

# Torture of Non-Citizens in Homicide Investigations

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THERE IS some disagreement as to whether the Athenians permitted the torture of free non-citizen Greeks in judicial investigations of homicide. Lipsius, following Guggenheim and Thalheim, among others, held that they did.<sup>1</sup> The four examples which Lipsius cited as evidence for this thesis, the Argive *xenos* (Thucydides 8.92), Philoneus' *pallakē* (Antiphon 1), the Mytilenaeen *xenos* (Antiphon 5) and Theodotus of Plataea (Lysias 3), have met various degrees of opposition.<sup>2</sup> The first of these examples, through lack of evidence, must remain purely speculative. The latter three, however, are sufficiently demonstrable as cogent testimony to Lipsius' contention and an examination of them ought to remove any doubt that the Athenians practiced such a procedure. I have treated elsewhere the case of Philoneus' *pallakē*.<sup>3</sup> Here I will examine those of the Mytilenaeen *xenos* and Theodotus.

According to Antiphon 5, a certain Herodes, while en route from Mytilene to Thrace on a business trip, was murdered, and a Mytilenaeen citizen was charged with the murder by members of Herodes' family and arraigned in Athens.<sup>4</sup> Two witnesses secured by the prosecution were put to torture in Mytilene to obtain a denunciation

<sup>1</sup> M. Guggenheim, *Die Bedeutung der Folterung im attischen Prozesse* (Zurich 1882) 22; T. Thalheim, in *RE* 3 (1899) 39–40 s.v. *Βάσαντοι*; J. Lipsius, *Das attische Recht und Rechtsverfahren* III (Leipzig 1915) 895. But cf. K. Maidment, *Minor Attic Orators* I (Cambridge [Mass.] 1941) 180–81 n. c and 189 n. b; J. W. Jones, *The Law and Legal Theory of the Greeks* (Oxford 1956) 141; R. Flacelière, *La vie quotidienne en Grèce au siècle de Périclès* (Paris 1959) 292.

<sup>2</sup> Lipsius, 895 n.122, is alone in viewing the torture of the Argive *xenos* as part of an investigation of homicide rather than of treason. His example of Philoneus' *pallakē* has been universally rejected in the belief that she was a slave: see n.3. On opposition to the other two examples, see below.

<sup>3</sup> This will appear next year in *AJP*.

<sup>4</sup> The prosecution in Ant. 5 was an *ἀπαγωγή κακούργων* rather than a *δίκη φόρου*; but this was probably to effect the detention of the defendant in Athens until the trial took place. See L. Gernet, *Antiphon* (Paris 1923) 103ff; K. Freeman, *The Murder of Herodes* (London 1946) 63; and Maidment, *op.cit.* (*supra* n.1) 150–57.

against the defendant. Concerning the second witness we are told only that he was an *ἐλεύθερος* (5.49), that he travelled on the same boat as the defendant and Herodes, and that he testified in favor of the defendant (5.42).

Three arguments have been offered which might invalidate this case as evidence: (a) Heffter pointed out that the torture occurred in Mytilene,<sup>5</sup> (b) Gernet faintly suggested that the reading *ἐλεύθερος* was at fault,<sup>6</sup> and (c) Maidment declared that the witness was not a Greek.<sup>7</sup>

True, the examination of the witnesses under torture occurred in Mytilene, as Heffter says. However, since all trials for crimes involving the death penalty were transferred to Athens, any preparatory investigation would probably have been carried out in accordance with Athenian legal procedures and under the supervision of a local Athenian legal administrator.<sup>8</sup> Furthermore, as Böckh long ago insisted in reference to this very point, Lesbian law would have differed very little from Attic law.<sup>9</sup>

The suggestion of Gernet which questions the validity of *ἐλεύθερος* is surprising. The reading of this word is not only an indisputable fact in the Mss but a necessary part of the defendant's comparison of the two witnesses, one whom he calls a *δοῦλος* and describes in terms of a man seeking his freedom through his testimony, the second whom he explicitly calls an *ἐλεύθερος* and whom he describes, in contrast, in terms of a freeman. To question the reading *ἐλεύθερος*, therefore, would necessitate questioning whole sections of the speech concerning the two witnesses, *viz.* §§30–52.

Maidment rests his thesis that the witness was not a Greek on the fact that he was tortured. This is begging the question, for he assumes as true that Athenians did not submit free Greeks to torture in judicial investigations, and this is, after all, the question of our inquiry.

That they did so, however, in public investigations, *i.e.* in crimes

<sup>5</sup> A. Heffter, *Die athenäische Gerichtsverfassung* (Cöln 1822) 313 n.12.

<sup>6</sup> Gernet, *op.cit.* (*supra* n.4) 122–23 n.4: "Si le texte *ἐλεύθερος* est certain, c'est le seul cas que nous connaissions, avec un autre qui n'est pas clair (Lys., III, 33), de la torture appliquée à un homme libre dans une cause privée."

<sup>7</sup> See n.1. This is probably the source of J. W. Jones' strange remark, *op.cit.* (*supra* n.1) 141 n.2: "It has generally been assumed that the freeman put to torture in Antiphon V.49 could not have been a Greek."

<sup>8</sup> See Maidment, *op.cit.* (*supra* n.1) 192 n. b. Also see CAH V.94.

<sup>9</sup> A. Böckh, *Die Staatshaushaltung der Athener*<sup>2</sup> I (Berlin 1851) 253 n. c.

against the state, is incontrovertible.<sup>10</sup> That they did in homicide investigations is a question which must be answered only by moving from the evidence of our texts to a conclusion which that evidence warrants. The evidence of Antiphon 5 is clear and cogent. The witness was tortured in an investigation for homicide, conducted by Athenians under Athenian law. He is called an *ἐλεύθερος* and described as such. There is no hint that he is anything other than a Greek. Finally, there is no indication in the defendant's speech that the prosecution was committing any irregularity in the torture of the witness.

The evidence, therefore, leads to the tentative assumption that free non-citizens were subject to torture in investigations for homicide.

This assumption is corroborated by Lipsius' fourth example, the hypothetical torture of Theodotus of Plataea as related in Lysias 3. The validity of this example has also been questioned recently by scholars who assume that Theodotus was a slave.<sup>11</sup> That he was a free non-citizen resident in Athens is a much more probable conclusion from the evidence which the text offers us.

The speaker of Lysias 3 is defending himself against a charge of assault with intent to kill<sup>12</sup> brought forth by Simon. Both had been

<sup>10</sup> The following were all involved in prosecutions for treason or crimes against the state. (a) Athenian citizens actually tortured were Aristophanes (Lys. 13.59–60) and Antiphon (Dem. 18.132–33), and possibly Andocides (Lys. 6.27, Andoc. 2.15), though the last has been discounted as a political fabrication. (b) Athenian citizens threatened with but escaping torture were Mantiheus and Apsephio (Andoc. 1.43–44), Phocion and Callimedon (Plut. *Phoc.* 35). (c) Free non-citizens who were tortured were the Peiraeen barber (Plut. *Nicias* 30 and *De garr.* 13), Xenophon (Lys. 13.54), Anaxinos of Oreus (Aeschin. 3.223–24, Dem. 18.137) and possibly Hippias of Thasos (Lys. 13.54), about whom a lacuna in the text may hide all the evidence. (d) Threatened but not actually tortured were the metic Agoratus (Lys. 13.25) and Agathon (Dem. 25.47), though whether the latter was a citizen or not is unknown.

<sup>11</sup> L. Gernet and M. Bizos, *Lysias I* (Paris 1924) 66 n.2 and 74 n.2; J. Petit, *Lysias* (Barcelona 1929) 41 n.1; W. Lamb, *The Orations of Lysias* (New York 1930) 70, 86 n.1; M. Fernandez-Galiano, *Lysias, Discursos I* (Barcelona 1953) 61, 77; R. Turasiewicz, *De servis testibus in Atheniensium iudiciis . . . per tormenta cruciatis* (Wrocław 1963) 68–69. But cf. among others M. Meier, *De bonis damnatorum* (Berlin 1819) 52–53 n.165; J. Breimi, *Lysiae et Aeschinis Orationes selectae* (Gotha 1826) 32; M. Isler, "Das Bürgerrecht der Platäer in Athen," *NJbb* 103 (1871) I, 114; H. Wiegand, *Die Platäer in Athen* (Ratzeburg 1888) 9; G. Fritzsche, *Geschichte Platäas* (Bautzen 1898) 22 n.4; T. Thalheim, *op.cit.* (*supra* n.1); G. Busolt, *Griechische Geschichte* III.2 (Gotha 1904) 1038 n.2; G. Ammendola, *Le orazioni 'Contro Simone' e 'Per Mantiteo'* (Città di Castello 1914) 42; N. Vianello, *Le orazioni di Lisia* (Torino 1914) 125 n.1; K. Freeman, *op.cit.* (*supra* n.4) 105–106; U. Albin, *Lisia, i discorsi* (Firenze 1955) 414 n.9.

<sup>12</sup> *δίκη τραύματος ἐκ προνοίας*. That this charge was interpreted as 'intent to kill' is the contention of Meier and Schömann, *Der attische Process*, rev. by Lipsius (Berlin 1883–87) 386–87; F. Blass, *Die attische Beredsamkeit I* (Leipzig 1868) 583 n.6; Lipsius, *op.cit.* (*supra* n.1) II.605–607, and Gernet, *op.cit.* (*supra* n.11) 65. Cf. K. Latte, *Hermes* 66 (1931) 147 n.3 and Jones, *op.cit.* (*supra* n.1) 267–69.

*erōntes* of Theodotus, a boy from Plataea (Lys. 3.5). Simon maintained that he had earlier made a contract for *hetairēsis* with Theodotus, had paid him a certain sum, and had received the money back when Theodotus broke off relations with him (Lys. 3.22–25). The speaker tells us that he and Theodotus had been so plagued by Simon's attempts to recover the boy that they left Athens for a prolonged stay, but that upon their return to Athens, Simon continued his efforts to take Theodotus from him by force (Lys. 3.10–18). Simon now charges that the speaker and the boy had come to Simon's house, had assaulted him and even threatened to kill him. The speaker disclaims such an action on the grounds of improbability, especially since the boy Theodotus would have been liable to torture and capable of laying a denunciation against him, the speaker, if he had done anything wrong (Lys. 3.27–33).

Theodotus was an Athenian, a slave, or a free non-citizen. He could not have been an Athenian, for the Skamandrian decree protected Athenian citizens from torture in judicial investigations.<sup>13</sup> Though there were exceptions, these were rare and confined to investigations of crimes against the state, *i.e.* public trials (see note 10). Furthermore, had he been an Athenian, Simon would not have confessed in his speech, as the speaker of Lysias 3 tells us, that he had made a contract with the boy for *hetairēsis*, since this was illegal if the boy were an Athenian.<sup>14</sup>

The theory that he was a slave has usually rested on the following line of thought: since he was a Plataean, he would have been an Athenian citizen. No Athenian could be tortured. He was liable to torture. Therefore, he was a slave. The fallacy in this argument is apparent when one realizes that though he was a Plataean he need not have been an Athenian, since not all Plataeans were Athenians.<sup>15</sup>

<sup>13</sup> Andoc. 1.43. See D. MacDowell, *Andocides, On the Mysteries* (Oxford 1962) 92–93.

<sup>14</sup> On the validity of such contracts in Athens see W. Becker, *Charikles II* (Berlin 1877) 268ff; Lipsius, *op.cit.* (*supra* n.1) II.436; Gernet, *op.cit.* (*supra* n.11) 66; and Albin, *op.cit.* (*supra* n.11) 414 n.7. But cf. Meier and Schömann, *op.cit.* (*supra* n.12) 732–33 and esp. L. Beauchet, *Histoire du droit privé de la république athénienne IV* (Paris 1897) 42ff.

<sup>15</sup> That Plataeans were granted Athenian citizenship after the destruction of their town by Sparta in 427 B.C. is supported by good authority: Thuc. 3.55 and 3.63; Isoc. *Pan.* 94; and Dem. 59.94–106. But not all Plataeans could or wished to take advantage of this. Wiegand, *op.cit.* (*supra* n.11) 6–9 argued that only a small percentage of those Plataeans living in Athens became citizens. (But cf. Fritzsche, *op.cit.* [*supra* n.11] 22–24). The decree, found in Dem. 59.104, contains some strict reservations upon the franchise, such as not being eligible to certain offices, though their children would be eligible if born from an Athenian wife in a proper Athenian marriage. The bestowal of citizenship was to

The most recent argument for his being a slave is that of Turasiewicz, who maintains that (a) there is nothing in the oration which confirms Theodotus' free status, (b) the appellation τὸ Πλαταικὸν μειράκιον would refer to a slave as well as to a freeman, and (c) the boy's occupation more befits a slave than a freeman.<sup>16</sup> The second point demonstrates only possibility, hardly probability, and as for the third point, automatically to associate amatory adventures, or, at the worst, *amor meritorius*, with the status of slavery is, to say the least, very misleading.

It is the first point that demands some consideration. It would be more logical to enquire whether there is anything in the oration which would confirm the theory that he was a slave. There is absolutely nothing. If he were a slave, we would expect to hear some mention of his owner, whom Simon or the speaker would have to have encountered, or of the possibility of a δίκη αἰκίας brought by the owner against Simon for having injured Theodotus. And naturally we would assume an attempt by either Simon or the speaker to purchase the boy so as to facilitate his courtship. Nothing of the sort is reported by the speaker.

He does, however, contrary to Turasiewicz's first point, produce three statements which confirm the free status of Theodotus. (1) Theodotus lived where he pleased, sometimes at the speaker's home, another time at Lysimachus' (Lys. 3.6,11,31). (2) He was free to leave Athens at will and remain away as long as he wished (Lys. 3.10). (3) He could make a contract with Simon and pocket the whole sum

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be a single and immediate grant and no Plataean would be considered as an applicant in the future except through the vote of the assembly.

Furthermore, some Plataeans looked forward to a return to their fatherland and must have been satisfied with their status as metics. Even those who became Athenian citizens "... were by no means content," says A. Diller ("Race mixture among the Greeks before Alexander," *Illinois Studies in Language and Literature* 20 [1937] 109), "to be absorbed in another city, however friendly." Plataean Athenians had a special meeting place in the Agora, formed a Plataean fighting unit in the army, colonized Skione in a group, and were denoted in Attic inscriptions by their ethnic as well as their demotic origin. E. Kirsten (*RE* 20 [1950] 2309 s.v. ΠΛΑΤΑΙΑΙ) believes that they "... waren also de iure attische Bürger, de facto privilegierte Metoiken." Under such conditions, it is quite possible that Theodotus' family did not have Athenian citizenship and that he lived in Athens as a metic, not necessarily an Athenian citizen and, though liable to torture, not necessarily a slave. Such is the judgement of Böckh, Meier and Schömann, Bremi, Isler, Wiegand, Fritzsche, Lipsius, Busolt, Thalheim and Ammendola, among others.

<sup>16</sup> Turasiewicz, *op.cit.* (*supra* n.11) 69.

of 300 *drachmae*, a sum which more than equalled the current average price of a slave.<sup>17</sup>

It would be extremely unlikely that a slave at Athens around 400 B.C. enjoyed the liberty which Theodotus is described as having. The *δημόσιοι* lived where they wished, as well as the *ἀνδράποδα μισθοφοροῦντα*, the privately-owned slaves; but to depart from Athens and to remain away indefinitely would have been impossible.

The third point, the contract between Simon and the boy, also argues against Theodotus' being a slave. The speaker distinctly says that the contract was made by Simon with Theodotus, not with a third party, *i.e.* a possible owner; and that according to Simon's charge, the money was given directly to Theodotus and later returned to Simon by him. A slave had no legal personality. He could not become a party himself to such a contract.<sup>18</sup> Furthermore, if the contract had been arranged between Simon and an owner, one might ask why Theodotus himself received the 300 *drachmae* and retained possession of the whole sum, as the allegations of both men imply. One could only suggest that he was the slave of an extremely liberal man, a suggestion which is possible but highly improbable. In fact, all of these acts of Theodotus—his freedom of movement, his trip abroad, his contract with Simon—together with the argument *ex silentio*, *viz.* no mention of slavery anywhere in the speech, limit the chances of his being a slave to a very narrow possibility and raise the hypothesis that he was a freeman to a substantial probability.

There have been two other approaches which might eliminate the case of Theodotus from Lipsius' category of documentary examples. Dobree and Blass understood the words *τοῦτό γε τὸ παιδίον* (Lys. 3.33) to refer not to Theodotus but to an accompanying slave.<sup>19</sup> It is probable that both based this conjecture on their observation that in referring to Theodotus, the speaker used only the words *μειράκιον* and *νεανίσκος*, while in this particular passage he used the word *παιδίον* and meant thereby the slave of the speaker, not Theodotus.

<sup>17</sup> For the average price of a slave see H. Wallon, *Histoire de l'esclavage dans l'antiquité I* (Paris 1847) 197–219; W. Westermann, in *RE Suppl.* 6 (1935) 915–16 *s.v.* SKLAVEREI; R. Barrow, *OCD s.v.* SLAVES; R. Sargent, *The Size of the Slave Population at Athens* (Urbana 1925) 47.

<sup>18</sup> Beauchet, *op.cit.* (*supra* n.14) II.426ff and 453.

<sup>19</sup> P. Dobree, *Adversaria* (Berlin 1874) 194: "*παιδίον*: non esse videtur Theodotus, sed ἀκόλουθος oratoris." Blass, *op.cit.* (*supra* n.12) I.594 n.1: "... mit *τοῦτό τὸ παιδίον* (3.33) ist Theodotus gar nicht gemeint." Albin, *op.cit.* (*supra* n.11) 414 n.9, rejects this conjecture as incomprehensible. Fernandez-Galiano, *op.cit.* (*supra* n.11) 77, thinks it a possibility.

It is true that the speaker refers to Theodotus as *μειράκιον* seventeen times and as *νεανίσκος* three times, and never as *παιδίον* outside of this passage. It is also true that *LSJ* cites a secondary meaning of 'slave' for *παιδίον*. However, though A. Bryant's protest ("... I find no clear case of *παιδίον*=*servus*")<sup>20</sup> goes too far, this meaning of *παιδίον* is extremely rare.<sup>21</sup> Lysias used the word eleven times in his other speeches but never to denote a slave. He usually meant a very small child, but once he included one who was at least ten years old.<sup>22</sup> Plato has Socrates in the *Phaedo* ask someone to take the women and his *παιδιά* home, and we know that at the time of his death, one of Socrates' *παιδιά* was a *μειράκιον*.<sup>23</sup> An example in Plato's *Theaetetus* offers a close parallel to our passage. Theaetetus is described as a *μειράκιον*, and Socrates often addresses him as *παῖς*.<sup>24</sup> But in the course of their dialogue, in which Socrates leads the boy into a refutation of certain theories of Protagoras, Socrates imagines Protagoras appearing before them to object to Socrates' method and protesting loudly: "Our good man Socrates has terrified a little boy (*παιδίον*) by asking if the same man could remember and at the same time not know the same thing..." (*Tht.* 166A). I suggest that in Lysias 3.33 the speaker used *παιδίον* instead of *μειράκιον* or *νεανίσκος* in order to emphasize his point that he could expect little or no help at all from "the child."<sup>25</sup>

A second argument against this view which would take *παιδίον* to refer to a slave and not to Theodotus is the statement of the speaker himself. In refuting Simon's charge that he had been attacked in front of his own home, the speaker twice insists that it was most improbable for him to have appeared in broad daylight at Simon's doors, where Simon's friends had gathered, with the very boy (*μετὰ τοῦ μειρακίου*) whom he had tried his best to keep from the hands of Simon. He asks the jury, "Who is there among you who would believe that I, who had earlier sailed away with the boy in order to avoid a fight, would as soon as I returned take the boy up to the very door

<sup>20</sup> A. Bryant, "Boyhood and Youth in the Days of Aristophanes," *HSCP* 18 (1907) 75 n.4.

<sup>21</sup> I have not found this meaning in *Hdt.*, *Thuc.*, *Lys.*, *Pl.*, *Isae.*, *Isoc.*, or *Dem.*, though the word frequently occurs in these authors.

<sup>22</sup> See D. Holmes, *Index Lysiicus* (Bonn 1895). That one of the children (*παιδιά*) of Diodotus was at least ten, see *Lys.* 32.5–9.

<sup>23</sup> *Phaedo* 116b. Cf. *Apol.* 34d.

<sup>24</sup> For examples of *μειράκιον* see *Tht.* 142c, 143e, 144c; of *παῖς*, 145d, 151e, 156a.

<sup>25</sup> So Bremi, *op.cit.* (*supra* n.11) 32: "Est rhetorica emphasis notione deminuta. Nam ubique juvenis nominatur τὸ μειράκιον vel ὁ νεανίσκος."

of Simon's house where I would most likely run into trouble?" (Lys. 3.29,32-33).

Finally, Guggenheim interpreted the participle *βασανιζόμενον* (Lys. 3.33) to mean not the use of torture but only a very intensive investigation or interrogation in which Theodotus would have been examined as an accessory to whatever the speaker might have committed.<sup>26</sup> This meaning, however, occurs, if ever, very rarely in such a context and has rightly been rejected.<sup>27</sup>

Thus, the evidence leads one to believe that Theodotus was a free non-citizen, that he was the *παίδιον* who would have been subjected to 'the question', and that this, indeed, meant the usual torture. We ought, then, to accept the case of Theodotus, along with those of the Mytilenaeen *xenos* and Philoneus' *pallakē* (see note 3), as legitimate demonstration of the thesis that the Athenians permitted the torture of free non-citizens in judicial investigations of homicide.

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<sup>26</sup> Guggenheim, *op.cit.* (*supra* n.1) 23.

<sup>27</sup> See Turasiewicz, *op.cit.* (*supra* n.11) 68-69, for refutation.