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## Origins of the Common Law (A Three-Part Series)-Part II. Anglo-Saxon Antecedents of the Common Law

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Origins of the Common Law  
(A Three-Part Series)  
Part II. Anglo-Saxon Antecedents of the  
Common Law\*

*David A. Thomas\*\**

In a terse but important chapter of their classic work, *The History of English Law Before the Time of Edward I*, Pollock and Maitland described aspects of Anglo-Saxon law and custom that they thought were pertinent to later common law developments.<sup>1</sup> This generalized characterization of Anglo-Saxon law

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\*This three-part series explores the earliest laws and customs that form the genealogy of Anglo-American common law. Those laws and customs that served the needs of a barbaric society gradually grew into a legal system that now governs the most complex activities in human history. Although much has been written on this theme, there persists a need to review traditional conclusions in the light of more modern findings and interpretations. The first article in this series considered whether Roman law in ancient Britain continued into Anglo-Saxon times, and thus directly influenced early common law developments. That article cited considerable evidence against such continuity. Thomas, *The Disappearance of Roman Law from Dark Age Britain*, 1984 B.Y.U. L. REV. 563-98; see also interesting archaeological notes on continuity in Campbell, *The Last Centuries: 400-600*, in *THE ANGLO-SAXONS* 38-41 (J. Campbell ed. 1982). The second article in this series asserts that the original seeds of English common law were carried to Britain in the Germanic customs of the Anglian, Saxon, and Jutish conquerors of the Romano-Britons, and it traces the influence of the Viking settlers. The entire series surveys the archaeological and documentary sources for fifth century north Germanic law and then examines the changes introduced during the periods of settlement. The third article will detail influences on the common law introduced by the early Normans. This series covers the time period preceding the era in which the common law is traditionally thought to have developed.

The conclusions of this second article are also intended to refute assertions that the Anglo-Saxons were descended from remnants of the ten lost tribes of Israel and were divinely appointed to carry on legal principles originally revealed by Jehovah. Such literature is placed generally under the subject heading "Anglo-Israelism." See, e.g., H. ARMSTRONG, *THE UNITED STATES AND BRITAIN IN PROPHECY* 95-96 (1980); D. BAYLEY & L. FURZE-MORRISH, *A PEOPLE NO ONE KNEW* 157-68 (1931); M. FULLER-GOOD, *THE GREAT AWAKENING, GOD'S CALL TO GREAT BRITAIN* 15-27 (1929); H. HOUGHTON, *THE NEW WORLD COMING* 117-22 (1941); see also W. MENZEL, *GERMANY FROM THE EARLIEST PERIOD* 7-9 (G. Horrocks trans. n.d.).

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1. 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 25-63 (2d ed. 1952).

did not detail the variety of localized customs, distinguish between those customs carried over from homelands and those developed after the conquest of the island, or describe the stages by which the Germanic laws evolved into common law. Such tasks were largely impossible then, and remain so now. However, this last area of inquiry—the stages by which Anglo-Saxon law evolved into common law principles—is important because it helps one understand both the sources and processes of the common law.

This article describes what is presently known of Anglo-Saxon legal history, pointing out such common law beginnings as can be perceived in the primitive and pagan customs brought by north German invaders and their later Viking attackers. It surveys the archaeological and documentary sources for fifth-century north Germanic law and then examines the changes introduced during the periods of settlement, Viking incursions, and unrest prior to the Norman invasion.

The chief difficulty in describing Anglo-Saxon law is that the written sources of the law, although abundant, are but mere literary fragments relative to the entire body of Anglo-Saxon customary law. Laws of only a few Anglo-Saxon kings are extant, and the earliest of these appeared a full 150 years after the Germanic people began settling in Britain. The written laws were conspicuously narrow in their scope, and the legal customs governing most daily affairs of this largely illiterate people remained unwritten.

Evidently, some features of these Germanic legal customs remained unchanged both in England and on the continent through the six centuries of Anglo-Saxon domination: the island isolation that usually spawned idiosyncracies was lessened by frequent contacts with continental Germans. But some change did occur, and many of the Anglo-Saxon laws that William the Conqueror promised to retain for his English subjects<sup>2</sup> had changed considerably from the laws introduced from the continent in the fifth century. By the eleventh century, those simplistic customs of a "barbaric" people had become laws to be fashioned into common law by Norman overlords.

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2. *The "Laws of William the Conqueror,"* in 2 ENGLISH HISTORICAL DOCUMENTS 400 cl. 7 (D. Douglas ed. 1953).

I. CHARACTERISTICS OF CONTINENTAL ANGLES, SAXONS, AND  
JUTES

A. *Continental Origins of the German Tribes*

To begin a legal genealogy of the common law, one must find the continental ancestors of Roman Britain's conquerors, but severe obstacles impede the search. As of the time of the Anglo-Saxon conquest, none of the Germanic tribes were literate; thus not a single written word in their vernaculars exists.<sup>3</sup> Even the basic framework of their prehistoric activities, usually accessible to archaeologists, remains obscure due to both illiteracy and nondurable building materials. However, identifying what is known about the origins of the Germans is crucial for establishing the origins of common law legal tradition.

Archaeological evidence suggests that the ancient people inhabiting areas of northern and central Europe now associated with German culture made the transition from hunting and food gathering to agriculture about the sixth millennium B.C., as the Mesolithic Age passed into the Neolithic.<sup>4</sup> Whether these early inhabitants were ancestors of the Germans, however, is not known. The Germanic people are members of the large Indo-European family of races, which was unified by speech and culture rather than by blood. They became a distinct people about 2000 B.C., as the Bronze Age began.<sup>5</sup> Modern philological and ethnological evidence has not been able to determine whether these first Germanic people originated in inner Asia or northern Europe, but Germanic culture appeared on both sides of the Baltic during the Bronze Age (1800-750 B.C.), apparently having evolved from an Indo-European culture that had earlier extended from Spain to Russia.<sup>6</sup> The theory of north European origin assumes Germanic penetration from there into Turkestan and India. The view of Asiatic origin, however, seems to be slightly favored.<sup>7</sup>

Most of the territory inhabited by modern Germanic people was occupied during the Bronze Age by people of primitive

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3. E. THOMPSON, *THE EARLY GERMANS* 7 (1965).

4. W. MAEHL, *GERMANY IN WESTERN CIVILIZATION* 4 (1979).

5. I. K. REINHARDT, *GERMANY: 2000 YEARS* 3 (rev. ed. 1961).

6. *Id.*; W. MAEHL, *supra* note 4, at 5.

7. W. MAEHL, *supra* note 4, at 5.

Illyrian,<sup>8</sup> Celtic, and Germanic culture,<sup>9</sup> with the Germanic people concentrated between the estuaries of the Weser and Oder rivers.<sup>10</sup> As the Bronze Age drew to a close about 800 B.C., a shift in climate brought cooler, damper weather to the north and forced the Germans southward into Celtic territory, accelerating Celtic migration toward Gaul and Italy. Also, in the seventh century B.C., Vandals and Goths drove the Illyrians out of the area between the Oder and Vistula rivers.<sup>11</sup>

Climatic change also brought loss of arable land to spreading rain forests, and after 500 B.C. hunger forced the larger German tribes even more into territorial conflicts with the Celts. In the third century B.C. those conflicts culminated in complete victory for the German tribes occupying central and western Germany. By this time, even if the German race had once descended from a single root stock, it "could no longer claim to be pure, for the conquest of middle Europe had involved racial admixture with the conquered."<sup>12</sup>

From the time the Celts were conquered, the Germanic tribes consisted of three main groups: the northern (becoming eventually the Norse, Danes, and Swedes), the eastern (who, occupying lands from the Oder to the Vistula, would emerge as Goths, Vandals, Burgundians, and Lombards) and the western (tribes of Jutland, Schleswig-Holstein, north central Germany, and the Rhine valley). Some western tribes opposed the Romans as they came along the Rhine late in the second century B.C., and after 55 B.C. many were exposed to the rich Romano-German culture spread along the left bank of the Rhine. Other western tribes, notably the Cimbri and Teutons, probed too far south and were eventually annihilated by the Romans.<sup>13</sup>

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8. Modern research identifies the Illyrians as "an Indo-European people who settled in the western half of the Balkan peninsula sometime between the end of the Bronze and the beginning of the Iron Age, *i.e.*, c. 1000 B.C. . . . At the height of their expansion the Illyrians extended their frontiers from the Danube to the Gulf of Ambracia and from the Adriatic to the Shar Mountains." 11 *ENCYCLOPEDIA BRITANNICA Illyria* 1101 (1972).

9. 1 K. REINHARDT, *supra* note 5, at 3.

10. W. MAEHL, *supra* note 4, at 5.

11. *Id.* at 5-6.

12. *Id.* at 7.

13. *Id.* at 7-8. By 121 B.C. the Romans had conquered the area of Gaul now known as Provence, although Roman dominance of all Gaul was not achieved until the campaigns of Julius Caesar, 58-51 B.C. The Franks, who conquered the Roman province of Gaul, were unknown until the third century A.D.

*B. Identities of the Invading Tribes*

The invaders of Britain appear to have had only limited contact with the Romans. Although referred to from early times as Anglo-Saxons, their precise ethnic identity and continental origins have been a matter of uncertainty and controversy. Until recently, Bede's assertion was accepted that the Anglo-Saxons consisted of the three Germanic tribes of Angles, Saxons, and Jutes,<sup>14</sup> the latter coming from the Jutland peninsula (modern Denmark and north Germany),<sup>15</sup> the Angles from roughly the modern Schleswig-Holstein region of West Germany north of Hamburg, and the Saxons from the area immediately south of the Angles. However, certain discoveries disturbed this neat casting: at least two other prominent German tribes, the Frisians and Franks,<sup>16</sup> seem also to have had a substantial presence in post-Roman Britain; and the Jutes as a people could not be distinctly identified in either old or new settlements.<sup>17</sup>

The most plausible current reconciliation of all the evidence suggests that: (1) the Jutes, though obscure, were a distinct tribe inhabiting part of the Jutland peninsula; (2) by the fifth century A.D. the populous and mobile north German tribes may have undergone considerable intermixing, so that artifacts of other tribes, such as Frisians and Franks, would be among those of the Anglo-Saxons; (3) Angles, Saxons, and Jutes embarking for Britain would have moved down the Frisian coastline, perhaps with lengthy periods of settlement among both Frisians and Franks, and would have brought with them objects that archaeologists later identify as Frisian and Frankish; and (4) in any event, some Frisians and Franks probably settled in Britain along with the other tribes.<sup>18</sup> Thus, one essentially returns to Bede's original description of the invaders, except that the distinction between tribes is somewhat blurred.

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14. BEDE, *ECCLESIASTICAL HISTORY OF THE ENGLISH PEOPLE* 50-51 (B. Colgrave & R. Mynors trans. 1969).

15. D. FISHER, *THE ANGLO-SAXON AGE 25-27* (1973) maintains that the names Jutes and Jutland are of different origins.

16. Campbell, *The Lost Centuries: 400-600*, in *THE ANGLO-SAXONS* 30-31 (J. Campbell ed. 1982); D. KIRBY, *THE MAKING OF EARLY ENGLAND* 27-28 (1987); F. STENTON, *ANGLO-SAXON ENGLAND* 5-8, 56 (1943).

17. F. STENTON, *supra* note 16, at 14-15.

18. D. FISHER, *supra* note 15, at 22-28.

### C. *Early Observations of Greek and Roman Writers*

The early literary references to the Germanic people are sparse. The first ancient writer to mention Germans was Pytheas of Massilia (Marseilles), a contemporary of Alexander the Great, who in the third or fourth century B.C. visited Britain and the coast of the North Sea.<sup>19</sup> Julius Caesar then wrote of the Germans during the first century B.C.,<sup>20</sup> and Cornelius Tacitus provided the most comprehensive and detailed description of Germanic culture as it existed at the beginning of the Christian era.<sup>21</sup>

None of these writings give much detail about Angles, Saxons, and Jutes. Only Tacitus, in the first century A.D.,<sup>22</sup> and Ptolemy, in the second century A.D., even mention the Angles;<sup>23</sup> Ptolemy alone describes Saxons in the preconquest period.<sup>24</sup> Ptolemy and Procopius discuss the Frisians only briefly,<sup>25</sup> and not a single commentator mentions the Jutes of that period. Tacitus remains the best source of information on ancient German social and legal customs,<sup>26</sup> but he only wrote about the Germans in general, and that a full three centuries before the Anglo-Saxon-Jutish migration to Britain. Undoubtedly, people moved and customs changed after that period. Moreover, some consider his credibility compromised by his manifest anti-Roman and pro-German moralizing, and it is unlikely that he ever directly observed Angles, Saxons, or Jutes or any Germans at all in their native habitats.<sup>27</sup> Indeed, those three tribes in particular probably had very little contact with the Romans.

19. Pytheas, who is believed to have flourished at a time before 285 B.C., was a navigator and the author of a geographical treatise, which is now lost. We learn of his writings through the Greek geographer and traveler Strabo, who wrote during the last half of the first century B.C. 8 *THE GEOGRAPHY OF STRABO* 453 (Loeb ed. 1939) (H. Jones trans.) (translator's description); 1 *THE GEOGRAPHY OF STRABO* 1.4.2-3, 2.4.1-2, 2.5.8 (Loeb ed. 1931) (H. Jones trans.); 2 *THE GEOGRAPHY OF STRABO* 4.2.1, 4.5.4 (Loeb ed. 1949) (H. Jones trans.); 1 K. REINHARDT, *supra* note 5, at 5.

20. J. CAESAR, *DE BELLO GALLICO* 4.1-3; 6.21-24 (M. Hadas trans. 1957).

21. 1 K. REINHARDT, *supra* note 5, at 5.

22. C. TACITUS, *THE AGRICOLA AND GERMANY OF TACITUS* ch. 40 (A. Church & W. Brodribb trans. 1885).

23. D. FISHER, *supra* note 15, at 22-23.

24. *Id.* at 23.

25. *Id.*; 5 PROCOPIUS, *HISTORY OF THE WARS* 3.20.7 (H. Dewing trans. 1928).

26. Changes in Germanic culture that probably occurred between the time Caesar wrote (51 B.C.) and the time Tacitus wrote (A.D. 98) are described in E. THOMPSON, *supra* note 3, at 1-28.

27. C. TACITUS, *DE ORIGINE ET SITU GERMANORUM* xix (J. Anderson ed. 1938) (editor's introduction).

*D. Germanic Legal Customs Described by Tacitus*

Tacitus mentions only one of the invading peoples, the Angles, one of seven small tribes who worshipped the goddess Nertha at an island sanctuary, either off their North Sea or Baltic Sea coastline.<sup>28</sup> Thus the Angles are probably included in his general descriptions of Germans. Seven of the forty-six chapters in his *Germania* contain information relevant to the laws and legal customs of the ancient Germans. These chapters are generalized descriptions, secondhand accounts recorded centuries before the Anglo-Saxon migrations, and may be summarized as follows:

*Government.* Tacitus suggests that kingship existed apart from military leadership, that a priestly class participated in the administration of justice, and that battle groups (and most likely other social organizations) were based on kinship relationships.<sup>29</sup>

*Councils.* Tacitus depicts political decisions as being surprisingly democratic, and the body politic as tribally organized. Once again a priestly class is said to have a role in these political matters, albeit a minor one.<sup>30</sup>

*Justice.* Half of the fines for lighter offenses were paid to the "state," suggesting an early recognition that such offenses not only affronted the victim and his kin, but also disturbed the peace, adversely affected the entire community, and threatened the rule of the community's leader,

28. C. TACITUS, *supra* note 22, ch. 40. King Alfred, in his preface to his translation of Orosius' HISTORIES AGAINST THE PAGANS, stated that the early continental Angles "lived on islands east of the Jutland peninsula." D. FISHER, *supra* note 15, at 23; G. ANDERSON, THE LITERATURE OF THE ANGLO-SAXONS 270-71 (1949).

29. They choose their kings by birth, their generals for merit. . . . But to reprimand, to imprison, even to flog, is permitted to the priests alone, and that not as a punishment, or at the general's bidding, but, as it were, by the mandate of the god whom they believe to inspire the warrior. . . . And what most stimulates their courage is, that their squadrons or battalions, instead of being formed by chance or by a fortuitous gathering, are composed of families and clans.

C. TACITUS, *supra* note 22, ch. 7.

30. About minor matters the chiefs deliberate, about the more important the whole tribe. Yet even when the final decision rests with the people, the affair is always thoroughly discussed by the chiefs. . . . Silence is proclaimed by the priests, who have on these occasions the right of keeping order. Then the king or the chief, according to age, birth, distinction in war, or eloquence, is heard, more because he has influence to persuade than because he has power to command.

*Id.* ch. 11.



king, or chief. Much time would pass before the "king's peace" of medieval England would become central to legal developments there, but the concept may have formed much earlier among these ancestors of the English.<sup>31</sup>

*Marriage laws.* The husband, whom Tacitus represents as usually monogamous and faithful, had considerable power over other members of his family. Large families were encouraged and infanticide forbidden. In this area of behavior, Tacitus draws the sharpest distinctions between Germans and "decadent" Romans.<sup>32</sup>

*Laws of succession.* Although he describes principles of German heirship, Tacitus does not tell us what sort of property is subject to laws of succession. Presumably, heirs inherited only items of personal property.<sup>33</sup>

*Feuds and fines.* The practice of composition—payments for personal offenses to inhibit blood feuding—was apparently well established among the Germans.<sup>34</sup>

31. In their councils an accusation may be preferred or a capital crime prosecuted. Penalties are distinguished according to the offence. . . . Lighter offences, too, have penalties proportioned to them; he who is convicted, is fined in a certain number of horses or of cattle. Half of the fine is paid to the king or to the stata, half to the person whose wrongs are avenged and to his relatives. In these same councils they also elect the chief magistrates, who administer law in the cantons and the towns. Each of these has a hundred associates chosen from the people, who support him with their advice and influence.

*Id.* ch. 12.

32. Almost alone among barbarians they are content with one wife, except a very few among them, and these not from sensuality, but because their noble birth procures for them many offers of alliance. The wife does not bring a dowry to the husband, hut the husband to the wife. . . . Clandestine correspondence is equally unknown to men and women. Very rare for so numerous a population is adultery, the punishment for which is prompt, and in the husband's power. Having cut off the hair of the adulteress and stripped her naked, he expels her from the house in the presence of her kinsfolk, and then flogs her through the whole village. . . . To limit the number of their children or to destroy any of their subsequent offspring is accounted infamous, and good habits are here more effectual than good laws elsewhere.

*Id.* ch. 18.

33. Sister's [sic] sons are held in as much esteem by their uncles as by their fathers; indeed, some regard the relation as even more sacred and binding, and prefer it in receiving hostages, thinking thus to secure a stronger hold on the affections and a wider hond for the family. But every man's own children are his heirs and successors, and there are no wills. Should there be no issue, the next in succession to the property are his brothers and his uncles on either side. The more relatives he has, the more numerous his connections, the more honoured is his old age; nor are there any advantages in childlessness.

*Id.* ch. 20.

34. It is a duty among them to adopt the feuds as well as the friendships of a

*Land.* The abundance of arable land conflicts somewhat with the modern view that barbarian migration, both before and after this time, was prompted at least in part by population pressures from within the German tribes.<sup>35</sup>

Tacitus' depiction of Germans as healthy, happy children of the forest is difficult to reconcile with the less idyllic picture of ancient Germans painted by modern research, but it is useful to note the basic social characteristics he mentions:

- tribal organization based on kinship relations;
- governance by both kings (or perhaps chieftains) and councils;
- chiefs elected by councils and responsible for administering law in the settlements;
- blood feuds and composition;
- payment of fines or penalties to the king as well as to the victim's family;
- heavy powers of family regulation held by the husband;
- laws of succession; and
- regulated land holding, although probably no scheme of estates in land.

#### *E. Contemporary Written Laws of Other German Tribes (The "Barbarian Laws")*

Between the time Tacitus wrote in the first century A.D. and the time of the first written Anglo-Saxon laws over five centuries later, the Roman Empire disintegrated and surrendered its provinces to Germanic invaders. As the end neared, an official collection of imperial statutes gathered under Theodosius II, the Theodosian Code, was issued with the consent of Valentinian III in A.D. 438.<sup>36</sup> In the decades that followed, perhaps with this code

father or a kinsman. These feuds are not implacable; even homicide is expiated by the payment of a certain number of cattle and of sheep, and the satisfaction is accepted by the entire family, greatly to the advantage of the state, since feuds are dangerous in proportion to a people's freedom.

*Id.* ch. 21.

35. Land proportioned to the number of inhabitants is occupied by the whole community in turn, and afterwards divided among them according to rank. A wide expanse of plains makes the partition easy. They till fresh fields every year, and they have still more land than enough; with the richness and extent of their soil, they do not laboriously exert themselves in planting orchards, inclosing meadows, and watering gardens.

*Id.* ch. 26; see also C. TACTUS, *supra* note 27, at 38-49.

36. THE THEodosian CODE AND NOVELS AND THE SIRMUNDIAN CONSTITUTIONS (C. Pharr trans. 1952).

as a model, several codes or statute-books known collectively as the *Leges Barbarorum* (Barbarian Laws) were issued by Germanic rulers. Several of the more purely Germanic of such codes were probably typical of laws and customs observed by the Anglo-Saxons, who were completing their conquest of Britain during this period.

The origins and contents of these barbarian laws can be described briefly as follows:

*Visigothic Laws*: the laws of Euric, for Visigoths, but showing some Roman influence, ca. A.D. 476.<sup>37</sup>

*Lex Romana Visigothorum*: promulgated by the Visigothic king Alaric II in A.D. 506 to govern Romans living in Visigothic territories. This collection is also known as the *Breviarium Alaricianum* (Breviary of Alaric).<sup>38</sup>

*Leges Visigothorum*: a collection of laws issued by Euric's successors promulgated in A.D. 654, which applied to both Gothic and Hispano-Roman subjects and which replaced the *Lex Romana Visigothorum*.<sup>39</sup>

*Burgundian Laws*: compiled for the Germanic Burgundians between A.D. 483 and 532.<sup>40</sup>

*Lex Romana Burgundionum*: issued ca. A.D. 500 for the use of Roman citizens living in the Burgundian kingdom. This code and the *Lex Romana Visigothorum* were based on the same Roman sources; the Visigothic code replaced the Burgundian in A.D. 534, when Burgundy was annexed to Merovingian Gaul.<sup>41</sup>

#### *Frankish Laws*

*Lex Salica*: attributed to Clovis, A.D. 481-511. Several editions have been found, causing considerable confusion. The earliest versions appear to contain ancient German custom along with contemporaneous legislation. Christian in-

37. LAWS OF THE ALAMANS AND BAVARIANS 20 (T. Rivers trans. 1977) [hereinafter cited as Rivers]; 2 H. BRUNNER, DEUTSCHE RECHTSGESCHICHTE 320-31 (1892); 1 F. POLLOCK & F. MAITLAND, *supra* note 1, at 5-6; R. SCHROEDER & E. VON KUENSSBERG, LEHRBUCH DER DEUTSCHEN RECHTSGESCHICHTE 252 (1932) [hereinafter cited as R. SCHROEDER].

38. Rivers, *supra* note 37, at 21; 2 H. BRUNNER, *supra* note 37, at 320-31; 1 F. POLLOCK & F. MAITLAND, *supra* note 1, at 8; R. SCHROEDER, *supra* note 37, at 252-53.

39. Rivers, *supra* note 37, at 20-21; 2 H. BRUNNER, *supra* note 37, at 320-31; R. SCHROEDER, *supra* note 37, at 253-55.

40. Rivers, *supra* note 37, at 20; 2 H. BRUNNER, *supra* note 37, at 332-40; 1 F. POLLOCK & F. MAITLAND, *supra* note 1, at 7; R. SCHROEDER, *supra* note 37, at 256.

41. Rivers, *supra* note 37, at 20; 2 H. BRUNNER, *supra* note 37, at 332-40; 1 F. POLLOCK & F. MAITLAND, *supra* note 1, at 7-8; R. SCHROEDER, *supra* note 37, at 257.

fluence was introduced in the sixth century A.D.<sup>42</sup> These laws were used by the Salian Franks and, by virtue of the Norman conquest, were thought by Pollock and Maitland to be ancestors of English law.<sup>43</sup>

*Lex Ribuaria*: believed promulgated after A.D. 596 for the Ripuarian or western Franks, and partly based on the *Lex Salica*. This code contains little non-German but some Christian influence.<sup>44</sup>

*Laws of other German tribes: Ostrogoths, Lombards, Alamans and Bavarians*

*Edictum Theodorici*: the Edict of Theodoric the Ostrogoth, for disputes between Ostrogoths and Romans in Italy, issued between A.D. 493 and 507. This edict is predominantly Roman.<sup>45</sup>

*Leges Langobardorum*: later than other barbarian codes, these Lombard laws were promulgated between A.D. 643 and 755 by several Lombard kings after the successful invasion of northern Italy.<sup>46</sup>

*Lex Alamannorum*: issued ca. A.D. 717-719, these Alamannic laws were Germanic, but with considerable Christian influence.<sup>47</sup>

*Lex Baiuvariorum*: dated about A.D. 744-748, these Bavarian laws were subsequent to and substantially based on the Alamannic laws, and both strongly resemble the laws of the Merovingian Franks. Indeed, the Bavarian code attributes these laws to the Merovingian King Theuderic I (A.D. 511-534), who assigned men learned in law to conform German custom to Christian law.<sup>48</sup>

Other Germanic laws appearing in the Carolingian age, from the Frisians, continental Saxons, Angli, Warni of Thuringia, and

42. Rivers, *supra* note 37, at 19; 2 H. BRUNNER, *supra* note 37, at 292-303; 1 F. POLLOCK & F. MAITLAND, *supra* note 1, at 6-7; R. SCHROEDER, *supra* note 37, at 257-64.

43. 1 F. POLLOCK & F. MAITLAND, *supra* note 1, at 7.

44. Rivers, *supra* note 37, at 19; 2 H. BRUNNER, *supra* note 37, at 303-08; 1 F. POLLOCK & F. MAITLAND, *supra* note 1, at 7; R. SCHROEDER, *supra* note 37, at 264-65.

45. Rivers, *supra* note 37, at 21; 1 F. POLLOCK & F. MAITLAND, *supra* note 1, at 9; R. SCHROEDER, *supra* note 37, at 255-56. *But see* 2 H. BRUNNER, *supra* note 37, at 365-68.

46. Rivers, *supra* note 37, at 21-22; 2 H. BRUNNER, *supra* note 37, at 368-74; R. SCHROEDER, *supra* note 37, at 265-68.

47. Rivers, *supra* note 37, at 39-40; 2 H. BRUNNER, *supra* note 37, at 308-12; R. SCHROEDER, *supra* note 37, at 268-69.

48. Rivers, *supra* note 37, at 40-42; 2 H. BRUNNER, *supra* note 37, at 313-19; R. SCHROEDER, *supra* note 37, at 269-72.

Franks of Hamaland, are beyond the scope of this article.<sup>49</sup> All of these barbarian laws can be divided into two groups: those with distinct Roman influence or intended to govern Romans living in the conquered lands, and those which are thoroughly Germanic. In using continental law sources to illuminate Anglo-Saxon legal customs, only those Germanic laws which are substantially free of Roman or Christian influence are relevant because the Angles, Saxons, and Jutes were, among the Germans, probably most free from Roman influence. This conclusion is confirmed by the fact that the first written Anglo-Saxon laws, ca. A.D. 600, contain almost purely Germanic custom.<sup>50</sup> Therefore, of the *Leges Barbarorum* listed above, only the laws of the early Visigoths, the Burgundians, the Salian Franks, and the Ripuarian Franks are pertinent. All others are either too Roman or too late in time to aid in understanding Anglo-Saxon law.

The laws of the Salian Franks, or the *Lex Salica*, are especially relevant to this inquiry: not only is the *Lex Salica* one of the earliest Germanic codes reflecting or actually influencing the legal customs of the continental Angles, Saxons, and Jutes,<sup>51</sup> but its traditions may have been part of the Norman legal heritage brought over to England with the A.D. 1066 conquest.<sup>52</sup> Of the many texts called *Lex Salica*, those containing only sixty-five titles are the earliest (and therefore most relevant to Anglo-Saxon laws) and are usually identified with an early form of the *Lex Salica* known as the *Pactus Legis Salicae*.<sup>53</sup>

Analysis of those sixty-five titles confirms the description of this early Frankish law as "primarily a penal law . . . concerned with the redress of crimes (murder, theft, mutilation, exploitation of women) by monetary means."<sup>54</sup> Twenty titles deal with various aspects of theft,<sup>55</sup> eighteen treat acts of violence against

49. 2 H. BRUNNER, *supra* note 37, at 340-54; R. SCHROEDER, *supra* note 37, at 272-79.

50. These are the dooms of Aethelberht, discussed in detail *infra* notes 137-57 and accompanying text.

51. Possible contacts between Franks and migrating Angles, Saxons, and Jutes are discussed *supra* text accompanying note 18.

52. See *supra* note 43 and accompanying text.

53. Rivers, *supra* note 37, at 19; K. ECKHARDT, *DIE GESETZE DES KAROLINGERREICHES* 8 (1953).

54. Rivers, *supra* note 37, at 19.

55. The text of the early *Lex Salica* may be found in K. ECKHARDT, *supra* note 53, at 17-93. The titles dealing with theft are: 2—pig theft; 3—cattle theft; 4—sheep theft; 5—goat theft; 6—dog theft; 7—bird theft; 8—bee theft; 10—slave and servant theft; 11—theft and burglary against free persons; 12—theft and burglary against servants; 21—boat theft and borrowing; 22—theft in mills; 23—eel and net theft; 27—miscellaneous.

persons,<sup>56</sup> and twelve are concerned with procedure.<sup>57</sup> The remaining fifteen titles regulate property damage, nonviolent personal offenses (such as poisoning), loss of property (such as unauthorized release of a slave, or not returning borrowed property), inheritance, immigration, and similar subjects.<sup>58</sup> Virtually all offenses are assigned a monetary fine, usually modified by a multiplier determined by the status of the victim, a Germanic practice known as "composition."

The other early Frankish law, the *Lex Ribuaria*, gives no additional enlightenment on the continental context for Anglo-Saxon legal traditions. Compiled almost a hundred years later than the *Lex Salica*, its text is essentially the same as the earlier law upon which it seems to draw as a model. Of its eighty-nine titles, numbers one through thirty-eight show Salian influence and thirty-nine through fifty-four are drawn verbatim from Salian text. Only the fines (Busszahlen) depart significantly from the Salian code, being based on a multiplicand of eighteen rather than fifteen.<sup>59</sup>

The Visigothic laws, or more precisely the code of Euric from ca. A.D. 476, are believed to have directly or indirectly influenced most German law codes from the Merovingian time.<sup>60</sup>

ous theft; 33—hunting and poaching; 38—horse theft; 39—theft of a foreign servant; 40—accusing a servant of theft; 55—stealing a corpse before burial; and 65—luring away a foreign slave.

56. Titles dealing with violent acts against persons are: 13—robbery of free persons or women; 14—ambush and plundering of Romans and Germans; 15—wife stealing and assault; 17—battle injuries or injuries from weapons and blood wounds; 20—improper touching or grasping of women; 24—killing women and children; 25—rape, fornication; 28—conspiracy, assassination; 29—mutilations; 35—killing servants or pillaging; 36—death caused by livestock; 41—killing a free person; 42—killing committed in a tribal assembly (*Zeltgenossenschaft*); 43—killing by one of a group, accomplices; 54—killing a nobleman; 61—robbery by force; 62—fine for killing; 63—killing a man who is on a campaign against the enemy. K. ECKHARDT, *supra* note 53, at 17-93.

57. Titles on procedure are: 1—fine for failing to respond to call to assembly; 18—false accusations; 46—official public notice; 47—claiming lost or stolen property in possession of others; 48—false witness, perjury; 49—witnesses; 50—oaths; 51—illegal challenge of a nobleman's possession of foreign goods; 53—release of hand from hot water ordeal; 56—failure to appear before assembly; 57—jury; 58—when goods are inadequate to pay a fine (*Erdwurf*). K. ECKHARDT, *supra* note 53, at 17-93.

58. Other titles are: 9—damage to agricultural fields; 16—arson; 19—poisons; 26—unauthorized release of slaves; 30—abuse, slander; 31—blocking the way of another; 32—false imprisonment; 34—fencing, enclosing; 37—pursuing stolen livestock; 44—money paid to widow of a decedent prior to remarriage (*Reifgeld*); 45—immigrants; 52—not returning borrowed property; 59—inheritance; 60—disavowing family relationships; 64—witches' servants. K. ECKHARDT, *supra* note 53, at 17-93.

59. 2 H. BRUNNER, *supra* note 37, at 303-08.

60. *Id.* at 324-25.

Euric's code seems to be the direct source both for the early Salian and early Burgundian codes;<sup>61</sup> the Bavarian and Lombard codes also show early Visigothic influence.<sup>62</sup> The codes of the continental Angles and Saxons of the Carolingian age, issued in A.D. 802 or 803, both used the *Lex Ribuaria*, which, as noted above, has Salian and Visigothic antecedents.<sup>63</sup>

Use of these sources as an aid in reconstructing early Anglo-Saxon legal traditions has only limited value. The early written codes, consisting of both individual statutes and precedential judicial sentences (Weistuermer),<sup>64</sup> do not refer to most customs of daily living, many of which eventually assumed the force of law. These daily relationships, involving occupancy of land, personal property, commercial dealings, inheritance, family relationships, class privilege, and a host of other subjects of concern even to "barbarian" peoples, did not fit into the cryptic codes or dooms,<sup>65</sup> which were devoted almost exclusively to what are known today as torts and crimes.

Moreover, each of the extant codes was promulgated by a ruler who was a legitimate king, with extensive power to enforce his legislation and whose jurisdiction would prompt him to give attention to the welfare of the entire people. Rulers with such broad jurisdiction and power did not arise among the Angles, Saxons, and Jutes in Britain until many decades after migration began. These early English warrior-pioneers lived in small war bands,<sup>66</sup> and in lives of constant insecurity and violence they undoubtedly lacked both the power and the literacy to legislate or commit legal customs to writing.

## II. GERMANIC LEGAL CUSTOMS

### A. *Land and Property*

Only through non-German sources does one gain a glimpse of the vast body of unwritten customary law. The early Germans of Roman acquaintance relied chiefly on their flocks and herds

61. *Id.* at 300-01, 326, 339.

62. *Id.* at 326.

63. *Id.* at 345-52.

64. *Id.* at 285-86.

65. The concept of "dooms" probably included decrees of principles to govern future cases as well as specific adjudications. *ON THE LAWS AND CUSTOMS OF ENGLAND* 5 (M. Arnold, T. Green, S. Scully & S. White eds. 1981) [hereinafter cited as *LAWS AND CUSTOMS*].

66. See D. FISHER, *supra* note 15, at 29-31; D. KIRBY, *supra* note 16, at 163-64.

for wealth and dignity,<sup>67</sup> but they also engaged in extensive agriculture, hunting, and food gathering.<sup>68</sup> It appears that in Julius Caesar's time, the first century B.C., differences in wealth between individual German families were slight and, in contrast to private ownership of flocks and herds, land was not privately owned. Parcels of land were reallocated to kindred or clans annually, thus inhibiting the accumulation of private wealth.<sup>69</sup> When Tacitus wrote of the Germans 150 years later, the annual land distribution was made on the basis of social standing and was made to individuals rather than to a kindred. This practice made possible the faster accumulation of wealth by those already wealthy.<sup>70</sup> It is believed that exposure to Roman goods and the Roman monetary system stimulated desire for private property and prompted leaders to alter the method of land allocation to favor private holdings and production, at least on a year-to-year basis.<sup>71</sup>

The passage of time and opportunities for conquest produced quite different land distribution practices among the early Anglo-Saxons in Britain. Land freshly conquered or pioneered by Anglo-Saxon settlers was divided by lot, with a number of tracts kept in reserve as commons or as defensive buffers.<sup>72</sup> Holdings assigned to individual warriors who became settlers were permanent, not subject to the annual reallocations practiced by their ancestors. The basic land unit everywhere but Kent was a tract deemed sufficient to support a peasant and his household, referred to in English documents as a "hide."<sup>73</sup> Apart from contributing to physical survival, holding an individual portion of land was a prerequisite for sharing in the use and product of the commons, for voting in public assemblies, and for going to court. Ownership of land therefore signified both freedom and franchise.<sup>74</sup>

### B. Social Classes

The legal customs of these first Anglo-Saxons in Britain were derived almost exclusively from their social organization.

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67. E. THOMPSON, *supra* note 3, at 3.

68. *Id.* at 5.

69. J. CAESAR, *supra* note 20, 6.22; E. THOMPSON, *supra* note 3, at 8-10, 15.

70. See C. TACITUS, *supra* note 22, ch. 26.

71. E. THOMPSON, *supra* note 3, at 18, 24-25; see D. FISHER, *supra* note 15, at 53 n.1.

72. I J. KEMBLE, *THE SAXONS IN ENGLAND* 90 (1876 & reprint 1971).

73. F. STENTON, *supra* note 16, at 276.

74. I J. KEMBLE, *supra* note 72, at 91.



While there exists virtually no direct evidence on the social organization of either the early groups of Anglo-Saxon mercenaries or the first invaders, circumstantial evidence establishes a framework. From the earliest surviving written Anglo-Saxon laws, dating back to the seventh century A.D. from the kingdoms of Kent and Wessex, a social structure consisting of several classes appears. This same structure is evident in the earlier written laws of continental Germanic tribes at the time of invading Angles, Saxons, and Jutes, as well as in the descriptions written by Tacitus four centuries earlier. Thus, it is a safe assumption that in this "dark age" of English law of the fifth and sixth centuries, Anglo-Saxons were also grouped into the standard classes of nobility, free commoners, freed men (former slaves), and slaves. The nobility were the social leaders and protective warriors; the other classes engaged primarily in agriculture, along with certain crafts and trades.

### C. *Kindred*

In addition to class, a German's niche in society was also marked by kindred affiliation. It is believed that the Anglo-Saxon kindred comprehended all blood relations within the sixth degree (to fourth cousins) and was the institution through which the law functioned. From sources in later periods of Anglo-Saxon history, one finds that a man without kin might not be able to obtain justice. The kindred would be surety for any fines assessed, guarantee good conduct, feed members in prison, pay ransom for a member, and assume responsibility for fatherless children. The kindred was consulted in distributing landed estates and arranging marriages. It provided for its needy members and protected, if necessary, women who married outside the kindred (as was required) and moved to another district.<sup>75</sup>

### D. *Blood Feud and Composition and Oaths*

The kindred's most fundamental role in maintaining social order lay in the conduct of the vendetta or blood feud. If a member of the kindred suffered death or injury at the hands of one not a member, the kindred was bound to exact comparable revenge from the offender's kindred.<sup>76</sup> Unfortunately, the of-

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75. D. KIRBY, *supra* note 16, at 141; F. STENTON, *supra* note 16, at 311-14.

76. D. KIRBY, *supra* note 16, at 142.

fender's kindred was then likewise obligated, resulting in perpetual violent vengeance.

Primitive societies the world over devised various means for mitigating the blood feud,<sup>77</sup> and the method universal among the Germanic tribes is known as composition.<sup>78</sup> The practice of composition assigned to the death or injury a value to be paid in money or goods; if accepted, the payment effectively relieved a victim's kindred from the obligation to carry on the vendetta. The offender's kindred, rather than the offender himself, was responsible for tendering payment. The amount to be paid was determined by both the injury and the social class of the victim.<sup>79</sup> The death of a member of the nobility, for example, might require a payment three times that required for the death of a peasant.

The schedule of payments, which was initially part of the unwritten folk custom and only later formalized in the written codes or dooms, was based on the concept of wergild, or the price of a man's life. Injury short of death was valued at something less than full wergild, and wergild itself depended on one's social class.<sup>80</sup> In Wessex, for instance, the wergild of the king was twelve times the wergild of a nobleman, which was six times the wergild of a peasant.<sup>81</sup> Large portions of the earliest Anglo-Saxon written laws are nothing more than schedules of payments for particular injuries; presumably these laws restated customs observed from ancient times.<sup>82</sup>

In addition to resolving conflict by composition, Anglo-Saxon law called for court proceedings based on a system of oaths. The kindred provided substantial support in such court proceedings. A man accused of an offense was usually permitted to meet the charge by swearing an oath to his innocence and bringing in several other men to give similar oaths. These "oath-helpers" were normally drawn from kindred, and presumably these practices were also of ancient origin.<sup>83</sup>

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77. W. SEAGLE, *THE HISTORY OF LAW* 27-50 (1946).

78. 1 F. POLLOCK & F. MATTLAND, *supra* note 1, at 47.

79. See, e.g., *The Laws of Aethelberht*, in *THE LAWS OF THE EARLIEST ENGLISH KINGS* 5 cl. 10, 7 cl. 14, 16 (F. Attenborough ed. 1922 & reprint 1974) [hereinafter cited as *Attenborough*].

80. 2 F. LIEBERMANN, *DIE GESETZE DER ANGELSACHSEN 732-34* (1903-1916 & 1960 reprint).

81. D. KIRBY, *supra* note 16, at 144-45.

82. See *supra* notes 51-58 and accompanying text.

83. F. STENTON, *supra* note 16, at 312-13. The oath procedure is generally described

*E. Lordship*

"The kindred group," according to one scholar, "may be defined as the basic unit of Germanic society, the relationship between lord and man the fundamental bond."<sup>84</sup> Yet the loyalties demanded by kinship and lordship were sometimes in conflict. In early Germanic societies, well-born young men would often leave their kindred to join the retinue of a chieftain, forming the nucleus of a war band. Once the kindred was abandoned, the duty to protect the lord became paramount. If the chief and his companions were victorious, their basis of nobility would be established and they would be "distinguished from other freemen by their [higher] wergild."<sup>85</sup> Even if in later generations the wealth or possessions of the nobleman's descendants dissipated, and even if peasant neighbors were very wealthy, the social superiority of the nobility remained in place, secured by a powerful wergild. Because of this higher wergild, the oath of a nobleman in an Anglo-Saxon court was credited with several times the value of a peasant's oath, resulting in an accused nobleman needing fewer oath-helpers.<sup>86</sup>

As Angles, Saxons, and Jutes crossed the Channel to achieve conquest in Britain, each invader group formed itself into a war band linked by lordship for the crossing and assault. The lords, as warrior chiefs, commanded the faithfulness and obedience of their followers, and promised in return to protect and provide for them. As the most honorable relationship known to Germanic society, lordship conferred on the lord the right to the *manbot* and the *heriot*. If a follower were slain, the lord claimed both the *manbot*, a sum based on the wergild, and the *heriot*, a death duty symbolizing return of the war gear given when the follower became the lord's dependent. The lord could also act in court as an oath-helper or compurgator for his followers, either noblemen or commoners.<sup>87</sup>

For a well-born person to leave the kindred and attach himself to a prominent lord was acceptable and incurred no loss of status. For a peasant to so surrender his independence was far

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in *The Laws of Ine*, in Attenborough, *supra* note 79, at 55 cl. 54.

84. D. KIRBY, *supra* note 16, at 140.

85. D. FISHER, *supra* note 15, at 130-31. But see D. KIRBY, *supra* note 16, at 143, which indicates that the origin of the "distinction between noble and peasant . . . remains obscure."

86. See, e.g., *The Laws of Wiltred*, in Attenborough, *supra* note 79, at 29 cls. 19-21.

87. D. KIRBY, *supra* note 16, at 147-48; 2 J. KEMBLE, *supra* note 72, at 98-103.

more serious, but hard times drove increasing numbers of peasants into a lord's protection.<sup>88</sup> By the beginning of the tenth century, all men were supposed to have a lord.<sup>89</sup> The constantly increasing powers and responsibilities of lords and kings gradually came into broad conflict with the powers of kindred; hence, the whole history of Anglo-Saxon society shows the relationship of man and lord becoming more important while kindred became less important.<sup>90</sup>

Scholars have debated whether early English society was essentially a society of free peasants gradually slipping into lord-dominated subservience, or was already substantially subjugated to lords at the time of the conquest.<sup>91</sup> Some confusion results from the fact that a peasant could be economically dependent, but still enjoy free status under the law. Anglo-Saxon society was neither uniform nor static: some aristocratic families became impoverished and dependent, and some peasants prospered. In extreme cases, persons sold themselves into slavery for food.<sup>92</sup>

#### F. Public Councils and Meetings

Although Tacitus' cryptic description of the Germanic council that deliberated on weighty matters of government and policy implies that the whole tribe participated,<sup>93</sup> the council in Anglo-Saxon times was quite clearly composed of only leading figures of the "kingdom." This council or *witan* (wise ones) had no set composition, but usually consisted of the king's household officers and any other members of the nobility summoned to the *witan* meetings.<sup>94</sup> Kemble concluded that the customary powers of the *witan* consisted of rights to consider any public act which the king might undertake, declare and change customary or folk law, make alliances and treaties of peace, elect the king, depose the king, levy taxes (in concert with the king), raise military

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88. D. FISHER, *supra* note 15, at 131; see I F. POLLOCK & F. MATTLAND, *supra* note 1, at 35-37.

89. *The Laws of Aethelstan (II)*, in Attenborough, *supra* note 79, at 129 cl. 2: "With regard to lordless men from whom no [legal] satisfaction can be obtained, we have declared that their relatives shall be commanded to settle them in a fixed residence where they will become amenable to public law, and find them a lord at a public meeting."

90. D. FISHER, *supra* note 15, at 132.

91. D. KIRBY, *supra* note 16, at 228-29.

92. I F. POLLOCK & F. MATTLAND, *supra* note 1, at 36.

93. C. TACITUS, *supra* note 22, ch. 11.

94. 2 F. LIEBERMANN, *supra* note 80, at 737-38.

forces, make grants and declare forfeitures of land, exercise judicial power, and, after the introduction of Christianity, make ecclesiastical appointments.<sup>95</sup> Quite likely some powers arose only as Anglo-Saxon government practices became more sophisticated, but it is significant that the witan remained an important administrative body throughout Anglo-Saxon history.<sup>96</sup>

### G. Kingship

At the apex of the social structure was the king. Tacitus' single reference to kingship among the German tribes informs us that monarchical power had definite limits. Although he was a commander with considerable power on the battlefield, the king deferred to the tribal assembly on many important governmental matters.<sup>97</sup>

In a general and undefined sense, the king was subject to the unwritten customary law, as declared and accepted by the folk and the king. In practice, the power to declare law lay with the witan.<sup>98</sup> Eventually, the Anglo-Saxon kings came to possess judicial, religious, and other administrative powers, including the power to tax, but it is not known whether these inhered in the concept of kingship during the conquest period or arose later.<sup>99</sup>

A king could apparently nominate his successor, but acceptance by the nobility was still necessary.<sup>100</sup> English kingdoms were not normally divided among heirs<sup>101</sup> in contrast to the debilitating continental practice.<sup>102</sup> This practice, in addition to conferring greater power on the Anglo-Saxon king, left him with great holdings of land to be conferred as rewards for service.<sup>103</sup>

95. 2 J. KEMBLE, *supra* note 72, at 204-82.

96. This point is perhaps best illustrated by the witan's role in selecting Harold Godwinson as king and successor to Edward the Confessor early in 1066. F. STENTON, *supra* note 16, at 571-72.

97. C. TACITUS, *supra* note 22, ch 7.

98. See, e.g., *The Laws of Wihfred*, in Attenborough, *supra* note 79, at 25.

99. 1 J. KEMBLE, *supra* note 72, at 1-103; D. KIRBY, *supra* note 16, at 168.

100. H. CHADWICK, *STUDIES ON ANGLO-SAXON INSTITUTIONS* 355-66 (1963). Apparently any member in the extended royal family was a possible candidate for the throne, so even the fittest candidate would still need to be elected. D. FISHER, *supra* note 15, at 254-55.

101. D. KIRBY, *supra* note 16, at 165.

102. In contrast with the Old English practice, Charlemagne's empire was divided among his sons, thus dissipating imperial power.

103. 1 J. KEMBLE, *supra* note 72, at 155; H. CHADWICK, *THE ORIGIN OF THE ENGLISH NATION* 159 (1924).

So, the picture of Anglo-Saxon society and law that emerges at the initial stages of the British conquest is that of numerous independent, uncoordinated warrior bands having certain social institutions in common, but following highly individualistic tribal customs. As conquest eventually became migration and society stabilized, fewer and larger political units with more powerful leaders emerged, increasing the influence of government and law.

### III. DEVELOPING KINGSHIP STIMULATED ENGLISH LAW

No change in Anglo-Saxon society more profoundly stimulated the growth of law than the developing institution of kingship. Kingship was not unknown to the invading Angles, Saxons, and Jutes of the fifth and sixth centuries, but kings apparently did not play prominent roles in invasion and early settlements. Tacitus, writing in the first century A.D., remarked that the Germans sometimes elected kings in times of war.<sup>104</sup> Anglo-Saxon literature gives other evidence that kingship was known at an early time, through tales of Offa, a fourth-century king of continental Angles,<sup>105</sup> and of Beowulf, a Swedish prince who dealt with kings of other people.<sup>106</sup> Yet kings played no large part in the migration from the continent, as the earliest phases of British conquest were conducted by war bands that functioned independently under their own leaders.<sup>107</sup>

When successful war bands eventually combined, and migration and conquest in the fifth and sixth centuries compelled resort to stronger central rule,<sup>108</sup> kingship arose among the invading Anglo-Saxons. An early example of such a king was the West Saxon Cerdic, who took the title of king several years after beginning the conquest of Wessex.<sup>109</sup> A brief review of how various parts of Britain were first conquered and then consolidated under the leaders called kings reveals conditions that contributed importantly to legal developments.

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104. C. TACITUS, *supra* note 22, ch. 7.

105. *Widsith* lines 35-44 (Moncrief trans. 1921).

106. *Beowulf* lines 11-21 (Swanton trans. 1978).

107. D. FISHER, *supra* note 15, at 45.

108. C. TACITUS, *supra* note 27, at liii (translator's introduction).

109. THE ANGLO-SAXON CHRONICLE 2 (G. Garmonsway trans. 1972) (genealogical preface); *id.* at 14-15 annal 495.

### A. *Transition from Roman Britain*

Romano-Britons of the fifth century were anything but pushovers for potential invaders. Despite being situated at the outer limits of Roman rule, this imperial province had a proud tradition of stability and prosperity; it had been visited or governed by virtually every important Roman leader since the commencement of the Claudian conquest four centuries earlier. During the decline of imperial authority, Britain had actively participated in providing for or eliminating numerous aspiring usurpers. Beset by bordering barbarians, it was forced to rely more and more on local military forces and such troops as the native leaders could hire. When it finally became clear that Roman authority had irreversibly withdrawn from the island, the province, though attacked, remained generally secure during much of the fifth century.<sup>110</sup>

As Roman authority weakened, attacks of varied intensity issued from the north and west by Picts and Scots and from the east and south by seaborne German pirates, usually called Saxons. In response, the British leaders hired German mercenaries, and abundant archaeological and documentary evidence reveals that heavy Germanic settlement took place in parts of Britain during this period. A plausible but only partially verified version of events during the middle of the fifth century describes these discontented German mercenaries as turning on their British masters, and then shifting inexorably from rebellion to conquest. This marks the beginning of Britain's fall to the Anglo-Saxons.<sup>111</sup>

### B. *Establishment of the First Anglo-Saxon Kings*

#### 1. *Kent*

It appears that Kent<sup>112</sup> was the first to come under German domination, under the leadership of an early mercenary settler and warrior named Hengest. Hengest fought the Britons in 455 and again with his son Aesc (or Oisc) in 457, after which the

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110. See Thomas, *Origins of the Common Law Part I: The Disappearance of Roman Law From Dark Age Britain*, 1984 B.Y.U. L. Rev. 563, 590-93.

111. S. JOHNSON, *LATER ROMAN BRITAIN* 119 (1980); P. SALWAY, *ROMAN BRITAIN* 471-72, 474, 482, 484 (1981).

112. Kent, as a name, has its origin in the name of the Celtic tribe Cantiaci, conquered by the Romans in 43 A.D. Later Jutish conquerors called themselves Cantware. Campbell, *The Lost Centuries: 400-600*, in *THE ANGLO-SAXONS*, *supra* note 16, at 38-39.

British fled Kent and retreated to London. Following battles in 465 and 473, Aesc became king in 488 and ruled Kent until 512.<sup>113</sup>

## 2. *Essex, Middlesex, and Surrey*

The early history of Essex (territory of the East Saxons) is locked in obscurity. The scant archaeological evidence reveals that Germanic settlement dates from early times, probably prior to the revolt of German mercenaries in Britain, but little is known about the development of kingship. No East Saxon king was ever important outside Essex. Essex sometimes included London and a separate province called Middlesex (territory of the Middle Saxons), although Middlesex, if not a separate kingdom, was probably autonomous for some time after the conquest. As an organized people, neither the folk of Middlesex nor of nearby Surrey (the "southern district") have an independent history.<sup>114</sup>

## 3. *Sussex*

Conquest of Sussex (the area taken by the South Saxons) began by seaborne invasion, rather than by the rebellion of settled mercenaries. In 477 Aelle and his sons, Cymen, Wlencing, and Cissa, landed with three ships at a site identified as near Selsey Bill and drove the Britons into the Sussex Weald (an extensive forested tract). Aelle fought further battles in 485 and 491, and in the later conflict he and Cissa led forces that massacred all Britons gathered in the old Roman fort near Pevensey.<sup>115</sup> Aelle was identified by Bede as the first of the Anglo-Saxon *bretwaldas*, king not only of the south Saxons but of all people south of the River Humber.<sup>116</sup>

## 4. *Wessex*

The area known as Wessex (land of the West Saxons) was invaded about 494 by Cerdic and his grandson Cynric with five ships. They apparently completed the conquest in six years.<sup>117</sup> Some portion of the conquered territory may have been left

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113. F. STENTON, *supra* note 16, at 16-17.

114. *Id.* at 53-54.

115. THE ANGLO-SAXON CHRONICLE, *supra* note 109, at 15 annal 491.

116. F. STENTON, *supra* note 16, at 17-19.

117. THE ANGLO-SAXON CHRONICLE, *supra* note 109, at 2 (genealogical preface).



under Stuf and Wihtgar, possibly Jutish relatives of Cerdic, and Cerdic himself ruled a West Saxon kingdom centered immediately south and west of the middle Thames. Cerdic came to be regarded as the founder of the West Saxon dynasty which eventually would rule all of England.<sup>118</sup>

##### 5. *East Anglia, Mercia, and Northumbria*

In East Anglia (territory of the East Angles), fifth-century German settlements were located along the waterways and often close to Roman sites, suggesting peaceful immigration prior to the Saxon revolt. No kingdom arose in this area until well into the sixth century, when a new wave of invaders struck, possibly from northern Denmark.

Evidence shows that the kingdom of Mercia (the land of the marches or border areas) arose during the same time, as people from East Anglia advanced inland. The southern part of Northumbria (the land north of the River Humber), known as the kingdom of Deira, was settled in the fifth century, probably by prerevolt mercenaries, but Aelle, the earliest known king, has only been dated to about 558. Northern Northumbria, eventually the kingdom of Bernicia, was invaded by Ida about the same time as Aelle ruled Deira.<sup>119</sup>

All of these accounts of early Anglo-Saxon kingdoms are subject to considerable dispute because of varying interpretations of the available evidence. These invaders were probably "no more than small groups of people united for military and later for economic advantage in their dependence on a leader."<sup>120</sup> An impulse to consolidate is illustrated by the position of Aelle, king of the south Saxons,<sup>121</sup> but it is not known whether this impulse was prompted by British aggression or the need to increase offensive capability. Aelle's position did not survive, possibly because of defeats by the British or by challengers within South Saxon ranks. The dim prominence of certain leaders obscures the notion that they were probably only survivors of incessant internecine warfare between leaders of competing war bands.

The Germanic presence in Britain was strengthened by im-

118. F. STENTON, *supra* note 16, at 19-27.

119. D. KIRBY, *supra* note 16, at 21-23.

120. D. FISHER, *supra* note 15, at 30.

121. *See supra* notes 115-16 and accompanying text.

migration from the continent at the same time the British were gradually shedding many Roman ways—ways perhaps seen by them as a cause of their weakness in withstanding barbarians—and reverting to Celtic tribalism.<sup>122</sup> In the first stage of the Anglo-Saxon conquest, from roughly 450 to 500, the British resisted the invaders but steadily lost ground near the east coast river estuaries, where no natural obstacles impeded the barbarian thrusts. By 500 the Anglo-Saxons occupied most of the coastal areas of southeast and eastern England and far inland up some rivers, territory which encompassed, in more modern geographic designations, Kent, Sussex, southern Hampshire, Essex, East Anglia, Lindsey, the East Riding of Yorkshire, and thence to the Cambridgeshire fens.<sup>123</sup>

Annals for the late fifth and early sixth centuries report a resurgence of British military activity. Under a leader named Arthur, the British fought the invaders in a series of twelve battles, culminating in a great victory at the still unidentified site of Mount Badon.<sup>124</sup> The German advance was halted for half a century thereafter.<sup>125</sup> The substantial migration of British people to Brittany in the late fifth century<sup>126</sup> became a stream of Germans returning to the continent in the early sixth century.<sup>127</sup> No noteworthy Kentish kings appear between Aesc (Oisc) and Aethelberht near the end of the sixth century; after Aelle there is no record of a South Saxon king for ninety years.<sup>128</sup>

### C. *The Second Phase of the Conquest and the Rise of the Heptarchy*

In a series of battles fought, according to the *Anglo-Saxon Chronicle*, in 552, 568, 571, 577 and 586, the Wiltshire Saxons and the Thames Valley Saxons united into the historic kingdom

122. R. COLLINGWOOD & J. MYRES, *ROMAN BRITAIN AND THE ENGLISH SETTLEMENTS* 316 (1936).

123. Modern maps illustrating this general period typically show Saxon territories at the end of the sixth century, a century later than the time referred to in the text, but still indicate the areas mentioned in the text. See, e.g., Campbell, *The First Christian Kings*, in *THE ANGLO-SAXONS*, *supra* note 16, at 52; H. CHADWICK, *supra* note 103, map facing page 10; D. FISHER, *supra* note 15, at 111.

124. The primary source for this statement is the *Easter Annals*, which are conveniently reproduced and analyzed in L. ALCOCK, *ARTHUR'S BRITAIN 45-48* (1971).

125. *Id.* at 115, 360-64.

126. F. STENTON, *supra* note 16, at 5-6.

127. *Id.* at 6; L. ALCOCK, *supra* note 124, at 115; D. FISHER, *supra* note 15, at 31.

128. D. FISHER, *supra* note 15, at 31.

of Wessex.<sup>129</sup> Through the end of the eighth century, further expansion was sporadic, and British resistance at times very effective. Complete dominance was not established until the Britons of Cornwall were defeated by Egbert in 838.<sup>130</sup>

In Northumbria, the separate kingdoms of Deira and Bernicia made painfully slow progress against powerful British rulers. The Germanic kingdoms were ultimately united under the Bernician king Aethelfrith about 593.<sup>131</sup> Despite subsequent dynastic struggles, the unified kingdom made major territorial gains through the seventh century. Then, as the kingdom met stiffer resistance from both the Picts and neighboring Anglo-Saxon kingdoms, its territory stabilized during the middle of the eighth century.<sup>132</sup>

The kingdom of Mercia originated in the thickly settled midland shires, with the Trent valley settlers overcoming other Germanic pioneers. This kingdom absorbed the lands known as Middle Anglia and the small kingdom of the Hwicce, and appeared in the middle of the seventh century as a powerful force among the Anglo-Saxon kingdoms.<sup>133</sup>

The kingdoms of East Anglia, Essex, Kent, and Sussex were not able to extend their territories during this second phase of hostilities, because of the activities of the other three large kingdoms, but they did consolidate their conquests.<sup>134</sup> All seven kingdoms have been artificially grouped together by some historians and called the Heptarchy.<sup>135</sup> The kingdoms of the Heptarchy never acted in concert, but were dominated in turn by Northumbria, Mercia, and Wessex. The process of absorption and amalgamation which produced these seven kingdoms continued throughout the period of the Heptarchy, and was halted only by the Viking invasions of the ninth century:

Kent after Aethelberht, East Anglia after Raedwald, and Essex and Sussex from an even earlier date, were never comparable in strength with the larger and later kingdoms created by the second phase of conquest. Even before 600 the territory of the

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129. *Id.* at 32-35.

130. THE ANGLO-SAXON CHRONICLE, *supra* note 109, at 63 annal 835.

131. *Id.* at 21 annal 593.

132. D. FISHER, *supra* note 15, at 41-43.

133. *Id.* at 43-44.

134. *Id.* at 108-09.

135. The Heptarchy, a modern designation, included the kingdoms of Wessex, Sussex, Kent, Essex, East Anglia, Mercia, and Northumbria. D. FISHER, *supra* note 15, at 110.

Middle Saxons had been taken over by the East Saxons, whose kings were themselves by then clients of the kings of Kent and later of the kings of the East Angles and of the West Saxons. From the middle of the seventh century Essex was little more than a dependency of Mercia and when, a century later, Aethelbald incorporated London and Middlesex into Mercia nothing politically significant was left. . . . The expansion of the Mercian kingdom resulted in the subordination of the kingdoms of the Hwicce . . . and the Magonsaetan . . . and of the Middle Angles in the east. The South Saxons, threatened by Wessex, sought to secure their independence by alliance with the rulers of Mercia; . . . but the Mercian supremacy ultimately resulted in the relegation of the South Saxon kings first to the status of sub-kings then of ealdorman of the Mercian kingdom; they never recovered their independence and in the ninth century Sussex was incorporated into Wessex. . . . In the [eighth] century Kent was subjected to Mercia and ultimately accepted the lordship of the kings of Wessex as the only alternative.<sup>136</sup>

#### D. Law Codes of the Early Anglo-Saxon Kings

##### 1. Doms of the kings of Kent

The most conspicuous legal activity of early Anglo-Saxon kings was the issuance of written law codes, known as dooms.<sup>137</sup> The earliest of these was issued by Aethelberht of Kent and, because it was written in Anglo-Saxon, has the distinction of being the first set of Germanic laws written in the vernacular.<sup>138</sup> Indeed, dating ca. 601-605, this code is the earliest Anglo-Saxon writing of any kind.<sup>139</sup> All of these "codes" were codes only in the sense that they were organized somewhat systematically or logically, not because they were comprehensive statements of law. They probably reflected some customary law of the time, but in fact did not include the vast bulk of customary law. All the codes are preoccupied with schedules of "composition" payments for specified offenses, and only incidentally give glimpses into the kings' other legal concerns.

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136. *Id.* at 110-12.

137. Simpson, *The Laws of Aethelberht*, in *Laws and Customs*, *supra* note 65, at 5.

138. *See id.* at 4. The laws of continental Germanic tribes discussed earlier were all written in Latin. *See supra* text accompanying notes 36-49.

139. *The Kentish Laws*, in Attenborough, *supra* note 79, at 3 (translator's introduction).

Some have questioned why Aethelberht wrote a code at all. His people and surely most of his council were illiterate.<sup>140</sup> The traditional explanation that the code was prompted by his conversion to Christianity during Augustine's mission has been challenged,<sup>141</sup> but Christian influence is a certainty both in Aethelberht's and in all subsequent Anglo-Saxon codes.<sup>142</sup> The laws probably consisted of a set of judgments pronounced by the king and his witan, concerning both abstract propositions (similar to legislation) and concrete cases (similar to adjudication).<sup>143</sup> Bede's explanation that this code was in imitation of Roman legislation is appealing, even if the content of the clauses exhibit purely Germanic custom.<sup>144</sup>

A brief topical summary of these ninety dooms will suffice to show some of the king's legal concerns during this period:<sup>145</sup>

- one establishes a compensation multiplier for offenses against the church and clerics, curiously and quite incongruously greater even than for offenses against the king;<sup>146</sup>
- eleven establish a compensation multiplier and compensation amounts for offenses against the king and his servants or representatives and imply that in Kent, even at this early time, the king is the personal lord of every freeman;<sup>147</sup>
- two establish compensation amounts for certain offenses against noblemen;<sup>148</sup>
- two establish compensation amounts for certain offenses against non-noble freemen (and cls. eleven and sixteen indicate that three classes of freedmen—possibly

140. Simpson, *The Laws of Aethelberht*, in *LAWS AND CUSTOMS*, *supra* note 65, at 15.

141. H. RICHARDSON & G. SAYLES, *LAW AND LEGISLATION FROM AETHELBERHT TO MAGNA CARTA 1-13, 157-69* (1966).

142. Clause 1 of the *Laws of Aethelberht*, while probably a subsequent addition to the original dooms, gives extraordinary legal status to ecclesiastical persons and property and is included in the oldest surviving text of this code. Attenborough, *supra* note 79, at 5 cl. 1.

143. Simpson, *The Laws of Aethelberht*, in *LAWS AND CUSTOMS*, *supra* note 65, at 5.

144. BEDE, *supra* note 14, at 150-51.

145. The English text used for the following analysis is *The Laws of Aethelberht*, in Attenborough, *supra* note 79, at 5-17.

146. *Id.* at 5 cl. 1.

147. *Id.* at 5-7 cls. 2-12.

148. *Id.* at 7 cls. 13-14.

manumitted slaves or subject people including Britons—are recognized),<sup>149</sup>

- five deal with forcible entry into and theft from dwellings and fenced enclosures;<sup>150</sup>
- three set fines for those supplying weapons by which offenses are committed;<sup>151</sup>
- six deal with wergilds for killing;<sup>152</sup>
- one deals with false imprisonment;<sup>153</sup>
- fourteen deal with women—injuries, marital and family relations, and misconduct;<sup>154</sup>
- forty list various personal injuries and their compensation;<sup>155</sup>
- five deal with various offenses by and against servants and slaves.<sup>156</sup>

The *Laws of Aethelberht* are not as varied in subject matter as the *Lex Salica*, analyzed earlier,<sup>157</sup> but are probably better organized. If subject matter choice truly reflects the controversies with which the king was most often engaged, then these laws reveal the most difficult social problems confronting an emerging Anglo-Saxon society.

A second Kentish code, usually called the *Laws of Hlothere and Eadric*, appeared near the end of the seventh century. The two kings probably did not rule jointly: Hlothhere reigned ca. 673 to 685 and was succeeded by his nephew and rival Eadric, who reigned only a year and a half.<sup>158</sup> Their decrees are introduced: "Hlothhere and Eadric, Kings of Kent, extended the laws which their predecessors had made, by the decrees which are stated below."<sup>159</sup> The sixteen clauses in their laws are summarized as follows:

- four assign additional wergilds for killings by servants;<sup>160</sup>

149. *Id.* cls. 15-16.

150. *Id.* at 7-9 cls. 17, 27-29, 32.

151. *Id.* at 7 cls. 18-20.

152. *Id.* at 7-9 cls. 21-23, 25-26, 30.

153. *Id.* at 7 cl. 24.

154. *Id.* at 9 cl. 31, 15 cls. 73-85.

155. *Id.* at 9-15 cls. 33-72.

156. *Id.* at 17 cls. 86-90.

157. See *supra* notes 51-58 and accompanying text.

158. *The Kentish Laws*, in Attenborough, *supra* note 79, at 2 (translator's introduction).

159. *The Laws of Hlothhere and Eadric*, in Attenborough, *supra* note 79, at 19.

160. *Id.* cls. 1-4.

- one requires kidnapping to be adjudicated by oath;<sup>161</sup>
- one appoints the custodian and guardian of a child whose father has died;<sup>162</sup>
- one regulates recovery of stolen property;<sup>163</sup>
- three require certain accusations to be adjudicated by arbitration, compensation, or oath;<sup>164</sup>
- one assigns penalties for defamation;<sup>165</sup>
- four deal with offenses committed within the dwellings of others;<sup>166</sup>
- one calls for witnesses to certify purchases of property in London (which may have been part of Kentish territory at the time).<sup>167</sup>

The third and final Kentish code is that of Wihtred, whose rule began about 690 during a period of considerable disturbance in southeast England. He issued these dooms in about 695, shortly after making peace with the Wessex king Ine.<sup>168</sup> One of his laws is identical to a contemporary doom of Ine.<sup>169</sup> These laws declare that they were drawn by a council of "notables," including several church officials, and that they added to the Kentish legal usages.<sup>170</sup> The twenty-eight dooms are almost exclusively related to ecclesiastical interests:

- two grant the church immunity from taxation and establish its penalty entitlement as equal to the king's;<sup>171</sup>
- four define the consequences for entering into or aiding illicit unions and not repenting of the same;<sup>172</sup>
- one limits the hospitality to be granted a wandering cleric not part of an order;<sup>173</sup>
- one regulates manumission of persons at the altar;<sup>174</sup>

161. *Id.* cl. 5.

162. *Id.* cl. 6.

163. *Id.* cl. 7.

164. *Id.* at 21 cls. 8-10.

165. *Id.* cl. 11.

166. *Id.* cls. 12-15.

167. *Id.* at 23 cl. 16.

168. *The Kentish Laws*, in Attenborough, *supra* note 79, at 2-3 (translator's introduction).

169. *See infra* note 193.

170. *The Laws of Wihtred*, in Attenborough, *supra* note 79, at 25.

171. *Id.* cls. 1-2.

172. *Id.* at 25-27 cls. 3-6.

173. *Id.* at 27 cl. 7.

174. *Id.* cl. 8.

- three prohibit work and travel on the Sabbath;<sup>175</sup>
- two penalize offerings to devils;<sup>176</sup>
- two penalize violations of fasting times;<sup>177</sup>
- nine regulate affirming by oath the statements and accusations of a bishop, king, head of monastery, priest, deacon, clerk, stranger at the altar, king's thegn, commoner at the altar, servant of the bishop or king, servant of a lord's company (where the lord is or is not a communicant), lay servant, and ecclesiastical servant;<sup>178</sup>
- three establish alternative penalties for thieves caught in the act;<sup>179</sup>
- one requires that a man who leaves the road without giving warning is assumed to be a thief, to be slain or put to ransom.<sup>180</sup>

Twenty-four of the twenty-eight dooms have a distinctly ecclesiastical flavor and reflect the interests of several important church officials on the council that drew up the decrees. Obviously, they added little to the customary law then being observed in the Kentish kingdom.

## 2. *Dooms of the kings of Wessex*

Although references to other lost codes exist, only one other Anglo-Saxon law code survives from the era prior to when Alfred and his successors began legislating for all of England.<sup>181</sup> This pre-Alfredian code is from Ine, one of Alfred's predecessors on the throne of Wessex, and is contemporary with the code of Wihtred in Kent, dating ca. 688-694. Ine, too, exhibited strong religious impulses, and even abdicated in 725 to make a pilgrimage to Rome, where he died.<sup>182</sup> His laws proclaim that they were drawn up with the advice of his father, two of his bishops, his

175. *Id.* cls. 9-11.

176. *Id.* cla. 12-13.

177. *Id.* cla. 14-15.

178. *Id.* at 27-29 cls. 16-24.

179. *Id.* at 29-31 cls. 25-27.

180. *Id.* at 31 cl. 28.

181. The most significant lost code is undoubtedly that of the great Mercian king Offa, which code Alfred included in the description of laws he relied on for his own code as among "the most just of the laws I found . . ." *The Laws of Alfred*, in Attenborough, *supra* note 79, at 63.

182. *The Laws of Ine and of Alfred*, in Attenborough, *supra* note 79, at 34 (translator's introduction).



chief nobles, counselors, and many "servants of God."<sup>183</sup> Its seventy-six sections may be summarized as follows:

- one requires priests to observe their rule;<sup>184</sup>
- one requires a child to be baptized within 30 days of birth;<sup>185</sup>
- one imposes penalties for work on the Sabbath;<sup>186</sup>
- two order payment of church dues;<sup>187</sup>
- one regulates the sanctuary of churches;<sup>188</sup>
- one penalizes fighting in the king's house, a monastery, a nobleman's house, and elsewhere;<sup>189</sup>
- twenty-two deal with theft, thieves, stolen property and unreturned borrowed property;<sup>190</sup>
- ten regulate adjudicatory procedure, including pledges, oaths, obtaining justice and false witness;<sup>191</sup>
- one prohibits selling an Englishman into slavery overseas;<sup>192</sup>
- two require a traveler to sound a warning when he leaves the road and permits him to be killed if he fails to warn;<sup>193</sup>
- eight deal with various circumstances of killing and the wergilds therefor;<sup>194</sup>
- three require maintenance for foundlings, and for illegitimate and fatherless children;<sup>195</sup>
- one requires return of double the bridal price if a man buys a wife and the marriage does not take place;<sup>196</sup>

183. *The Laws of Ine*, in Attenborough, *supra* note 79, at 37.

184. *Id.* cl. 1.

185. *Id.* cl. 2.

186. *Id.* cl. 3.

187. *Id.* at 37 cl. 4, 57 cl. 61.

188. *Id.* at 39 cl. 5.

189. *Id.* cl. 6.

190. *Id.* at 39-61 cls. 7, 10, 12, 14-18, 22, 24-25, 28-29, 36, 46-48, 53, 57, 72-73, 75.

Clause 29 of the *Laws of Ine* may be compared with Clause 52 of the *Lex Salyca*, *supra* note 58, both dealing with failure to return borrowed property.

191. *The Laws of Ine*, in Attenborough, *supra* note 79, at 39-57 cls. 8-9, 13, 19, 30, 35, 37, 41, 54, 62.

192. *Id.* at 41 cl. 11.

193. *Id.* at 43 cls. 20-21. Clause 20 of the *Laws of Ine* may be compared with Clause 28 of the *Laws of Wihfred*, in Attenborough, *supra* note 79, at 31 cl. 28, requiring a traveler to sound a warning when he leaves the road.

194. *The Laws of Ine*, in Attenborough, *supra* note 79, at 43-61 cls. 23, 32-34, 70-71, 74, 76.

195. *Id.* at 45 cls. 26-27, 49 cl. 38.

196. *Id.* at 47 cl. 31.

- six regulate moving without permission, eviction, and failure to enter into possession;<sup>197</sup>
- three impose penalties for damage by stray animals;<sup>198</sup>
- two penalize destruction of trees;<sup>199</sup>
- two discuss penalties for breaking into fortified premises and for depredations by a lord's men;<sup>200</sup>
- two deal with obligations accompanying land use, including military service and rents;<sup>201</sup>
- one penalizes illicit compacts;<sup>202</sup>
- five deal with transactions in animals, animal parts, and animal labor;<sup>203</sup>
- one sets a penalty for the early shearing of sheep.<sup>204</sup>

The law codes summarized above, and the creation of lost codes that may have issued from other kingdoms, show that even before England came under the rule of a single king, those who called themselves kings assumed substantially greater stewardship for their realms and subjects than that claimed by earlier German kings. Some important aspects of this greater royal role included protection of the church and ecclesiastical personnel, regulations for the uniform administration of justice, keeping the peace as a public and not merely a private interest, regulating possession and cultivation of land (especially where rents and services were due to the king), and regulation of family matters to ensure that private support responsibilities were fulfilled.

In a larger sense, the dooms must have reflected the issues commonly before the king for his personal adjudication, and they thus reveal the kings' increasing preoccupation with legal matters.<sup>205</sup> More particularly, Ine's code shows important changes in the concepts of kingship:

For its date it is a lengthy document, covering a wide range of human relationships, entering much more fully than any other early code into the details of the agrarian system on which society rested, and marked by a definite purpose of advancing

197. *Id.* at 49 cl. 39, 57-59 cls. 63-66, 68.

198. *Id.* at 49 cls. 40, 42, 49.

199. *Id.* at 51 cls. 43-44.

200. *Id.* cls. 45, 50.

201. *Id.* at 53 cls. 51, 67.

202. *Id.* cl. 52.

203. *Id.* at 55 cls. 55-56, 58-60.

204. *Id.* at 59 cl. 69.

205. Alfred, for instance, had to hear suits even while washing. D. KIRBY, *supra* note 16, at 168.

Christianity. It is not a tariff of offences, but the result of a serious attempt to bring together a body of rules governing the more complicated of the questions with which the king and his officers might have to deal. It is the work of a responsible statesman, capable of bringing his clergy and nobles into deliberation on the blending of ancient custom and new enactment in an elaborate body of law. It stands for a new conception of kingship, destined in time to replace the simple motives which had satisfied the men of an earlier age.<sup>206</sup>

When Alfred the Great issued his code nearly two centuries later, which was the first applied to all lands under English rule<sup>207</sup> at a time when European kings were ceasing to exercise legislative powers,<sup>208</sup> Ine's laws were added to Alfred's laws as an appendix.<sup>209</sup> Before turning to the English codes of Alfred and his successors, it is appropriate to review with particularity the evolution of kingship to the end of the ninth century and its impact on Anglo-Saxon law.

#### *E. Changes in Anglo-Saxon Kingship: Effect on Law*

Early Anglo-Saxon kings ruled people, not territories.<sup>210</sup> With consolidation of conquests and increasing stability, kingdoms became identified as specific areas. These earliest kingdoms have been cryptically characterized by Fisher:

Certainly they were small and required little in the way of institutions. Their law was customary not royal, transmitted orally rather than in writing, and knowledge of it reposed in the body of the folk and was declared in the assembly of the folk by men specially learned in it. No sophisticated arrangements were needed to provide for the maintenance of the king and his retinue: they lived on the renders of their own estates and on the food farms [rent] paid by their subjects. The principal function of kings was to lead their people in war.<sup>211</sup>

In the approximately one hundred years from the time described in this statement until the legislation of Aethelberht, important changes occurred in the roles kings assigned themselves.

206. F. STENTON, *supra* note 16, at 71 (footnote omitted).

207. See D. FISHER, *supra* note 15, at 231.

208. F. STENTON, *supra* note 16, at 273.

209. *The Laws of Ine and of Alfred*, in Attenborough, *supra* note 79, at 35 (translator's introduction).

210. D. KIRBY, *supra* note 16, at 163.

211. D. FISHER, *supra* note 15, at 133.

These changes are illustrated in what is known of Aethelberht's conduct, even though he may have been ahead of his time. Certainly his pattern of kingship presaged the styles of subsequent kings.

Aethelberht maintained contacts with "foreign" courts both in England and on the Continent.<sup>212</sup> He assumed personal responsibility for dealing with Augustine's mission, regulating preaching, and later legislating for protection of ecclesiastical interests.<sup>213</sup> His laws show that the "king's peace" was gaining recognition; offenses committed in the king's presence or in gatherings called by the king were assigned extra penalties. Personal offenses normally resolved by payments to kindred also resulted in fines paid to the king, who now assumed the role of protector of the people in civil affairs. His dooms themselves reveal a king who accepted responsibility for the development and enforcement of customary law and who exhibited considerable interest in the internal affairs of his kingdom. Fisher infers from Aethelberht's laws that the king had officials to collect fines and arrange compositions between kindred.<sup>214</sup> Ine's laws mention that courts were presided over by *ealdormen*,<sup>215</sup> whose verdicts had to be obtained before redress could be sought.

The influence of the church was at times heavy. Kings such as Aethelberht of Kent and Edwin of Northumbria took very seriously conversion and the effect of Christianity on the lives and traditions of their people.<sup>216</sup> It was in the church's interest to encourage converted Anglo-Saxon kings to extend boundaries by conquering heathen neighbors. Good kings (from the church's perspective) used their powers to protect and further church interests, and such kings gave generously to establish religious foundations. Clerics taught that kings were responsible before God for the behavior of their people and had to remain humble before God, and apparently the Roman law concept that law was what pleased the prince had no influence. Instead, the old Germanic principle that the king was subject to customary folk law generally prevailed.<sup>217</sup>

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212. Aethelberht's wife Bertha was a Frankish princess. F. STENTON, *supra* note 16, at 105.

213. H. FINBERG, *THE FORMATION OF ENGLAND 550-1042*, at 37-39 (1976).

214. D. FISHER, *supra* note 15, at 134.

215. *The Laws of Ine*, in Attenborough, *supra* note 79, at 37.

216. See generally F. STENTON, *supra* note 16, at 105-16.

217. D. KIRBY, *supra* note 16, at 166.

Even though strife over succession was the rule in Anglo-Saxon kingdoms, it was confined to ruling families, and the victor assumed the entire kingdom: Anglo-Saxon kingdoms were not divided among heirs as were the Merovingian and Carolingian kingdoms.<sup>218</sup> The king's most substantial resource was large tracts of land from which he rewarded his followers. While the land was technically the property of the entire people, the king had rights to rents, services, or other returns, which he could grant for faithful service.<sup>219</sup> Such grants were made by royal diploma or charter releasing the land from some public burdens, and these grants were called bookland.<sup>220</sup> In Mercia, even bookland continued under the burdens of military service, bridge building, and fortress maintenance.<sup>221</sup> Elsewhere, bookland was exempt from the king's proprietary right to tax the land known as *feorm*.<sup>222</sup> Revenue and tribute were also exacted from subject territories.<sup>223</sup>

The king could also order extraordinary national taxation, as shown by the *danegeld* and *heregeld* assessments of the Viking era,<sup>224</sup> and he took a percentage of the fines imposed by courts.<sup>225</sup> These national tax assessments, in particular, suggest considerable administrative machinery at the king's disposal, used to calculate land assessments and to collect them. Part of that machinery was a writing office, evidenced by numerous royal charters and writs.<sup>226</sup> Late in the Anglo-Saxon period, copies of charters were kept in the king's chapel, the beginnings of a record office. The practice of issuing writs, short letters on administrative business, probably began in the ninth century and "has been described as Anglo-Saxon England's most important contribution to the science of government."<sup>227</sup> It became a principal procedural contribution to development of the common law.

218. *Id.* at 165.

219. F. STENTON, *supra* note 16, at 302-03.

220. Finberg, *King Alfred's England* in *THE AGRARIAN HISTORY OF ENGLAND AND WALES A.D. 43-1042*, at 458-462 (H. Finberg ed. 1972).

221. *Id.* at 459.

222. 1 W. BIRCH, *CARTULARIUM SAXONICUM* 143 no. 99 (1885) (Grant by Wihtried, King of Kent on April 8, A.D. 699); *id.* at 157 no. 108 (Grant of privileges by King Ini on May 6, A.D. 704).

223. Finberg, *supra* note 220, at 413.

224. F. STENTON, *supra* note 16, at 406-07.

225. See 2 J. KEMBLE, *supra* note 72, at 53-55.

226. F. STENTON, *supra* note 16, at 389-90.

227. D. KIRBY, *supra* note 16, at 171.

Early Anglo-Saxon kings had judicial power, but this power was largely undefined. Exempt from oath requirements, the king was also entitled to act as judge in all cases of disputed law.<sup>228</sup> The king's normal routine of constantly moving from place to place must have encouraged appeals.

Over a century ago, Kemble produced a lengthy list of Anglo-Saxon royal prerogatives, some without direct English evidence but drawn by analogy from Germanic practice on the continent. Such powers and privileges eventually strengthened the role of medieval monarchs in shaping the common law. These rights included the right to possess large land holdings, to receive contributions in kind from free men (later compulsory), to receive a portion of fines payable for offenses, to keep a personal military guard, to call out the armed militia, to proclaim and maintain peace, to maintain the coinage, to oversee justice, and to elevate his followers. More personal prerogatives included that of pardon, escheat and forfeiture, treasure trove, hospitality for his travels through the country (including service for horses and watchmen), personal labor for building and fencing royal residences, recovery of wrecks or salvage, mint, mines and minerals, markets with tolls and police powers, tolls, forests, strangers (a portion of the stranger's wergild in exchange for the duty of protection), licensing of bridge, road, canal, port, harbor and castle construction, wardship and marriage, and *heriot*.<sup>229</sup>

Keeping in mind that the royal powers described above were not fully employed by all Anglo-Saxon kings at all times, and that their development and utilization were uneven, their impact on the development of law may be summarized as follows:

1. As rule over groups of people became territorial, local and royal administrative machinery grew.
2. The practice of writing laws, even for only exceptional circumstances, lent stability and formality to legal development, inserted the royal authority more explicitly into the unwritten customary law, and began a long process culminating in the placement of royal power at the center of all important legal development.

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228. 2 J. KEMBLE, *supra* note 72, at 40-49.

229. 2 J. KEMBLE, *supra* note 72, at 29-103. *Heriot* was a death duty by which the survivors of the king's followers returned the weapons, or their value, which the king theoretically had conferred when he first accepted the companionship. See *supra* text accompanying note 87.

3. Exercise of revenue powers, especially of national taxation based on land holdings, not only required competent officials and stable administrative procedures, but asserted comprehensive royal power over all the lands of the kingdom.

4. More active involvement in foreign relations paralleled the king's growing interest in internal affairs. This increased domestic interest reflected a perceived divine stewardship over the welfare and behavior of his subjects and the need to maintain the king's peace, a civil order defined by law. Essential to peace was limiting the private warfare of blood feuds between kindred, eventually extending the power of the state over this most ancient of customs.

5. The king granted interests in land, which grants refined and defined real property interests generally, and recorded these interests. Other administrative writings known as writs would become very important in the formal development of law after the Norman Conquest.

6. The king actively participated in adjudicating individual cases. No other person in the kingdom, except possibly legal advisors to the king, had greater influence on the development and application of customary law.

7. Even though relatively powerful by comparison with other medieval monarchs, Anglo-Saxon and English kings made no attempt to alter the traditional Germanic principle that even kings remained subject to the law.

#### *F. Laws of the Later English Kings*

Ravages of the Danish Vikings during the ninth century disrupted every aspect of Anglo-Saxon society. Only Wessex under Alfred the Great survived the raids that turned into invasions. Alfred stopped the Danish advance, began unifying the proud and disparate people of the other conquered kingdoms, and gradually recovered territory and rule from the Danes. Thenceforth English laws would be issued by kings of all the English.<sup>230</sup>

Once England was united under one king, the extension of royal influence on legal developments accelerated:

These ideas concerning the nature of royal power impelled

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230. Alfred's achievement in unifying English government and law was probably aided by the earlier unification of the English church. See H. FINBERG, *supra* note 213, at 51.

kings, in fulfilment of the obligations of their office, increasingly to extend the range and intensity of their activities in government; and induced subjects willingly to accept the increased degree of royal authority which flowed from such activities. To ensure that justice was done to all men they exerted their authority in supporting the proper functioning of the local courts; anyone failing to attend a court when summoned was fined, and anyone who refused to take part in measures against a man who refused to pay the fine was himself fined; where Alfred had exhorted his reeves to do justice, under his successors the denial of justice by a royal official or a lord incurred a heavy fine and loss of office. Since one of the king's first concerns was the maintenance of internal peace those offences most productive of disorder were made subject to particularly heavy penalties traditionally imposed on offenders against the king's peace.<sup>231</sup>

The laws issued by Alfred and his successors are especially important because they applied to the entire English nation. In content they added little to the types of decrees in earlier Anglo-Saxon law codes. They do, however, reveal a continuing trend toward a more active, powerful monarchy. A summary of the origins and content of these later English law codes follows.

### 1. *The laws of Alfred the Great*

Alfred reigned from 871 until his death in about 899. The date of his code is uncertain, estimated at 892-893 by one scholar and prior to 889 by another.<sup>232</sup> A lengthy introduction contains a translation of the Ten Commandments and other passages from the book of Exodus, a brief apostolic history (quoting from the book of Acts), a description of the growth of church law, and a statement that schedules of compensations were decreed and written by many councils. The king then declared:

Now, I, King Alfred, have collected these laws, and have given orders for copies to be made of many of those which our predecessors observed and which I myself approved of. But many of those I did not approve of I have annulled, by the advice of my councillors, while [in other cases] I have ordered changes to be introduced. For I have not dared to presume to

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231. D. FISHER, *supra* note 15, at 251; see also 2 J. KEMBLE, *supra* note 72, at 1-2.

232. 3 F. LIEBERMANN, *supra* note 80, at 34; *The Laws of Ine and of Alfred*, in Attenborough, *supra* note 79, at 35 (translator's introduction).



set down in writing many of my own, for I cannot tell what [innovations of mine] will meet with the approval of our successors. But those which were the most just of the laws I found—whether they dated from the time of Ine my kinsman, or of Offa, king of the Mercians, or of Aethelberht, who was the first [king] to be baptised in England—these I have collected while rejecting the others.

I, then, Alfred, King of the West Saxons, have shewn these to all my councillors, and they have declared that it met with the approval of all, that they should be observed.<sup>233</sup>

These laws, as described, provide protection for ecclesiastical interests and assign penalties for various types of offenses, with greater punishments for misdeeds that threaten the king's peace. There is a singular reference to land held by title deed, called "bookland" ("bocland" in Anglo-Saxon), which was inheritable and could be limited by the transferor to alienation only within the kindred.<sup>234</sup> Thirty-four of the seventy-seven clauses describe penalties for various personal injuries.<sup>235</sup>

## 2. *The treaty of Alfred and Guthrum*

Following Alfred's defeat of the Danish king Guthrum in 878, this treaty, drawn up sometime between 880 and Guthrum's death in 890, set out procedures and penalties for certain offenses. The boundaries between the English and Danish areas were also described.<sup>236</sup>

## 3. *The laws of Edward and Guthrum*

In an introduction, challenged by Liebermann as not authentic,<sup>237</sup> these laws are described as those enacted first by Alfred and Guthrum and later by Edward (the Elder, who reigned 899-924) and Guthrum. Guthrum's death in 890 makes this latter liaison suspect. In any event, the decrees drew further distinctions between penalties imposed in English and Danish districts.<sup>238</sup>

233. *The Laws of Alfred*, in Attenborough, *supra* note 79, at 63 (footnotes omitted).

234. *The Laws of Alfred*, in Attenborough, *supra* note 79, at 83 cl. 41.

235. *Id.* at 87-93 cls. 44-77.

236. *The Treaty of Alfred and Guthrum*, in Attenborough, *supra* note 79, at 96-97, 99-101.

237. 3 F. LIEBERMANN, *supra* note 80, at 87.

238. *The Laws of Edward and Guthrum*, in Attenborough, *supra* note 79, at 97, 102-09.

#### 4. *The laws of Edward the Elder*

Edward issued two series of laws, more coherent and logical than earlier codes. The first set of laws, consisting of only three clauses, makes reference to "folkland" (of uncertain meaning, possibly the land held communally by all the people) and "bookland."<sup>239</sup> Of the eight clauses in the second set of laws, one makes reference to the "domboc,"<sup>240</sup> probably the "doombook" of laws of Ine and Alfred, showing that those laws had not been superseded.<sup>241</sup>

#### 5. *The laws of Aethelstan*

Six series of laws issued by Aethelstan, who reigned ca. 924-939, are of uncertain dates. Their subjects and probable order of issuance are I (ecclesiastical matters), II (administration of justice), V (administration of justice from a council at Exeter), III (repeats substance of I, II and V in the form of a letter to the king from officials and people of Kent), IV (administration of justice), and VI (an ordinance governing guilds, drawn up by bishops and reeves from London).<sup>242</sup> Perhaps the most interesting of these laws is clause 2 of II Aethelstan:

With regard to lordless men from whom no [legal] satisfaction can be obtained, we have declared that their relatives shall be commanded to settle them in a fixed residence where they will become amenable to public law, and find them a lord at a public meeting.<sup>243</sup>

This statement illustrates the official distaste for the "lordless man," probably showing that lordship had been significantly extended during the centuries of Anglo-Saxon rule.

A point made in the very next clause is also noteworthy: "He who applies to the king before he pleads as often as is required for justice [at home], shall pay" a fine.<sup>244</sup> Thus one hears the cry of a monarch feeling the burden of legal duties. More

239. *The Laws of Edward (I)*, in Attenborough, *supra* note 79, at 117 cl. 2.

240. *The Laws of Edward (II)*, in Attenborough, *supra* note 79, at 120 cl. 5.

241. *The Laws of Edward the Elder and of Aethelstan*, in Attenborough, *supra* note 79, at 112 (translator's introduction).

242. *Id.* at 112-13; *The Laws of Aethelstan*, in Attenborough, *supra* note 79, at 122-73.

243. *The Laws of Aethelstan (II)*, in Attenborough, *supra* note 79, at 129 cl. 2 (footnote omitted).

244. *Id.* cl. 3 (footnote omitted).

than other dooms, the tenor of Aethelstan's laws is of a monarch beset with headstrong and unruly nobles who flouted the law and with citizens who would not carry out such traditional responsibilities as court attendance and pursuit of thieves.

#### 6. *Other law codes*

Other aspects of Anglo-Saxon law appear in the laws of the English kings Edmund I (issued 942-946),<sup>245</sup> Edgar (issued 946-963)<sup>246</sup> and Aethelred II (issued 980-1016),<sup>247</sup> of the Anglo-Danish king Cnut (issued 1027-1034),<sup>248</sup> and various writings from and after the time of the Norman conquest purporting to describe Anglo-Saxon law under Edward the Confessor (in effect at the time of the 1066 Conquest).<sup>249</sup> However, the main foundations for common law were well in place by then, set both by an active monarchy and by the steady development of local legal customs.

### IV. LOCAL, CUSTOMARY ANGLO-SAXON LAW LAYS A FOUNDATION FOR COMMON LAW

#### A. *The Framework for Law in Local Administrative Organization*

So well rooted were the devices and forms of Anglo-Saxon local government that they were taken over intact by the conquering Normans and thus figured prominently in common law developments of the later Middle Ages. Most fundamental of these features was administrative organization.

Much evidence suggests that the earliest folk-groups were identified by the name of the original successful leader, and that name referred to a particular body of people wherever they happened to be.<sup>250</sup> By the seventh century, as Anglo-Saxon society was becoming more territorial, some old folk-groups had stabilized into administrative districts, sometimes called provinces, or in certain localities eventually called shires and hundreds. This terminology originated in Wessex and spread to most of the rest

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245. 1 F. LIEBERMANN, *supra* note 80, at 184-91.

246. *Id.* at 192-214.

247. *Id.* at 216-70.

248. *Id.* at 273-371.

249. *Id.* at 529-672 (discussed in 1 F. POLLOCK & F. MAITLAND, *supra* note 1, at 98-107).

250. D. KIRBY, *supra* note 16, at 174-75.

of England by 1016, primarily because of West Saxon hegemony during the Viking conflicts.<sup>251</sup>

Some shire boundaries probably conformed to the boundaries of the old folk-groups; others did not. Many shires were administered by important officials of the king, called ealdormen, some of whom were possibly the successors of older folk-group leaders. Each of these officials had considerable legal power. Shires came to be divided into hundreds (or wapentakes in predominantly Danish areas), usually administered by an officer of the king called a reeve. The reeve's duties were to administer the king's lands and to preside over the hundred courts, as the ealdorman presided over the shire courts. Certain high reeves became the chief administrative officials over shires and were known as shire reeves, or more familiarly, sheriffs.<sup>252</sup>

The main responsibilities of the reeves, and ultimately of the ealdormen, were to maintain law and order, punish criminals, collect royal dues, conduct courts, supervise tolls, exchanges and mints, and—especially in the case of ealdormen—conduct military operations. The work of these royal officers could not have progressed without the cooperation of the people, especially when the ravages of the Danish wars disrupted local law and order.<sup>253</sup> Kings of this time evinced a greater sense of responsibility for civil order in laws that stressed citizen responsibility for pursuit and apprehension of thieves.<sup>254</sup>

There is unfortunately little information about town life under the Anglo-Saxons. Possibly the free inhabitants of towns formed themselves into *gylde*s of uncertain nature, and they may have corporately enjoyed certain privileges. London, in particular, seems to have enjoyed substantial independence.<sup>255</sup> One can only speculate whether persons fleeing servitude could find any measure of refuge in towns, as was the case in a later era, and whether seeds of self-government first germinated there.<sup>256</sup>

### B. Local Courts and Procedure

Another civic responsibility was court attendance. In England, the hundred courts met every four weeks, and the shire

251. F. STENTON, *supra* note 16, at 289-90.

252. D. KIRBY, *supra* note 16, at 175-79.

253. *Id.* at 177-78; F. STENTON, *supra* note 16, at 301-02, 408-09.

254. See, e.g., *The Laws of Aethelstan (IV)*, in Attenborough, *supra* note 79, at 149-51 cl. 6.

255. 1 F. LIEBERMANN, *supra* note 80, at 232-37.

256. 2 J. KEMBLE, *supra* note 72, at 309-12.

and borough courts met every six months and every four months respectively.<sup>257</sup> The king's court took "original jurisdiction" over some matters (breach of king's peace, forcible entry, and injury to persons in a homestead, ambush, and harboring of fugitives) and appeals from the other courts. Some of these appeals were complex, because local customary law differed from district to district. No later than the tenth century, the king was granting to individual lords the right to hold private courts, which continued the development of local law. By the time of the Norman conquest, the majority of landed nobles possessed such judicial power, and this movement may have actually slowed the spread of royal justice.<sup>258</sup>

Court procedure also rested on local residents' sense of responsibility, for not only was attendance of free men often required at the proceedings, but the procedure itself often directly involved many without a direct connection to the lawsuits. Formal court procedure would have appeared to modern observers as a form of the degenerate "swearing contest" often afflicting modern procedure. In fact, Anglo-Saxon court procedure did not call for the introduction or weighing of evidence. Instead, the truth of allegations and denials was based on a man's honor, made even weightier after the Christian conversion by reference to divine sanctions against falsehood. Once an accusation was made, the accused had to appear or forfeit. The plaintiff would swear to the truth of the charge, and the defendant would swear to the denial. The denial would be assisted by the oaths of several oath-helpers or compurgators, whose number and status were prescribed by tradition according to the seriousness of the charge and the status of the defendant. If a defendant met the oath requirement, the suit ended.

Alternatively, if a defendant failed to meet the oath requirement, or if a plaintiff could back up an accusation with his own oath-helpers, or if the accused had a bad reputation or had been caught in the act or possessed incriminating property, the ordeal would be invoked. In all of its various forms, such as testing by boiling water, a red hot iron, or being thrown into water, the ordeal was the means for seeking the judgment of God as to guilt or innocence. If guilty, the defendant suffered the penalty

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257. 1 F. POLLOCK & F. MATTLAND, *supra* note 1, at 42-43.

258. D. KIRBY, *supra* note 16, at 180-83.

prescribed for the offense, ranging from imprisonment, fine, flogging, and mutilation, to execution. Evaluation of evidence, which seems absent from the formal procedure, may have occurred before the matter formally came into court.<sup>259</sup>

### C. *Other legal customs*

#### 1. *Property other than land*

As pointed out by Pollock and Maitland, under Germanic law possession rather than ownership was central: "Those who have studied the modern learning of possessory rights and remedies are aware that our common law has never really abandoned this point of view."<sup>260</sup>

The property most commonly exchanged was probably cattle, and the mode of transfer was actual delivery. A bargain was probably bound by pledges and earnest money, although there is no direct evidence on any of these points. Written contracts were not in use.<sup>261</sup>

#### 2. *Real property, tenures, and feudalism*

The rules for landholding at various times during the Anglo-Saxon age are best described in terms of the prevailing social structure, because the most distinctive feature of social classes was their respective relationships to the land. All land seems to have had impressed upon it certain public burdens: the obligations of military service, bridge construction, and fortress maintenance. Perhaps it is this land generally that is meant by the mysterious term "folkland."<sup>262</sup>

The powers over land exercised by kings has already been discussed:<sup>263</sup> the kings reserved for themselves great tracts of land in subjugated territories. Some of this land was granted to their chief warrior companions who formed the noble class, and after Christian conversion, kings frequently made grants to the church. The grantees were supported by the rents and services of humble agrarian folk who actually occupied and tilled much of the land.<sup>264</sup> These royal grants were probably only a life inter-

259. 1 F. POLLOCK & F. MAITLAND, *supra* note 1, at 38-40.

260. *Id.* at 57.

261. *Id.* at 57-58.

262. Finberg, *supra* note 220, at 453.

263. See *supra* notes 219-23 and accompanying text.

264. Finberg, *supra* note 220, at 446.

est: if a father wished to pass a holding on to a son, he probably had to seek the king's acquiescence. A younger son might serve in personal attendance on the king in anticipation of being favored with his own grant of land.<sup>265</sup>

At some time, probably beginning shortly after conversion to Christianity occurred, the need for church endowments not limited to the life of one grantee became obvious. Anglo-Saxon rulers began granting land to the church by means of royal charters, giving virtually full possessory and hereditary rights. This land was always referred to as *bocland* or bookland. Obtaining such charters was at first the exclusive privilege of the church, but transparent subterfuges arose. A lay person could secure a grant of bookland by founding a church and bequeathing it to his descendants, who would have to take orders or the veil. The bequest was always in jeopardy if heirs died or wished to remain lay persons, so commonly the local bishop would be named the ultimate heir. Also widespread was a practice, condemned by Bede, by which many important persons had themselves tonsured and called their institutions monasteries, but whose commitment to orders was superficial. So much land was consumed by this practice in Northumbria that there was not enough land left for grants to young warriors, who often left.<sup>266</sup>

While all land was normally subject to certain secular burdens—taxation, military service, purveyance, labor, and judiciary duties<sup>267</sup>—Ine of Wessex went so far in 704 as to declare church lands perpetually exempt from taxation,<sup>268</sup> and Wihtred of Kent exempted churches from all secular burdens,<sup>269</sup> an act ratified by a church council in 742. But in 749 the powerful Mercian king Ethelbald declared church lands exempt from all secular burdens except bridge building and fortress work.<sup>270</sup> A few years later, his successor Offa added the requirement that holders of bookland must meet quotas for military service.<sup>271</sup> Wessex followed, and by 842 Wessex land charters show that all three

265. *Id.* at 444-45.

266. *Id.*; H. FINBERG, *supra* note 213, at 92.

267. H. FINBERG, *supra* note 213, at 121.

268. 1 W. BIRCH, *supra* note 222, at 157 no. 108 (Grant of privileges by King Ine on May 28, A.D. 704).

269. *Id.* at 143 no. 99 (grant by Wihtred, King of Kent, on April 8, A.D. 699).

270. *Id.* at 254 no. 178 (privileges granted by Aethelbald, King of the Mercians, in A.D. 749).

271. Finberg, *supra* note 220, at 459.

“common dues” were being imposed on bookland in Wessex.<sup>272</sup> This removed any barriers to extending bookland outright to lay persons, which in fact occurred in Offa’s time.<sup>273</sup>

Bookland carried the rights of alienation or devise,<sup>274</sup> and even portions held by the king as his own demesne passed to the grantee. As bookland rights developed, they apparently also included judiciary rights,<sup>275</sup> at least to keep part of fines assessed, if not the right to hold court.<sup>276</sup>

Land not granted by charter might have been held under a more precarious tenure which for convenience can be called loan land.<sup>277</sup> Such land could not be alienated or inherited without the king’s permission or charter. If permission or charter were granted, the land became bookland, but would revert to the king if the holder died without heirs. Such a holding can be described as a lease for a term of lives, usually three lives, followed by a reversion.<sup>278</sup> Loan land was subject to normal secular dues and it, like bookland, could be forfeited for failure to fulfill those dues.

The tracts of land granted by loan or book were usually very large, and the grantees were often members of the lay nobility or higher clergy. Substantial portions of their holdings were occupied by tillers of the soil from several other classes, with the social class corresponding to the terms of their tenures. Certain fundamental shifts in the proportions and privileges of these classes occurred during the Anglo-Saxon centuries.

Just below the nobility on the social scale was a class of free farmers, discussed at some length in the laws of Aethelberht,<sup>279</sup> and sometimes apparently labeled *geneats* or *radcnihts*. However, outside of this source, we have very little direct informa-

272. 1 W. BIRCH, *supra* note 222, at 390 no. 282 (Grant by Brihtric, King of Wessex, in A.D. 801); 2 W. BIRCH, *id.* at 13 no. 438 (Grant by Athelwulf, King of the West Saxons, in A.D. 842).

273. Finberg, *supra* note 220, at 459.

274. *Id.* at 461. However, during Alfred’s reign, holders of bookland were forbidden to alienate it if ancestors had entailed it in the family. *The Laws of Alfred*, in Attenborough, *supra* note 79, at 83 cl. 41.

275. F. MAITLAND, *DOMESDAY BOOK AND BEYOND* 258-92 (1897).

276. Finberg, *supra* note 220, at 464.

277. 1 F. POLLOCK & F. MAITLAND, *supra* note 1, at 61.

278. Finberg, *supra* note 220, at 521; 3 W. BIRCH, *supra* note 222, at 321 no. 1091 (Grant for life by Oswald, Bishop of Worcester, in A.D. 962); *id.* at 382 no. 1136 (Letter of Oswald, Bishop of Worcester, in A.D. 964).

279. *The Laws of Aethelberht*, in Attenborough, *supra* note 79, at 5-9 cls. 4, 6, 9, 24, 27, 29, 31.



tion about this class. Their land, even if free of rent obligation and freely alienable, would still have been subject to the secular dues owed to a lord or the king. Depictions of early Anglo-Saxon society as consisting mostly of such free persons cannot be substantiated and, in fact, the Domesday Book shows the free class to have been surprisingly small except in the heavily Danish areas. In the later Anglo-Saxon age, it is possible that some of these freemen became mounted retainers for their lords or the king, thus receiving a holding and expected in return to pay rent, perform labor, and attend and ride on errands.<sup>280</sup> Some may see in this yeoman farmer-mounted servant the forerunner of the medieval knight, already in place before the Normans came.<sup>281</sup>

More information on the rules for land holding during the Anglo-Saxon period is essential to answering the question of the degree of feudalism in 1066. In England a person could be economically dependent (unfree), but still be personally free, especially in legal standing. Freemen are known to have been tenants in varying degrees of servitude. If, however, by feudalism it is meant that the kings conditioned land holding on providing a specified number of military vassals as warriors, then English feudalism probably arose during the Anglo-Saxon period. Evidence for this incipient feudalism lies in references to the *geneats* and the *radcnihts* of late Anglo-Saxon times, and in leader agreement to provide the king with certain numbers of armed men, and in the fact that service in the *fyrð* or militia had always been associated with land holding.

Later feudal society included other classes that arose during the Anglo-Saxon age, such as the *geburs*. As another class of free persons, *geburs* held much smaller tracts than the *geneats*, paid rent in kind and money, and performed labor for their lord. The lord, who originally provided both land and stock, reclaimed them when the *gebur* died. Still lower on the social scale, the class of *kotsetlan* or cottagers held land of the lord also, and performed heavy labor. Economically unfree, the cottagers probably could not move from their land, but were still personally free.<sup>282</sup> This nominal personal freedom would be lost if a cottager was captured during civil strife or sold himself into slavery

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280. Finberg, *supra* note 220, at 514-15.

281. J. LINDSAY, *THE NORMANS AND THEIR WORLD* 301-11 (1974).

282. *Id.* at 510-11; see, e.g., 3 W. BIRCH, *supra* note 222, at 111, no. 935 (Grant by King Eadwig to Aelfwine, in A.D. 956).

during times of hardship.<sup>283</sup> Pollock and Maitland concluded that "serfdom was much more of a personal bondage and less involved with the occupation of particular land before the Norman Conquest than after."<sup>284</sup>

It is likely that by 1066 a large majority of the population held land that was part of a manor; that is, they were dependent on a lord to whom they owed rents and services, and most of the men worked in some form of personal servitude on their lord's lands.<sup>285</sup> A manorial economy probably existed quite early in Anglo-Saxon England. The lord who thus was landlord often was also the lord who commanded the tenant's military loyalties and answered for him in court.<sup>286</sup> One lord could hold land of another.

#### D. *Impact of the Vikings*

This firmly-set social hierarchy underwent wrenching upheaval during two centuries of Viking conflict. As a result of their first invasions and the settlements of Alfred and his successors, the Danish Vikings were confirmed in their political domination over huge areas of eastern and northern England. More than a third of England, known as the Danelaw, was left to the intruders. Debate continues today over the density of Danish populations and the extent of their influence.<sup>287</sup>

Our inquiry is limited to the impact on legal developments caused by extensive Danish settlement. Curiously, when Cnut, a great Danish king of England, issued a law code, it was "in the full stream of English legal achievement," exhibiting no Danish idiosyncracies.<sup>288</sup> This characteristic has been explained by the fact that Danish traditions of kindred organizations, wergilds, and public assemblies were very similar to those of the English. Moreover, when the Danes accepted Christianity, they accepted the body of English law associated with the church and were ex-

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283. Finberg, *supra* note 220, at 509-10.

284. 1 F. POLLOCK & F. MATLAND, *supra* note 1, at 37.

285. *Id.* at 61. Possible exceptions would be the many men in the predominantly Danish eastern counties who paid their geld directly to the king. See D. KIRBY, *supra* note 16, at 227.

286. See *supra* notes 84-92 and accompanying text; D. KIRBY, *supra* note 16, at 228.

287. H. LOYN, *THE VIKINGS IN BRITAIN* 125 (1977).

288. *Id.* at 128.

posed to English clergy, who were most responsible for written legal records.<sup>289</sup>

Nevertheless, a doom of Edgar declares "that secular rights be in force among the Danes according to as good laws as they can best decide on,"<sup>290</sup> and Aethelred issued parallel codes for Englishmen and Danes.<sup>291</sup> Putting aside the question of how much common law development was affected by the Danes, several of their distinctive legal practices have been identified and were evident in Anglo-Danish England. In land law, terminology was distinctly Danish, and there was heavy reliance on independent sureties for land transactions. Land measurement and assessment were altered and received a new vocabulary.

In procedure, a public prosecutor may have been utilized. Twelve leading thegns (noblemen) in each borough went from the court and swore on relics that they would neither accuse any innocent person nor protect any guilty one. A majority of eight determined the presentments of this body. Differences in assessing fines and difficulties in reconciling disparate monetary units existed in the Danelaw. Compensation paid to a slain man's lord was based on the victim's status, whereas in English areas that amount was determined by the lord's rank. A greater penalty was assigned for breach of the king's peace, suggesting it was more highly valued (or more readily broken).

Most significantly, the Danes appear to have had a much greater proportion of free peasants among its population. Historians have divided over whether this social difference is directly related to Scandinavian settlement or arises from regional peculiarities in place before the Danes arrived. It is appealing to attribute this freedom to "the infusion of large numbers of Scandinavian farmer warriors with their traditions of independence, reinforced by their nature as colonists."<sup>292</sup> Scandinavians also made significant contributions to urban growth.<sup>293</sup>

The impact of all these circumstances on legal developments may have been pervasive in the Danelaw, but their impact on national law as a whole was subtle and imperceptible.

289. *Id.* at 125-27.

290. *Edgar's Code Issued at "Wihthordesstan"*, in 1 ENGLISH HISTORICAL DOCUMENTS 399 cl. 2.1 (1955); 1 F. LIEBERMANN, *supra* note 80, at 211.

291. A code written for the Danelaw is *King Ethelred's Code Issued at Wantage*, in 1 ENGLISH HISTORICAL DOCUMENTS 402-05 (1955); 1 F. LIEBERMANN, *supra* note 80, at 228-33.

292. H. LOVN, *supra* note 287, at 132.

293. *Id.* at 125-37.

## V. CONCLUSION

After the "flower of the youth and nobility of England"<sup>284</sup> lay dead on the Hastings battlefield and William ground out the complete conquest of England over the next two decades, no legal revolution occurred. The Normans had little original law to contribute to the English. Indeed, William promised that all inhabitants of England would continue under the laws of Edward the Confessor, with certain additions. When Norman administrative practices began molding local law into common law, the substance of the law was overwhelmingly Anglo-Saxon.

As much as the present state of research permits, it has been shown that Germanic legal customs were brought to Britain and proceeded in an unbroken course of development to become the foundation for law common to all of England. The evidence for those ancient laws and practices on the continent is consistent with what is known of the earliest Anglo-Saxon period and reveals a society dominated by blood feuds, kindred, lordship, and public assemblies.

Stabilization of society after the conquest of Britain led to centralization of power, with kingship ascending and fewer and larger kingdoms emerging. Concentration of ruling power generated legal developments that were different from, but natural extensions of, old customs. This concentration prepared the way for the common law. At the same time, purely local practices developed virtually unhindered by central authority and made their own contributions to common law foundations. The Scandinavian intrusion tended to both enhance and interrupt this process.

The most conspicuous achievements in creating common law would not occur until the thirteenth century. Meanwhile, one more element would enter Old English society: the ruthless energy of the Normans, who would stamp their barons and castles onto the top of society, but would eventually blend into it.

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294. D. KIRBY, *supra* note 16, at 148.

