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## Legal Pluralism in Archaic Greece

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Abstract: The theory of legal pluralism argues that law's function in modern society must be understood as a negotiation between different sets of legal orders operating simultaneously. This paper argues that archaic Greece, too, was a legally plural society and explores two negotiations as evidence: 1)the relationship between Drakon's murder law and the procedure of blood-money negotiation; 2)the Gortyn Law Code and oath-trials.

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## Legal Pluralism in Archaic Greek Law

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The law of the Archaic polis has the opportunity to be a fruitful nexus of discussion between legal scholars and ancient historians. Its creation nearly *ex nihilo* after the advent of writing in Greece should be a starting point for scholars studying the role of law in society. Why the archaic citizen first chose to write law is vitally important for what written laws are meant to do, either because this knowledge will reveal a legal unforeseen use for law or because it will help us evaluate how we use law in the modern nation-state. For scholars of the archaic polis, the paucity of legal evidence in the early polis forces us to rely upon theories of law's role in society in order to fill in such broad gaps in evidence. Every scholar depends upon his or her understanding of law's institutional role while translating and interpreting Greece's earliest laws. The study of law in the Archaic polis should be mutually beneficial for scholars of both fields, and changes in one field should be reflected in the scholarship of the other.

Contemporary social shifts have led the discipline of legal sociology to reconsider the role of law in the modern state. Internationalization, post-colonial legal systems, and new research into the application of similar laws by different communities have all challenged the early and middle 20th century questions that defined the discipline. Before recent critique, legal positivists such as Hans Kelsen<sup>1</sup> and H.L.A. Hart advocated a law separate from society, and this theory focused debates within legal sociology on what held law together and how it interacted with the society it regulated. In Kelsen's case, a fundamental norm unified law, which was basically the legislative power of the state; in Hart's, a fundamental "rule of recognition" found in any society uniformly lent authority to law. Some recent studies have weakened the positivist position. These studies suggest that society does not create or make authoritative one legal system with which it subsequently interacts, but rather that in making decisions about law, any person or community is confronted by several overlapping legal systems, a situation called legal pluralism. To explain how society uses law, therefore, we must understand how these legal systems interact and how the individual chooses a legal process for dispute resolution.

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<sup>1</sup> Thus Kelsen (1967) attempts to find a "pure" theory of law, which he defines as a theory which "only describes the law and attempts to eliminate from the object of this description everything that is not strictly law." p. 1 He limits social "influences" in law, as if law was something that can be separated from the society it regulates. According to Hart (1961), "English law, French law, and the law of any modern country regulates the conduct of populations inhabiting territories with fairly well-defined geographical limits. Within the territory of each country there may be many different persons or bodies of persons giving general orders backed by threats and receiving habitual obedience. But we should distinguish some of these persons or bodies... as subordinate lawmakers in contrast to the Queen in Parliament who is supreme the subordinate lawmakers keep within limits statutorily prescribed and so may be said in making law to be agents of the Queen in Parliament. If they did not do so we should not have one system of law in England but a plurality of systems; whereas in fact just because the Queen in Parliament is supreme in relation to all within the territory in this sense and the other bodies are not, we have in England a single system in which we can distinguish a hierarchy of supreme and subordinate elements." (p.24-25 (original emphasis) All law is united into a common system that seeks to regulate society from without.

It is odd that, while still a relatively recent paradigm shift in legal sociology, scholars of ancient law have yet to confirm or refute legal pluralism in the ancient world. In the ancient world, there are several time periods in which societies experienced rapid growth and syncretism, much as internationalism and post-colonialism are doing today. Also like today, this growth required new political institutions and new legal systems. This paper examines one such time, archaic Greece, as a test case for legal pluralism in the ancient world.<sup>2</sup> Law was first written down in Greece during this time, and Hart describes the writing of law as the most basic example of the "rule of recognition" that makes written law a unified system. When it comes to archaic law, classicists seem to believe him.<sup>3</sup>

Perhaps the reason ancient historians have been so slow to challenge the theories of legal centrism has been that legal centrism has formed a keystone in the debate about state formation in archaic Greece. The rise of written law in archaic Greece is synchronic with the development of the polis, and most ancient historians consider it a key component of state development. There are two views of exactly how this happened, which I call the social control theory and the process control theory respectively. The theories of law as social control argue that the first written laws came out of political strife within the city-state. This political strife forced political change, and written law was part of this change. Snodgrass, in his work *Archaic Greece*, describes how the aristocracy developed written law to legitimate their rule over the people only to find that once law was written they lost power over it.

Law-courts and litigation can exist and flourish for centuries without a codified set of laws. . . , so long as the absolute power rests in the same hands inside the court-room as outside it: that is, in the hands of a monarch or narrow ruling-class. . . The mere fact that the laws exist outside the prejudice of an individual magistrate is the first and greatest check on his power.<sup>4</sup>

Snodgrass makes this a small part of a larger argument about state formation, but Michael Gagarin develops the theory further in his work *Early Greek Law*:

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<sup>2</sup> It is not lost on me that this topic is not entirely absent from the debate about Greek law. Robin Osborne (1985) and Sally Humphreys (1988) have particularly challenged the unity of law in the Classical period. Humphreys (ibid.; 1986) and Steven Johnstone (1999) have challenged the separation of law from society, contending that the system was the forum for power disputes in Athens. It should be noted, however, that these fine studies still focus on the law as a stable part of a larger discourse and ignore the fragmentary nature of the law itself. Osborne is concerned with the options available to litigants within the legal system, but he does not explore these as choices between legal systems and philosophies. They are part of one unified system with many avenues toward dispute resolution. I contend that these systems were not unified and they were constantly in tension with one another because the chosen forum of dispute resolution lent different advantages to different litigants. These studies are beneficial, but they miss the most recent theories of legal pluralism, and they fail to fully integrate law into society. For the most part, however, this study aims to support them by revealing a precedent for these power struggles within the court system during the archaic period.

<sup>3</sup> Thus, Holkeskamp (1992; p.101) states that writing laws "vests them with an authority of their own," and this authority is apparent since these laws replaced the previous legal norms. Gagarin cites Hart and argues that law is a public, formal procedure for dispute resolution. (1986; p.7)

<sup>4</sup> Snodgrass (1980) p.118.

Hesiod's words suggest a certain first-hand acquaintance with social turmoil, and during the two centuries after he wrote (ca. 700 BC) many Greek cities experienced a considerable amount of internal strife. This was also the period when many cities took the decisive step in the development of law, the writing down of laws, and it is possible that these two phenomena are somehow connected.

Gagarin goes on to describe how not only was it possible that laws and social strife were related, but that lawgivers like Solon and Drakon quelled disputes around this time by writing down laws that were to last into the 4th century. Another variant of the social control theory is found in an article by Walter Eder. Instead of a populist victory, written law was a conservative ploy by the elite to protect the power they had.

I suggest that the archaic law codes had the following three main purposes. First, they were designed to stop the unpredictable development of customary law and political behavior, which under the increasing pressure of the discontented were about to change to the detriment of those in power. Second, they were supposed to provide appeal to a defined and published body of law. . . Third, a legal basis for existing property arrangements was thus to be created in order to render ineffective any demand for cancellation of debts or distribution of land.<sup>5</sup>

Written law was less of a negotiation between social classes and more of a new tool that the elite employed to legitimate the current power structure. If the elite could attribute their power to time-honored tradition, encapsulated in the laws, they could deflect growing criticism of their political rule. Social control theories, then, vary in the political use of law, but for all of them, political strife in the archaic polis was resolved by written law. Written law enhanced the polis's monopoly of violence and catapulted its primitive structure into a true state, the Classical polis.

Karl Holkeskamp, however, has attacked the belief that law was first written in a period of political strife. Along with other process-control scholars, he believes that law came about in a stable political situation through the efforts of not an individual lawgiver, but rather of the *nomothetai*, *aisymnetai* and other 'givers of law' that were legitimate city officials in the archaic period. Law was first written to refine existing political practice.

This suggests that the image of the great lawgiver as a towering figure and symbol of political identity. . . was indeed a philosophical and historiographical construct in a variety of different ways. . . However, it is the literary tradition itself which seems to offer a glimpse of this reality and a starting-point for a fundamentally different approach to the problem. After all, sometimes classical philosophers and historians not only referred to *nomoi* and *nomothetai* and their more or less famous authors in general terms, but actually quoted and discussed, or at least mentioned in passing, individual laws and their contents in some detail.<sup>6</sup>

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<sup>5</sup> Eder (1986) p.264-5

<sup>6</sup> Holkeskamp (1992)

To Holkeskamp, the polis created written laws gradually in its attempt to respond to situations that were not covered by the community's customs. Other scholars of this theory view law as a small part of an ongoing discourse of power within the polis. According to Sally Humphreys, written laws embody "ideological tensions which often appear as a discrepancy between 'theory' and 'practice.'"<sup>7</sup> For process-control scholars, written laws were a better way to run the city and they became the means through which a primitive, stable political apparatus evolved into the true state that we find in the archaic polis.

These opinions differ in whether a stable state apparatus existed when laws were first written, but they both believe that once law was created, the law received the authority of the citizen body. The first written law both reveals a strong monopoly of violence in the archaic polis and increases this monopoly. Immediately, written law rules the entire polis and supplants whatever norms of social order existed previously. Indeed, for Gagarin, the lawgivers were appointed to "restore stability during a period of turmoil"<sup>8</sup> by recording "some of the community's traditional practices and the established decisions of their judicial authorities or to write new laws on substantive or procedural matters." In other words, the lawgivers were successful because their new laws collected and replaced what was unwritten. For Holkeskamp, the new laws were legitimate as the expressions of the existing citizen-controlled state structure. The state was merely refining its practice by giving rules for future generations to follow in the event of similar emergencies. In both cases, the first written law became the law of the land either instantly or nearly instantly and supplanted whatever legal (or non-legal) orders existed before.<sup>9</sup>

In the following discussion, I will argue that many questions about how law worked in archaic Greece are best answered if we understand that the earliest written laws were not immediately authoritative as the expression of a unified citizenry. Rather, these written laws gained authority only through interacting with existing legal practice and never actually received absolute legal authority over legal disputes. Law in Archaic Greece was highly pluralistic, and various systems competed and interacted with each other when individuals tried to resolve disputes in this society. The role of archaic law is found in the competition between legal systems. This paper will explore these interactions by trying to create the symbiosis between studying ancient law and modern legal theory that is so sorely missed in other studies. It begins with a detailed discussion of legal pluralism as a theory, and it uses this discussion to create a model by which to judge whether archaic laws were written under legal pluralism. It then applies this model to two case studies, Drakon's Homicide Law and the Gortyn Law Code, in order to prove that archaic Greece was indeed a highly pluralistic society. Finally, the evidence from these case studies is used to support a new theory of legal pluralism in state development. It concludes with a new hypothesis postulating why law was first written in society.

## 1.1 The Development of Legal Pluralism

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<sup>7</sup> Humphreys (1985) p.256

<sup>8</sup> Gagarin (1986) p.59

<sup>9</sup> Holkeskamp, *ibid.*

Before describing the theory of legal pluralism, it will be helpful to describe the varied development of legal pluralism. On the one hand, legal pluralism's diverse origins and applications have created the view that it truly is a new paradigm (in Kuhn's sense) within legal studies, opposed to the legal positivism and centrism of Hart and Kelsen. On the other hand, this variety has stifled its use and steered the debate towards arguments seeking common definitions. Arguing scholars tend to use the same language to describe different things, which is fine. The definition of pluralism each scholar uses (not to mention each definition of "law" and "legal system") should be based upon the phenomena they wish to analyze and the question they wish to ask. Only a definition that wrongly describes the situation analyzed should be rejected. However, this flexibility requires scholars to be specific about the definitions they employ in their studies. Many of the fiercest debates about legal pluralism arise from definitions and uses of legal pluralism that are particular to each of the disciplines that have defined it. Legal pluralism has been created and defined by a variety of disciplines, but most influential studies can be divided into three permeable groups: studies emphasizing institutional analyses, evolutionary analyses, and colonial jurisprudence.

Institutional analyses are identified by synchronic analyses of complex societies. They have arguably had the greatest impact upon legal pluralism because they first identified the pluralistic nature of law and have the broadest applicability to all studies of legal pluralism. This approach began in the early 20th century with Eugene Ehrlich's arguments for "living law." Ehrlich coined the term "lebendes Recht" as a legal order opposed to the official law of the state.<sup>10</sup> This order is found within society's organizations and groups, and law is created by the same social processes in each group. Ehrlich is considered by some scholars to share an understanding of legal pluralism with the colonial scholars, and together this view is labeled "classic legal pluralism."<sup>11</sup> But Ehrlich saw living law as a necessity in every society, and this separates him from the scholars who believed that legal pluralism resulted at the intersection of different cultures.

If Ehrlich represents the oldest starting point for institutional legal pluralism, then Sally Falk Moore represents a rebirth, and her theory of the semi-autonomous social field vastly influenced all subsequent legal pluralists. Moore has argued that every society constantly creates new norms and legal orders because social relations constantly change.<sup>12</sup> These temporary social bonds create "semi-autonomous social fields" each of which contains a different legal order. Furthermore, each individual belongs to several social fields at any given time. This creates overlapping legal systems, and while state law overlaps with them, it far from encompasses them. Law is formed from relationships within each social field, and while state law can influence a field, legislation often does not have the effect intended because it must negotiate with the internal social order.<sup>13</sup> Moore then continued the line of Ehrlich that law is created by the relationships of groups and organizations within a society, but she moved beyond Ehrlich to describe a plethora

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<sup>10</sup> Ehrlich (1913) p.81 "The living law, even where it is created by the state, is preponderantly, as to its content, limited to an association."

<sup>11</sup> Merry (1988) p.873

<sup>12</sup> Moore (1978); (1973)

<sup>13</sup> Moore (1978)

of social fields all interacting with law but partially separate from the state.<sup>14</sup> These two scholars began and redefined the institutional approach to the law respectively. They analyzed the effect of law synchronically within a society and extracted a general principle of law's role within all societies.

The second approach to legal pluralism emphasizes legal evolution. In doing so, these scholars carry on a tradition beginning as early as Henry Maine's *Ancient Law*. This approach tends to describe all social orders as law and focuses mainly on "primitive" societies, though many newer studies focus on complex societies. The work of Malinowski in the 1920's has been extremely influential in this scholarly strand. Malinowski identified complex legal systems in primitive societies in order to refute Durkheim's previous assertion that criminal law alone existed there. He defined law by the function that it played in society, and thus the definition of law was expanded to include normative orders of all sorts.<sup>15</sup>

Like Ehrlich, Malinowski's work fell out of favor rather quickly, but its spirit was revived by Leopold Pospisil in the 1950's. Pospisil argued that all societies have different "legal levels" and while primitive society has yet to formulate a law that can be applied to the whole, it nevertheless had law within each "subgroup" of the society. Every such subgroup owes its existence in a large degree to a legal behavior of its members... This multiplicity of legal systems, whose legal provisions necessarily differ from one to another, sometimes even to the point of contradiction, reflects precisely the pattern of the subgroups of the society-what I have termed 'societal structure' (structure of a society).<sup>16</sup> Furthermore, these sub-groups could be arranged hierarchically within the society by the number of members to which they applied and their degree of specialization. The definition of law is expanded to include the orders of all subgroups, and the law of subgroups higher up trumps law of the lower subgroups. Primitive society simply lacks the top rung of the legal ladder that modern society has created. Malinowski and Pospisil looked for the place of law in "primitive" societies and tried to extract a larger rule for legal evolution over time. In doing so, however, both expanded the definition of law to include a greater number of social orders.

Finally, the term "legal pluralism" was actually coined in the field of colonial jurisprudence. In 1975, M. B. Hooker's work *Legal Pluralism: An Introduction to Colonial and neo-Colonial Laws* showed how modern imperialism brought Western legal principles to eastern colonies and how the native legal systems reacted. He defines legal pluralism as, "the situation in which two or more rules of law interact."<sup>17</sup> This definition was not concerned with one society in particular, but only interested in legal transfers between cultures. While this source of legal pluralism has an extremely limited application, it has had an enormous impact upon legal pluralists. Indeed, most modern

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<sup>14</sup> *ibid.* "The constitution of a state is, among other things, an organization of organizations. The more complex the society, the more the layers of rule-systems, the more adjacent ones there are, and the more numerous and diverse the separate 'jurisdictions' or autonomous fields, and the more intricate the questions of domination/autonomy, hierarchy/equivalence, proliferation/reduction, amalgamation/division, replication/diversification in the relations within and among the constitutive levels and units." p. 27-28

<sup>15</sup> Malinowski (1926): "In looking for 'law' and legal forces, we shall try merely to discover and analyse all the rules conceived and acted upon as binding forces, and to classify the rules according to the manner in which they are made valid." p.15

<sup>16</sup> Pospisil (1971) p.125

<sup>17</sup> Hooker (1975) p.6

legal pluralists use colonial or post-colonial societies as their examples because the pluralistic elements of law are most conspicuous.<sup>18</sup> The focus on colonial societies was rapidly expanded to all societies when it became clear that unequal power relationships were not necessary to witness "two or more rules of law interact[ing.]"

These three legal investigations each separately arrived at the conclusion that centralist views of law were insufficient. Unfortunately, the different questions these scholarly schools were asking and the methods through which they were answering them have become contradictory within the larger debates surrounding the theory of legal pluralism itself. Legal pluralism has been defined in a myriad of ways for many different purposes. As a paradigm shift within legal studies, however, legal pluralists do not need to agree on the "correct" definition. They need only to define what definition is most appropriate for particular questions. The next sections search for the definition of legal pluralism appropriate for the ancient historian.

## 1.2 Problems of Legal Pluralism

Before evaluating legal pluralism in archaic Greece, the ancient historian must answer two criticisms about the theory itself. First, many legal pluralists redefine law to include other sociological phenomena. Critics rightly point to the contradictory way some legal pluralists define law. For instance, the legal pluralism advocate Sally Engles Merry defines law as the "situation in which two or more legal systems coexist in the same social field."<sup>19</sup> But she then defines "legal system" to include, in her words, "nonlegal forms of normative ordering." There is an obvious shift in what she means by "legal" in these sentences, and this shift is picked up by Tamanaha in his vicious critique of legal pluralism.

As should be immediately apparent, so generous a view of what law is slippery slides to the conclusion that all forms of social control are law; Not only does the term 'law' thereby lose any distinctive meaning-law in effect becomes synonymous with normative order. . .<sup>20</sup>

When legal pluralism defines all normative orders as "legal," it cannot be an effective tool to analyze the interaction between law and a particular normative order because every normative order is law. Without a reason to separate some normative orders as law and others as subordinate to law, legal pluralists are really studying the interaction between all normative orders and must admit that all normative orders interact as equals.

But legal orders are unique within our society precisely because they set boundaries on what can be considered "legal" and what cannot be considered "legal." Legal and non-legal normative orders act in similar ways, but they are treated differently by the individuals in society.

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<sup>18</sup> Merry (1988) p.874

<sup>19</sup> Merry (1988) p.870

<sup>20</sup> Tamanaha (1993) p.193

Within recent legal anthropology as well as in the work of Hanne Petersen, Santos, Teubner and others, one finds theories and empirical studies clearly indicating that modern informal legal normativity is often highly changeable, highly contingent, highly particular, and not oriented towards general stable norms. All of these characteristics violate the traditional view of customary law within the legal sciences as well as traditional sociological views of norms.<sup>21</sup>

While norms and law are both volatile, law is perceived as a relatively stable entity, and, indeed, many theories of legal genesis rely upon law's stability to explain its sudden emergence during state formation.<sup>22</sup> Law determines what we can consider legal or illegal in any hypothetical situation, and in doing so, it separates itself from other social norms. As Gunther Teubner states:

If we are interested in a theory of law as a self-organizing social practice, then it is not up to the arbitrary research interests to define the boundaries of law. Boundaries of law are one among many structures that law itself produces under the pressures of its social environment. And only a clear delineation of the self-produced boundaries of law can help to clarify the interrelations of law and other social practices.<sup>23</sup>

So what normative orders we label "legal" remains an important question for our inquiry. If we are to determine whether laws in archaic Greece received the immediate authority that current theories claim (thus being the purest example of a unified legal order under state control as Hart believes), we must identify what we consider to be another truly legal alternative to the state's law. We must know what is legal before we can claim there is legal pluralism.

The second criticism leveled against the theorists of legal pluralism is that they deconstruct other theories without replacing them. This comes in part from the proclaimed connection of legal pluralism to theories of post-modernity.

Legal pluralism is the key concept in a post-modern view of law. Not the legal pluralism of traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather the conception of different legal spaces superposed, interpenetrated and mixed in our minds as much as in our actions, in occasions of qualitative leaps or sweeping crises in our life trajectories as well as in the dull routine of eventless everyday life.<sup>24</sup>

Post-modernism often focuses on the individual to the detriment of the institution, and post-colonial studies have complemented this focus with a political agenda. But while

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<sup>21</sup> Dalberg-Larsen (2000) p.149, original emphasis

<sup>22</sup> North (1981)

<sup>23</sup> Teubner (1992) p.1452

<sup>24</sup> de Sousa Santos (1987) p.293

post-modernism uses an individual's perspective to illuminate distinct legal spaces, it often fails to define how these spaces map onto the real world that the individual inhabits. We are left with a theory that can only explain how things didn't work (often because it is paralyzed by its inability to limit the number of norms that are labeled legal, as the first criticism points out.) For time periods with relatively scant evidence, the ancient historian benefits little from purely deconstructive analysis. The evidence always allows us to deconstruct, and legal pluralism must be constructive to be truly valuable.

I will attempt to answer both these criticism - at least to the extent that they prevent the ancient historian from analyzing archaic Greece. The next two sections analyze two camps of contemporary legal pluralists. From this analysis, I will form a constructive theory of legal pluralism. Both camps fail to answer these criticisms effectively, but they clarify the question, and this discussion will lead me ultimately to a new definition that will be useful for our inquiry.

### 1.3 Anti-state Legal Pluralists: The Static Perspective

In some way, every study of legal pluralism similarly challenges the hegemony of the state to set the only legal rules. The new paradigm of legal pluralism arose from this rejection of state law. Now legal pluralists are trying to place the state back into society, and are divided about how to do it. Some believe the state minimally influences both the individual and the various legal orders in which he or she lives. John Griffiths is perhaps the best known and most vocal of advocates for this form of legal pluralism. He denies the state a central legal position and believes that law is inherently plural. This understanding of legal pluralism is ahistorical, reductionist, and ultimately useless for the ancient historian.

Griffiths' argument is based on Sally Falk Moore's theory that society is made up of semi-autonomous social fields. He states that as "every collection of persons which exercises social control over its members...a group, the fundamental unit of social control."<sup>25</sup> Society is made up of many SASFs and every individual belongs to many of them simultaneously. Since the members of a state are also the members of many other social orders, the state cannot expect its social controls, in the form of law, to override all other forms. State law usually loses its bid to regulate other social control. "Seen from the perspective of the shop-floor society, the state is often unable to bring anything like as much regulatory force to bear on relationships and activities as other SASFs which are closer to the scene."<sup>26</sup> Thus, to Griffiths, state law has little practical effect upon the lives of its citizens. It is dependent upon the citizens to adopt the state rules in place of the social controls of the other SASFs t? which they belong. Moreover, since the state apparatus has multiple units of social control, the state can never implement law in the form that it is written because each unit offers different interpretations based on its own internal social controls.

Sally Falk Moore hesitated to attribute legal qualities to all SASFs. She used the term reglementation in order to preserve law's special place in modern society. In contrast, Griffiths attributes the adjective legal to all forms of social order, Even though

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<sup>25</sup> Griffiths (1992) p.158

<sup>26</sup> *ibid.* p.159

he admits that the strength of an SASF depends on its ability to organize, he assumes that individuals experience all forms of social control as law. He begins by defining legal pluralism as, "...the presence in a social field of more than one legal order."<sup>27</sup> But he goes on to define a legal order as an intrinsic property of a social field. "" .it follows that law is the self-regulation of a 'semi-autonomous social field."<sup>28</sup> This self-regulation seems equivalent to the social control that delineated a social field in the first place, and Griffiths never introduces variant definitions for either" This means that all social fields are structured legally, and that law governs every social relationship. Indeed, Griffiths finds legal pluralism to be the "omnipresent, normal situation in human society."<sup>29</sup> Since each relationship entails its own form of law, all social fields have a legal order. The individual accepts or rejects state law just as it accepts or rejects the rules of any other association.

Finally, whatever a mobilizing actor does, this is done for his or her own reasons, not for the reasons which moved the "external" legislator..,Thus the social working of law, even in the case of some degree of "penetration", is more dependent upon the circumstances and motives of the actors than the intentions of the legislator.<sup>30</sup>

The legislator enacts a rule that has no authority independent of that attributed to it by the individual it seeks to regulate. Individuals, for Griffiths, do not attribute any special status to state law.

Griffith's theory, and all anti-state theories of pluralism, contain three problems. First, it is completely dependent on law being just another social norm that interacts with others, but individuals certainly do not always see state law as just another social norm. The very fact that every individual has a stake in state law affords it a special place in society, and greater power in its attempt to influence other social orders than the "law" of other associations. Second, Griffith's theory always favors local law over state law. He denies that changes in SASFs are ever forced by outside pressures (such as state law), or that they ever allow an order to be more easily "penetrated." In other words, the citizen will naturally follow every other SASF in a society before the state. But he provides no evidence for this phenomenon. Finally, state law is statically plural and never is it more or less unified. Were it more unified, Griffiths would be forced to admit that some states can easily penetrate all other SASFs within a society. As Griffiths states, "Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion." The state merely is plural all the time, and never does the state have more or less ability to regulate the behavior of individuals.

These problems are particularly acute for historical inquiries. A claim that an institution such as the state remains static in its ability to regulate individuals is not only wrong, it is ahistorical. A stateless society regulates individuals differently than a state society. The modern nation-state exercises a different amount of control in a different way than either a medieval kingdom or the Roman republic. But worse still, a static

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<sup>27</sup> Griffiths (1986) p.1

<sup>28</sup> *ibid.* p.38

<sup>29</sup> *ibid.*

<sup>30</sup> Griffiths (1992) p. 166

theory does not allow us to explore how the state interacts differently with other social orders over time, since it always acts the same. Furthermore, Griffiths' emphasis on the individual is impossible to replicate with ancient evidence. It requires modern statistics and interviews with individual group members to understand how they respond to state law imposed upon other social orders within which they must operate. Finally, anti-state theories do not allow us to ask whether state law was created in a pluralist society because every state is automatically plural. They can assert this only because every SASF creates law. We clearly must seek a more specific, less essentializing definition of law than Griffiths provides-- one which is more realistic, historical, and functional to the study of archaic Greece.

Griffiths represents an extreme example of the camp of contemporary legal pluralists that wish to deny the state any special authority over law. Although his belief seems extreme, all members of this camp encounter the same problems because they insist that state law is in no way different from the law of other social fields. In a critique of Sally Engles Merry, Von Benda Beckman has argued that any theory that does not displace the state entirely cannot be legally plural.

But in the end she accepts essentialist elements that constitute the ideology of state/legal centralism by stating that state law is fundamentally different from other forms of regulation in that it exercises the coercive power of the state and monopolizes the symbolic power associated with state authority.<sup>31</sup>

Although pluralists like Griffiths and von Benda Beckman deny the state's power through law, they never really describe what power the state does hold, why it exists, or how to describe its development. Anti-state pluralists offer little proof for a theory with such limited use. Ancient historians wishing to study law in state formation must find another definition of legal pluralism to evaluate the ancient world.

#### 1.4 State-centered Legal Pluralists: Change through Pluralism

As a response to such a broad definition of "legal," state-centered pluralists have searched for a more practical approach to describe a society with multiple legal systems. They do this by beginning investigations with the law of the state, probably the one thing that all scholars can agree must be law.

In this my work as in the work of other researchers along the same lines, I soon identified two major problems: firstly, the conception of a plurality of legal systems within the same political space could lead to a relative neglect of the state law as a central form of law in our societies; secondly, once the concept of law was disengaged from the concept of the state, the identification of a plurality of laws would know no limit with the result that, if law is everywhere, law is nowhere.<sup>32</sup>

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<sup>31</sup> Von Benda-Beckmann (1988) p.900

<sup>32</sup> Santos (1985) p.299

These scholars argue that state law is fundamentally different from other forms of social order. Dalberg-Larsen points to the ideological difference of state law as a primary reason to separate it from other social orders.

The fact that the law is seen as a relatively stable and clear-cut entity called valid law (at the national level) is thus, in one sense, the result of a particular ideologically determined view of the law, dominant among lawyers in particular, but which is also accepted by most ordinary people as expressing the correct view of the law. . . If we are to understand the nature of our legal system, we must understand it as something which is partly the product of traditional jurisprudence, partly of lawyers' habits of thinking etc. It must also be seen as formed by sources of law such as legislation, which in some ways contribute to making valid law a relatively clear and stable entity.<sup>33</sup>

State law differs then in two ways. First, individuals experience state law differently than other social norms. People feel it expresses the correct model of law, and they act on this feeling. Second, state law is a conceptual system created outside of relationships by legal professionals. While individuals maintain the power to apply state law within their relationships, state law is still a tangible object that exists irrespective of the personal relationships of a society. Since the law of the state differs fundamentally from other legal systems, state-centered pluralists focus their investigations on the relationships between state law and other normative orders.

Bonaventure de Sousa Santos has emerged as a leading advocate of a state-centered pluralism, and his work provides a new conceptual framework within which to examine multiple legal systems. Santos began investigating legal pluralism when he researched the settlement of Pasargada in Rio de Janeiro, Brazil. This settlement is essentially a ghetto community that created its own internal legal system through the Resident's Association quite separate from and parallel to Brazil's courts. This study led Santos to numerous articles discussing his approach to legal pluralism more broadly, in which he creates a model of modern societies for the legal pluralist. This model forms the basis of his state-centered theory of legal pluralism.

Santos' model is created to explain the British factory acts of the 19th century.<sup>34</sup> Santos first deconstructs the separation of state/civil society that arises from modern capitalism. He shows that through a series of interventions before the 19th century, the "public" state allowed "private" industry to develop while simultaneously fostering a false image of economic autonomy. "This means that to a great extent laissez-faire policies were carried out through active state intervention. In other words, the state had to intervene in order not to intervene."<sup>35</sup> Economic autonomy was dependent on the state, but the state was similarly dependent on the economy to become public. If it was not able to separate itself from the economy, it would not have been able to universalize political participation through equal political and civil rights. From this realization, Santos breaks

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<sup>33</sup> Dalberg-Larsen (2000) p.151

<sup>34</sup> This is a summary of Santos (1985)

<sup>35</sup> *ibid.* p. 304

society into four spheres each with "primary clusters of social relations." He labels them the householdplace, workplace, citizenplace, and worldplace.

Elementary Components ⇒	Unit of Social Practice	Institutional Form	Mechanism of Power	Form of Law	Mode of Rationality
Structural Places↓					
Householdplace	Family	Marriage/Kinship	Patriarchy	Domestic Law	Affection Maximizing
Workplace	Class	Factory	Exploitation	Production Law	Profit Maximizing
Citizenplace	Individual	State	Domination	Territorial Law	Loyalty Maximising
Worldplace	Nation	International agencies, bilateral/multilateral agreements	Unequal Exchange	Systematic Law	Effectivity Maximizing <sup>36</sup>

Each place contains a dominant form of law based on a different type of power. Although structurally autonomous, all spheres are interconnected and dependent upon each other. It is also important to note (though Santos does not explicitly) that no relationship in any sphere is monopolized by one legal system or mechanism of power. A relationship between individuals contains elements of each place. Also, these are not legal systems, but rather spheres between which different legal systems can be placed. As Santos's description of the Factory Act shows, the state legal system used its law to guarantee economic autonomy. Thus, the state legal system does contain some production law, though Santos believes it deals primarily with territorial law.

With this model in place, Santos describes how the factory acts showed a negotiation between the law of the state and the law of the factory. The factory workers lobbied the state and won their requests for a limited working day and other benefits, but at the same time the imposition of a working day "accelerated the transition from the manufacture system to the factory system and they changed the conditions of competition in favour of the most productive and technically advanced factories and industries."<sup>37</sup> The increased power afforded to the workers by the state was actually equivalent to the power they lost within the factory itself.

This negotiation between the factory and the state led Santos to his final conclusion that these two arenas each had a legal system, and it was the negotiation between them that ultimately determined the shape that the factory laws took.

The main point of my argument is that the power of command in the workshop is not political power in any metaphorical sense. It is as political as the power of the citizenplace, the power of the householdplace or the power of the worldplace. They are different in their forms as they derive from different modes of production. . . but this does not alter their political nature. On the contrary, such nature is not an attribute of any of them separately, it is rather the aggregate effect

<sup>36</sup> Chart at Santos (1985) p.309

<sup>37</sup> *ibid.* p.314

of the articulations among them.

Similarly, the factory code is not law in any metaphorical sense. It is law, just as the law of the state is law.<sup>38</sup>

The factory code is law because of its political nature, a nature that was able to negotiate with the more manifest political nature of state law. The end result of this negotiation was the factory acts, which improved the standing of the workers in the citizenplace but limited their power in the workplace.

Santos' analysis is not without its faults. He takes an overly Marxist approach to his historical analysis, and I disagree that the workers did not ultimately have a vested interest in greater workplace efficiency. What is important for us, however, is that he offers a new approach to legal pluralism with three important characteristics. First this method analyzes how legal systems change as a result of "interlegal" negotiations. This makes it an historical approach, accounting for change over time. Second the results of negotiation allow us compare the relative strengths of interacting legal systems and thus the plurality of the society as a whole. If the state had either created a law that limited the work day without also limiting the power of the worker within the workplace, we could consider the factory code a weak alternative law or not a law at all. Then the society would be less pluralistic because there would be one less system with which the state had to negotiate. Finally, Santos shows that these negotiations express themselves in the created laws. By analyzing what the law regulated and (more importantly) what it did not regulate, Santos was able to see that while regulating the working day, state law simultaneously denied the worker other protections. Santos makes legal pluralism an historical phenomenon, a relatively measurable phenomenon, and a phenomenon that is expressed in a form that can be studied - the written law and its process.

All three effects are marked improvements over the anti-state legal pluralists. They form what Santos calls in another article a "new scientific agenda" for the study of legal pluralism. They turn study away from the isolated legal systems so difficult to penetrate that anti-state pluralists advocate. Instead, he calls for the study of interlegality, the "phenomenological counterpart of the state of legal pluralism" which is "highly dynamic."<sup>39</sup> It is evidence of this phenomena that will allow us to see if archaic Greece was in fact a legally plural society.

## 2.1 A New Definition for the Ancient Historian

Towards the benefit of the historian, Santos equates the study of legal pluralism with a study of "interlegality." In doing so, he avoids having to define what, for him, constitutes a "legal system" and "law." Since the institutions he studies are known to interact with the state, he does not need to produce a detailed definition for what a "legal system" is or is not. We, however, do not have the same luxury because our question asks whether any institutions existed opposite the state that created truly "legal" orders and interacted with the state in the same way that the English factories or the Brazilian

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<sup>38</sup> *ibid* p.314

<sup>39</sup> Santos (1987) p.298

Parsagadas did for Santos. We do not have the benefit of clearly defined institutions that produce an obvious normative order.

Our paucity of evidence does not mean that institutions having the capacity to create a legal order did not exist. It merely forces the issue of defining how to identify an alternative legal system within the same social field as state law because the institutions that might have produced this law are not as readily apparent. Santos did little to help us define "legal system" in his work. In his later articles, he refers the reader back to the article I discussed above, in which I can find no explicit definition. Dalberg-Larsen, who praises Santos, is obsessed with finding a suitable definition, but ultimately uses the term "legal common sense" to separate law from other forms of social order. Besides the fact that "legal common sense" is completely impractical, it is striking that a legal pluralist could believe that "common sense" is something separate from a cultural construct. Moreover, he states that the creation of a legal profession marks law off from other forms of social order, and legal systems before Rome had at best a scribal profession and at worst no profession at all, which is the case in archaic Greece. Yet no one would argue that they had no substantive law.

The problem that Santos avoids and Dalberg-Larsen fails to solve is a definition of law that includes the state. Luckily, for the purposes of our question, we do not need to develop a definition of law that includes state and non-state law. We need merely to find a definition that shows that state law was developed in a legally pluralistic environment. With this in mind, I offer the following definition: A non-state legal system is an alternative process of dispute resolution or prevention that has been recognized by state law through negotiation. By recognized I mean responding to an existing system. By negotiation I mean the process evident in Santos's understanding of interlegality identified as the process of mixing the semiotic codes used by each system. This definition avoids the mess of defining law but allows us to identify a legally pluralistic society in accordance with a state-centered pluralistic vision. It emphasizes the importance of interlegality, but at the same time limits what orders we can consider law by requiring an alternative system to be a process that an individual can use in place of the state to solve disputes.

Let me briefly explain what I mean through an example. The idea of recognition from state law is not equivalent to sanctioning another system or even acknowledging it by name. The state merely needs to recognize the non-state system as a viable alternative of dispute resolution or prevention. For example, it is custom in one neighborhood to allow any man over the age of 80 to make a binding judgment on any dispute, and there is some repeated process for finding a man of this age and bringing your dispute to him. According to my definition, this process only becomes legal when the state enacts a law that negotiates with this process. If new legislation creates a court in this neighborhood to manage disputes, the process of taking disputes to men over 80 remains non-legal. However, once the state enacts a law that all arbitration is to be done by men under 40, the state has negotiated (without sanctioning this process) and made the process "legal." The more typical response of state law, and something we saw in Santos's discussion of the factory acts, would be to make a law requiring all judges in the new state-sponsored system to be over the age of 80. This would incorporate part of the neighborhood process into the state process but would still be considered a negotiation because the state system

responded through law and recognized that individuals were using this alternative system to resolve disputes.

This definition has two major drawbacks, neither of which are impediments for our study. First the definition requires the existence of a state legal apparatus for negotiation. I am aware of how difficult it is to define what constitutes a state and what does not, but I leave this issue for others to decide. For us, the important thing is that a state apparatus existed in archaic Greece before the creation of archaic law.

This means that even the earliest laws, straightforward regulations of rather simple issues though they are, by their claim to application and enforcement made explicit in the sanctions, necessarily presuppose a fairly broad and solid foundation of 'statehood.'<sup>40</sup>

As Holkeskamp argues, the earliest Greek laws are focused on specific problems that state institutions faced, and this presupposes standard operating procedures for state offices. Second, the definition depends on our ability to detect these alternative processes through the laws themselves. Thus the law might actually be negotiating with a process that we do not realize exists, being so far removed from the daily life of a Greek in the 7<sup>th</sup> century BCE. Greece is a lucky example because for the literature roughly contemporary with the laws we have. The works of Homer, Hesiod, and other poets, as well as later Classical authors, provide evidence of social life in archaic Greece, which can help us identify other social institutions that perhaps formed alternative legal processes. Moreover, we are not searching for *all* alternative legal systems, a task which is probably impossible for any time period much less archaic law when evidence is so limited. Rather, one or two examples of interlegality shows that archaic Greece is a legally pluralistic society and the state has less power than current theories assume. For other periods and cultures, however, ancient historians might find this definition limiting. I assume that other definitions will be necessary in those cases. For ours, this one works well.

## 2.2 Greek society-a model for legal studies

The definition I propose for studying ancient law forces us to analyze how the language of law regulates the society in question and ask why it was not written differently. It forces us to ask a counterfactual question - the use of which has been generally frowned upon by ancient historians. However, as Ian Morris argues in a forthcoming work on the Athenian Empire, they are necessary to explain historical causation and useful if we can limit our counterfactuals to specific questions at what I call a "nexus of choice" recognized by contemporary subjects. In other words, we can only use counterfactuals when people who were closely related to the event in question imagine that it could have turned out differently.<sup>41</sup>

This creates the biggest problem with this inquiry. With such limited contemporary sources, we must assume that contemporaries had a legitimate choice to write these laws differently. If these laws are the complete transcription of a thorough

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<sup>40</sup> Holkeskamp (1992) p.95

<sup>41</sup> Morris (2001) p.9-17

oral code then we have no reason to assume that archaic Greeks could have written these laws differently. In response, I believe that even if the laws originally came from an oral tradition, we have enough to show that no city wrote a systematic and complete set of rules. Thus the selection of laws to be written was in itself a choice. Still, this does not allow us to reasonably ask the question "How could this law have been written differently" since an oral tradition cannot be written differently without becoming a separate literary tradition. Most scholars, however, seem to believe that the archaic polis had a choice in the way that they wrote their laws. I will not set out to prove this now, but ask merely that we consider it for this inquiry and take seriously the counterfactuals I will propose.

For Santos, the makers of the Factory Acts had choices in their legal negotiations with the factory workers. They could have refused the workers' demands, giving the factory owners unbridled rights to determine the extent of the working day. They could also have yielded to the workers without creating a law that accelerated and cemented the place of the factory in the British economy. These options became apparent because of Santos's model of capitalist society (figure 1). Ultimately, the Factory Acts found a way to satisfy both the "production law" that maximized profit, on which the factory codes were focused, and the state's "territorial law" that maximized the loyalty of the citizens in British society.

Greek society, however, requires a different chart. The concept of "profit maximizing" was not readily apparent, nor were the concepts of the state or the world place the same. In figure 2, I show a breakdown of Greek society modeled on Santos's chart.

Elementary Components ⇒	Unit of Social Practice	Institutional Form	Mechanism of Power	Form of Law	Mode of Rationality
Structural places ↓					
<i>Oikosplace</i>	Family	Marriage/Kinship, community	Patriarchy	Family Law	Affection/Profit Maximizing?
<i>Polisplace</i>	Citizen	Polis (state)	Domination?	Territorial Law	Loyalty Maximizing
<i>Worldplace</i>	Greece?	Oaths, Inter-polis agreements, Pan-Hellenic institutions, guest-friendship relationships?	Greek identity?	Religious Law?	Security Maximizing?

This chart is not fully certain because I know of no ancient historians that have attempted to divide archaic society into such a chart. It is very useful for us, however, when identifying where we should begin looking for alternative legal processes.

Compared to the chart of capitalist society, the oikosplace has combined the functions of the economic and domestic spheres. The polisplace is similar to the citizenplace, and the world place is similar but less concerned with economic maximization (the efficiency mode of rationalization) and more concerned with issues of Greek identity and religion.

This chart gives us a place to begin looking for negotiation, between state law and other processes that are less concerned with loyalty to the state and more concerned

with other rationalities connected with other legal forms. In the following two sections, I will examine two ancient laws that show evidence of legal pluralism. The first is Drakon's homicide law of c.620 BCE. This law recognizes a strong process of inter-familial negotiations, which influenced the way Drakon's law was written. These familial negotiations are a separate legal system that can be identified with the oikosplace in Greek society. The second section looks at the legal system of oath trials in early law and primarily the Gortyn Law Code. This written code recognizes the oath as an alternative legal system more affiliated with the world place of Greek society. Both examples are evidence that state law negotiated and recognized other legal systems in Greek society. Both examples are thus evidence of legal pluralism.

### 3.1 Drakon's Homicide Law and Blood-Money

Drakon's homicide law is our earliest example of law in Athens. It is believed to have become the process used to resolve murder disputes by all Athenians after its enactment in 620 BCE. The orators support this conclusion, and Demosthenes cites the law at 43.57. Most helpful of all is the fact that we have a fragmentary inscription dating from 409/8 BCE when the law was recopied. The language of the law is considered to be the genuine language from 620 BCE.

#### ΠΡΟΤΟΣ ΑΞΣΟΝ

καὶ ἑὰμ μὲ' κ [π]ρονοί[α]ς [κ]τένει τίς τινα, φεύγει[ν·δ]ι-  
 κάζειν δὲ τὸς βασιλέας αἴτιον] φόγ[ο] Ε———<sup>17</sup>———Ε [β]ολ-  
 εύσαντα· τὸς δὲ ἐφέτας διαγι[δ]ο[γ]α]. [αἰδέσασθαι δ' ἑὰμ μὲν πατέρ]ρ ἑ-  
 ι ἑ ἀδελφός] ἑ ἠῆς, ἡπάντ[α]ς, ἑ τὸν κοιλύοντα κρατῆν· ἑὰμ δὲ μὲ] ἡοῦ-  
 τοι ὄσι, μέχρ' ἀνεφ[σ]ιότετος καὶ [ἀνεφσιῶ, ἐὰν ἡπάντες αἰδέσ]α-  
 θαι ἐθέλοσι, τὸν κοιλύοντα [κ]ρατῆν· ἐὰν δὲ τούτον· μεδὲ ἡῆς ἑί, κτέ-  
 νει δὲ ἄκοιν], γνῶσι δὲ ἡ[ο]ι φ[ρ]άτορες ἐὰν ἐθέλοσι δέκα· τούτος δ]ὲ ἡο-  
 ι πεντέκοι]ντ[α καὶ] ἡῆς ἀρ[ι]στ[ί]νδεν ἡαιρέσθον. καὶ ἡοι δὲ πρ[ό]τε[ρ]-  
 ον κρέν]α[ν]τ[ε]ς ἐν] τῶιδε τῶι θεσμῶι ἐνεχθέσθον. προειπῆν δ]ὲ τῶι κ-  
 τέγαγ[τι ἐν ἀγορ]ᾷ μέχρ' ἀεφσιότετος καὶ ἀνεφσιῶ· συνδιόκ]εν  
 δὲ [κ]ἀνεφσιῶς καὶ ἀνεφσιῶν παῖδας καὶ γαμβρὸς καὶ πενθερὸς κ-  
 αὶ φ[ρ]άτ]το[ρ]ας...

#### FIRST TABLE

Even if a man not intentionally kills another, he is exiled. The basileis are to adjudge responsible for homicide either the actual killer or the planner; and the Ephetai are to judge the case. If there is a father or brother or sons, pardon is to be agreed to by all, or the one who opposes is to prevail; but if none of these survives, by those up to the degree of first cousin once removed and first cousin, if all are willing to agree to a pardon; the one who opposes is to prevail; but if not one of these survives, and if he killed unintentionally, let ten phratry members admit him to the country and let the fifty-one choose these by rank. And let also those who killed previously be bound by this law. A proclamation is to be made against the killer in the agora by the victim's relatives as far as the degree of cousin's son and cousin. The prosecution is to be shared by the cousins and cousins' sons and by sons-in-law, fathers-in-law, and phratry members...<sup>42</sup>

<sup>42</sup> Text Stroud (1968); translation Gagarin (1981)

Our fortune to have a copy of the text has also come with two particularly difficult questions of interpretation, which are best solved if we use this law as evidence of interlegality. The ancient sources continually refer to Drakon's homicide law in cases of intentional homicide, and usually with the penalty of death. The language of the law, however, does not mention either intentional homicide or a penalty of death. Moreover, it seems to redundantly attribute powers of pardon to the victim's family when we know from later sources that family members were the only possible litigants. The critical evidence is found in two unusual facets of the law. The first is how we interpret the *καὶ ἐὶ* that begins the law. Is the *καὶ* a connective to another written part of the text, and does this mean that Drakon's homicide law, as we have it written here, is incomplete? Second, the inclusion of such a detailed process of pardon in lines 13-18 are an often overlooked, but important provision of the law. Why does Drakon spend so much time describing how someone can override the state's decision? I will argue three things about this law. First, that it is complete as it was written and that it purposefully excluded a law about intentional homicide. Second, that the conditions of pardon from lines 13-18 are evidence of interlegality. These conditions are the result of a negotiation between the state homicide law and the existing alternative process of blood-money negotiation. Finally, I argue that both of these are indicators of legal pluralism because they reveal that the law must convince individuals to use the state's legal process instead of another available legal process.

The beginning of the text itself, the *καὶ ἐὰν μὲν κ [π]ρονοίῃς* is the most disputed part of this law because its interpretation determines whether this inscription supports statements in Classical authors that Drakon did write a law for intentional homicide, even though this law only speaks directly about unintentional homicide. An excellent survey of scholarly opinions is provided by Gagarin in his 1981 monograph. He breaks the scholarly debate into three views, each of which insists that Drakon wrote a law of intentional homicide that is unrepresented on the stone. They base this assertion on passages in Demosthenes and elsewhere. The first, presented by Busolt and Swoboda, is that this law is complete.

...auch es betrifft auch nur die Falle von unvorsätzlichem und straflosem Totschlag und knüpft mit *καὶ*, mit "und" oder "auch", unmittelbar an eine vorausgesetzte Satzung Über Totschlag an. Die Form der Anknüpfung (ohne *δέ*) beweist, dass es nicht ein abgebrochenes Stück seines Blutrechts ist, sondern in der tat "das Gesetz (also das ganze Gesetz) Drakons Über *φόνος* umfasst, das nach dem Volksbeschluss in Stein gehauen werden sollte.<sup>43</sup>

They argue that because it begins with *καὶ ἐὶ* instead of the typical connective *δέ*, we should consider the law complete. To explain the absence of a rule for intentional homicide, they believe this law was actually an amendment to an existing law that covered intentional homicide, coming to be together referred to as "Drakon's law". The other law, however, was not republished in 409 because intentional homicide was not actually part of what Drakon prescribed.

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<sup>43</sup> Busolt-Swoboda (1926) vol. 2, p.811

The second opinion, argued most avidly by Kohler and Harrison, proposes that the original law did have a part about intentional homicide that was not recopied. Kohler thinks this law was on another stele that was not preserved, and Harrison thinks that the ΠΡΟΤΟΣ ΑΞΩΝ at the top stands for "the contents of the first axon" on which we would find the intentional homicide law.

Finally, the third opinion is argued by Stroud in his seminal 1968 monograph on the law. He argues that the intentional homicide law is found later in the law, and believes that he detects enough letters in line 56 (ΕΡΟΣ) to make out a "ΔΕΥΤΕΡΟΣ ΑΧΩΝ," later on the stone after which the law was probably written. The first *καί* of the law becomes adverbial and the entire first phrase is to be translated "even if without forethought a man kills another. . ." He uses his own insertions from Demosthenes' s passages in lines 14-22 and 27-29 to argue that there must have been another law for intentional homicide, and concludes that the second axon is the only place where it could be.

Each of these hypotheses has its problem. We have no evidence that homicide laws existed for Drakon to amend. If one did exist, there is no apparent reason that they would not have been copied with his, especially if they were collectively known as Drakon's. If there was an intentional homicide law that was simply not recopied, there is no reason why the *καί* would still be included in the recopied law. Finally, there is absolutely no proof that, even if line 56 marked a second axon, the axon would contain the law on intentional homicide. There is actually quite a bit of circumstantial evidence against it. Examining other law codes, Gagarin notes that in the cases of penalties, laws are written in hierarchical order by either seriousness of offense or status of the offenders or victims.<sup>44</sup> We would expect the most serious crime, intentional homicide, to be written first if it was written at all.

Gagarin's opinion is that the law is complete as it is. However, he also believes that this law, as written, implies and was meant to imply that the punishment for intentional murder was the same as that for unintentional murder. The exception "even if" at the beginning shows that both intentional and unintentional murder are subject to the same procedures. He has to do this because he does not question later assertions that Drakon made a law covering intentional homicide as well as unintentional homicide.

I have no doubt that by Demosthenes' time all homicide laws were considered a part of Drakon's original mandates. However, I have reservations about casting this back upon our interpretation of what Drakon originally meant in the law that we have. If we survey early legal inscriptions we find that early laws rarely make general mandates.<sup>45</sup> In fact, most every law is meant to apply to a very specific set of circumstances that are unusual. If it is the norm that early archaic laws tend to the specific situation, then it should not be surprising that Drakon wanted to fix a law for a situation that was surely far less common than intentional homicide. Moreover, we should be wary of believing the orators when they attribute particular laws to the lawgivers. Steven Johnstone has rightly shown that orators invoke lawgivers as a rhetorical strategy that allowed litigants to interpret laws flexibly.<sup>46</sup> They often attributed a law to a lawgiver only to widen the

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<sup>44</sup> Gagarin (1981)

<sup>45</sup> see Hölkeskamp (1992) for his conclusions

<sup>46</sup> Johnstone (1999) pp.25-33

scope of what that law covered. Athenian litigants were less concerned with attributing laws to the correct historical source and more concerned to attach Drakon's name onto something that would help their argument. We should expect Drakon's law, then, to cover only a very specific circumstance, in spite of claims by later orators that Drakon established the law for all murders.

Thus, Gagarin only provides half the answer to the problem. We do have a complete law that gives a rule for unpremeditated murder. We do have the law that came to be the basis for all Athenian homicide law by the 4th century. But we do not have a law that was meant to apply to homicide both intentional and unintentional. Drakon's law is meant only for the unusual case of murder without forethought.

My second argument concerns perhaps the least talked about aspect of the law, the conditions of pardon in lines 13-18. These conditions incorporate an alternative legal process to settle homicide disputes in use before and after Drakon, namely negotiations between families about compensation for homicide victims, which I will call "bloodmoney negotiation." Drakon gives legal powers of pardon to the family of a homicide victim, but these were already the only people allowed to bring suit for murder. In Greek law, murder is a private crime that cannot be prosecuted by the citizens at large. It was the responsibility of the family to act. Therefore, the family at all times had power of pardon by the simple reason that no one else had the ability to file suit. The law we have is redundant, and few scholars have addressed this issue. Gagarin has noted this peculiarity and has argued that Drakon's law tries to set a restraint on the family's right to grant pardon by requiring a court procedure first. This doesn't answer the question because if someone knew that they were going to settle a case why would they go to court in the first place?

There was certainly a well-known procedure for familial negotiations about compensation for murder victims when Drakon wrote his law. In the Iliad, two examples, are given. First is the dialogue between Ajax and Achilles in book 9 (632-36).

...καὶ μὲν τίς τε κασιγνήτοιο φονῆνος  
ποινήν ἢ οὐ παιδὸς ἐδέξατο τεθνηῶτος·  
καὶ ῥ' ὁ μὲν ἐν δῆμῳ μένει αὐτοῦ πόλλ' ἀποτίσας,  
τοῦ δέ τ' ἔρητύεται κραδίη καὶ θυμὸς ἀγήνωρ  
ποινήν δεξαμένῳ...

Even someone when a brother or his own son is murdered takes compensation.  
And the one remains there among the people having paid much, and the heart and proud spirit of the other is soothed by taking the money.

Ajax uses blood-money negotiation in a metaphor designed to persuade Achilles to accept compensation for the harm Agamemnon did to him by taking away Briseis. The metaphor only works if blood-money negotiation truly is a well-known procedure. The second passage is the trial scene on Achilles shield in book 18 (497-508).

...ἔνθα δὲ νεῖκος  
ῥώρει, δύο δ' ἄνδρες ἐνεΐκεον εἴνεκα ποιῆς  
ἄνδρὸς ἀποφθιμένου· ὁ μὲν εὐχέτο πάντ' ἀποδοῦναι  
δῆμῳ πιφαύσκων, ὁ δ' ἀνείκετο μηδὲν ἐλέσθαι...

And there a quarrel has broken out, and two men are fighting about the compensation for a man having died. One man claims to have paid all, declaring it publicly, but the other refuses to take anything.

The trial described surrounds not the murder, but rather whether the victim's family will accept the blood-money compensation they have been offered. The one side claims to have paid everything required of him, but the other refuses to accept the compensation. The case is referred to judges. The man who claims to have paid everything required of him believes he has a public complaint, and this shows a public conception of fair compensation in blood-money negotiation. Both examples show that the process of blood-money negotiation in cases of homicide was well known. And the use of blood-money did not end after Drakon. Although it came to be looked down upon, the practice of taking money as compensation for a murdered relative lasted into the 4th century and appears in Demosthenes 58.28-29. Both before and after Drakon, a murderer could use the process of blood-money negotiation to avoid prosecution.

So why does Drakon include this provision in his law? The passage does two things. First, this clause officially limits the parties responsible for pardon to those of the male relatives. This isn't a change since these were the only relatives allowed to appear in court anyways. If anything, it encouraged blood-money negotiation by expanding it from merely the father or brother (as in Ajax's speech) to include other male relatives. In doing so, this law in one sense actually extends the process of blood-money negotiation. But in another sense, it does limit it by setting a time on when these negotiations can take place. The law implies that the family can intervene only after the ephetai have passed sentence. If this is the case, then the law actually asks people to wait on blood-money negotiation until after a court tries the murderer. Now, families were *not required* to do this. There is no way that it could keep families from simply not prosecuting, but it did allow families to follow Drakon's law, the law sponsored by the polis, without giving up the process that they were used to. In modern law, we send cases to mediation and arbitration before trial to reduce the number of cases that must go to court. Drakon's law attempts the opposite: by keeping blood-money negotiation on the table, it encourages families to use the state's courts before deciding that arbitration/mediation/negotiation is the best way to settle the dispute.

Our discussion so far has shown two things. First, that the law is complete but can be used only in the specific and unusual situation of unintentional murder; second the law allows a system of blood-money negotiation to operate in conjunction with Drakon's law. Both of these arguments give evidence that this law was created in a legally pluralistic society. Athenians already had a blood-money negotiation to resolve intentional homicide disputes before Drakon's law was written, and that process continued to be used after Drakon's law took effect. Drakon's law lacks a rule about intentional homicide because it wasn't needed at the time that the law was written. Instead the law we read attempts to find a niche that made it useful. This is the unusual situation of killing *μη ἐκ προνοίας*, or without giving forethought.

Next, the pardon clause shows that the law was meant not only to find a niche opposite the process of familial negotiation, but also to eventually incorporate bloodmoney negotiation into Drakon's legal process, the one sponsored by the state. The

clause "allowing" the family pardon rights did not grant the family any powers that it did not already have or change the process under which families were accustomed to operate. Drakon's law entices individuals into using the court system by allowing them to maintain the present alternative system. It is trying to slowly incorporate blood-money negotiation into the state's legal process. There is no reason to believe that the enactment of Drakon's law radically changed the way that the average Athenian of the late 7th century BCE resolved his dispute with someone who murdered his kinsman. The ambiguity of Drakon's law, however, was probably intentional. While it was meant only for cases of unpremeditated murder, its language allowed the rule, if it was frequently used by the Athenians, to apply to intentional homicide as well. And history shows us that this did in fact happen by, at the latest, the 4th century BCE.

With this new understanding, Drakon's homicide law shows that the earliest written laws were written not with the knowledge that these would immediately replace the existing non-written processes of dispute resolution in the archaic polis. Rather, these laws were written so that they could compete as alternative processes of dispute resolution, specifically with the process of blood-money. Drakon's law was written in a situation of legal pluralism because it recognized and negotiated with an alternative legal process.

### 3.2 Oath trial and the Gortyn Law Code

Drakon's law on homicide reveals one alternative legal system, blood-money negotiation, that happened to have strong ties to the oikosplace in Greek society. Another alternative legal system can be found that is closely connected with the world place of Greek society. This alternative legal system is that of oath-trials. Oath-taking was the primary means of securing treaties between poleis because security for the treaty was given to the gods.

"Faith" (*pistis*) was the underlying basis of all international relationships, the determining factor of all acts of public conduct as well as private; it was the fundamental principle of fairness, equity (*epieikeia*). As a rule, "faith" was reinforced by a solemn oath, and the most common oath-phrases of ancient writers dealing with interstate pacts were: "to give or exchange oaths and faith" (*horkous kai pis tin didonai or poieisthai*); "to conclude or break oath-bound faith" (*horkia pista temnein or delesthai*); and "to conclude a treaty by oaths accompanied with libations and sacrifices" (*spondas kai horkia temnein*).<sup>47</sup>

Importantly, however, even in international oaths, each city swore on the local gods. The god to whom one swore was a guardian of the political community to which one belonged. In this way, oaths served to protect political communities from strife within the polis just as outside, and the oath played an important role in Early Greek Law.

Earlier scholars emphasized trial by oath as a primitive means of dispute resolution that came to be minimized by the introduction of state law. Hence Bonner and Smith state, "In a primitive state of society as long as men stood in complete awe of the

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<sup>47</sup> Plescia (1970) p.58

gods an oath in the name of the gods would have proved sufficient, for few men would have tempted Providence by swearing a false oath.<sup>48</sup> These early theories were formulated on outdated evolutionary models of legal development from religious to secular. Trials by oath did not cease with the onset of state law, nor do we see so marked an increase in the amount of secularization of the law courts that would be required to justify Bonner and Smith's statement. The citizen of the archaic polis did not necessarily afford more or less awe to the gods than the citizen of the classical polis.

Both before and after law was first written down, trial by oath is limited to men. It is a process that includes a formal challenge (later called a πρόκλησις) which must be agreed upon by both litigants, without a judge. If the challenge was accepted, the result decided the dispute. Homer provides evidence for the process as it took place in the archaic age. In his Homeric hymn to Hermes, Hermes offers to take an oath that he never stole Apollo's cattle.

εἰ δ' ἐθέλεις, πατρός κεγαλήν μέγαν ὄρκον ὁμοῦμαι  
 μὴ μὲν ἐγὼ μήτ' αὐτὸς ὑπίσχομαι αἴτιος εἶναι,  
 μήτε τιν' ἄλλον ὄπωπα βοῶν κλοπὸν ὑμετεράων,  
 αἴ τινες αἰ βόες εἰσὶ· τὸ δὲ κλέος οἶον ἀκούω.

But if you wish, I will swear a great oath on the head of my father that neither did I myself steal them nor have I seen that anyone else at all was the thief of your cattle, whatever cattle these are, such as I hear about this theft.

The trial takes place between two gods. The defendant, Hermes, makes a challenge to Apollo which Apollo rejects because he believes he has a case strong enough for trial. The next example comes from the dispute between Menelaus and Antilochus after the chariot race in Iliad book 23.

ἀλλ' ἄγατ', Ἀργείων ἡγέτορες ἠδὲ μέδοντες  
 ἐς μέσον ἀμφοτέροισι δικάσατε, μηδ' ἐπ' ἀρωγῇ,  
 μή ποτέ τις εἴπησιν Ἀχαιῶν χαλκοκιτῶνων·  
 Ἄντιλοχον ψεύδεσσι βηισάμενος Μενέλαος  
 οἴχεται ἵππου ἄγων, ὅτι οἱ πολὺ χείρονες ἦσαν  
 ἵπποι, αὐτὸς δὲ κρείσσω ἀρετῇ τε βίῃ τε.  
 εἰ δ' ἄγ' ἐγὼν αὐτὸς δικάσω, καί μ' οὐ τινά φημι  
 Ἄντιλοχ', εἰ δ' ἄγε δεῦρο, διοτρεφές, ἦ θέμις ἐστί.  
 στάς ἵππων προπάροιθε καὶ ἄρματος, αὐτὰρ ἰμάσθλην  
 χερσὶν ἔχε ῥαδιυῆν, ἧ περ τὸ πρόσθεν ἔλαυνες,  
 ἵππων ἀψάμενος γαίηοχον ἐννοσίγαιον  
 ὄμνυθι μὴ μὲν ἔκων τὸ ἐμὸν δόλω ἄρμα πεδῆσαι.

But come on, leaders and rulers of the Argives, judge both sides to the crowd, not with favor, lest someone of the bronze-coated Achaeans say at some point: "Menelaos beat Antilochos by lies and left driving the prize mare, although his horses were by far worse he was mightier in honor and strength." But I myself will judge and I claim that no one else of the Danaans will reproach me. For it will be a straight judgment. Antilochos, come over here, nobleman, as is custom,

<sup>48</sup> Bonner and Smith (1930) vol. II p. 145

standing here in front of the horses and chariot, then take the slender whip in hand with which you drove ahead of me, touching your horses, swear to the earthholding earth-shaker that you did not willingly hinder my chariot by trickery.

In this example, the challenge is issued by a prosecutor, but the process is the same. One complainant offers to resolve the dispute by an oath and names the terms of the oath. Antilochus subtly refuses the challenge, but had both agreed, the oath would have decided the dispute.

Modern scholars have formulated three opinions regarding the legal position of oath trials. The first and most prominent position is advocated by Gagarin. He believes that the oath trial was a legitimate way to solve a dispute, but that it was rarely employed for this purpose. Instead, it was most often used to improve the rhetorical position of the orator since it could be argued that the opponent was lying whether he accepted the oath or not.

In the same way, an oath-challenge was normally worded in such a way that the opponent would almost certainly refuse it. The litigant who offered the oath would then argue that the refusal proves his opponent is corrupt, not interested in the truth, etc.; but on the other hand, if the opponent does offer to swear an oath, one can argue that this shows he is a scoundrel who will say or do anything to win acquittal.<sup>49</sup>

He points to the absence of accepted oath challenges in the Classical period as primary evidence. He concludes that the only oaths sworn with any regularity were administered within the setting of the courtroom and then only as a last resort for evidentiary purposes. Judges ordered oaths only when it was unlikely that unbiased witnesses would come forward.<sup>50</sup>

The relative unimportance of trial by oath in Gagarin is contrasted to the central legal importance of the oath found in Thür. Thür believes that the very purpose of the state judge in early Greek law is to decide the terms of the oath and force the litigants to take it. The judge decided all cases by conjuring an oath that would satisfy the litigants involved.

In contrast, in early Greece magistrates did not decide cases themselves. Rather they would formulate an oath and decide which of the litigants was to submit to taking it. This-as I shall show-is the meaning of *dikazein* ('to decide').<sup>51</sup>

The oath is thus the central method of both proof and judgment within the state legal system. Thür believes that this applied only to the archaic polis, and that the meaning of *δικάζειν* changed slowly into simply "judge" or "decide" by the Classical period. His

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<sup>49</sup> Gagarin (1995) p. 129

<sup>50</sup> "I conclude that in early Greek law oaths could help friends settle their disputes peacefully and in the absence of other evidence or means of settlement, an oath was better than nothing. But except for certain cases at Gortyn, there is no evidence that a judge could impose a decisive oath on a litigant or that oaths ever were a primary means of settling disputes." Ibid p. 133.

<sup>51</sup> Thür (1996) p.61; see also Thür (1989; 1970)

opinion relies on two passages in the Iliad, one of which he misinterprets and the other he guesses on the meaning of a disputed word. His argument is not very strong, and we will return to these examples later.

Finally, the opinion closest to the legal pluralist view is advocated by Mirhady. He believes that trial by oath is an alternative dispute resolution process before going to court in Athens.

It is true that the evidence for all kinds of challenges, including the oath challenge-despite its appearance in so many different forms of literature-is rather slight. The inference drawn from this lack of evidence has been that oaths were rarely used, that the challenges were simply rhetorical ploys. But it appears they were meant to lead to settlements of cases out of court, perhaps on the basis of some compromise (entailed in a promissory oath). So it is understandable that we do not have many speeches referring to them, since the speeches we have were spoken before *dikasteria* in cases where all such compromise had failed.<sup>52</sup>

Trials by oath are so infrequently mentioned in the orators because these cases are in courts that are being used in place of trial by oath. For the Classical period, Mirhady's argument is the strongest. Thür avoids the Classical period altogether and Gagarin ignores half of the arguments that Mirhady makes. Mirhady quotes a passage from Aristotle that seems to me strong evidence; Gagarin seems to overlook it and argues basically that these disputes are too important to be tried by anything except a court of law.<sup>53</sup> Mirhady has presented a much stronger argument than Gagarin.

The only problem with Mirhady's argument (and Gagarin's for that matter) is that the Law Code of Gortyn seems an exception in both of their views. It is clear in this law code that oaths were appointed by law, and they were probably overseen by judges. The code would seem to point toward Thür's interpretation, except that the verb *δικάζειν* is used only once when an oath is required. This one example comes from a portion of the text that is a later amendment to the longer code, and it seems to go against Thür's chronology for the meaning of *δικάζειν*. At other points, the word *ἀπομοσία* is used for the oath-process in the courtroom. The problems with the Gortyn Law Code for these scholars are again the result of legally monistic and centrist beliefs about the nature of law. Mirhady believes that oath trial was not a "legal" action; it was a way of avoiding the courtroom.<sup>54</sup> Gagarin and Thür search in vain for a way to place this process within state law, believing that all legal actions culminate in a courtroom trial. The Gortyn Code shows these assumptions to be false. This law recognizes the process of oath and negotiates with it, just as we saw in Drakon's law. Because of this, the Law Code of Gortyn shows that oath trial is an alternative legal system, and it negotiates with it in two ways. First, state judges offer to accept the risks of the oath for the litigants in making his decision. In doing so, there were benefits for both

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<sup>52</sup> Mirhady (1991) p.83

<sup>53</sup> Arist. *Rhet.* 1377a8 ff.

<sup>54</sup> *ibid.* p.79

sides over the oath trial process. Second, the code extends the use of oath trial to non-citizens (namely women and slaves) who had legal rights but were not able to be involved in oath trials. They could participate in the oath trial process only within the state courtroom.

The code generally commands judges to do one of two things when a case comes before them. For some, they were required to *δικάζειν*, or judge, the case. For others, they were required to *ὀμνύντα κρίνεν*, or decide under oath, the outcome of the case. These clauses are more distinct than they appear in English translations, as the following lines make clear.

...αἱ δέ κ' ἀντὶ δόλοι μολίοντι  
ποιόντες ὃν ἐκάτερος ἔμ-  
εν, αἱ μὲν κα μαίτυς ἀποπονεῖ, κ'  
ατὰ τὸν μαίτυρα δικάδδεν, αἱ  
δέ κ' ἔ ἀνποτέροις ἀποπονίοντι  
ἔ μεδατέροι, τὸν δικαστὰν ὀ-  
μνύντα κρίνεν.<sup>55</sup>

And if they contend about a slave, each declaring that he is his, the judge is to give judgment according to the witness if a witness testify, but he is to decide on oath if they testify either for both or for neither.

When the code asks a judge to *δικάζειν*, he is provided with either indisputable evidence of the testimony of witnesses. For this reason, *δικάζειν* means much more to preside over a case than truly judge because there is usually no apparent dispute of fact. When the judge decides by *ὀμνύντα κρίνεν*, he acts much closer to our modern sense of judge a dispute. He is asked to do this when there are competing factual claims, with no witnesses or witnesses for both sides. In this case, he decides who is speaking the truth and what the proper settlement will be. Only when a factual dispute exists must the judge swear an oath.

Why the discrepancy of oath in these procedures? Let's consider the actions of the litigant who brings each type of case to trial. In the first procedure based on *δικάζειν*, one litigant has an evidentiary advantage over the other, which eliminates the probability that a trial by oath will be proposed.<sup>56</sup> If litigant A has an evidentiary advantage, why would he offer his opponent, B, a trial by oath in lieu of a court trial where A is assured by law to win? Why should he risk the chance that B will perjure himself in the oath trial and avoid the penalty? In a situation with a factual dispute, one in which neither side has an evidentiary advantage, each litigant is much more likely to settle the dispute out of court because the risk involved is greater on both sides. If A can get B to back down from an oath and pay at least part of the suit, he will not take a case to trial where the judgment could go either way. In this situation, the code had to incorporate oath-trial to entice people to use the state's courts. The code presents the judge as a guarantor of the oath trial process. He can ensure a proper oath trial because he both sets the terms of the oath

<sup>55</sup> Il. 18-24, text and translation from Willets (1967)

<sup>56</sup> Notice that in Homer's Hymn to Hermes, Apollo rejected the oath and he had been alerted to Hermes' guilt by an eye-witness. Moreover, Hermes seemed perfectly willing to perjure himself, and Apollo declined to take that risk.

and takes it. This process avoids long stalemates and counter-challenges and resolves the dispute more quickly. Not every dispute without evidence would go to trial, and undoubtedly oath trials were most prevalent in these cases. But it is significant that in the cases most likely to be resolved by oath trials, the Gortyn Code recognizes this process and incorporates it into the judge's procedure.

The Gortyn Code incorporates oath trials not only with respect to the judge's actions, but also with respect to the witnesses and litigants. In these cases, the code explicitly names an oath as the decisive factor in the dispute. This has been the cause for much confusion among scholars about the proper role of oath trial in the code, since it appears to be random when an oath decides a dispute and when it does not. A previously unconsidered common thread connects all of these situations. In each case of oaths required by litigants or witnesses, we see that the litigants or the witnesses are likely to be individuals that would not be able to participate in oath challenges.

The law requires oaths from witnesses and litigants in one of two ways. Four times in the code, the law specifically requires an oath from one of the litigants. Three times in the oath, a litigant or witness is labeled as ὀρκιότερος which has traditionally been translated as "preferred in oath." Let us consider these cases before those specifically requiring oaths. The law first uses the term ὀρκιότερος during its sanctions for rape. A raped slave is to be ὀρκιοτερος in testifying whether she had been seduced by her attacker, in other words, whether it had been consensual or not.

ἐνδοθιδίαν δόλαν αἱ κάρτει δαμ-  
άσαιτο, δύο στατερωνς καρασ-  
τασεῖ· αἱ δέ κα δεδαμναμέναν, πε-  
δ' ἀμέραν, ὀδελόν, αἱ δέ κ' ἐν νυτ-  
τί, δύ' ὀδελόνς· ὀρκιοτέραν δ' ἔ-  
μεν τὰν δόλαν.<sup>57</sup>

If a person should forcibly seduce a slave belonging to the home, he shall pay two staters; but if she has already been seduced, one obol by day, but if in the night, two obols; and the slave shall be ὀρκιοτέραν.

This passage follows the terms employed for the rape of free women or men and serf women. Neither of these conditions require the rape victim to be ὀρκιοτέραν. The use of the term ὀρκιοτέραν is reserved specifically for slave women. The other two examples of ὀρκιοτέραν also involve slaves and women, though less explicitly. They both come during the section in which the law tells divorced parents who is responsible for newborn children.

...αἰτέκοι γυνὰ κ-  
ερεύουσα, ἐπελλεῦσαι τῷ ἀ-  
νδρὶ ἐπὶ στέγαν ἀντὶ μαιτ-  
ύρον τριῶν. αἱ δέ μὲ δέκσαι-  
το, ἐπὶ τῷ ματρὶ ἔμεν τὸ τέκ-  
νον ἔ τράπεν ἔ ἀποθέμεν· ὀρκ-  
ιοτέροδ δ' ἔμεν τὸς καδεστ-

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<sup>57</sup> Col. II, 11-16

ἀνὴς καὶ τὸς μαίτιρανς, αἱ  
 ἐπέλευσαν. αἱ δὲ οἰκέα τέ-  
 κοι κερέουσα, ἐπελεύσαι  
 τῷ πάσται τῷ ἀνδρός, ὃς ὄ-  
 πειε, ἀντὶ μαιτύρον δυῶν.  
 ...κὸρκιο-  
 τερον ἔμεν τὸν ἐπελεύσαν-  
 τα καὶ τὸς μαίτιρανς.<sup>58</sup>

If a wife who is separated should bear a child, they are to bring it to the husband at his house in the presence of three witnesses; and if he should not receive it the child shall be in the mother's power either to rear or expose; and the relatives and witnesses shall be ὀρκιοτέροδ as to whether they brought it. And if a female serf should bear a child while separated, they are to bring it to the master of the man who married her in the presence of two witnesses...and the one who brought it and the witnesses shall have preference in the oath.

Just as in the previous passage, the law uses ὀρκιοτέροδ to describe a group that certainly included at least one woman (the mother), and probably attending women as well. The mother is to bring the child with three witnesses to the father, and since the law applies specifically to divorced women, it is reasonable to assume that some of these women lacked husbands or other male relatives to act as witnesses. Although the law mentions relatives, the relatives to which it refers are specifically the relatives of the ex-husband since the term τὸς καδεστάνς means not just relatives but specifically relatives through marriage. These are not the blood relatives of the ex-wife, but those of the ex-husband. On the wife's side, the law makes any witness ὀρκιοτέροδ since it is likely that the divorced woman might lack male relatives and instead ask slaves or other women to serve as witnesses. In every case where the law uses ὀρκιότερος, the term is meant to apply specifically to women and slaves, who could not participate in oath trials on their own.

The same principle applies to situations in which litigants are required to take oaths. The Code specifies an oath only for a woman or in cases that it is likely for a slave to have a business interest in the suit. There are four places at which a code is prescribed. Two of them refer to the same situation, which requires a wife being divorced from her husband to swear an oath regarding the divorce settlement.

...ὄν δέ κ'  
 ἔκσαννέσεται δικάδσαι τ-  
 ἀν γυναικ' ἀπομόσαι τὰν Ἄρ-  
 τεμιν πὰρ Ἀμυκλαῖον πὰρ τὰν  
 Τοκσίαν. ὅτι δέ τίς κ' ἀπομο-  
 σάνσαι παρέλει, πέντε στατ-  
 ἔρανο καταστασεῖ καὶ τὸ κρ-  
 έος αὐτόν.<sup>59</sup>

<sup>58</sup> Col. III, 44-55, Col. IV, 6-8

<sup>59</sup> Col. III, 5-12; the other reference to this oath is at XI, 47ff. This clause is an amendment that requires a woman to take this oath within twenty days of the divorce in the presence of the judge.

... but as regards things which she denies, (the judge) shall decree that the woman take an oath of denial by Artemis, before the statue of the Archeress in the Amyklaian temple. And whatever anyone may take away from her after she has made her oath of denial, he shall pay the thing itself plus five staters.

The law comes in the context of a divorce. The woman receives half of the value of the estate and half of all the things she had woven while the couple was married. The law requires that the wife give back anything more than this that she takes. In cases where she denies to have taken something that belongs to the husband, the oath settles the case. What is so important about the oath is that it is administered by a judge and it applies specifically to a woman. If it were a free man, there would be no need for the court because the oath-trial could be done outside. We have no evidence that women could participate in oath trials, and thus the state court has found another niche. The states judge will administer the oath as if it were an oath trial against the wife. The second and third required oaths are both business disputes, which would often involve slaves or serfs. The second reference solves disputes arising over debts on inherited property.

...ἀνδοκ-  
ἀδ δὲ κένκοιστᾶν καὶ διαβολᾶς κ-  
αὶ διρέσιος μαίτυρες οἱ ἐπιβ-  
ἀλλοντες ἀποποιόντων. ἔ δέ κ' ἀ-  
ποφείποντι, δικαδδέτο ὁμόσ-  
αντα αὐτὸν καὶ τὸν μαίτυρ-  
ανς νικῆν τὸ ἀπλόον.<sup>60</sup>

.. .but in the case of surety and money given as securities and fraud(?) and promise(?), the heirs as witnesses shall testify. And after they have testified, let (the judge) decree that (the plaintiff), when he has taken oath himself along with the witnesses, have judgment for the simple amount.

The heirs of some property testify as to a business claim on the property. These business claims most certainly contained dealings with both serfs and slaves, since slaves often owned their own businesses and ran their own economic affairs. Serfs also had economic autonomy, though were certainly no thought of equally in terms of the law since special laws and penalties are demarcated for them. Free men, serfs and slaves all came into contact economically, though we have no proof that slaves or serfs could receive an oath challenge. This law again uses the states court to extend oath trials where they could not go before. The final evidence is the most striking because it even maintains the autonomy of the litigant to give an oath challenge.

αἴ τις κα πέρα-  
Ι συναλλάσσει, ἔ ἐς πέραν ἐπι-  
θέντι μὲ ἀποδίδου...  
...αἴ δὲ μαίτυρε-  
ς μὲ ἀποποιόιεν, ἔ κ' ἔλθει ὁ συ-

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<sup>60</sup> Col. IX, 34-40

ναλλάκσανς, ὅτερόν κα κέλεται ὁ  
μεινπόμενος, ἔ ἀπομόσαι ἔ σὺν-

If one has formed a partnership with another for a mercantile venture, in case he does not pay back the one who has contributed to the venture... but if witnesses should not testify, in case the contracting party comes, whichever course the complainant demands, either to deny on oath or—

Unfortunately, the stone is lost at the point it states the alternative to oath for the complainant. This is the only point at which the litigant has the opportunity to decide the outcome of a case. Just as above, the business ventures described here were open for ~ partnerships between all social classes. In this case, the law not only uses oath trial but allows the complainant to decide if he wants to implement it in the courtroom setting. In every example in which the state specifically regulates an oath, the situation calls for the possible, likely or certain involvement of a litigant or witness who could not be challenged in an oath trial—namely a woman, serf, or slave.

The Law Code of Gortyn, then, recognizes and negotiates with the alternative legal process of oath trial in two ways. It finds its niche by allowing the citizens of Gortyn to use the courtroom as a place to conduct oath trials about matters where a typical oath trial would have no jurisdiction. The fact that every instance of ὀρκιότερος and every specifically defined oath would often involve a non-citizen male or woman shows that these cases were specifically written to allow an oath in cases where oaths were not possible by customary oath trial. Next, in cases between two citizens, the code requires judges to δικάζειν disputes that would likely be brought to trial, but to use oaths in cases where factual disputes make an oath trial more likely. Just as in Drakon's Law, the Code allows litigants to keep their alternative process within the confines of state law. It has recognized and negotiated with the process of oath trial, an alternative legal process. The Gortyn Law Code is thus another example of legal pluralism, this time with oath trial.

#### 4.1 Further Considerations

Both Drakon's homicide law and the Gortyn Law Code show evidence of legal pluralism. In Athens, a process of compensation for murder victims existed both before and after Drakon's law was enacted. Drakon's law reveals that it has recognized this process and is competing with it because it was written to incorporate blood-money into the new legal process sponsored by the state. At Gortyn, the law similarly shows negotiation with the existing process of trial by oath. It still allows cases to be decided merely by the swearing of an oath, but like Drakon's law, it attempts to incorporate trial by oath by using judges as guarantors or extending oath-trials within the court to situations in which oath trial could not previously have been used. In both examples, the state law has recognized and negotiated with another legal process, and archaic Greece must be a legally pluralistic society.

These examples prove that archaic Greece was a legally pluralistic society. Scholars can no longer assume that laws were written merely to provide them with immediate authority. The first legal code had to compete with other legal systems in order to attract cases and gain legitimacy in the polis. The citizen body as a whole did

not unanimously approve the laws that eventually came to be identified as those of the polis. If these were not at their inception collaborative rules of the citizen body, then who is pushing for this new legal system? This question is particularly important because it relates directly to the theories of state formation that legal centrism supports. In current theories of written law, the state's legal system was the result of unexpected situations that the polis faced which the laws were meant to prevent in the future. The system was meant to benefit the citizen body as a whole, and thus it was either immediately or very quickly understood to be the only legitimate law. But as we have seen, the law was actually trying to *entice* citizens to use the state's law, and this raises doubts that it was ever the unitary expression of any citizen body. But if it didn't belong to all the citizens, to what group did the new legal process belong? In other words, who wrote laws down in the first place?

Each early written law probably negotiated with different sets of alternative laws depending upon its location. It is not surprising that the earliest laws that we possess focus on widely different things, and our examples are witness to this, with Athens having our earliest criminal law but Gortyn placing more of an emphasis on issues of property, marriage and social status. What is surprising, however, are the similarities of early laws. Most of these laws set up a system of state-sponsored arbitration, of judges empowered by the state to settle disputes. A system of judges was just one of the many legal processes that could have become identified with the state. One could imagine the Athenian polis writing down codes about blood-money or Gortyn writing various oaths to be taken in different situations. Instead, we find the same push to empower judges to decide disputes.

The use of judges has also been noted in texts that predate written laws, and this evidence identifies who is connected to the process of empowering judges. Hesiod, writing in the 7th century BCE, has two passages that identify the role of the judge in pre-law society, one from the *Theogony* and one from his *Works and Days*.

Καλλιόπη θ' ἡ δὲ προφερεστάτη ἐστὶν ἀπασέων.  
 ἡ γὰρ καὶ βασιλεῦσιν ἅμ' αἰδοίοισιν ὀπηδεῖ.  
 ὄντινα τιμήσουσι Διὸς κοῦραι μέγαλοιο  
 γεινόμενόν τε ἴδωσι διοτρεφέων βασιλῆων,  
 τῷ μὲν ἐπὶ γλώσση γλυκερὴν χεῖουσιν ἔέρσην,  
 τοῦ δ' ἔπε' ἐκ στόματος ῥεῖ μείλιχα· οἱ δὲ νυ λαοὶ  
 πάντες ἐς αὐτὸν ὀρώσι διακρίνοντα θέμιστας  
 ἰθείησι δίκησιν· ὁ δ' ἀσφαλῆως ἀγορεύων  
 αἰψά τι καὶ μέγα νείκος ἐπισταμένως κατέπαυσε·  
 τούνεκα γὰρ βασιλῆες ἐχέφρονες, οὔνεκα λαοῖς  
 βλαπτομένοις ἀγορήφι μετὰτροπα ἔργα τελεῦσι  
 ῥηιδίως, μαλακοῖσι παραιφάμενοι ἐπέεσσιν·  
 ἐρχόμενον δ' ἀν' ἀγῶνα θεὸν ὡς ἰλάσκονται  
 αἰδοῖ μείλιχίη, μετὰ δὲ πρέπει ἀγρομένοισι.<sup>61</sup>

And Kalliope. She is the most excellent of all.  
 For she attends upon glorious kings.  
 Whomever the daughters of great Zeus honor

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<sup>61</sup> *Theog.* 79-92

And see being born of Zeus's line of kings,  
 On his tongue they pour sweet drops,  
 And from his mouth soft words pour.  
 And indeed the people  
 All of them look upon him judging lawsuit  
 With correct judgments.  
 And, speaking strongly, he  
 Quickly puts an end to even some great quarrel knowledgeably:  
 For on this account kings are prudent, since kings  
 Accomplish restitution for people harming each other in the marketplace  
 Easily, advising them with persuasive words.  
 And the people revere him as a god walking up to the quarrel  
 With gentle shame, and he stands out among the crowd.

This passage identifies the king as the source of justice in the early polis. His means of judging is that of mediation, using persuasive words to find an acceptable answer. His "trials" are conducted in public, and his political power arises from his ability to solve disputes. The people revere him in the context of the quarrel, and he is prudent because he ends disputes.

The second Hesiodic passage from the Works and Days is often cited in the theory of legal centrism as evidence for the political instability that forced a united response from the citizens. Hesiod is writing this poem in response to a legal decision against him in a property dispute with his brother Perses.

αὐτίκα γὰρ τρέχει Ὀρκος ἅμα σκολιῆσι δίκησιν,  
 τῆς δὲ Δίκης ῥοθος ἐλκομένης ἢ κ' ἄνδρες ἄγνωσιν  
 δωροφάγοι, σκολιῆς δὲ δίκης κρίνωσι θέμιστας.<sup>62</sup>

For immediately Oath runs together with crooked justice  
 And when Justice is dragged away there is a clamor by which men act  
 As bribe-devourers, and with crooked justice judge suits.

Hesiod goes on to describe the consequences for both the citizen and the city of "crooked" judgments. He ends the section with an exhortation to the kings to guard against "crooked" judgments, though he repeats again that they are currently "gift-devouring." It is generally supposed that Hesiod is describing both his bitter feelings about his personal dispute as well as a more general problem rampant in society at this time. Because of this passage, Gagarin cites Hesiod as strong evidence of the strife that the archaic city had to face and that they answered with written laws. For us, two things are important. First, Hesiod uses the plural and implies either that there are many kings in the polis who are able to try disputes or that kings in every polis are corrupt. We will see that the former case is more likely. Second, Hesiod's never mentions either who he considers to be the polis or who these kings normally judge. There is no evidence in this passage about what sorts of people these courts are judging except Hesiod himself, who (if we believe in the autobiographical tradition) held enough property both to make it

an inheritance suit and who had enough spare time to compose at least two massive poems.

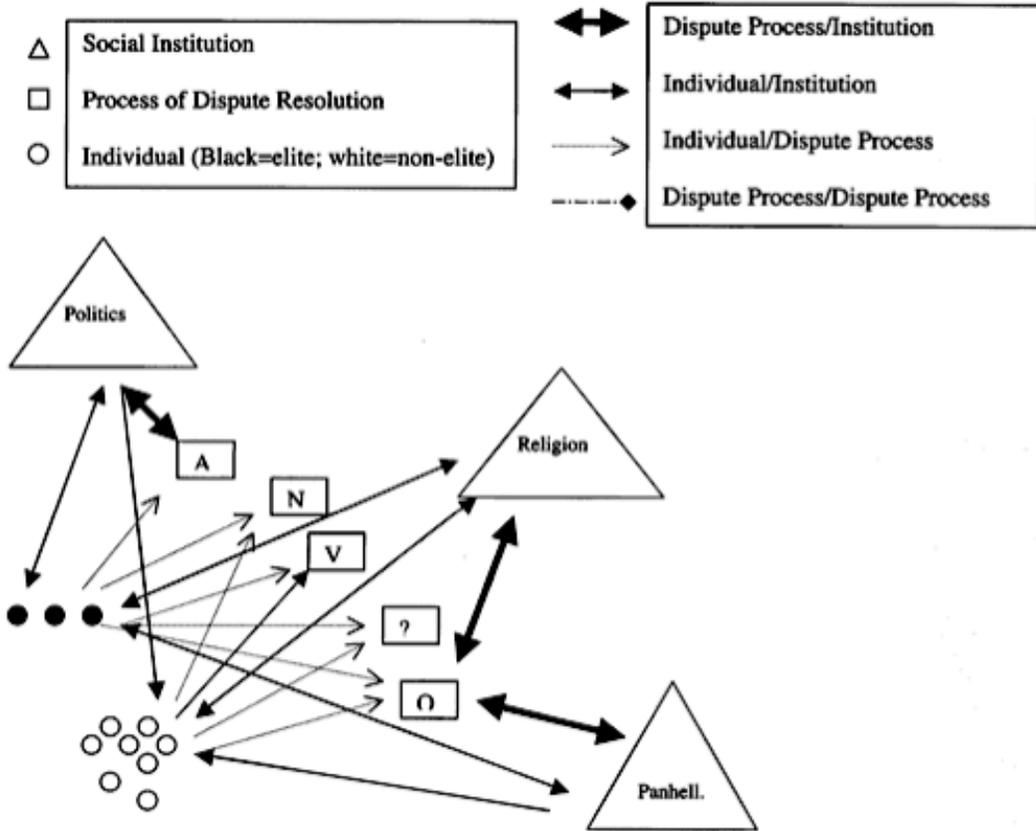
From Hesiod we know that trials with judges before written law were held in public and were judged by at least one basileus and probably many, The last piece of evidence was mentioned above in connection with the process of blood-money. It is in the trial scene on the shield of Achilles in Iliad book 18.

ἄμφω δ' ἰέσθην ἐπὶ ἴστορι πείραρ ἐλέσθαι.  
λαοὶ δ' ἀμφοτέροισιν ἐπήπνουν ἀμφὶς ἀρωγοί  
κήρυκες δ' ἄρα λαὸν ἐρήτυον· οἳ δὲ γέροντες  
εἴατ' ἐπὶ ξεστοῖσι λίθοις ἱερῶ ἐνὶ κύκλῳ,  
σκήπτρα δὲ κηρύκων ἐν χέρσ' ἔχον ἡεροφώνων.  
τοῖσιν ἔπειτ' ἦισσον, ἀμοιβηδὶς δὲ δικάζον.  
κεῖτο δ' ἄρ' ἐν μέσσοισι δύω χρυσοῖο τάλαντα,  
τῷ δόμεν ὅς μετὰ τοῖσι δίκην ἰθύντατα εἴποι.

And both were eager to reach an end with a judge.  
The crowd shouted as an aid for both sides  
And the heralds calmed the crowd. The elders  
sat on polished stones in a holy circle,  
and they held the scepters of the loud-voiced heralds in hand  
Then they sprung up towards them, and they judged one after another  
and in the middle lay two talents of gold  
to give to the one who spoke the straightest judgment among them.

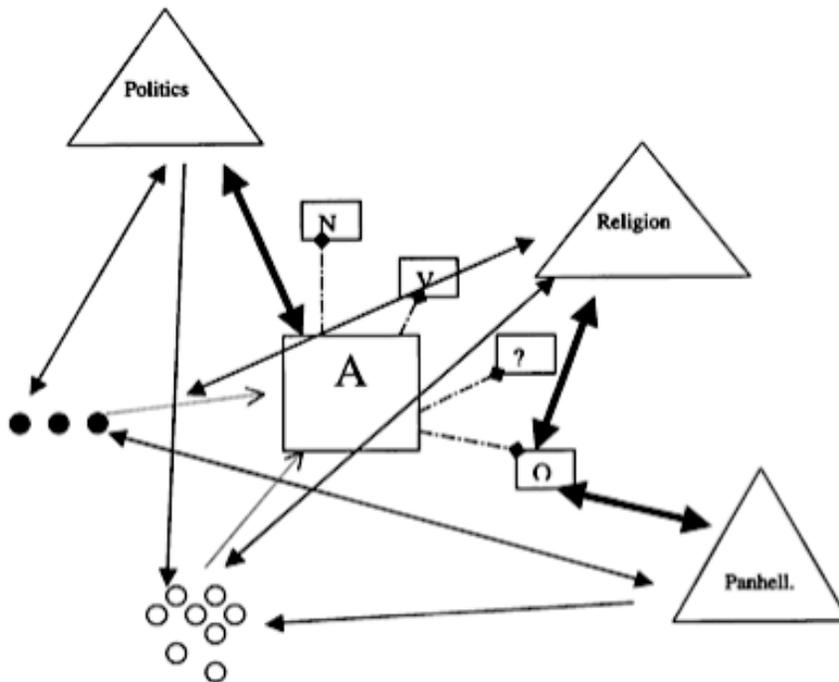
The scene confirms much of what we see in Hesiod. The trial takes place in public, and the people are actively involved which shows the political importance of these lawsuits. There are indeed several kings, and it appears that the litigants get to decide which king offered the best resolution. But this speech also gives us our best evidence for who the litigants of such matters were. The poem states that there are two talents of gold to be given for the best judgment. We can assume that the city does not pay for legal cases to be decided because there was no form of direct taxation. The only people that might be offering these two talents for dispute resolution could be the litigants, and this was a tremendous sum of money for any period in Ancient Greece, especially so for the archaic period. Admittedly, our evidence is slight and poor, but it is all we have to determine the litigants in these situations. Between this scene and Hesiod's description, we can hypothesize that the litigants that had chosen to make use of the system that eventually became the "official" system of the polis were rich citizens.

The state legal system has its roots in a system used exclusively by the wealthy. For an unknown reason, the wealthy wrote law that tried to incorporate the legal processes of the masses into their own. This process is best described in a diagram. The wealthy first protected their legal system, and left the rest to fend for themselves. (fig. 1)



**Fig. 1 Pre-Written Law Societies**

A is arbitration before a judge, accessed only by the rich and supported by political power. N is negotiation such as blood-money negotiation discussed in section 3.1 above. V is vengeance system. O is oath trials. I have left the ? box that stands for any other dispute resolution.



### 2.2 Ideal Post-Written Law Society

This chart represents the ideal that the elite was trying to create. Arbitration (A) becomes the only legitimate system through which other forms of dispute resolution can be accessed. The political institutions create law to support the court system, and the courts act as a social control mechanism.

These charts are the game plan for the elite. At first, their access to judges distinguished them from others. Later, they attempted to make this the only legitimate way to solve disputes, The interlegal negotiations are their attempt to create the ideal in figure 2. They realized that their political power allowed them to fix the rules of the justice game.<sup>63</sup>

### 4.2 Conclusion

This last conclusion is mere speculation on my part that will require much more serious research. But it does provide a constructive starting place and a new question for further research. What this paper shows is the following: First, the earliest written laws show evidence that they were not written to immediately replace the social norms existing before. These laws were written as a result of negotiations with alternative legal systems, and they attempted to entice people to take advantage of the state's new processes. These

<sup>63</sup> Flannery (1972) provides a fascinating contrast to this conclusion. He argues for two means of institutional change in societies: linearization and promotion. In the former, a higher institution begins to interact with a service that previously required a middle man. In the latter, the lower institution becomes a middle man in other interactions. Both seem at play here. More work needs to be done to identify how the political structure interacts with the legal structure of the archaic polis.

laws were written in a state of legal pluralism. Second, the legal system that was written down originally belonged to the wealthy citizens of the society.

These conclusions offer a plethora of areas for new study. My hope is that other legal processes that existed while these archaic laws were written will be revealed, and that some explanation will be offered for the wealthy extending their judicial system to the citizen population. Beyond Greece, I hope that the definition of legal pluralism I offered will spur other ancient historians studying state formation to examine other societies for similar phenomena. What is certain, however, is that ancient historians are dealing with a highly pluralistic legal culture during the formation of the polis in archaic Greece. Current theories are not suited to archaic society.

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