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ATHENIAN JURIES IN MILITARY *GRAPHAI*

Though much is uncertain in modern scholarship about the public prosecution (by *graphê*) of military offences under classical Athenian law,¹ the points of common agreement have long included two inter-connected ones which relate to the procedural conduct of cases brought under this head. The consensus has held (*a*) that it was the generals (*stratêgoi*) who presided over the court which heard such cases, and (*b*) that the *dikasts* themselves were the defendant's fellow-soldiers.² And this is because points *a* and *b* alike appear to rest on a firm evidential basis: the opening chapters of, respectively, Lysias 15 and 14 *Against Alkibiades*, which are the only speeches from a military *graphê* which survive in full (from the year 395).

When I was invited to submit a proposal for a paper at *Symposium 2007*, this seemed a good opportunity to voice a suspicion (which had originated a year or so earlier) that only the first of these orthodoxies is well-founded. So the first and longest part of what follows here (Part I) is a lightly-revised version of what I did submit, and what was accepted as my submission; it is also the version to which Peter Rhodes formulated the first (oral) version of his Response. However, just weeks before speaking to my paper in Durham I learned of a published study (Bertazzoli 2001) which had anticipated some of my arguments; arguments that I had wrongly believed to be novel. On the advice of Edward Harris (who opined that an academic standpoint can gain strength when it is reached by a plurality of scholars working independently of one other) I have therefore not, here, absorbed Bertazzoli's arguments as if I had read them when framing my own. Instead, part II below – presented verbally, and summarily, in Durham – is my response to Bertazzoli. Part III then reflects briefly on the discussion at *Symposium 2007* itself (including the views of my Respondent) and the current state of the argument.

¹ See e.g. Lipsius (1905-1915) 452-459, MacDowell (1962) 110-112, Harrison (1971) 31-34, MacDowell (1978) 159-161; Hamel (1998a) 63-64, vastly expanded in Hamel (1998b); Harris (2004) 256-260.

² So e.g. Jebb (1893) 253; Lipsius (1905-1915) 112-113, 143, 456; Berneker (1964); Harrison (1971) 32, 46; Rhodes (1972) 183 n. 4; Pritchett (1974) 234; MacDowell (1978) 160; Ridley (1979) 513; Carey (1989) 144; Fernández Nieto (1990) 111 (point *a* only); Saunders (1991) 324 ('special military courts') and 328 n. 28 ('special courts of soldiers'); Hansen (1991) 268-9 (point *a* only); Hamel (1998a) 63, and *obiter* in Hamel (1998b) 398 (point *b* only); Kapparis (1999) 224; Todd (2000) 161; Hansen (2003) 279 (point *b* only).

I

In Lysias 15.1 the (unidentifiable) speaker begins thus:

Ἐγὼ μὲν, ὧ ἄνδρες δικασταί, καὶ ὑμᾶς αἰτοῦμαι τὰ δίκαια ψηφίσασθαι, καὶ τῶν στρατηγῶν δέομαι, ἐπεὶ καὶ ἐν τῇ ἄλλῃ ἀρχῇ πολλοῦ ἄξιοι τῇ πόλει γεγόνασι, καὶ τῶν τῆς ἀστρατείας γραφῶν κοινούς εἶναι τῷ τε διώκοντι καὶ τῷ φεύγοντι, καὶ μὴ βοηθοῦντας ᾧ ἂν βούλωνται πᾶσαν προθυμίαν ἔχειν παρὰ τὸ δίκαιον ὑμᾶς ψηφίσασθαι (‘For my part, men of the jury, I ask you to vote for what is just, and the generals I beg – since in the rest of their official duties too they have behaved in a way worthy of the polis – to be impartial also towards both the plaintiff and the defendant in *graphai astrateias*, and, by not helping the party they might favour, to make every effort to have you vote contrary to what is just’).

Jebb, Harrison, Pritchett and Carey all cite this passage as sufficient to prove that the generals who are being exhorted to display this impartiality (or neutrality) are holding the actual presidency of the court.³ Strictly speaking it falls short of that, since the passage could equally well bear the interpretation that the generals were merely present in court and giving evidence *ex officio*. Nevertheless as the speaker proceeds, through §§ 2-4 which are addressed to the generals themselves, he puts forward procedural analogies with other presiding officials – the thesmothetai, the (*sc.* eponymous) archon, the polemarch, and the Eleven – which do make it necessary to accept that here too the address is to the actual presidency of the court, the authority which, in that capacity, will be (in a twice-repeated phrase) putting the matter to the vote.⁴

Accepting this, furthermore, creates no problems for our understanding of Athenian law and legal procedure in the fourth century. Above and beyond the fact that the ten generals were allowed to exercise summary judicial powers *in the field* (?Aristot.*Ath.Pol.*62.1, etc.) – what Fernández Nieto felicitously calls ‘la jurisdicción castrense’⁵ – they were (as indeed Lys. 15.1 notes) holders of a public office (ἀρχή) which had its civilian aspects. So here, in short, the ἀρχή is the εἰσάγουσα ἀρχή: in suits which arose out of military service it was one of the generals who accepted the case in the first instance and brought to a court for determination.⁶

³ Jebb (1893) 253; Harrison (1971) 32 with n. 3; Pritchett (1974) 234; Carey (1989) 144. For κοινός as even-handed cf. e.g. Thuc.3.53.2, 3.68.1; Isoc.5.80; ?Aristot.*Ath.Pol.*6.3.

⁴ Hence 15.1-4 is the appropriate citation, as in e.g. Hansen (1991) 269 n. 39 (but contrast 190 with n. 116); Hamel (1998a) 63 n. 20.

⁵ Fernández Nieto (1990) 115.

⁶ That the full board of ten would have been spared from other duties to undertake this task is of course impossible. Lys.15.1 (τῶν στρατηγῶν δέομαι κτλ) does appear to indicate a

Should one therefore be believed that the dikasts, too, in such military lawsuits were entirely composed of Athenians wearing (as it were) their helmets, i.e. soldiers rather than regular dikasts?

Solid grounds, *prima facie*, for thinking so come in Lysias 14.4-5 (again delivered by an unidentifiable speaker):

δοκεῖ δέ μοι καὶ πολίτου χρηστοῦ καὶ καὶ δικαστοῦ δικαίου ἔργον εἶναι ταύτη τοὺς νόμους διαλαμβάνειν, ὅπῃ εἰς τὸν λοιπὸν χρόνον μέλλει συνοίσειν τῇ πόλει. (5) τολμῶσι γάρ τινες λέγειν ὡς οὐδεὶς ἔνοχός ἐστι λιποταξίου οὐδὲ δειλίας· μάχην γὰρ οὐδεμίαν γεγονέναι, τὸν δὲ νόμον κελεύειν, ἔάν τις λίπη τὴν τάξιν εἰς τοῦπίσω δειλίας ἔνεκα, μαχομένων τῶν ἄλλων, περὶ τούτου τοὺς στρατιώτας δικάζειν. ὁ δὲ νόμος οὐ περὶ τούτων κελεύει μόνον, ἀλλὰ καὶ ὅποσοι ἂν μὴ παρῶσιν ἐν τῇ πεζῇ στρατίᾳ ('It seems to me that it is the task of an honest citizen and of an upright dikast alike to interpret the laws in a way that will benefit the city in the future. (5) For certain people dare to say that nobody is liable to a charge of desertion or of cowardice, since no battle took place; but (that) the law prescribes that if someone deserts his post in retreat because of cowardice, while the others are fighting, the soldiers are to be dikasts in respect of this man. But the law makes prescriptions not only about these men but also any who fail to appear in the infantry ranks').

I want to suggest that modern scholars have accepted this at face value too readily, without considering either the conceptual or the practical difficulties it raises. How did the kind of *ad hoc* soldier-dikasts envisaged here relate to the annual pool of ordinary dikasts, whose empanelling and general procedural handling is so copiously attested in the *Ath.Pol.* and elsewhere? In Mogens Hansen's summary, 'a juror in the People's Court had (1) to be at least thirty years old; (2) to have been picked by lot at the beginning of the year as a member of the panel of 6000 citizens from which the jury for each individual case would be drawn; (3) to have sworn the Heliastic Oath; and (4) to have been picked by lot on a given day to serve for that day'.⁷ If *ad hoc* soldier-dikasts were subject to these conditions, one would like to know exactly how so (especially in respect of points 2 and 3); and if not, on what basis and with what alternative guarantees. Had they sworn the normal oath? Were they paid? On

plurality (and hence a subset of the ten), but one can posit rhetorical elision here, moving implicitly from the plural to singular. See further below, Part III.

⁷ Hansen (1991) 178-203, at 181. Peter Rhodes rightly points out in his Response that the procedures for jury empanelling (etc.) described in the *Ath.Pol.* (and summarised here by Hansen) was not yet in use in the 390s. See further below, Part III.

such points the sources – including Lysias 14 and 15 themselves, to which we must return below – are silent.⁸

Once acknowledged, such concerns as these can in my view be met by a fresh look at, and a broader interpretation of, the phrase *περὶ τούτου τοὺς στρατιώτας δικάζειν* in Lys.14.5.

My translation of this passage, given above, sought to be as neutral as possible, but there is one fundamental question here which it is virtually impossible not to beg: is the relevant law actually being quoted, *verbatim*? Debra Hamel certainly thinks so, and formats her own translation accordingly:⁹

Some dare to say that no one is liable to a charge of *lipotaxion* or *deilia* because there has not been any battle, and that the law prescribes, “if someone leaves his position out of cowardice, moving to the rear while the others are fighting, in the case of this man the soldiers serve as jurors.” But the law applies not only to these men, but also to all those who do not appear in the infantry.

No other translator makes his/her view comparably clear, though others may of course share it nonetheless. In any event the proposition is that we have here an extract from the law in question, which would need to be treated in precisely the same terms as (e.g.) the citations of the law on homicide etc. (with τὴν βουλὴν δικάζειν as counterpart to the present τοὺς στρατιώτας δικάζειν) in Demosth. 23.22, 24, 26, 30 and 215. And if this were demonstrably true it would be pointless to challenge the idea, no matter how awkward its corollaries, that this part of the law created military dikasts. But surely caution is required here. These (for us) vital words are proffered not as explicit quotation of what the law says, nor even as the speaker’s implicit endorsement of what it says, but, on the contrary, merely as part of what ‘certain people’ (τινες) say that it says; ‘certain people’ whom the speaker cites only and immediately to disagree with. (They are presumably, as Carey

⁸ All that is clear from Lys.14-15 is that the jurors hearing that case had sworn an oath or oaths (14.22, 40, 47; 15.10). Harrison (1971) 46 (effectively repeating Lipsius (1905-1915) 143) writes that ‘[t]here must have been some procedure, the details of which we cannot recover, for making a special selection of jurors in two types of case. In those which involved matters connected with the Mysteries only those initiated into the Mysteries could sit as jurors [Andok.1.28, 31], and in cases of military indiscipline in the field juries were composed of men who had been serving on the campaign in question [Lys.14.5]’. This at least acknowledges the problem, but the implied parallelism looks, to me, misleading. Andok.1.28 concerns not a recurrent procedural arrangement but a specific decree to deal with the scandals of 415; and besides, the most plausible interpretation of the decision taken then is that ‘of the jury allotted to the case, those members who had not been initiated were to be excluded’ (MacDowell (1962) 82).

⁹ Hamel (1998b) 364.

suggests, the defendant's friends and supporters.¹⁰) Perhaps the wording of the law attributed to these people is exact. That is a possibility I cannot disprove. But perhaps, instead, only the words ἐάν τις λίπη τὴν τάξιν εἰς τοῦπίσω δειλίας ἔνεκα, μαχομένων τῶν ἄλλων represent direct quotation, or perhaps only ἐάν τις λίπη τὴν τάξιν εἰς τοῦπίσω δειλίας ἔνεκα, or perhaps none of it at all.¹¹ Under any of these three scenarios, at any rate, the phrase τοὺς στρατιώτας δικάζειν would not compel belief in the existence of a special category of dikasts who were all, by definition, soldiers.

Besides, is the phrase not a troublingly vague one? In an instance like τὴν βουλὴν δικάζειν (Demosth. 23: above) it is clear that the council of the Areiopagos is meant, because the council of the Areiopagos has a clear, objective and ongoing existence. But here, orthodoxy requires us to believe, an Athenian simply set up 'the soldiers' as dikasts – leaving it to modern scholars to explain, as they have routinely felt obliged to do, that *particular* στρατιῶται are meant: those 'who had served on the campaign'?¹²

We do have here, I reiterate, an extra, complicating layer of rhetoric in that what is presented first is what τινες assert about the law. For a parallel, where this is even more overt, see [Demosth.] 43.7: οὗτοι ἅπαντες κοινῇ ἐπιβουλεύσαντες προσεκαλέσαντο τὴν γυναῖκα πρὸς τὸν ἄρχοντα εἰς διαδικασίαν τοῦ κλήρου τοῦ Ἀγνίου, φάσκοντες τὸν νόμον κελεύειν [*'claiming that the law prescribes etc.'*] παρὰ τοῦ ἐπιδεδικασμένου καὶ ἔχοντος τὸν κλῆρον προσκαλεῖσθαι, ἐάν τις βούληται ἀμφισβητεῖν. Litigants, to put it mildly, were under no obligation to present their opponents' arguments accurately, fairly or completely.¹³ Yet even if this complication is stripped out and 14.5 treated as if everything in it was expressed by the speaker himself, his main aim is to convince the court that the law covers pre- as well as post-engagement dereliction of duty; *astrateia* as well as *lipotaxion*.¹⁴ All else, surely, is secondary, unemphatic, and this includes the phrase περὶ τούτου τοὺς στρατιώτας δικάζειν. It becomes a loose way – prompted by the fact that this is,

¹⁰ Carey (1989) 152.

¹¹ The relevant passage of law is of course read out to the court at the end of § 5, so one seizes upon § 6 for any clue as to what the dikasts have heard ('Ακούετε, ὦ ἄνδρες δικασταί, ὅτι κτλ); and the repetition of the phrase εἰς τοῦπίσω might be significant in that regard.

¹² MacDowell (1978) 160; his gloss is typical.

¹³ Compare (*mutatis mutandis*) Dover (1993) v: 'I have observed that other people cannot be trusted to state my own arguments correctly and adequately, and I have to infer that I cannot be trusted to state theirs'.

¹⁴ This point is somewhat obscured in the most recent translation, that of Todd (2000) 164: '[a] Some people dare to claim that nobody is liable to charges of desertion or cowardice, since no battle took place, whereas [b] the law says etc'. Rather, both *a* and *b*, together, make up the daring claim, and *b* is refuted by what the law actually prescribes (ὁ δὲ νόμος οὐ περὶ τούτων κελεύει μόνον, ἀλλὰ καὶ κτλ). This is better conveyed in the Loeb edition (Lamb (1930) 341), and latterly by Hamel (1998b) 364 (quoted above).

precisely, a military case – of expressing *a general likelihood that the dikasts will include soldiers*, including some who may have been on the campaign(s) in question.¹⁵

The hypothesis can be tested by reading Lysias 14 and 15 with this very issue in mind. Are the speakers, uniquely in the corpus of fully-extant Attic oratory, addressing a panel of dikasts made up entirely of soldiers (as the orthodox view of 14.5 obviously has to suppose) or a normal Athenian dikasterion?

Support for orthodoxy might appear to arise principally from five other (and for present purposes ancillary) passages:

(i) 14.7: the speaker claims that the younger Alkibiades ‘did not march out with you’ (οὐκ ἐξῆλθε [Reiske: ἐπεξῆλθε mss] μεθ’ ὑμῶν);

(ii) 14.9: his behaviour is said to have shown that ‘he despised you and feared the enemy’ (ὑμῶν κατεφρόνησε καὶ τοὺς πολεμίους ἔδεισε);

(iii) 14.15: the dikasts are flattered by being told that, unlike the defendant, ‘you¹⁶ did not dare to abandon the ranks or to choose what was pleasant for you yourselves; no, you were much more afraid of the laws of the polis than the danger of facing the enemy’ (οὐκ ἐτολμᾶτε ἀπολιπεῖν τὰς τάξεις οὐδὲ τάρεστὰ αὐτοῖς αἰρεῖσθαι ἀλλὰ πολὺ μᾶλλον ἐφοβεῖσθε τοὺς τῆς πόλεως νόμους ἢ τὸν πρὸς τοὺς πολεμίους κίνδυνον);

(iv) 14.17: Alkibiades is referred to as the man who ‘did not dare to fight with you’ (οὐκ ἐτόλμα μεθ’ ὑμῶν μάχεσθαι);

(v) 15.12: the dikasts are urged to vote in the same frame of mind ‘as when you thought that you were about to face the ultimate danger against the enemy’¹⁷ (ἦνπερ ὅτε ᾤεσθε πρὸς τοὺς πολεμίους διακινδυνεύσειν).

I begin with passages i and iv, which constitute an obvious pairing. Since the phrases ἐξῆλθε μεθ’ ὑμῶν and μεθ’ ὑμῶν μάχεσθαι do unquestionably refer to the particular campaign in question, that of 395, the plural ‘you’ of μεθ’ ὑμῶν might seem in isolation to demand to be understood as the particular soldiers who fought in it. But the fact is, we have no right to interpret such phrases in isolation. Rather, they have to be placed in a broader context: the context of how speakers in Athenian lawsuits conventionally addressed (and manipulated) dikasts, which, let it be repeated, are in all other surviving speeches besides Lysias 14-15 “civilian” dikasts. Thus passage i, Lys.14.7, could be juxtaposed with Lys.25.9: some of those who had

¹⁵ For recently-serving soldiers as a subset of a jury see Lys.21.10 (καὶ ταυθ’ ὅτι ἀληθῆ λέγω, πάντες ἐπίστασθε ὅσοι ἐτυγχάνετε ὄντες ἐκεῖ τῶν στρατιωτῶν); [Demosth.] 50.3 (δέομαι ὑμῶν ἀπάντων δικαίαν δέησιν· ὅσοι μὲν τῶν στρατιωτῶν ἐστε καὶ παρῆτε ἐκεῖ, αὐτοὶ τε ἀναμνήσθητε καὶ τοῖς παρακαθημένοις φράζετε τήν τ’ ἐμὴν προθυμίαν κτλ). When the term στρατιῶται reappears later in Lys.14 it embraces allied contingents as well as Athenian troops (§ 14).

¹⁶ These second-person plurals come immediately after a mention, in 14.14, of οἱ στρατιῶται in the third person, but the context makes it clear that this means the whole army, non-Athenian allies included; cf. Carey (1989) 157.

¹⁷ I borrow here the translation of Todd (2000) 176, for reasons which will emerge below.

registered for Eleusis in 403 besieged their own side ‘having marched out with you’, ἐξεληθόντες μεθ’ ὑμῶν. And with passage iii, Lys.14.17, one could compare Lyk.*Leok.*57: rather than absconding in 338, Leokrates should have stayed to hold off the enemy ‘by fighting with you’, μεθ’ ὑμῶν μαχόμενος. In these instances μεθ’ ὑμῶν is not to be taken literally, for it is part and parcel of the familiar psychological assimilation of three levels of second-person plurals: you the dikasts in the present case = you all dikasts (past, present and future) = you the citizens at large.¹⁸

Other military versions of this are sometimes fairly broad-brush in their application (so Lys.10.27: the speaker’s father was many times a *stratêgos* and shared dangers) μεθ’ ὑμῶν) and sometimes relate to specific campaigns. And if they are of the latter type, they fall into one of three sub-types: (a) they can refer, as here, to recent events (so Demosth.23.151, Charidemos campaigned μεθ’ ὑμῶν against Amphipolis, and Hyp.*Ath.*29: Athenogenes did not serve μεθ’ ὑμῶν at Chaironeia);¹⁹ (b) they can relate to events long enough ago for only the elderly dikasts to remember (so Demosth.20.52-53, from 355: Corinthians fought μεθ’ ὑμῶν τῶν τότε στρατευσαμένων in 394); or (c) they can concern events far back in the distant, historical past (so [Demosth.] 59.96, from c.340: the Plataians fought μεθ’ ὑμῶν in 479).

In the light of all this, our passages ii, iii and v likewise do not demand to be understood as referring narrowly to the present dikasts in an antecedent role as soldiers on the campaign which has brought the younger Alkibiades to trial. Instead, I contend, all four of these passages conform fully with the conventional rhetorical treatment of Athenian dikasts alluded to above.

And so indeed do Lys.14-15 as a whole; 14 especially. To avoid undue repetition, the more striking examples will suffice. When 14.10 describes Alkibiades as ‘not scrutinized by you’ (οὔτε ὑφ’ ὑμῶν δοκιμασθεῖς) for cavalry service, this associates the present dikasts with the body which actually performed that task, the *boulê* (*Ath.Pol.*49.1-2, etc.); 14.17 makes them conceptually responsible for the death-sentence passed on the elder Alkibiades (cf. 14.39 below); 14.24 refers to what ‘you’ habitually do in tolerating defendants who speak at length on the merits of themselves and their ancestors; 14.25 recalls Archedemos Blear-Eye embezzling ‘your’ property; 14.30 claims an onus to punish any member of Alkibiades’ family who comes to court as one falling on both the present dikasts and future ones (καὶ ὑμῖν καὶ τοῖς μέλλουσιν ἔσσεσθαι), i.e. not only in military trials; 14.39 declares that ‘the more senior of you’ (οἱ πρεσβύτεροι ὑμῶν) condemned the elder Alkibiades to death; 14.43 refers, more generally, to previous occasions when ‘you’ have acquitted guilty defendants. And note also 14.32-34, where the dikasts are invited to be indignant that the defendant ‘is using your (*sc.* military) virtues as

¹⁸ See on this, in brief, Whitehead (2000) 48-49, 67.

¹⁹ Dein.2.18, ὅτε δ’ ὑμεῖς ἐστρατεύεσθε πάντες, οὗτος ἦν ἐν τῷ δεσμοτηρίῳ, probably refers to Chaironeia also (looking back from 323); so Worthington (1993) 306.

precedents for his own villainy (ταῖς ὑμετέραις ἀρεταῖς χρήται παραδείγμασι περὶ τῆς ἑαυτοῦ πονηρίας)'; this turns out to mean the democratic counter-revolution launched from Phyle, that iconic event from which so many other litigants in late fifth-century and early fourth-century lawsuits sought to generate warm patriotism and cognate emotions in the dikasts sitting in judgement on them.²⁰ In sum: the dikasts in Lys.14-15 are always apostrophised in the way familiar from countless other forensic speeches (ὦ ἄνδρες δικασταί), never as anything else; they are never asked to bring to bear any factual knowledge from the campaign; and in what is presented as the first military trial of its kind for almost a decade (14.4) it is never suggested that they are coming to their task as novices, who might benefit from guidance (real or rhetorical) on that score. Instead they are treated throughout as the normal, seasoned dikasts they surely were.

Is there other evidence which bears upon this question? At this point it is necessary to look outside Lys.14-15, and indeed beyond forensic oratory of any kind – to Plato, *Laws* 943A-D. The extent to which this passage may have influenced interpretation of Lys.14.5 is not clear to me, though they have certainly (and unsurprisingly) been mentioned together.²¹ In any event Plato has this to say:

στρατεύεσθαι τὸν καταλεγέντα ἢ τὸν ἐν μέρει τινὶ τεταγμένον. ἐὰν δέ τις ἐκλείπῃ τινὲς κάκῃ μὴ στρατηγῶν ἀφέντων, γραφὰς ἀστρατείας εἶναι πρὸς τοὺς πολεμικοὺς ἄρχοντας, ὅταν ἔλθωσιν ἀπὸ στρατοπέδου, δικάζειν δὲ τοὺς στρατεύσαντας ἐκάστους χωρὶς, ὀπλίτας τε καὶ ἰππέας ... καὶ τοὺς ἄλλους δὲ κατὰ ταῦτὰ εἰς τοὺς αὐτῶν συννόμους ... ἐὰν δὲ στρατεύσῃται μὲν τις, μὴ ἀπαγαγόντων δὲ τῶν ἀρχόντων οἴκαδε προαπέλθῃ τοῦ χρόνου, λιποταξίου τούτων εἶναι γραφὰς ἐν τοῖς αὐτοῖς οἷς περὶ τῆς ἀστρατείας ('He who has been rostered or assigned to some special detail is to go on campaign. If anyone is cowardly and absconds without the generals' leave, public prosecutions for failure to serve [*astrateia*] are to be brought before the military authorities, after return from camp, and the jurors are to be those men who have been on (the) campaign, separately grouped: hoplites and cavalry and the other categories likewise,

²⁰ See for example Isok.16, a closely contemporary (and thematically related: Carey (1989) 148-150) speech delivered in a trial where again the defendant is the younger Alkibiades; a rhetorical flourish in the final chapter (§ 50) makes him, the speaker, lament the prospect that *τοτε μὲν μεθ' ὑμῶν, νῦν δ' ὑφ' ὑμῶν τῆς πόλεως στερήσομαι*. Also e.g. Isok.18.2 with 48-50; Lys.13.62-63, 26.17-20, 31.8-14; Aischin. 2.176, 3.187-190.

²¹ See e.g. England (1921) 2.573: 'Ast quotes Lysias, *Adv. Alc.*, where it is stated that at Athens it was the military law that that desertions were to be established before courts of fellow-soldiers – no doubt presided over by their officers'. 'Ast' is G.A.F.Ast (1778-1841), presumably in his edition of the dialogue (Leipzig 1814; *non vidi*). From the other angle of approach, writers on Athenian law who might cite Plato, few actually do; an exception is Lipsius (1905-1915) 453 nn. 5-6, on the terminology of suits.

each appearing before their own comrades ... If someone does go on active service, but returns home before the commanders withdraw the troops, any such men are to be publicly prosecuted on charges of desertion [*lipotaxion*] before the same (jurors) as are concerned with *astrateia*.’).

If *Lysias* had expressed himself with the same clarity as this on the particular point which I have addressed here, it would have been fruitless to question the usual understanding of it. In any event, Plato does make himself clear about how such matters would be dealt with in his best-practically-possible polis, Magnesia.

In doing so he alerts us to relevant and important differences of approach to them, then and now. Present-day systems of trial by jury usually take pains to ensure that those sitting in judgement on a given defendant are not already hostile to him. Here by contrast, whether the charge in question is draft-dodging or subsequent desertion, hostility seems almost bound to be felt, by soldier-jurors who had done their duty and risked their lives in ways that he (unless he could prove otherwise) had not.

That Plato’s thinking here was consistent *in general terms* with the morality of his time seems clear if one compares e.g. *Lys.*12.84 (Eratosthenes will be tried by ‘jurors who are none other than those maltreated men themselves’, οὐχ ἑτέρων ὄντων τῶν δικαστῶν ἀλλ’ αὐτῶν τῶν κακῶς πεπονθότων) and *Lys.*26.1 (‘I am vexed that he is coming before you confident in this hope, as if those wronged were one set of people and those preparing to vote on these issues another, instead of those who suffered the maltreatment and those who will hear about it being the same’, ἀγανακτῶ εἰ ταύτη τῇ ἐλπίδι εἰς ὑμᾶς ἤκει πιστεύων ὡσπερ ἄλλων μὲν τινῶν ὄντων τῶν ἡδικημένων, ἐτέρων δὲ τῶν ταῦτα διαψηφιουμένων, ἀλλ’ οὐκ ἀμφοτέρα τῶν αὐτῶν καὶ πεπονθότων καὶ ἀκουσομένων); and cf. *Lyk. Leok.*134.²² (For its obverse side, a favourable predisposition, see *Lys.*21.22: ἐγὼ μὲν οὖν, ὃ ἄνδρες δικασταί, οὐκ οἶδ’ οὐστίνας ἢ ὑμᾶς ἐβουλήθην περὶ ἐμοῦ δικαστὰς γενέσθαι, εἴπερ χρὴ τοὺς εἰ πεπονθότας περὶ τῶν εἰ πεποιηκότων εὐχεσθαι τὴν ψῆφον φέρειν; ‘so for my part, men of the jury, I do not know what jurors I would prefer to try my case than you, if one ought to pray that the benefited vote on the benefactors’). Yet morality is one thing, procedure another. Plato does, for Magnesia, create a procedure for these military offences in which the jurors are those who have been most directly affected by them. His phrase *δικάζειν ... τοὺς στρατεύσαντας* – unlike *Lysias*’ *τοὺς στρατιώτας* *δικάζειν!* – is clear and explicit. Is he therefore adopting real-life Athenian procedure? As always with *Laws*, the question needs to be open-mindedly posed, not begged. On the present topic there are features of Plato’s scheme for which no Athenian precedent is known – the separate approach taken to infantry, cavalry, etc. – and his psychology-driven ideas about appropriate penalties, omitted above, seem more nuanced than the

²² Cf. Carey (1989) 131 (and 153), with further references.

corresponding provisions (*atimia*, etc.: Lys.14.9) of Athenian law.²³ So whether his soldier-jurors were borrowed from Athens too must be declared not proven.

I end by returning to Attic oratory, and with an argument from silence. In his First Philippic Demosthenes famously²⁴ laments Athens' reliance on mercenaries rather than citizen troops in the mid fourth century, one consequence of which he regards as the malicious unreliability of reports reaching the Athenians on the performance of their generals (Demosth.4.46). And how, he rhetorically asks, can this be stopped? 'When you, men of Athens, designate the same men as soldiers and eye-witnesses of the generals' performances and, on their return home, jurors at the *euthynai*, so that you will not merely hear about your own affairs but also be present to see them' (ὅταν ὑμεῖς, ὦ ἄνδρες Ἀθηναῖοι, τοὺς αὐτοὺς ἀποδείξετε στρατιώτας καὶ μάρτυρας τῶν στρατηγουμένων καὶ δικαστὰς οἴκαδ' ἐλθόντας τῶν εὐθύνων, ὥστε μὴ ἀκούειν μόνον ὑμᾶς τὰ ὑμέτερ' αὐτῶν ἀλλὰ καὶ παρόντας ὄπᾶν: Demosth.4.47). This would have been the most golden of opportunities to comment that the law already created such eye-witness jurors in military *graphai* – if that had been so. Again, therefore, I am drawn to the conclusion that it was not so.

II

As explained in the preface to this paper, a version of it (Part I here) had been written and submitted without benefit of reading Bertazzoli 2001. Her article poses a rhetorical question, 'Tribunali militari in Atene?', and answers it with a quiet but firm Not Proven. So she, not I, deserves the credit for first challenging the entrenched modern orthodoxy in this area; unsurprisingly, I find her general position persuasive; and if it is enhanced in its persuasiveness by what I have put forward here, so much the better. That said, our approaches (and conclusions) are not *precisely* the same, so the differences between us may aid clarity in certain areas.

Bertazzoli found (as I did not) one or two scholars in the past who, without fully developing the point, did query orthodoxy on this matter. Mention must particularly be made of Ines Caimo's edition (Florence 1935) of Lysias' speeches *Against Alkibiades*. There, so I gather (*non vidi*), Caimo argued that, in the key phrase from 14.5 (περὶ τούτου τοὺς στρατιώτας δικάζειν), τοὺς στρατιώτας is *not the subject of the infinitive but its object*.²⁵ Bertazzoli mentions this in passing on the second page of her exposition²⁶ and returns to it in her concluding section.²⁷ There she first

²³ Saunders (1991) 324-8, at 324: 'the penalties he prescribes are not those of Attic law'. Contrast Morrow (1960) 270: 'there is nothing in either the procedure or the constitution of these courts, so far as we can see, that departs from Athenian practice'.

²⁴ For discussion see e.g. Pritchett (1974) 4-33; Hansen (1975) 59-65.

²⁵ Also, but less importantly, Caimo is said to have understood the τούτου in περὶ τούτου as not masculine but neuter.

²⁶ Bertazzoli (2001) 58.

²⁷ Bertazzoli (2001) 69-70.

declares that construing the passage in such an unusual way – like Caimo she could find no parallels, and neither can I – might make better logical sense of it. However, she finally, and I believe correctly, endorses the traditional *grammar* (and hence translation) of the phrase but adopts the same sort of *interpretation* of it as I have argued for here: that the dikasts will be, in plain and simple fact, (ex-)soldiers.

As broader context for her (I might venture to say our) understanding of Lys.14.5, Bertazzoli brings to bear much the same two-faceted approach as I have. One facet is to stress now uncomfortably the idea of special, *de iure* soldier-dikasts fits with the rest of the Athenian court system, especially, in her view, its reliance on sortition.²⁸ The other is to deal with other items of evidence, those of (so to speak) ancillary relevance. Concerning Plato, *Laws* 943A-D, we are at one in our belief that it has no probative bearing on what happened in *Athens*.²⁹ As to the Athenian evidence itself, we share only some, not all, of it in common. For instance: she missed the relevance (as an argument from silence) of Demosth.4.47. But I, more reprehensibly, missed the relevance of Demosth.39.17 and [Demosth.] 59.27:³⁰ there, prosecutions for *lipotaxion* and *astrateia* respectively seem to be envisaged as taking place in regular jury-courts (with, in the former case, paid dikasts).

So much for the dikasts in such cases; what of the presidency of the court? I began my own analysis (part I here) by arguing that the other element of the standard picture – that *stratēgoi* presided – is still the correct inference to draw from Lys.15.1-4. Oddly, in such a long and careful piece, Bertazzoli never addresses this point directly. Instead her conclusion is couched in rather vague terms: she has shown, she claims in her final sentence, the need to reconsider ‘alcuni aspetti della giurisdizione militare ateniese, in quanto le ipotesi formulate dai moderni non sembrano sufficientemente suffragate dalle fonti’.³¹ I am not entirely sure what these plurals mean; but I am, still, sure what they ought not to include. Bertazzoli poses her question, ‘Tribunali militari in Atene?’, and answers it in the negative: there were *no* ‘tribunali speciali per la giurisdizione relativa ai reati militari, cioè vere e proprie corti marziale’.³² No indeed. Not merely no summary justice for Athenian soldiers while still under arms (of the kind attested for Argos by the Thrasylos anecdote in Thuc.5.60.6); also, and more important for present purposes, no courts martial in a context which might be described, borrowing Roman terms, as *domi* rather than *militiae*, i.e. within the same conceptual sphere of crime, procedure and punishment as ordinary law and ordinary (civilian) life. However, given the fact – as I believe it to be – that prosecutions for these military offences were heard under the presidency of high military office-holders, it seems necessary to say that the traditional picture of ‘tribuni speciali’ for them cannot be entirely swept away.

²⁸ Bertazzoli (2001) 62-65, cf. 70

²⁹ Bertazzoli (2001) 66-69.

³⁰ Bertazzoli (2001) 66.

³¹ Bertazzoli (2001) 70.

³² Bertazzoli (2001) 57.

III

I begin with two points which take up the end of part II, on the presidency of the court in these cases. First: in the version of my paper presented at Durham, I declared that Lys.15.1 guarantees that a plurality of generals – a subset of the full board of ten – should be envisaged as presiding. Gerhard Thür professed himself unconvinced, however, and reasonably so. Even if ἀρχαί themselves were multiple (e.g. the thesmothetai, the Eleven), they acted individually when acting as εἰσάγουσα ἀρχή to (and in) a court. So my suggestion, already at n. 6 above, is that Lysias is making his client slide rhetorically from the plurality of generals who will be participants in the case – who will ‘testify for Alcibiades’, as Harris (2004) 259 bluntly puts it – to their individual colleague in the chair. Secondly: my original analysis lacked a diachronic element. I do believe that one of the generals was εἰσάγουσα ἀρχή at the time of this trial, the mid-390s. But my Respondent draws attention to the suggestion of Harrison (1971) 32-33 – which, like Rhodes, I believe could be stated more confidently – that Demosth.39.17 reveals that by about the middle of the fourth century the εἰσάγουσα ἀρχή (for *lipotaxion* at least) had become a taxiarch.

The harder questions therefore remain those which pertain to the status and credentials of the dikasts in these cases. I have the following observations to make.

As briefly indicated already in Part I (at n. 7), it was wrong – of Whitehead and Bertazzoli alike, it can now be said – to cite the highly elaborate system of jury empanelling (etc.) as set out in the *Ath.Pol.* as a procedural impediment to the notion of soldier-dikasts in 395. Then, as Peter Rhodes points out, such a system (involving e.g. individual jurors’ *pinakia*) was not yet in use. Nevertheless a system was in use, and if, as is routinely assumed, it is the one glimpsed in Aristophanes’ *Ekklesiazousai* and *Ploutos*,³³ it still in my opinion involved a level of complexity into which a special role for soldier-dikasts would have introduced awkward complications.

Plato, *Laws* 943C-D continues to tantalise. I am aware now, though not when I wrote what is now Part I here, of Bertrand (2001).³⁴ In it, while approaching the question from the Plato side, he nevertheless voices doubts *obiter* about the orthodox view that the ἄνδρες δικασταί addressed in Lys.14-15 are the defendant’s former comrades-in-arms. And naturally I endorse his warning against assuming that, in this regard, Plato’s model was Athens.³⁵

For Magnesia Plato’s prescription is that δικάζειν τοὺς στρατεύσαντας. Saunders translates ‘Such cases must be judged by the soldiers who have fought in

³³ So e.g. MacDowell (1978) 37-38; and see also, more broadly, Boegehold (1995) 30-36, esp. 31-34 (where this 410-c.340 system informs the second of his ‘Three Court Days’).

³⁴ My thanks to Prof. Bertrand for a photocopy of this.

³⁵ Bertrand (2001) 17-18.

the campaign',³⁶ and this is justified both by the context and by the tense of the participle. The aorist points to dikasts who have been on a *specific* campaign (cf. e.g. Hyp. *Epit.*35, τοὺς ἐπὶ Τροίαν στρα(τεύ)σαντ[α]ς) – in this instance, evidently, the one where the defendant's alleged sins, of omission and/or commission, have been committed. But to assert, as so many have done, that Lysias' τοὺς στρατιώτας δικάζειν means the same thing is unjustified. It might describe men *of campaigning experience in general terms*; those dikasts who knew something about armies (and appropriate behaviour in them); cf. e.g. ἐστράτευμαι in Isai.2.42 and 7.41, and ἐστρατευμένος in Demosth.21.95.

In Part I (at n. 8) I briefly addressed the phenomenon which has often been introduced as a supporting analogy for the notion of special soldier-dikasts: those who were (or were not) Mystery-initiates. (See also Bertazzoli (2001) 59-62.) Whether this was a one-off arrangement for the circumstances of 415 or a standing rule in cases of this kind, MacDowell's simple model of empanelling a putative jury, discarding from it those who did not meet this qualification, and then (evidently) replacing them with others who did meet it might offer a way of visualising how τοὺς στρατιώτας δικάζειν could have worked in practice. Even naval service would not have been enough.³⁷ But I remain unconvinced that any of this was laid down by law.

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³⁶ Saunders (1970) 490, with my emphasis.

³⁷ As it happens, assumptions that dikasts will be sailors (or, more generally, of nautical/thetic status) as opposed to soldiers are hard to find in *any* extant speech; so no great importance, in my view, can be assigned to Lys.14.39 and its distancing of the present jury (τις ὑμῶν) from those who had died at Aigospotamoi (τοὺς τεθνεώτας ἐν τῇ ναυμαχίᾳ).

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