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CHALLENGES IN ATHENIAN LAW: GOING BEYOND OATHS AND *BASANOS* TO PROPOSALS

Abstract: This paper aims to broaden our thinking about "proposals" (or "challenges"), which until now has focused on oaths and *basanos*. In addition to these I discuss proposals to resolve the case or an issue in the case, to go to arbitration, to produce a text and to testify in court, distinguishing between proposals that are seriously intended and those made primarily for rhetorical purposes.

Keywords: arbitration, Athens, *basanos*, challenge, oath.

Recent scholarship on what have traditionally been called "challenges" in Athenian law, including my own work and that of the respondent to this paper, Gerhard Thür, has focused almost entirely on oaths and *basanos* (the interrogation of slaves under torture).[1] I have long felt that this was too narrow a view of these unique procedures, and so in this paper I would like to expand the focus to include a number of other types of procedures that are similar to oaths and *basanos*. In order to do this, I need to abandon the English term "challenges" (which I have never liked) and find a broader term for the procedure that is sometimes marked in Greek by the verb *prokaleō* or the noun *proklēsis*. Most generally, one person either requests that another person do something, like swear an oath, or offers to do something himself (or to have someone else do something), and the most general term I can find for both requests and offers is "proposals."[2] I can "propose" that you do something or that I do something or that we do something together, or that a third party do something. Thus, this paper is about proposals.

In addition to oath and *basanos* proposals, two other types have received a little attention, proposals to refer a dispute to arbitration and proposals to produce a document.[3] In addition to these four, however, there are four more types that have

1 See Gagarin 1996, 1997, 2007; Mirhady 1991, 1996; Thür 1977.

2 Johnstone 1999: 70-92 uses the term "dare" which, like "challenge," implies that there is a risk involved and that the challenger or darer does not expect the other person to accept. This may fit some of the cases but not many others, particularly not when the speaker proposes to do something himself, where he would have to say, "I challenge/dare you to let me swear an oath" (vel sim.).

3 Arbitration: Johnstone 1999: 70-92; Scafuro 1997: 117-41; documents: Harrison 1971: 135-36.

received no attention at all. These are proposals to resolve the entire dispute, to resolve a specific issue in the dispute, to have someone testify in court, and to undertake an *antidosis* or exchange of property.[4] *Antidosis* has special rules of its own that make it quite different from the other seven; thus, it does not belong in a paper on proposals, and I will not discuss it any more. Instead, I will briefly review each of the other seven types and suggest some general conclusions about their use in Athenian litigation. As Thür correctly notes in his response, a close study of individual cases is necessary in order to give precision to these conclusions, but my aim in this paper is to begin a broader discussion of proposals. Closer study of individual cases hopefully will follow.

I begin with some comments on the major features of all proposals. First, language. Each of these types of proposal is sometimes referred to by the noun *proklēsis* or the verb *prokaleō* (literally "call forth"), which in Homer is mostly used of requesting a duel. But *proklēsis* or *prokaleō* are only used in about one-third of all proposals mentioned in the orators, and there are also many other ways to make clear that a proposal of some sort was made. One can say, for example, "I requested" that something be done, or "I offered" or "was ready" to do something. At other times there is no clear identifying term but it is certain that a proposal was being or had been made. If a speaker reports, for example, that two parties agreed to go to arbitration, one of them, or perhaps a third party, must have suggested arbitration or made a proposal to arbitrate. Thus, no specific language was required for making a proposal and the concept of a "formal proposal" has little meaning in the overall picture.

In some cases it is uncertain whether or not a proposal was made. It can also be unclear whether a proposal mentioned in one place is the same proposal as one mentioned somewhere else. And, of course, in reading through the speeches I have probably overlooked some passages in which a proposal is indicated. Nevertheless, the figures I have compiled, though approximate, can give us a reasonably good picture of the relative frequency of different types of proposals.

I have found 173 mentions of proposals in all. In order of frequency there are 50 to resolve the entire case, 42 proposals to conduct a *basanos*, 26 to submit the dispute to arbitration, 24 to swear an oath, 10 to resolve a specific issue in the case, 7 to produce a document, and 4 to obtain testimony from someone. In 86 of these 173 proposals, either *proklēsis* or *prokaleō* is used. In addition, *proklēsis* or *prokaleō* is used in 10 passages to designate other sorts of actions or unspecified actions.[5]

Proposals can be found in Greek literature as early as Homer, and they generally follow certain rules. First, either party to a dispute can make a proposal;

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[4] *Antidosis* has of course been studied before (e.g. Gabrielsen 1987), but not in connection with proposals.

[5] See Appendix for the complete list.

or a third party can make a proposal to the two disputants. There are examples of both in the *Iliad*: in Book 23 Menelaus proposes that he and Antilochus settle their dispute after the chariot race (*Iliad* 23.581-85), and in Book 1 Nestor proposes a resolution to the dispute between Agamemnon and Achilles (*Iliad* 1.254-84).[6] Second, in responding to a proposal, a person can either agree to do what is proposed or refuse; refusals are often not stated explicitly in words but conveyed implicitly by some action (or inaction), as in both Homeric examples just mentioned. Third, if the proposal is accepted, the proposer is obliged to accept the results of whatever action he has proposed, though occasionally he fails to honor this obligation; on the other hand, in some types of proposals like oaths, a rejection of the oath or refusal to swear may constitute an acknowledgment by the refuser that the requested oath would be false. This is the case when Mantias proposes that Plangon swear an oath, expecting her to reject the oath (because she has been bribed). When, instead, she accepts his proposal and swears the oath, he is obliged to accept the truth of what she says (Dem. 39.3-4, 40.10-11, discussed more fully below).

Although an accepted proposal is (morally) binding on the proposer, sometimes an accepted proposal is not implemented, often because the two sides cannot agree on various details of the implementation. *Basanos* proposals are sometimes accepted, but the two sides may still not be able to agree on the precise terms of the interrogation, and so no interrogation is ever conducted (e.g. Dem. 37.40-42; Isoc. 17.15-17). Moreover, even when a proposal is accepted and implemented, this does not necessarily lead to a resolution of the entire dispute. This depends entirely on whether the proposal is aimed at the central issue in the dispute or at some minor issue. If a document is requested, for example, and the other side agrees to provide it, this may resolve the entire dispute, though we have no example of it doing so; more likely it will resolve only one specific point, leaving other points and the dispute as a whole unresolved. Apollodorus, for example, says that he produced the records that Timotheus wanted and let him examine them, but that Timotheus disputed some of the details in the records and still has not paid his debt; hence, the present trial (Dem. 49.43-44). Most requests for documents mentioned in the forensic speeches are in fact denied, and this case shows that even when the document is produced, the dispute may remain unresolved.

This example (and others like it) allow us to answer one of the main questions scholars have had about proposals, namely whether an accepted proposal necessarily ended the dispute. Long ago, Headlam noted that the forensic speeches never mention a *basanos* proposal that was accepted and successfully implemented. He argued that the reason we never hear of a successful *basanos* proposal was that

[6] In his response below, Thür argues that in Athens no third party interferes "by directing a formal proposal to the litigants," but in, e.g., Dem. 59.45 it is said that after Phrynion sued Stephanus, "their friends brought them together and persuaded them to submit to arbitration" (συνῆγον αὐτοὺς οἱ ἐπιτήδειοι καὶ ἔπεισαν δίαιταν ἐπιτρέψαι αὑτοῖς).

if the proposal was accepted by both sides and the interrogation was carried out, the results of the interrogation would have decided the case, there would be no trial, and we would never hear of this proposal.[7] This cannot be correct. If the *basanos* settled only a minor point, the dispute as a whole would remain unresolved and the case would proceed to trial. Even if a proposal settled the central issue, as with Mantias' proposal to Plangon, the proposal could still be mentioned during a later trial, as Mantias' proposal and others are. Thus, the reason we never hear of a successfully implemented *basanos* proposal must lie elsewhere. I will return to *basanos* below, where I will argue that the reason we never hear of a successfully implemented *basanos* proposal is because the purpose of most, if not all, such proposals was not to be accepted or successfully implemented, but rather to provide the speaker with a rhetorical argument in support of his case.

Of the seven types of proposals I will be discussing, four resemble proposals that are familiar today: whole-case proposals, specific-issue proposals, proposals for arbitration, and proposals to produce a document. Of these, the most common is the whole-case proposal. In most civil suits today, one or both sides will offer a proposal to settle the case. Such straightforward settlements were sometimes proposed in Athens. Demosthenes, for example, sued Aphobus for ten talents as part of his overall claim for thirty talents from the three trustees of his father's estate. He relates that at the arbitration hearing Aphobus "offered a proposal that he was willing to show me that the estate was worth ten talents [i.e. one-third of what Demosthenes was claiming], and if it fell short of this, he said that he himself would make up the difference" (Dem. 27.50). Demosthenes says that he asked Aphobus to show this, but that he refused to do so.

More often, however, whole-case proposals are complex, and often include matters separate from the actual dispute. Andocides reports, for example, that when he and Callias both claimed the same woman, Callias paid Cephisius to bring charges against Andocides concerning his involvement in the scandal of the Mysteries. Then Callias offered to have Cephisius drop his charges if Andocides would give up his claim to the woman (And. 1.120-23). Such proposals are also familiar today. A rich and powerful individual or corporation brings suit against a poor defendant and offers to drop the suit if the defendant agrees to some separate course of action, such as dropping a suit he had brought against the person or corporation. Finally, a proposal to resolve the entire dispute may also contain a choice of alternatives, as when Mnesicles proposes that Nicobulus and his partner either take back all the money they had paid (for a workshop) and leave (giving up the workshop) or keep the workshop and pay all the debts associated with it (Dem. 37.12).

Specific-issue proposals are also fairly common today, especially in more complex suits, such as divorce cases, where parties may propose a settlement on

[7] Headlam 1893.

certain points, like the ownership of a house or a pet animal, while leaving other points, like custody of children, undecided for the moment. Similarly in Athens one can make a specific proposal that would only resolve one issue, but not the entire case. For example, during Dareius's suit against Dionysidorus to recover damages from a breach of contract, he claims that he has asked and proposed several times without success that Dionysidorus bring the ship back to Athens to prove that it was in good sailing condition (Dem. 56.40). This point, if established, would help Dareius's case but it would not be decisive, as several other points in the contract would still be in dispute.

Proposals for (private) arbitration seem to have been the most successful type, although the cases we hear of in the speeches may not be representative of all such cases. Here, we can distinguish between formal arbitration – a traditional procedure in which, as a rule, the two parties choose arbitrators (often one arbitrator selected by each party and a third by mutual agreement), and agree to be bound by their decision – and informal arbitration, in which the two parties meet, often together with family members or friends, and seek to resolve a dispute simply by discussing the dispute informally. There is a fine example of informal private arbitration in Menander's *Epitrepontes*, where a slave and a shepherd ask a passer-by to arbitrate. He agrees on the condition that they will accept his ruling; they agree, and he rules in favor of the slave. The shepherd is unhappy, but he accepts the decision (Menander, *Epitrepontes* 218-375, Arnott). In Athens, private arbitration may occur before any litigation has begun or even been contemplated, but it may also occur while litigation is in progress. For example, when Phrynion and Stephanus submit their dispute to arbitration, each of them has already brought suit against the other (Dem. 59.45-48).

When an arbitration proposal fails to result in actual arbitration, the speaker usually blames his opponent's intransigence (e.g. Lys. 32.2), but it is perhaps more likely that in most cases both sides deserved a share of the blame. Arbitration proposals that are accepted and lead to an actual arbitration, on the other hand, usually produce settlements that are accepted by all, often because all parties would swear at the beginning to accept the result. But these settlements may or may not have lasted. The settlement proposed by the arbitrators of the dispute over the property of Menecles (Is. 2.29-33), though accepted by all at the time, displeased the speaker greatly, and Isaeus 2 is essentially a continuation of the arbitrated dispute over this property. And one wonders how long the arbitration settlement which both Phrynion and Stephanus accepted, in which they agreed to share Neaira on alternate days, would have lasted (Dem. 59.45-48). Despite such problems, however, we hear of many disputes in Athens being resolved by arbitration, and even if some of these were relatively minor disputes and others may not have lasted permanently, the use of arbitration must have helped reduce the burden of litigation on the courts.

The fourth relatively familiar type of proposals in the forensic speeches are proposals requesting to see a document. Such proposals, though not very common, were simple and straightforward, but even when such proposals were accepted, a request for a document did not generally resolve the main dispute, as we saw in Dem. 49.43-44 (discussed above). Requests for a document are not uncommon today and are handled in similar ways as in Athens, except that we often have rules concerning requests for documents that make such requests legally enforceable.

The four types of proposals discussed so far – whole-case, specific-issue, arbitration, and documents – often appear to have been offered seriously in the hope of resolving the dispute, or at least some aspect of the dispute, and it was not uncommon for these types of proposals to be accepted and for the two sides to reach an agreement. In that case, the agreement would be binding (*kyrios*) according to the law that "whatever two persons agree on is binding" (Hyp. *Ath*. 13). Of course, agreements sometimes fell apart as the two parties disagreed over the details of implementation, but this seems to have been uncommon, and binding agreements seem to have kept many disputes from reaching the courts. And if one party tried to bring a suit concerning a matter that an agreement had already settled, the accused could then file a *paragraphē*, arguing that the suit was inadmissible and should be rejected.

The remaining three types of proposals – oath, testimony, and *basanos* – concern either practices that do not exist today, the *basanos*, or practices that were subject to special rules in Athenian law that do not exist today, swearing an oath and testifying in court. All three, therefore, operate somewhat differently from anything today.

Oath proposals, in which either someone offers to swear an oath or to have someone else, usually a friend or family member, swear an oath, or requests that his opponent swear an oath, are often mentioned in the forensic speeches, but with the exception of the oath Mantias requested from Plangon (Dem. 39.3-4, 40.10-11, see below), they are never accepted. It appears, in fact, that oath proposals were never made with the expectation that they would be accepted, though there may have been exceptions (e.g. Dem. 59.60).[8] The most common oath proposals are offers by the speaker himself to swear or to have someone associated with him swear, or are reports that the speaker or someone associated with him offered to swear in the past. These oath proposals are never accepted, and in many cases it appears that the opponent was not even given a chance to accept. Only on six occasions does a

[8] The members of Phrastor's *genos* may have been making a serious proposal to Phrastor when they proposed that he swear an oath that "he believed that the boy he wished to adopt was his own son, born of an Athenian woman betrothed to him according to the law" (ἢ μὴν νομίζειν εἶναι αὐτοῦ υἱὸν ἐξ ἀστῆς γυναικὸς καὶ ἐγγυητῆς κατὰ τὸν νόμον, Dem. 59.60). Phrastor refused to swear the proposed oath, but it seems possible that the *genos* would have allowed him to adopt the boy if he had been willing to swear.

speaker report that someone else was asked to swear an oath, and all but one of these proposals were rejected.

The one that was accepted occurred in unusual circumstances and resulted in two suits brought by a certain Mantitheus against his half-brother, whom he calls Boeotus. According to Mantitheus, his father Mantias refused to recognize Boeotus and a brother of his as his sons. In order to establish conclusively that they were not his sons, he made an agreement with their mother Plangon: he would propose an oath for Plangon to swear, stating that the boys were his sons, and she would refuse to swear this oath, thereby implicitly confirming that the boys were not his sons. In return, Mantias gave Plangon thirty minas. When Mantias then offered the oath, however, Plangon double-crossed him: she accepted the proposed oath and swore that the sons were his. Mantias then had no choice but to accept her oath (since he had offered it) and to agree that the boys were his. Whatever the truth of the matter, it is clear that this oath proposal, like the other four in which someone else was asked to swear, was expected to be rejected.

Two more aspects of oath proposals should be noted. First, it has been suggested that because women were not allowed to testify in court in Athens, the reason why a speaker reports that a woman was willing to swear an oath and specifies the content of her oath is that this is a way to introduce the woman's testimony in court.[9] This cannot be correct. Speakers could easily report what a woman said without mentioning an oath, just as, for example, in his first speech against Aphobus, Demosthenes simply reports what his mother said (Dem. 27.40). And speakers can, if they prefer, report that either a man or a woman swore an oath without either of them testifying in court. One speaker, in fact, reports that several men and women swore oaths on the same occasion and none of these testifies in the case (Is. 12.9-10).[10]

Second, an offer to swear an oath is often treated as if the oath had actually been sworn. In the same Isaeus passage just mentioned, for example, the speaker reports that three relatives of Euphiletus (two men and a woman) offered to swear an oath; he then tells the jury, "you would rightly consider our oaths more credible than those men's words" (Is. 12.9-10).[11] Strictly speaking, "our oaths" refers not to actual oaths that were sworn, but to offers to swear oaths. There was a long tradition in Greek literature, going back to Homer, of treating oath offers as if they were oaths.[12] Evidently, this tradition carried on into the forensic speeches, so that proposals to swear an oath may often have functioned as a means of introducing the

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9 See, e.g., Mirhady 1991: 82, Gagarin 2007: 42-43.

10 On the other hand, Demosthenes (29.33) reports that two men, Therippides and Demon, testified in court, and then adds that his mother was willing to swear an oath. But his reason for mentioning an oath seems to be to add emphasis to his mother's words, which could have been reported without mention of an oath.

11 δικαίως ἂν καὶ τοὺς ἡμετέρους ὅρκους πιστοτέρους νομίζοιτε ἢ τοὺς τούτων λόγους.

12 See Gagarin 2007: 43-46.

oath in court while adhering to the traditional rule that the proposed oath was only actually sworn if the other party accepted the proposal.

Proposals to testify, as Thür notes, were different from all others in that they were not made to a litigant but to a third person. Normally, one asked friends or others sympathetic to one's case to testify and they sometimes, perhaps often, agreed to do so. But whether they agreed or not, we never hear about these proposals in the speeches. Those that we do hear about, and that concern us here, are proposals that a friend of one's opponent, or someone sympathetic to the opponent's case, testify. A person could not be compelled to testify and thus would only testify if he agreed, but someone who refused to testify could be forced to swear an oath of exemption (*exōmosia*), that the testimony requested by the litigant was not true. In most cases we hear nothing more about requests for testimony that were rejected, though we may presume that there must have been many such cases, especially since anyone who testified for a litigant in court risked being sued for false testimony. Occasionally, however, a litigant would request in court that someone testify, and the requested witness would have to be present in court to confirm his *exōmosia*.

We only have four examples of this, two of them in the same speech, but they all follow the same pattern (Aes. 1.45-50, Aes. 1.67-69, Dem. 45.58-61, Is. 9.18-19). The speaker in each case tells the jury that he has prepared a deposition for a particular witness to affirm in court, and he gives a fairly detailed description of the deposition. He adds that he does not expect the person in question to accept the proposal and affirm the deposition, but that the speaker wants the court to know what sort of person the potential witness is. Then the speaker may also ask the clerk to read out the deposition he has prepared, or he may have the *exōmosia* read out, after which the proposed witness affirms his *exōmosia*. In other words, the proposal that someone testify was originally offered, and the actual deposition was crafted and written down, not with the purpose of producing a witness's actual testimony in court, but as a rhetorical strategy to introduce in court a hypothetical deposition giving the impression that it was actual testimony.

Finally, in a *basanos* proposal, one party to a dispute offers his own slave or slaves for interrogation, or requests that one or more of his opponent's slaves be interrogated, or asks his opponent to agree that they will interrogate a slave or slaves belonging to a third party. Often the proposer specifies exactly what question or questions will be put to the slave, and often he adds other conditions, such as that he will pay for any damage his opponent's slaves may suffer in the interrogation.

Fairly strict guidelines applied to the actual interrogation: either party could pose the questions, but often a public interrogator was used; both parties had to be present; only simple questions that could be answered yes or no were allowed; and certain limits were placed on the severity of the torture. One obvious difficulty would be to determine when a slave who changed his answers was telling the truth; it was always possible that some more beating or whipping would result in a new

answer, making it impossible to know which was the real truth. The speaker's account in Antiphon 5.31-41, confusing as it is, gives an example of the sort of difficulty that might result, though this interrogation did not result from a proposal and only one party was present. The slave who was tortured gave one story first and then, the speaker says, changed his mind twice. The basic question in all such interrogations was, and remains today, did the torture force the slave to tell the truth or did it force him to say only what the questioner wanted to hear? Despite this uncertainty, forensic speakers often express their complete confidence in the *basanos* procedure as the best way to elicit the truth.

Almost all of the *basanos* proposals mentioned in the forensic speeches are declined by the other side, and on the few occasions when they are initially accepted, some objection is always raised before the interrogation is actually carried out. This is not surprising since, like the proposals to testify that are mentioned in the speeches, or proposals to swear an oath, *basanos* proposals were generally offered with no expectation that they would be accepted. As Thür (1977) has demonstrated, many of these proposals contained conditions that ensured that they would be rejected. The purpose of *basanos* proposals, then, was not to produce official slave testimony that could be used in court. Rather, as in proposals for witness testimony and oath proposals, speakers sometimes describe *basanos* proposals in detail, including the questions the proposer wished to ask at the interrogation, and speakers sometimes even write these details down in a document that could then be introduced in court (and read out by the clerk) during the speaker's account of his *basanos* proposal. This would convey the impression that the speaker was introducing material in court that was the result of an actual interrogation process.

In other cases, a litigant might propose a *basanos* in order to provide rhetorical material that the speaker could then use in his pleading, often by arguing that the opponent's refusal proved that the speaker's case was true. A speaker would argue that, because the *basanos* procedure was the best way to reveal the truth, since (as everyone knows) torture forces slaves to tell the truth, his opponent's rejection of a *basanos* proposal showed that he was not interested in determining the truth, but that he feared that the truth would confirm the validity of the speaker's case. Antiphon was particularly fond of this argument and developed a special form of it, which I call the hypothetical role reversal. The argument, in brief, is that if I had refused his proposal, he would treat my refusal as very strong evidence that his case against me was true; so when I offer him a proposal and he is the one avoiding the test, surely it is only fair that this same refusal be evidence that my case is true. Variations on this argument are found in Ant. 1.11-12, 5.38, and 6.27.

This survey of different types of proposals in Athenian law, reveals one group of four (whole-case, specific-issue, arbitration, and documents) that operate in ways that are reasonably familiar today, and one group of three (*basanos*, *horkos*, and testimony) that have their own special rules and operate in ways that may seem

strange to us today. These last three types of proposals, moreover, not only are almost always rejected but also apparently were almost never offered with the expectation that they would be accepted. Rather, the proposer almost always expected them to be rejected, and indeed they almost always were. Their primary purpose, it seems, was to allow the litigant who offered the proposal to use his offer for rhetorical advantage in his pleading. Sometimes a litigant would argue that his opponent's rejection of the proposal proved that he did not want to discover the truth (which accepting the proposal would have done). At other times he offered his proposal as a means of introducing the evidence that his offer was seemingly seeking to obtain. Thus, none of these three types can be considered a serious means of negotiation. They were rhetorical proposals, pure and simple.

The rules governing the *basanos*, oath, and testimony proposals are all specific to classical Athenian law. We do not know how or why they were created or developed into the forms we find in the classical period. We should note, however, that already in Homer, in the dispute between Menelaus and Antilochus after the chariot race in Book Twenty-Three of the *Iliad*, Menelaus proposes an oath which is implicitly rejected in a way that suggests that informal rules existed similar to those governing oath proposals in Athens (*Iliad* 23.566-611).[13] In the dispute between Orestes and the Furies in Aeschylus' *Eumenides*, moreover, when the Furies complain to Athena that Orestes is unwilling "to give or receive an oath," their language seems to suggest (poetically) oath proposals – offers or requests to swear an oath (*Eumenides* 429).[14] It seems, therefore, that the rules governing oath proposals developed early out of the community's traditional rules and customs about swearing oaths.

We have no information about the previous history of either *basanos* or testimony proposals, but because in the classical period these (and oath proposals) primarily served litigants' rhetorical needs, it seems reasonable to conclude that the rhetorical nature of Athenian litigation played a role – perhaps the primary role – in shaping the rules governing them. It is thus worth considering the rhetorical theory concerning these types of proposals.

The three types of proposals share a common place in the structure of Athenian forensic pleadings, which differs from the structure of pleadings in any other legal system I know of. When a litigant wants to introduce witness testimony, slave testimony, or the content of an oath in court, he pauses in his speech and asks a clerk to read out the text that he has submitted beforehand. This structure, which combines the litigant's speech with periodic interruptions for the reading of prearranged texts, is analyzed by Aristotle as a combination of what he calls *entechnoi pisteis*, or "artistic proofs" – the speech that a litigant wrote with "skill"

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[13] Different interpretations of this scene have been proposed; for my understanding of it see Gagarin 1997: 131-32.

[14] ἀλλ᾽ ὅρκον οὐ δέξαιτ᾽ ἄν, οὐ δοῦναι θέλοι.

(*technē*) – and *atechnoi pisteis*, "non-artistic proofs" – the documents that, because they already existed, required no *technē* on the part of the litigant but could simply be inserted into the speech (*Rhetoric* 1.15.1).[15]

Aristotle lists five of these "non-artistic proofs": laws (*nomoi*), witnesses (*martyres*), contracts (*synthēkoi*), interrogations (*basanoi*), and oaths (*horkoi*). In other words, the three types of proposals that are primarily rhetorical are all located among Aristotle's "non-artistic proofs," which a litigant can produce without any rhetorical skill; he just takes an existing document and inserts it in his speech. Of course this is an oversimplification: it may be true that laws and contracts, which existed independently of any litigation, were simply found and then inserted in the speech, but even with these it would take some skill to select the right part of the law or contract to read out and to decide the best place to insert it in one's speech. The three types of proposals we are considering, however, did not exist before the litigant began preparing for the trial. Thus, they were always created either by the litigant himself, or by a logographer in consultation with the litigant, in order to support the argument that he planned to make in his pleading.

Although the origins and early history of this unusual structure – a pleading interrupted from time to time by the reading of documents – are completely obscure, the structure itself is already clear in our earliest speeches, those of Antiphon in the late fifth century. And the same structure persists through the entire corpus of surviving speeches down to the late fourth-century, ensuring that the three rhetorical types of proposals continued to be an important factor contributing to the rhetorical nature of Athenian forensic discourse.

These three types of rhetorical proposals make up about 40% of all proposals, and if we add some of the whole-case proposals, specific-issue proposals and others that were not intended to resolve the dispute but whose purpose was primarily to make a rhetorical point, we can conclude that about half of all proposals were probably offered in order to make or prepare for a rhetorical argument. This suggests that we need to rethink the meaning of success as it applies to proposals.

If a proposal was seriously intended to resolve the dispute, it would be successful if it succeeded in doing so, or at least if it resolved some issue that was part of the dispute. In these terms, the likelihood of a proposal's success depends in large part on whether or not the proposer offers his proposal seriously in the hope of reaching a settlement. By this criterion, the most successful proposals appear to have been those for arbitration, followed by whole-case and specific-issue proposals. However, because litigants offered many proposals whose purpose was not to settle the dispute but simply to make a rhetorical argument, success in these cases would depend not on whether the proposal resolved the case, but on how effectively it was used to support the litigant's pleading. Unfortunately we have no way of assessing how persuasive these rhetorical proposals were. But there are a

[15] See Carey 1994.

great many such proposals in the surviving speeches, and their frequency seems to be fairly constant over time. This suggests that the logographers must have concluded from experience that these purely rhetorical proposals could often help their case succeed.

To conclude, from early times proposals were a vital element in Athenian dispute resolution both before and during litigation. Proposals that were genuinely intended to resolve a dispute were sometimes effective, and if litigants were more likely to mention unsuccessful proposals, then the percentage of successful proposals may have been higher than the speeches suggest. Even if the success rate was low, however, the benefits of ending the dispute would be great, whereas the cost of failure would leave one no worse off than before. Proposals that were offered for rhetorical reasons, on the other hand, are harder to assess. It is easy for a modern critic to see the weakness of many of the arguments based on such proposals, but Athenian juries may have found them more persuasive, which would explain why they continue to be used.

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APPENDIX: PROPOSAL IN THE ORATORS

Bold Face indicates passage where either *proklēsis* or *prokaleō* is used.
The parentheses contain the total number of proposals followed by the number using *proklēsis* or *prokaleō*.

Whole case (50, 6): Aes. 2.148. **And**. 1.122-23. **Ant**. 6.38. **Dem**. 21.3, 20, 39 (2), 40, 104; 25.47 (3); **27.50-52**; **30.1**; 31.10; **32.18**; **37.12**; 38.20; 41.4; **50.31**; 56.12, 15, 22; 58.19, 28, 32, 34, 42; 59.6, 53. **Hyp**. *Lyc.* 2; *Dem*. 2. **Din**. ***Dem*. 4-5**. **Is**.1.2, 16, 28, 35, 51; 5.1; 11.27. **Isoc**. 17.18, 21, 22; 18.9-10. **Lys**. 1.25, 29; 4.2; 6.12, 7.21, 12.9.

***Basanos* (42, 20): Aes**. **2.126-28**. **Ant**. **1.6-7**; 2.4.8; **5.38**; **6.23**. **Dem**. **29.11**, 13, 19, 21, 25, 38, 50; 30.27, **35-36**; 31.23; **37.27, 40, 42, 43**; **45.61**; **46.21**; **47.5**, **35**, **40**; **48.32-34**; 49.55, 57; **53.22 (2)**; **54.27**; **59.120**. **Is**. **6.16**, 42; 8.10, 17, 29. **Isoc**.17.12, 28. **Lyc**. **1.28**. **Lys**. 4.10, **15**; 7.34.

Arbitration (26, 5): Aes. 1.63. **Dem**. 27.1; 33.14, 30; 34.18; 36.15; 40.16, 39, **43**, **44**; 41.1, 14, 29; 47.45; **52.14**, **30**; 55.35; **56.17**; 59.45, 68. **Is**. 2; 5.31. **Isoc**. 17.19; 18.10. **Lys**. 32.2, 12.
Oath (24, 8): Dem. 29.26, 33; 31.9; 33.13; 39.3; **40.10**; **45.60**; 49.42, 43, **65 (2)**; 50.31; **52.15**, 18; **54.40**; **55.27** (2), **35**; **59.60**, 63. **Is**. 9.24; 12.9 (2), 10.

Specific Issue (10, 5): Dem. **45.48-49**; 47.74; 48.8, **34**; 50.2, **33-4**; 52.18; **56.40**; 57.12. **Isoc**. **17.51**.

Document (7, 5): Dem. **36.4**, **7**; **45.10**, **31**; **48.48**; **49.43**; 50.30.

Testify (4, 1): Aes. 1.46, 67. **Dem**. **45.60**. **Is**. 9.18.

Unspecified and Other (10, 10): **Dem**. **45.15-16**, **48-49**; **47.1**, **12**; **50.33-8, 57**. **Din**. **1.5**. **Hyp**. ***Dem*. cols. 2 (2)**, **3**.

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