THE NATURE OF PROOFS IN ANTIPHON

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IN DISCUSSING the revolution of the 400 in 411 B.C., Thucydides (8. 68) gives us a brief description of one of its leaders, Antiphon of Rhamnus:

> Of all the Athenians of his day Antiphon was second to none in virtue and had the greatest power both in intellect and in the expression of his thoughts. He did not come forward in public or willingly enter any dispute, being regarded with suspicion by the multitude because of his reputation for cleverness (διὰ δόξαν δεινότητος). Nevertheless, for those involved in a dispute, whether legal or political, he alone was most able to help whoever consulted him for advice.

When the 400 were overthrown, Antiphon was tried, convicted, and sentenced to death, but (Thucydides continues) "of all the men up to my time who were accused on this charge of subversion he seems to me to have made the best defense in a capital case."

In the centuries since Thucydides recorded this opinion, Antiphon's reputation has suffered, and in terms of rhetorical ability he is usually ranked behind the fourth-century masters, Lysias, Isocrates, and Demosthenes.[1] This evaluation of Antiphon, though perhaps valid in some respects, is in part the result of a slim but influential volume published more than a half-century ago, in which Friedrich Solmsen examined Antiphon's three courtroom speeches (1, 5, and 6) from the perspective of Aristotle's distinction, in the *Rhetoric,* between "nonartistic proofs" (πίστεις ἄτεχνοι) and "artistic proofs" (πίστεις ἔντεχνοι).[2] Claiming that early Greek legal procedure knew only nonartistic proofs (e.g., oaths), which were automatically decisive, Solmsen placed Antiphon at a point of transition between this archaic system and fourth-century procedure, in which artistic proofs dominate. Antiphon makes much use of the newer, artistic proofs, but (Solmsen argued) the archaic, non-

An earlier version of this paper was presented at a seminar at the University of Michigan Law School. I should like to thank the organizers—James Boyd White, Sally Humphreys, and GailAnn Rickert—and the other members of the seminar for their many helpful comments.

1. George Kennedy, for example, compares Antiphon unfavorably with Lysias and Isaeus, though he does acknowledge that Antiphon's speeches "have certain virtues, which were sometimes to be lost later" (*The Art of Persuasion in Greece* [Princeton, 1963], pp. 131–33). J. de Romilly asserts that in contrast to Antiphon and Andocides, "with [Lysias], forensic oratory becomes more than a technique; henceforth it is a literary art" (*A Short History of Greek Literature* [Chicago, 1985], p. 114).

2. *Antiphonstudien,* Neue philologische Untersuchungen 8 (Berlin, 1931).

0009-837X/90/8501-0002$01.00

artistic proofs still influence his speeches, determining to some extent the nature of his arguments and the arrangement of his material.[3]

Solmsen's thesis is brilliant in many respects and has the undeniable merit of situating Antiphon within a legal and intellectual tradition; but however desirable such a perspective may be, it is a mistake, in my view, to portray Antiphon as dominated or even strongly influenced by the kind of archaic legal tradition that Solmsen describes. The legal tradition, I suggest, put no such constraints on Antiphon's argumentation or use of proofs; rather, we must understand that the construction of his arguments was determined essentially by the facts of the case (in a broad sense) and by his own rhetorical ability.

One way of refuting Solmsen's views is to examine the speeches of Antiphon and demonstrate that nonartistic proofs do not in fact play the role that Solmsen alleges. This approach would require a thorough study of all the arguments of each speech, a task I shall not undertake here.[4] Rather, I should like to raise more basic questions, concerning two points: first, Solmsen's use of Aristotle's distinction between "artistic proofs" and "nonartistic proofs"; second, the question of proofs in early Greek legal procedure. I shall argue that Solmsen's thesis is based on a mistaken understanding of early Greek legal procedure compounded by a mistaken application of Aristotle's categories of proofs, and that he thus situates Antiphon in a falsely conceived legal tradition.

I. PROOFS IN ARISTOTLE

The terms πίστεις ἄτεχνοι and πίστεις ἔντεχνοι were created by Aristotle.[5] A similar distinction is made by Anaximines in the *Rhetorica ad Alexandrum* (7 1428a16–26), which may be slightly earlier,[6] but since Solmsen bases his thesis on Aristotle, I shall concern myself only with the discussion in his *Rhetoric*. Near the beginning of Book 1, after defining rhetoric as the "ability to discover the available means of

3. Solmsen's conclusions have not necessarily been adopted in detail, but he has set the terms for discussion of Antiphon. This is especially clear in the work of Kennedy, the most important contemporary scholar of Greek rhetoric writing in English; see *Art,* pp. 131–32, and *The Cambridge History of Classical Literature,* vol. 1: *Greek Literature,* ed. B. M. W. Knox and P. E. Easterling (Cambridge, 1986), where Kennedy writes (p. 501): "In terms of content and technique the most significant aspect of Antiphon's speeches is the conflict evident in them between direct evidence and argumentation, what Aristotle was later to call non-artistic and artistic proof" (in support of this statement Kennedy refers the reader to Solmsen). See also J. W. Jones, *The Law and Legal Theory of the Greeks* (Oxford, 1956), p. 143.

4. Some work along these lines has been done by G. Vollmer, "Studien zum Beweis antiphontischer Reden" (Ph.D. diss., Hamburg, 1958); B. Due, *Antiphon: A Study in Argumentation* (Copenhagen, 1980); and G. Goebel, "Early Greek Rhetorical Theory and Practice: Proof and Arrangement in the Speeches of Antiphon and Euripides" (Ph.D. diss., Madison, 1983), pp. 49–55. For the arguments of Ant. 5, see M. Gagarin, "*The Murder of Herodes,*" Studien zur klassischen Philologie, (Frankfurt, 1989).

5. So Quint. *Inst.* 5. 1. 1, which agrees with the evidence of the surviving texts. I have searched the *TLG* data base (on their Pilot CD ROM #C) for the expressions ἄτεχνοι πίστεις and ἔντεχνοι πίστεις; they are not uncommon in later writers on rhetoric, all of whom are directly or indirectly influenced by Aristotle.

6. Anaximenes uses the term "supplementary" (ἐπίθετοι) proofs, which includes witnesses, interrogations, oaths, and the opinion (δόξα) of the speaker.

persuasion (τὸ ἐνδεχόμενον πιθανόν) for any subject," Aristotle introduces a fundamental distinction (1. 2. 2 1355b35–39):

> Proofs [as πίστεις is usually translated] are either nonartistic (ἄτεχνοι) or artistic (ἔντεχνοι). By nonartistic I mean those that are not provided by us but are already at hand, such as witnesses (μάρτυρες), interrogations (βάσανοι),[7] contracts (συγγραφαί), and the like; by artistic I mean those that can be constructed systematically by us. Thus we have only to make use of the former, but we must discover the latter.

Most of Book 1 is concerned with artistic proofs, but in 1. 15 Aristotle returns to the nonartistic proofs, adding laws and the oath to the three already mentioned (witnesses, interrogations, and contracts) and examining each of these in turn.

Regarding laws, he advises the orator (much as a modern law professor might advise his students) that if the relevant law favors his opponent, he must argue for the priority of unwritten laws or equity, whereas if the written law favors his side, he must argue that the jurors have an obligation to uphold the law. Next, witnesses from the past, such as poets, should be enlisted where they are needed. As for contemporary witnesses who are familiar with the facts of the case, if such witnesses are available to testify in his favor, he should stress the superiority of their testimony over general arguments; but if he has no such witnesses, he should argue that the jurors must judge on the basis of probability, since arguments from probability cannot be bribed, and so forth. Aristotle continues in a similar vein, showing how to use the available evidence of contracts, interrogations, and oaths. For instance, if the interrogation supports your case, you argue that this is the only sort of reliable testimony; but if it goes against you, you argue that testimony gained through torture is not reliable.

To understand the nature and function of these "nonartistic proofs," we must begin by noting that πίστις, at least when modified by ἄτεχνος or ἔντεχνος, does not mean "proof," or even "evidence," but (in Grimaldi's words) "evidentiary material," that is, the material on which the speaker draws in constructing his arguments.[8] For Aristotle, the testimony of a witness is not in itself proof, or even necessarily evidence, but material the speaker may use as it suits the needs of his case. In this respect the nonartistic πίστεις serve much the same function for the speaker as the aristic πίστεις, the main difference being that the latter are general considerations whereas the former are specific to a particular case. The testimony of a witness, for example, may be used in the same

7. I use "interrogation" to translate βάσανος, which designates both the process of questioning slaves (whose testimony was admissible in Athens only if obtained by torture, βάσανος) and the testimony that results. In 1. 15 interrogations are treated as a special category of witnesses.

8. W. M. A. Grimaldi, S. J., *Aristotle, "Rhetoric" I: A Commentary* (New York, 1980), p. 20; this meaning is confirmed by the opening words of *Rhet.* 2: "These [i.e., the proofs discussed in Book 1] are the things from which (ἐκ τίνων) one must" construct the argument. The German translation of πίστις is usually *Beweis* ("proof, evidence"), which is broader than any single English word but still suggests material that is decisive in itself rather than a source of or basis for argument. *Beweismittel* is better. For the meaning of πίστις in other contexts in the *Rhetoric*, see Grimaldi, ibid., pp. 19–20, 349–56.

sort of argument from probability as the analysis of criminal mentality (1. 12), and Aristotle's analysis of just and unjust acts (1. 13) begins with a discussion of laws, to which he returns in 1. 15.

None of these nonartistic πίστεις is automatically decisive. Aristotle occasionally hints that an oath may decide a case; for example, one justification he suggests for refusing to swear an oath is that this refusal is virtuous because one knows that one would win the case by swearing the oath, but not by refusing it (1377a17–19). But throughout the discussion of oaths Aristotle clearly envisions the swearing of an oath by one party or the other as an action requiring discussion and argument by the speaker in court; in such cases, plainly, the oath is not decisive per se. He is particularly interested in oath-challenges, where a litigant either offers to take an oath himself or asks his opponent to take one, and he provides justification for issuing either kind of challenge, and for the acceptance or refusal of a challenge issued by one's opponent. In each instance, however, he assumes that the challenge has or has not been made before the case comes to court and that if made, it has or has not been accepted. Thus the oath-challenges, like the other πίστεις, are material for the speaker to manipulate in whatever way suits his case. And as with the other πίστεις, artistic and nonartistic alike, that manipulation takes the form of rational argument.

There is no hint, moreover, that the nonartistic πίστεις are logically or historically prior to the artistic πίστεις. Aristotle devotes less time to the nonartistic πίστεις because they are limited in number and are used only in forensic oratory, whereas the artistic πίστεις have a broader scope and are relevant to all three branches of oratory. But the logical status or force of the nonartistic πίστεις is indistinguishable from that of the artistic πίστεις. The distinction between the two in the *Rhetoric* is a useful tool for Aristotle's systematic analysis of the art of rhetoric, nothing more.

I must emphasize that although Aristotle often presents general arguments to be used in challenging the evidence of nonartistic πίστεις, he does not value these general arguments more highly than the direct evidence. In the whole section about witnesses (1375b26–76a32), for example, there is one short passage (1376a17–23) about πιστώματα (the means of confirming the testimony of witnesses), where we are given arguments both for and against their testimony:

> Someone who has no witnesses can say that one must decide from probabilities and that this is the meaning of [the oath] "according to my best judgment," and that probabilities cannot be bribed or convicted of bearing false witness; but someone who has witnesses when his opponent does not can say that probability arguments have no responsibility and that there would be no need for witnesses if [the truth] could be sufficiently determined by arguments.

Throughout this section Aristotle clearly implies that the evidence of witnesses is indeed valuable and should be depreciated only when it favors one's opponent; and yet it is sometimes claimed (in an evident

echo of this passage) that "in practice probability appeared safer than witnesses who were only too easily corrupted, for probabilities could not be bought."[9] Any unbiased reading of Aristotle or of the surviving Greek orations shows otherwise.[10]

In sum, Aristotle's conceptual distinction between the two kinds of πίστεις does not imply the kind of distinction between automatic, so-called "irrational" proofs and logical arguments that underlies Solmsen's analysis of early Greek legal procedure and its development in the fifth and fourth centuries. It does not necessarily follow that this kind of distinction was not present in the law, but we can find no evidence for it in Aristotle. Thus, if we wish to understand the nature of Greek law before Antiphon, we must turn away from the *Rhetoric* and look at the evidence for law itself.

II. PROOFS IN EARLY GREEK LAW

In his discussion of the nature of early Greek law Solmsen relies fundamentally and exclusively on the work of Kurt Latte.[11] As his title (*Heiliges Recht*) implies, Latte examines the "religious" element in Greek law, particularly the use of oaths and witnesses, which (he argues) was especially important in early procedure. These methods of proof (*Beweis*) operated automatically: a litigant who swore a specified oath or produced a specified number of witnesses would win his case without further ado. In this formal theory of proof (*formale Beweistheorie*) early Greek law resembled early Germanic law, with its procedures for deciding cases by ordeal (which Latte discusses briefly), oath, or formal witnesses. This picture of an automatic, irrational, formalistic legal process is wholeheartedly accepted by Solmsen, who adds interrogations to Latte's list of archaic methods of proof.[12] However, although we may find traces of some of these procedures in early Greek law, the evidence does not support Latte's overall picture of archaic legal procedure or the parallel with early Germanic law. I shall consider each of the procedures separately, beginning with interrogation.

9. Kennedy, *Art*, p. 32, and similarly in his *Classical Rhetoric and Its Christian and Secular Tradition from Ancient to Modern Times* (Chapel Hill, 1980), p. 21. (I single out Kennedy because of his wide influence and because Solmsen's thesis so clearly colors his views. It is only fair to add that I, like all who study Greek oratory, have learned a great deal from his many books and articles.)

10. The bias goes back to Plato, whose antipathy to rhetoric is well known; see esp. *Phdr.* 267A, where Socrates says that Tisias and Gorgias "saw that probabilities were more to be honored than the truth" (cf. 272D–73A).

11. *Heiliges Recht* (Tübingen, 1920), esp. part 1, "Das Verfahren" (pp. 5–47), discussed by Solmsen, *Antiphonstudien*, pp. 6–8. A more recent survey of the subject by G. Sautel ("Les preuves dans le droit grec archaïque," *Recueils de la Société Jean Bodin pour l'Histoire Comparative des Institutions* 16 [1965]: 117–60) provides a more comprehensive statement of the traditional view but is generally superficial and uninformative.

12. Solmsen, *Antiphonstudien*, pp. 6–7, summarizes Latte's conclusions as follows: "dass im *archaischen* Gerichtsverfahren jenen untechnischen, vorrhetorischen, ja man darf sagen: λόγος-fremden Bestandteilen des Prozesses die eigentlich entscheidende Rolle zufällt und das richterliche Urteil durch den Befund der μάρτυρες, und ὅρκοι weitgehend festgelegt ist. Die μάρτυρες, βάσανοι, ὅρκοι sind ursprünglich durchaus vollwertige und autarke πίστεις, ja sogar die eigentlichen πίστεις, neben denen der λόγος gar keinen Erweiswert hat."

Latte never discusses interrogation in early procedure, for the simple reason that βάσανος is not used in the sense "examination by torture" before the last third of the fifth century.[13] Solmsen includes interrogation in his summary because it is important for his discussion of Antiphon, but we have no evidence that it played a role in earlier procedure. It seems clear, moreover, that the primary motivation for the common challenge to an interrogation (πρόκλησις εἰς βάσανον), whereby one litigant challenges the other either to interrogate the challenger's slaves or to hand over his own slaves for interrogation by the challenger, is rhetorical. The challenger normally does not expect his challenge to produce a statement from the tortured slave; rather, he expects to use his opponent's refusal of the challenge as evidence that he is trying to avoid the truth.[14] Many such challenges are mentioned in the surviving speeches, but none appears to have been accepted. In this and other respects the procedure remained essentially unchanged from the late fifth to the late fourth century. As Aristotle's advice in *Rhetoric* 1. 15 shows, an interrogation provides the evidentiary material for rhetorical arguments; it is not in itself an automatic or definitive proof.[15]

The evidence for ordeal as a legal procedure in Greece at any time is so meager as to be virtually nonexistent. Latte cites only the statement of the watchman in *Antigone,* who before reporting to Creon the burial of Polynices asserts (264–67): "I am ready to hold molten iron in my hands and walk through fire and swear to the gods that I neither did the deed nor have any knowledge of anyone who planned or did the deed."[16] Latte may be correct in thinking that this recalls an ancient procedure of ordeal, which in various forms is known in medieval Europe and elsewhere, and one can find a few other scraps of evidence for the ordeal in Greece, especially if one defines ordeal broadly enough to include such things as the exposure of children in the wilds.[17] But nothing points to its use in a legal context. Slaves may have been subjected to ordeal by their masters, or children by their parents, but there is no evidence that a legal case might be so decided. I might add

13. G. Thür, *Beweisführung vor den Schwurgerichtshöfen Athens: Die Proklesis zur Basanos,* Sitzungsberichte der Österreichische Akademie der Wissenschaften, Phil.-Hist. Kl., vol. 317 (Vienna, 1977), pp. 14–15, cites Antiphon and Aristophanes for fifth-century examples of this meaning. I would add Hdt. 8. 110.

14. Thür, *Beweisführung,* pp. 233–61.

15. Thür (*Beweisführung,* pp. 205–32) demonstrates that the orators always speak of βάσανος as a means of certifying the truth of a slave's testimony and not as an automatic, decisive procedure (as was argued by J. W. Headlam, "On the πρόκλησις εἰς βάσανον in Attic Law," *CR* 7 [1893]: 1–5). Thür (*Beweisführung,* pp. 287–312) argues that the procedures of the βάσανος made it very difficult for jurors independently to evaluate the truthfulness of the tortured slave's testimony; as a result, they tended to accept the evidence of the interrogation as incontrovertible. Even if this is correct (and I am not fully persuaded), it is not evidence for an archaic procedure of interrogation operating automatically.

16. *Heiliges Recht,* pp. 5–6.

17. So G. Glotz, *L'ordalie dans la Grèce primitive* (Paris, 1904). For a different view of ordeal, as a flexible tool for dispute-settlement, see P. Brown, "Society and the Supernatural," in *Society and the Holy in Late Antiquity* (Berkeley and Los Angeles, 1982), pp. 302–32, esp. 306–17 (repr. from *Daedalus* 104 [1975]: 133–51).

that much the same is true of trial by combat, which some have proposed as an early Greek legal procedure, though Latte and Solmsen do not mention it.[18] Such examples as the duel between Paris and Menelaus in the *Iliad* show only that single combat could be used to settle a war, not that it was ever used for deciding a legal case.

With regard to witnesses it has been argued that witnesses at Gortyn were always "formal witnesses"—that is, witnesses who were formally summoned to witness a particular event and later testified in court, where their testimony was automatically decisive—and that at Gortyn, as in early Germanic law, the testimony of an accidental witness who happened to know the facts of the case was not admissible.[19] It can be shown, however, that although in certain cases a person was required formally to summon a specific number of witnesses, whose testimony could later be decisive in court, accidental witnesses were certainly permitted to testify in at least some cases and could probably testify in many other cases where their testimony is not mentioned explicitly.[20] We have a few possible indications (e.g., Arist. *Pol.* 1269a1–3) that in some cases the testimony of a specific number of witnesses might automatically decide a legal case, but these examples do not establish that witnesses were in general automatically decisive in early Greek law. And there is no certain Greek parallel to the "oath-helpers" of early Germanic law, who swore in support of someone's case regardless of their knowledge of the facts, and whose sworn statements were decisive. Moreover, although witnesses in Athenian courts regularly were relatives or associates of the litigant and swore to the truth of his entire case, they were certainly expected to know the facts to which they swore.[21] This is clear as early as Antiphon's fifth speech (*The Murder of Herodes*), in which witnesses are called nine times;[22] in each case they testify to facts they happen to know from their own experience. Moreover, their testimony is clearly not decisive in itself but is subject to examination and argument just like other sorts of evidence.

Most of Latte's study is devoted to oaths. At Gortyn, the law could direct one litigant to swear an oath that would decide the matter, but such laws normally regulated situations where there probably would not be any other relevant evidence;[23] it does not appear that automatic,

18. See A. M. Armstrong, "Trial by Combat among the Greeks," *G&R* 19 (1950): 73–79.

19. See J. W. Headlam, "The Procedure of the Gortynian Inscription," *JHS* 13 (1892–93): 48–69, followed by R. F. Willetts, *The Law Code of Gortyn,* Kadmos Supplement 1 (Berlin, 1967), p. 33.

20. See M. Gagarin, "The Function of Witnesses at Gortyn," in *Symposion 1985: Vorträge zur griechischen und hellenistischen Rechtsgeschichte,* ed. G. Thür (forthcoming). For accidental witnesses the clearest example is *ICret.* 4. 41. v. 4–11, discussed by M. Gagarin, "The Testimony of Witnesses in the Gortyn Laws," *GRBS* 25 (1984): 345–49.

21. See S. Humphreys, "Social Relations on Stage: Witnesses in Classical Athens," *History and Anthropology* 1 (1985): 313–69; her objections (p. 353) to certain studies of the "primitive" nature of Athenian witnesses apply equally well to the study of early Greek procedure.

22. Ant. 5. 20, 22, 24, 28, 30, 35, 56, 61, 83.

23. See, e.g., *ICret.* 4. 72. iii. 5–9: in a divorce, the wife is allowed to keep her own property and half of the income it has produced; a wife accused of taking more can swear an oath of denial, which is decisive.

decisive oaths were used in other cases. We also find occasional oath-challenges in literature, where one litigant either challenges the other to swear an oath or offers to swear one himself: for example, Menelaus challenges Antilochus, after the chariot race in *Iliad* 23, to swear an oath that he did not use trickery to gain second place, and the Furies challenge Orestes, in Aeschylus' *Eumenides,* to swear an oath that he did not kill his mother. In neither case is the challenge accepted, though the implication may be that if it were, the oath would be decisive. But in both passages, as in Aristotle, the oath-challenge (like the challenge to an interrogation in legal speeches) is more a rhetorical strategy than a means of proof: it is primarily intended to provide material for argument after the challenge has been refused, not to settle the case automatically when the challenge has been accepted.

We may conclude that despite isolated cases, there is no evidence for the general use of automatic, "irrational" procedures for settling legal disputes in early Greece. Moreover, the literary evidence from Homer to the fifth century consistently depicts legal procedure as largely consisting of rational debate by the litigants before a judge or judges empowered to render a decision,[24] and this picture is utterly at odds with the picture drawn by Latte and accepted by Solmsen. Indeed, the "irrational" procedures of medieval Germanic law, which have often been introduced as parallels for early Greek law, were crucially dependent on the general belief in, or at least acceptance of, an almighty divinity, whose hand would guide the procedure to a just outcome. In contrast, at no stage of Greek culture evident to us did a similarly authoritative divine force exist. From the Homeric epics on, Greek culture is characterized by a thoroughly rational approach to debate and decision-making, in which omens, prophecies, and even the direct commands of the gods are discussed, debated, and sometimes, but by no means always, followed. It would be contrary to everything we know to ascribe fundamentally "irrational" procedures to early Greek law.

III. PROOFS IN ANTIPHON

Let us now return to Antiphon and his place in the legal and rhetorical tradition. Much of the early history of Greek oratory is obscure,[25] but there is little doubt that the formal study of rhetoric began about the middle of the fifth century, probably in Sicily with Tisias and Corax. At this time rhetoric also became an important concern of the sophists Gorgias, Protagoras, and (later) Thrasymachus and others. The ideas of these thinkers found a particularly receptive audience in Athens, where the reforms of Ephialtes and Pericles in the middle of the fifth century led to greatly increased use of the popular law courts. The most obvious effect of this new interest in rhetoric was an increased use of logical argument, in particular the argument from probability, or εἰκός.

24. See M. Gagarin, *Early Greek Law* (Berkeley and Los Angeles, 1986), pp. 19–50.
25. Summarized by Kennedy, *Art,* pp. 52–70.

The argument from εἰκός was not invented by Tisias or Corax. The earliest explicit example is in the *Hymn to Hermes,* where Hermes argues that he, a mere babe, is not like a cattle thief (265 οὐδέ . . . ἔοικα) and thus did not steal Apollo's cattle. The date of the *Hymn* is uncertain, but almost all scholars date it before 450.[26] The earliest explicit argument from εἰκός in tragedy is probably Pasiphaë's speech in Euripides' lost play the *Cretans,* usually dated to the 430s.[27] Herodotus, too, is fond of arguments from εἰκός (e.g., 3. 38. 2). But if Tisias and Corax did not invent this kind of argument, they almost certainly developed new forms of it, including what I call the reverse argument from εἰκός. The classic example concerns a fight between a weak man and a strong man. The weak man gives the expected argument: it is not likely that he, a weak man, assaulted a strong man. The other counters with a "reverse" εἰκός: he is not likely to have assaulted a weak man, since he would immediately be suspected of the crime.[28] The reverse argument is sophistic (in both senses) and was seldom used, though it is introduced by the defendant in Antiphon's *First Tetralogy* (2. 2. 6), which is certainly a product of the intellectual ferment of this period.[29]

The second half of the fifth century saw an increasing use of arguments from εἰκός and other rhetorical techniques, but this development did not mark any move away from nonartistic πίστεις, since these (as I have argued) had no special value before this time. The development may be seen in the speeches of Antiphon's younger contemporary Andocides, where the use of logical arguments increases over a twenty-year period (ca. 410–390).[30] Andocides' earliest speech, *On His Own Return,* shows little interest in rhetorical argument, but also no significant use of nonartistic πίστεις. One decree is cited during a historical account, but no law is cited, no witness is called, and βάσανος (25) is used only in the sense of "test of character." Thus Andocides' earliest speech is "nonartistic" in that it lacks rhetorical and logical sophistication, but not because it uses nonartistic πίστεις of the sort discussed by Solmsen. Other contemporary evidence, moreover, such as the parody of a trial in the *Wasps* (produced in 422), also provides no evidence for the use of nonartistic πίστεις in legal cases. Particularly significant for our purposes is the testimony of the cheese-grater (962–66), who is an impartial witness and testifies to the facts as he happens to know them.

Consider, finally, Antiphon's courtroom speeches. From among the four kinds of nonartistic πίστεις mentioned by Aristotle (other than

26. Most date it around 500; see R. Janko, *Homer, Hesiod and the Hymns* (Cambridge, 1982), pp. 140–43.

27. See Goebel, "Rhetorical Theory," pp. 290–301.

28. Arist. *Rhet.* 2. 24. 11 1402a17–28 attributes this example of a fallacious argument to Corax. Its relation to a similar example (attributed to Tisias) in Pl. *Phdr.* 273B–C is not clear; cf. Goebel, "Rhetorical Theory," pp. 117–35.

29. *Pace* R. Sealey, "The *Tetralogies* Ascribed to Antiphon," *TAPA* 114 (1984): 71–85, I accept the *Tetralogies* as fifth-century works, probably by Antiphon.

30. See G. Kennedy, "The Oratory of Andocides," *AJP* 79 (1958): 32–43; Kennedy cites Latte and Solmsen on the use of proofs in early procedure (p. 34) but says nothing about such proofs in his analysis of Andocides.

written contracts), no law is cited, and the occasional references to oaths concern only those normally sworn by litigants or witnesses in the course of a trial. True, the importance of oaths in an ordinary homicide trial (as opposed to the procedure of ἀπαγωγή) is emphasized in Antiphon 5, but the reference to oaths does not control or dominate the arguments on this point, and there is no hint that the oaths would ever be automatically decisive. Nor does Antiphon place any special emphasis on witnesses. None is called in Antiphon 1, one is called in 6, and only in 5 are witnesses called about as frequently as they are in later oratory. As far as we can tell, all these witnesses testify to facts they happen to know, as narrated by the speaker. This leaves the interrogation. It is only here that Antiphon seems out of step with the practice of later oratory, and this is the topic to which Solmsen devotes most of his attention. There are references to βάσανος in all three speeches, but it plays a prominent role only in *The Murder of Herodes* (Antiphon 5), for reasons that become clear when we examine the case against the speaker, Euxitheus.[31]

Herodes' relatives have clearly based their case primarily on the testimony extracted from a slave by torture. He admitted being Euxitheus' accomplice in the murder and gave a detailed account of the crime. Euxitheus' defense includes both facts, which he narrates and calls witnesses to support, and arguments from probability, which cast doubt on the slave's account. He also tries to discredit the slave's testimony by repeatedly questioning the propriety of the prosecution's interrogation of the slave and the value of any evidence obtained by it (30–51). For this purpose, in addition to arguments from probability (37), Euxitheus employs general arguments against the validity of such evidence (32), just as Aristotle recommends (cf. *Rhet.* 1. 15. 26 1377a1–5). But in all this there is nothing automatically decisive or "irrational" about the interrogation, nor does it have any special value or force different from that of the other evidence he introduces. The interrogation is extremely important to Euxitheus because the prosecution's argument in this particular case depends so heavily on the testimony obtained by βάσανος. But if the argument about the interrogation is developed at greater length here than in other surviving speeches, this is attributable to the nature of the case and the lack of other kinds of evidence, not to any *Beweistheorie* or lack thereof.

In sum, the interrogation in Antiphon 5 is not an archaic, "irrational" means of proof but is material for rational argument of the kind developed and fostered by the sophists and rhetoricians of Antiphon's day. Its prominent role in this speech can be explained by the special facts of this case. This is not to deny that in general the use of and interest in arguments about interrogation seem to have declined after Antiphon; perhaps such arguments were so frequently introduced by Antiphon and his contemporaries that they came to be considered commonplace and

31. For a detailed examination of the case, see Gagarin, "*Murder.*"

ineffective. In *Rhetoric* 1. 15 Aristotle devotes less space to the interrogation than to any of the other nonartistic πίστεις, claiming that it is not a difficult subject to handle.[32] But the diminished role of the βάσανος in later oratory is a sign of the increased sophistication of rhetorical argument, not of a new theory of proof.

I have tried to show that Antiphon was not controlled or even influenced by a tradition of "irrational" proofs from which he was trying to free himself. He was an innovator, testing new kinds of arguments and using whatever material he had available in each particular case. The effect of Solmsen's study is to diminish his accomplishment by introducing a dominant theory of proof to explain the presence or absence of certain arguments. We ought rather to look for explanations in the material itself. Once we understand the legal tradition correctly, we may still think that Antiphon's rhetorical skill is less developed than his successors', but we will be able more accurately to understand and evaluate the nature of his argumentation. Antiphon was the first Athenian to apply the new rhetorical techniques to actual cases, or at least the first to make extensive use of them, and his impact on his fellow citizens is well attested by Thucydides. It is time modern scholars appreciated his accomplishment.

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32. Interrogation is discussed in eleven lines (1376b31–77a7); the other four πίστεις each receive about three times as much space.