WRITING AUTHORITY

Elite Competition and Written Law in Early Greece

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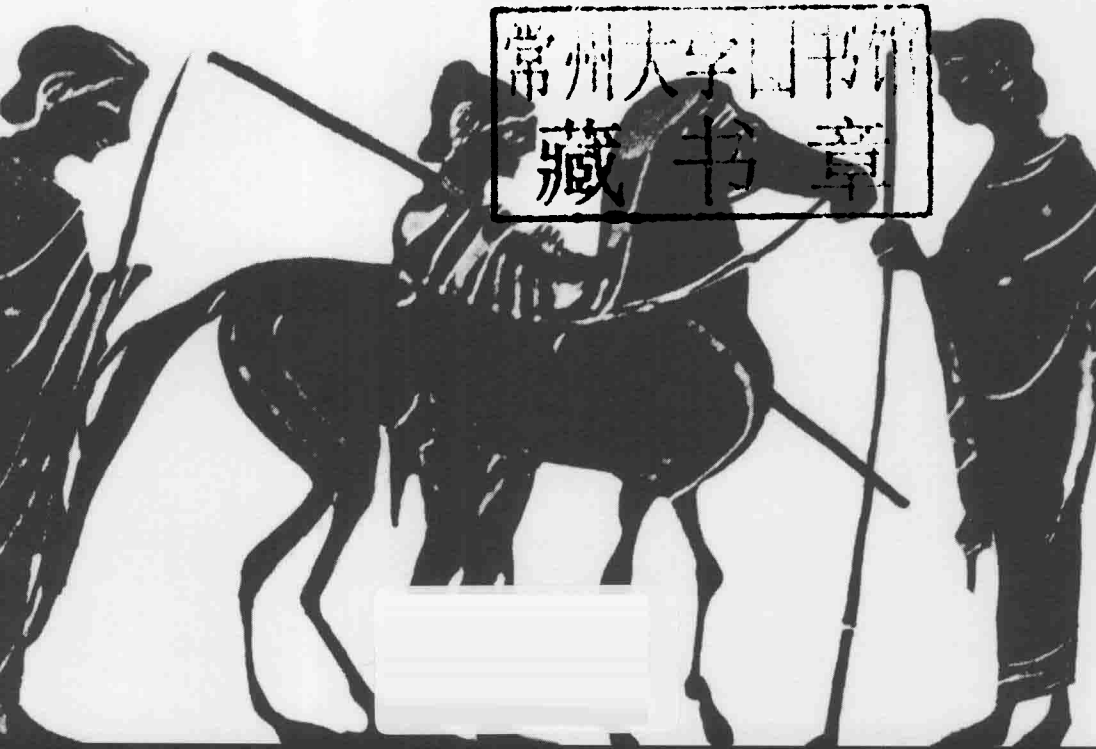

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PREFACE

This book is a contribution to a long-established subject of scholarly debate, the emergence of written law in the Greek world, beginning around the middle of the seventh century BCE. Despite the already immense bibliography on the topic, it continues to demand the attention of each generation of scholars, who find something new over which to puzzle in the fragmentary remains of most early laws and the interpretations of ancient writers regarding the significance of legislation in the formative period of Greek civilization. Even as I was revising the present monograph for a final round of reviews, two major monographs on the subject appeared in English alone, namely Michael Gagarin's *Writing Greek Law* and Zinon Papakonstantinou's *Lawmaking and Adjudication in Archaic Greece*, both published in 2008. The reader may then be forgiven for asking, why the need for yet another book examining the genesis of written law among the Greeks?

In my view, the best way to answer that is to state that there has yet to appear a study quite like the one the reader now holds. Like any scholar, I stand on the shoulders of giants to whom I and others owe an enormous intellectual debt, and this book would not have been possible without their many insights and inspirations; yet, I would argue that the scholarly examination of early Greek legislation has yet to embrace all of the tools at our disposal for understanding it in its complete context. Modern approaches to the study of law and legal theory—particularly in the realms of "legal culture" and "law-as-community"—have much to offer, as does the discipline of anthropology. The last generation or so has seen the resistance to a dialogue between anthropology and classical studies wane, but to date no one has engaged in a "thick descriptive" approach to our available evidence for early Greek law. Such a method necessitates an exploration of the juridical world of the Greeks before and during the process of committing laws to writing, so that we have a fuller appreciation of the cultural dynamics that compelled such a transformative event in the legal history of the Greeks. By considering the emergence of written law among the Greeks "in the round," I argue that we can not attribute it to popular or institutional forces, but rather to the elites whose competition for power and prestige encouraged them to seek new ways to enshrine legal authority in a rapidly changing social and

cultural landscape, where new problems arose for which traditional norms and "rules" seldom had the answers.

But that is to anticipate. My hope is that in constructing the argument as I have, classicists, ancient historians, legal historians, theorists, and anthropologists will all find value in what follows. Writing about the ancient world so as to satisfy the demands of the specialist audience, while maintaining accessibility for those without Greek or a general background in Classics, is always challenging. I have sought to provide enough context to aid the nonspecialist while avoiding tedium for the classical historian. In the text of the argument, I have transliterated the Greek; quotations of the Greek itself I have consigned to the notes where the language of a particular passage, and my interpretation of it, may interest the reader with Greek. I beg the indulgence of the philologically inclined when it comes to translations: this being a treatise on law, I have preferred technical exactitude over aesthetic elegance. In terms of transliteration, I have opted for more familiar, Latinized spellings of the names of literary figures and characters and well-known toponyms, while choosing more direct transliteration from the Greek for individuals and places perhaps more obscure to a general reader.

This book has a long history of its own, and over the years I have incurred many debts of gratitude. I want to thank my many teachers over the years who selflessly gave much of their time and expertise in helping me become the scholar and educator I am today. Carol G. Thomas of the University of Washington offered invaluable guidance and advice when I was just beginning my serious study of early Greek law, and her encouragement at various stages of this project helped bring it to its completion. The suggestions and criticisms of Robin Stacey and Lawrence Bliquez, respectively of the History and Classics Departments at Washington, have improved this project significantly. To James J. O'Donnell, currently Provost at Georgetown University, I owe my abiding interest in the subject of the interface between orality and literacy. James D. Nason, an anthropologist at Washington, endured many thankless hours in conversation that immeasurably made of me a much more sophisticated thinker in that discipline than I otherwise would have been. I owe Robert Stacey, now a divisional dean of the College of Arts and Sciences at Washington, gratitude for his intellectual and professional guidance over the years. Sandra Joshel and Alain Gowing have also provided invaluable advice over the years, and I thank them. Last, but by no means least among my teachers, W. Lindsay Adams of the University of Utah was the person who inspired me to pursue an academic career in ancient history, and his tutelage and friendship I have found invaluable in the twenty years I have known him.

Two of my former colleagues in the Department of History at Northern Illinois University deserve special acknowledgment and thanks. James Schmidt and Sean Farrell read multiple drafts of this study as I executed substantial revisions, and their keen and critical observations at every stage of the process, regarding both substance and style, were extraordinarily helpful; in fact, this study would not exist in its present form if not for their urging to persevere with the project as a monograph rather than cannibalize its ideas for journal articles. Anne Hanley, also at NIU, strongly suggested the same course of action. Among others who read all or parts of the evolving manuscript were Valerie Garver of NIU, Peter and Carin Green and Craig Gibson of the University of Iowa, and Byron J. Nakamura of Southern Connecticut State University. I appreciate their time and their input more than I can adequately express.

I would additionally like to thank for their collegiality, friendship, and support the following former colleagues at Northern: in the Department of History, Stan Arnold, E. Taylor Atkins, Sandra Dawson, Heide Fehrenbach, Aaron Fogleman, Michael Gonzales, Robert Hagaman, Kristin Huffine, Eric Jones, Vera Lind, Ismael Montana, Brian Sandberg, and Andrea Smalley; and in Anthropology, Michael Kolb and Leila Porter. My former chair, Beatrix Hoffman, was a source of strength in what could have been an otherwise unbearable experience in my final years at Northern, which coincided with the completion of the book: again, words can not help but fail to capture my sense of gratitude. I also wish to thank Christopher Blackwell and Anne Leen of the Department of Classics at Furman University, where I have found a welcoming home away from home due to the kindnesses that they and many others at Furman have offered.

I am grateful as well to J. Alex Schwartz, Director of Northern Illinois University Press, for his extraordinary professionalism and plentiful advice in bringing the project from manuscript to monograph; I also want to thank all of the staff at the Press for their many contributions to this volume, including Susan Bean and Pamela Hamilton, whose careful evaluation of the manuscript saved me from various inconsistencies; Sara Hoerdeman, who helped guide the book through the press board; and Julia Fauci and Shaun Allshouse for their keen eye and taste in producing a beautiful monograph. I additionally owe Alex my gratitude for his efforts in securing three outside reviewers whose expertise and many helpful criticisms were invaluable, rescuing me from various oversights and errors, and offering insights and suggestions that have made this a better book. David Tandy's detailed and exacting analysis of both the initial and revised manuscripts was, for lack of any better description, above and beyond the call of duty. At the time of this writing, the other two

readers remained anonymous: but their reviews were equally helpful, and I thank them for their criticisms and suggestions, positive and otherwise, which they will hopefully find reflected in what follows. Any errors that remain are, of course, my own.

No undertaking such as this, I believe, is truly possible without a support system. I have been very fortunate in my circle of friends over the years, something over which I have had at least some control, and want to acknowledge especially Lawrence J. Roseman of Seattle for his sage observations over the years about life, career, and the universe in general. My good fortune in my teachers I have already noted, but perhaps I have been most fortunate in that group in which we are all subject to Fate. My family—my late paternal grandfather, my parents and stepparents, aunt, and sister—have, I am certain, often puzzled over why someone would dedicate so much of his life to something as obscure as archaic Greek law in a profession once hilariously characterized by Henry Beard as "the fast-paced, high-paying world of the classics." Whatever their doubts, they have always been supportive and encouraging, and their faith at the darkest of times has been sustaining.

Finally, but most importantly, I express my heartfelt appreciation for my wonderful wife, Laura. The completion of this book was complicated by a variety of factors both professional and personal, and the combined weight of it all can not have made me an easy person to live with, much less love. Throughout everything, she exhibited a constancy, patience, and devotion to make Penelope herself proud. And, as if all this were not enough, just as this project went out for the final round of peer reviews, she brought into the world our beautiful son, Trajan. For these things and so much else, Laura, you will always have my love and gratitude. Thank you.

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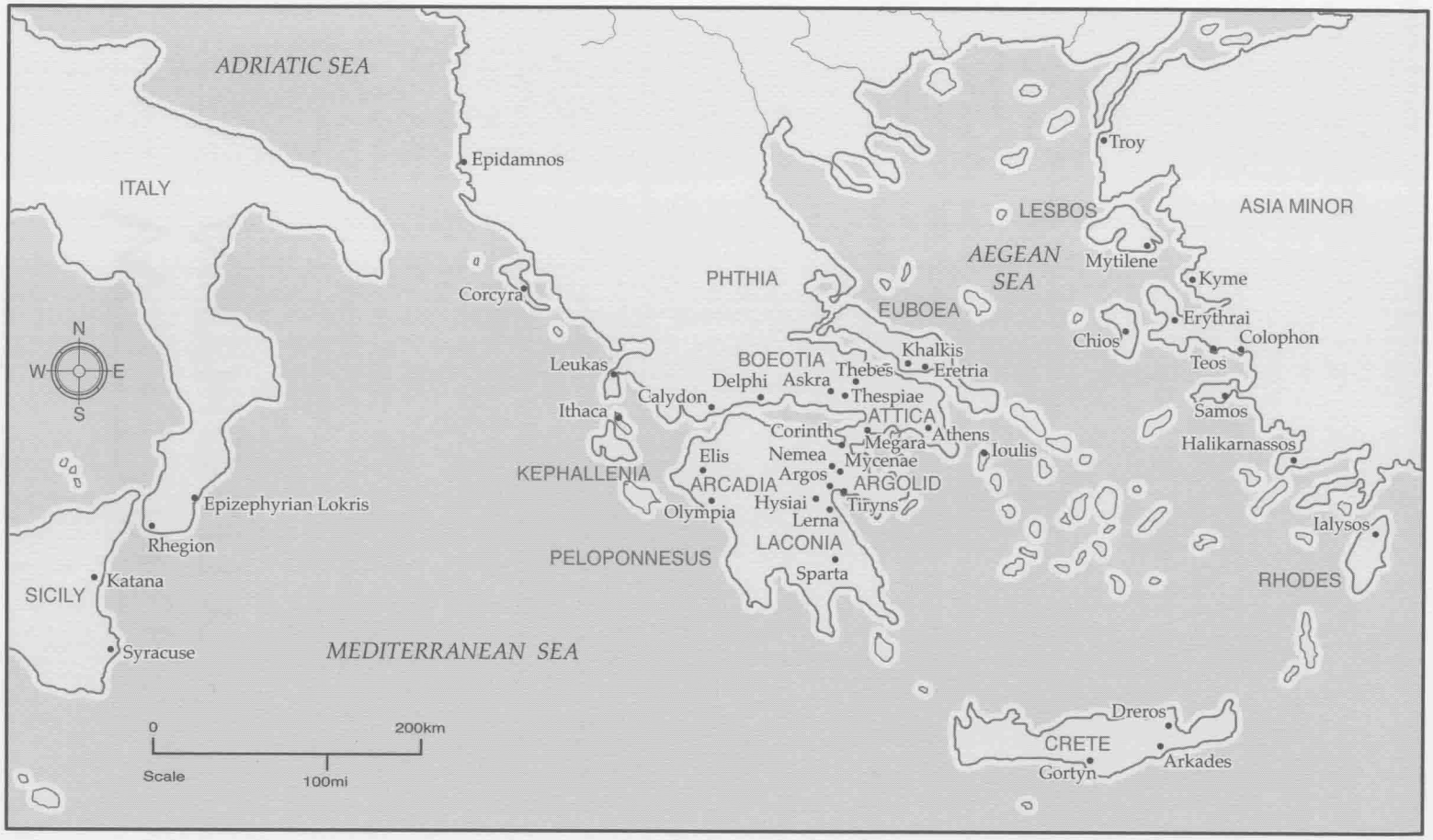
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CHAPTER ONE

Law, Justice, and Legislation in Early Greece

1. Introduction

In his *Works and Days*, the seventh-century[1] poet Hesiod railed against what he perceived as the grave miscarriage of justice in his central Greek hamlet of Askra. As part of his exposition, he sets out the myth of the devolution of man through five ages, each more degraded than the preceding one. His own age of iron, the fifth and final, would come to an end when, among a host of other problems,

> there will be no joy for the oath-keeper, neither for the just (*dikaiou*) nor good, but rather men will praise the doer of evil deeds and his outrageous behavior; there will be no justice (*dikê*) at hand, nor reverent shame. And the dastard will injure the better man, speaking against him with crooked pronouncements (*skoliois muthoisin*), and he will swear an oath on them.[2]

Some form of the Greek word typically taken as equivalent to the word justice, *dike* (δίκη), appears twice in these five lines, once in its adjectival form, "the just" (for whom there will be no joy), and once in a substantive form, as Hesiod tells us there will be no justice present. It is clear from the context of the passage that Hesiod considered the future lack of justice to go hand in hand with the departure of reverent shame, *aidôs*, the prevalence of "outrage," *hubris*, and the swearing of false oaths.[3] Hence with false testimony and *hubris* ruling the day, justice and reverence would be driven out, and there would be no protection against evil.[4]

To underscore his point, Hesiod moves directly from this general description to an admonitory fable which even the *basileis*,[5] the chieftains of

Thespiae,[6] could appreciate: the tale of the hawk and the nightingale.[7] The raptor of the story explains to his captured prey, who cries pitifully from the pain of her captor's talons, that she is now at his mercy: he is the stronger and thus has the power to do with her as he pleases. He may make a meal of her or set her free, but the decision is entirely his, and her protests are futile. There is no retribution for the hawk, who in Hesiod's version ends the fable with the arrogant proclamation that only a fool resists the strong, for then the weaker will suffer pain as well as shame.[8]

Hesiod has plainly connected the perpetration of merciless injustice to the position of the *basileis*, and he continues by associating both of these issues more specifically still, narrowing his focus from the end of ages in an atmosphere of wickedness and lawlessness to his particular quarrel with his brother Perses. As is well known, Hesiod had apparently lost a dispute over his and Perses' patrimony, largely—Hesiod suspects—because his brother suborned the less than incorruptible *basileis* of Thespiae in their adjudication of the dispute.[9] Hesiod warns his brother that the outrageous behavior of the mighty (a nexus already established around hawk–*basileis*) will ultimately crush its practitioner, no matter how temporarily prosperous.[10]

As we will have occasion to note later, Hesiod's view of the *basileis* and justice is not so uniformly dire throughout his extant corpus. But until the last twenty-five years or so, modern scholars who confronted the problem of justice and the appearance of written law in early Greece focused on Hesiod's less flattering portrait, and accepted in the main the reality of a "system" that promised violence to anything resembling fair play at the hands of those who rampantly abused their power. Moreover, Hesiod—while offering the most extensive contemporary statement on these matters—was not alone in his assessment. A variety of later ancient authorities suggested that, in the absence of written law, the potential was great for the abusive exercise of judicial power by those who were responsible for "remembering" the customs of the community upon which settlement of disputes was based.

THE CENTRAL ARGUMENT of the present study is that that the appearance of written law in the ancient Greek *polis* arose from the inadequacy of existing custom as a structure of authority to regulate elite competition within what had previously been a functional legal culture. Rapid social, economic, and political change, combined with emergent literacy, compelled Greek elites to supplement communally informed dispute resolution, based on received and accepted custom, with statutory laws that primarily addressed issues of greatest concern to the elite members of the *poleis* that adopted such statutes.

A curious chronological divide separated the introduction of alphabetic writing to the Greek world (ca. 800) from the appearance of the first written Greek laws (ca. 660). This more than century-long delay invites attention because the Greeks had employed writing for a variety of uses aside from law and had learned the technology from the Phoenicians, who themselves belonged to a well-established Near Eastern tradition of written law. For much of the twentieth century, scholars typically explained this delay as a product of class conflict. In their view, the elites who controlled the emerging *poleis* dispensed justice from memory and therefore resisted writing down laws as it might undermine their ability to settle disputes, presumably to their own advantage. By following such practices, they enriched their households and maintained their grip on the social, political, and economic reins of their communities. Only when the yeomanry became indispensable to the defense of the state as hoplite soldiers, so the argument goes, did the nonelites agitate for written law as a guarantor of their judicial rights and a protection against elite abuse.

Over the last twenty years or so, scholars have begun to challenge this view. While my own work has been informed by some of these criticisms, I argue that any understanding of Greek law in its seventh- and sixth-century context must rely largely on evidence from the Archaic period. The Athenian literary tradition after 400 dominates the Classical sources that speak about early law. Dependence on these sources has in many respects reproduced fourth-century Athenian attitudes, which had come to recognize written law as the only legitimate source of legal authority. I instead focus attention on the surviving literature of eighth- through early sixth-century Greece, as well as the epigraphic evidence of early legislative activity. This evidence is less contaminated by later theorizing about the relationship of justice to written law, though it is certainly not without its own complications. I employ a legal anthropological approach to the surviving poetry attributed to the epic poets Homer and Hesiod. By identifying and analyzing the trouble cases that appear in this literature, I argue that the Greek world prior to written law had a functional and consistent, if not altogether complex, legal culture. That legal culture featured meaningful participation of the wider community in the settling of disputes on the basis of assumptions about approved and disapproved behaviors, which forces us to examine more closely the indications in our evidence of judicial abuse by the elites: can these be taken at face value, or are there other considerations lurking behind the complaints some Greek authors leveled at those responsible for the administration of justice? Furthermore, the communal and competitive nature of Greek legal culture rendered it highly unlikely that elites could have systematically corrupted the

judicial process toward their own ends and provokes us to wonder why some Greeks eagerly sought out their decisions if those judgments were indeed so routinely crooked. Epic song itself was a source of legitimacy or sanction for certain behaviors, both reflecting the values of the society at large and at the same time reinforcing them, and these values would have often determined the ways in which disputants pursued their quarrels and how, if it came to third-party arbitration, those quarrels would be regulated or resolved. In a society where change had moved relatively slowly, the epic tradition had the capacity to keep pace with the evolving assumptions and mores of the community.

One of the keys in interpreting the rise of written law is to appreciate the relationship between traditional modalities of creating legitimate authority, the special challenges introduced by the limited spread of literacy, and the actual content of early written laws, all within the context of the rapid social and economic changes taking place in Greece from the late eighth century through the beginning of the sixth. Even if there had been appalling *systematic* judicial abuse prior to the writing of law, it is unclear that many Greeks of this period would have seen written law as the answer to this problem. The ability to read and comprehend lengthy texts was still significantly restricted, and our evidence as late as the end of the sixth century suggests that high-level literacy remained a limited skill: in other words, a written law that replaced traditional precepts but that few could read would merely have replaced one type of elite power with another or at least emphasized different abilities belonging to the same elite group. Furthermore, certain voices within the Greek literary tradition relate details—and the existing epigraphic evidence provides reasons to credit them—that suggest a somewhat "conservative" purpose in the work of some of the early lawgivers. Writing, rather than being employed to achieve social leveling, instead aimed at creating legitimacy and authority for certain laws. This was necessary for two reasons. First, with the writing down of the epic traditions, and the diffusion of increasingly canonical and fossilized versions of those traditions, epic songs became increasingly irrelevant to the reality around them, a dynamic exacerbated by the significant socioeconomic and demographic changes taking place in the Greek world. Second, the vast majority of what we find in surviving early laws, as well as later literary accounts of the content of other laws, suggests that the "writing up," or drafting, of laws occupied the attention of early legislators far more than their "writing down," or recording. That is to say, much of early written law concerns issues that had arisen rather recently as a result of the *polis* and related pressures, issues that did not impinge significantly upon the Homeric world. Monumental inscription imparted to such new laws the legitimate authority that could not be found for them in the epic tradition and

that could reinforce the legitimacy of new provisions regarding, clarifying, or emending older customs as the now increasingly static epics grew further out of touch with the realities of the Greek world-experience and as those older and accepted customs now impinged upon the members of the community in a new set of socioeconomic and political realities.

I argue that the evidence of the seventh- and sixth-century legislation suggests that written laws emerged first and foremost as a response to aristocratic or elite concerns about their own number. A definition is in order. By "elite," I follow Sara Forsdyke's very useful characterization: those who possessed political privilege "based on the claim to some combination of wealth, good birth, divine favor, and excellence (*aretê*) in some socially recognized attainment, whether prowess in battle, political skill, or some other cultural practice."[11] (As Forsdyke states, such elites exercised a monopoly on public office in Archaic Greece.) The laws issued under their leadership covered, among other things, inheritance, adoption, and marriage. In and of themselves, these areas of the law are by no means of interest solely to elites, but the paramount focus of much early legislation was in controlling the allocation of property, even in some cases preserving a current, disproportionate distribution or equilibrium of the ownership of land and other wealth. In addition, we find laws restricting both the iteration (or, if one prefers, ensuring the rotation) of magistracies and the ostentatious display of wealth at funerals. What these laws indicate, I argue, is an attempt by elites to prevent the concentration of various social, political, and economic resources in the hands of too narrow a circle of the elite, such that one group of families, or even one individual household, might come to dominate the public life of the community; whether they succeeded (and often they did not) is another matter. These considerations ultimately lead us to the conclusion that written law emerges in early Greece, not as a result of a deeply dysfunctional legal culture, popular agitation, the expression of communal control over the *polis*, or a range of other variously suggested explanations. Rather, we should understand the appearance of written law as a means by which elites attempted to regulate their own competition for prominence and sought to invest those statutes with authority by giving them monumental, written form.

The availability of established, written rules to which all could refer was only later, and to some degree quite accidentally, a victory for a wider segment of the community in many Greek *poleis*. Indeed, as has also become clear, writing for public purposes may have been as much an instrument of power and legitimization as an instrument for greater judicial and political parity. In the early days of written law, the elites of various Greek *poleis* were responding to radical social and economic changes that heightened tensions among the