

ROBERT W. WALLACE (EVANSTON)

RESPONSE TO DOUGLAS M. MACDOWELL

I was happy to receive, very promptly, Douglas MacDowell's careful, even cautious study of the *epobelia*, the "obol on the drachma" that I shall translate "the one-sixth." I am less cautious and have little time and so plunge in, making nine points.¹

First, in our earliest reference to the one-sixth, Isokrates 18.11-12 of 403/2,² Kallimachos initiated against the unnamed speaker a suit for 10,000 drachmas. A witness testified that the case was not admissible because it had been arbitrated. Kallimachos did not prosecute this witness for false witness because if he failed to get one-fifth the votes, he must pay the one-sixth. "After persuading the official, he brought the same suit again, intending to risk only the *prytaneia*." From the witness episode related here, Lipsius,³ Whitehead (90), and MacDowell all conclude that the one-sixth was payable in a suit for false witness, when a litigant was claiming money from the witness "as compensation for loss of a case" (MacDowell). MacDowell adds, it was not payable "when he was simply prosecuting an opponent to claim a sum of money." Now, at the *anakrisis* for Kallimachos's first suit the official declined to let that case go forward because a witness stated that the arbitration had gone against Kallimachos and he had not challenged it. May I suggest that if Kallimachos sued the witness and failed to get one-fifth the votes, he would have owed one-sixth not to the witness but in the original case for 10,000 drachmas, which the verdict in the false witness case would have automatically decided?⁴ If so, the one-sixth was applicable not in cases of false witness but at least in this failed prosecution to claim 10,000 drachmas, just as Demosthenes (27.67) later claimed it was in his suit for money against his guardians.

Second, although MacDowell might modify his statement "it is obvious ... there can be *epobelia* only when a sum of money is under consideration" because he himself mentions suits such as *paragraphai* involving the one-sixth but no money, I see his point and shall begin to suggest that the one-sixth was introduced in money suits in 403/2 in the wake of the Thirty's fiscal rapacities (see Isokr. 18.35) and the

¹ In addition to MacDowell's essay, I cite A.R.W. Harrison, *The Law of Athens* I, II (Oxford 1968, 1971) and D. Whitehead, "Athenian laws and lawsuits in the late fifth century B.C.," *MH* 59 (2002) 71-96, by author's surname. I am grateful to David Whitehead for sending me a copy of this article.

² For the date see Whitehead 71-84, 89; the alternative is 401 (MacDowell n. 4).

³ J.H. Lipsius, *Das attische Recht und Rechtsverfahren* III (Leipzig 1915) 937-39.

⁴ See Harrison II 128-31, and S.C. Todd, *The Shape of Athenian Law* (Oxford 1993) 146.

reintroduction of *dikai*, not only to compensate the defendant “for the trouble the prosecutor had put him to,” as MacDowell rightly says, but especially to discourage frivolous financial lawsuits (Harrison II 120). The provision certainly had that effect on Kallimachos, although he attempted to devise a way around it, on which now my third point.

“After persuading the official, [Kallimachos] brought the same suit again, intending to risk only the *prytaneia*.” Despite varying scholarly opinions (see Whitehead 85-86, 88), “persuading the archon” I think points neither to a change of archon in a new year nor to “persuading by cash.” The speaker mentions neither point although the first would have clarified and the second helped his argument. On the contrary, the following clause that Kallimachos’s new prosecution risked only *prytaneia* indicates that Kallimachos convinced the official to let him prosecute his case under a different and older statute: one that did not stipulate paying the one-sixth but only *prytaneia*. This implies what we shall see elsewhere, that there was no general procedural statute about the *epobelia*. Rather, one or more laws on recovering money stipulated the one-sixth, others did not.

Fourth, in 403/2 the speaker of Isokrates 18 tries to stymie Kallimachos’s new prosecution by the brand-new procedure called *paragraphê* (“counter-indictment”).⁵ Introduced by Archinos, *paragraphai* targeted improper prosecutions more generally, and included the one-sixth penalty, as Apollodoros’s case against Phormion (Dem. 45.6), Demosthenes *Against Lakritos* (35.46) and the garbled scholion on Aeschines 1.163 (329b Dilts) also attest. Hence, in his second suit Kallimachos once again did not escape liability for the penalty of one-sixth, in the *paragraphê* procedure which – bad luck for him – could have been introduced after he initiated that suit. The *paragraphê* procedure also stipulated that if he did not pay, he would suffer *atimia* (Isokr. 18.35).⁶ *Paragraphai* did not necessarily involve money and either defendant or plaintiff might be liable; in cases not involving money we don’t know how the amount of “one-sixth” was fixed. Thus we have immediately found a different statutory version of the one-sixth. Because Isokrates 18 doesn’t mention losing by four-fifth the votes in *paragraphai*, MacDowell further concludes that the one-sixth was owed even if a litigant lost by the smallest margin. However, this penalty would have been a tremendous deterrent to bringing any *paragraphê*, and in paying the one-sixth in the *paragraphê* that he lost, Apollodoros stresses that the dikasts “refused to listen to a single word” of his, suggesting that he basically got no votes. In 403/2 Isokrates 18.3 expressly says that the *epobelia* in *paragraphai* was directed again those “audacious enough to *mnesikakein*” regarding the horrors of 404, a motivation confirmed for Archinos by *Ath. Pol.* 40 as Whitehead (85) notes.

Fifth – skipping down six or more decades – Dem. 47.64 is extraordinary: in a suit for assault where no money was at issue, the *defendant* had to pay (and says he did pay) the one-

⁵ See H.J. Wolff, *Die attische Paragraphe* (Weimar 1966).

⁶ For a general discussion, see M.H. Hansen, “*Atimia* in consequence of private debts?,” *Symposion 1977 Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, eds. J.Modrzejewski and D. Leibs (Cologne and Vienna 1982) 113-20. Hansen suggests that the cases in question were close to public cases.

sixth on damages of 1,100 drachmas (as MacDowell says, probably the penalty proposed by the prosecutor), plus 30 drachmas *prytaneia*. This again must refer to a different statutory provision. Furthermore, we hear of the one-sixth in no other case of assault.

Sixth and most explosively, in his suit against Aphobos in 364/3 to reclaim his patrimony, the young orphan prosecutor Demosthenes says that if he loses he must pay the one-sixth, and if he cannot pay he is disfranchised (Dem. 27.67, 68).⁷ Why on earth would the Athenians have singled out desolate and impoverished orphans to suffer such brutal punishments? Because of this difficulty, MacDowell suggests that the *epobelia* “was now extended to all financial claims.” On the other hand, we have no good evidence for such a general procedural law,⁸ and we scarcely ever hear of the one-sixth. If every prosecutor was liable to it – and, Demosthenes says, *atimia* – in lawsuits for money, surely others would have mentioned it? At any rate in the assault case in Dem. 47.65, 75, the speaker says he was anxious to pay the one-sixth penalty imposed on him simply because “I did not think it best to be in default” or for his opponent Theophemos to carry off more of his property. Sections 65, 75, and 76 of that speech nowhere indicate any penalty for non-payment so serious as disfranchisement. Because it is incredible that the Athenians singled out destitute orphans to pay the one-sixth or face disfranchisement for seeking to recover their property, and because there is no evidence that most other prosecutors faced these penalties, I boldly suggest that in fact Demosthenes was not necessarily liable to the one-sixth or disfranchisement. One-sixth statutes with disfranchisement for non-payment existed at least in *paragraphai* (Isokr. 18.35), but Demosthenes was not prosecuting under a statute of that type. To gain sympathy he alleges that these penalties applied and he does not mention that he would have to lose by four-fifth the votes (but only “if [Aphobos] is acquitted”), all for dramatic effect.⁹

Seventh and following from this last point, please note how many of our very few mentions of the one-sixth are hypothetical, except in *paragraphai*. Kallimachos in Isokrates 18 didn't pay it, the young Demosthenes didn't pay it, Androkles in Demosthenes 35.46 didn't pay it, and Aeschines 1.163 (contracting for the services of a male prostitute) is a fantasy. Except in the one case of assault and a few *paragraphai*, the one-sixth is only ever mentioned as a possibility. Furthermore, nobody ever boasts that he will make his opponent pay the one-sixth. Rather, Apollodoros (Dem. 45.6) is indignant that he had to pay it – as bad (he says) as not getting a hearing. Aeschines 1.163 and the mercantile cases in Demosthenes 54 and 56 present the one-sixth as a harsh punishment like imprisonment. In addition, in 56.4 Demosthenes states “he has come into your court *dêlon hês ...*” MacDowell

⁷ The latter passage (I “run the risk of *atimia*”) makes clear that the legal penalty is meant, not personal dishonor.

⁸ Harrison II 183 rightly rejects the general statements by the late lexicographers *Anec. Bekk.* 255.29-30, *Et. Mag.* 368.48ff., and *Souda* s.v. *epobelia*.

⁹ See C. Carey and R.A. Reid, *Demosthenes Selected Private Speeches* (Cambridge 1985) 208: “it is probable that at 27.67 Dem. is using exaggerated language.”

translates *dêlon hês* “evidently intending to punish us by the one-sixth and imprison us ...” I agree: *dêlon hês* indicates that these punishments were not made explicit, but the speaker is evoking them for dramatic effect.

Eighth, this helps suggest a date for the first *epobelia* measure. After the Thirty were overthrown in 404/3, *dikai* were suspended (see Whitehead 72). As for example Lysias 17.3 remarks, “because there were no *dikai*, we were unable to recover from them what they owed.” During this period arbitrations took the place of *dikai*, as in Isokrates 18 in the first case involving Kallimachos, seeking to recover money lost under the oligarchy (18.35). The reinstatement of *dikai* in 403/2 will have led to a flood of suits to recover alleged assets.¹⁰ The penalty of *epobelia* aimed to control these suits. According to the Aeschines scholion Archinos himself introduced this measure, a claim Whitehead (88) defends but MacDowell doubts. Shortly afterwards, Archinos proposed *paragraphai* as a broader means of controlling litigation, also including a one-sixth provision and adding disfranchisement for non-payment.

Finally, ninth, Pollux 8.47-48 says that in *phasis* cases litigants not gaining one-fifth the votes incurred the one-sixth. No one has believed this (see Whitehead 90 n. 72), because *phasis* was a public suit and part of the money went to the polis. However, in one type of *phainein*, for cutting down too many olive trees and where the prosecutor split the fine with the polis, we are expressly told that the prosecutor had to pay *prytaneia* – otherwise levied only in private cases – on that portion of the penalty going to him (Dem. 43.71, Harrison II 94). It is consistent that in public suits like *phainein* where a prosecutor stood to gain from another individual, complete defeat also meant paying the one-sixth. This again was a distinct statutory provision involving the *epobelia*.

I conclude that in 403, the Athenians introduced the one-sixth to reduce frivolous financial prosecutions. It worked well and so, soon afterwards, a one-sixth clause was added to the new *paragraphe* law, but with different terms; here, either litigant was liable, and the penalty for non-payment was disfranchisement. At some point, some law or laws involving “showing” also stipulated the one-sixth, as did one law about battery; mercantile laws regarding *paragraphai* or financial claims remanded prosecutors who could not pay the one-sixth to jail. In an earlier *Symposion* paper on *phainein* I argued that there was no general law setting down that procedure, but different laws each specified its own procedure of “showing.”¹¹ The one-sixth is parallel. Liability to pay one-sixth of a disputed value was invoked in different ways, in different legal contexts. Other laws remained unaffected and in force. Because the initial one-sixth law against rapacious prosecutors reflected the chaos of 404, because it was severe and was judged to be severe and litigants like Demosthenes and the merchants could appeal to its severity to influence their cases, people rarely prosecuted under it, and so it has remained obscure – at least until recent work by David Whitehead, Professor MacDowell, and (just maybe) myself.

¹⁰ In or shortly after 403/2, the number of deme judges was increased from thirty to forty and they henceforth served in Athens, confirming increased judicial activity.

¹¹ R.W. Wallace, „*Phainein* in Athenian laws and legislation,” in *Symposion* 1999, *Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, eds. G. Thür and F. Nieto (Cologne and Vienna 2003) 167-81.