were present confirm the challenge and its rejection and he adds the typical praise of βάσανος. As the speech proceeds the speaker introduces other free witnesses (8.13, 17, 20, etc.), and quotes a law (8.34).

At several points he refers back to the βάσανος, using it to bolster the credibility of his other witnesses as well as to support his case directly. His words are revealing. First, after hearing the testimony of witnesses (8.27) he returns to the point that his witnesses are credible, arguing that the jurors should believe his statements because of his witnesses, and should believe his witnesses because of his βάσανοι (πόθεν χρὴ πιστεύεσθαι τὰ εἰρημένα; οὐκ ἐκ τῶν μαρτυριῶν; οἶμαί γε. πόθεν δὲ τοὺς μάρτυρας; οὐκ ἐκ τῶν βασάνων; εἰκός γε, 8.28). He also argues that support for his account comes from the fact that "my opponents have avoided a βάσανος of the servants" (τούτους βάσανον ἐξ οἰκετῶν πεφευγότας, 8.29). Finally, just before the end of the speech he summarizes his case to the jurors (8.45): "you have sufficient evidence from witnesses, from βάσανοι, and from the laws themselves (ἔχετε δὲ πίστεις ἱκανὰς ἐκ μαρτυριῶν, ἐκ βασάνων, ἐξ αὐτῶν τῶν νόμων) that we are children of a legitimate daughter of Ciron." In other words, just as he has presented to the jurors the evidence of witnesses and a law, so too he has given them the evidence of a βάσανος. Wyse comments (ad loc.) that, "in reality the 'proof' is deduced from the refusal of the opponent to submit Ciron's slaves to examination by torture"; this may be true, but the expression "evidence from βάσανοι" refers not to a logical deduction the jurors ought to make, but directly to the rejected challenge that is read in court, confirmed by witnesses, and incorporated into the speaker's argument. This βάσανος is the deposition (μαρτυρία) that is presented to the jurors in the same way as the witnesses and the law that are cited, and the three kinds of evidence are used in the same way—as πίστεις ἄτεχνοι in Aristotle's terminology.

In this speech, then, βάσανος does not designate a hypothetical procedure of interrogating a slave under torture, but a forensic procedure for introducing a slave's presumed testimony in court; βάσανος is the rejected challenge that allows the facts in question to be introduced to the court with the assumption that they would have been confirmed by the requested slaves.[49] Elsewhere, when the orators introduce a βάσανος by means of a document, they normally designate this either a πρόκλησις or a μαρτυρία (as in Isae. 8). Like βάσανος, πρόκλησις too can be used (e.g., Dem. 45.59) to designate not just the challenge but the evidence introduced to the court by means of a rejected challenge. In this connection it is worth noting that in *Ath. Pol.* 53.2–3 Aristotle includes προκλήσεις along with μαρτυρίαι and νόμοι as

49. There is a similar use of ὅρκος ("oath") in Dem. 49.65, where the speaker says "after I had put an oath in the (evidence) jar." In fact he had not sworn an oath but only made an offer to swear (in writing); it is this offer he puts into the jar, calling it his oath. As Mirhady 1991a, 24 explains: "simply by offering in writing (through the *proklêsis*) to swear an oath a litigant does in a sense swear it, even if not at an official level, since judges may presume that someone offering to swear an oath really means to do so." Substitute "interrogate a slave" for "swear an oath" and one can make nearly the same statement.

the evidence that is officially sealed before a trial,[50] while in *Rhetoric* 1.15 Aristotle uses βάσανος, which he calls a type of μαρτυρία. Of course, the orators use βάσανος in other ways as well, to designate either the actual interrogation or the entire process including challenge and interrogation. Indeed, both terms, πρόκλησις and βάσανος, can designate either specific stages of a procedure or the process as a whole.

The use of βάσανος in Isaeus 8, however, is the clue we need for understanding the orators' continuing high praise of the procedure: if βάσανος was designed as a procedure to elicit true evidence from slaves by torture, it was a failure, for it rarely (if ever) achieved this goal; but if βάσανος was designed (as its use in Isaeus 8 suggests) as a procedure for introducing the evidence of slaves in court by means of a rejected challenge, it was eminently successful. This suggests that even if an actual interrogation by βάσανος occurred from time to time, the interrogation of slaves was neither the main purpose nor the normal manifestation of evidentiary βάσανος.

Further details confirm this suggestion that the actual interrogation of slaves was not the purpose of βάσανος. First consider the two cases where, we are told, a challenge was apparently accepted and plans were made for the interrogation but one litigant later changed his mind. Demosthenes 37 is a complicated case concerning the ownership of a mine. In 37.40–42 the speaker, Nicobulus, relates how his opponent Pantaenetus issued him a written challenge that a slave who knew the facts should be questioned by βάσανος. Though he claims that this interrogation would not be fair, Nicobulus says he accepted the challenge and both parties gave a security deposit. When the time came for the interrogation, however, Pantaenetus made a different challenge, insisting that he himself conduct the interrogation, and he then seized the slave and "began dragging him around" (ἐπιλαβόμενος εἷλκεν, 37.42). Nicobulus' account is vague and confusing,[51] which is probably his intention, but clearly the interrogation never took place. Nicobulus then issued a counter-challenge, which Pantaenetus rejected, and this counter-challenge is read in court. Although it is not stated explicitly, we can be reasonably certain that when Pantaenetus changed his mind after his challenge was accepted, he suffered no penalty, since if he had, Nicobulus would surely have mentioned it.

Similarly in Isocrates 17.15–17 the two sides apparently agree to carry out a βάσανος but in the end their agreement collapses and the interrogation never takes place. The case concerns a sum of money allegedly deposited with the banker Pasion. According to the speaker's account (which we must, as always, treat with some skepticism[52]), Pasion repeatedly refused to allow his slave Cittus to be subjected to βάσανος, first claiming he was free;

50. ἐμβαλόντες τὰς μαρτυρίας καὶ τὰς προκλήσεις καὶ τοὺς νόμους εἰς ἐχίνους.

51. Thür 1977, 148–51 has a helpful discussion, though I am not in agreement on every detail; see also Maffi 1988, 196–98.

52. From other sources we learn that Pasion was one of the most successful and apparently respected bankers in Athens; thus the picture the speaker in Isoc. 17 gives of his villainous behavior may well be exaggerated, if not downright false.

at one point, however, he agreed to hand over the slave, and the two sides chose inquisitors (βασανιστάς) and met at the Hephaestion. The speaker asks that Cittus be beaten and racked, but Pasion says they did not choose executioners (δημοκοίνους) and requests a verbal interrogation. At this point the agreement breaks down and the inquisitors refuse to participate. According to the speaker, everyone later condemned Pasion's behavior, who then asked the speaker's forgiveness, but since the speaker does not mention any legal consequences other than the (alleged) disapproval of others, it is likely that there were none.

It is possible that in both cases the degree of agreement previously reached is exaggerated. In Isocrates 17, in particular, it is clear that Cittus is an important employee of Pasion, in a business where slaves were often entrusted with full responsibility for transactions and where personal trust and experience were of utmost importance. It is plausible that Pasion would have allowed Cittus to be interrogated verbally but would not want him beaten and racked, since if he were seriously injured, no ordinary compensation would be adequate. Indeed, the speaker's insistence on physical torture may have been motivated by his knowledge that Pasion would reject this regardless of the truth of the matter. Nonetheless, both examples show that the only ill effect of breaking an agreement about a βάσανος was the criticism this might provoke from one's opponent. In other words, after a challenge was accepted, either party could still reconsider and withdraw at any time if he felt his challenge or his acceptance of a challenge was a mistake. A litigant might take some trouble to show that he was prepared to allow an interrogation, and there was probably a certain amount of "brinkmanship" in his apparent cooperation, but in the end he could always withdraw from the agreement if he wished.

Other features also helped insure that the interrogation would not actually occur. From the evidence in the orators[53] Thür (169–90) shows that the owner would normally hand over his slave to his opponent, who would administer the βάσανος—usually in the form of whipping or beating, though the rack is also mentioned—while asking the question that had been agreed to. There was no limit to the duration of the beating or the number of blows;[54] rather, the interrogation was supposed to continue "until the slave seemed to tell the truth," and at any time the owner could object to the severity or to other aspects of the interrogation and withdraw his slave. Thus, if a βάσανος was actually carried this far, one can easily imagine the two parties disagreeing about the duration of the interrogation: did a slave's first answer seem to be the truth? or should the torture continue to get the real truth out of him? There would also be room for disagreement about damages, which the interrogator would owe unless the slave supported his

53. Thür 1977, 169–73 also draws on the whipping scene in Ar. *Ran.* 616–73. This scene obviously parodies elements of a βάσανος, but although Xanthias gives his "slave" for βάσανος, the scene contains none of the language of challenge and Aristophanes is probably drawing on elements from judicial more than evidentiary torture.

54. Glotz 1908 surveys a wide range of evidence for the punishment of slaves in Greece, including the normal Athenian penalty of fifty blows, but none of his material relates to evidentiary torture.

case.[55] In other words, even if an actual interrogation took place, the two parties might still persist in their disagreement over the results.

These rules made it very unlikely that an interrogation would be completed to the satisfaction of both parties; even if both initially agreed on a βάσανος (which they rarely did), it is likely that one of them would eventually withdraw from the agreement.[56] If we understand βάσανος as it has traditionally been understood—a method of interrogation designed to elicit truthful testimony from slaves—then we have to conclude that the Athenians designed this procedure in such a way that it would almost never work. But if we understand βάσανος as a tool of forensic oratory—a means of presenting the evidence of slaves to the jurors—then this is no longer a difficulty. Indeed, if the purpose of βάσανος was to provide evidence for a forensic speech in court, then the ineffectiveness of the (hypothetical) process of interrogation would be desirable, for it would give litigants greater confidence to make challenges on matters about which they were reasonably certain without being constrained by the possibility of an occasional miscalculation. If their challenge was accepted, they could always stop the process at a later point without serious consequences.

Finally, consider the truth a βάσανος seeks to determine. There can hardly be a clearer indication that the aim of Athenian legal procedure was not to elicit a full and truthful account of the facts but rather to allow each litigant to devise a forensic strategy that would produce the strongest possible λόγος for his case. Unlike a judicial βάσανος, where the questioner asked whatever questions he thought would best reveal the truth, in an evidentiary βάσανος the question was restricted to a single point of information chosen by the challenger to fit his needs. This question might sometimes be central to the case, but often it was irrelevant or misleading, and the opponent had no opportunity to broaden or alter it except by issuing his own counter-challenge. The restrictions placed on the question make it virtually impossible that the challenge to βάσανος was intended to elicit the full truth in the case; the restrictions were well suited, however, to the needs of litigants wanting a πίστις to use in their λόγος.

In sum, by the age of the orators evidentiary βάσανος had become a legal fiction, whose function and purpose were not (and may never have been) the eliciting of truth from slaves. For the orators a βάσανος was a challenge designed in such a way that the challenger's opponent would not only reject it but say nothing in response to the challenger's forensic utilization of the βάσανος. The challenger could also expound, without fear of contradiction, the legal fiction that extracting information from slaves by torture was the surest way to discover the truth. The orators maintained this fiction to the end, but when the Athenians really needed the evidence of slaves in court—in commercial cases in which the slaves themselves would often be

55. Sometimes the challenge would mention potential damages, but later disputes on this point were still possible; see Thür 1977, 199–203.

56. These rules for βάσανος also made it less likely that one party could trick the other, as happened with the oath-challenge mentioned above (n. 33); under similar circumstances the procedure of βάσανος would still give the deceived party opportunities to break the agreement.

major players—they may have dropped the fiction and allowed slaves to testify in the same way as free witnesses.[57]

I have tried to show that although as an extra-forensic procedure for actually interrogating slaves under torture βάσανος was for the most part a legal fiction, as a forensic procedure for introducing evidence in court it was rational and effective. I have not tried to answer the other charge brought against βάσανος, that it was cruel, since it is much more difficult, and probably impossible, to assess the total effect of the procedure on the slaves themselves (or their masters). Although in this procedure slaves may only rarely, if ever, have been tortured, there are other important aspects of the question that would take us beyond the scope of this paper. Scholars like Finley and duBois have stressed the ideological function of βάσανος in reinforcing the sense that slaves are "Other,"[58] or in marking the boundary between free and slave, and in these terms the number of times that βάσανος was used in practice may make little difference. As long as the orators continued to speak of βάσανος with regard to slaves but not free men, it would retain its ideological effectiveness, no matter how rarely an interrogation actually occurred. Even the argument that the testimony of slaves is more reliable than that of free men would help reinforce the ideology of difference. I am not saying it did not matter to slaves whether or not they really were tortured; of course it did. But the ideological impact may have been nearly the same in either case, reminding slaves that their bodies were always available for the physical domination of their masters. In this sense, the conclusions we have reached about the function of βάσανος would do little to mitigate its cruelty, for legal fictions, like myths, may often have more influence over members of a society than the "truths" we scholars seek to uncover. On the other hand, it may not be an insignificant comment on Athenian slavery that use of this peculiar procedure was largely confined to oratory.[59]

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LITERATURE CITED

Beauchet, Ludovic. 1897. *Histoire du droit privé de la république athénienne.* 4 vols. Paris.

Bushala, E. W. 1968. Torture of Non-Citizens in Homicide Investigations. *GRBS* 9: 61–68.

_____. 1969. The *Pallake* of Philoneus. *AJP* 90: 65–72.

Carey, C. 1988. A Note on Torture in Athenian Homicide Cases. *Historia* 37: 241–45.

57. See above n. 1.

58. Finley 1980, 94–95; duBois 1991, 35–62.

59. A briefer version of this paper was delivered (in French) at a conference on "Le IVème siècle: approches historiographiques" in Nancy in September 1994 and will be published in the proceedings of the conference; I am grateful to Pierre Carlier for the invitation to participate. Versions were also presented at the Universities of Texas, Keele, and Leicester, and at the 1994 APA meeting. I am grateful to the audiences on all these occasions, and especially to Lyn Foxhall, for suggestions and criticisms. I also thank Stephen Todd and an anonymous referee for *CP* for many helpful comments on an earlier written version. David Mirhady informs me that a paper of his taking a very different approach to the subject of βάσανος will appear in *JHS* in 1996.