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A RESPONSE TO ROBERT WALLACE

In the Classical period the Athenians were concerned about individuals abusing their legal system and enacted several measures to discourage frivolous suits. In an article published in *Dike* in 1999, I studied the penalties for those who either did not follow through a prosecution after initiating a public suit or failed to win one-fifth of the votes cast at the trial.[1] Wallace accepts most of my analysis of the evidence for these penalties, but differs with me on two points of detail. His proposals are based on a careful reading of the relevant texts and merit serious consideration.

Our main point of agreement is about the intent of the law about frivolous prosecutions. Wallace agrees with me that the aim of this law was to discourage sycophants, those who abused the legal system for private gain.[2] The Athenians did not want litigants to use the courts to pursue private feuds and to harass opponents by bringing suits without legal merit. They therefore established serious penalties for the sycophants who attempted to abuse the legal system.[3] Wallace also accepts my arguments for retaining the manuscript reading παρανόμον in the scholion to Demosthenes 22.3 and rejects Reiske's emendation παρανόμων.[4] Finally, Wallace follows my analysis of Theophrastus *Laws* fr.636c (Fortenbaugh).[5] We agree that the penalty for the person who brought a public action and failed to gain one-fifth of the votes was a form of partial *atimia*: the offender lost his right to bring any kind of public action in the future, not just the kind of action for which he had failed to win one-fifth of the votes.

So far, so good. Our two main disagreements concern the offense of not following through on a public action. The first disagreement relates to the penalty for this offense. In my essay in *Dike* I saw no reason to reject the evidence of the ancient sources that state the punishment for failing to follow through a public suit was a fine of 1,000 drachmas as well as partial *atimia*, that is, loss of the right to

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1 Harris (1999). The earlier view, found in e.g. MacDowell (1990) 327-28, was that the accuser who failed to gain one-fifth of the votes only lost the right to bring the same kind of public charge.

2 Wallace believes that the main aim of the law was to prevent bribery by sycophants. I find this too narrow a view of the threat posed by sycophants, who practiced various kinds of abuses. On sycophants in general see Harvey (1990).

3 On the Athenian attitude toward litigation see Harris (2005).

4 See Harris (1992) 79.

5 See Harris (1992) 79.

bring any public action in the future.[6] Wallace prefers to reject this evidence and argues that the penalty was only a fine of 1,000 drachmas. Our second disagreement relates to the meaning of the phrase "not following through" (οὐκ ἐπεξελθών, μὴ ἐπεξελθεῖν, etc.). In my *Dike* essay I collected several passages which show that accusers might withdraw a public action at the *anakrisis* without penalty.[7] I then examined several other passages which indicate that the law on frivolous prosecutions made it illegal to initiate a public suit and then either not show up at the *anakrisis* or not bring the case before a court. Wallace agrees with my point that it was possible to withdraw a public suit without penalty provided that one did it in the proper way. But he argues that those who did not follow through a public suit were subject to a fine only if they were paid not to follow through. Wallace's argument is a little hard to follow because he argues for both of his points at once in his analysis of the evidence. For the sake of clarity I will deal with each of his arguments separately.

Wallace's claim that there was no *atimia* for failing to follow through rests mainly on an *argumentum e silentio*. Wallace notes that in the demosthenic speech *Against Theocrines* and in several other passages the speaker does not mention *atimia* as a penalty for failing to follow through a public action, but can we conclude from their omission that this penalty was not contained in the law about frivolous prosecutions? As Robin Osborne once remarked to me, "Absence of evidence is not evidence of absence." In *Against Theocrines* (Dem 58. 6) Epichares does not mention the penalty of *atimia*, but he may be selective in his summary of the law and merely leave out the penalty. In this same passage Epichares says that there was a fine of 1,000 drachmas for failure to gain one-fifth of the votes but does not mention *atimia* as a penalty in this case – is Wallace prepared to argue from this passage that there was also no *atimia* for the person whose case won less than one-fifth of the votes cast by the judges? If Wallace consistently applies this type of *argumentum e silentio*, he will have to contradict the view expressed at the beginning of his paper that the failure to gain one-fifth of the votes did bring with it a form of *atimia*.

Wallace then tries to argue away the evidence of the *lexicon Cantabrigiense* (which is one of the three sources for Theophrastus fr. 636 [Fortenbaugh]):
πρόστιμον ἔκειτο τῷ μὴ μεταλαβόντι τὸ πέμπτον μέρος τῶν ψήφων ὡς Θεόφραστος ἐν πέμπτῳ περὶ νόμων. ἐν δὲ τοῖς δημοσίοις ἀγῶσιν ἐζημιοῦντο χιλίαις καὶ πρόσεστί τις ἀτιμία ὥστε μὴ ἐξεῖναι μήτε γράψασθαι παρανόμον μήτε φαίνειν μήτε ἐφηγεῖσθαι. ἐὰν δέ τις γραψάμενος μὴ ἐπεξέλθῃ, ὁμοίως.

The source states that in public suits there was a penalty of 1,000 drachmas and partial *atimia* for the person who did not gain one-fifth of the votes. The same was

[6] Harris (1999) 126-27.
[7] Harris (1999) 130-38.

true for the person who did not follow through.[8] Wallace prefers to reject this evidence solely on the basis of his *argumentum e silentio* about several passages in the Attic orators. If one does not accept this argument (as one should not), Wallace's objection to the evidence of Theophrastus falls to the ground. And if Wallace does not question the reliability of the information in the first part of the fragment, why does he arbitrarily reject the information in the last part? In fact, the evidence of Theophrastus is actually confirmed by Demosthenes 21.103 where the orator says that Euktemon did not follow through and thus incurred *atimia* (ἠτίμωκεν αὐτὸν οὐκ ἐπεξελθών). Wallace attempts to evade the clear implication of this passage by claiming that the penalty of *atimia* applied only in the charge of *lipotaxion*. I see nothing in the passage that compels us to adopt the view that this charge was somehow exceptional – why should it be? Wallace does not explain. He admits the penalty for failure to win one-fifth of the votes applied generally – why not the penalty for failure to follow through? Indeed, the evidence of Dem. 58.10ff. indicates that this penalty was part of a general provision applying to all public charges, not just one or two. Finally, Demosthenes states that Euctemon incurred *atimia* for not following through, not for failing to follow through on this particular type of charge. There is no good reason to reject the evidence of Theophrastus or to adopt a strained interpretation of Demosthenes 21.103. On the contrary, the two passages confirm each other and make it certain that the failure to follow through incurred a form of *atimia*. This is not a hypothesis of mine; it is what the ancient sources plainly state. Wallace presents no compelling argument to reject this evidence.

Wallace bases another argument on a document which was inserted into Demosthenes' speech *Against Meidias* and which contains what purports to be the law about *hybris*. It is important to have the full text of the document before us:

ἐάν τις ὑβρίσῃ εἴς τινα, ἢ παῖδα ἢ γυναῖκα ἢ ἄνδρα, τῶν ἐλευθέρων ἢ τῶν δούλων, ἢ παράνομόν τι ποιήσῃ εἰς τούτων τινά, γραφέσθω πρὸς τοὺς θεσμοθέτας ὁ βουλόμενος Ἀθηναίων οἷς ἔξεστιν, οἱ δὲ θεσμοθέται εἰσαγόντων εἰς τὴν ἡλιαίαν τριάκοντα ἡμερῶν ἀφ' ἧς ἂν ᾖ ἡ γραφή, ἐὰν μή τι δημόσιον κωλύῃ, εἰ δὲ μή, ὅταν ᾖ πρῶτον οἷόν τε. ὅτου δ' ἂν καταγνῷ ἡ ἡλιαία, τιμάτω περὶ αὐτοῦ παρχρῆμα, ὅτου ἂν δοκῇ ἄξιος εἶναι παθεῖν ἢ ἀποτεῖσαι. ὅσοι δ' ἂν γράφωνται γραφὰς ἰδίας κατὰ τὸν νόμον, ἐάν τις μὴ ἐπεξέλθῃ ἢ ἐπεξιὼν μὴ μεταλάβῃ τὸ πέμπτον μέρος τῶν ψήφων, ἀποτισάτω χιλίας δραχμὰς τῷ δημοσίῳ. ἐὰν δὲ ἀργυρίου τιμηθῇ τῆς ὕβρεως, δεδέσθω, ἐὰν ἐλεύθερον ὑβρίσῃ, μέχρι ἂν ἐκτίσῃ.

His argument here runs into a similar difficulty. Wallace notes that the document lists the penalty of 1,000 drachmas for failing to follow through, but omits the penalty of *atimia*. True enough, but the document also omits the penalty of *atimia* for not gaining one-fifth of the votes. Is Wallace also prepared to argue on the

[8] A scholion to Demosthenes 22.3 and an entry in Harpocration contain similar information but omit the penalty for failure to follow through a prosecution.

basis of this document that there was no penalty in this case and thus contradict himself again? It would be better to admit with Drerup that the document is a forgery.[9] There are strong grounds for this view: 1) the unparalleled application of the law not just to *hybris* but to all possible offenses, 2) the equally unparallelled and nonsensical expression γραφὰς ἰδίας, 3) the final clause (where the subject is the accuser) does not fit well with the previous clause (where the subject is the defendant). Like the *nomoi* at 8 and 12 in this speech this document is a fake, and the omission of the penalty of *atimia* is another reason to deny its authenticity.[10]

The second area of disagreement concerns the offense of "not following through." In my article in *Dike* I showed that this must mean to fail to show up at the *anakrisis* or to bring the case before a court on the basis of three passages. One was Demosthenes 21.103, another was Demosthenes 58.10, and Antiphon 6.37. In his analysis of Dem. 58.12 Wallace claims that Theocrines' offense was settling for money, not failing to appear at the *anakrisis*. Wallace appears to assume that we must make a choice: either Epichares accuses him of settling for money or failing to show up at the *anakrisis*, and that only one of these actions could have been illegal. But the summary of the law at 5 and 6 indicates there were three actions on which the law imposed a penalty: 1) bringing a public action and not gaining one-fifth of the votes, 2) not following through, and 3) reaching a settlement contrary to the laws (διαλυομένων παρὰ τοὺς νόμους). Epichares charges Aristogeiton with both offenses #2 and #3. At 10 he clearly states Theocrines did not show up at the *anakrisis* and thus did not follow through (εἰς τὴν ἀνάκρισιν καλούμενος οὐχ ὑπήκουσεν). He is thus subject to the penalty of 1,000 drachmas. Nothing is said here about settling for cash. At 12 he accuses Theocrines of settling in violation of the law, that is, offense #3. Epichares provides more information about this charge at 20. Here he says that while one can come to a settlement in private matters, in cases involving the Treasury one must not make an illegal settlement, that is, one which does not deprive the Treasury of a fine.[11] To sum up, I see no reason to reject the evidence of the ancient sources about the penalty for not following through on a public suit and about the meaning of the term ἐπεξελθεῖν. Once more, this is not a hypothesis – it is what the ancient sources plainly state.

As for Wallace's general point about idiosyncrasies in Athenian law, I do not basically disagree, but would not use the word "idiosyncrasy" and would use different evidence to illustrate the point. The word "idiosyncrasy" conveys the impression that Athenian law was quirky, irrational, and capricious. I would prefer to say that Athenian law contained some actions with distinctive procedural features

[9] Drerup (1898) 297-300. This work appears to be unknown to Wallace. MacDowell (1990) 263-69, followed by Wallace, accepts the document as genuine, but see the next note.

[10] For a discussion of the forged laws in this speech see Harris (1992) 75-8.

[11] I thought I made this point clear in Harris (1999) 141-2.

suited to the nature of the substantive offense.[12] For instance, mercantile suits differed from normal private suits in providing for imprisonment until the award was paid by the defendant.[13] The reason for this "idiosyncrasy" was that the defendants were often foreigners who might abscond without paying. According to Hyperides (2.12) there was no penalty for the accuser who failed to gain one-fifth of the votes in an *eisangelia*.[14] This may have been done so as not to discourage citizens from prosecuting serious public crimes. But there were also some general procedural rules that applied to all or many private or public actions such as this one, which was aimed at discouraging frivolous prosecutions in general. Instead of making assumptions about the existence of idiosyncrasies, I think it is better to study the substantive content of individual statutes to understand their procedural features.[15]

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[12] On this general point see C. Carey (2004).

[13] See Dem. 33.1 and 56.4 with the discussion of Cohen (1973) 75-83.

[14] Pollux 8.52-3 states that there was a penalty of 1,000 drachmas, but no *atimia*. Some scholars think this penalty was added around 330 B.C.E., but see Rubinstein (2000) 115-22.

[15] I made this point in Harris (1994).

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