

Patrick Wormald

**Papers Preparatory to
The Making of English Law:
King Alfred to the Twelfth Century**

**Volume II
From God's Law to Common Law**

Edited by Stephen Baxter and John Hudson

UNIVERSITY OF LONDON
EARLY ENGLISH LAWS
2014

Published by
UNIVERSITY OF LONDON
EARLY ENGLISH LAWS
<http://www.earlyenglishlaws.ac.uk>

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ISBN 978-1-909646-03-2

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Preface

It is hard to believe that it is ten years since Dad passed away. Looking back to 2004, the immediate aftermath of his passing has taken on a dreamlike quality, but the outpouring of affection for him as a person, teacher and thinker that followed – and which helped make the pain more bearable – remains vivid.

There followed a truly gargantuan effort on the part of many to bring some of the projects that Dad had underway to a suitable conclusion, and to reflect on the impact of his work. This resulted in a series of publications, culminating in a memorial volume published in 2009 containing contributions by many of his friends and colleagues from around the world. There seemed no better way to complete the project of bringing Dad's work to a close.

A close, we thought, until now. It has long been our hope that something could be done with the material for Volume II of *The Making of English Law*, but the nature of the material precluded print publication. Some of it was almost finished, some little more than draft notes; it all seemed insurmountable and destined to be left as it was. Fortunately, the creation of this marvellous resource, and the editorial work of Stephen Baxter, John Hudson and Bruce O'Brien among others made electronic publication feasible. Tom, Mum and I are all extremely grateful for all the efforts of all those involved in making this happen.

Scholarship moves on, as Dad himself knew, even if he might find that notion somewhat uncomfortable. We, though, can see his work continue to make a contribution to the subject he was so passionate about. This is an even better point of conclusion to his oeuvre than we might have hoped. And in closing, I cannot resist in wondering what he, with his great interest in and love for Scotland, would have made of the momentous events happening at the moment. As I write this, the referendum is yet to happen; as you read it the result will be known. Whatever else, this proves that history goes on, and I think Dad would like that.

Luke Wormald, 18 September, 2014

Abbreviations

[This list of abbreviations follows that printed in Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century, Volume I, Legislation and its Limits* (Oxford, 1999), except that works not cited in the present collection have been omitted.] Order is primarily alphabetical and secondarily that of an Abbreviation's following or next distinguishable letter, *whether or not acronymic*; i.e. CCSL (Corpus Christianorum) precedes CDL (Codice Diplomatico Longobardo), *DB* (*Domesday Book*) precedes *Dec. Ch.* (*Decretio Childeberti*), etc.

<i>Ab. Ch.</i>	<i>Charters of Abingdon</i> , ed. Kelly.
Abt	Laws of Æthelberht, ed. <i>Gesetze</i> .
Af	Laws of Alfred, ed. <i>Gesetze</i> .
<i>ANS</i>	[<i>Proceedings of the Battle Conference on Anglo-Norman Studies</i> I–IV (1978–81), edited by R.A. Brown] <i>Anglo-Norman Studies</i> V – (1983–).
<i>Ans.</i>	<i>Collectio Capitularium Ansegisi/Kapitulariensammlung des Angsegis</i> , ed. Schmitz.
ASC	‘Anglo-Saxon Chronicle’.
<i>ASE</i>	<i>Anglo-Saxon England</i> .
[I–VI] As [+As Alm]	Laws of Æthelstan, ed. <i>Gesetze</i> .
[I–X] Atr	Laws of Æthelred, ed. <i>Gesetze</i> .
<i>Að</i>	<i>Að</i> , ed. <i>Gesetze</i> .
Bede, <i>Hist. Eccl.</i>	Bede’s <i>Ecclesiastical History</i> , ed. Colgrave and Mynors.
<i>Blas.</i>	<i>Be Blaserum</i> , ed. <i>Gesetze</i> .
<i>Burt. Ch.</i>	<i>Charters of Burton</i> , ed. Sawyer.
<i>Can. Eg.</i>	<i>Wulfstan’s Canons of Edgar</i> , ed. Fowler.
<i>Cap.</i>	<i>Capitularia Regum Francorum</i> , ed. Boretius and Krause.

CCSL	Corpus Christianorum Series Latina (Turnhout).
CDL	<i>Codice Diplomatico Longobardo</i> I–V, ed. Schiaparelli, Brühl, Zielinski.
CHn cor	Coronation Charter of Henry I, ed. <i>Gesetze</i> .
<i>Chron. Ram.</i>	<i>Chronicon Abbatiae Rameseiensis</i> , ed. Macray.
[I–II] Cn	Laws of Cnut, ed. <i>Gesetze</i> .
Cn 1018	Kennedy (ed.), ‘Cnut’s law code of 1018’.
Cn 1020	Cnut’s Letter to England (1020), ed. <i>Gesetze</i> .
Cn 1027	Cnut’s Letter to England (1027), ed. <i>Gesetze</i> .
<i>Coll. Can. Hib.</i>	<i>Collectio Canonum Hibernensis = Irische Kanonensammlung</i> , ed. Wasserscheben.
<i>Concil.</i>	<i>Concilia Aevi Karolini</i> .
‘Conf.’	Fowler (ed.), ‘Late Old English Handbook for use of a Confessor’
<i>Corp. Iur.</i>	<i>Corpus Iuris Civilis</i> , ed. Mommsen, etc.
CP	Maitland, <i>Collected Papers</i> , ed. Fisher.
DB	<i>Domesday Book</i> , ed. Farley, etc. (with Phillimore edition numbering system in parentheses)
DBB	Maitland, <i>Domesday Book and Beyond</i> .
<i>Dec. Ch.</i>	<i>Decretio Childeberti</i> , ed. Eckhardt, <i>Lex Sal.</i>
DHII	<i>Heinrici II et Arduini Diplomata</i> , ed. Breßlau.
<i>Disputes</i>	Davies and Fouracre (eds), <i>Settlement of Disputes</i> .
<i>Ed. Ro.</i>	<i>Edictum Rothari</i> , ed. in <i>Leg. Lang.</i>
EETS	Early English Texts Society.
[I–IV] Eg	Laws of Edgar, ed. <i>Gesetze</i> .
EGu	‘Peace of Edward and Guthrum’, ed. <i>Gesetze</i> .
<i>EHD I</i>	<i>English Historical Documents I</i> , ed. Whitlock.
<i>EHD II</i>	<i>English Historical Documents II</i> , ed. Douglas.

<i>EHR</i>	<i>English Historical Review</i> .
[I–III] Em	Laws of Edmund, ed. <i>Gesetze</i> .
<i>ELS</i>	<i>English Lawsuits from William I to Richard I</i> , ed. R. C. Van Caenegem, 2 vols, Selden Society 106–7 (London, 1990–91).
<i>Episc.</i>	<i>Episcopus</i> , ed. <i>Gesetze</i> .
[I–II] Ew	Laws of Edward the Elder, ed. <i>Gesetze</i> .
<i>Exc. Can.</i>	‘Excerptiones de Canonibus’, i.e. ‘Excerptiones Ecgberhti’, in <i>Ancient Laws</i> , ed. Thorpe; or in Aronstam, ‘Latin Canonical Tradition’.
<i>Formul.</i>	<i>Formulae Merovingici et Karolini Aevi</i> , ed. Zeumer.
<i>Forf.</i>	<i>Forfang</i> , ed. <i>Gesetze</i> .
<i>Gesetze</i>	<i>Die Gesetze der Angelsachsen</i> , ed. Liebermann.
<i>Glanvill</i>	<i>Treatise commonly called Glanvill</i> , ed. Hall.
<i>Grið</i>	<i>Grið</i> , ed. <i>Gesetze</i> .
<i>Had.</i>	<i>Hadbot</i> , ed. <i>Gesetze</i> .
Hl	Laws of Hlothere and Eadric, ed. <i>Gesetze</i> .
Hn	‘Leges Henrici Primi’, ed. <i>Gesetze</i> .
<i>Hom.</i>	<i>Homilies of Wulfstan</i> , ed. Bethurum.
Hom.N	<i>Wulfstan, Sammlung Homilien</i> , ed. Napier.
<i>Hu.</i>	ed. <i>Gesetze</i> .
Ine	Laws of Ine, ed. <i>Gesetze</i> .
<i>Inst. Pol.</i>	Die ‘Institutes of Polity’, ed. Jost.
<i>Iud.</i>	<i>Dei Iudicia Dei</i> , ed. <i>Gesetze</i> .
<i>JW</i>	<i>Chronicle of John of Worcester</i> , ed. Darlington and McGurk.
KCD	<i>Codex Diplomaticus</i> , ed. Kemble.
<i>Laws (At)</i>	<i>Laws of the Earliest English Kings</i> , ed. and tr. Attenborough.
<i>Laws (Ro)</i>	<i>Laws of the Kings of England from Edmund</i> , ed. and tr. Robertson.

<i>Leg. Alam.</i>	<i>Leges Alamannorum</i> , ed. Lehmann/Eckhardt.
<i>Leg. Burg.</i>	<i>Leges Burgundionum</i> , ed. de Salis.
<i>Leg. Lang.</i>	<i>Leges Langobardorum</i> , ed. Bluhme (with Boretius).
<i>Leg. Liutpr.</i>	<i>Leges Liutprandi</i> , ed. in <i>Leg. Lang.</i>
<i>Leg. Vis.</i>	<i>Leges Visigothorum</i> , ed. Zeumer.
Leis Wl	‘Leis Willelme’, ed. <i>Gesetze</i> .
<i>Lex Bai.</i>	<i>Lex Baivariorum</i> , ed. de Schwind.
<i>Lex Fris.</i>	<i>Lex Frisionum</i> , ed. Eckhardt and Eckhardt.
<i>Lex Rib.</i>	<i>Lex Ribuarua</i> , ed. Beyerle and Buchner.
<i>Lex Sal.</i>	<i>Pactus Legis Salicae, Lex Salica</i> , ed. Eckhardt (MGH).
<i>Lex Sax.</i>	<i>Lex Saxonum</i> , in <i>Gesetze des Karolingerreiches III</i> , ed. Eckhardt.
<i>Lex Thur.</i>	<i>Lex Thuringorum (Angliorum et Werinorum)</i> , in <i>Gesetze des Karolingerreiches III</i> .
<i>Lib. Æth.</i>	<i>Anglo-Saxon Ely</i> , ed. Keynes and Kennedy.
<i>Lib. El.</i>	<i>Liber Eliensis</i> , ed. Blake.
LS	Wormald, ‘Handlist of Anglo-Saxon Lawsuits’.
MGH	Monumenta Germaniae Historica (Hannover, unless stated otherwise).
<i>Northu.</i>	‘Northumbrian Priests’ Law’, ed. <i>Gesetze</i> .
<i>Ord.</i>	<i>Ordal</i> , ed. <i>Gesetze</i> .
<i>Pact.</i>	<i>Pactus pro tenore pacis (regum Childeberti et Chlotharii)</i> , ed. Eckhardt, <i>Lex Sal.</i>
PBA	<i>Proceedings of the British Academy</i> .
<i>Penit. Ps.Th.</i>	<i>The Penitential of (pseudo-)Theodore</i> , in <i>Ancient Laws</i> , ed. Thorpe.
PL	<i>Patrologia Latina</i> .
PM	Pollock and Maitland, <i>History of English Law</i> .
<i>Rect.</i>	<i>Rectitudines Singularum Personarum</i> , ed. <i>Gesetze</i> .
RoASCh	<i>Anglo-Saxon Charters</i> , ed. Robertson.

<i>Romscot</i>	ed. <i>Gesetze</i> .
S	<i>Anglo-Saxon Charters</i> , ed. Sawyer.
S*	Sawyer's <i>Anglo-Saxon Charters</i> , revised Kelly and Keynes [now the Electronic Sawyer]
<i>SE Maitland</i>	Maitland, <i>Select Historical Essays</i> , ed. Cam.
<i>Sels. Ch.</i>	<i>Charters of Selsey</i> , ed. Kelly.
<i>Shaft. Ch.</i>	<i>Charters of Shaftesbury</i> , ed. Kelly.
TRHS	<i>Transactions of the Royal Historical Society</i> .
<i>Wer.</i>	<i>Wergeld</i> , ed. <i>Gesetze</i> .
WhW	<i>Anglo-Saxon Wills</i> , ed. Whitelock.
Wi	Laws of Wihtræd, ed. <i>Gesetze</i> .
<i>Wif.</i>	<i>Wifmannes Bewedding</i> , ed. <i>Gesetze</i> .
Wl ep.	William I, 'Episcopales Leges', ed. <i>Gesetze</i> .
Wl lad	William I, 'On Exculpation', ed. <i>Gesetze</i> .

Editorial Introduction

Patrick Wormald intended to publish *The Making of English Law: King Alfred to the Twelfth Century* in two volumes. The first of these, *Volume I, Legislation and its Limits*, was published in 1999. Material for *Volume II, From God's law to Common Law* existed in various stages of development when Patrick died on 29 September 2004. The purpose of this collection, published on the tenth anniversary of that date, is to make that material freely and readily accessible; and the aim of this Editorial Introduction is simply to describe the nature and status of each part of the collection, and to explain how it has been assembled.

The papers existed in various formats and at different stages of development in 2004. A small proportion existed in hard copy, recovered from Patrick's papers, which were collected from his home, and have since been catalogued and archived at King's College, London.¹ The remainder existed only as electronic files recovered from Patrick's computer and back-up disks. The papers were written at various dates between the late 1980s and early 2000s, and consist broadly of two types: some survive as fully-drafted chapters complete with endnotes, the remainder as lecture drafts.

The latter comprise the texts of a series of eight lectures delivered at the University of Oxford in the 1990s. This lecture series was intended primarily for undergraduates, and sought to distil the essence of both projected volumes of *The Making of English Law*. The scheme of the lectures, given in Hilary Term, 1998 is set out below.²

A. Legislation and its limits

Lecture I The Impact of Legislation

Lecture II The Manuscripts of Legislation

¹ London, King's College London College Archives, K/PP148 (papers of Patrick Wormald). This consists of eleven archive boxes and three arch-lever files of papers collected from Patrick's home in October 2004; the hard copy of drafts chapters of Volume II is in one of the arch-lever files.

² This is drawn from a handout which accompanied the first lecture of this series, which was attended by Stephen Baxter.

Lecture III	Law-codes as Texts
Lecture IV (a)	The Limits of Old English Legislation
B. From God's Law to Common Law	
Lecture IV (b)	The Dues of God
Lecture V	The Pursuit of Crime
Lecture VI	The Machinery of Justice
Lecture VII	The Nature of Title
Lecture VIII	English Law and the English State.

Readers familiar with *Legislation and its Limits* will recognize that the first three lectures and the first half of the fourth relate to the content of that volume. The remaining lectures covered the material intended for Volume II, and is all published here in one form or another: as we shall see, lectures IVb and V survive as full drafts, part of lecture VII was developed (see Appendix 3), but the others survive only in lecture form.

To judge from the surviving material, the lectures appear to have gone through two main stages of development. The lectures were first written out in full, with virtually every word delivered included in the text; then, at a later date, they were redrafted in a shorter, abbreviated format, with the text set out as a series of bullet points. There was a handout for each lecture. There are, in addition, two versions of a 'Plan and Prospectus', which were written for the publisher, Blackwell Publishing Ltd, and summarize the structure of the work. The longer 'Plan and Prospectus I', written in August 1998, contains a sketch of the content of Volumes I and II. The shorter 'Plan and Prospectus II' was written shortly before Volume I was first published in 1999 and contains a sketch, in bullet points, of the content of Volumes II only, together with statements describing the status of each chapter of that volume: this provides a useful snapshot of where volume II stood that year. Since these documents provide a helpful overview of the work as whole, they are published here as Appendices 1 and 2.

Since the collection is necessarily miscellaneous, it may help briefly to summarize what is known about the nature and status of each of its constituent parts.

Part III: The Origins Of An English Royal Law

Chapter 7B, ‘Re-introductory: The Limits of Legislative Evidence’. This survives as a substantive draft with endnotes (converted here to footnotes). When ‘Plan and Prospectus II’ was written, this existed ‘only in lecture-draft’. It was therefore written between *c.* 1999 and 2004.

Chapter 8. Church and King. This survives as a full draft with endnotes. When ‘Plan and Prospectus II’ was written in *c.* 1999, this existed ‘only in lecture-draft’. However, in this case, it is known that the text was completed between then and 2002, since the author gave a copy to John Blair that year.³

Chapter 9. The Pursuit of Crime. This survives as a full draft with endnotes. ‘Plan and Prospectus II’ describes the text as ‘complete but unrevised and unchecked’. Only a fragment of this survives electronically, but Patrick circulated hard copies of the text shortly after it was first written in the late 1980s; Stephen Baxter received a copy in the summer term of 1990, and this forms the basis of the version published here. Patrick developed some of the material in this chapter – most notably the discussion of surety arrangements and the origins of frankpledge, and the relationship between royal government and feud – in articles published during the 1990s.⁴

³ John Blair has kindly read both versions and has informed us that the text printed here has not changed in any material way from the text he saw in 2002.

⁴ P. Wormald, ‘Frederic William Maitland and the Earliest English Law’, *Law and History Review* 16 (1998), 1–25; repr. in his *Legal Culture in the Early Medieval West: Law as Text, Image and Experience*, (London, 1999), pp. 45–69; *idem*, ‘Giving God and King their Due: Conflict and its Regulation in the Early English State’, in *Settimana di studio del Centro Italiano di studi sull’alto medioevo* 44 (Spoleto, 1997), pp. 549–90; reprinted in Wormald, *Legal Culture*, pp. 333–57; *The Blackwell Encyclopaedia of Anglo-Saxon England*, ed. M. Lapidge, J. Blair, S. Keynes, and D. Scragg (Oxford, 1999), entries on ‘Courts’, ‘Frankpledge’, ‘Jury’, and ‘Oaths’ (pp. 126–7, 192–3, 267, 328–9).

Chapter 10. The Machinery of Justice. The ‘Plan and Prospectus II’ indicates that the text existed ‘as a lecture-draft’, and there is no surviving evidence of any further work on the chapter itself. Patrick did however develop some of the material contained in this chapter in articles printed in the 1990s.⁵

Chapter 11. The Foundations of Title. The shorter ‘Plan and Prospectus II’ indicates that the text existed ‘as a lecture-draft’. However, an electronic file containing approximately 13,500 words of this chapter survives, and the date of some of the publications it cites suggests that it was written between 1999 and 2004. Its content corresponds with the first of this chapter’s three sections listed in ‘Plan and Prospectus II’: ‘Tenure by charter (‘Bookland’) and by any other right (‘Folkland’). However, since the text breaks off incomplete, and only deals with one section of the projected chapter, we have chosen to publish the text of the lecture as chapter 11, adding the fuller but incomplete text as an Appendix 3. This may be compared with the author’s published work on Anglo-Saxon property law.⁶ ‘Plan and Prospectus II’ indicates that the remaining two sections of this chapter intended to treat inheritance and lordship respectively. Patrick offered a provisional statement on inheritance in an article published in 2000.⁷ The section on lordship was never written. Patrick used a research grant awarded by the Oxford History Faculty to commission Stephen Baxter to produce an analysis of entries in Domesday Book which illuminate the nature of lordship in eleventh-century England. This research was undertaken and delivered to Patrick in hard

⁵ P. Wormald, ‘Lordship and Justice in the Early English Kingdom: Oswaldslow Revisited’, in *Property and Power in the Early Middle Ages*, ed. W. Davies and P. Fouracre (Cambridge, 1995), pp. 114–36; repr. in *Legal Culture*, pp. 313–32; Wormald, ‘Frederic William Maitland’, in *Legal Culture*, pp. 49–54 (on private justice).

⁶ P. Wormald, *Bede and the Conversion of England: the Charter Evidence* (Jarrow Lecture, 1984); repr. in his *Times of Bede*, ed. S. Baxter (Oxford, 2005), pp. 135–66; *idem*, ‘On *Da Wapnedhealf*: Kingship and Royal Property from Æthelwulf to Edward the Elder’, in *Edward the Elder, 899–924*, ed. N. J. Higham and D. H. Hill (London, 2000), pp. 264–79.

copy in 2000.⁸

Chapter 12. The Viability of Law Enforcement. The ‘Plan and Prospectus II’ indicates that the text existed ‘as a lecture-draft’, and the corresponding material is found in the opening section of lecture VIII of the Oxford series (see below, in chapter 15).

Part IV: Implications and Speculations: The Birth of A Distinctive English Law

Chapter 13: The Timing of Continental Influence. The ‘Plan and Prospectus II’ indicates that the text existed ‘in very rough pre-lecture draft’, and some corresponding material appears in the lecture VIII of the Oxford series (see below, in chapter 15).

Chapter 14: Emerging Lineaments of a ‘Common Law’: Possible Turning-points. The ‘Plan and Prospectus II’ indicates that the text existed ‘as series of fairly full lecture drafts’. The corresponding material appears in lecture VIII of the Oxford series (see below, in chapter 15).

Chapter 15. Epilogue: Glanvill, Father and Son. The ‘Plan and Prospectus II’ indicates that the text existed ‘roughly sketched out’. Patrick developed some of the ideas intended for Volume II, part IV in a lecture to the Selden society, which has since been published.⁹

⁷ Wormald, ‘*On Ða Wapnedbealf?*’.

⁸ Patrick did not, so far as we know, write anything further on this subject. The research did however inform S. Baxter: *The Earls of Mercia: Lordship and Power in Late Anglo-Saxon England* (Oxford, 2007), pp. 204–69; and *idem*, ‘Lordship and Justice in the Early English Kingdom: the Judicial Functions of Soke and Commendation Revisited’, in *Early Medieval Studies in Memory of Patrick Wormald*, ed. S. Baxter, C. Karkov, J. Nelson and D. Pelteret, Studies in Early Medieval Britain, general editor N. Brooks (Ashgate, 2009), pp. 383–419.

⁹ P. Wormald, *Lawyers and the State: The Varieties of Legal History*, Selden Society Lecture (July 2001).

The decision to publish the collection in this form warrants some explanation. The fact that Patrick set himself exacting standards, and that he may not have considered much, if any, of the material ready for publication, naturally constituted a serious consideration. However, other considerations pulled strongly heavily in the opposite direction. First, and most importantly, Patrick's family decided from the outset that he would have preferred to share his ideas, even if presented in provisional and unpolished forms, than to have them protected or suppressed. Since then, the position has always been that the surviving elements of 'Volume II' should be available to anyone who wished to consult them; and publication is a logical extension of that decision. Second, Patrick was always concerned not to hold up the research of others by withholding his own; and publication precludes the possibility, however remote, that any student or scholar might feel deterred from undertaking research on early English law by the thought that something significant might lie hidden in his unpublished papers. Third, the papers published here have been circulating in various forms for a considerable period of time – some for twenty-five years – and important work published by other scholars engages with it.¹⁰ This makes it all the more desirable to make the papers readily accessible.

The decision to publish the material electronically rather than as a printed book also warrants explanation. The most important consideration here was that papers are not sufficiently complete to be published as a printed book. The substantive drafts might have been published as articles, but this would have necessitated divorcing them from context. It is much easier for readers to follow the logic flow and argument of the work *as a whole* once the material is assembled in one place. The publication of the *Early English Laws* website created an excellent home for the material, not least since it enables readers to follow up references to many of the fundamental texts and manuscripts which the papers themselves engage with. We suspect Patrick would have been pleased to be published alongside the manuscripts of Alfred's law code and *Textus Roffensis*.

¹⁰ It is beyond the scope of this introduction to survey the literature on early English law and government published in the last decade, except to note that J. G. H. Hudson, *The Oxford History of the Laws of England: Volume 2, 871–1216* (Oxford, 2012) contains an extensive bibliography.

The material is published here as a single electronic file. The alternative was to create and publish electronic copies of the material in manuscript form. This at first seemed an attractive possibility, since it would have enabled readers to see the material precisely as Patrick left it. However, a variety of factors made this unsatisfactory. Some of the material is extant only in hard copy, which is now nearly twenty-five years old and in relatively poor condition. Although it would have been possible to make digital copies of this, the quality of the reproduction would have been low and the size of the resulting electronic files excessively large. Second, the material that survives in electronic copy loses its original formatting when the electronic files created in the 1980s and 1990s are imported into current word-processing software packages. Third, the papers are cumbersome to read in manuscript form, since the texts are accompanied by endnotes and handouts: the work is much easier to read, whether in hard or electronic copy, once the endnotes have been converted into footnotes, and the handout matter has been integrated into the text. The resulting document is, we hope, much easier to access, handle, read and search electronically – even though this comes at the cost of minor editorial intervention.

Such intervention has been kept to a bare minimum. For the sake of clarity, we have chosen to publish the earlier, fully-drafted versions of the lectures in preference to the later, abbreviated versions. We have, however, collated the earlier and later versions of the lectures, adding any substantive material contained in the latter to the text of the former. The material that survives only in hard copy (i.e. chapter 9) has been rekeyed. All of the endnotes have been turned into footnotes. The matter in the lecture handouts has been repositioned in the lecture texts at the appropriate places. All of the tables have been reset, and bibliographical references have been placed in footnotes. Very minor textual amendments have been made to integrate the repositioned matter into the text; these, and other minor editorial interventions are signaled with square brackets. The numbering of some of the handout matter has been modified in places to eliminate ambiguity. Italics replace underlined text throughout. We have chosen a single font which is different from any of those Patrick himself preferred, partly because some of the fonts he used cannot be replicated using current software. Certain abbreviations have been made internally consistent (for example,

the abbreviation ‘Wor.’ used in chapter 9 has been replaced by ‘LS’). The list of abbreviations emulates that supplied in the front matter of Volume I, except that the list has been pruned to exclude works not referred to in Volume II. The numbering and letter headings used in some of the lectures has been converted into continuous text by replacing (a), (b) and (c) with ‘first’, ‘second’ and ‘third’. The form ‘C10th’, which occurs frequently in the lectures, is rendered ‘tenth century’ or ‘tenth-century’ as appropriate. The collection as a whole has been turned into a single, continuously-paginated document with a table of contents and an internally consistent formatting scheme. The material has been left double-spaced to preserve something of the feel of its draft status. We have not otherwise added or deleted any text; nor have we attempted to check or proof-read footnote references back to source, plug internal cross-references, expand abbreviated bibliographical references in the footnotes, or compile a bibliography or index.

We are deeply indebted to Jenny, Luke and Tom Wormald family for supporting this venture, and for giving us permission to publish the collection. We should also like to thank Tessa Harvey and Blackwell Publishing Ltd for releasing the material from contract to permit publication in this form, and for allowing us to print appendices 1 and 2; Dr Matt McHaffie for his editorial work on chapter 9 and other parts of the collection, generously funded by the School of History at the University of St Andrews; Jane Winters for permission to publish on the Early English Laws website; and John Blair, George Garnett and Bruce O’Brien for reading drafts.

Stephen Baxter and John Hudson

September 2014

PART III: THE ORIGINS OF AN ENGLISH ROYAL LAW

Chapter 7B. Re-introductory: The Limits of Legislative Evidence

The subject of this book is one of History's most singular facts. The English legal system is quite unlike those of the rest of Europe. Consequently, the law of most of what was once the British Empire, the United States included, stands apart from that of the rest of the globe. Merely to cross the Anglo-Scottish border is to enter a new legal zone. Most historians agree that this divergence goes back at least as far as the twelfth century. The intellectual revolution that then resurrected the classics of Roman jurisprudence while making a system out of the law of the western Church ('Canon' law), had quite different effects in England than elsewhere. In most European kingdoms and principalities the result was ultimately 'Reception'. Western law was sooner or later Romanized, and more or less influenced by Canon Law. In the kingdom of the English, the secular and spiritual jurisprudence of Rome inspired not imitation but emulation. As Maitland put it in an understandably purple passage:

One race stood apart from its neighbours, turned away its eyes at an early time from the fascinating pages of the *Corpus Iuris*, and, more Roman than the Romanists, made the grand experiment of a new formulary system ...¹

By 'a new formulary system' Maitland meant the 'writs' codified in the 'Treatise on the Laws and Customs of the Realm of England' attributed to King Henry II's Chief Justiciar, Ranulf de Glanville (1187x89). The opening words of 'Glanvill' quote those introducing *The Institutes*, the student textbook of the Roman Emperor Justinian's *Corpus Iuris* (533). *Glanvill's pro forma* writs may intentionally echo the system of *actiones*

¹ PM II, p. 674 (seldom unconscious of the American dimension, Maitland continued: 'Those few men who were gathered at Westminster round Patteshull and Raleigh and Bracton were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic Ocean'). Maitland told this story in chapters v–vi of 'Book I' (I, pp. 111–73); his view, its problems and its critics are more fully assessed below, chapters 13–14 [7–8]). The present chapter is primarily a recapitulation of conclusions reached in my first volume, for the benefit of those who have skipped or skimmed its technicalities – hence its numeration as 7B[1]; see especially the Preface, chapters 1 (historiographical 'Prologue') and 7 ('Conclusions'), pp. x–xiii, 3–28, 477–83.

regularized by Justinian. Yet they owed little to Roman – or canonical – ideas. They authorized or enjoined action in the name of the king of the English. The judges enforcing them were not principally graduates of Europe's new Universities, educated in the 'Learned Laws'; they were trainees of the king's own courts, who learned from watching the experts at work. *Ius Commune* in most of Latin Europe meant the law common to civilized men. Its English counterpart was a 'Common Law' which was the law exclusively available to the King of England's subjects.

Why?

No one knew better than Maitland that this question needed asking. The attempt to answer it is a (if not indeed *the*) *motif* running right through his great *History of English Law*.² And the answer he gave was good enough to hold the field for most of the present century. In essence, it was that England's Angevin kings, Henry II (1154–89), Richard I (1189–99) and John (1199–1216), were able to erect their own system of royally controlled law, when in the rest of western Europe the only alternatives to the Learned Laws were regional customaries.³ Richard and John were ruled out of further consideration, the one charged with neglecting his English realm and the other with giving it altogether undue attention. The palm was in effect left with Henry. Many of the world's legal systems have been fathered on archetypal law-givers; some of the status mythically

² See the closing words of his introductory sketch, 'The Dark Age in Legal History', PM I, p. 24; the introduction to chapter iv 'England under the Norman Kings', I, p. 79, and the transition to chapter v, 'Roman and Canon Law', I, pp. 110–11; chapter v's conclusion, pp. 131–5; such passages as those on the weakness of English *retrait lignager* (II, p. 313) and on the birth of an English 'formular system' (II, pp. 558–9); and the prelude to the peroration quoted above, II, p. 673. He sounded the same note in 'Why the History of English Law is not Written', his Inaugural Lecture of 1888 (seven years before he for ever made good the deficiency), CP I, pp. 482–3; and in his 'Outlines of English Legal History' (two years before the main work), CP II, pp. 433–45. See too his contrasting of English and German legal history, when introducing his translation of Gierke, *Political Theories of the Middle Age*, pp. xii–xviii; and his letters to Vinogradoff and Sidgwick, *Letters of Maitland*, ed. Fifoot, pp. 49, 166–7. In his *English Law and the Renaissance*, he mooted the possibility that the processes that set 'Common Law' on its distinct course in the Middle Ages could have been put into reverse at the Renaissance, though here he persuaded few others: see Elton, *Maitland*, pp. 79–88, and Helmholz, 'Learned Laws', pp. 156–8.

³ To the references in n. 2, add, e.g., the opening and concluding paragraphs of PM chapter vi, I, pp. 136–8, 167–73.

attached to Appius Claudius, Cormac mac Airt or indeed Chingiz Khan has been accorded by sober historical judgement to Henry II.⁴

As England's special destiny comes to seem less manifest, the tendency to seek out divergence in its past recedes. Professor Milsom, Maitland's most distinguished modern critic, considers that he took inadequate account of 'feudalism', a stage of social and governmental evolution generally thought to have been common to all 'medieval' societies. Maitland was, thinks Milsom, misled by the great thirteenth-century treatise on English law going under the name of 'Bracton', which gave a hindsighted air of deliberate policy to Angevin initiatives that were designed to shore up rather than undermine feudal justice. Henry was in fact more sympathetic than Maitland or *Bracton* to the courts held by feudal lords. He aimed to make them more efficient.⁵ But however plausible the case that Henry was not so consciously a law-reformer as he came to seem, it leaves the idiosyncrasy of English legal history unexplained. Something contrived to take it in a different direction from that of the rest of Europe; if not Henry II's constructive genius, then what?

Among critiques of Milsom's own position is one which finds Angevin justice more wilful than in his model, because it drew on a tradition of royal intervention stretching back to Henry I (1100–35) and beyond.⁶ In those terms, the reason why the

⁴ For an early medieval list of primordial legislators, see chapter 2, p. 43. On Appius Claudius and the Twelve Tables, see, e.g., Schulz, *Roman Legal Science*, pp. 8–10; on Cormac mac Airt and the Brehon laws, Binchy, 'Linguistic and Historical Value of the Irish Law Tracts', p. 000; and on Chingiz Khan, Morgan, 'The "Great *Yasa* of Chingiz Khan" and Mongol law in the Ilkhanate'.

⁵ Milsom's case was first fully set out in his 'Introduction' to the 1968 reissue of PM; it was developed in his *Legal Framework of English Feudalism*, and summarized in 'F.W. Maitland', pp. 279–81, or "'Pollock and Maitland": a lawyer's retrospect', pp. 256–8; its most recent (and powerful) exposition is 'Maitland and the Grand Assize'. For more or less sympathetic distillations, see Palmer, 'Feudal Framework', and Hudson, 'Milsom's legal structure'.

⁶ Thus van Caenegem, *Birth of the English Common Law*, pp. 9–11, 13–19 (building on his *Royal Writs*, pp. 17–20, 26–8, 33–4, etc.); or Hudson, *Land, Law and Lordship in Anglo-Norman England*, pp. 36–51, 133–43, and *Formation of the English Common Law*, pp. 52–219. Compare the rather differently angled critiques of Biancalana, 'For Want of Justice: Legal Reforms of Henry II'; and Brand, 'Origins of English Land Law: Milsom and after', pp. 221–5.

Angevins did not reach out for the support of Roman law was that it was superfluous. The most notorious Romanist principle, ‘what has pleased the prince has the force of law (*quod principi placuit legis habet vigorem*)’, was an aspiration for other twelfth-century monarchies. In the English kingdom, it was already true.⁷ Unlike Frederic Barbarossa (1152–89), his imperial contemporary, Henry II had no need to turn to the ‘Civil’ Law in order to compete on equal intellectual terms with that of the Church.⁸ Nor was this solely a matter of royal aggression. The justice of the Angevins was more regularly solicited by their English than by their continental subjects.⁹ The question why English law did not go down the same road as other medieval systems is thus reformulated. How was it that English kings were so much more strongly placed than their rivals? Whence did they derive their unmatched capacity to intervene?

Maitland’s answer, and that of most subsequent historians, was that England was a conquered country, subject to its conquerors’ feudal disciplines.¹⁰ To this there is the not merely glib counter that its name and most of its institutions were not imported or imposed but indigenous and adapted. The Norman-French diaspora was not prone to create structures of authority from scratch when it found viable apparatus *in situ*.¹¹ If Henry II was more detectably powerful in England than in Normandy (where he spent more time), it must have been his English inheritance that made him so.¹² But the distinctive features of that inheritance are not logically sought when the English kingdom was assimilated to the feudal *mores* of Europe at large, so much as when the kingdom was itself most obviously distinctive: that is, before 1066.

Such is the starting-point of this book. It explores the *prima facie* relevance for English law’s later history of the vigorous tradition of English royal legislation between

⁷ *Digesta* I iv 1 (*Corp. Iur.* I(ii), p. 35); *Glanvill* quoted it too, Pr., p. 2.

⁸ Cf. chapter 6, p. 475.

⁹ Clanchy, *England and its Rulers*, p. 145; Holt, ‘Writs of Henry II’, pp. 55–60.

¹⁰ E.g. PM II, p. 558–9; ‘the exceptional vigour of the English kingship, or, if we look at the other side of the facts, the exceptional malleableness of a thoroughly conquered and compactly united kingdom’.

¹¹ Compare Bartlett, *Making of Europe*, chapters 2, 4, with Matthew, *Norman Kingdom of Sicily*, chapters 7–8.

¹² See the analysis and map in Gillingham, *Angevin Empire*, pp. 51–4.

890 to 1020, a time when there was little or no secular law-making elsewhere in the West.¹³ Maitland scouted a possible connection between the legal activity of England's tenth-century kings and that of their twelfth-century successors. There was, he observed, no such gulf here as in the rest of Europe between the age of the *Volksrechte* (concluding in the ninth century) and the era of the Learned Laws. 'When on the continent the voice of law has become silent and the state for a while seems dissolved in feudal anarchy', English legislation was enjoying its 'golden age'.¹⁴ But this was a thread that he followed no further. He intensely admired the nineteenth-century German scholarship that had transformed the understanding of Europe's early legal history. Two of its basic convictions were that there was a primal system of 'Germanic' law comparable to that of any other *Volk*, and expressive like any law of that people's 'spirit (*Geist*)'; and that this ancient system was overwhelmed in and after the twelfth century by the advent of the Law of Imperial and Papal Rome. Maitland could hardly break the hold of those principles, even had he wanted to. Anglo-Saxon law was nothing if not 'Germanic'; was it not, almost uniquely, preserved in a Germanic vernacular? And though its twelfth-century replacement was not Roman or Canon Law, there was no escaping the sense that this century was everywhere one of sweeping legal change. That sense was reinforced by the oft-repeated observation that *Glanvill*, the clarion of the new Common Law at the end of the twelfth century, was so utterly unlike the mumblings of the so-called 'Laws of Henry I (*Leges Henrici Primi*)' in its second decade – strangled as these were by the sclerotic tendrils of a 'scheme of *wer* (blood-price) and bloodfeud, *bot* and *wite* (amendment and fine)'.¹⁵ If it crossed Maitland's mind that Anglo-Norman justice was not quite as the *Leges* made it seem, this responsible scion of nineteenth-century scholarship was in the end content to take evidence as he found it.

¹³ The one exception is Italy under the Ottonians and Salians: see chapter 7, n. 6, and chapter 14, pp. 000.

¹⁴ *CP* II, p. 20; there is at least a suggestion that Maitland took this possibility more seriously earlier in his career than later on: *CP* I, p. 204. For what follows, cf. chapter 1, pp. 16–20.

¹⁵ *PM* II, p. 448; cf. I, pp. 100–1, 165; *CP* I, p. 332, II, pp. 29–30, 36, 443–4, III, pp. 451, 467–8; and my 'Frederic William Maitland', pp. 5, 20–1 (pp. 48, 64–5).

It would be unjust to Maitland to guess that the Latin of the *Leges* was, for all its obscurities, a more accessible medium than the Old English of the pre-conquest legislation it seemed to distil. He had under four years to live by the time Liebermann published his definitive edition of the texts, and had long been engaged on other matters. At all events, he was unwilling to commit himself on the purport of the Anglo-Saxon codes themselves.¹⁶ What cannot easily be gainsaid is that twentieth-century scholars have been reluctant to venture where he would not lead, and with less excuse. The sheer monumentality of Liebermann's corpus, wherein already elliptical texts are translated only into German and elucidated by German-language commentary as telegraphic as the Latin of the medieval Exchequer, may have discouraged even the intellectually foolhardy.¹⁷ The very fact that it is a corpus, treating the law of the whole period from the seventh to the twelfth century as a seamless web (like the *Corpus Iuris*), has encouraged tendencies to view Anglo-Saxon law as a 'system' both undifferentiated and distinct. The two main features of legal historical comment are that it echoes *Leges Henrici Primi* in extracting evidence regardless of its chronological context, and that it dwells on whatever sets pre-conquest law apart from that of the Angevin age, especially the earliest texts. Anglo-Saxon law was once cherished as a testament to ancient liberties. Since the nineteenth-century, it has become a treasury of the merely ancient.¹⁸ Either way, the power of the first kings of the English is downplayed. We hardly gather that the codes of kings from Edward the Elder (c. 910) to Cnut (1020x1) have very little to say about 'wer

¹⁶ *DBB*, p. 226 ('Frederic William Maitland', pp. 5–6 (p. 49)). Cf. *CP II*, p. 12: 'we may doubt whether our English materials will ever enable us to present any picture of a system of English or Anglo-Saxon law as it was at any earlier date than the close of the eleventh century'; or p. 19: 'The materials are too scanty' 'to reconstruct ... a complete system of ... the law of the Confessor's day, to say nothing of Alfred's ...'

¹⁷ Cf. chapter 1, pp. 23–4. The standard English language versions, *Laws (At)* and *Laws (Ro)*, stay close to Liebermann, nor is the former wholly to be relied upon. Whitelock's magisterial translations in *EHD I* are limited to a selection of texts; and while her Wulfstan studies amount to one of the few fundamental post-Liebermann contributions (chapter 5, pp. 345–65, 389–97), her legal commentaries break little new ground.

¹⁸ See chapter 1, pp. 4–14, 24. To speak, like Maitland and many others, of the Anglo-Saxon 'dooms' of course accentuates their air of alien solemnity. But it is the strict equivalent of calling a leg a 'shank': later Old English usage was *gerædnes* (roughly 'decree') or *lagu* itself (chapter 5, pp. 312, 327–8).

and bloodfeud, *bot* and *wite*, except in so far as these averted the wrath of authority itself.

For all of that, the central conclusion of this book's first volume was that the law of the Old English kingdom was never going to lend itself to straightforward exposition. In the first place and most obviously, the transmission of legal texts is uneven and on the whole highly precarious.¹⁹ Some royal law-codes, notably King Alfred's great law-book (894/5), are extant in a number of copies and several lines of textual transmission. Some, however, come down in single copies, and more in single textual families, while a few survive only as fragments. A good example is Edgar's important *Wihthordesstan* code of (probably) *c.* 973. This made otherwise unparalleled arrangements for its publication.²⁰ But all that was preserved intact was the version addressed to the Danes in the North and East of the kingdom; and of this there are just two copies, both from Worcester and closely akin to each other. Of the apparently harsher version intended for 'English' England, there may be an account in a contemporary set of *miracula*, and (conceivably) two fragments; one of these is attached to Æthelred II's treaty of 994 with Viking leaders, as part of a package perhaps assembled at Bath Abbey; while the other formed a supplement to Alfred's law-book, alongside pieces of uncertain status about arson and organizing the Hundred.²¹ No pre-conquest manuscript is given over solely to legislation: almost every volume containing a law-code seems to have been primarily a repository for something else, whether an *Anglo-Saxon Chronicle*, a collection of homilies, or Holy Writ itself. Purely legal codices date only from after 1066. These alone supply copies of the laws of Edward the Elder and of Edmund (*c.* 945), of the early legislation of Æthelred (*c.* 997), and even of so fundamental a text as Cnut's code. It is clear enough, then, that much has been lost. The proviso, and an important one, is that losses appear to have

¹⁹ Reference for what follows should be made to Vol. I's chapter 4, especially its conclusion (pp. 262–3), and to chapter 5's sections on 'Transmission', (pp. 265–71, 291–300, 320–3, 330–9, 349–52, etc.).

²⁰ IV Eg 15 – 15:1.

²¹ Wulfstan Cantor, *Narratio de S. Swithuno*, pp. 154–7 (with comment and edition of Lantfred's prior text by Lapidge, *Cult of St Swithun*); II Atr (App.) 8 – 9:4; *Forf.* On the Swithun *Miracula*, see chapter 3, pp. 125–8; for the descent of the legal fragments, see in particular chapter 4, pp. 231–3, and chapter 5, pp. 320–1, 369–70, 378–9; and on the overall context of Edgar's later legislation, see chapter 6, pp. 441–2.

occurred sooner rather than later. There is every sign that serious efforts were made after the Conquest to make anthologies of Old English law. That collectors regularly came up with the same sets of texts implies that little else was by then available.²² What escaped notice at that stage is unlikely ever to have had a wide circulation.

It is not merely that so much is so shakily preserved. Even pivotal statements are so anomalous in transmitted form as to prompt doubts about their suitability for forensic use. Alfred's law-book comprised a preface which translated three chapters of Mosaic law from Exodus and which amounted to more than twenty per cent of the book as a whole, followed by a collection of his own laws notably heterogeneous both in style and theme, and then by a set of decrees attributed to his ancestor Ine (688x93) that contradict his own on a number of substantial points; furthermore, the whole book from the last part of the preface to the end of the Ine code is deployed in a sequence of 120 chapters that repeatedly defy the logic of their content. Whoever gave the *domboc* this form had the authority to ensure its descent through all textual families. But the convenience of court authorities was evidently not at the forefront of his mind.²³ Edmund's decree on bloodfeud, which is extant in several copies but in a unilinear transmission, was thus furnished with a grisly textual howler, and with a set of concluding clauses that possibly derived from an independent tract on the same topic and arguably ran counter to its central contention.²⁴ The legislation of Æthelstan (c. 928–37) survives mainly in a textual hotchpotch seemingly amassed by Archbishop Wulhelm of Canterbury (926–41) and probably reflecting his particular concerns. The later legislation of Æthelred (1008–14) is recorded almost exclusively by Archbishop Wulfstan of York and Worcester (1002–23), who was actually its author, and who certainly adapted its presentation to his own purposes. Even Cnut's code, also drafted by Wulfstan but preserved by other agencies, has been touched up in one version. What all these features suggest is that written law had more plasticity, less formal integrity, than

²² See especially chapter 5, pp. 402–15.

²³ Chapter 5, pp. 266–72, with chapter 6, pp. 416–21.

²⁴ II Em 7 – 7:3; cf. chapter 4, pp. 248, etc., and chapter 5, pp. 308–9, 374–8.

might be expected of precepts with ostensibly binding force. To this can be added that legislative pronouncements were never in point of fact adduced in legal proceedings, even when (as on criminal issues) they had much to offer. And they were seldom enough noted by narrative sources.²⁵

As the tenth century went on, royal legislation begins to look increasingly sophisticated. Prose was more confident and variegated, structures more carefully devised. Edgar's Andover code (?959x63) was bipartite in form, with thoughtfully crafted provisions on the Church's rights and revenues balanced by elegantly plotted measures on judicial integrity.²⁶ There was greater willingness to proceed from the principles on which decisions were taken to the contingencies that might thus arise (it is usually thought that early law-making is preoccupied with contingency). The 'Danelaw' text of Edgar's *Wiltbordesstan* code opened with an elaborate analogy between God's entitlement to tithe and a landlord's to rent. One possible fragment of its 'English' equivalent justified the procedural changes it introduced by invoking the convenience of parties to a dispute.²⁷ At the same time, there are signs of a more direct manner being cultivated for less formal communication between ruler and subject; such is indeed the tone of Edgar's 'Danelaw' code.²⁸ These features can be read as symptoms of a growing familiarity with the medium of written law, of a readier response to the disciplines of its expression. Which makes it all the more of a shock that the millennium was no sooner passed than this evolving legislative style was submerged in the torrents of Archbishop Wulfstan's pulpit eloquence. Though there were presentational differences between what Wulfstan composed as homilies and what he drafted as laws, they were not great and they grew progressively less.²⁹ Enough of Wulfstan's codes survive in copies from scriptoria other than York or Worcester to show that this was not simply a matter of his adjusting the texts in the privacy of his personal circle. So it would seem that legal prose had not dug

²⁵ Chapter 3, section 1.

²⁶ II–III Eg; see chapter 5, pp. 315–16; and cf. pp. 271–2, 288, 300–3, 309–10.

²⁷ IV Eg 1a – 1:3; II Atr 9, 9:4; chapter 5, pp. 317–18, 324–6.

²⁸ Chapter 5, pp. 318–19, with cross-references.

²⁹ Chapter 5, pp. 339–41, 344–5, 352–4; chapter 6, pp. 449–51.

deep enough roots to flower as a genre in its own right.

A further consideration is that legislation appears to have been stimulated as much by ideological impulse as by governmental policy or social need. The Mosaic model looms so large in Alfred's law-book as to suggest that his chief objective was to measure up to it; that would explain its 120 chapters, since Moses allegedly died aged 120. Codes in the tenth century could be issued at times of enhanced ideological sensitivity, like the creation of Æthelstan's 'empire' and (perhaps) the imperial coronation of Edgar at Bath.³⁰ Wulfstan's first codes were an attempt to arm society for its imminent encounter with Antichrist. By the time he drafted Cnut's code late in his life, he had come to see that law could provide the terms of a new covenant between God and people; Alfred's vision was realized in a codification more comprehensive than his own.³¹ Yet that was apparently the consummation of Anglo-Saxon law-giving. If the dramas of the Old English kingdom's last half-century of existence evoked any legislative reaction, it is lost to us.

All in all, the impression is that the making of written law figured less largely in regulating the behaviour of pre-conquest society than the effort invested in it would lead us to expect. As for the twelfth-century compilations that have dominated perceptions of the subject since Maitland's time, there is of course no question of their official status. It is easy enough to show that they were products of the new Francophone ascendancy. What they knew of Old English law thus drew on as narrow a range of texts as is available to modern commentators, and was even worse hampered by unease with its forms of expression.³² More significantly yet, *Leges Henrici Primi* and its ilk were more alive to the cultural compulsions of the early Twelfth-century Renaissance than to the requirements of judge or litigant. These dictated, for instance, that a law of inheritance had to be procured from somewhere, no matter if this meant dredging one up from the seventh-century Frankish *Lex Ribuaria*; or that compensations for death and injury must

³⁰ Chapter 6, pp. 421–7, and pp. 439–45.

³¹ Chapter 6, pp. 451–65, with chapter 5, pp. 355–66.

³² Chapter 4, pp. 233–44; chapter 5, pp. 404–14.

be listed regardless of any continuing relevance, because no self-respecting law-book was complete without them.³³ The premium was on comprehensiveness and (what passed for) system, on intellectual rather than judicial coherence. At the same time, the perspectives of a society habituated to regional *coûtumes* may have raised awareness of local variations, with the result that a lot more was now heard of West Saxon, Mercian or Dane- law than in pre-conquest codes.³⁴ The long and short of it is that Anglo-Norman writers not only do *not* fill the gaps in the Old English record; they may distort as much as they broaden our knowledge. To lean on their guidance is to be led by the visually impaired.

For this frustrating position there are two sorts of explanation.³⁵ One dwells on how much must be lost. What survives, it could be argued, is naturally what most interested the ideologues who dominated the airwaves between that time and this; more explicitly, the bishops whose cathedral libraries were best placed to come intact through the traumas of the Conquest and the Dissolution. More pragmatic action by kings and reeves had much less chance to register with posterity. The copies of laws conveyed from royal council to local court are just those that will have been battered into extinction, whereas those enrolled in symbolically resonant settings acquired relative immortality. Traces of secular official action may nonetheless reside in the neglected corpus of anonymous codes, few of which are ideologically coloured. One could, for example, propose that the texts supplementing the Alfred-Ine law-book, third among them the *Hundred Ordinance*, had been tacked onto it by reeves made responsible for local operations against crime, and categorically instructed to use the ‘domboc’ by Edward the Elder.³⁶ In sum, the extant state of legal texts is neither here nor there. It tells us only about the predilections of an unrepresentative intelligentsia.

The other approach would claim that the intelligentsia were, on the contrary, those most prone to embrace and promote the new-fangled technology of written law. Bishops

³³ Hn 70 – 71, 93 – 93:27.

³⁴ Chapter 6, pp. 465–70.

³⁵ For what follows see Vol. I’s ‘concluding’ chapter 7, especially pp. 478–81.

³⁶ *Blas., Forf., Hu.*; I Ew Pr; chapter 5, pp. 286–8, 366–87, above all p. 379.

did not constitute a think-tank in the back-rooms of an early medieval regime. As we are reminded by the Anglo-Saxon image of Pharaoh's court on the dust-jacket of this book, they were a highly vocal presence in its front line. The way they treated texts is not, therefore, to be marginalized as untypical. These were men whose vocation and training gave them the strongest commitment to the ideal of government by codified law, as once practised by Israel and Rome. Hence, the mentality that preserved law-codes was not at variance from that which issued and applied them. Instead, it is the best guide to that mentality.

We thus come down to a choice between supposing that the king's lay and clerical servants used written law in different ways, the former's hypothetical approach being more congenial to us than the latter's; or that ealdormen and reeves did not in fact make much use of it, leaving the bishops who have bequeathed its often half-baked memorials as its chief exponents. The concluding chapter of this book's first volume found reasons for preferring the second option to the first. In the last part of this volume, that case will be restated and refined. But for the purposes of Part III, to follow now, it matters not a whit which option is favoured. The point that stands, either way, is that extant texts can never be more than a partial guide to the law as experienced. Whether much that mattered has been lost or was never committed to writing in the first place, whether the law enforced was a system of written law more clear-cut than now appears, or law that was unwritten (without, however, being frozen into only glacially mobile custom), early English jurisprudence is going to withhold a great deal from observers.³⁷ That is exactly why its potential has remained half-shrouded from the twelfth century to the twentieth. Its study requires at least as much attention to what it implied as to what it explicitly stated. Pre-conquest codes can tell us no more than a fraction of what we need to know; post-conquest texts may have told us a lot that we would be better not to have thought we knew. Understanding the first phase of English legal history must of course begin with formal legislation. But a beginning is all that it offers.

³⁷ Chapter 7, pp. 482–3.

As in volume I, it is the intractability of the evidence that has dictated the method adopted below. Part III is devoted not just to what the law-codes say but to what they *indicate*. Investigation proceeds by taking a conspectus of their testimony on any one topic, often by setting out the provisions of successive codes in sequence, as a prelude to asking what assumptions seem to underlie them, what agenda they appear to presuppose. The approach of Liebermann's great *Sachglossar* was not in fact so very different (if appreciably more compressed).³⁸ But he conceived of an essentially static system, whose roots in a yet remoter antiquity it was his business to unearth. This study is alert to the possibility of change, so giving a lot more attention to chronological development within the period covered. Consideration goes not so much to Scandinavian or Icelandic patterns, of theoretically common 'Germanic' ancestry but manifest only in later medieval materials, as to Carolingian templates in a position to shape Anglo-Saxon developments. More notice is taken of non-legislative evidence. Topics are broached by describing an illustrative lawsuit. Legal clauses are but contributory voices, not necessarily the most audible, in discussions whose tone can be set by wills, place-names, even the macabre remnants of executed criminals.

Each of the four areas of law reviewed in the following chapters is thus examined for the *direction* in which its makers seem to be moving. The first subject addressed, unusually for legal history, is Church law, in deference to the fact that predictably it dominates so many texts, and because there are reasons for thinking it a much livelier influence on the legislative programme in general than the immemorial traditions given pride of place by most histories of Old English law. Then comes a study of a criminal jurisprudence which, judging from pre-conquest texts (case-law above all), was no longer a matter of resolving wrongs by payment and/or violence between families ('*wer* and bloodfeud, *bot* and *wite*', or in today's parlance 'kin-based' justice). The signs are that the party injured by disorder, theft, even sexual malfeasance, was envisaged as the community at large, and that redress by payment and/or violence was prerogatively the

³⁸ *Gesetze* II(ii); see chapter 1, pp. 23–4.

king's. That leads on to a review of judicial institutions, in which it is again not hard to detect symptoms of vigorous overhaul, and where there are notably *few* symptoms of the slackening official control which Maitland thought he saw. Finally, the pre-conquest law of property emerges as markedly different from the norms prevalent after 1066, though scarcely less exposed to intervention by royal fiat. A brief summary concludes that the level of juristic activity in the Old English kingdom sustains comparison, to say no more, with that of the Angevin period.

If that were so, it would indeed be on the cards that what happened in the tenth century was as relevant for the singular path taken by English law as what was done in the twelfth. Yet there can be no pretence that the connection is easily established. If it could be, it surely would have been by Maitland himself, and this book would have been written a century ago after all. Part IV therefore abandons even the pursuit of semi-concealed agendas and half-apparent trends for an avowedly speculative model of English legal evolution. Early medieval history is necessarily a matter of model-building. Maitland's is a model, hallowed by his genius and enshrined by the vastly richer evidence that the twelfth century makes available. But it can hardly be stressed enough that enriched evidence is a *problem* when evidence of all varieties is becoming more plentiful, as in the twelfth century it assuredly was. There is an overwhelming temptation to equate first manifestations with origins, an epiphany with a birth. The model adopted here is that crucial features of the Common Law were in place *before* the evidence for them becomes conclusive. The prime novelty of the Angevin age was precisely the increasing professionalism that rendered it 'luminous' for Maitland. But the pervasive ideology that made the peace the king's, and his justice the birthright of all his free subjects, was several centuries older: as old in fact as the kingdom of the English, the inheritance from his grandfather to which Henry II so repeatedly laid claim. That the evidence for this model is weaker than for Maitland's does not invalidate it. That it should be is inherent in the model itself.

It might almost be said, then, that the mood of this book shifts from imperative to indicative to subjunctive. The conclusions of volume I's Part II were, if not binding, then

at any rate evadable only by substituting assumptions for the *prima facie* physiognomy of the data as they materialize. Part III, this volume's first, is by contrast ready to follow up the directions to which the data merely point. Part IV switches to an interpretation that is just one among a number that they will bear, my preference for which is a matter of how things *might* have been. The reason for these changes of mood is that it is idle to deny speculation its place in remoter periods of historical study; but its ambit should be as restricted, and in any event as delineated, as is methodologically tolerable. The hope here is that even if Part IV's edifice be demolished by other hands, the logic of Part II, and the implications of Part III, will require that another, no less novel, be erected in its place. This project was first undertaken not with the ambition to rewrite the early history of English law but in an attempt to make sense of Anglo-Saxon legislation. That was the business of volume I. Only growing awareness that the texts of before and immediately after the Conquest could not be *expected* to tell as full a story as those of the Angevin era began to suggest that an orthodoxy founded on that contrast might be wrong. That is the possibility which this second volume explores.

Chapter 8. Church and King

Roundell Palmer, first earl of Selborne and most distinguished of Gladstone's Lord Chancellors, was the kind of law-reformer Maitland applauded. He arranged the conversion of the Lord Chancellor's Office into a Department of State. He oversaw the migration of the Law Courts to the Strand from their immemorial home in Westminster Hall. He sponsored the first effective Married Woman's Property Act. But on ecclesiastical matters he remained, unlike (he feared) Gladstone, a doughty champion of the Church of England as by Law Established. He had refused the Woolsack till 1872 out of opposition to the disestablishment of the Irish Church. After declining to resume it in 1886 through antagonism to Irish Home Rule, he devoted the next years to writing *A Defence of the Church of England against Disestablishment*.¹ Central to this issue, as it had been since 1789 in the corresponding continental controversies, was the question of Church Endowment. In rebutting the position of the 'Radicals', Selborne was carried into closer investigation of early English Church history than he had anticipated. The result was a second and more scholarly book on the early history of tithes. Despite shortcomings inseparable from the time and circumstances in which it was written, it is still the best account of the Old English evidence on that topic.²

¹ He also spent his final years campaigning against Rosebery's plan to disestablish the Welsh Church. On Selborne's life and career, see Heward, *Victorian Law Reformer*, especially pp. 241–58 (though with only cursory reference to his *Ancient Facts and Fictions*, next n.).

² Selborne, *Defence*, chapters VII–VIII and Appendices I–II: the latter, on what is now called 'VIII Æthelred', may be compared with the discussion in my vol. I, chapter 5, pp. 336–7; it emerges that, though wrong to deny Æthelred's issue of the code, Selborne came closer to perceiving the text's nature – and the date of Cnut's laws – than subsequent commentators. Selborne, *Ancient Facts and Fictions*, for which see (e.g.) nn. 000 below; if Professor Constable's comment, 'most early works on tithes are tendentious', *Monastic Tithes*, p. 2 (n. 1), was aimed at Selborne as well as others, then that distinguished scholar (to whose discussion of the subject my own is heavily indebted) was for once unjust: Selborne had a point of view, but his assessment of the evidence was for the most part scrupulously scholarly and in some respects pioneering. He was naturally conscious of the lead given by Selden, his great Common Law predecessor, in his *Historie of Tithes*; among the intriguing continuities involved is that Selden possessed, and may have been instrumental in preserving, the oldest manuscript of Edgar's Andover code, the formative tithe-legislation of the pre-conquest era: chapter 4, pp. 185–6, and n. 98; below, pp. 000.

Selborne was one of those Victorians whose attachment to the *Ecclesia Anglicana* seems to have been deepened by the number of their friends and contemporaries who took the Path to Rome. The case put in the first two chapters of his *Defence* was essentially that argued by Anglican apologists since Archbishop Parker: it was not the Church of England that had changed at any time since its foundation but the Church of Rome.³ Twentieth-century expertise has learned to smile at the thesis so devastatingly caricatured by Maitland as the proposition that ‘the Church of England was Protestant before the Reformation and Catholic after it’.⁴ Yet Selborne and others were entitled to find something familiar about what was said and done by English Church authorities before the ‘Gregorian Reform’. It was no illusion that every Western Church then ‘had, as a matter of fact, its own national organization ... its own system of ecclesiastical law and administration ... under the support and sanction of laws, made by its own civil rulers’; that ‘the Establishment of the Church by law’, understood as ‘the incorporation of the law of the Church into that of the realm’, was a feature of the Old English polity.⁵ Later Anglo-Saxon kings and their Carolingian prototypes were seen, and saw themselves, as Godly princes like the rulers of Old Testament Israel, answerable to the Lord for the observance of their subjects.⁶ Thus far, the Old English Church was as much a ‘State Church’ as its post-Reformation descendant. Therein lay not only the rationale of the laws made by kings about the Church, but also the inspiration of their entire Law and Order programme. ‘God’s Law’, in Archbishop Wulfstan’s favoured phrase, was the fount of the law made for His people. It was perforce ‘Common’ to all. That is why an account of early English law may properly begin with the mutual obligations arising from relations between the kingdom and its Maker.

³ Selborne, *Defence*, pp. 7–28.

⁴ Elton, *Maitland*, p. 72; Maitland’s rebuttal of the Stubbsian position (as described by Elton, pp. 69–79) is in *Roman Canon Law*; on which see (besides Elton himself) Donahue, ‘Roman Canon Law in the medieval English Church’, and Helmholz, ‘Learned Law’, pp. 163–8.

⁵ Selborne, *Defence*, pp. 6, 10, and cf. p. 69.

⁶ See vol. I, chapter 2, pp. 50–1, chapter 3, pp. 121–4, chapter 5, pp. 363–5, chapter 6, pp. 421–3, 427–9, 448–9, 462–5.

What is due to God

Foremost among the kingdom's obligations were what King Edgar and Archbishop Wulfstan called 'the dues of God (*Godes gerihita*): the payments owed to His clergy in return for their services and His; the fiscal perquisites of the Church discussed in Selborne's second and more scholarly volume.⁷ One of these, 'church-scot', made an appearance in the West Saxon code of King Ine (688–93).⁸ But it was the legislation of tenth- and eleventh-century kings that identified and enforced the full gamut of ecclesiastical levies. These decrees, their background and their more immediate context, are the subject of the ensuing section.

(i) Church taxation

Sometime in 1086, William the Conqueror and his court spent a whole Sunday hearing a dispute between the abbey of Holy Trinity Fécamp and William de Briouze.⁹ At stake (as clarified only from the later sequence of documents to which the case gave rise) were the rights of the 'parochia' of St Cuthmann at Steyning in Sussex, which had been granted to Fécamp by the Confessor and/or the Conqueror.¹⁰ De Briouze had encroached on these in constructing his castle at Bramber and the collegiate chapel next door. William's court ordered that a disputed wood be divided down the middle; that a park and warren created by de Briouze on Fécamp land be destroyed; that a ditch dug to bring water to

⁷ IV Eg 1:4,6; EGu 5:1, 6:4, V Atr 11 = VI 16 = Cn 1018 13 = I Cn 8, II Cn 48, etc.

⁸ Ine 4, 61; see below, pp. 000.

⁹ ELS 163A (i, pp. 128–9); updated edition by Bates, *Regesta* 146 (who is confident that the court met at Lacock, Wilts, despite *Reg.* i 220). The document specifies that the court met 'una dominica die a mane usque ad vesperam', but gives no mensal or AD date; it is the witnessing of 'the king's sons' that reveals that it must have been heard by William I, and the year can be deduced from the facts that Bishops Maurice of London and Robert of Chester were already in post (each having been nominated at Christmas 1085, and Maurice having been consecrated in April), and that the Conqueror left England for the last time in autumn 1086. The court's assembly at Lacock rather suggests it was on the way to or from the epochal Salisbury assembly of 1 August.

¹⁰ S 1054; Bates, *Regesta* 141, 144; cf. DB i 17b, 28b (*Sussex* 5:2, 13:9–10). For this, and for the best account of the dispute and the matters arising, see Matthew, *Norman Monasteries*, pp. 20–2, 38–41.

his castle be filled in; that what had been taken from Fécamp men as toll at his bridge be repaid in full, 'since it was never given in King Edward's time'; and that ships navigating the River Bramber be 'quit for two pennies' unless they also had business at William's castle. Furthermore, and of particular interest for us:

It was decreed concerning St Cuthmann's burial rights (*sepultura*) that they should remain unimpaired, and at the king's command the bodies which had been buried at William's Church were dug up by William's own men and taken back to St Cuthmann's church for lawful burial. And Herbert *decanus* restored the pennies he had received for the burials, the wakes, the bell-tolling, and all that was received for a corpse; and he first made one of his kin swear in his place that he had not had more.

A number of points arise from this case. The first is that, for all the peremptory vigour of its judgements, the 1086 hearing was far from the end of the matter. A decade or so later, there was a *placitum* in William II's court at Foucarmont in Normandy, where Fécamp sued de Briouze's son Philip and the monks of Saumur for what it had successfully claimed in the previous reign. After the outcome of the earlier hearing had been reported, 'it was agreed and adjudged that the monks of Saumur should restore to the church of Fécamp whatever they had received since the death of the king both in tithes and in burial-fees and in offerings and in all other things that belonged to the church of St Cuthmann'. Rufus followed up by sending a writ to England, ordering enforcement of the judgement, 'and see to it that I hear no claim thereon for default of justice (*pro penuria recti*)'.¹¹ Yet de Briouze and Saumur were not finished even then. On 13 January 1103 the abbot of Fécamp and Philip came to an agreement at Salisbury in the presence of King Henry, his Queen and numerous leading barons. Eighteen burgesses –

¹¹ *ELS* 163B–C; *Reg.* i 423, 416 (cf. *Reg.* i 424, apparently a previous attempt to enforce the judgement, up to five years earlier).

burgenses – seized by Philip’s father ‘in the lordship (*dominio*) of the Saint at Steyning’, and recovered by the earlier judgement (whose record said nothing of this), had been seized once more by Philip; they were now to be held by him of the abbot ‘as a fief (*in feodo*)’. So was the warren, with each party hunting their own rabbits and seeing to the discipline of their own men. The bridge was to be reconstructed so that ships could pass beneath it, discharging only what ‘consuetudinem et quietudinem’ there had been in King Edward’s time. ‘As for the *parochia* of St Cuthmann, which had been invaded in Philip’s castle and in Beeding ... it should remain quit and free ... to the church of Fécamp as regards the living and the dead and all customs that belonged to the *parochia*, as it was before the Normans took England’.¹² In short, all the issues ostensibly resolved in 1086 were still open in 1103, and were only settled then on terms somewhat less unfavourable to the de Briouzes.

One reason why the case was spun out was that it had been complicated by the intrusion of a third party. Already in 1080 William de Briouze had given St Nicholas Bramber and the nearby church of Beeding to Sele priory, the English cell of the powerful abbey of St Florent Saumur, together with demesne tithes from twenty manors, ‘saving that tithe which the monks of Holy Trinity [Fécamp] have’; also ‘ecclesiastical pleas (*placita hominum de christianitate*), a tithe of his toll at Steyning and [Bramber], and a tithe from his fisheries and hunts, with feeding for their pigs and woodland for their heating and building’.¹³ Even at the outset, therefore, Saumur was a party to the dispute. Suits involving ecclesiastical corporations were always likely to be prolonged, because churches had the resources (including archives) and the supernaturally driven incentive to maintain their claims. Only when Fécamp and Saumur came to terms, the latter renouncing Bramber’s interest in the perquisites of Steyning’s *parochia* in return for Fécamp’s conceding its entitlement to the church of Beeding and the revenues arising,

¹² *ELS* 163D; *Reg.* ii 626. The controverted toll was adjourned to a meeting three weeks later and adjudged to Fécamp when Philip defaulted.

¹³ *Reg.* i 71; Bates, *Regesta*, p. 798. Cf. Blair, ‘Secular Minster Churches’, p. 135; and Franklin, ‘St Augustine’s Daventry’, p. 98.

was the way open for Fécamp's settlement with de Briouze.¹⁴ It is worth adding, because so characteristic of post-conquest litigation, that this case is known not only from a pair of royal writs but also from a series of typically Norman extended (albeit retrospective) *placita* preserved by Fécamp; while Saumur's side of the story is hardly less fully documented. The contrast with pre-1066 lawsuits is striking.¹⁵

That point introduces another of more immediate moment. Fécamp was a formidably articulate adversary, whose rights stood a good chance not only of registration in the historical record but also of vindication before a ruling establishment that patronized it lavishly. One important implication of its lawsuit is that a minster's position was still well-enough established in English law to be acknowledged after 1066 so long as it had the right friends. Another is that it was vulnerable in the extreme if it did not. A century later, a closely similar case was brought by the prior of Leominster, the outcome of which was again that the burial-fee was to be repaid (though in this instance the prior was persuaded to let the corpse be, 'because it would now be stinking and horrid to look at'). The point here is that Leominster had become a dependency of Henry I's favoured abbey of Reading. Leominster's rights to an extensive *parochia* were duly confirmed in a charter of the Bishop of Hereford, dated 1123, and quite successfully enforced thereafter. But it seems to have suffered at least some losses between 1086 and its acquisition by Reading.¹⁶

It would not be difficult to multiply instances of this sort of controversy in the post-conquest period. In 1092 the aged St Wulfstan convened in his brand new crypt a synod of experts from the three counties of his diocese to cope with a dispute that had arisen between churches in Worcester itself. It found that 'there was no *parrochia* in the whole city of Worcester except only that of the mother-church' since its foundation in 680; and with its conversion to monastic life, 'the lands, tithes, burial-rights (*sepulture*) and any other ecclesiastical customs and dignities ... passed into the common ownership of

¹⁴ Matthew, *Norman Monasteries*, pp. 39–40.

¹⁵ Cf. chapter 3, pp. 143–6, 157–8.

¹⁶ Kemp, 'Parochia of Leominster', pp. 83–90.

the monks'.¹⁷ At around the same time, two monks of Abingdon sued Bishop Osmund of Salisbury, who had just dedicated a church with a cemetery at Kingston Bagpuize, for the 'customs' of its 'mother' church at Longworth (itself now subject to Abingdon). The annual payments to Abingdon and Longworth then agreed by two Kingston 'seniores' were later renewed under Henry I, after one of their heirs had refused to pay. Soon afterwards, a priest of Pewsey who buried a 'parochianam' of Longworth in his own church was obliged by a 'chapter of priests' at Abingdon to dig her up and take her for burial at Longworth.¹⁸ The powerful churches of Worcester and Abingdon were in a position to supply for themselves the sort of support that Fécamp had given Steyning and Reading Leominster. Other churches may by then have been less fortunately placed.¹⁹

Steyning was the initial burial-place of Alfred's father (858). It has all the hallmarks of what historians have come to identify as a 'minster', among them a founding saint whose one-time existence is as credible as the high medieval hagiography enveloping it is not.²⁰ Minsters were something like the modern 'team-parish': colleges of from two to a dozen or more priests, which saw to the 'pastoral care' of areas several times the size of modern parishes, most obviously by sending out one of their number to administer the sacraments in an outlying 'chapel'. In return, they could expect a set of fiscal and ceremonial acknowledgements of their status from the members of their *parochia*. That structure was beginning to break down by the end of the first millennium, as country gentlemen established their 'own' churches, which would, after coming under the

¹⁷ *Councils*, ed. Whitelock *et al.*, ii, pp. 635–9; *EHD II* no. 85.

¹⁸ *Chronicon Abingdon II*, pp. 120–2; for Abingdon's acquisition of Longworth in the context of Æthelwold's restoration, see *Ab. Ch.* 51, 80, 84 (S 567, 654, 673).

¹⁹ Cf. *DB i* 87c (*Som* 2:2–4) for *consuetudines* paid by a string of manors to the Bishop of Winchester's minster-manor of Taunton, among them church-scot, and that 'when the lords of these lands die they are buried at Taunton'; or *Dugdale VI*(3), p. 1328 (xi), a charter of 1125x35, wherein it was the will of Henry I and Earl Roger that the 'mother church' of All Saints Warwick 'should experience no detriment or diminution in tithes nor in *sepulturis* nor in offerings ... nor in any customary benefits belonging to mother churches', from the church of the Holy Sepulchre; and, in the sort of deal often struck in these circumstances, All Saints settled for payment of 30d and attendance by a Holy Sepulchre representative every All Saints Day.

²⁰ Blair, 'Saint Cuthmann'. The legend is perhaps most familiar as adapted in Christopher Fry's verse drama, *The Boy with the Cart*.

bishop's watchful eye in the reforming conditions of the twelfth century, become the parish churches of medieval and modern times. This model of early pastoral administration has duly attracted the controversy that is an occupational hazard of advances in the understanding of remote ages.²¹ But what matters for the present discussion is the position in the late Old English period, when the monetary entitlements of the 'old minster' were laid down in legislation. We may begin with the one that captured the most notable attention at Steyning: 'sepultura', evidently a Latinization of Old English '*saulsceat(tas)*, soul-money'. The relevant laws are nearly all from the pen of Archbishop Wulfstan.

1. V Atr 12 – 12:1: And it is most proper (*rihtast*) that *saulsceat* always be paid at an open grave. And if any corpse be buried elsewhere outside the correct parish (*rihtscriftscire*), let *saulsceat* nevertheless be paid at the minster to which it belonged (*Ðam mynstre Ðe hit to hyrde*).
2. VI Atr (Lat.) 20: And offerings for the dead suitable for souls (*munera defunctorum animabus congruentia*) are to be offered at an open grave.
3. VI Atr (OE) 20 – 21: And it is most proper that *saulsceat* always be paid ever (*aa*) at an open grave. And if any corpse be buried elsewhere outside the correct area (*rihtscire*), let *saulsceat* nevertheless be paid at the minster to which it belonged.
4. VIII Atr 13: And it is most proper that *saulsceat* always be paid ever at an open grave.
5. Cn 1018 13:6–7: And it is most proper that *saulsceat* always be paid at the open grave. And if any corpse be buried elsewhere outside the correct parish

²¹ A good introduction to the 'minster hypothesis' are the papers in Blair (ed.), *Minsters and Parish Churches*; with the papers of Thacker, Foot, Cubitt and Blair himself in Blair

(*rihtre scriftscire*), let *saulsceat* nevertheless be paid at the minster to which it belonged.

6. I Cn 13 – 13:1: And it is most proper that *saulsceat* always be paid ever at an open grave. And if any corpse be buried elsewhere outside the correct parish (*rihtscriftscire*), let *saulsceat* nevertheless be paid at the minster to which it belonged.

It was stressed in this volume's introductory chapter that examination of pre-conquest law on any topic requires a wide frame of reference. Issues taken as understood in individual clauses can be brought out by previous, or even subsequent, legislation. In this case, the apparently chronological order of the laws of Æthelred and Cnut as cited above may conceal the stages whereby Wulfstan's ideas evolved.²² The Latin version of 'VI Æthelred' (2.) gives only the first of the two relevant clauses. The second clause's absence here and in 'VIII Æthelred' (4.), of 1014, may mean that it is little if at all older than Cnut's code of 1018 (5.), and that it was then retrospectively inserted into extant versions of 'V Æthelred' (1.), the text usually thought to correspond most closely to what was promulgated at Enham in 1008. Similarly, the forms 'rihtre scriftscire' (5.) and 'rihtscire' (2.) may imply that 'rihtscriftscir' (1., 6.) is a Wulfstan neologism.²³ Even 'scriftscir', though an obvious enough term for 'spiritual province', appears only thrice

and Sharpe (eds), *Pastoral Care*. For the controversy, see Cambridge and Rollason, 'Pastoral organization', and Blair, 'Ecclesiastical organization'.

²² For my own reconstruction of the (oft-reconstructed) relationship between these texts, see chapter 5, sections 7, pp. 332–5, and 8, pp. 346–7, 362; my suggestion is that the 'V Atr' texts are later adaptations of the Enham decrees for use as homilies (hence their anonymity and presence in manuscripts containing homilies that seem to have been repeatedly revised); while both Latin and Old English versions of 'VI Atr' were drafts made in preparation for the 1018 and/or 1020/1 codes, the Latin (as with some Wulfstan homilies) being a preliminary effort that may therefore afford the best view – except perhaps as regards clause order – of the 1008 'original'.

²³ Liebermann regarded 'rihtscire' (2.) as a scribal slip, as is possible, even if this is a 'Wulfstan MS': chapter 4, pp. 190–2. Yet 'rihtscriftscire' (1., 6.) is hardly better attested; and why, if 'rihtscriftscir' were in general use, would one bother to introduce adjectival 'rihtre' in 1018 (5.)? Besides, 'rihtscriftscire' is missing from the re-statement of this principle in *Hom.N* xxiii, p. 118, the entire clause being omitted in *Hom.N* lxi, p. 318. Wulfstan apparently could coin words: chapter 9, pp. 000.

outside the corpus of Wulfstan's works.²⁴ All of this suggests that Wulfstan was not restating a familiar principle so much as asserting one hitherto unstated or anyway unquestioned.

The requirement that payment be made 'at an open grave' was an obvious way to ensure that the grave's supplier received what was owed for it.²⁵ The addition of the second clause, with its emphasis on 'the correct parish' and 'the minster to which (*saulsceat*) belonged' implies that in the early-eleventh century there was already some of the same competition to offer this service and collect the revenues arising as we have found after 1066. Previous Cnut clauses on 'old minster' entitlements, largely derived from laws of Edgar, allowed a thegn to transfer some of his tithes from an 'old minster' to a private foundation so long as the latter catered for obsequies.²⁶ This suggests that the *rihtscriftscir* 'to which (*saulsceat*) belonged', was the 'old minster', and that its monopoly was by then under the pressure that would ultimately undermine the whole system.

Before that, the position is far from clear. There are clauses in Æthelstan's 'Tithe Ordinance' requiring payment of soul-scot to 'the places to which it properly belongs', and in Edgar's Andover code stipulating that 'for each Christian man, soul-scot is to be paid to the minster to which it belongs'. But each is under suspicion of having been interpolated by Wulfstan himself.²⁷ Still, burial-dues do feature well before 1008 in charters and of course wills. Their first appearance seems to be in a lease of the 870s in which the Bishop of Winchester granted a three-life tenure 'free of everything except bridge-work and army-service and eight church-scots (?) and the priest's dues and soul-scots'. At the end of the century, Bishop Wærferth of Worcester gave a two-life lease to the priest Werwulf 'for our old companionship' (the lessee was possibly his colleague on King Alf-

²⁴ II As 26; 'Zwei Homilien', in *Texte und Untersuchungen*, ed. Brotanek, p. 26 (ln. 18); *Northu.* 42 (strongly influenced, though probably not written, by Wulfstan: chapter 5, section 9(xx)). Cf. his use of cognate, and likewise unique, compounds, EGu 5, II Cn 44.

²⁵ Cf. Bullough, 'Burial, Community and Belief', p. 195, on Abt 22, requiring that the first instalment of a wergeld be paid at an 'open grave': 'the kin who have accompanied the body will still be there'.

²⁶ I Cn 11, II Eg 2; cf. below, pp. 000.

²⁷ I As 4, II Eg 5:2; the point made in chapter 5, pp. 295, 314–15, being that they occur in Wulfstan MSS but not in texts of these codes to which the archbishop had no access.

red's intellectual team), 'on condition that tenants ... pay the bishop's due which is customarily called *circsceat* and *sawlsceat*'. An idiosyncratic royal charter of 955, apparently translated from one of 'alliterative' type, freed an estate with the usual 'triple exception' and went on to expect from a 'thoughtful landowner church-scot, soul-scot and tithes'.²⁸ A series of wills from the mid-tenth century onwards provide explicitly or implicitly that soul-scot be paid for the testator's final resting-place. The Lady Wynflæd wished 'a mancus of gold to be given to every servant of God as *saulsceatte*' – a bequest that may or may not be clarified by her later instruction that the stock on the estate at Chinnock go to her granddaughter 'except for the *saulsceatte* that is to be paid to Yeovil'. Æthelwold gave the New Minster twenty mancuses of gold 'for his soul', plus a cup as '*sawelsceatte*', while also bequeathing twenty mancuses to Abingdon 'for his brothers'. Ælfflæd gave Ely 'the pair to the ring which was given as *sawlesceatte* for my lord' (her husband, the heroic Ealdorman Byrhtnoth, having been buried there). Archbishop Ælfric of Canterbury bequeathed lands to Christ Church 'to saulsceate', and Bishop Ælfwold did much the same for Crediton. The Old Minster received an estate from Ælfgifu, who intended that her body rest there; Ealdorman Æthelmær made a similar arrangement with the New Minster.²⁹

Now, it does not follow from their receipt of 'soul-money' that all these places were necessarily 'old minsters'. The word 'saulsceat' could sometimes have been used loosely, in the sense of any money offered to procure prayers for one's soul. The very anxiety expressed by Edgar, Æthelred, Cnut and their clerical advisers shows that bequests of *saulsceat* might infringe the 'old minster' prerogative their laws sought to uphold. Only if its putative rights were exercised as a set, as in Steyning's case, can there

²⁸ S 1275 (871x77), 1279 (899), S* 566 (955); for alliterative charters, see chapter 6, n. 81; on 'freeing' of estates and services reserved, see chapter 5, pp. 344, 355, and chapter 11, pp. 000.

²⁹ S 1539 (s. x^{med}), 1505 (post-987), 1486 (1000x2), 1488 (1003x4), S* 1492 (1008x12), S 1484 (966x75), 1498 (971x83).

be assurance of an old minster's status.³⁰ But the most important point for present purposes is that there was nothing to stop this role being assigned to newly founded churches in the tenth century itself. Winchester's 'New Minster', arguably built with some pastoral intent, is a case in point. It has been observed since the matter was first investigated that hundredal units often had their own minsters; but many such units were assuredly tenth- or eleventh-century creations.³¹ It may be that the whole 'minster debate' has been bedevilled by the deduction that, because these foundations were coming under challenge in the tenth century from more obviously 'private' churches or else from monastic 'reform' itself, their own great days had long since passed.

Older generations of historians traced the origin of sepulchral dues to pre-Christian burial usages.³² Like all such suggestions, this is easier to believe than to prove – and no longer fashionable even to believe. What is true, and may conceivably have a bearing on that theory, is that the 870s is by European standards remarkably early to find payment for burial as established practice. Among the earliest continental evidence is the hostile reaction of Gregory the Great, who told Bishop Januarius of Cagliari that priests had no business to 'profit from others' grief.³³ His comments were quoted or echoed by a series of Carolingian authorities, including the manual known as 'Quadripartitus' and the capitulary of Radulf of Bourges (both known to Wulfstan).³⁴ Gregory had, however, conceded that, provided nothing was *demande*d, the relatives, neighbours or heirs of the deceased need not be forbidden to 'offer something of their own accord for [a church's]

³⁰ In S 1534 (c. 1000), Wulfgeat of Donington 'first grants to God his *sawelscattas*', then at once goes on to specify gifts to a set of churches, including Worcester, Sts Æthelberht and Guthlac at Hereford, Leominster, Bromyard and Wolverhampton; any of these was indeed an 'old minster', but what is the other evidence that this was true of Wulfgeat's 'home church' of Donington, which Whitelock thought his likely burial-place and recipient of his 'soul-scot'?

³¹ Blair, 'Secular Minster Churches', pp. 118–19; Blair, 'Introduction', pp. 3–6; and for the New Minster, cf. Biddle, *Winchester in the Early Middle Ages*, pp. 314, 452, 459.

³² Stenton, *Anglo-Saxon England*, pp. 152–3; Liebermann, 'Seelschatz'(1), *Gesetze* II, p. 647.

³³ *Gregory I, Registrum* viii 35. For this and what follows, see the valuable discussion by Treffort, *L'Église Carolingienne et la Mort*, especially pp. 172–4, 183–4.

³⁴ *Antiqua Canonum Collectio* iv '380' (recte 381, cf. Richter's n., p. 43, and Kerff, *Quadripartitus*, p. 30, n. 73); Radulf, Kapitular xviii; and for Wulfstan's access to these texts, see chapter 4, pp. 213–19 and Table 4:4. See also (e.g.) Hartmann, 'Neue Texte zur bischöflichen Reformgesetzgebung', p. 370 (with n. 4).

lighting'. As the ninth century proceeded, this sort of saving-clause became increasingly prominent.³⁵ The result was formative canons in the collections of Regino of Prüm (early-tenth century) and Burchard of Worms (early-eleventh).³⁶ By 1025 the Council of Arras could turn Gregorian logic on its head: Abraham's purchase of a family sepulchre at Hebron justified making a donation to the one's final resting-place.³⁷ Continental inspiration can hardly, then, underlie what looks like accepted English custom by the later-ninth century. Nor does the introduction of soul-scot seem to have owed anything to secular or ecclesiastical authority. It was, somehow, both (comparatively) general and (relatively) ancient.

The most ancient of 'old minster' revenues, though not, as it happens, spelled out in Steyning's case, was church-scot. It had been enjoined since the first century of the English Church's history. Widely separated clauses of Ine's code ordered that it be paid at Martinmas (November 11) on pain of twelfold restitution and a sixty-shilling fine.³⁸ These stipulations were taken up by tenth-century codes. Payment was commanded by Æthelstan's Tithe Ordinance and by Edmund's London synod.³⁹ Edgar's Andover code ordered that church-scot be paid to the 'old minster', going on to cite Ine's law on

³⁵ Theodulf, Kapitular II i 10; Hinkmar, Kapitular III ii; *Cap.* 293:72 (Council of Meaux/Paris, 845/6); *Cap.* 252:16 (Council of Tribur, 895).

³⁶ Regino, *De Ecclesiasticis Disciplinis* i 122, 125, 127; Burchard, *Decretum* iii 159 (each ascribing Theodulf's view to a 'Synod of Nantes').

³⁷ *Synodus Attrebatensis* vii, *Mansi* XIX, cols 445–6. Given this evolutionary pattern, it seems extremely unlikely that the decretal heading the title in Gregory IX's *Decretalium Collectio*, III xxviii 1 (Jaffé, *Regesta* 2536) should really be ascribed to Leo III (795–816) – and certainly not to '810'; cf. Treffort, *L'Église Carolingienne et la Mort*, p. 173, citing Aubrun, *Paroisse en France*, p. 67, so ultimately Bernard, *Sepulture en Droit Canonique*, pp. 167–8. The next decretal in the series was attributed to Leo the Great rather than (probably) Leo IX, and one might likewise transfer the 'Leo III' decretal to (say) the devout and busy Leo VII (936–9). It could be relevant that a pronouncement of Leo IV (847–55) seems to have echoed Gregory's letter (*PL* CXV, col. 677–8). I am (as ever) deeply indebted to Dr Martin Brett for guidance through this maze.

³⁸ Ine 4, 61 (cf. Whitelock's note, *EHD* I, p. 406); the reason for these clauses coming so far apart is probably that they were promulgated on different occasions: chapter 2, pp. 104–5, with my "Inter cetera bona ...", pp. 977–83 (pp. 188–92).

³⁹ I As 4 (cf. above, n. 27; the *Quadripartitus* text does refer to 'cyricsceatta' though not to 'sawlsceattas' or 'sulbalmessan, plough-almes'); I Em 2 (again, all versions include church-scot, though non-Wulfstan texts have 'ælmesfeoh' in place of 'Romfeoh': chapter 5, p. 309, and below, nn. 65, 107).

Martinmas payment and the sanction for default. Church-scot then appeared beside tithes in the expostulatory first section of Andover's *Wiltbordesstan* sequel.⁴⁰ The references in Wulfstan's codes for Æthelred and Cnut substantially repeated what Edgar had said, while the *Leges Henrici* echoed Cnut.⁴¹ Enforcement of this singular church due was thus a king's business from near the beginning of the Old English legislative tradition until the very end.

There is, moreover, a remarkably rich seam of evidence running through the documentation of the later Anglo-Saxon period that such payments were in fact made. Particularly instructive is the Domesday entry for Pershore in Worcestershire:

The County states that the church of Pershore ought to have Church-scot from all 300 hides: that is, from each hide where a free man resides one load of corn (*unam sumbrinam annonae*) on St Martin's Day, and if he have more hides they are to be free; and if that day be missed, he who has withheld corn is to pay it elevenfold, but first to pay what he owes. The Abbot of Pershore himself has the forfeiture from his 100 hides, as he ought to have from his own land. From the other 200 hides the abbot himself has his load and payment, and the abbot of Westminster has the forfeiture because it is his land; and the abbot of Evesham likewise has it from his own land, and all others likewise from their lands.

Apart from the fact that the stipulations of Ine's code are clearly echoed, the payment of church-scot in kind (*annona*) looks like a mark of its antiquity. So does the point that,

⁴⁰ II Eg 2:2 – 3 ('Ðam fullon wite Ðe seo domboc tæcð'); IV Eg 1:3.

⁴¹ VI Atr 18:1 (Martinmas payment); VII Atr 4 ('church-scot and due tithe as it stood in the days of our ancestors'); VIII Atr 11 (Martinmas); I Cn 10 – 10:1 (Martinmas and penalty for default), 11:2 (payment to the 'old minster from every free hearth'); Hn 11:4, quoting I Cn 10–10:1, with the penalty for default adapted to post-conquest currency. For the absence of this provision from EGu, V Atr and Cn 1018, see chapter 5, p. 335 and n. 337. There are also relevant stipulations in *Rect.* 1, 2, 3:4, 4:1, which relate as usual to the demands of the Tidenham survey, S 1555 (chapter 4, p. 233).

though Westminster's acquisition of two-thirds of the Pershore estate gave it the right to the profits of justice from that part, Pershore retained its entitlement to church-scot from all that had once been its own.⁴² On this evidence, Pershore was the 'old minster' to which church-scot was payable, regardless of what the king himself did with its lands.

The pattern revealed at Pershore can be traced back to the later-ninth century. Some of the earliest documentary references have already been quoted (pp. 000). The burdens from which Bishop Ealhferth of Winchester did *not* free his lessee of the 870s included 'eight church-scots', as well as 'priests' dues and soul-scots'. Similarly, Wærferth's tenant and 'old companion' of 899 remained committed to paying the bishop his 'rectitudinem' of 'circsceat et sawlsceat'.⁴³ The Winchester contract was followed by one of 902 which obliged the tenant to pay 'the due church-scots', as well as to perform military, bridge and fortress service like everyone else, and to contribute annually 'to the repair of the church to which the estate is attached (*to þære cyrican bote þe ðet land to hyrð*) in the same proportion as other people do, each by the measure of his property'. Another Winchester document of similar date renewed the tenure granted by a previous bishop to the new lessee's 'yldran', 'on condition that he render church-scots and church-scot-work, and that his men be ready for harvest or for hunting when the need arises'.⁴⁴

As for Wærferth's lease, it was the first of quite a series of Worcester records reserving payment of church-scot in much the same way. Wærferth's kinswoman Cyneswith was allotted three hides at Elmstone Hardwicke 'free in every respect except that each year she give three measures (*mittan*) of wheat as church-scot to Bishop's

⁴² *DB* i 175c (*Worcs* 9:7); cf. *DB* i 174c (*Worcs* 8:1). The (essentially authentic) writ of the Confessor transferring Pershore to Westminster is S* 1143 (cf. S* 1144–6); it grants the land 'mid sace 7 mid socne, mid tolle 7 mid teame', i.e. with 'profits of justice' (below chapter 10, part 3)), but makes no reference to 'church-scot'.

⁴³ S 1275, 1279; see also S 566, as above, pp. 000.

⁴⁴ S 1285, 1287; repair of the local church fabric appears to be indicated in the first of these, and perhaps too by the 'church-scot-work' of the second – as also presumably by I Em 5 ('ælc biscop bete Godes hus on his agenum'), VI Atr 51, VIII Atr 6 (among uses of tithes, see below, pp. 000), II Cn 65:1. It is not so clear that the 'cericican weorces' (as opposed to 'woruldweorces') of Bishop Brihthelm's lease, S 693 (961), denotes any of these obligations.

Cleeve'.⁴⁵ At least fourteen of Bishop Oswald's many leases (962x91) made payment of church-scot a condition of tenure. Ælfric (963) was 'each year to plough two acres and therein sow his church-scot and afterwards reap it and bring it in'. Leofward (987) was to have five hides in Oxfordshire for his own lifetime and that of his chosen heir, 'on condition that ... the tenant always pay *tributum ecclesiasticum quod circsceat dicitur* to Pyrton'.⁴⁶ The commonest form of reference to the due, even when most of the rest of the text was in the vernacular, was 'ecclesiasticus census', which there is no reason to doubt was a Latinization of 'circsceat'.⁴⁷ Oswald's famous memorandum about the terms on which he let Worcester properties specified 'civic sceott' together with 'toll', 'tacc id est swin sceade(?)' and 'other rights (*iura*) of the church' among a tenant's liabilities.⁴⁸ And Domesday itself declares roundly, in terms reminiscent of its Pershore passage, that the bishop was have Martinmas 'annona', on pain of multiple restitution, from each and every hide of its land.⁴⁹

Worcester's bishops thus contrived to make this due an obligation on a par with the military and fortificatory services they could expect as a matter of course. Ten hides at Bishampton, belonging to the manor of Fladbury in the triple hundred of Oswaldslow,

⁴⁵ S 1283. There was a 'monasterium' dedicated to St Michael at Bishops Cleeve in the later-eighth century (S 141). In S 1415 (889) Bishop Wærferth leased the estate from the Worcester 'familia', noting that it had previously belonged 'ad monasterium to Clife'; and in Domesday Book, a notably large and valuable manor at Bishops Cleeve, with a number of dependents (and with a priest holding one hide), was 'land of the church of Worcester' held by Bishop Wulfstan (*DB* i 165a (*Gloucs* 3:7)). Wærferth had himself been obliged to keep up payments of 'censum aeclesiae' to Cleeve, so this was evidently an 'old minster', control of which was at some point assumed by the bishop: see Blair, 'Secular Minster Churches', pp. 105–12.

⁴⁶ S 1303, S* 1354; Pyrton too looks like an 'old minster', despite the dubiety (at best) of its earlier charters: S* 104, S 107, 217.

⁴⁷ S 1299, 1301, 1316, 1318, 1324, 1352, 1370, 1372–4 ('ecclesiasticus census'); S 1305, 1363 ('circsceat', etc.). Note also S 1298, 'Aecclesiae vero munus et sepultura'. Cf. S1406 (1046x53) 'civicsceatte', S1405 (1058) 'aecclesiastice census'; but S 1388 (1016), S 1384 (1017) merely 'sanctae dei/matris aeclesiae necessitatibus'.

⁴⁸ S 1368 (classically discussed by Maitland, *DBB*, pp. 303–18); the itemized services could have covered the '*cirvanlade* (church portage?)' demanded in S 1309, 1332 – which would not, then, be seen as a variant of church-scot (or even 'cyrican bote', as above).

⁴⁹ *DB* i 174a (*Worcs* 2:80). As Mr Baxter points out to me, this passage was reproduced as a marginal note on f. 140v, in Part I of 'Hemming's Cartulary': *Hemingi Chartularium*, ed. Hearne, p. 308.

were said in 1086 to have been held of the bishop by four ‘free men’ ‘rendering full soke and sake and church-scot and burial (*circset 7 sepultura*) and military and naval obligations and suit of court (*expeditiones et navigia 7 placita*) to Oswaldslow; as did the 1086 tenants.⁵⁰ While tenth-century records occasionally reveal the detritus of other ‘old minster’ rights (nn. 45, 46, 50 above), the assumption would be that Worcester itself had normally engorged these along with the estates to which they were attached, much as it had may have usurped other and even older entitlements in the city itself.⁵¹ Be that as it may, this diocese’s habitually lavish documentation affords the clearest view of church-scot provision in the pre-conquest period.

But there are also occasional sightings elsewhere. Domesday Book attests its outlay (sometimes, not always, in favour of what look like ‘old minsters’) in Hampshire, Dorset, Somerset and Sussex.⁵² In Buckinghamshire, the bishop of Lincoln’s manor of Stoke Mandeville was said to ‘lie to/at the church of Aylesbury’; the bishop of Dorchester had held it before 1066; and ‘from the eight hundreds that lie in the circuit of Aylesbury, each sokeman that has one hide or more renders one load of corn to this church’, each having also supplied one acre of corn or four pence before 1066 though not thereafter. Aylesbury shows every sign of being an ‘ancient minster’.⁵³ In Oxfordshire, the royal manors of Benson and Headington paid eleven shillings and ten and sixpence respectively ‘de

⁵⁰ *DB* i 173a (*Worcs* 2:21); that the ten hides included ‘a priest having half a hide’ is again a pointer to an ‘old minster’ (Blair, as n. 45, pp. 105–6) ? at Fladbury (*S** 62, 76, 185, etc.). For Oswaldslow’s unique status, see chapter 10, part 3); and *pro tem* my ‘Lordship and Justice in the Early English Kingdom’, pp. 114–28 (313–25).

⁵¹ Above, pp. 000 and n. 17; Bassett, ‘Churches in Worcester’; and *idem*, ‘Origins of the parishes of the Deerhurst area, pp. 6–10. *S** 1423 (1016x23) is an Evesham lease stipulating that ‘both church-scot and tithes go (along with ‘toll and team’) to the holy minster [Evesham], as [the tenant?] has much need that they do’.

⁵² *DB* i 39b (*Hants* 1:44), the royal manor of Hurstbourne, its church held by a named priest with half a hide, on which see Hase, ‘Mother Churches of Hampshire’, p. 48, and nn. 27, 33 (pp. 63–4); i 79a (*Dorset* 23:1), payable to Abbotsbury (refounded by one of Cnut’s favoured housecarls, so perhaps not an ‘old minster’); i 87c (*Som* 2:2), the Bishop of Winchester’s great Taunton manor (cf. *RoASCh* App. I iv); i 29c (*Sussex* 14:2), Iping, held from the king either side of 1066 (and for a clue to its rights see the discussion of the early South Saxon Church in *Sels. Ch.*, pp. lxxv–lxxiii). Compare too the church dues payable to the ‘minster’ at Lambourn, *RoASCh* App. I v.

⁵³ *DB* i 143d (*Bucks* 3a:1). Cf. Blair, ‘Minster Churches in the Landscape’, pp. 41–4; and ‘Frithuwold’s kingdom’, p. 106.

Circet'.⁵⁴ As far away as Derby, the *burgenses* gave the king twelve 'thraves of *annona*' each Martinmas, forty sheaves of which went to the abbot of Burton (a 'thrave' apparently consisting of twenty-four sheaves). The borough of Derby had twelve carucates of 'taxable' land, each of which was thus responsible for one Martinmas thrave. It seems that Derby's 'old minster' obligations had been secularized, and that the king used part of them to favour Burton abbey, which, as a c. 1002 foundation, was scarcely an 'old' minster itself.⁵⁵ Nor is the Domesday record the last that is seen of church-scot. Renders in kind which appear to be church-scot under another name (*Scrifcorn*) were owed in the *parochia* of Leominster throughout the twelfth and thirteenth centuries.⁵⁶ The render appears under its own name, payable in poultry as well as grain, in medieval records from Abingdon, Battle, Christ Church (Hampshire), Glastonbury, Gloucester and St Paul's.⁵⁷ The mid-twelfth-century Black Book of Peterborough reports that 'plenary villeins' at Fiskerton (Lincs) paid their lord (i.e. the abbey) two pence at Martinmas, and 'half villeins' one.⁵⁸ In 1304, the bishop of Lincoln excommunicated the inhabitants of eight parishes surrounding the one-time royal vill (and likely 'old minster') of King's Sutton in Northamptonshire for failing to come up with the church-scot due to it. In the same county, the minster of Fawsley was claiming church-scot from two associated hundreds as late as the reign of Mary Tudor.⁵⁹

The relative ubiquity of church-scot poses an important problem. The counties of Hampshire, Dorset, Somerset and Berkshire were in the old kingdom of Wessex, where the laws of Ine applied as a matter of course. But how did the same levy come to be

⁵⁴ DB i 154c (*Oxon* 1:1–2).

⁵⁵ DB i 280b (*Derbys* B:1,13); Round, "'Churchscot" in Domesday'; cf. the striking evidence marshalled by Hill, *Medieval Lincoln*, pp. 68–9. For residual Derby 'old minster' rights, see Kemp, 'Parochia of Leominster', p. 94, n. 51, and Campbell, 'Church in Anglo-Saxon Towns', p. 125 (144–5); and cf. also *Chronicle of Æthelweard*, p. 37.

⁵⁶ Kemp, 'Parochia of Leominster', pp. 87–8.

⁵⁷ Neilson, *Customary Rents*, pp. 193–6.

⁵⁸ *Chronicon Petroburgense*, ed. Stapleton, 'Appendix', p. 164. Cf. Neilson, *Customary Rents*, p. 193: Martinmas payment is very telling.

⁵⁹ DB i 219c, 220b, 222d, 223c–d, 224d (*Northants* 1:8, 2:6,11, 17:3, 18:37,61–3, 22:6); *Reg.* ii 1104 (1115); Franklin, 'Identification of Minsters', p. 81, and 'St Augustine's Daventry', p. 99.

enforced right across the Midlands from (at least) Herefordshire to Lincolnshire, and from Oxfordshire to Derbyshire, not to mention Sussex.⁶⁰ There seem to be two possibilities, neither without its problems. The first is that this due was laid down from the earliest age of the English Church and that only Ine's laws took note of it. In favour of that proposition is that the penitential attributed to Archbishop Theodore instructed that the 'tributum ecclesiae' was to accord with the 'custom of the province', 'so long as the poor suffer no oppression (*vim*) in tithes or anything else'. As James Campbell dryly notes, this inclines one to think that they were suffering oppression. Further, Bede's Letter to Egberht complained that up-country Northumbria did not see a bishop from one year to the next, not but what collectors of 'bishops' tributes (*tributis antistiti*) contrived to make their presence felt.⁶¹ Yet the first and surely the only authority able to make such an obligation so general was Theodore himself; and it then seems odd that the sole mention of it credited to him was a protest against its abuse.⁶² The other option is that the various early English churches each made their own arrangements for their upkeep at their flock's expense; and that what made West Saxon practice general was the legislation of the kings from Alfred onwards. The date of the earliest Worcester lease to specify Church-scot (889) is *just* compatible with that thesis (above, n. 45); extant Worcester contracts of earlier date make no mention of 'ciricsceat' or even 'ecclesiasticus census'.⁶³ Yet were the first kings of the English truly that powerful?

⁶⁰ *Contra* Neilson, *Customary Rents*, p. 194: its apparent absence is less surprising in East Anglia than in Kent; but cf. S* 1390, 'pro censu L denarios', a lease by Archbishop Æthelnoth (1020x38).

⁶¹ Poenitentiale Theodori II xiv 9 (and see below, n. 68); Epist. Bede ad Ecgb. 7, p. 410; Campbell, 'First Century', p. 13 (p. 50).

⁶² *Fleta* i 45, p. 102, apparently thought that it was 'paid in the time both of the Britons and the English', meaning that it could conceivably be inherited from the Romano-British Church (Neilson, *Customary Rents*, p. 196); but this is a *very* thin evidential thread by which to hang so extraordinary a possibility. November 11 (unlike November 1) was of no special significance in the 'Celtic' calendar.

⁶³ S 1254 (718x45), 1255 (774), 109 (775), S* 1261 (?814), S 180 (816), 1262 (798x822), 1272 (849), 1273 (855); cf. S 1270 (840x52).

This brings us to the third and most important of minster dues, tithes. It was in Æthelstan's so-called 'Tithe Ordinance', probably his first piece of legislation, that compulsory payment of tithes made its appearance.⁶⁴ There was then a continuous set of pronouncements in the codes of all his successors from Edmund to Cnut.⁶⁵

1. I As Pr. – 3: I inform the reeves in every borough and pray you in God's name and that of all his saints, and also urge you for the sake of my friendship that you first give tithes from my own property both in livestock and in the yearly fruits of the earth (*ge ærest of minum agenum gode agyfan þa teopunga, ægþer ge on cwicum ceape ge on þæs gearæs eorþwæstmum*)... and the bishops are to do the same from their own property, and my ealdormen and my reeves likewise. And I wish that bishops and the reeves command it to all those who should obey them, and that it be paid on the proper appointed day [that is, the execution of John the Baptist]. Let us consider how the patriarch Jacob spoke ... and the Lord himself spoke in his Gospel [how Moses spoke in God's law] ... It is for us to consider how terribly it is declared in books: "if we will not pay the tenths to God, that he will deprive us of the nine parts when we least expect it, and we also have the sin in addition".

2. I Em 2: Tithes we enjoin on every Christian man for the sake of his

⁶⁴ See chapter 5, pp. 294–5, 299, 302–3.

⁶⁵ Translations of the following texts are by and large Whitelock's, *Councils and Synods I*, pp. 43–7, 60–3, 95–109, 338–82, 386–402, 468–86, 506–13; Cn 1018 is as usual cited from Kennedy. As regards excerpt 1., the argument in chapter 5, pp. 294–5, 302, 309, 314–15 (cf. above, pp. 000 and n. 27) is such that the *Quadripartitus* text's identification of the 'proper appointed day' with the feast of St John the Baptist's execution probably should be preferred to the less specific reading of Wulfstan MSS (and quotation of Matthew 25:29 likewise to that of Exodus 22:29); 29th August would indeed be a logical deadline for tithe payment, yet one can well imagine that Wulfstan would wish to introduce an element of flexibility (cf. excerpts 3, 5, 7, 10). So also, the 'HBQ' reading 'ælmesfeoh' should have priority over 'D' (Wulfstan) 'Romfeoh 7 sulhælmessan' in excerpt 2; and 'G' 'ealdan mynstre' over 'A'/'D' 'ealdum mynstrum' in 3; while, also in 3, II Eg 2:3 (plough-alms, 'A'/'D') is to be omitted.

Christian faith, and Church-scot and alms-money [Rome-money and plough-alms]. And if anyone will not do it, he is to be excommunicated.

3. II Eg 1:1 – 2:1, 3 – 3:1: And all tithes is to be given to the old minster[s] to which obedience is due (*þam ealdan mynstre [ealdum mynstrum] þe seo hyrnes tobyrð*); and it is to be paid both from the thegn's demesne and from his tenant-land (*ge of þegnes inlande ge of geneatlande*), as the plough go over it. If then there be any thegn who has on his bookland a church for which there be a graveyard, let him hand over a third part of his own tithes to his own church. If anyone have a church for which there be no graveyard, let him do for his priest what he will from the nine parts ... And the tithes of all young stock is to be paid by Pentecost and of fruits of the earth by the equinox. And if then anyone will not pay his tithes as we have declared, let the king's reeve and the bishop's and the minster's mass-priest go there and take the tenth part regardless for the minster to which it belongs, and assign to him the ninth part, and divide the eight parts in two (*7 niman unþances ðæne teoðan dæl þe hit to gebyrige, 7 tæcan him to þam nygofan dæle, 7 todæle man þa eahta dælas on twa*), with the lord of the land taking half and the bishop half, whether this be a king's man or a thegn's.

4. IV Eg Pr. – 1, 1:4–5: King Edgar has been pondering what amends he might make for the sudden pestilence (*færcwealme*) that greatly oppressed and reduced his people. It seemed to him and his wise men that a misfortune of this kind was merited by sins and by disobedience to God's commands, and especially by withholding of the obligatory tribute (*neadgafoles*) that Christian men should pay God in their tithes ... I and the archbishop command that you do not anger God nor merit either sudden death in this present life or

indeed eternal hell in the future by any withholding of God's dues, but both poor man and rich who have any produce are to pay God his tithes with all joy ... Then, I command my reeves for my friendship and for all that they own that they punish each of those who do not pay this and wish to break the pledge of my wise man by any backsliding (*wascipe*) ...

5. V Atr 11 – 11:1: And let God's dues readily be paid every year; that is, plough-alsms fifteen days after Easter and the tithe of young stock by Pentecost and of fruits of the earth by All Saints day...

- cf. VI (lat.) 15:2 – 17: ... Nor are long-established churches to be deprived of tithes or other possessions so that they can be given to new oratories (*nec ecclesiae antiquitus constitute decimis vel aliis possessionibus priuentur, ita ut in novis oratoriis tribuantur*). Tenths of fruits and of calves and lambs and plough alms and church dues are to be returned to the Lord at the proper times each year; that is, plough alms fifteen days after Easter; and tithes of calf and lamb are to be paid to the appropriate churches by Pentecost, and tenths of fruits of the earth about the feast of All Saints ...

6. VII Atr 4 – 4:2: And we command that every man ... give church-scot and his proper tithe, as observed for the better in the days of our ancestors, as the plough traverses the tenth acre. And every due is to be rendered for God's friendship to the mother church to which it belongs (*adiacet*). And let no one take from God what pertains to him and our predecessors conceded to Him.

- cf. VIIa Atr 8: And every year henceforth God's dues are to be paid very correctly, that God Almighty have mercy on us and grant that we may overcome our enemies.

7. VIII Atr 6 – 9:1, 12: And about tithe, the king and his wise man have decided and declared, just as is right, that a third part of the tithe that belongs to the Church is to go to repair of the church (*ciricbote*), and another part to the servants of God and a third to God's needy and poor slaves (*Godes þearfum 7 earman þeowetlingan*). And every Christian man is to be sure that he rightly pay his tithes to his Lord, ever as the plough go over the tenth acre, for hope of God's mercy and for fear of the full fine that King Edgar made lawful; that is, if anyone will not rightly pay tithes [**more or less verbally as excerpt 3.**]. And every tithe of young stock is to be paid by Pentecost for fear of the fine, and of fruits of the earth by the equinox or for sure by All Saints day.

8. Cn 1018 13 – 13:3: And let God's dues readily and rightly be paid every year, that is plough alms for sure fifteen days after Easter and the tithe of young stock by Pentecost, and of fruits of the earth by All Saints day.

9. I Cn 8 – 8:2, 11 – 11:1: And let God's dues be paid every year readily and rightly, that is plough-alms fifteen days after Easter and the tithe of young stock by Pentecost, and of fruits of the earth by All Saints day. And if then anyone will not pay his tithes as we have declared, that is the tenth acre exactly as the plough go over it, then let the king's reeve and the bishop's and the landlord's (*landrican*) and the minster's mass-priest go there ...[**word-for word as excerpt 3.**] ... If then there be any thegn [**word for word as 3.**] the nine parts.

10. Cn 1027 16: Before I come to England, all dues which we owe God according to ancient law are to be paid, that is plough alms and the tithes of animals born this very year ... and in mid-August tithes of fruits ...

One feature of this sequence is its interconnections. It was not unusual for Wulfstan to quote earlier codes, especially those he had drafted himself.⁶⁶ But neither he nor anyone else normally acknowledged a specific source, as in 7. It is noteworthy too that, though Wulfstan became more conscious of Edgar's ideas in his codes of 1009 and 1014 (6-7), he returned to the wording of 1008 (5) in the Oxford code of 1018 (8), and only fully blended the two approaches in Cnut's Winchester code (9). After his departure from the scene, the author of Cnut's 1027 letter (Lyfing of Tavistock and Crediton?) reverted to something like Æthelstan's payment deadline.⁶⁷ Of special interest is the relationship between Æthelstan's warning of what would happen to non-payers (1) and the penalty devised for them by Edgar (3): evaders were deprived not indeed of all nine tenths of their remaining property but of all of it bar one tenth. The overall impression is of a sustained and structured campaign to provide the English Church with a comprehensive set of tithe regulations. How effective was it?

The first issue to resolve is what evidence there is of compulsory tithes before Æthelstan's initiative. The earliest (apparently) English evidence is Archbishop Theodore's penitential, as already quoted (pp. 000): 'The tribute of the Church is to be according to the custom of the province, that is so long as the poor suffer no oppression in tithes or anything else'. This is immediately followed by a problematic clause instructing that 'It is not legitimate to give tithes except to the poor or pilgrims, or laymen theirs [except to] churches (*Decimas non est legitimum dare nisi pauperibus et peregrinis sive laici suas ad ecclesiam*)'. Earlier in the same title, there is an intimation that tithes are payable in Lent; while in a previous title comes the statement that 'a priest is not compelled to give tithes' [*or* 'one is not compelled to give tithes to a priest (*Presbiter[o]*

⁶⁶ See chapter 5, pp. 346–7, 353–63. For Wulfstan's wording on this theme in his 'Pastoral Letter' (*Hom. XIII*) and 'private' codes (EGu, *Can. Eg.*) see chapter 5, table 5.3 (p. 338). In VIII Atr 5:1 = I Cn 3:2, he reprised Edgar's distinction between 'headminsters', 'lesser' churches with a cemetery and 'field-churches'.

⁶⁷ See chapter 5, p. 348.

decimas dare non cogitur’].⁶⁸ However one reads these somewhat inscrutable prescriptions, they hardly suggest that tithes were yet a universal obligation. In any case, the text of Theodore’s penitential as now extant is as likely to reflect conditions on the eighth-century continent (or Ireland) – as those of later-seventh-century England.⁶⁹ The same goes *a fortiori* for the views of the missionary St Boniface; his long letter to Archbishop Cuthberht that set part of the agenda for a forthcoming Council at *Clofesho* (747) envisaged that tithes would be payable, but there is no sign of any such requirement in the decrees of the actual council.⁷⁰ In England itself, Bede was aware that ‘tribute’ was being extracted by the Church, but he does not identify it with tithe; and in the *Historia Ecclesiastica*, the ‘tenth part’ of his animals, produce and clothing given by Bishop Eadberht of Lindisfarne to the poor is represented as a mark of his exceptional piety.⁷¹ Perhaps the decisive point is that none of the late-ninth/early-tenth documents cited earlier for soul-scot or church-scot make any mention of tithes; whereas the eccentric 955 charter anticipated payment from a ‘thoughtful landowner’ not only of church-scot and soul-scot but also of tithes.⁷² Thereafter, records of this type (apart from the Worcester leases) are as likely to refer to tithes as to any other church due.⁷³

Hardly less conclusive is that this English evidence fits with the continental. There was Biblical warrant for rendering a tenth of one’s produce to God. Yet it is surprisingly difficult to find that this was anywhere an obligation as opposed to good practice before

⁶⁸ Poenitentiale Theodori II xiv 9–10, II xiv 1, II ii 8, and see above, nn. 8, 61. I here follow Professor Constable’s translation, *Monastic Tithes*, p. 25, n. 1.

⁶⁹ See now Charles-Edwards, ‘Penitential of Theodore’, which (in my view) supersedes all previous discussions of the material; the general effect of his arguments is to attach more credit than is accorded by previous interpreters to the ‘Iudicia Theodori’, i.e. ‘D’ (Finsterwalder, *Canones Theodori*), or ‘Capitula Theodori’ (*Councils and Ecclesiastical Documents*, ed. Haddan and Stubbs, III, pp. 205–7).

⁷⁰ *Briefe Bonifatius* 78, p. 168; cf. the pope’s letter, *ibid.* 83, p. 187.

⁷¹ See n. 61, and Bede, *Hist. Eccl.* iv 29, pp. 442–3.

⁷² S* 566; cf. nn. 28, 43–5. But see next n. for RoASCh App. I v.

⁷³ E.g. S 1448 (?963), S* 1423 (1016x23), S 1390 (1020x38), RoASCh App. I iv–v (c. 1086), Meritt, ‘Old English Entries’, pp. 344, 347–8; Professor Dumville’s dating of this last entry, ‘Anglo-Saxon Chronicle’, pp. 79–82, could put it earlier than Æthelstan’s Tithe Ordinance, for whose date, see chapter 6, pp. 439–40, but palaeographical evidence can surely not establish a *mid*-920s date.

the Carolingian era.⁷⁴ Caesarius of Arles, most vigorously articulate of Merovingian churchmen, warned his flocks of the dire consequences of evasion, along lines suggestively like Æthelstan's threat. Sixth-century councils followed his lead.⁷⁵ The legislation of Merovingian kings did not. Irish canonists made a particular point of tithes, as of so many Old Testament norms, and they may have had some effect on pastoral practice.⁷⁶ But it was the Carolingians who changed the picture in mainland Europe. In what was probably a local record of a general ordinance, Pippin told Archbishop Lull that he should 'arrange on our command (*ordinare de verbo nostro*) that each man pay his tithe whether he like it or not'.⁷⁷ Within a decade or two, Charlemagne's Herstal capitulary (779) put his government's weight behind the principle.⁷⁸ A regular sequence of reminders was provided over the following half century.⁷⁹ Like Pippin (and Edgar), the Council of Frankfurt (794) saw non-payment as the cause of natural disaster, in its case a severe famine. Louis the Pious threatened the recalcitrant with force, his 'own men' being summoned to his presence.⁸⁰ The episcopal capitulary of Ghaerbald of Liège specified the revenue's triple division in a way that directly influenced the wording of Æthelred's 'eighth' code (see chapter 13, pp. 000). Theodulf's capitularies did much the same (though with a fourfold division) in texts the English certainly knew.⁸¹ Archbishop

⁷⁴ Genesis 28:22, Exodus 22:29, Leviticus 27:30–3, Numbers 18:21–31, Deuteronomy 14:22–3, I Samuel 8:15,17; Constable, *Monastic Tithes*, pp. 9–10.

⁷⁵ *Caesarius, Sermo xxxiii*, pp. 143–5; *Concilia Galliae*, pp. 198 (Tours, 567), 241 (Macon, 585).

⁷⁶ *Coll. Can. Hib.* xvii 5, and ('B' text) xx 11; Kottje, *Studien zum Einfluß des alten Testaments*, pp. 57–68; Charles-Edwards, 'Pastoral role of the Church', p. 70, and Sharpe, 'Churches and communities', pp. 104–5.

⁷⁷ *Cap.* 17. Cf. the Bavarian Ascheim council (*Concil.* 10:5), which may in fact be earlier.

⁷⁸ *Cap.* 20:7.

⁷⁹ *Cap.* 24:11; 26:17 (the Saxon capitulary, leading to Alcuin's protest against thus burdening the newly converted, *Alc. Ep.*, pp. 154, 158, 161, 289); 87:3; 78:7; 83:3; 84:7 (arising from the 813 councils, *Conc.* 34:9, 35:38, 36:38, 37:18, 38:16); 89:9, 93:8 (for Italy); and see nn. 80, 83–4. 'Nona et decima', payable on 'loaned' church lands, are something else: Constable, 'Nonae atque Decimae'.

⁸⁰ *Cap.* 28:25; 191:6–7.

⁸¹ Ghaerbald, Kapitular I iv–v; Theodulf, Kapitular I xxxv, II i 5; cf. *Cap.* 112:13; 248:10 (Council of Mainz, 847), 249:3 (Mainz, 852). Haito of Basel, Kapitular xv, cited *Conc. IX Toledo (655):6* (*Concilios Visigóticos*, ed. Vives, p. 301) for triple division, before preferring fourfold parcelling 'secundum usum Romanorum pontificum et observantiam sanctae

Hincmar, another figure of likely significance for Anglo-Saxon law-giving, not only made similar arrangements for his diocese but also quoted the relevant capitulary legislation in his tract ‘On churches and chapels’.⁸²

A particular theme of Carolingian legislation that clearly became central for the English Church too was that long-established churches should not have their tithe revenue eroded by newly-founded rivals. The point was first made in legislation of 803/4. It was rehearsed in capitularies apparently arising from the five great councils of 813, and resumed in Louis’ ‘ecclesiastical capitulary’ of 818/19; so finding its way into both the first two books of Anseghis’ collection of capitularies. This point too was quoted by Hincmar in his *De Ecclesiis*.⁸³ Meanwhile, the capitulary collection of ‘Benedict the Deacon’ (essentially Anseghis, distended by a large number of forged decrees) made both the Caesarius/Æthelstan point about the fate of evaders, and the one protecting ‘ancient’ churches from the claims of new competitors. So, presumably under its influence, though citing the authority of ‘Augustine’ and the Council of Chalcedon, did the Council of Tribur (895), last of the great series of Carolingian episcopal assemblies.⁸⁴ The obvious implication is that the tithes and perquisites of ‘ancient’ churches were facing the same sort of threat in ninth-century Francia that they were experiencing in England by the early-eleventh (above, pp. 000).

What seems to have happened increasingly in the Frankish church was that the tithes owed by landowners became disposable items of lay patronage like any other. At best, they, or fractions thereof, might be paid to favoured monasteries: that is to say, to institutions whose business was prayer and contemplation, rather than churches

ecclesiae Romanae’ (i.e. Gelasius: Jaffé, *Regesta* 636). See, in general, Constable, *Monastic Tithes*, pp. 43–56.

⁸² Hincmar, *Kapitular II iii, xvi*; *Hincmar, Collectio de ecclesiis et capellis*, pp. 67, 75, 85, 93–4, and cf. pp. 110, 118–19.

⁸³ *Cap.* 42:2–3; 78:19 (*Concil.* 34:20 (Arles), 36:41 (Mainz)); 84: 13, 154:4 = *Ans.* ii 34 (also 813); 138:12 = *Ans.* i 87; cf. also *Cap.* 32:6 (‘de Villis’, for Charlemagne’s own estates); 43:8 (805–6); *Hincmar, Collectio de ecclesiis*, p. 75. On Anseghis, see chapter 2, pp. 52–3, and Professor Schmitz’s superb edition, *Ans.*

⁸⁴ *Benedicti Capitularia* i 154 (and cf. ii 197), i 157, pp. 000; *Cap.* 252:13–14. For ‘Benedict’, see chapter 2, p. 59 and n. 152; and for Emperor Arnulf’s Tribur council, chapter 3, p. 124.

committed to pastoral activity.⁸⁵ All that could be done for those traditionally intended to be the beneficiaries of tithe was that they held on to the portion assignable to the ‘parish clergy’. By the later eleventh century, French councils were insisting on the local church’s retention of its third share but of no more.⁸⁶ The Norman Council of Lillebonne (1080) decreed that ‘no layman should have any share in altar dues or burial-dues (*sepultura*) or the third part of the tithe (*tercia parte decimae*), nor receive money in any way for the sale or gift of these things’; a provision repeated by a Rouen council of 1096.⁸⁷ The unspoken assumption was that they could do what they wished with the other two-thirds.

Against this background, the story of Old English tithes falls into place. Given the persistent Carolingian interest in the subject, it makes sense that the very first demand for tithe payment as a matter of course was not Æthelstan’s but the ‘capitulary’ issued by the papal legates for the Northumbrian and southern English churches in 786; George of Ostia, the senior legate, was also bishop of Amiens and active in the Frankish church for up to forty years.⁸⁸ On the basis of a string of quotations from scripture and from an unnamed ‘wise man’, the capitulary instructed that ‘all are to take care to give tithes from all they possess, because that is reserved for the Lord, and to live and pay alms on the nine parts’. If, then, this decree were enforced as the legates (and perhaps kings Ælfwold and Offa) intended that it be, we should have evidence of the English Church following the Carolingian line within a few years of its emergence. However, to judge from the English ninth-century texts reviewed above, this legatine admonition, like the others, remained an aspiration rather than a rule.⁸⁹ The tenth-century position was another matter. The legatine capitulary was extensively laid under contribution by Archbishop Oda

⁸⁵ See Constable’s fundamental study, *Monastic Tithes*, pp. 57–98; also the still valuable Boyd, *Tithes and Parishes*, pp. 75–128.

⁸⁶ Conc. Toulouse (1056) x–xi, Tours (1060) viii, *Mansi* XX, cols 849, 928.

⁸⁷ *Ecclesiastical History of Orderic Vitalis* v 4, ix 3 (III, pp. 28–9, V, pp. 22–3).

⁸⁸ ‘*Capitulare 786*’ (*Alc. Ep.* 3) xvii; Levison, *England and the Continent*, pp. 127–8.

⁸⁹ Above, pp. 000 and n. 72. To this extent, Selborne was right, *Ancient Facts and Fictions*, pp. 152–5, 159–67. My argument, ‘Offa’s “Law-code”’, pp. 37–42 (214–19), was not that these *were* laws of Offa (and/or Ælfwold), but that Alfred referred to ‘synod-books’ laid down by ‘synods of holy bishops and distinguished wise men’, among them one ‘in the time of Offa king of the Mercians’; which is just what the legatine capitulary was. See also chapter 2, pp. 106–7.

of Canterbury's 'Constitutions' (941–58, 945/6?), themselves closely related to the decrees of the Council of London which promulgated King Edmund's first code (2., above, pp. 000).⁹⁰ It is quite likely that this was one of the 'books' from which Æthelstan took his warning about non-payment (1.).⁹¹

The next secular legislation on tithes is in 'II' Edgar (3.). There seems likely to be a link between the thirds retained by parish clergy on the continent in the tenth and eleventh centuries and Edgar's insistence that only a third of a thegn's tithes, whether from demesne or 'tenant land', be assigned to a church that he had built on his 'bookland' – and then only when that church had a cemetery. If so, Edgar and his ecclesiastical advisers neatly reversed continental priorities. 'Ancient' churches held on to the lion's share of tithes; it was the third share assigned elsewhere to those entrusted with pastoral care that was reserved for the thegn's own purposes. English churchmen, or Archbishop Wulfstan at least, knew Carolingian legislation on this topic: the passage quoted from 'VI' Æthelred (lat.) in the above series of excerpts (5. 'nec ecclesiae antiquitus constitute ... tribuantur') is more or less word-for-word identical with a clause attributed by Ansegisus to Louis the Pious, and attached to the end of Book I in the version of his collection transmitted by Bodleian Library MS Hatton 42. Wulfstan glossed that manuscript, and he or whoever else compiled the 'Excerptiones Egberti' included the 'nec ecclesiae' clause in both its recensions.⁹² As we have now seen, laws to this effect are reasonably read as signs that traditional parochial arrangements were coming under pressure.

The question is, how much pressure, and with what effect? As so often in early English history, this question is much more easily answered for the post-1066 period than the time before. There is no doubt that the 'old minsters' rapidly lost their grip on tithes in the Anglo-Norman era, just as they were threatened, unless they had a vigorous

⁹⁰ *Councils and Synods* I, p. 74; as, again, Selborne saw, pp. 154–5, though missing, *ibid.* and pp. 218–19, the connection between Oda's Constitutions and Edmund's laws; for which see chapter 5, p. 310.

⁹¹ For other possibilities, see chapter 13, pp. 000.

⁹² *Ans.* ii 34; *Exc. Can.* 24 (3); cf. Sauer, 'Zur Überlieferung', pp. 349 (2(a)), 357; and above, chapter 4, table 4.4. See further, again, chapter 13, pp. 000.

new patron to make their case, with loss of burial fees (pp. 000). Countless charters transfer two-thirds – or all – a landowner’s tithes to a foundation of his choice: whether a Norman or French abbey or a cell it had engendered north of the Channel; or if not, a resplendent new foundation of their own. To give more than selected examples would be otiose. Sheriff Picot of Cambridgeshire and his wife celebrated the latter’s miraculous recovery from near-mortal illness through the agency of St Giles by founding a church at Cambridge for six canons in his name, assigning to it two parts of the tithes from their demesne and of all their knights in the shire. A charter of Peter de Valognes for St Mary’s Binham (which was to be a dependency of St Albans) granted it two-thirds of his own demesne tithes and two thirds of those of the *milites* holding land of him in Norfolk; further, any of his *milites* who died in England were to be buried there and of course pay accordingly. A royal charter of 1107 for the dependency of La Charité-sur-Loire at St Andrew’s Northampton confirmed donations by a series of barons, including two-thirds of the demesnes at Wollaston, Thorpe and Spratton (Northants).⁹³ The new ascendancy had no wish to patronize churches wherein local identities were vested before 1066, with their mysterious and strangely-named saints; they preferred the saintly patrons they remembered from home.⁹⁴ Their French experience was one of doing as they liked with two-thirds of their tithes (above, pp. 000). English local churches too now had to settle for the parish clergy’s residual third.

How, then, did the rights of ‘old minsters’ bear up before the Conquest? An older generation of scholars thought that the system was far gone in decay by 1066, even that it had been shattered by the Scandinavian raids. The new school of minster studies is less sure.⁹⁵ A study of the mother church of Christchurch (Hampshire) finds that it was when taken over by Ranulf Flambard, Anglo-Norman government’s first hatchet man, that it

⁹³ *Liber Memorandum de Bernewelle*, ed. Clark, pp. 38–40; *Reg.* ii 828 with *Dugdale* iii 345–6 (i); *Reg.* ii 833. For the general situation, see Kemp, ‘Monastic Possession of Parish Churches’, pp. 141–4, and ‘*Parochia* of Leominster’, pp. 84–7; with Blair, *Early Medieval Surrey*, pp. 142–50, and ‘Introduction’, pp. 10–13.

⁹⁴ Cf. Matthew, *Norman Monasteries*, pp. 28–44.

⁹⁵ Stenton, *Anglo-Saxon England*, pp. 155–6; Lennard, *Rural England*, pp. 295–303, 396–404; and for the new view, the studies edited by Blair, *Minsters and Parish Churches*.

ceased to be a truly collegiate foundation, becoming a single wealthy living for an absentee pluralist who hired chaplains to perform its residual functions.⁹⁶ The implication is that until then it functioned as it had since time immemorial. Stenton deduced a general decline from a Domesday entry for Derby recording that ‘Stori ... could make himself a church on his land without anyone’s leave and dispose of his tithe where he would’; but we might as reasonably conclude that Stori’s behaviour was singled out because it was exceptional.⁹⁷ A charter of Stephen’s reign can be read to mean that Ælfric son of Wihtgar, a wealthy thegn in Edward the Confessor’s England, had endowed seven prebends of his new church of St John the Baptist at Clare (Suffolk) with a series of lands plus the tithes of others; these being then assigned to Bec in 1090 by Gilbert fitz Richard, son of Ælfric’s post-conquest *successor* Richard fitz Gilbert; and in 1124, through an arrangement confirmed by the bishop of Norwich, transferred by Richard fitz Gilbert, his son, to St Augustine’s at Stoke-by-Clare.⁹⁸ If this is an accurate memorial of what had happened sixty years before, not a reading back into pre-conquest times of the sort of transaction to which Norman lords were habituated, it has few if any known parallels.

Another problematic case is Nether Wallop in Hampshire, which Countess Gytha held from Earl Godwine her spouse, and whose church was elaborately reconstructed and decorated in the first half of the eleventh century. This had all the manor’s church-scot, but half as opposed to two-thirds of its demesne’s tithes and forty-six pence of those of its villagers; while a ‘small church (*ecclesiola*)’ nearby had eight acres of the tithe. Moreover, there are signs that it had been carved out of an older *parochia* centred on Mottisfont. This could mean that the house of Godwine had been creating a focus for its own patronage and display by usurping Mottisfont’s church-scot and most of its tithe-

⁹⁶ Hase, ‘Mother Churches of Hampshire’, especially pp. 49–51.

⁹⁷ *DB* i 280b (*Derbys* B:16).

⁹⁸ *Stoke by Clare Cartulary*, ed. Harper-Bill and Mortimer, 70 (vol. I, pp. 54–8); cf. the editors’ introduction, III, pp. 29–37. I owe my knowledge of this text (and indeed most of the ideas in this section) to the generosity of Dr John Blair. For Ælfric’s wealth and power in pre-conquest England, see Clarke, *English Nobility*, pp. 52–3, 138; for another instance of his dealings with Church property, see chapter 3, pp. 156–7 (LS 150); and for his son’s dispossession, see *DB* ii 448a (*Suffolk* 76:5).

entitlement – a possibility to which much of its recorded behaviour lends credence. But it is possible too that a comital manor with rights and responsibilities extending well beyond its own hundred had at some point been given a church with revenues worthy of its status.⁹⁹ Less ambiguous is the position at the royal vill of Sutton Courtenay (Berks), where Abingdon claimed that in the time of King Edward and his predecessors it had had ‘two portions’ of the tithes; Abingdon was of course a reformed monastery, but had not ceased to be an ‘old minster’ too as regards tithes and other dues (pp. 000).¹⁰⁰ And in what does look like an echo of Edgar’s stipulations, St Clement’s Norwich held on to two-thirds of the tithes of the city’s ‘Gildencroft’, despite the area’s assignation to other parish churches.¹⁰¹ In short, there is at least some evidence that ‘ancient minsters’ held their own quite successfully.¹⁰² We face, for the first and far from last time in this volume, the possibility that the Old English kingdom’s structures were in good working order up to first light on 14th October 1066, thereafter falling into the hands of a ruling-class that subverted because it did not understand them.

That is a cue to stand back and draw some general impressions about ‘old minster’ receipts in Old English law and practice. A radical and persuasive reappraisal of the continental situation in and after Carolingian times has found it to be an ‘illusion’ that parishes were being hewn out of regions once subject to mother churches much earlier in Frankish lands than in England (or Italy).¹⁰³ In other words, Carolingian legislation defending ‘ecclesiae antiquitus constitutae’ had more effect than it has been credited with. That would make it all the more questionable to date the erosion of English ‘ancient minster’ prerogatives a lot earlier than *c.* 1100. It may indeed be that historians

⁹⁹ *DB* i 38c (*Hants* 1:19); Gem and Tudor-Craig, ‘A “Winchester School” wall-painting’, especially p. 116; Blair, ‘Introduction’, pp. 6, 7 (‘comital or thegnly minster’, ‘sub-minster or superior estate church’). It may be noted that Mottisfont had ‘all the custom of the living and the dead’, *DB* i 42ab (*Hants* 4:1).

¹⁰⁰ *Chron. Ab.* II, p. 27.

¹⁰¹ Campbell, *Norwich*, p. 4, n. 42.

¹⁰² Cf. also Cownie, *Religious Patronage*, pp. 26–33.

¹⁰³ Reynolds, *Kingdoms and Communities*, pp. 81–8 – though Susan Reynolds sets aside this strand in Carolingian legislation, in favour of that which made for the emergence of classic parochial structures.

have drawn the wrong conclusion from the legislation seeking to uphold them. This could mean not that the old system was tottering but that it was being given a new lease of life, even a newly formal structure, in circumstances when there were other calls on landowning patronage, to be sure, yet which were not in that respect unprecedented. Small-scale 'private' foundations were hardly a new development in the Anglo-Saxon Church.¹⁰⁴

This is to raise more fundamental questions about minster origins and continuities than can be tackled here. A few observations are, however, possible. One relates to what was said above about the ubiquity of church-scot. To take the view that the familiar features of the 'minster system' were widespread throughout the English kingdoms from the earliest times is to confront a double problematic: first that a relatively homogeneous system came into existence without anything very evident in the way of central control, beyond the archiepiscopates of Theodore and his two successors (669–734); and second that it survived not only Danish invasion in the ninth century but also West Saxon conquest in the tenth.¹⁰⁵ Both are possible, and the second is to a degree apparent. But one can reasonably ask how *probable* it is that the Church of the Domesday Danelaw was (say) financed as it had been half a millennium before; and as regards tithes, this is out of the question. If the trend from larger to smaller ecclesiastical structures mirrors that which has been detected in secular landholding from the mid-tenth century, it seems no less clear that the later Anglo-Saxon period saw the construction of remarkably consistent institutions of secular administration – though not without a perceptible inheritance from the earlier period (chapter 10, pp. 000). It is interesting that two

¹⁰⁴ Cf. the well-known cases of the 'gesith' foundations in Bede, *Hist. Eccl.* v 4–5; whether or not these were staffed from within a 'minster system' (Blair, 'Ecclesiastical Organization', n. 15), this does not affect the reality of an early eighth-century dialectic between large-scale/'communal' and small-scale/'private' enterprises, precisely such as tenth- and eleventh-century legislation reflects.

¹⁰⁵ One can to some extent circumvent the first problem by postulating more or less significant survival of *Romano-British* arrangements, a road down which some exponents of the 'minster hypothesis' seem tempted to go, and which matches the current drift in the understanding of early Anglo-Saxon culture as a whole (cf. above, n. 62); but this in turn adds an obviously more acute fifth-century continuity problem to that of the ninth/tenth.

different explanations of the notably splintered and ‘privatized’ parochial fabric of Domesday Lincolnshire, one more inclined than the other to credit a process of fragmentation hastened by the impact of Danish settlement, agree that the decisive factor was the lack of governmental input in the tenth and eleventh centuries.¹⁰⁶ It is an assumption which can hardly be invariably valid that all large and ‘multi-member’ structures, whether parochial or manorial, encountered by historians in evidence of the eleventh century or later, have primordial origins.¹⁰⁷ None of this is to deny that many, perhaps most, minsters were ancient foundations; nor that a number in some parts of the country may also have been institutionally archaic. But it is to suppose that the more uniform the pattern that emerges once the evidence is good enough to show it, the likelier it is to owe more to the restless organizational urges of England’s first rulers than to earlier initiatives. If the upshot of this argument may be a soggy compromise between the polar redoubts of the ‘minster debate’ (above, n. 21), that is to acknowledge, as this book has before and will again, the force of two contradictory reasonings; even to recognize how far each party highlights different facets of the same truth.

A second impression concerns tithes specifically and may be drawn with more assurance. Burial was in a sense a ‘seller’s market’; if clergy insisted on charging for laying one’s loved-ones to rest, one was not well-placed to refuse. Disbursements simply in recognition of a church’s status are something else again. The evidence is that tithes were *not* compulsory anywhere in western Europe before the mid-eighth century at the earliest.

¹⁰⁶ Sawyer, *Anglo-Saxon Lincolnshire*, pp. 154–7, 166–8; Hadley, ‘Conquest, Colonization and the Church’, pp. 121–6. Professor Sawyer questions, *Anglo-Saxon Lincolnshire*, p. 170 (n. 69), whether Lincoln Cathedral’s post-conquest ‘minster’ perquisites can be traced back to the rights of a pre-conquest Lincoln episcopal minster (cf. Hill, *Medieval Lincoln*, as n. 55); but on the argument espoused here, they could well be attributable to the (temporary) resurrection of the Lincoln bishopric in the 990s (chapter 5, p. 329, below, pp. 000).

¹⁰⁷ Cf. Hadley, ‘Conquest, Colonization’, pp. 114–15; the fact that Uhtred had bought Hope and Ashford off ‘pagani’ as evidently going concerns (S* 397) need not mean that he had taken over the details of their 1086 structure, let alone that ‘pagani’ did so themselves from previous incumbents; nor does it follow from the rich sculptural evidence of an important pre-Danish church at Bakewell that the dimensions or revenues of its parish were much older than its 949 refoundation by Uhtred as a ‘coenubium’ (S* 548).

There is no question of this being inherited, like some other sub-Roman structures of authority, from the empire itself. Yet by the twelfth century, payment of tithes was not only universal: it was so closely integrated into patterns of landholding that it had become what it would remain for most of the second millennium, an ineluctably complicating factor in proprietorial patronage.¹⁰⁸ The one agency that could have produced this result is the king's government. It is not easy to think of any more telling demonstration of the sheer power of early medieval rule, or of what it actually means to characterize Carolingian or early English regimes as 'theocracies'. Landowner and tenant alike were obliged to acknowledge the 'rule of God', which is to say of His self-appointed agents, to the extent of parting annually with a tenth of their hard-earned produce.

This does not exhaust the list of payments the English Church could anticipate from its flock. Wulfstan's codes also looked for payments of 'plough-alm's and 'light-scot'.¹⁰⁹ The evidence, once again, is that they or something very like them were forthcoming throughout the Middle Ages and even into the Reformation era.¹¹⁰ Of special interest, given its relevance in the controversies of the 1060s and indeed 1530s, was what later generations called 'Peter's Pence' and the Anglo-Saxons 'Rome-money'. A *resumé* of the relevant legislation should again be helpful.¹¹¹

1. *Romscot*: *Romgescot* is to be given before midday on St Peter's Day after midsummer. If anyone neglect it, he is to pay 60 shillings and give the Rome-

¹⁰⁸ Hence the studies of (*inter al.*) Selborne and Boyd (nn. 2, 85).

¹⁰⁹ V Atr 11;1/VI 16, 19; VIII Atr 12 – 12:1; Cn 1018 13:1,5; I Cn 8:1, 12 – as part and/or continuation of excerpts 5, 7, 8–9 above; and cf. *Hom.* XIII lns 77–8, EGu 6:2–3, *Can Eg.* (II) 54.

¹¹⁰ Neilson, *Customary Rents*, pp. 190–2; *Cartularium Monasterii de Rameseia*, ed. Hart and Lyons, I, pp. 282, 294, 341, 353; these appear to have been the product of inquests into abbey properties conducted in the mid-thirteenth century. For possible remnants of the same obligations in immediately pre-Reformation times, see Hutton, *Rise and Fall of Merry England*, pp. 17–18, 50, 52.

¹¹¹ On the translations used in this sequence, and also for the reason for excluding I Em 2, cf. n. 65; for Wulfstan's wording in *Hom.* XIII, *Can. Eg.* and EGu, cf. n. 66; and for the provisions of *Northu.* and ? *Rect.*, see nn. 114–15 below. (It may also be noted that the 'D' MS of V Atr omits the Rome-money phrase, presumably by *saut du même à même.*) For the

penny twelvefold.

2. II Eg 4 – 4:3: And every hearthpenny (*beorðpaning*) is to be given by St Peter's Day. And he who has not paid it by that time-limit is to take it to Rome and thirty pence in addition, and then to bring back a statement that he has there remitted as much; and when he return home, he is to pay the king 120 shillings. And if he again will not hand it over, he is again to take it to Rome with another such compensation; and when he return home, he is to pay the king 200 shillings. And on the third occasion, if he still will not pay then, he is to suffer loss of all he own.

3. V Atr 11:1: And Rome-money (*Romfeob*) by St Peter's Day.

Cf. VI (lat.) 18; Roman money is to be rendered to the pontiffs for the festival of the blessed apostles Peter and Paul every year.

4. VIII Atr 10 – 10:1: And Rome-money is to be paid every year on St Peter's Day; and he who will not pay it is to repay it twelvefold and 120 shillings to the king.

5. Cn 1018 13:4: And Rome-money by St Peter's Day.

6. HomN LXI: And Rome-money is to be paid every year on St Peter's Day; and he who does not pay it is to hand over in addition 30 pence and bring [send] it to Rome and pay the king 120 shillings in English law.

7. HomN XXIII (MS K): And every hearthpenny is to be given to the bishopric by St Peter's Day every year [... and for someone who ... there is no other amend but that he go to Rome and take the penny to St Peter's altar and thereafter acquire a writ from the pope and take it to his diocesan bishop

and be thereafter quit (*sacles*)].

8. I Cn 9 – 9:1: And Rome-money by St Peter’s Day. And he who withholds it after that day is to give that penny to the bishop and thirty in addition and to the king 120 shillings.

9. Cn 1027 16: [cf. p. **00, 10.**] ... and the pennies which we owe to St Peter at Rome, whether from town or from country ...

The first point to stand out here is the high probability that the brief and anonymous *Romscot* (1.) is indeed the earliest of these passages. The reasoning is simply that the text is self-evidently an adaptation of Ine’s law on church-scot to the extent of echoing it verbally, and presumably originated in the margin of a manuscript opposite it, before eventually finding a home between the rubrics and text of Alfred’s *domboc* as a whole (cf. chapter 4, p. 227, chapter 5, pp. 368–9). It is difficult to envisage any circumstances in which this would have been done once Edgar and his successors had made more serious penalties available. The origin of this historically fateful due thus remains mysterious. Payments were apparently made to Rome from Ine’s time, and under Alfred on a regular basis.¹¹² It is not inconceivable that the initiative reflected by *Romscot* was launched by one of the early tenth-century regimes, before Edgar gave it a more formal and forbidding footing. Thereafter, the arrangements, whether official or not, seem to degenerate into whimsy. The thought of a recalcitrant solemnly setting off for Rome with a purse of thirty pence and returning with a papal receipt (2.) is difficult to take seriously. It is no surprise that Wulfstan envisaged something more sensible (together with a return to the Ine/*Romscot* multiplier) in ‘VIII’ Æthelred (4.). But the effect of that is then lost by his return to Edgar’s sanction in a homily entered into the

Synods, p. 100, n. 2.

¹¹² All attributions by sources from the twelfth century onwards are obviously guesswork; but for payment of some order by Offa, see *Alc. Ep.* 127, pp. 188–9; for Alfred’s seemingly annual transfers, ASC 883C–E, 887–90, pp. 79–83; and for their possible origin in the dispositions of his father’s will, *Asser* 16, pp. 15–16. Further to the standard detailed account, Lunt, *Financial Relations of the Papacy with England*, pp. 3–30, a thoughtful review of the problem (though differing on the date of *Romscot*) is Loyn, ‘Peter’s Pence’.

York Gospels (even if then emended in his own hand from ‘bring’ to ‘send’ (6.)).¹¹³ Meanwhile, someone glossed another of his late homilies (7.) by spelling out Edgar’s sanction all over again, with the added improbability that one penny rather than thirty is to be carted over the Alps and duly recorded on papal papyrus. Perhaps this sort of notion was not after all entirely alien from the mentality that teased out the implications of Æthelstan’s warning on non-payment of tithes (cf. above, pp. 000, and chapter 9, pp. 000). In any event, plausibility returns with Cnut’s dispositions (8.). Payment through diocesan bishops – and to their considerable profit – remained normal procedure for the rest of the Middle Ages.¹¹⁴ Payment there clearly was, before 1066 as thenceforward. What else but its suspension just before 1066 would have prompted the *Roland* poet to envisage Charlemagne crossing the Channel to impose ‘St Peter’s *chevage*?’¹¹⁵

In sum, the kings of the English from Æthelstan onwards seem to have saddled their subjects with an astonishingly severe system of ecclesiastical finance. As in other instances that will crop up as these pages unfold, the initial reaction is incredulity. In this instance as in those, it is a reaction to reconsider. A more resolute surmise is that Old English government would not have been able to enforce these liabilities, however draconian its methods, unless their ideological basis had carried conviction. Historians have wished to see compulsory tithes and the rest as some sort of *quid pro quo* for the support of ‘the Church’. This is to give the Church more corporate bargaining-power than it possessed at that time – or, arguably, any other. It also envisages a more mechanical process than the argument requires. Tithes were the Law of God. They were part of the heritage of God’s Chosen, transmittable, like any other aspect of that heritage,

¹¹³ See chapter 4, p. 196; and Keynes, ‘Additions in Old English’, p. 94.

¹¹⁴ Lunt, *Financial Relations*, pp. 68–84; Loyn, ‘Peter’s Pence’, pp. 242–5. An interesting provision for collection in the wapentakes of the northern archdiocese, together with characteristic gradation of default payments according to social rank, is *Northu.* 57:1 – 58.

¹¹⁵ For a thorough review of the evidence, see Barlow, *English Church, 1000–1066*, pp. 295–7 (adding *Chanson de Roland* lns 372–3); it may be noted too that discharge of this due is recorded in the same quarters as Church-scot, plough-alm or light-scot (above, nn. 57, 106). It is not, however, clear that the *ketsetla*’s ‘hearthpenny’ of Maundy Thursday (*Rect.* 3:4), still less the ‘ælmesfeoh’ of the thegn and genat (*Rect.* 1, 2), is identifiable with ‘Romfeoh’.

to Franks or Englishmen who aspired to take Israel's place in God's special favour. God's law was royal law, of course. What else should it be?

(ii) Fast and Festival

Having said so much about the impact of Old English law-making on Church taxation, it will be salutary to turn to an area where it was evidently much less effective. Within a few years of his Tithe Ordinance, Æthelstan issued a prohibition of Sunday trading:

And that there be no trading (*cyping*) on Sundays; if, then, anyone do it, he is to suffer loss of the goods and pay 30 shillings.¹¹⁶

This gave a new direction to the laws on Sunday 'weorc' that had been enacted by Ine and Wihtræd.¹¹⁷ It fairly clearly echoed Carolingian legislation.¹¹⁸ Within a few more years, however, the king seems to have changed his mind. The ban on Sunday commerce was apparently lifted.¹¹⁹ The next that is heard of the subject is in Archbishop Oda's 'Constitutions' of the 940s, which were preoccupied with the fear that 'vain superstitions' might be observed on Sundays or Saints' Days. King Edgar then took up the theme in his Andover code (??959/60), decreeing that Sunday be 'held from noon on Saturday till dawn on Monday, [on pain of] the fine laid down by the *domboc*'.¹²⁰ His reference was to

¹¹⁶ II As 24:1, a law attached to one on unwitnessed purchase of 'stock (*yrfe*)'. For evidence that this clause was *added* to the Grately code of c. 928/9 (though presumably pre-dating the issue of the Exeter/Thundersfield edict, ?934x6), see chapter 4, p. 177, chapter 5, p. 294, and Wormald. 'Lambarde Problem', p. 261 (164).

¹¹⁷ Ine 3 – 3:2, Wi 9 – 11. Af 5:5 had doubled the payments due for theft committed on Sunday, or at Christmas, Easter, 'Holy' Thursday, and Rogation Days. Cf. also Conc. Clovesho, 747, xiv (*Councils and Ecclesiastical Documents*, ed. Haddan and Stubbs, III, p. 367).

¹¹⁸ *Cap.* 61:8 = *Ans.* i 139; see below, pp. 000, and nn. 123, 125, with fuller discussion in chapter 13, pp. 000.

¹¹⁹ IV As 2, VI As 10 (the second as well as the first of these reflecting enactments of the Thundersfield Council (chapter 5, pp. 297–9, chapter 6, pp. 439–40)). For detailed consideration of what this revision in fact involved, see chapter 5, n. 130: the alternative (on the whole, perhaps, less likely) possibility is that it was the *introduction* of the Sunday prohibition that constituted the revision.

¹²⁰ "Constitutions" of Archbishop Oda' ix (not for once an echo of the 786 *capitulare*, cf. n. 90 above), II Eg 5.

Ine's law, but the time-limits represent an interesting adjustment of Wihtræd's along lines laid down by a letter said to have fallen from Heaven onto the tomb of St Peter, which had continued to circulate both in insular and continental spheres despite repeated proscriptions.¹²¹ Early in the eleventh century, Archbishop Wulfstan became (as usual) much more specific:¹²²

1. V Atr 13 – 13:1: Let the Sunday holiday be kept eagerly (*georne*), as befits it, and trade (*cypinga*) and public meetings be eagerly avoided on the holy day.
2. VI Atr (Lat.) 22:1: The solemnities of Sunday are to be keenly celebrated with the utmost honour, nor is anyone to be occupied with servile work (*operis servilis*) on that day; further, secular business and public trials (*quaestiones*) are to be dropped on that day.
3. VI Atr (OE) 22:1: Let the Sunday holiday be kept eagerly, as befits it, and trade and public meetings and hunting and worldly works be eagerly avoided on the holy day.
4. VIII Atr. 16 – 17: And let Sunday trade be fervently forbidden [on pain of] the full fine.
5. Cn 1018 14:1: Let the Sunday holiday be kept eagerly, as befits it, and trade and public meetings and hunting and worldly works be eagerly avoided on the holy day.
6. Cn. 1020 18: And further we admonish that the Sunday holiday be kept with every effort and honoured from Saturday noon till Monday dawn, and

¹²¹ For a comprehensive survey of the evidence, see Whitelock, 'Bishop Ecgred, Pehred and Niall'; Whitelock suggested that Edgar's laws influenced the homilies either side of 1000 containing this message, but it seems just as possible that Edgar was influenced by their source.

that no one be so presumptuous as to conduct any business (*cypinge*) or to attend any meeting on the holy day.

7. I Cn 14:1 – 15:1: And let every Sunday festival be kept from Saturday noon till Monday dawn. And we also earnestly forbid Sunday business and every public meeting, unless there be a great need for it. And let hunting and all worldly works be eagerly avoided on the holy day.

Wulfstan's intellectual odyssey through these excerpts is (as ever) not easy to follow. A reasonable guess is that the Latin text in **2** once more represents his earliest extant pronouncement. There is, as is sometimes the case, a hint here of a possible source in a Carolingian edict.¹²³ That would in then be the source of **1** (if not *vice versa*).¹²⁴ In 1014, as with tithes, came the introduction of a penalty for breach of the principle (**4**), and again this involved citation of Edgar, if not in this case explicitly. **3** once more goes with **5**, representing importation of further forbidden activities, and pretty obviously from Carolingian inspiration, whether direct or indirect.¹²⁵ The relevant part of Cnut's 1020 letter was also, in all probability, a Wulfstania supplement (chapter 5, p. 347), and here Edgar's expanded time-limit was combined with a commerce ban. Finally, and as ever, almost everything that Wulfstan had previously drafted on the subject was anthologized in Cnut's code (**7**). By 1020/1, then, English Christians were expected to abstain from business, litigation, hunting and other worldly labours from near the

¹²² For the approach taken through these excerpts, cf. above, nn. 22, 65; again, I largely though not closely follow Whitelock's *EHD I* translations.

¹²³ *Cap.* 78:15, from *Concil.* 34:16 or 36:3; cf. Jost, *Wulfstanstudien*, p.42, nn.1, 3; the so-called 'Penitential of Pseudo-Theodore' xxxviii:8 (and its source in *Cap.* 22:81 = *Ans.* i 75) would provide the prohibition of pleas and the wording 'opera servilia', but also items that do not feature till **3, 5, 7**: see below. There is no apparent trace of Exc. Can. xxxvi. See also chapter 13, pp. 000.

¹²⁴ Also from this early stage (cf. chapter 5, p. 391) would be EGu 7 (with its Æthelstania penalty adapted to Danelaw conditions – and going on to cite a version of Ine 3 – 3:2), and Can. Eg. 19; it is quite unclear why the later and generally fuller Junius version of the latter confined its prohibition to trading.

¹²⁵ See the *Cap.* 22:81/*Ans.* i 75 and 'Penit. Ps. Theod.' xxxviii:8 citations, n. 123 above.

beginning to the very end of the weekend.¹²⁶

Sundays were just one aspect of an increasingly demanding scale of holy day observance, whose origins lay as far back as reported legislation on Lent by Æthelberht's grandson. Alfred penalized offences against the Lenten fast with the severest fine at his disposal (short of the royal *mund*), and doubled the compensation for *burhbryce* (chapter 5, p. 267) at that time, or for theft then or at other holy season. In an interesting shift of emphasis, he also required that free men have the day off for twelve days at Christmas, seven at and after Easter, the week before the Assumption (though 'at harvest-time'), and the feasts of All Saints, St Gregory and Sts Peter and Paul; even the unfree were to have the four Ember weeks to sell their own produce.¹²⁷ Thereafter, Oda's 'Constitutions' spoke of the 'three wings that lead saints to heaven', these being Lent, the 'four fasts' (a week in each of spring, summer, autumn and winter), and Wednesdays and Fridays, and hoped that saints' days would be as devoutly observed as Sundays. But Edgar was content to adjure the keeping of 'the ordained fasts with all eagerness'.¹²⁸

It was again when Wulfstan mounted the stage that the range of fast and festival was spectacularly extended. 'Lenten and other fasts laid down by the fathers, and festivals of saints instituted by Catholics' featured in the Latin text of 'VI Æthelred'; other 'holidays and fasts to be duly observed' were the 'high feasts' of Mary, those of all apostles (with no fasting at [the vigil of?] Sts Philip and James because of its coincidence with the Easter season), and – anyway eventually – that of Æthelred's 'martyred' brother, Edward. There was to be Friday fasting; and it was a particular point that Ember fasts should be those that 'St Gregory ordered for the *Angelcyn*'.¹²⁹ It was also insisted that

¹²⁶ Ælfric, *Hirtenbriefe Ælfrics* I;151, followed Edgarian lines, and for the Old English Theodulf, see below, n. 130. The variation introduced by *Northu.* 55–6 (post-Wulfstan, chapter 5, pp. 396–7), namely abstinence from transportation or riding except for emergency food-supplies, could conceivably itself go back to *Cap.* 22:81/ *Ans.* i 75, though the allowance that one could travel six miles from York in wartime is evidently local.

¹²⁷ Af 40:1–2, and see above, n. 117; Af 43.

¹²⁸ "Constitutions" of Oda' ix; II Eg 5:1 (the specification of Fridays in the 'A' MS is a Wulfstan intrusion: chapter 5, p. 314).

¹²⁹ V Atr 14 – 17; VI Atr (Lat and OE) 22, 22:2 – 25:2; Cn 1018 14:2–7, and cf. Cn 1020 19. For the particular problems of St Edward's day and the Ember fasts, see chapter 5,

these should be times of ‘peace and concord among Christians’, that ordeals and oaths be avoided, and that debts or compensations be paid either before or afterwards.¹³⁰ Meanwhile, a special abstinence was prescribed for one post-Michaelmas *triduum*, to ward off the attentions of a great Scandinavian army, probably in 1009; and serfs were then to be let off work so as to go church and fast more efficaciously.¹³¹ When Wulfstan came to sum up in Cnut’s Winchester code, he added that there was to be no fasting from Easter to Pentecost or from Christmas to the octave of Epiphany, apart from voluntary self-denial and what confessors prescribed. St Dunstan’s day was at the same time added to St Edward’s. Most important, the secular code adapted the sanctions already provided by the ‘Edward-Guthrum’ tract had for working on feasting days or breaching a fast, and Alfred’s law doubling the penalty for theft or *burhbryce* at holy times was extended to fighting, sexual intercourse or ‘any grave crime.’¹³²

A poem of Wulfstan’s time and perhaps from his circle underlines the value of fasting and lays particular emphasis on the Ember Day customs of ‘England’, as ordained by its apostle.¹³³ (It probably survives as it does because it was made part of a collection of this period that was designed to celebrate the traditions and destiny of the English (chapter 4, pp. 178–80)). The poem went on, as Wulfstan himself often did, to berate priests for their worldly lifestyle, relaxing after mass over wine and oysters regardless of Opening Time. Overall, it leaves somewhat of an impression that the law’s demands were not being met as they might have been. More objective tests are hardly to be had. It is something that calendars covering much of southern England from before 1100 enter not just major feasts of the Church, nor merely those of the national apostles, Gregory

pp. 333–5, 343–4; the best bet remains that each was admitted to the texts as part of the process whereby Wulfstan constructed the 1018 Oxford agreement, even if St Edward’s day appears only in V Atr and Ember fasts in VI.

¹³⁰ V Atr 18 – 20, VI Atr (Lat and OE) 25 – 25:2, Cn 1018 15 – 15:2. This point first appears in EGu 9 (and see n. 132); there may be a hint here of Theodulf, Kapitular I xxiv = *Theodulfi Capitula in England*, ed. Sauer, p. 337, lns 19–20 (cf. chapter 13, pp. 000).

¹³¹ VII Atr 2, 2:2b–3a, VIIa Atr 1, 5:1; cf. chapter 5, pp. 330–2.

¹³² I Cn 16 – 17:3; EGu 7:1 – 8; II Cn 45::1 – 47:1 (the influence of Ine and Wihtred, which is possible for EGu, becomes quite clear in II Cn). In addition, II Cn 44:1 repeats EGu 9:1’s discouragement of executing criminals on Sunday (‘unless he flee or fight’).

¹³³ *Anglo-Saxon Minor Poems*, pp. 98–104; Sisam, *Studies*, pp. 45–60.

and Augustine, as required since 747, but also, in almost all cases where this could be expected, those of Dunstan and Edward.¹³⁴ But charters and administrative records can hardly be counted on to give details of holy days as they do of anticipated church revenues.¹³⁵

When grants of marketing rights begin to proliferate from the later-eleventh century, however, they have a disturbing implication. At least until the thirteenth century, it was quite normal to hold markets on Sundays.¹³⁶ As a likely result of a well-known sabbatarian campaign carried out in 1200–1 by Abbot Germer of Flay (armed with yet another ‘letter from heaven’, couched in terms like those that may have inspired Edgar’s law), market-day was switched from Sunday to a weekday in at least twenty-two places. A further twenty-one or more made the change in the papally-guided regency of Henry III.¹³⁷ Some at least of these are highly likely to have been markets for many centuries previously. Barton (Lincs), Leominster, Lichfield, Oundle, Peterborough, Pershore, Thatcham, Wenlock, Wimborne, Wing and Wolverhampton were ‘old minsters’; Exeter, Porchester and Stamford were early boroughs; Farnham was an ancient estate; Wantage was of course a West Saxon royal vill. If Sunday markets were being held in these places after 1200, they probably always had been, whatever Æthelstan, Æthelred or Cnut had to say about it. A tentative reservation may perhaps be entered. Normans certainly had few

¹³⁴ Conc. Clovesho, 747, xvii (*Councils*, ed. Haddan and Stubbs, p. 368); *English Kalendars*, ed. Wormald, nos 3, 6, 8–20, both entries being in most cases capitalized. Exceptions are 5 (London BL Add. MS 37517, the ‘Bosworth Psalter’, 988x1012), in which – interestingly – Dunstan’s feast is recorded but Edward’s entered and then erased, 7 (London BL Cotton MS Vitellius A.xii, post-conquest Salisbury), omitting Edward, and 2 (Salisbury MS 150), which is too early (969x 78) for either; in 1 (Oxford, Bodleian Library, MS Digby 63, ninth-century Northumbrian but at Winchester by 1000), Dunstan’s feast is entered retrospectively but early, and in 4 (Oxford, Bodleian Library, MS Bodley 579, the ‘Leofric Missal’ of c. 970), this is done for each feast. Cf. Dumville, *Liturgy*, pp. 26–7, 51, 60–1, 64–5.

¹³⁵ S 223, 1478 are among very few Anglo-Saxon charters to mention markets; the first says nothing of days on which Worcester’s market was held, while the second shows that one was held at Stow on the ‘earlier’ and ‘later’ feasts of St Mary, the abbey’s dedicatee.

¹³⁶ Sawyer, ‘Early fairs and markets’, pp. 63–6; *Anglo-Saxon Lincolnshire*, p. 176; Britnell, *Commercialization of English Society*, pp. 11–20.

¹³⁷ *Roger of Howden, Chronica* IV, pp. 123–4, 167–72 (quoting the ‘letter from Heaven’ in full); Salzman, *English Trade*, pp. 123–6; Cate, ‘The English mission of Eustace of Flay’; Britnell, *Commercialization*, p. 84.

qualms about organizing business on the Sabbath: Battle Abbey's market was still meeting then under Elizabeth.¹³⁸ It may then give pause that, whereas Wallingford's market was on Saturdays in 1086, it still needed changing from Sundays to Mondays in 1218.¹³⁹ This chapter opened with a meeting of the royal court on a Sunday – no other dating information being given; but out of the thirty-five mensally dated assemblies of king and courtiers between 930 and 1066, just two (Christmas, Easter, Pentecost and the royal coronations of Æthelstan and Eadred apart) took place on Sundays; and one of those was probably the occasion of the Easter council that issued Edmund's ecclesiastical code.¹⁴⁰ Yet it is best, on the whole, to take the evidence in the round, as indicating that the Old English kingdom's efforts to restrain worldly activities on Sundays were not a success. It may be significant that the government actually admitted failure the first time the attempt was made, and that Cnut allowed for occasions of 'great need'. That being so, it would be rash to assume that orders to fast at the required times were a lot more successful.

At the same time, it might be possible to approach the issue of fast and festival from an angle that would accord better with the indications of this chapter's first section. Among Wulfstan's obsessions was the persistence of heathen belief and, more to the point, practice. These normally featured in his homiletic 'enormity catalogues'.¹⁴¹ An expanded list was given by his 'Canons of Edgar', a probably early work that reached fully elaborated form only in its second edition:

...utterly wash out every heathenism; and forbid well-worship and

¹³⁸ *Chronicle of Battle Abbey*, pp. 84–5; Salzman, *English Trade*, p. 125. Cf. DB 120c (*Cornwall* 2:6, Robert of Mortain's St Germans, though in rivalry to an older one on the same day), *Exon.* 194v (*Devon* 11:1, Mont St Michel's Otterton), *Reg.* ii 925 (Bishop Flambard's Norton), iii 274 (Geoffrey de Mandeville's Saffron Walden).

¹³⁹ DB i 56c [*Berks* B:7]; *Rotuli Litterarum Clausarum*, ed. Hardy, I, p. 366b.

¹⁴⁰ Above, pp. 000; chapter 6, pp. 431–4, with n. 85; S 890 (25 July 997). On the other hand, few if any of the first 500 (to 1176) of van Caenegem's *ELS* were Sunday meetings.

¹⁴¹ E.g. (in likely chronological order, *Hom.*, pp. 103–4, above, chapter 5, nn. 349, 452): *Hom.* VII 128–34, VIIIc 158–68, XX (EI) 161–6, *HomN* L 266;24–267:1, LX 309:21–

necromancy (*licwigelunga*) and auguries and incantations and wicked worship *tree-worship and stone-worship, and that devil's craft that is performed when children are dragged through the earth*, and the nonsense that is performed *on New Year's Day* in various sorceries, and in heathen sanctuaries and with elder trees and also with various other trees and stones, and in many and various delusions...¹⁴²

The archbishop did not otherwise address the topic so explicitly until his legislative drafts of 1018, before, as usual, giving his views plenary expression in 1020/1.¹⁴³ There was nothing much to correspond with all this in the legislation of earlier kings (Wihtræd apart). Edmund's London Council condemned 'sorcery (*liblac*)', and Archbishop Oda warned, as earlier noted, against 'vain superstitions' and 'magic illusions'. In one of early medieval Europe's extremely rare witchcraft cases, a woman was 'drowned at London Bridge' for sticking an iron pin into an enemy's image.¹⁴⁴ Wulfstan's apparently growing concern with the problem can thus be interpreted as a function of his widening reading.¹⁴⁵ Alternatively (or concurrently), it might be attributed to deepening experience of Danelaw conditions on the part of the only major legislator to spend long there. What other signs are there that an active 'paganism' survived in north-eastern England until – or indeed after – the archbishop's time?

Historians' approaches to this question divide into two (actually far from clearly demarcated) schools. On the one hand lies the view, as old as the Enlightenment but given new and sophisticated form by today's Reformation historians, that substantial elements of heathen usage survived the 'conversions' of the early Middle Ages, as

310;6. *Hom.* XII, taken mainly from Ælfric (*Homilies of Ælfric*, ed. Pope, xxi) is more generally concerned with paganism and may have influenced I Cn 5:1 (below).

¹⁴² *Can. Eg.* (largely Whitelock's translation) 16, pp. 319–20; passages in italics are found only in the earlier 'D' (Corpus Cambridge MS 201) version, those in bold italics are additions in the second (Bodleian Junius 121) edition. Cf. EGu 11 (also early).

¹⁴³ II Cn 5:1, cf. VI Atr 7 (OE, hardly Lat.), Cn 1018 8 – 10:1, Cn 1020 15; for translations of the II Cn law, see Wormald, 'Archbishop Wulfstan', pp. 249–51; *Northu.* 48 (below, n. 152) seems to draw on Cnut's. There is no comparable law in either V or VIII Atr.

¹⁴⁴ I Em 6, "'Constitutions" of Oda' ix, p. 74, LS 43 (RoASCh 37).

¹⁴⁵ Cf. Ashley, 'Representations of the Barbarian', pp. 236–9.

customs not eliminated until the Reformation, and sometimes not even then. On the other, there is the now widespread conviction that paganism, in particular Scandinavian paganism, put down no roots, and soon and smoothly mutated into full Christian observance. Hence, the anti-pagan initiatives of Wulfstan and others were, if not products of desktop study and pulpit rhetoric, then largely ineffective. It is claimed that something like the customs Wulfstan denounced were still observable in the nineteenth century.¹⁴⁶ Yet the theory of unquenched popular paganism has now been dealt a near-mortal blow, at least for the British Isles, by the researches of Professor Ronald Hutton.¹⁴⁷ Almost nothing can be securely earmarked as a relic of ancient belief. Much that had given scholars and folklorists that impression, for example the Morris Dance or 'May Games', turn out to be developments of the (sometimes immediately) pre-Reformation era. England in 1500 was a thoroughly Christian society that liked to let its hair down on major festal or seasonal occasions. There is no good reason to suppose that the position in 1000 was so different.

The thesis that Scandinavians heedlessly forsook the convictions with which they landed in England dwells either on evidence that Christian enterprises continued, rapidly resumed, even (like the 'St Edmund', 'St Peter' and 'St Martin' coinages of East Anglia, York and Lincoln) took off, in the occupied areas; or on the syncretism of 'Danelaw' culture, notably sculpture in which images of Thor's fishing expedition or Ragnarök take their place in habitually Christian contexts or alongside recognizably Christian themes.¹⁴⁸ The case for continuity has to get around the one undoubted fact of post-invasion conditions north and east of Watling St: that only at York and Lindisfarne/Chester-le-Street did bishoprics or churches of any significance remain in continuously effective operation.¹⁴⁹ That many sites show signs of residual or at least resumed occupation is certainly true. But those tempted to make much of this should contemplate the

¹⁴⁶ Sawyer, *Anglo-Saxon Lincolnshire*, p. 144.

¹⁴⁷ Hutton, *Pagan Religions of the Ancient British Isles; Rise and Fall of Merry England*; and (above all) *Stations of the Sun*.

¹⁴⁸ Bailey, *Viking Age Sculpture*; Lang, 'Recent Studies'.

¹⁴⁹ The episcopal sequence resumed at Elmham and ?Lindsey by the 950s, but at 'Dommoc', Hexham and Leicester never.

uncounted roofless chapels of Ireland, their graveyards in working order to this day. As for syncretic imagery, its lesson, like that of Icelandic saga, is surely that there was more life in traditional Scandinavian culture than in that of ‘Germanic’ society as a whole. The Danelaw’s citizens did not forget ancestral legends as readily as the author of *Beowulf*. Fourteenth-century Yorkshiremen were still being terrorized by malign spirits in recognizable line of descent from the Norse *draugr*.¹⁵⁰

The central problem with the automotive account of Scandinavian conversion is that its solution is what it must in fact explain: Danish paganism was easily overborne because Danish paganism was easily overborne.¹⁵¹ Why, then, did ninth-century missions to Scandinavia fail almost totally, its would-be apostle falling back on the consolation of Job?¹⁵² One answer would be that religious change was dictated from above in the tenth-century Danelaw, but not in Scandinavia itself until somewhat later. The Northumbrian Priests Law’s demanded socially graded mulcts for religious recidivism:

If anyone is encountered who henceforth carries on any heathenism, either by sacrifice or divination, or love wizardry or idol worship by any means, if he be king’s thegn let him pay 10 half-marks, half to Christ half to the king. If it be a landowner otherwise, let him pay 6 ... If ... a ‘færbena’ (≠ *ceorl*) ... 12 *ores* (¾ mark).¹⁵³

Historians of sixteenth-century England are quite used to supposing that weekly shilling fines wore down recusancy. Were those of eleventh-century Yorkshire so much less efficacious? Or are we to deny that any early medieval government could be as effective as an early modern, in the teeth of the evidence for what the former achieved in ecclesiastical taxation? So far as the evidence goes, the Old English Church had a

¹⁵⁰ Schmitt, *Ghosts in the Middle Ages*, pp. 142–7, with its review by Murray, ‘Revenants from darkness’, p. 4.

¹⁵¹ I thus agree with Abrams, ‘Conversion of the Danelaw’, pp. 000.

¹⁵² Wood, ‘Christians and pagans’.

¹⁵³ *Northu.* 48 – 50.

common ritual cycle like that of the late Middle Ages. Nothing suggests that ‘Danelaw’ counties were out of line. Prelates at York, Lincoln, Durham or Carlisle were no more taxed by outlandish usage than their southern colleagues.¹⁵⁴

The early modern analogy might therefore be pressed further. ‘The early Tudor Church’, argues Professor Hutton, ‘had, clearly, provided parishioners with certain services, and experiences, not obtainable from its Protestant successor. One apparently widespread popular reaction to this difficulty was to set about providing them for oneself, through the medium of what later was to be dubbed folk ritual. In general the reformers seem to have accepted this transposition as unimportant, and so allowed it to occur without molestation.’¹⁵⁵ In the very same key, the Abbots Bromley Horn dance could be equipped with fresh reindeer antlers in the eleventh century, because authorities less driven than Wulfstan saw no harm in it.¹⁵⁶ Fossils of ancient cult (if such they be) reflect not on the mere rusticity of pagan creed nor on the frailty of government power, but on the good sense of most of those concerned.

(iii) Continence

‘The Commonwealth’s act of 10 May 1650 “for suppressing the detestable sins of incest, adultery and fornication” was’, writes one of the twentieth century’s most distinguished historians, ‘an attempt, unique in English history, to put the full enforcement of the state behind the enforcement of sexual morality. Spiritual misdemeanours were reclassified as secular crimes and severe penalties prescribed for behaviour which had previously been left to the informal sanctions of neighbourly disapproval or the milder censures of the ecclesiastical courts. Incest and adultery became felonies, carrying sentence of death...’¹⁵⁷ Unique in English history this campaign was not. As Sir Keith was in fact made aware by the comments of William Lambarde himself, the legislation of Anglo-Saxon kings

¹⁵⁴ For instances of possible pre-Christian activity suppressed (or not) by high-medieval bishops, see Hutton’s notably sceptical review, *Pagan Religions*, pp. 298–300.

¹⁵⁵ *Stations of the Sun*, p. 418.

¹⁵⁶ Campbell (ed.), *Anglo-Saxons*, p. 241.

¹⁵⁷ Thomas, ‘The Puritans and Adultery’, p. 257.

showed every bit as much determination to stamp out sexual malfeasance as abuses of the Sabbath, and for the same reason as moved the makers of the Commonwealth, the Reformed Kirk of Scotland and the godly polities of New England. Such was the law of God.¹⁵⁸

The crystallization of Old English law on sexual morality is an object-lesson in the patterns of Anglo-Saxon legislation, and in the difficulties of reconstructing them. Alfred's (but not Ine's) code has a set of provisions on sexual matters. Some laws cover cases of rape; some seem to concern 'fornication (*forlicgan*)'; some are about adultery. All without exception offer compensation to the victim, with no word of a fine for higher authority.¹⁵⁹ In the same spirit, Alfred allows that one might kill a man 'without feud' if finding him behind closed doors, let alone beneath a blanket, with one's wife, legitimate daughter or sister or fully wedded (?step-) mother, much as one should escape vengeance if slaying a thief caught in the act.¹⁶⁰ This self-consciously traditionalist law-giver still sees offences from the angle of the injured party. For the next half century, no more is heard of the subject. A quite different note is then sounded by Edmund's London Council, which went so far as to deny consecrated burial to those who had intercourse with nuns or to adulterers in general. The influence of Oda's Constitutions is once again likely, even if his strictures are confined to 'unjust and incestuous unions with nuns, relatives or other disallowed persons'.¹⁶¹ But by this time or not long afterwards, a law was in force which levied more immediately palpable sanctions on the sexually miscreant:

And on your question about adulterers, whether with nuns or lay women, the forfeited woman and man (*wæpned*) go respectively to the bishopric with her

¹⁵⁸ Thomas, 'Puritans and Adultery', pp. 265, 271–2, with Wormald, 'Lambarde problem'; cf. Hirst, 'Failure of Godly Rule', pp. 48–50, 60–6.

¹⁵⁹ Af 11 – 11:5 (compensation increasing with wergeld), 25 – 25:1, 26; 18:1–3 (again socially graded, and this is with a 'betrothed (*bedweddodn*)' woman, so in some sense adulterous); 10 (once more, escalating compensation for each rank). It seems likely that the presence of sexual law in Alfred's as opposed to Ine's code is the result of Æthelberht's influence: above, chapter 5, pp. 280–1.

¹⁶⁰ Af 42:7.

third, and to the lord – whether it be bookland or folkland, whether of the king himself or of any man – he goes with his two parts (*twæde*) to his lord if he has wicked intercourse, and they are both forfeit.¹⁶²

This passage, which came to light only when Laurence Nowell's transcript of otherwise irrecoverable pages in BL Cotton Otho B.xi were passed, amidst a collection of Lambarde family manuscripts, to the British Museum in 1934, was evidently from a letter of authoritative legal or pastoral guidance.¹⁶³ The word 'twæde' is unlikely to be as late as *c.* 1000, the date of the manuscript from which Nowell copied it. It makes sense to guess that it was first penned at around the time of Edmund's legislation and bore the imprint of the teeth that the law had by then acquired.

Such was still the law in the eleventh century, though the evidence is hardly more explicit. Wulfstan's 'Edward-Guthrum' tract ordered, picturesquely evoking conventional coital technique, that in cases of incest ('syblegerum') 'the king have the upper and the bishop the lower'. That was also the wording of *Leges Henrici Primi*, as applied to cases of adultery; while Domesday's statements of the law in force in Kent and Lewes also allocate an adulterous man to the king, his partner to the bishop.¹⁶⁴ Wulfstan otherwise had little to say of the subject, except as regards clerical celibacy, until *c.* 1018.¹⁶⁵ By then, however, he had taken on board the incest definitions of the 'Penitential of Pseudo-Theodore', extending the prohibition of marriage to the 'sixth decree'.¹⁶⁶ At the same time, he moved towards the more sweeping penalization of laymen's sexual misdemeanours which took concrete form in Cnut's *secular* code.

These clauses insist that it is adultery if a married man have intercourse with a

¹⁶¹ I Em 4; "'Constitutions" of Oda' vii – more or less verbally quoted from '*Capitulare* 786' xv (cf. chapter 5, p. 310),

¹⁶² 'Ymb Æwbricas': chapter 5, pp. 372–3.

¹⁶³ Chapter 4, pp. 173–4, 175–6; Wormald, 'Lambarde Problem', pp. 238–9 (140–1).

¹⁶⁴ EGu 4, Hn 11:5, DB i 1b [*Kent* D;19], 26a [*Sussex* 12:1].

¹⁶⁵ V Atr 9 – 9:1 (clergy), 10 ('every Christian man to forgo illicit intercourse'), cf. VI (Lat.) 5, 5:3, 11; VIII Atr 30 (clergy to 'have no business with wife or warfare').

¹⁶⁶ VI Atr 12 – 12:2 (and cf. 5:2); Cn 1018 11:1 – 12:1, 12:4; also I Cn 7 – 7:1, 7:3; 'Penit. Ps. Theod.' xx 19–20 (for the Carolingian ?sources of this, see chapter 13, pp. 000).

single ('æmtige?!) woman, though 'much worse' if the woman is married too, and likewise classify intercourse with a sister as graver than with a more distant relative. The adultery penalty is 'that one compensate (*gebete*) in proportion to the deed'. That is what is said about incest too, but it is this time added that the compensation may take the form of one's wergeld, a fine or total forfeiture. Wergeld is also the cost of rape of widow or maiden alike, while a married man lying with his slave-girl is to lose her 'and amend for himself with God and man'. As for the adulterous wife, she is to suffer 'public disgrace', lose all she owns to her husband, and her nose and ears into the bargain. On the other hand, a married man persisting with a concubine imperils his soul through excommunication but suffers nothing more immediately corporeal.¹⁶⁷ How are these measures to be squared with what is said by the 'Ymb Æwbricas' passage, 'Edward-Guthrum' and Domesday Book? The latter at first sight seem to imply total forfeiture even for adultery *tout court*, whereas Cnut's law does not. Yet the Lewes customs in fact stipulate a fine of no more than 100d (20 shillings in West Saxon currency, 8/4d in post-conquest reckoning), while then going to make the usual provision that 'the king has the adulterous man, the archbishop the woman'. It could be that this apportionment became formulaic and applied to whatever was due for whatever sexual offence. Wulfstan, for his part, was at pains by the time he drafted Cnut's code to distinguish the degrees of any sort of crime.¹⁶⁸ Adultery (especially a man's) was of course less serious than rape or incest.

The important thing is that these penalties were indeed enforced. In 1002, Archbishop Ælfric purchased from the king for fifty talents(?) an estate of twenty-four hides at Dumbleton on the Gloucestershire-Worcestershire border.¹⁶⁹ This property had

¹⁶⁷ II Cn 50 – 55 (this last clause is a verbal quotation from Wi 4); VI Atr 12:1 and *HomN* 308:9–10 are preliminary prohibitions of marriage to a divorcee, while Cn 1018 12:3 and I Cn 7:2 add fornication ('*forligeru*') in general.

¹⁶⁸ See chapter 5, p. 363, and below, pp. 000.

¹⁶⁹ LS 68, S 901, *Ab. Ch.* 132 (1002); Dr Kelly has an important discussion of the somewhat complex circumstances surrounding the grant, the chief conclusions of which are that it was probably made at a major council of English prelates under the archbishop; that the estate was much the same as that purportedly granted by Æthelstan to an abbot of Evesham in 930, and subsequently confirmed by Edgar to the bishop of

been forfeited by an unnamed woman for ‘fornicaria praevaricatione’. The size of the estate and the likelihood that it had been passed to its owner by a bishop alike indicate that the offender was someone of substance. At much the same time, a ‘matrona’, also anonymous, seems to have forfeited two hides at Hallam, Derbyshire, which Æthelred gave to one of his *ministri* for the hardly credible sum of 21 pounds of gold.¹⁷⁰ It need not of course follow that the lady’s offence was sexual; wives or sisters could be implicated in the supposed treason of their associates, and widows could be obliged to surrender what their husbands had originally forfeited.¹⁷¹ A rather more likely instance is the ‘ineptiae’ for which a certain Leoflæd lost twelve hides and more at Marlcliff and Bentley, Worcestershire, and which were subsequently bought from King Æthelred by Ealdorman Æthelmær to form part of his endowment of Eynsham.¹⁷² Clearer still is a post-conquest case (1067x70), in which another unnamed woman forfeited to Bishop Æthelmær of Elmham for ‘marrying within a year of her husband’s death’.¹⁷³ After this catalogue, it may afford some satisfaction to a modern view that men were not wholly immune from such prosecutions. In the first half of Cnut’s reign, Godwine son of Earwig was accused of ‘unrihtwife’ by the bishop of Lichfield.¹⁷⁴

The last two indictments may also raise a rather different issue than sexual morality

Ramsbury (S* 404, *Ab. Ch.* 22); and that Ælfric passed the estate to Abingdon in his will (S 1488, WhW 18, *Ab. Ch.* 133). After the conquest, it was the subject of acrimonious dispute between the monks of Abingdon, the abbot and his nephew, Robert: *Chron. Ab.* II, pp. 35–6: the latter was ‘forinsecorum studiorum prudentem’ and could only be dislodged by supernatural means.

¹⁷⁰ LS 73, S 923, *Burt. Ch.* 33 (1011); since the land was ‘matronae suprascriptae (*sic*) tam naturales quam legitimas villas michi iure decretario assignatas’, this is very probably one of many Æthelred charters recording a forfeiture: chapter 3, p. 149.

¹⁷¹ LS 58 (996), 72a (1008), 75 (1012), 112 (975x84), and cf. 62 (995xx99).

¹⁷² LS 70, S 911 (1005). Professor Godden most helpfully informs me that Ælfric, *Catholic Homilies* I xxxii:95–7, ‘ne ... urne lichaman ... unþæslicum plegan and hilæste gescyndan’, seems to be translating *Bede, Homiliae*, ed. Hurst, ii 23:97–9, ‘nec membra nostra ... lusibus atque **ineptis** dare motibus decet’, the reference being to the dancing of Salome! There must surely be a good chance that S 911, Eynsham’s foundation charter and an exceptionally grammatical, indeed eloquent, text, was drafted by or under the influence of the abbot himself.

¹⁷³ *DB* ii 199a [*Norfolk* 10:67]. See below, pp. 000, and n. 175.

¹⁷⁴ LS 78, S* 1462a (1017x27). Cf. also LS 29, S* 375 (909); this is, however, a highly questionable charter, which it is therefore better to take as evidence of what *might* have happened than of anything that actually did.

as such. In a different section of Cnut's code entirely, Wulfstan included a series of clauses about precipitate remarriage by widows. Twelve months was the minimum they could spend before acquiring another husband, on pain of losing their 'morning-gift' (chapter 11, pp. 000) and anything else they received from their previous partner; the guilty man lost his *wergeld*. Neither widows nor maidens were to be forced to marry a man who was not of their choice, though widows who were so coerced still lost their property unless prepared to forsake their abductor.¹⁷⁵ Godwine son of Earwig's offence could as well have been of this order as a case of 'incest'. Nevertheless, it is evident from these laws that women were not seen as solely the victims of this kind of transaction. That ought to be why it was a woman that Bishop Æthelmær prosecuted. If, moreover, they were not free agents, those pressurizing them might as well be their own kin as any suitor. The clause emphasizing their freedom of choice forbade that they 'be given for money, unless [a would-be husband] chooses to give anything of his own accord'; the implication seems to be that families might be bargaining over their relicts.¹⁷⁶ Widows in this kind of society were vulnerable to the designs of relatives as well as of predatory males. They could in effect be heiresses; the destiny of their fortune was of urgent concern to several parties.¹⁷⁷ That is why it was a good move to deny impatient widows, or in effect their kins, a share in a decedent's possessions. Second marriage to God was also a possible property strategy; a Cnut law, with close Carolingian counterparts, prohibits over-hasty consecration of widows as nuns.¹⁷⁸

Yet it could also be significant that these clauses appear in a section of Cnut's code headed 'the alleviation whereby I wish to secure the whole people against what has hitherto oppressed them altogether too much'. Among the oppressions envisaged were

¹⁷⁵ II Cn 73 – 73:2, 74.

¹⁷⁶ II Cn 74. According to *Wif.* (chapter 5, pp. 385–7), husbands could be expected to recompense their intended's family for the cost of bringing her up ('ðæt fosterlean'); but all moneys surrendered by the bridegroom in the two extant marriage-agreements (the first involving Archbishop Wulfstan's own sister) go to the bride: S 1459, 1461.

¹⁷⁷ Leyser, *Rule and Conflict*, chapters 5–6, especially pp. 50–1, 58–62, 71–2; Nelson, 'Wary widow', especially pp. 84–94.

¹⁷⁸ II Cn 73:3; *Cap.* 138:21 (= *Ans.* i 96), 196:47–9; *Concil.* 50:44.

clearly the government's own.¹⁷⁹ Immediately before introducing the principle of a twelve-month respite, Æthelred's laws had put widows under the protection of God and the king.¹⁸⁰ In what ways could kings in fact threaten their interests? The answer to this question in a post-conquest 'feudal' world, when the 'Coronation Charter' of Henry I seems at first sight to echo Cnut's concerns, is familiar enough: kings were exploiting their right to have a say in what happened to the lands they had (notionally) granted to the dead husband; and this over time became another fiscal device, like so many of an English king's 'feudal' prerogatives.¹⁸¹ For earlier eleventh-century kings, the relevant issue was the 'heriot' (chapter 11, pp. 000), the military kit or cash payable to a king or lord on his follower's death, and usually by widows. One Cnut law required widows to pay it within the twelve-month period, and an earlier one forbade lords to extract more from a deceased's possessions than the heriot itself.¹⁸² This whole section of the code is arguably meant to fix a rational and equitable scale of heriots.¹⁸³ It is nowadays appreciated that the fiscality of the Old English regime reached the point that those meeting the Geld liability on any one estate at once became its *de facto* owner.¹⁸⁴ It does seem possible that lords, the king included, could in effect auction a wealthy widow to the man who bid the highest heriot. One did not need 'feudal' suzerainty in order to make lordship pay.

At least two of the charges of (ostensibly) sexual impropriety in pre-conquest England were brought by bishops, and bishops stood to gain from the penalties enforced. Such conduct was naturally a bishop's business. But this was of course not at all the same situation as prevailed after the onset of 'Gregorian' Reform. Once churchmen had their own courts, as in England they began to from early in Lanfranc's pontificate, then matters pertaining to the 'rule of souls' belonged properly to those

¹⁷⁹ II Cn 69 – (?)82; chapter 5, pp. 361–2; Stafford, 'Laws of Cnut'.

¹⁸⁰ V Atr 21 – 21:1 (VI 26 – 26:1).

¹⁸¹ CHn cor 3 – 4.

¹⁸² II Cn 73:4, 70.

¹⁸³ Brooks, 'Arms, Status and Warfare', pp. 85–93.

¹⁸⁴ Lawson, 'Collection of Danegeld and Heregeld'.

courts.¹⁸⁵ Sexual morality was tied up with one's spiritual fate since Christianity's earliest days. As marriage was gradually sacramentalized, as sin became increasingly a personal rather than a socially collective affront to God, it fell exclusively under the law made by and for those entrusted with the cure of individual souls. It therefore passed out of the cognizance that the king's justice had hitherto exercised over it, as over whatever enraged God with society at large, and under the ascendant jurisdiction of the Church.¹⁸⁶ That should not obscure the relatively brief era when early medieval government's concern with the holiness of its people led it to legislate on sexual behaviour as had God for ancient Israel. Wulfstan's positively Gregorian obsession with clerical chastity did not, anyway in legislative texts, extend to stipulating proportionate restraint from the laity. He differed in this from the bishops in council at Paris in 829, whose injunctions were then converted into a primer of the secular lifestyle by Bishop Jonas of Orléans. But he did take Cnut's regime further than those of Charlemagne or his son towards the penalization of deviance.¹⁸⁷

To a real extent, then, Lord Selborne was quite right about the place of the Church's law in that of the pre-Gregorian kingdom of the English - even if the mind-set of its makers was not exactly Erastian. Enforcement of God's will, as set forth in Holy Writ, was the condition on which rule was entrusted to royal authority by Him and by His Church. To advance the prospects of his subjects' salvation was hardly less a king's job than a bishop's. Had it not been David's or Solomon's, as much as it was Nathan's or Zadok's? Only the advent of so many bad kings in Israel had pushed the irate prophet to the fore. It is thus no accident that Archbishop Parker was so close a student of the laws of Alfred and his heirs. They did foreshadow his own Supreme Governor. This section's

¹⁸⁵ Wl ep. 2; cf. above, chapter 5, p. 399.

¹⁸⁶ Duby, *The Knight, the Lady and the Priest*, pp. 130–5, with Helmholz, *Marriage Litigation*, pp. 1–5; Brundage, *Law, Sex and Christian Society*, pp. 179–84, 205–10, 223–5.

¹⁸⁷ *Cap.* 196:54 (II, pp. 45–6); except when rehearsing the terms of some earlier *Volksrechte* (69:5, 157:3, 203:6), Carolingian legislation was very largely exhortatory: *Cap.* 22:68 (= *Ans.* App. ii 38), 22:82 (= *Ans.* i 76), 33:25, 38:15, 114:1, 121 (I, p. 240), 205:5, 248:3, 252:(*ind.*)4–7,40–5, 267:8, 298:8 (II, p. 444); but cf. *Cap.* 287:4, the very last capitulary proper.

last word can be left with Pope Gregory VII, who did not make a habit of commending secular rulers for their stewardship of Church business. When it came to the king of England's record in restraining clerical marriage or in exacting tithes, he informed his over-zealous legates that he was well-satisfied.¹⁸⁸

What is due from God

A people ruled in God's name was in some special sense a people ruled *by* God. Interventions from On High could be anticipated in the form of rewards for those who did His will and punishment for those who did not. If they could be anticipated, however, they could not of course be predicted. Early medieval intellectuals (Charlemagne himself allegedly included) that had been taught God's ways by Augustine knew that His providence was utterly inscrutable. In fact, supernatural action was almost by definition miraculous. Yet a political society that was so confident of God's immanence as that of Carolingian Europe could hardly resist the temptation to go beyond compliance and invocation towards some *system* of summoning divine power into the affairs of men. Might it not be possible to find a valve that would open and close the reservoir of Almighty energy banked up behind the vast dam of the Heavens? If the law was God's, could not His justice be seen to work against the non-compliant? It was because the makers of English law thought that the ordeal could do just that that it may be discussed here, and not in the sort of chapter on 'Procedure' to which standard legal histories usually relegate it.

(i) Ordeal

Eadric, the king's reeve at Calne, was one of the hard-faced local officials who made King Edgar's government so formidable.¹⁸⁹ Around the turn of the year 971–2, he

¹⁸⁸ *Registrum Gregorii VII*, ed. Caspar, ix 5, pp. 000.

¹⁸⁹ He may be identifiable with the 'Eadric 1', who begins to attest Edgar's charters in 966, in sixteenth position among 'ministri' (or lower), and who was arguably the beneficiary of S 668 (?972), a charter granting a ten hide estate at (?) Winterbourne Bassett, Wiltshire (just a few miles from Calne), that survived as an apparent original at

arrested and charged a slave for ‘a certain misdeed’, a ‘trivial crime (*vili scelere*)’, for which the penalty was nonetheless death. The slave was held ‘in chains’ ‘by royal agents (*clientibus*)’ pending his owner’s arrival, whereupon he was to carry a red-hot iron bar, with the consequence that if his hand failed to heal after three days sentence would be carried out. He belonged to a wealthy ‘negotiator’ called Flodoald, whose name suggests that he was a Norman or northern French merchant – according to a slightly later account of the episode, he was ‘well-known in Winchester’. Flodoald was very fond of his slave, and offered the reeve a whole pound of silver, indeed the slave himself, if he would drop the ‘unjust’ charges. The slave’s ‘friends and kinsmen (*amici et parentes*)’ did the same – it is interesting that this ‘servus’ had kin who were in a position to do so. Eadric, however, was implacable,

and compelled [him] to carry in his bare hand a searing piece of iron of considerable size glowing red-hot from much coal. When the man...took it hesitantly (*timide*) in hand, at once a huge burn filled the entire palm of his scorched hand. His hand was sealed up in the usual way till the third day. But Flodoald summoned the man the following day and discovered him condemned and guilty. Moved with extreme anguish for the man who was about to die, he called his brother and friends...and got ready to go home [rather than witness his servant’s execution].

However, he first prayed that God, through St Swithun’s intercession, would free the man from disgraceful death, promising that the saint himself could have the slave.

Winchester but is extant now only as a seventeenth-century transcript. He is probably not the same as the much more senior figure who appears in Edgar’s earlier charters, and since there are no further Eadric attestations until the future Eadric ‘Streona’ appears in 996, he must have left the scene not long after receiving this grant: Keynes, *Atlas of Attestations* LVII(9–10), LXIII(2), and compare Professor Lapidge’s discussion, as next n. It may not be too fanciful to see Eadric as the kind of enforcer who pushed the Edgar-Æthelwold ‘Reformation’ through, and whose prominence did not survive their royal patron.

When Phoebus unfolded the third day, the man was led before the king's reeve so that all the *clientuli* standing around could see if he was innocent of the alleged crime. When they arrived before the *legislatores*, his very enemies judged the man innocent, and his ill-wishers declared him unimpaired ... It was an extraordinary wonder that his supporters saw the blister and swelling, whereas the prosecutors saw his hand as healthy as if he had never touched the burning iron.

The slave's joyful companions thanked God and St Swithun, duly making a present of him to the agent of his rescue.¹⁹⁰

We are fortunate to have so startlingly revealing a story as that of Flodoald's slave. Accounts of the administration of the ordeal in its heyday are not uncommon (even if *miracles* affecting the conduct of the ordeal are perhaps significantly scarce: beneficent supernatural agencies were thus in competition). But few are of such relatively unquestionable historicity as this.¹⁹¹ Little about it seems in any way out of the ordinary, its *denouement* apart. Lantfred's story, in other words, is another of those precious slices of evidence which may show how far the law really worked along the lines laid down by authority. Can it in fact be accommodated beside what is knowable of ordeals from prescriptive or theoretical sources?¹⁹²

¹⁹⁰ LS 154; Lantfred, 'Miracula Sancti Swithuni' 25, ed. Lapidge, *Cult of St Swithun*, pp. 308–11. Professor Lapidge shows that this source can be closely dated 971x5; and for its bearing on another case in Edgar's reign (LS 155), and even on the course of his legislation, see above, chapter 3, pp. 125–7, chapter 5, pp. 321, 369–70. This story too was re-told by Wulfstan *Cantor* in his 'Narratio Metrica de Sancto Swithuno', ed. Lapidge, as above, also by Campbell, *Frithegod, Breuiloquium ... Wulfstan, Narratio*, lns 299–434, pp. 150–4, and was thus discussed by Whitelock, 'Wulfstan *Cantor* and Anglo-Saxon law', pp. 87–92 (she did not know of Lantfred's prior account).

¹⁹¹ Bartlett, *Trial by Fire and Water*, pp. 13–26; most of these tales are literary fiction or at best doubtfully historical. For another possibility, also involving St Swithun, see LS 170 (very sceptically assessed by Bartlett, pp. 17–18); and for more regular manifestations of the supernatural in the judicial sphere, cf. above, chapter 2, pp. 70–6, chapter 3, pp. 158–60.

¹⁹² Apart from Professor Bartlett's vivid and vigorous argument (as previous n.), whose approach to the ordeal's 'heyday' is much like that adopted here, I regard Nottarp, *Gottesurteilstudien* as still the best book on the subject. Important papers to rather contrary

Ordeal is yet another sphere where the legislative evidence changed to a very marked degree with the dawn of the tenth century. Seventh-century codes have almost nothing to say of it – so little that only a masterly piece of textual and philological research by Liebermann established that Ine did in fact refer to it. A *ceorl* repeatedly accused of theft and finally convicted ‘in ceace’ or by other conclusive means was to lose his hand or foot; and someone providing the wherewithal for another to get out of ‘ceace’ but unwilling to do so second time around cannot expect to recover his goods (‘ceapes’). The earliest copy of this code read ‘ceap’ in all instances, and the *Quadripartitus* translator was evidently baffled by the correct reading when he encountered it. But ‘ceac’, preserved by later manuscripts, is a relatively rare Old English term for a cup or other vessel containing liquid. Its meaning in this context is thus clearly enough ‘(hot) water ordeal’; the procedure whereby an accused was obliged to extract an object from scalding water without long-term damage to his limb.¹⁹³

Alfred added nothing to Ine in his respect. But a new role for the ordeal is evident in the post-Alfredian regime’s very first pronouncement. Edward the Elder’s first code, perhaps from the earliest years of his reign, ordered that proven perjurers were not to be entitled to an oath thereafter, but were ‘worthy of the ordeal’.¹⁹⁴ Æthelstan’s Grately code (c. 928) went on to stipulate the ‘three-fold’ ordeal for charges of betraying a lord, sacrilege, and witchcraft or other attempts at underhand killing. Those often accused and convicted by the ‘single’ ordeal (the case envisaged by Ine) were to be imprisoned and released only on payment of 120 shillings, and on surety being supplied by their kin.

effect (below) are Hyams, ‘Trial by Ordeal’, (Flodoald’s slave, pp. 93–5); and Brown, ‘Society and the Supernatural’. For the different (significantly so, below) position in eleventh- and twelfth-century France, see White, ‘Proposing the Ordeal’, and ‘Imaginary Justice’. For the possibility of an ‘archaeology of the ordeal’, see Reynolds, ‘Anglo-Saxon Law in the Landscape’, pp. 37, 78–81.

¹⁹³ Ine 37, 62; Liebermann, ‘Kesselfang’; cf. above, chapter 4, p. 172, with n. 40. Latin ‘caucus’/OE ‘ceac’ describe what, according to Bede, King Edwin of Northumbria set up at roadside springs (*Bede, Hist. Eccl.* ii 16, pp. 192–3, *Old English Bede* I, pp. 144–5); this was Alfred’s word for the ‘luter’ in which worshippers washed their hands and feet before entering Solomon’s temple (*Alfred’s Version of Gregory’s Pastoral Care* xvi, pp. 104–5), and for the ‘*scyphum* (jug)’ taken by the fugitive David from the sleeping King Saul’s tent rather than touch the Lord’s Anointed (*Libri Psalmorum*, p. 79).

¹⁹⁴ I EW 3.

Slaves convicted at the ordeal were to be flogged three times, with the value of the [*sc.* stolen] goods (*ceapgild*) repaid twice over if the flogging is remitted. Anyone who ‘compounds (*þingie*)’ for an ordeal might do so only as regards the value of the goods, not the fine – the meaning of this typically elliptical provision perhaps being that one could negotiate one’s way out of either undergoing an ordeal or the consequences of failing one by paying the owner more than the value of the goods stolen, but this would not let one off the fine due to authority (without the latter’s own consent).¹⁹⁵ The king’s later and more severe batch of anti-theft laws ordered that the oft-accused who were convicted by ordeal were to be executed unless their kin stood surety and paid the value of the stolen goods, as before, but this time the offender’s whole wergeld was payable as opposed to 120 shillings.¹⁹⁶ Besides all this, the Grately code goes beyond any other legislation from the early medieval West in giving relatively detailed instructions for administering ordeals:

If anyone pledges to undergo an ordeal, he should come three days before to the priest who is to consecrate it, and live off bread and water, salt and vegetables until he is to undergo it, and attend mass on each of the three days and make an offering and go to communion on the day that he is to go to the ordeal, and then swear the oath that he is innocent at law of the charge... And if it be the water ordeal, he is to sink one and half ells on the rope; if it be the iron ordeal, there are to be three days before the hand is unbound. And let everyone pursue his charge with a preliminary oath..., and those present for either party are to fast by command of God and the archbishop, and there are not to be more than twelve on either side; if the accused’s group is more

¹⁹⁵ II As 4 – 6, 7 (with reference to 1:3), 19, 21.

¹⁹⁶ VI As 1:4 (and cf. 9); this appears to be a measure from the Council of Thundersfield (above, chapter 5, pp. 295–9), whose semi-official summary says simply that those convicted of theft by ordeal or any other means suffer death, IV As 6.

than twelve, the ordeal is to be invalid.¹⁹⁷

This may be compared with the fuller account in a perhaps semi-official tract from the same sort of date:

By the commands of God and of the archbishop and all bishops, we order that no one come into the church after the fire is brought in with which the ordeal is to be heated, except the priest and he who is to undergo it. And nine feet is to be measured from the stake to the mark, the feet being those of him he who undergoes it. And if it be water, let it be heated till it boil, whether the vessel be iron or bronze, lead or clay. And if the charge be single, the hand reaching for the stone is to be plunged in up to the wrist, if it be 'triple' to the elbow. And when the ordeal be ready, two men are to go in from either party and are to agree that it is as hot as we said before. And an equal number from either party are to go in and stand along the church on each side of the ordeal, and they are to fast and to have held back from their wives during the night; and let the priest sprinkle holy water over them all, each of them tasting it, and let them all kiss the Book and the sign of Christ's cross. And let no one improve the fire after the consecration begin, but the iron is to lie on the embers till the last collect; it is then to be put on the stake; and no other word is to be spoken therein, except that God be earnestly prayed to reveal the whole truth. And let the accused drink holy water, and let it be sprinkled on the hand that is to carry the ordeal. The nine feet are to be measured in three lots of three: at the first mark near the stake, the accused is to be on his right foot, at the second on his left, then back to his right foot at

¹⁹⁷ II As 23 – 23:2; translation based on *EHD I*.

the third, whereupon he is to throw down the iron and hurry to the altar. And his hand is to be sealed, and inspected after three days as to whether it be filthy or clean within the seal. And the ordeal is to be invalid for anyone who break these rules (*lage*), and he is to be pay the king 120 shillings as a fine.¹⁹⁸

On the whole, these prescriptions match up well with the experience of Flodoald's slave. The 'enemies' and 'supporters' to whom Lantfred referred were presumably the two sides lining the church when the iron was consecrated; and the restriction on the number of an accused's backers may have been meant to stop human pressures the effect on perceptions of the result that the story credits to St Swithun. But perhaps the main point is that the slave's master and kinsmen were in no sense guilty of bribery when offering a pound of silver or his own person to get him out of his ordeal. Æthelstan allowed that one might 'compound for' the ordeal, and to make a gift of the slave was logically equivalent to paying the wergeld due for convicted thieves under his later laws.¹⁹⁹

Further refinements as regards the context of ordeals were introduced by Æthelred II and Cnut. The central issue was now the distinction between 'single' and 'triple' ordeals. This distinction had been established by the semi-official literature of the mid-tenth century: triple meant that the iron weighed three pounds as opposed to one, that the depth of boiling water was the length of a forearm not a hand, and (one might guess) that the depth to which one was required to sink in cold water was proportionately

¹⁹⁸ *Ordal* (there is a translation in *Laws* (At), pp. 170–3, which omits the passage – extant only in *Quadripartitus* Latin – from 'The nine feet...' to '...altar'); for the tract's possible relationship to Æthelstan's and to others' codes, see chapter 5, pp. 373–4. The tracts *Blas.* (also very closely related to Æthelstan's laws, chapter 5, pp. 367–8) and *Hu.* 9 (slightly later and also linked, chapter 5, pp. 378–9) ordain that the weight of iron in a 'three-fold' ordeal is to be three pounds; and for further evidence on ordeal administration, see below, pp. 000, and nn. 204–10.

¹⁹⁹ Cf. Whitelock, 'Wulfstan *Cantor*', pp. 88–90.

greater or less than ‘one and a half ells’ (just over two feet).²⁰⁰ A triple ordeal was, obviously enough, enforced for graver offences like conspiracy against a lord, and more generally for behaviour such as to have forfeited the community’s confidence. Thus, a charge could be rebutted by single ordeal, or by an oath equivalent to a pound in value which was its counterpart, unless no one dared offer the oath; those of ‘bad reputation’ (*tyhtbysig*, i.e. multiply charged, chapter 9, pp. 000) could expect to go a triple ordeal; and anyone failing to attend an ordeal was liable, through his sureties, for his wergeld.²⁰¹ At any rate in the adapted and harsher version of his code that Æthelred aimed at the Danelaw, triple ordeals were also in order for coining and for anyone wishing to clear a kinsman of the theft for which he had evidently been executed; even a first charge of theft entailed single ordeal (without the option of an oath); and it was for an accuser to choose whether the ordeal were of water or iron.²⁰² Flodoald’s slave would in this light have been subjected to the triple ordeal, appropriate for charges bearing the death sentence; and if so, he must have been less well-thought-of in the community at large than by his owner.²⁰³

The laws are not, however, the only, and perhaps not even the best, evidence for the way that ordeals were meant to be administered in the tenth and eleventh centuries. At almost exactly the same time that Edward made the first legislative reference to ordeals for two hundred years, elaborate rituals for their conduct began to circulate in England. It is not at all likely that this is coincidence. Nine sets of texts are to be found in pre-conquest liturgical manuscripts or *Textus Roffensis*.²⁰⁴ The major series of these, named ‘Iudicia Dei I–III’ by Liebermann, occurs in almost all the relevant volumes. The

²⁰⁰ See nn. 197–8; the ‘ell’ was the equivalent of the Hebrew cubit, i.e. the distance from the elbow joint to the tip of the middle finger (notionally eighteen inches).

²⁰¹ VI Atr 37 (not in V Atr 30), ‘on Ængla lage’, not for Danes; II Cn 57; I Atr 1:1,3,4,7, III Atr 3:4, II Cn 22 – 22:1, 30, 30:3–3a,6.

²⁰² III Atr 6, 7, 8; under this code, evaders paid two and a half marks to the ‘landrica’ (chapter 10, pp. 000) and went to the ordeal regardless, III Atr 4:1. For the relationship between I and III Atr, see chapter 5, pp. 326–9, and below, chapter 9, pp. 000.

²⁰³ *Contra* Whitelock, as n. 199.

²⁰⁴ Listed in *Gesetz* I, p. 401, n. b); but for revisions of his datings and provenances, see nn. 205–9. See also Rollason, *Two Anglo-Saxon Rituals*, pp. 12–17, 20.

earliest is the ‘Sherborne’ or ‘Dunstan’ pontifical, which there is actually quite good reason to associate with the archbishop himself.²⁰⁵ Later copies include those in the ‘Lanalet’ pontifical, perhaps belonging to Bishop Lyfing of Wells (998/9–1013), future archbishop of Canterbury, or else to his later namesake of Crediton and Worcester; the so-called ‘Samson’ pontifical, from Christ Church Canterbury and also of early-eleventh-century date; the ‘Ramsey Pontifical’ of *c.* 1030, which perhaps belonged to Bishop Ælfweard of London (1035–44); and the ‘Red Book of Darley’ (1060/1), with Sherborne, Westminster or Winchester associations.²⁰⁶ It is also these rituals that are found in *Textus Roffensis*; and ‘T’ was copied by Andrew Horn into his re-edition of the ‘London Collection’ of laws (1313–14).²⁰⁷ A second group (‘Iudicia Dei IV–VI’) is in the ‘Durham Collectar’ or ‘Ritual’, a book written in southern England little if at all later than 900. ‘VI’ consists of an address in the scribe’s West Saxon to the person about to take the ordeal (this is also in ‘Ramsey’), while most of ‘IV’ and ‘V’ are rendered into late tenth-century Northumbrian by the prolific glossator, Provost Aldred of Chester-le-Street.²⁰⁸ Of the rest, ‘VII’ is a version of ‘T’ with extra prayers in Latin and Old English, and is in ‘Ramsey’ and Corpus Cambridge 44; ‘VIII’ comprises two Old English adjurations added to ‘T’ in the ‘Red Book of Darley’; and ‘IX’ is a brief set of blessings for the hot iron from ‘Lanalet’, ‘Ramsey’ and Corpus 44.²⁰⁹

²⁰⁵ Paris BN MS lat 943, ff. 89v – 93v; Leroquais, *Pontificaux Manuscrits* 93, II, pp. 6–10, at p. 8; Ker, *Catalogue* no. 364; Dumville, *Liturgy*, pp. 82–4.

²⁰⁶ Rouen Bib. Mun. A.27 (368), ff. 148r – 149v, Leroquais 188, II, pp. 287–300, at p. 297, *Pontificale Lanaletense*, ed. Doble, pp. 116–25, Ker, *Catalogue* no. 374, Dumville, *Liturgy*, pp. 86–7; Corpus Christi College, Cambridge, MS 146, pp. 301–14, Ker *Catalogue* no. 37, Dumville, *Liturgy*, pp. 72–3; BL, Cotton MS Vitellius A.vii, ff. 5r–12v, Ker *Catalogue* no. 213, Dumville, *Liturgy*, p. 79; Corpus Christi Cambridge 422, pp. 319–44, Ker *Catalogue* no. 70, Dumville, *Liturgy*, pp. 74–5; also Corpus Cambridge 44, pp. 365–86 (continuing in a ‘Parker’ hand, from CCC 146, to – unnumbered – p. 399), (?) Canterbury, s. xi^{med}, Ker *Catalogue* no. 33, Dumville, *Liturgy*, p. 71.

²⁰⁷ *Textus Roffensis*, ed. Sawyer, I, ff. 49v – 57r; Corpus Cambridge 70/258, p. 31–7; see above, chapter 4, pp. 244–53, 237–8, with Catto, ‘Andrew Horn’, pp. 372–4.

²⁰⁸ Durham, Cathedral Library, MS A.iv.19, ff. 48r – 49v, 54r – 55r; *Durham Collectar*, ed. Correa, pp. 76–82, 216–18, 225–7; *Durham Ritual*, ed. Brown, pp. 15–17, 39–41; Ker *Catalogue* no. 106, Dumville, *Liturgy*, pp. 129–30.

²⁰⁹ Rouen MS A.27, f. 159 (Doble, pp. 108–9); Cotton Vitellius A.vii, ff. 4rv; Corpus 44, pp. 362–3.

'Iudicia I' and 'II' are ceremonies for the (cold) water ordeal and for those of hot iron and hot water. They are very similar to the instructions laid down in the legal texts. The three-day fast, communion on the day of trial, drinking and sprinkling of holy water, and kissing of Gospel and Crucifix are all in 'I', which is actually a mass interspersed with extra prayers and rubrics. The presence only of those who are fasting, the iron's three-pound weight and the nine-feet it is to be carried, the hand or forearm depth of the retrievable stone, and the three day wait for the hand to heal are all in 'II', otherwise a set of prayers for the procedure to work as God wills. 'III' comprises prayers for the ordeal of (swallowing) a lump of bread and cheese. 'IV', 'V' are prayers with rubrics for cold water and iron respectively. What is most significant about these liturgies is the extra effort put into solemnifying what must anyway have been awe-inspiring ceremonies. The priest's adjuration to the fire heating the iron or water in 'II' is as follows:

God, who showed great wonders through fire, dragging Abraham from the Chaldaean conflagration when others perished; God who allowed the bush to burn before the gaze of Moses without being consumed; God, who led out the three boys from the blaze of the Chaldaean furnace, when several were burned up; God who engulfed the people of Sodom and Gomorrah in an inferno, but gave safety to your servant Lot and his own; God who in the advent of your Holy Spirit distinguished the faithful from the unfaithful with the sign of fire: show us in this test of our puniness the strength of that same Holy Spirit, and through the heat of this fire **distinguish the faithful from the unfaithful**, that by its touch those knowing of that theft/homicide/adultery whose investigation is proceeding **may be terrified (*exhorrescant*)**, and their hands [or feet] burned somewhat, but those immune from that charge may be freed completely and remain unharmed ...

Another possible choice of prayer also invokes the case of Susannah. A third concludes:

If any guilty party, puffed up by the breath of the evil one, despises or makes trial of Your judgement, and wishes to protect and defend his sins against the trial of Your truth by herbs or other devices or the stratagems of sorcery, let Your strength which conquers all, Lord God, declare it most justly and mercifully on him with truth, that wickedness do not lord it over justice but wrong be subdued by truth, and that **the rest, seeing this, may be freed of their unbelief ...**

As for the result: ‘if he is clean, let God be thanked. But if swelling pus is found in the mark of the iron, let him be held guilty **and unclean**’.²¹⁰

In so far as the ordeal ‘worked’, it was through exploiting a guilty conscience.²¹¹ God, it went without saying, knew the truth of the matter. Participants in the ceremony might be fooled into seeing the manifestation of His judgement as other than it in fact was; that, after all, was what St Swithun did. This no doubt explains appeals that God circumvent the effects of herbs or other maleficent devices. Nevertheless, God was not mocked. Those all too well aware of His laser-powered vision could be expected to hold a hot iron as gingerly as possible (Flodoald’s slave did so ‘timide’), hence aggravating the risk of a serious burn. They would grab for the stone in the bubbling water, so accentuating the chance of missing it. They were liable to catch their breath when lowered into the water, so enhancing their buoyancy. The more the atmosphere was infused with awareness of the Divine Presence and the certainty of His action, through biblical reminiscences of the shattering precedents, the more profound the effect on an uneasy conscience would be. Carolingian and Old English kings targeted ordeals at people already under grave suspicion from the community in which they lived, or those

²¹⁰ *Iud* II:2,4,5.

²¹¹ Nottarp, *Gottesurteilstudien*, pp. 24–33.

whose low status exposed them to society's disrespect.²¹² Outside Flodoald's household, the reeve Eadric's certitude was evidently shared. In the terms of 'Ordeal Anthropology', the attendance of neighbours, themselves purified by fasting, abstinence from sex and aspersion of holy water, could only intensify the pressures on truly guilty (or otherwise vulnerable) parties. That pressure would be multiplied many times over by enrolling God's Majesty among them. Ordeals were 'third degree'. Suspects might even confess.²¹³

The English ordeal rituals are evidently inter-related. More to the point, they closely resemble the Carolingian series, not only in general terms but in many specific details.²¹⁴ The relationship between the English cold water ritual and one in a ninth-century manuscript from Rheims is particularly close:

Iudicium Dei I

(1) Peractis coram sacerdote trium dierum ieiuniis, cum homines vis mittere ad iudicium aquae frigidae ob comprobationem, ita facere debes: (1:1) Accipe illos homines quos vis mittere in aquam, et duc eos in ecclesiam; et coram omnibus illis cantet presbiter missam, et faciat eos ad ipsam missam offerre. (2) Cum autem ad communionem venerint, antequam communicent, interroget eos sacerdos cum adiuratione et dicat: (2:1) Adiuro vos N per Patrem et Filium et Spiritum Sanctum et per vestram Christianitatem quam susceptistis, et per unigenitum Dei filium et per sanctum evangelium, et per istas reliquias, quae in ista

Ordo Iudiciorum Dei 17 (+ 18–19)

(a) Cum homines vis mittere ad probationem (**19**: ad iudicium aquae frigidae ob comprobationem) ita facere debes: Accipe illos quos voluntatem habes mittere in aqua, duc eos in ecclesia, et coram omnibus illis cantet presbiter missam, et faciat eos ad ipsam missam offerre. Cum autem ad communionem venerint, antequam communicent, interroget eos sacerdos, cum coniuratione (**19**: adiuratione) ita dicens: (b) Adiuro vos homines, per Patrem et Filium et Spiritum Sanctum, et per vestram Christianitatem, quam suscepistis, et per unigenitum filium Dei, et per sanctam Trinitatem, et per

²¹² Cf. *Cap.* 39:5 (= *Ans.* App. ii 3), 139:1,15 (= *Ans.* iv 13,27), 252:22/22a, 278:3; Bartlett, *Trial by Fire and Water*, pp. 28–30.

²¹³ Brown, 'Society and the Supernatural', pp. 139 (314–15).

²¹⁴ Continental 'Ordines Iudiciorum Dei' are ed. Zeumer, *Formul.*, pp. 601–722: first those for single types, then sets for a series, then recurrent prayers not already included (the English series 'I–III' forms Appendix I, pp. 710–16). Many of these in fact come from *non*-liturgical MSS (cf. above, chapter 2, p. 61, with n. 162), nearly all are *eastern* Frankish, and the great majority are later than the English series. The ninth-century evidence (below) is nonetheless quite sufficient to reveal their Carolingian roots. The 'Rheims' MS cited for Ordo A 17 (below) is now Paris BN MS lat. 12287.

ecclesia sunt, et per illud baptismum, quo vos sacerdos regeneravit, ut non presumatis ullo modo communicare neque accedere ad altare, si hoc fecistis aut consensistis aut scitis, quis hoc egerit. (3) Si autem tacuerint, et nulli hoc dixerint, accedat sacerdos ad altare et communicet. (3:1) Postea vero communicet illos quos vult in aquam mittere. (3:2) Cum autem communicaverint, dicat sacerdos ante altare: (3:3) Corpus hoc et sanguis domini nostri Iesu Christi sit vobis ad probationem hodie.

(4) – (18): Incipit missa iudicii: *(mass is that printed by Zeumer as ‘Ordo A 23’, but with extra lesson from Leviticus 19:1, 10–14, a different Secret, and a full complement of concluding rituals).*

(19) Expleta missa, faciat ipse sacerdos aquam benedictam, et pergat ad locum ubi homines probentur.

(19:1) Cum autem venerit ad ipsum locum, det illis omnibus bibere de aqua.

(19:2) Postea vero coniuret aquam, ubi culpabiles mittat.

(21) Item alia. Adiuro te, creatura aquae, in nomine Dei Patris omnipotentis, qui te in principio creavit et iussit ministrare humanis necessitatibus, qui etiam iussit segregari ab aquis superioribus; (21:1) Adiuro etiam te per ineffabile nomen Iesu Christi, filii Dei vivi, sub cuius pedibus mare et elementum divisum se calcabile

sanctum evangelium, et per istas reliquias, quae in ista sunt ecclesia, ut non praesumatis ullo modo communicare, neque accedere ad altare, si vos hoc fecistis, aut consensistis, aut scitis, quis hoc egerit. (c) Si autem omnes tacuerint, et nullus hoc dixerit, accedat sacerdos ad altare et communicet (**18**: Postea communicet) eos (**18**: quos vult in aquam mittere). Postea vero dicat ad illos quos communicat (**18**: Cum autem communicant, dicat sacerdos per singulos - **19**: ante altare); Corpus hic (19: hoc) et sanguis domini nostri Iesu Christi sit vobis ad probationem hodie.

(Continental rituals mostly omit the ordeal mass, which Zeumer prints separately as ‘Ordo A23’, ascribing it to Soissons.)

(d) Expleta missa, faciat (**18**, **19**: sacerdos) aquam benedictam et accipiat sacerdos ipsam aquam, ibique (**18**: vadat) ad illum locum, ubi homines probabuntur. Cum autem venerint ad ipsum locum, det illis bibere de aqua benedicta, dicens ad unumquemque: Hec aqua fiat tibi ad probationem. Postea vero coniuret aquam ubi illos mittit.

(**18**: e) Adiuro te aqua, in nomine Dei Patris omnipotentis, qui te in principio creavit et te iussit ministrare humanis necessitatibus, qui etiam te iussit segregari ab aquis superioribus. Adiuro te etiam per ineffabile nomen Christi Iesu, filii Dei omnipotentis, sub cuius pedibus mare, elementum aquarum, se calcabile

prebuit, qui etiam baptizare se in aquarum elemento voluit; (21:2) Adiuro etiam te per Spiritum Sanctum qui super Dominum baptizatum descendit; (21:3) Adiuro te per nomen sanctum et individuae Divinitatis, cuius voluntate aquarum elementum divisum est, et populus Israel siccis pedibus statim transivit, ad cuius etiam invocationem Heliseus ferrum, quod de manubrio exierat, super aquam natate fecerat; (21:4) ut nullo modo suscipias hos homines illos, si in aliquo sunt culpabiles de hoc quod illis obicitur, scilicet aut per opera aut per consensum aut per conscientiam seu per ullum ingenium; (21:5) sed fac eos super te natate, et nulla possit esse contra te causa facta aut ullum prestigium inimici, quod illud possit occultare. (21:6) Adiurata autem per nomen Christi, praecipimus tibi, ut nobis per nomen eius oboedias, cui omnis creatura servit, quem Cherubin et Seraphin conlaudant dicentes: ‘Sanctus, Sanctus, Sanctus, Dominus Deus exercituum’, qui etiam regnat et dominatur per infinita secula seculorum, Amen.

(22) *(Further adjuration of Water, with Day of Judgement, 12 apostles, 72 disciples, 12 prophets, 24 elders, 144,000 praising the Lamb, ranks of angels, martyrs, virgins and confessors, Blood of Christ, Four Gospels and and Evangelists, 72 books of Old and New Testaments)*

(23) Post has autem coniurationes aquae exuantur homines, qui mittendi sunt in

prebuit, qui etiam in aquarum elemento baptizari voluit. Adiuro te etiam per Spiritum Sanctum, qui super Dominum baptizatum descendit. Adiuro te per nomen sanctae et individuae Trinitatis cuius voluntate aquarum elementum divisum est, et populus Israheliticus per illud siccis vestigiis transivit; ad cuius etiam invocationem Heliseus ferrum, quod de manubrio exierat, super aquam natate fecit, ut nullo modo suscipias hunc hominem N, si in aliquo ex hoc est culpabilis, quod illi obicitur, scilicet aut per opera aut per consensum aut per conscientiam aut per ullum ingenium; sed fac eum natate super te, et nulla possit esse contra te causa aliqua facta aut ulla prestigatio, quae illud possit non manifestare. Adiurata autem per nomen Christi praecipimus tibi, ut nobis per nomen eius oboedias, cui omnis creatura servit, quem Cherubin et Seraphin laudant, dicentes: ‘Sanctus, Sanctus, Sanctus, Dominus Deus exercituum’, qui etiam regnat et dominatur per infinita secula seculorum, Amen.)

e) *Coniuratio hominis, with Day of Judgement (18: 24 elders) four evangelists (by name), 12 apostles, 12 prophets, martyrs, confessors and virgins, ranks of angels, Sydrac, Misac and Abdenego’, 144,000 who suffered for Christ.*

f) *(Holy Water prayer)*

d) *(cont. from before adjuration above)*
Post coniurationem aquae, exuat illos

aquam, propriis vestimentis, et osculentur singuli evangelium, et aqua benedicta super omnes aspergatur. (23:1) Et qui adsint omnes ieiunient. (23:2) Et sic proiciantur singuli in aquam. (23:3) Et si submersi fuerint, inculpabiles reputentur; si supernataverint, rei esse iudicentur.

vestimentis eorum, et faciat eos per singulos osculare sanctum evangelium et crucem Christi. Et postea super unumquemque aspergat de aqua benedicta et proiciat singulos in aqua. Haec omnia facere debes ieiunus, neque illi ante manducent, quia ipsos mittunt in aqua.

There is of course no doubt that the English liturgy borrows from the Frankish.²¹⁵ It is, in addition, more than possible that the exemplar of the Durham Collectar, ordeal rituals presumably included, reached England from Rheims in the baggage of Grimbold.²¹⁶

The argument can be taken a little further than that. Ordeals by no means carried all before them in the intellectual climate of the Carolingian Renaissance. As one aspect of his offensive against the divisively variant *leges* within the empire, and in particular the Burgundian law prevalent in his own archbishopric, Agobard of Lyons vigorously attacked the notion that God's judgement could be so manipulated by human agency. Most of the arguments that eventually discredited the ordeal at the turn of the twelfth and thirteenth centuries were already deployed in his tracts.²¹⁷ Unease among the councillors of Louis the Pious about the appropriateness of judicial duels for confrontations between churchmen developed into outright repudiation of the 'Cross'

²¹⁵ This was established not only by Liebermann, *s.v.* 'Ordal' 5), *Gesetze* II, p. 601, but also by Brunner, *Rechtsgeschichte* II, pp. 541–2; von Schwerin, *Rituale für Gottesurteile*, p. 3, n. 1, refused to take up a position, but the drift of his arguments certainly flows in this direction. The major doubter was Nottarp, *Gottesurteilstudien*, pp. 223–8, but (unconvincingly) with regard to the principle of ordeals, not their liturgies, where he was ready to accept English indebtedness to the Franks. Nor is the tabulated evidence all there is to say: *Iud* II:3 can, for instance, be compared with 'Ordines' A 6(b); IV:2–4 with A 2(b); 'VII' also shares prayers with A 17–19; and IX:1 is A 1(a). There seems to be a good chance that the very word was borrowed into Old English: Bosworth/Toller, *s.v.*; it still of course survives as 'urteil' in modern German.

²¹⁶ *Durham Collectar*, ed. Correa, pp. 106–23.

²¹⁷ Agobard, *Epistolae*, ed. Dümmler, 3 (8–14), pp. 161–4, and 'De Divinis Sententiis'; cf. Grelewski, *Réaction contre les Ordalies*, pp. 23–57; Leitmaier, *Die Kirche und die Gottesurteile*, pp. 45–9 and ff.; Boshof, *Erzbischof Agobard*, pp. 44–7; above, chapter 2, p. 48.

ordeal which had temporarily replaced it (818/19), then briefly into rejection even of trial by water (829).²¹⁸ Against such arguments and in defence of the procedures that had recently vindicated the wretched Queen Theutberga against her husband Lothar II, Archbishop Hincmar of Rheims, the most formidable legal mind of the ninth century, made the case for the validity of immanent divine justice (860).²¹⁹ Central to his thesis were just those scriptural instances that featured so prominently in the Rheims and Durham ordeal liturgies and their derivatives: Noah, Sodom and Gomorrah, the Red Sea, Elishah, the Babylonian furnace, St Peter on the Sea of Galilee, and Lazarus. He repeatedly made the point that these episodes marked out the innocent from the guilty; that in his dealings with his original Chosen People, God had indeed judged through the media of fire and water.²²⁰ We might perhaps see in the progressive liturgification of traditional ordeal procedures not only mounting confidence that God's Justice could thus be expressed but a defensive reaction against ideologically honed criticism.²²¹

At all events, if there were one place in the ninth-century Frankish Church where the Biblical foundations and ritual expression of ordeals were thoroughly well aired, it was at Hincmar's Rheims. Once again, therefore, it begins to seem possible that the Church of Rheims played a seminal role in the development of later Anglo-Saxon law. The arrival of the exemplar of the Durham Collectar and of at least one other collection

²¹⁸ *Cap.* 134:1 (816), 138:27, 139:10 (818/19), 192:12 with 186:5 (829); chapter 2, pp. 71–2. *De Divortio*, pp. 152–6, especially p. 152. Hincmar brushed aside the 829 prohibition as based on the ceremony's misleadingly baptismal element, pp. 158–9. He also went over much the same ground in *Epistola xxv*, to Bishop Hildegard of Meaux, *PL CXXVI*, 161–71.

²¹⁹ Hincmar, *De Divortio*, 'Interrogatio et Responsio vi', pp. 146–60; further to this superb edition's introduction, see Airlie, 'Private Bodies and the Body Politic', especially p. 28.

²²⁰ *De Divortio*, pp. 152–6, especially p. 152. Hincmar brushed aside the 829 prohibition as based on the ceremony's misleadingly baptismal element, pp. 158–9. He also went over much the same ground in *Epistola xxv*, to Bishop Hildegard of Meaux, *PL CXXVI*, 161–71.

²²¹ Another reflex of this movement would be the attempt to legitimize the water ordeal pseudo-historically by alleging that it had been used by Charlemagne to try Pope Leo III, then authorized jointly by Louis the Pious and Pope Eugenius II: 'Ordines', ed. Zeumer, pp. 706 (26), 617 (14(a)), 620 (18(g)), etc.; von Schwerin, *Rituale für Gottesurteile*, pp. 42–7; Nottarp, *Gottesurteilstudien*, pp. 323–30 (ready to credit at least the Eugenius part of the story).

of rituals linking a Rheims liturgy with English ‘Iudicium I’, most probably among the books brought in by Grimbold, sparked a heightened awareness of the possibilities of such procedures among the West Saxon intelligentsia. Edward the Elder may have issued his ground-breaking law in Grimbold’s lifetime. Wulfhelm and Oda, the likely architects of his son’s law-making, will have been educated in that formative climate.²²² The result was to make Old English justice even more aggressively and explicitly a Revelation of God’s than was the case in the Carolingian empire. Once again, the makers of the English kingdom were ready to think through the lessons of its Frankish predecessor.

With ordeals, as with so much else, the Conquest ushered in a new and more thoroughly French set of priorities.²²³ Most obviously, it introduced the judicial duel, which was well established among the Franks as well as the Burgundians, but of which there is not so much as a hint in pre-conquest sources.²²⁴ One of the Conqueror’s few extant laws made it available to his new subjects under conditions likely to favour the incomers.²²⁵ Ordeals were now used – or anyway available – for resolution of property disputes between ostensibly equally matched parties. They crop up quite regularly in Domesday Book, especially on ‘Little Domesday’s’ eastern circuit.²²⁶ They had never, seemingly, been thus applicable in the Old English kingdom. But all of that is a subject for a later chapter (chapter 14, pp. 000).

The socio-cultural setting of ordeals in the early medieval West has recently been a matter of debate. On the one hand there is emphasis on the ‘face-to-face’ context: the system’s dependence on neighbourly assessment, and hence capacity to express neighbourhood judgement. On the other stands stress on ‘hard, intrusive, rule-making

²²² Above, chapter 6, pp. 423–6, 438–9, 458–62.

²²³ *Iud* X – XVI are a substantially new set of rituals and prayers (though drawing on much the same range of precedents and images), of post-conquest date and in manuscripts of actual or ultimately continental provenance.

²²⁴ Liebermann’s ‘Anhang’ (*Gesetze* I, pp. 430–1), is in one twelfth-century MS (Cotton Tiberius B.viii, ff. 155r – 156v: cf. *Coronation Book of Charles V of France*, but otherwise only in much later books. Cf. Guillot, ‘Le Judiciaire’.

²²⁵ *Wl* lad; above, chapter 5, p. 399.

²²⁶ E.g. *ELS* 15, pp. 38–9; and 31, 85, 100–2, 104–5, 110–13, etc. Cf. Fleming, *Domesday Book and the law*, p. 524 (V 1 3, *s.v.*).

lordship'.²²⁷ These positions need by no means be incompatible. The 'verdict' of an ordeal was in the last resort the interpretation that its immediate audience put upon its outcome. Clearly, then, it was an expression of local opinion, a matter of the 'micro-politics of social interaction'. We might well believe that a sympathetic community could 'read' the signs so as to spare an accused from the ultimate penalty – much as early modern juries deliberately assessed the value of stolen goods below the level to which capital punishment applied.²²⁸ When Rufus furiously denounced the way that fifty down-at-heel English gentry had come through the hot-iron ordeal on a charge of poaching his deer, this was not reason's voice nor indeed (whatever Eadmer's view) merely that of a habitual blasphemer echoing through a priest-ridden epoch. It need have signified neither more or less than a modern constabulary's resentment of a jury that failed to deliver the desired verdict.²²⁹

Yet this episode forcibly reminds us that high authority had its own expectations of the ordeal. On all the evidence, liturgical, even forensic, as well as legislative, its application was utterly consistent with the assumptions on which the kingdom of the English was founded. God could be relied upon to close the trap on those whom the community had reason to disown. To invoke His Biblical operations was to tighten the psychological tourniquet with which officials like Eadric might expect to disable the guilt-ridden – or socially insecure. Such a process might be highly unpleasant but was in its own terms anything but irrational. Ordeals, like tithes, were a hallmark of a theocratic regime. To call down God's justice went with paying His dues, sharing His holidays, emulating His purity. The rituals belonged in pontificals because a bishop was a theocratic state's good servant, but also because, like the coronation liturgies found in some of the same books, they had at least quasi-sacramental force. The conviction that justice could thus be seen to be done, widespread in the run of human societies, reached

²²⁷ Hyams (as n. 192), Brown (as n. 213); Bartlett (as n. 191), p. 36. Cf. White, 'Proposing the Ordeal', pp. 96–106.

²²⁸ Herrup, 'Law and Morality in Seventeenth-century England'; Sharpe, *Crime in seventeenth-century England*, pp. 146–7. The quoted phrase is that of Miller, *Bloodtaking and Peacemaking*, p. 4.

²²⁹ *ELS* 150 (i, 122).

an all-time peak of intellectual respectability under the Carolingians and their English students because God could so confidently be expected to give visible support to those who could be so sure that they were doing His Will. Like state prosecution of fornication, it lost credibility just when, and because, it ceased to seem at all likely that God did His work directly through the secular arm.

(ii) Reprieve and Pardon

Bishop Theodred of London (c. 924–51) was a leading architect of King Æthelstan's regime. One of his resulting responsibilities was to oversee the East Anglian Church, whose bishoprics had been closed down under Scandinavian assault and did not retrieve a prelate of their own until the 950s.²³⁰ He was thus a promoter of the cult of the martyred King Edmund.²³¹ Abbo of Fleury's *Life of St Edmund* tells how eight burglars conspired to break in by night and remove the precious gifts and ornaments with which the faithful had decked out the new tomb. However, they were immobilized by the saint's power in the very process of penetrating his sanctuary ('one hanging from his ladder in mid-air, another bent double at his digging'). They were thus arrested in the morning and led before Theodred, who at once sentenced them to be hanged. Æthelstan's laws on thieves caught in the act actually left him with no choice. All the same, says Abbo, he was to repent his judgement for the rest of his life, and indeed ordered a three-day fast to avert divine indignation. He had forgotten the Proverbial injunction that those led away to death should always be delivered; how the prophet Elisha had given Samaritan raiders bread and water and sent them home; that canonical authority forbade a bishop or any cleric to do the job of a 'denouncer (*delatoris*)', 'because

²³⁰ Whitelock, *Some Anglo-Saxon Bishops of London*, pp. 17–21. For Theodred and Æthelstan's legislation and the implications for the story that follows in the text, cf. chapter 5, pp. 296–9.

²³¹ Further to the text as follows, Hermann, *De Miraculis* 2, pp. 29–30, explicitly dates the saint's translation to the future Bury St Edmunds in Æthelstan's reign, at the time when we gather from Theodred's will (WhW 1, pp.2–5; S 1526, preserved at Bury) that he was administering the East Anglian diocese(s). See also Whitelock, 'Fact and fiction in the legend of St Edmund', p. 222.

it was quite unfitting that ministers of eternal life should give their assent to the death of any man'.²³² Whether or not any such sentiment ever in fact crossed Theodred's mind – and Æthelstan was to send him on a mission of (relative) mercy to Archbishop Wulhelm – Abbo, and Ælfric after him, voiced a principle that was well-established by the end of the tenth century and did leave a mark on the theory if not necessarily the practice of early English law.

There had long been a strand in Canon Law that expressed unease about the involvement of clerics in secular judgements. Its inspiration, as is evident from Abbo's story, lay in those parts of the Bible that took the side of the condemned against their sentencers, and in St Paul's prohibition of the implication of Christ's soldiery in the world's business. The point was unequivocally made in the Carolingian *Quadripartitus*, and taken up in detail by Ælfric's Pastoral Epistles. The clergy of his diocesan, Bishop Wulfsgie of Sherborne, were admonished for their love of 'the world's discourse (*woruldspraca*)' and ambition to be sheriffs. Archbishop Wulfstan's priests were warned not to be 'judges in the condemnation of man'. In particular, they were excluded by a string of Gospel quotations from judging thieves or robbers. 'The lamb is innocent and does not have the bite of evil. So whoever is a judge or slayer of robbers cannot be counted among the innocent'. Ælfric went on to spell out the message specifically for bishops in a letter for Wulfstan's personal perusal.²³³ The point of all this cannot have been lost on someone as committed as Wulfstan to the bishop's role in marshalling society for God's inspection. Ælfric's view was duly quoted in the 'Excerptiones Egberti'.²³⁴ But the archbishop could hardly go all the way with it. His 'Institutes of Polity' repeatedly stressed how bishops should lay down God's law, for example in a

²³² LS 157; Abbo, *Life of St Edmund* 15, pp. 83–5, and cf. *Ælfric's Lives of Saints* xxxii, ed. Skeat, II, pp. 328–31. The Biblical texts are Proverbs 24:11, II Kings 6:21–3, and I Corinthians 6:4.

²³³ II Timothy 2:4 (and cf. previous n.); *Antiqua Canonum Collectio* iv 200, ed. Richter, p. 23; *Hirtenbriefe Ælfrics* 1:103, 3:80–90, 2a:xv, pp. 23, 66–7, 226–7. Compare the important discussion by Vollrath, *Synoden Englands*, pp. 329–38, which, however, reads the significance of the evidence somewhat differently.

²³⁴ *Exc. Can.* 156–7 (135–6); on Wulfstan's responsibility for this collection, see chapter 4, pp. 217–19, and my 'Archbishop Wulfstan', pp. 000 (231–40).

‘gemot’ (there being no word that this was a spiritual gathering). His ‘Episcopus’, incorporated into *Polity*’s second edition, declared explicitly that a bishop was to give leadership in ‘worldly as in divine business’; he should thus ‘eagerly settle disputes and procure peace alongside the secular judges (*worulddeman*)’, ‘arrange purgation in a prosecution’, ‘define judgements with secular judges’.²³⁵

The compromise attained by Wulfstan and other exponents of sub-Carolingian jurisprudence was that the death penalty should be used more sparingly than hitherto. That way, bishops could avoid the yet greater reproach of shedding blood without washing their hands of the judicial process.²³⁶ On behalf of Æthelred and again Cnut, therefore, Wulfstan stipulated that ‘Christian men are not to be condemned to death for all too little, but otherwise one is to devise lenient punishments (*fridlice steora*) ... and not ruin for little God’s handiwork and his own merchandise, that he so dearly bought’.²³⁷ The alternative penalties were those laid down for the notoriously suspect later in Cnut’s code, and also, if Lantfred can be believed, by Edgar previously. Thieves and incorrigible evil-doers were to lose hands or feet or both, and for graver offences their eyes, nose, ears and upper lip or scalp.²³⁸ The policy corresponds to one set out in Wulfstan’s ‘Canon collection’, criticizing secular judges of the time in that they precipitately sentence men to death for slight offences, and suggesting the alternatives of enchainment, flogging, hunger or cold, removal of skin, hair or beard, and, in more severe cases, loss of eye, nose, hand, foot or some other limb (one version adds prison, the stocks, tarring and feathering, and the pillory). This strategy is ascribed to ‘Saxony’, though nothing seems to

²³⁵ *Inst. Pol.* II 81, p. 76; *Episc.* 1, 4 – 5, 9. On these texts, see chapter 6, pp. 458, 463–4, and chapter 5, n. 584.

²³⁶ For an interesting Carolingian foretaste, see *Cap.* 83:8, that no one was to dispense secular judgements in the ‘atrium’ of a church, ‘because men sentence to death at them’; this was an amplification of the point made in 813 Councils, that secular pleas be not held in churches, ecclesiastical buildings or ‘atriis’: *Concil.* 34:22, 36:40, and *Cap.* 78:21; cf. above, pp. 000, and nn. 123, 125.

²³⁷ V Atr 3 – 3:1 (VI 10 – 10:1, Lat. with further scriptural quotation), Cn 1018 4 – 5, II Cn 2 – 2:1.

²³⁸ II Cn 30:4–5; LS 155, Lantfred, *Miracula Sancti Swithuni* 26; for full discussion, see above, chapter 3, pp. 125–7.

be known of its actual origins.²³⁹ On closer examination, therefore, leniency is neither the most obvious quality nor in fact the rationale of these penalties. The priority, as chillingly conveyed by Cnut, was that scope be given to preserve the culprit's soul. Wulfstan's 'Edward and Guthrum' tract spelled it out more clearly: such human wreckage as survived for three days (though apparently not less), could *with the bishop's permission* have wounds and salvation attended to.²⁴⁰

This development has an important bearing on one of William the Conqueror's supposed judicial innovations and will be discussed further in chapter 14. Attention may meanwhile and finally switch to a comparable tramelling of legal rigour. Wulfstan's 'soul-saving agenda' sometimes extended to inserting a proviso that the full sanctions of a law would not apply if 'amendment' were made, by which he appears to have meant spiritual redress through penance and also perhaps compensation to injured parties.²⁴¹ There was a place too for a royal prerogative of pardon.²⁴² Neither device was without precedent, even in the earliest phase of Anglo-Saxon legislation, but the archbishop appreciably increased their incidence.²⁴³ It was quite logical for an approach that so closely equated crime with sin to allow that terms be made with God as with human sufferers from wrong. The same approach of course dictated heightened concern with the internal

²³⁹ BL, Cotton MS Nero A.i, ff. 157rv, Corpus Christi College, Cambridge, MSS 190, p. 242 (*Hirtenbriefe*, ed. Fehr, Anh. III 38), 265, pp. 109–10; Bateson, 'Worcester Cathedral Book', pp. 724–7, at 726–7 (Corpus 265 version); Whitelock, *Councils and Synods* I, p. 348, n. 1 (Nero A.i, Corpus 190) – quoting some of the same texts as VI Atr 10:1 (Lat.). See also *Penit. Ps.Th.* i.

²⁴⁰ II Cn 30:5, EGu 10.

²⁴¹ EGu 4; EGu 11 = VI Atr 7 = Cn 1018 7 = II Cn 4a; VIII Atr 27 = I Cn 5:3; VIII Atr 40 – 41; Cn 1018 8 – 8:1 = II Cn 4:1–2; Cn 1018 10 = II Cn 7; Cn 1020 17; II Cn 36:1, 39, 41 – 41:2. Cf. Dr Schwyter's important discussion and revealing fig., 'Syntax and Style', pp. 202–4 (though a high proportion of his 'butan' occurrences are essentially stylistic), and above, chapter 5, pp. 340, 354 (which regrettably overstates the extent of Wulfstan intervention).

²⁴² *Grið* 16; VIII Atr 1:1 = I Cn 2:3; Cn 1020 12 (probably not Wulfstan's personal work, chapter 5, p. 347); II Cn 2:2, 59; and cf. II Cn 12, 15; the first two arise from seeking of sanctuary.

²⁴³ Ine 6, 36:1, Wi 26, Af 2, 7, 77(?), I Ew 2:1, II As 26, V As Pr.:1, VI As 1:4–5, I Em 1, 4, 6, II Em 1, Hu. 3:1, III Eg 3 – 4 = II Cn 15:1, 16, III Atr 16, IV Atr 5:4; more general statements (either way) are II Em 3, III Eg 1:2 = VI Atr 10:2, III Eg 7:3 = II Cn 26, IV Eg 1:1,5, 9. Cn 1018 8 etc., 36:1, 41:1, 59 rephrase earlier laws or Wulfstan's own, in part perhaps to spell out 'merciful' alternatives more clearly.

psychology or external circumstances of any crime:

Always, the more powerful a man here in the world, or the higher in privilege of rank, the more deeply should be amend his sins and the more dearly pay for every misdeed; for the strong and the weak are not alike nor can they bear a like burden, any more than the sick are like the healthy. Thus one should moderate and distinguish reasonably, whether in religious penances or worldly punishments, between age and youth, wealth and poverty, and every category. And if it happen that anyone commits any misdeed involuntarily or unintentionally, that is not the same as he who offends of his own free will; so also he who does wrong under compulsion is always worthy of protection and of better judgement ... And for fear of God, one should eagerly show mercy and leniency, and give such assurance (*beorge*) as there is need of.

This passage is from the appendix to the version of Æthelred's Enham decrees which Wulfstan probably drafted when preparing one of his codes for Cnut, and it duly left its mark on the Winchester code.²⁴⁴ The influence upon it of penitential casts of thought is very clear. Most of it did in fact come from a tract on Confession that was certainly available to Wulfstan, if probably not his own work.²⁴⁵

One of legal history's most enduring illusions is that 'primitive' law draws no distinction between the degrees of any offence, 'punishing' the unintended, involuntary or otherwise excusable wrong as heartily as the premeditated or malicious. This misconception should never have survived a wholly devastating onslaught by the lamented David Daube.²⁴⁶ Inasmuch as it persists, that is because of failure to distinguish between the priorities of penalization and compensation. It is entirely appropriate that

²⁴⁴ VI Atr 52 – 53, II Cn 68 – 68:3; cf. above, chapter 5, pp. 333–5, 346, 362–3.

²⁴⁵ Conf. iii; cf. above, chapter 4, pp. 217, 222.

²⁴⁶ Daube, *Roman Law*, pp. 157–75.

legal systems which, in considering offences, take as their starting-point the harm suffered by victims or their dependents, and ways in which this can be remedied, should continue to insist that the latter in some way receive satisfaction – even, if it come to that, through wreaking comparable damage in turn – from the source of their misfortune. That need in no way mean that they are unaware of the difference between wrongs that are wilful, negligent, accidental or provoked. No apophthegm even of the much-cited *Leges Henrici* has been quoted as often as ‘he who unknowingly offends will knowingly amend (*qui inscienter peccat scienter emendet*)’. Yet each time the author made this point (the word ‘*emendet*’ not of course meaning ‘be punished’), it was part of a wide-ranging and sophisticated review of the circumstances from which death or injury might result, and of the importance of making allowance for them.²⁴⁷ Having said that, a system which, like that of the early English kingdom, continued to take due note of motive, justification and excuse, whilst moving toward a largely penal view of wrongdoing, might be considered, albeit at the risk of posterity’s condescension, to have been approaching maturity.

The Common Law of high medieval England in effect operated on the assumption that all killings were felonious unless and until proved otherwise. A royal pardon was nonetheless available to those (among others less deserving) who killed by accident or in self-defence. The condition was that aggrieved families or dependents retained the right to bring a prosecution of their own (‘appeal’), or to seek reparation, presumably financial.²⁴⁸ In other words, justice that could be, and as often as not was, cruel and arbitrary left scope for mitigation, and did not altogether close its eyes to the feelings of survivors. Those inclined to characterise any legal abuse as ‘medieval’ might even find something to learn here. However that may be, the policy of the thirteenth-century chancery did not obviously differ from that conveyed in Cnut’s code. The next chapter will provide telling evidence of the ferocity and indeed avarice of Old English criminal law. It will also suggest that the principles of bloodfeud lingered in so far as to reckon

²⁴⁷ Hn 88:6a, 88:1–10; 90:11a, 90:1–11d (esp.11b–d).

²⁴⁸ Hurnard, *The King’s Pardon for Homicide*, pp. vii–xiv, 1–30.

with victims' entitlement to compensation (if no further). This chapter herewith offers indications that degrees of punishment varying in concord with the conditions of an offence were contemplated, anyway in theory. Wherein, then, lay the difference between the exercise of mercy by 'Common' law and that of the Old English kingdom? One contrast was that cases of death by misadventure were not necessarily covered by the courts. An interesting little corpus of slayings within the family circle shows that this entailed penitential pilgrimage to the feet of the pope, but seemingly no prosecution by secular authority, even for a man who hit his mother over the head with a candlestick.²⁴⁹ Otherwise, however, the late Naomi Hurnard's distinguished study, turning as it does on the date 1130, that of the first Pipe Roll, deduces change from the advent of manifest evidence; and admirable as this in principle seems, it tends towards the assumption, generic among legal historians, that the 'backwardness' of a legal system is in direct proportion to its lack of explicit documentation.²⁵⁰ Actually, we may readily accept that the law was less mechanically applied in pre-conquest England, and that, appropriately given its premiss, it might privilege penance over penalty. That does not qualify the evidence that it operated much the same machinery of punishment and pardon, not excluding all possibilities of abuse, as the justice of the twelfth century.

Discussion of this last aspect of the ecclesiological context of early English law has highlighted one of its paradoxes. A system founded on the conviction that God's Law was there to be applied by a regime acting in His name, and so giving a leading role both as agent and spokesman to bishops, might find that they were disqualified by their spiritual calling from acting on the letter of that Law. Such contradictions were no doubt

²⁴⁹ *Lib. El.* ii 60, p. 131; *Chronicle of Hugh Candidus*, pp. 29–30 (the future abbot of Peterborough and Wulfstan's predecessor at Worcester and York, here allegedly Edgar's 'cancellarius' at the time when he suffocated his son in a drunken slumber); *Councils and Synods* I 43, pp. 231–7, nos i – iii, v, vii–viii (a collection in Corpus Cambridge MS 265, Oxford, Bodl. Barlow 37, and Copenhagen, Gl. Kgl. Saml. MS 1595 4^o, so apparently originating with Wulfstan (cf. above, chapter 4, pp. 213–19), and comprising three letters of address by him, with five papal replies, one to him).

²⁵⁰ Hurnard, *King's Pardon*, pp. 6–18. Crucial too is her notice of the prevailing concern with compensation and fine in Hn (i.e. c. 1118); yet, p. 7, she also observed (rightly, cf. above, chapter 5, pp. 412–13, chapter 6, pp. 465–70) that 'much of this material may really have been of antiquarian rather than practical interest'.

inherent in statecraft inspired by a Holy Writ which, however it sought to come to terms with imperial authority, was consistently subversive of the political, social and ecclesiastical *status quo*. This is a reminder of another no less important point. There was something experimental about the polities erected by Carolingian and early English rulers. Their architects could reasonably think that they were essaying something that had never been fully tried out before – or not except all too briefly under exceptional Israelite kings. They were yet to be educated by rueful experience in the mysteries of God's ways. Understandably, then, they could be trapped in the dialectic between the ideal and the feasible. Synthesis, which had its own costs, was achieved only at the price of trial – and error.

One other thing has surely emerged from the foregoing. It would be surprising in the extreme if law-making that gave such devoted attention to financing God's Church, to observing His days of rest and recreation, to sharing His imperviousness to the lures of the flesh, and to beaming down His justice and mercy on the miscreant, were content to leave deviance from His norms to be accommodated within the age-old cadences of inter-party strife and negotiation. Nor was it.

Chapter 9. The Pursuit of Crime

In the early months of 1014, the kingdom of the English faced the first of its two eleventh-century conquests. Sveinn's triumphant rampage through southern England had reduced the hitherto obdurate London citizenry to submission – much as William's would, forty-three years later. Æthelred had fled with his wife and two young sons to his brother-in-law, Duke Richard II of Normandy (the Conqueror's grandfather had meanwhile agreed to share the spoils of England with Sveinn). The achievement of Alfred's dynasty seemed, like the other early medieval hegemonies it had sought to emulate, to have collapsed. The kingdom's leading churchman knew why:

It is no wonder that things go wrong with us, for this people ... has become very corrupt through manifold sins and many misdeeds (*synna* 7 ... *misdæda*): through murders and mischiefs, grasping and greed, stealing and spoliation, kidnapping and heathen vices kin-fights and killings, violations of holy orders and violations of marriage, lying with kin and lying with various illicit partners. And also more than should be are in perdition and perjury through oath-breaches and pledge-breaches (*aðbricas* 7 ... *wedbrycas*) and ... breach of fast and breach of festival

Echoing Alcuin's letter on the sack of Lindisfarne in the first Viking the 'Sermon of the Wolf' went on to draw the moral of Bede's *Ecclesiastical History*. Gildas had warned the Britons of their sins; they ignored him; and they lost their land to the English.¹

¹ *Sermo Lupi ad Anglos*, edited by D. Whitelock (Methuen's Old English Library, general editors A.H. Smith and F. Norman, London, 3rd edn, 1967), lines 133–46, pp. 60–2 (and cf. pp. 1–6 for the different versions of this text, and its context). On the events of 1014, see S. Keynes, *The Diplomas of King Æthelred 'the Unready', 978–1016* (Cambridge Studies in Medieval Life and Thought, 3rd series, general editor W. Ullmann, 13, Cambridge, 1980), pp. 225–8; and for Sveinn's pact with Duke Richard II, *Guillaume de Jumièges, Gesta Normannorum Ducum*, edited by J. Marx (Rouen, 1914) v 7, p. 80. For Wulfstan and

Crime, by and large, interests legal historians as little as it does successfully practising lawyers. Pollock and Maitland gave it barely half the attention they devoted to tenure and to ownership. Their distinguished modern heir, Professor Milsom, finds its history ‘miserable’. Furthermore, societies like the Anglo-Saxons are thought to have no real sense of crime: ‘The system of *bot* and *wite* is hardly compatible with the distinction between crime and tort’.² Archbishop Wulfstan’s great sermon should give pause. He was not blaming the Danish victory on a plethora of wrongs indistinguishable from crimes; his confusion, on the contrary, was between crime and sin. As a master of pulpit rhetoric, and as a legal expert who drafted codes in almost exactly these terms for Æthelred earlier and Cnut later, he might be thought exceptionally sensitive. So it is instructive to consider the charm for the recovery of stolen cattle which found its way into both the vernacular legal collections of the early-twelfth century. It ranks cattle-theft with that of the Cross of Christ, which, with the help of Abraham and Job, will ‘lead [the thief] bound to judgement (*ad iudicium ligatum*)’; the penalty that awaits him is compared to the ‘*wite*’ of the Jews for ‘hanging Christ’.³ This is extravagant language for even the most unneighbourly dispute. Apparently, Anglo-Saxons did think that they knew what crime was. Evidently, they at least found it extremely interesting. Indeed, crime was the main preoccupation of the first kings of the English. This chapter contends that the criminal law they developed amounts to a major forensic achievement. It is as likely to arouse horror as admiration in the modern breast. But it has a significant place in English legal history.

Alcuin, compare *Sermo Lupi*, lines 184–99, pp. 65–6, with *Alcuini Epistolae* 17, edited by E. Dümmler (*Monumenta Germaniae Historica, Epistolae Karolini Aevi II*), p. 47.

² F. Pollock and F.W. Maitland, *The History of English Law, before the time of Edward I* (2 vols, revised edition by S.F.C. Milsom, Cambridge, 1968), Book II, chapters 1, 4, 8: of the ‘Doctrines’ chapters, only those on Contract and Family Law are significantly shorter. S.F.C. Milsom, *Historical Foundations of the Common Law* (London, 1969), p. 353; nb too, *loc. cit.*: ‘The starting-point is that of tort’. H. Cam, ‘The Evolution of the Medieval English Franchise’, *Speculum* XXXII (1957), pp. 427–42, at p. 431; reprinted in her *Law-finders and Law-makers in Medieval England* (London, 1962), pp. 22–43, at p. 27.

³ Textus Roffensis (‘H’), f.95r; Corpus Christi College Cambridge MS 383 (‘B’), p. 87; edited by D. G. Storms, *Anglo-Saxon Magic* (The Hague, 1948) 11B, pp. 202–5; cf. Charms 12–15, 86, pp. 206–11, 311, from MSS CCC 41 and Harley 585 (Ker, *Catalogue nos.* 32:6–7, 231:2).

The Meaning of Treason

(i) Forfeiture

Nineteen years before Wulfstan's sermon, Æthelwig, the reeve at Buckingham, together with Wynsige, his counterpart at Oxford, found themselves in serious trouble at court. Leofric, a member of the household of three brothers at Ardley in N.E. Oxfordshire, stole a bridle, *instigante diabolo*. When it was found 'in his bosom', the bridle's owners and the three brothers 'rose up instantly and made war on each other (*concito cursu bellum in invicem insurgentes inierunt*)'. Two of the brothers were killed; the third managed to escape with the robber into St Helen's Abingdon. The neighbourhood heard about it, and Æthelwig and Wynsige buried the brothers *inter christianos*. Nothing more is known of the fugitives, But Ealdorman Leofsig also heard the news; and, coming before the king, charged the reeves with 'wrongly (*non recte*) burying the slain brothers among Christians'.

But I (*sc.* King Æthelred) did not wish to sadden Æthelwig, because he was dear and precious to me. So, at one and the same time, I allowed those buried to rest with Christians, and granted the aforesaid land (Ardley) to him in perpetual inheritance.

The episode is described in the charter recording the grant of Ardley to Æthelwig.⁴ It was one of the long series of Æthelred charters, already discussed in chapter 3, which tell how granted land came into royal hands. Others would in due course recount the exile and forfeiture of Leofsig himself, for killing Æfif, the chief royal reeve, 'inoffensively in

⁴ LS 54, S 884, KCD 1289 (in what follows, I have frequently given only my 'LS' no. to particular cases, though also, as here, fuller bibliographical detail when any document receives more extended discussion; for a concordance of LS nos. with the principal lists and/or editions, see the Appendix to chapter 3, pp. 000 above). The charter is authentic and datable before 21st April 995; it comes from the Abingdon cartulary, but may perhaps have been drafted at Christ Church Canterbury: Keynes, *Diplomas* (as n. 1), pp. 96, 120, 253. The text does not say as much, but there is no doubt that Ardley was forfeited by the brothers. It may not have been their sole property or main seat (see below); but that is perhaps a reasonable deduction, given Ardley's location, and the involvement of reeves from both Oxford and Buckingham.

his own home, which is a wicked and alien deed among Christians and pagans (*in propria domo eius eo inscio perimere, quod nefarium at peregrinum opus est apud Christianos et gentiles*); and also of his sister, Æthelflæd, who did everything she could to assist him, in defiance of the Judgement by the king and ‘the wise in council’, that any who presumed to infringe the sentence ‘would know themselves deprived of all their goods (*exhereditari se sciret omnibus habitis*)’.⁵ What is singular about the Ardley charter is not the forfeiture of the feuding brothers, but the charge levied at the reeves. How did they come to face royal justice and to need a royal pardon? Why was their burial of the brothers an offence at all?

An answer emerges from a case some forty years earlier still. An estate at Sunbury (Middlesex) was forfeited under circumstances examined in the next part of this chapter. Edgar granted it to Ealdorman Athelstan, who sold it to one Ecgferth, Ecgferth, In his turn, bequeathed the estate, and one at Send (Surrey), to Archbishop Dunstan, for the ‘ward (*mundgenne*)’ of his widow and child. When he died, Dunstan approached the king, but was told that ‘my *witan* have declared Ecgferth forfeit for all his property, by the sword that hung on his hip when he drowned (*habbað ætreccð ... ealle his are þurb þæt snyrd þe him on hýpe hangode þa he adranc*)’. The king then granted Sunbury and Send to Ealdorman Ælfheah, Dunstan offered ‘his’ (presumably Ecgferth’s) wergeld. Edgar replied, in almost audibly sardonic tones: ‘That might be offered for him in return for a clean grave (*þæt mihte beon geboden him wið clænum legere*) but I have left the whole suit (*spæce*) to Ælfheah’. The Archbishop was obliged, six years later, to spend £115 on buying the lands. It is impossible to say just what Ecgferth had done. He was evidently a man of property, but he appears in no other source, narrative or documentary, as one might have expected him to had his crime had major political implications, like Leofsige’s.⁶ The ‘sword on his hip’ perhaps implies the sort of mayhem that had embroiled the three Ardley brothers. What is clear is that his crime, like that of the Ardley brothers, deprived him not only of his land but also, in the normal course, of Christian burial. The cost of a ‘clean grave’ was

⁵ LS 71, 75; *ASC* 1002 CDE, p. 238.

⁶ LS 40, S 1447, Robertson, *Charters* XLIV, pp. 90–3. There is no Ecgferth among the grantees or witnesses of Edgar’s charters.

wergeld – the price of life. To bury men killed fighting for a thief meant much the same as abetting an outlaw, like Æthelflæd. Goods, life and soul were alike forfeit. This is hardly the process of tort. So far from being treated as affronts to an individual, amendable by feud or composition, the offences of the Ardley brothers and of Ecgerth seem to be seen as crimes against society, punishable by its constituted authority, the king or king's reeve, and also by its patron, God.

Chapter 3 observed that the proportion of recorded Anglo-Saxon lawsuits where crime is the issue, or one of them, is remarkably high, considering that documentation comes mainly from titles to property kept by churches. Of the 179/80 catalogued cases, eighty-two/three relate to crime and its consequences, a ratio of 4:5. If one discards pre-Alfredian pleas, none in any sense criminal, the eighty-three compare with seventy-eight that are purely 'civil'.⁷ Even when one sets aside the twenty criminal cases among the twenty-six in the fourth (narrative) category, and concentrates on those in charters or *notitiae*, in Domesday Book or in cartulary-chronicles, the resulting sixty-three amount to 46.6% of the 135 after 890 which ostensibly concern property alone. The best way to show that this is indeed an extraordinary state of affairs is to put the English evidence alongside that from continental Europe. Hübner's still valuable list (which in effect also excludes category four cases) contains some 480 records of legal process from the Merovingian and Carolingian kingdoms down to 911 in eastern Francia and 987 in the West (Italy is excluded from these calculations as a special case); and at least another

⁷ The total no. of cases varies as to whether no. 72 a)–b) (Wulfgeat, S 916, 934) is counted as one case or two: see my discussion, 'Lawsuits', n. 29, pp. 256–7, and cf. S. Keynes, 'Crime and Punishment under Æthelred 'the Unready'', *People and Places in Northern Europe 500–1600: Essays in Honour of Peter Hayes Sawyer*, edited by B. Strand and I.N. Wood (Ipswich, 1990), pp. 67–81, at p. 000. In any event, the total has increased by one since my list published: above, p. 000 and n. 170. To be added to the table, 'Lawsuits', p. 280, are the new suit ('177a'), six 'unjust pleading' cases (35, 111, 116, 120, 134, 143, below, pp. 000), 39 (new suit, though not new crime) and 167, a 'maladministration' case, like one of the charges levied in nos. 163, 165. I am aware of the difficulty of distinguishing 'civil' from 'criminal' pleas at this date, but the logic of this chapter is that the distinction was as evident to the Anglo-Saxons as to 'Glanvill'. The confusion, if any, arose from the encroachment of 'criminal' on 'civil' (as in the 'unjust pleading cases') rather than from inability to separate crime and tort.

dozen should be added. A mere twenty-seven report criminal proceedings.⁸ The pattern for the Ottonians and Salians is much more like the English. From 936 to 1056 there was a minimum of forty-three cases north of the Alps where crime was a central issue, as against some fifty-five property pleas without obvious reference to crime and punishment. The German percentage is still below the English for the same period; and it should be noted that Hübner closed his list *c.* 1000, so that the non-royal documents where crime rarely features are under-registered.⁹ Further, Professor Leyser's seminal study of Otto the Great's rule rightly makes much of the large number of such cases in his diplomas. But Otto's eighteen compare with twenty in the royal diplomas of Æthelred the Unready, who reigned almost exactly as long, and who is not usually ranked (unlike Otto) among history's more masterful rulers. Counting all documents bar

⁸ R. Hübner, 'Gerichtsurkunden der fränkischen Zeit', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, germanistische Abteilung* 12 (1891), Anhang, nos. 39, 80, 121 + 132, 123 (?), 133–5, 176, 201 (?), 218, 233, 253, 326, 363, 421, 439, 442, 445, 462, 464, 466–7 (this last is a *spurium*, but its narrative, unlike that of Hübner 475, seems likely to relate to a real episode: see authentic Ottonian diplomata (abbreviations as next note): *DOII* 165, pp. 185–7, *DOIII* 1, pp. 393–5, *DHIII* 260, pp. 345–7); and further, *Recueil des Actes de Charles II le Chauve*, edited by G. Tessier (3 vols, Chartes et Diplômes relatifs à l'Histoire de France, Academie des Inscriptions et Belles-Lettres, Paris, 1943–55) 242, 347, 427–8, II, pp. 48–50, 272–4, 454–8; and *Recueil des Actes d'Éudes roi de France*, edited by R.-H. Bautier (Chartes et Diplômes, Paris, 1967) 34, pp. 147–50. For the Italian cases, listed by Hübner in 'Gerichtsurkunden', Part II (as above, 14, 1893), see above pp. 000, and below 000, n. 12.

⁹ *Conradi I, Heinrici I et Ottonis I Diplomata* [*DOI*], edited by Th. Sickel (*Monumenta Germaniae Historica, Diplomatum Regum et Imperatorum Germaniae* I) 59–60, 107, 115, 135, 155 + 166 + 189 + 201 + 236, 171, 194–5, 200, 204, 207, 217 + 219, 226, 316, 320, 330, 331 + 332 + 333, pp. 141–2, 190–1, 197–8, 215, 236–7, 247–8, 271, 280–1, 237–8, 252–3, 275–6, 280, 282, 285–6, 299–302, 310–11, 429–431, 434–5, 444–7; *Ottonis II Diplomata* [*DOII*], edited by Th. Sickel (*MGH, Diplomata* II (ii)) 127, 353, pp. 538–9, 782–3; *Heinrici II et Arduini Diplomata* [*DHII*], edited by H. Bresslau (*MGH, Diplomata* III) 215 (?), 410 (?), 428, 434, 480 (?), 498–9, pp. 252, 525, 548–9, 555–6, 612–13, 635–6; *Conradi II Diplomata* [*DKII*], edited by H. Bresslau (*MGH, Diplomata* IV) 217 (?), pp. 296–7; *Heinrici III Diplomata* [*DHIII*], edited by H. Bresslau and P. Kehr (*MGH, Diplomata* V) 43 + 44, 74 (?), 92 (?), 265, 305 + 310 + 311, 333 + 335, 334, 360, 361, 367, pp. 53–5, 98–9, 118–19, 352–4, 414–15, 423–5, 455–8, 489–92, 499–500. To these may be added Italian cases: *DOII* 130, 285, pp. 146–7, 332–3; *DHII* 281, 321 + 322, 336 + 349, 337, pp. 332–3, 402–8, 426–7, 447–8, 428–9; *DKII* 54, 251, 255 + 271, 273, pp. 63–4, 346–8, 352–3, 376–7, 378–9; *DHIII* 29, pp. 37–9; but the effect of including Italy is to widen the Ottonian ration, in that there is a much larger of Italian 'civil' *placita*: cf. pp. 000. Again, the German total of 55 (including Italy) is 2.27% of a total 2426 royal diplomata, whereas the 20 in Anglo-Saxon royal charters (LS 27, 36–7, 41, 44, 48, 54, 56, 57 + 58, 60–1, 63–4, 68, 70–1, 72 a), b), 73, 75–6) is 2.61% of the 765 authentic texts.

category four, Edgar's reign saw a minimum of fifteen instances in half the time.¹⁰

This introduces a second field of comparison. Nearly all the twenty-seven Frankish cases concern disloyalty or disobedience of various types; the exceptions are single instances of homicide, *latrocinium* and *incestuosa vel alia illicita opera*, together with one vague reference to *culpa*.¹¹ The German picture is this time no different. The forty-three break down into twenty-six with no specific charge, twelve where it is treason or the equivalent, and one each of arson, homicide, *latrocinium*, incest and illegitimacy.¹² Whatever one's view of the relation between crime and politics, there is little doubt that politics lay behind not only German 'treason' charges but also most other proceedings against depravity specified or otherwise. An example is the case of Count Tiemo, of whom Henry III's diplomas say only that his lands had passed by lawful judgement into imperial lordship. Adam of Bremen shows that what he actually did was to avenge the

¹⁰ K. Leyser, *Rule and Conflict in an Early Medieval Society: Ottonian Saxony* (London, 1979), pp. 36–8. (His list, p. 153, n. 33, also includes revoked benefices, DOI 61, 197, pp. 142, 197; to these one could add DOI 58, pp. 140–1; and, for other reigns, DOIII 64, 175, 177, 184, 312, pp. 470–1, 585–8, 593–4, 738–9, DHII 315, pp. 395–6, etc.; but, since benefices were revocable in principle, I have excluded these cases from my figures.) Æthelred's cases are LS 44, 48, 54, 56–8, 60–1, 63–4, 68, 70–1, 72 a)–b), 73, 75–6; one can perhaps add LS 62 (S 1223), a private charter relating to a forfeiture said to have occurred *temp.* Æthelred II. Edgar's 15 are as tabulated, 'Lawsuits', p. 280, minus 154–6 (category 4), but plus nos. 35, 39, 116 (see n. 7) and 36–7 (cases resolved under Edgar).

¹¹ Homicide: Hübner 253; *Latrocinium*: *Receuil Charles II* 242; 'Incest': Hübner 176; '*Culpa*': Hübner 421. Note too '*negligencia*': *Receuil Charles II* 427, *Receuil Endes* 34; '*nequitia*': Hübner 462.

¹² The Ottonian and Salian breakdown is as follows: unspecified: DOI 59–60, 107, 135, 171, 194, 207, 217 + 219, 226, 330, pp. 141–2, 190–1, 215, 252–3, 275, 285–6, 299–302, 310–11, 444–5; DOI 102, 141, pp. 115–16, 158–9 [Italian: 130, pp. 146–7]; DOIII 353, pp. 782–3; DHII 215 (?), 410 (?), 428, 434, 480 (?), 498–9, pp. 252, 525, 548–9, 555–6, 612–13, 635–6; DKII 217 (?), pp. 296–7 [Italian: 255 + 271, 273, pp. 352–3, 376–7, 378–9]; DHIII 43 + 44, 74 (?), 92 (?), 265, 305 + 310 + 311, pp. 53–5, 98–9, 118–19, 352–4, 414–15, 423–5. 'Treason' etc.: DOI 115, 155 + 166 + 189 + 201 + 236 [only 189 and 201 mention Guntramn's offence], 195, 204, 316, pp. 197–8, 236–7, 247–8, 271, 280–1, 237–8, 275–6, 283, 429–31; DOI 56b [56a does not even say that the property was confiscated], 163, pp. 66–7, 183–4, [Italian: 285, pp. 332–3]; DOIII 127, pp. 538–9; DHII [Italian: 321 + 322, 336 + 349, 337, pp. 402–8, 426–7, 447–8, 428–9]; DKII [Italian: 54, 251, pp. 63–4, 346–8]; DHIII 333 + 335, 334, 361, 367, pp. 455–8, 491–2, 499–500 [Italian: 29, pp. 37–9]. Homicide: DHII [Italian: 281, pp. 332–3]; DKII 228b, pp. 309–12 [228a does not specify the offence], [Italian: 252, pp. 348–9]. Arson: DOI 200, p. 280. *Latrocinium*: DOI 320, pp. 434–5. 'Incest': DHIII 360, pp. 489–91. 'Illegitimacy': DOI 331 + 333, pp. 445–7.

death of his father in a judicial duel by hanging up the man who had killed him by his legs between two dogs until he died; and what his father had done was attempt to ambush the emperor.¹³

But the English picture is again very different. Allowing for the rhetorical propensities of Æthelred's charters in particular (and as usual omitting category four), seven English prosecutions for treason and the like are to be weighed against sixteen for theft and *latrocinium* (regarding this last as theft aggravated by violence), four for mayhem (usually involving homicide), four other homicides, four sexual offences, two instances of contumacy, a single charge of witchcraft, and six which, as explained in Part 2 of this chapter, can only be called cases of unjust pleading. The impression is such that, while one instinctively reads treason/political opposition into unspecified German charges, one is not nearly so tempted with the nineteen English prosecutions where no detail is given.¹⁴ It may well be that if there were the same wealth of narrative material for the last two centuries of Anglo-Saxon England as there is for the first century and a quarter of Germany, it would become clear that feuds and struggles for power underlay many English allegations of what, as they stand, seem relatively lesser crimes. One should therefore maximize the possible 'politics' figure, by including all examples of resisting the king's judgements and killing his officers (royal service was evidently somewhat hazardous under Æthelred II), plus any other where there is the slightest reason to suspect a political dimension. Even then, one is left with thirty-nine 'minor' offences, as

¹³ DHIII 305 + 310 + 311, pp. 414–5, 423–5; *Adam Bremensis Gesta Hammaburgensis Ecclesiae Pontificum*, edited by B. Schmeidler (*Monumenta Germaniae Historica, Scriptores Rerum Germanicarum in Usum Scholarum*, 3rd edn) iii 8, pp. 148–50; K. Leyser, 'The German Aristocracy from the Ninth to the Early Twelfth Century: a Historical and Cultural Sketch', *Past and Present* 41 (1968), p. 42 (reprinted in his *Medieval Germany and its Neighbours 900–1250* (London, 1982), pp. 161–89, at p. 178).

¹⁴ Unspecified English charges are: LS 33, 36, 44, 48, 51, 64, 70, 72 a), 73, 79, 81, 88, 94, 97, 99, 101, 107, 118, 131; treason and desertion: nos. 27, 30, 62–3, 72 b), 76, 144; theft and *latrocinium*: nos. 23, 25, 31, 37, 38–9, 41, 45, 56, 60, 100, 102, 124, 127, 129, 132; mayhem, usually including homicide: nos. 40, 54, 58, 71; sexual offences: nos. 29, 53, 68, 78; homicide: nos. 50, 61, 145, 148; contumacy: 57, 75; witchcraft: no. 43; unjust pleading (see below): nos. 35, 111, 116, 120, 134, 143. Category 4 cases work out as: unspecified, LS 154, 160, 171; treason and maladministration etc., nos. 162–5, 167, 170, 175; theft and *latrocinium*, nos. 155, 156–8, 169, 173, 178; mayhem, no. 177a; homicide, no. 161; coining, no. 174.

opposed to twenty-four with a whiff of treason.¹⁵ And suppose that a large majority of English cases were indeed examples of man's unregenerate confusion between opposition and wickedness: there still remains an important ideological contrast between a culture where almost the only weapon of political opprobrium was 'infidelity', and one that seized on the whole arsenal of human deviations. Victims of Otto's remorseless purposes have not gone down in history as stealers of cattle, let alone belts.

Those whose knowledge of anti-social or anti-establishment behaviour is taken from assize roles, quarter-sessions records or law reports, and who naturally find this type of evidence poor stuff, need to realize that specialists in Europe's pre-bureaucratic age are lucky to have it at all. The reason why crime features in extant records, which almost by definition relate to property or privilege, is that it led to forfeiture. As was noted in chapter 3, recipients of forfeited property were understandably concerned that the claims of one-time owners and their kin be written out. The contrast in evidence between the two sides of the Channel should therefore mean that a larger amount of land was forfeit in England on a wider variety of pretexts. Among warrior-aristocracies whose ethic dictated that loyalty earned landed reward and *vice versa*, the dispropriation of the disloyal was a matter of course. What stands out is the English view of disloyalty. Later Anglo-Saxon Kings were seemingly more active and aggressive than their predecessors or continental counterparts in the fight against crimes that did not *directly* affect their own interests. 'Disloyalty' covered offences against the subject as well as the 'state'. Both were offences against God. Why?

Before this question is answered, four others need a moment's attention. First, was forfeiture as effectively enforced throughout the English kingdom as in its Wessex heartland? Until the mid-tenth century, instances are confined to the area south (and usually southwest) of the Thames.¹⁶ Under Edgar, they extended to East Anglia and

¹⁵ To the seven treason cases above, one can add: unspecified, LS 33, 36, 44, 48, 64, 72 a), 79, 81, 101, 118 [plus, Category 4, homicide: no. 161]. Cf. also Helmstan, pp. 000 above.

¹⁶ LS 23, 25, 27, 29–31, 33. Exceptions are nos. 131, 157 and perhaps 171.

eastern Mercia. Thereafter, they have a relatively even geographical spread.¹⁷ But the pattern is complicated by the distribution of the evidence. Forfeiture appears in eastern counties from Edgar's time, because it is then that Ely and Ramsey sources come on line. One could of course regard the Ely and Ramsey foundations as proof (or indeed channels) of increased royal power in the area. But that consideration hardly applies to the four easterly forfeitures out of five in Domesday Book. Little Domesday (and also Lincolnshire's survey) were simply more voluble about lawsuits.¹⁸ If forfeitures become evident wherever and whenever suitable sources are available, there is no real reason to doubt that enforcement coincided with the imposition of West Saxon rule. Indirect evidence does suggest that what historians persist in calling the 'Reconquest of the Danelaw' was accompanied by dispropriation of the recalcitrant in favour of an incoming elite, much like the Norman Conquest itself.¹⁹ That said, an exception should be made of Northumbria. One of the first cases north of the Thames is Archbishop Osketyl's confiscation of Helperby, in the North Riding of Yorkshire, from two brothers who shared a wife.²⁰ It might be thought exceptional. The next Northumbrian prosecution was that of Aldan-Hamal by Earl Tostig. There is some suggestion that Tostig's handling of the case involved the sort of outrage against northern norms that prompted the 1065 rebellion against his rule.²¹ It will soon be seen that the usual machinery of criminal

¹⁷ For example, forfeitures under Æthelred are located as follows: pre-886 Wessex: LS 44, 48 (?), 57-8, 60, 72 a)-b), 158, 169, 174; non-Viking Mercia: nos. 54, 56, 61, 63-4, 68, 70-1, 76, 79, 81; ex-Danelaw: nos. 50-1, 62, 73, 75, 107, 144. Ely sources contribute five of Edgar's total: nos. 118, 124, 127, 129, 132.

¹⁸ LS 99-102. I discuss the distribution of Domesday cases in a forthcoming paper on 'Domesday Book and Anglo-Norman justice' [=P. Wormald, 'Domesday Lawsuits: a Provisional List and Preliminary Comment', *England in the Eleventh Century*, ed. C. Hicks (Stamford, 1992), pp. 61-102.]

¹⁹ See (e.g.) *The 'Book of Bishop Æthelwold' and other record of the history and endowment of Ely Abbey in the tenth and eleventh centuries* (forthcoming) 35, p. 000 (= *Liber Eliensis*, edited by E.O. Blake (Camden Society XCII, London, 1962) ii 25, p. 99). On analogy with the post-conquest regime, one might wonder about the circumstances of the purchase of Danelaw property in S 397, 1606 (*Charters of Burton Abbey*, edited by P.H. Sawyer, Anglo-Saxon Charters II, British Academy, Oxford, 1979) 3, 7, pp. 5-7, 11-12; cf. P.H. Sawyer, 'The Charters of Burton Abbey and the Unification of England', *Northern History* X (1975), pp. 28-39.

²⁰ LS 53.

²¹ LS 173; cf. chapter 3 above, pp. 000.

control did not extend north of the Humber. North of the Rivers Ribble and Tees, there were not even shires. But, by the same token, the comparative uniformity of southumbrian administration ought to mean that crime was as vigorously pursued in what had once been the kingdoms of Mercia or East Anglia as in one-time Wessex or Kent.

A second and related question is that of social incidence. Was it merely the powerless that felt the weight of early English criminal law? Or could one contrariwise argue that royal justice was concerned only with the politically threatening? Evidence to be considered soon prompts the unsurprising conclusion that the poor were more vulnerable to the system's rigours. Yet one would expect documents recording forfeiture to concentrate at the upper end of the social scale, like landholding itself. In fact, the same factors seem to apply to the distribution of forfeiture throughout society as to its geographical spread. The average amount of land surrendered in the fifty or so texts that specify quantity works out at just under ten hides.²² Given that five hides was reckoned the proper holding of a thegn, it seems that Anglo-Saxon justice had surprisingly scant respect for persons. It follows, besides, from the answer to the next question that an estate described as forfeit in a charter re-granting it was often only one among a defendant's many holdings. The sole chartered forfeitures of the powerful Ealdorman Leofsige came to less than ten hides, though his sister's amounted to fifteen.²³ The one text that seems likely to list a total forfeiture is, significantly, a restitution. Wulfric got back up to 225 hides spread over three counties, previously lost 'for some little offence (*cuiusdam offensaculi causa*)'. The average figure may thus be too low.²⁴ On the other hand,

²² This of course a very rough figure, not least because some forfeited estates cannot be identified, while the hidage of others has to be taken from Domesday Book, by which time area and/or hidage may well have changed. See also n. 24.

²³ Compare LS 71, 75.

²⁴ LS 36. Of the estates restored here, some were previously given to Wulfric (S 503, 529, 542, 558, 575, 577), amounting to 95 hides (cf. M. Gelling, *The Early Charters of the Thames Valley* (Studies in Early English History, general editor H.P.R. Finberg, Leicester, 1979), pp. 52–3). Near-contemporary charters for others rate an estate restored in Berks (S 591) at 25 hides, and one in Hants (S 414 etc.) at 20. Domesday Book supplies 10 hides for Garford and 16–20 for Chaddleworth (both Berks), 5 for Worting, Hants, and a total of 49 for the Sussex lands. Because restorations are exceptional evidence, Wulfric's estates

some recorded confiscations are very small. A thief lost one hide at Titchmarsh (Northants); Eadwold's *publicum latrocinium* cost him a hide and a half.²⁵ About a dozen cases involve loss than five hides. It is probably symptomatic that the smallest of all, a virgate, is brought out by the searching beam of Domesday Book; and chapter 3 noted that the next smallest is among the more microcosmic details of the Ely *Libellus*.²⁶ Similarly, the beneficiaries of saintly intervention in the fourth category of cases were usually those whose social position put them in most need of it. All of this is as much as to say that different areas of English society, like different parts of England, show up in whatever sources give them the chance to do so. Precisely because of the patchiness of the evidence, one need hardly hesitate to say that criminal justice penetrated to the community's deepest levels, but certainly did not leave its upper crust intact.

Thirdly, was everything at risk, or was inherited property safe? For the reasons just given, charters alone can scarcely answer this question. A salutary lesson is that the only documentary evidence for the losses of the house of Godwine in 1051 are two entries relating to thirteen hides in Herefordshire Domesday.²⁷ It does sometimes seem that all lands were not surrendered. When Æthelweard, of whom 'it is pretty well-known to everyone far and wide how he and his brother were criminals against me, and how both incurred my enmity as a result of their crimes', handed over Waterperry (Oxon.), among other lands, to Æthelred, this was to win back royal *amicitia*, and thus presumably in order that he did *not* forfeit all his property.²⁸ All the same, the language of most charters strongly suggests that forfeiture meant a clean sweep. It is normal to find the words *ealle*,

were omitted from the above calculation; including all the above hidages would have raised the average forfeit to nearly 15. But since recorded forfeitures may often relate to only one of an accused's many properties, Wulfric's case may not have been so very exceptional.

²⁵ LS 41, 37.

²⁶ LS 100, 130; see chapter 3, p. 000 and n. 150.

²⁷ DB i 186a [*Herefordshire* 19: 2–3].

²⁸ LS 64; the probability is that S 937 relates to Waterperry, in that this is a grant to Abingdon, and Waterperry was held in Domesday by Robert d'Oilly (DB i 158c [*Oxfordshire* 28: 22]), a known enemy of the abbey's.

tota or their equivalents.²⁹ Not infrequently, moreover, there is specific reference to ‘inheritance’. The difficulty here is that, as explained in chapter 11, *hereditas* was one of the labels of book land, which, by definition, must at some point have been acquisition, not inheritance. Yet some texts are as explicit as one has any right to expect. Ælfric *Cild*, outlawed for treason at Cirencester in 985, lost ‘not only what he had seized from a certain matron and usurped for himself into his own *hereditatam* but also all the rest that he possessed *iure hereditario*, for himself and all his posterity’. Similarly, the Leofric whose punishment for mutiny was examined in chapter 3 is said to have held the forfeited estate at Whitchurch ‘*paternae haereditatis iure*’.³⁰ These sound not like cases of withdrawn patronage, but like wholesale assaults on a criminal’s standing in society.

To whom, finally, was property forfeit? Is there any sign of its going to anyone other than the king? So far as the evidence of royal diplomas is concerned, the answer is obviously no. For the king to be granting an estate, he must have received it. Charters usually say in as many words that all lands were ‘added/assigned/deputed/subjected to my command/hand/lordship/right’.³¹ Less formal documents occasionally indicate lesser beneficiaries. Osketyl got the estate paid over by the Yorkshiremen who shared a wife. Peterborough’s Abbot Ealdwulf was given Castor and Maxey (Northants.) by those who incurred outlawry for homicide and an unspecified offence respectively.³² But more striking are informal texts that imply or make explicit forfeiture to the king. The Sunbury estate that ended up with Ecgferth had been confiscated by Ealdorman Byrhtferth for theft, but it was King Eadwig who took action when the culprit calmly resumed possession, and it was King Edgar who gave judgement when he tried to retrieve it by

²⁹ E.g., LS 25, 29 (cf. S 814), 30, 33, 36, 40, 57, 60, 63, 72 a) (cf. *ASC* 1006 CDE, p. 240), 101, 118, 131, 143, 162, 165, 170.

³⁰ LS 63, 76. With reference to no. 63, note that the once great family of Ælfhere of Mercia disappears almost completely from history: A. Williams, ‘*Princeps Merciorum gentis*: the family, career and connections of Ælfhere, ealdorman of Mercia, 956–83’, *Anglo-Saxon England* 10 (1981), pp. 143–72, at pp. 171–2.

³¹ E.g., LS 30, 37, 43–5, 48, 54, 56–7, 61, 63, 68, 73, 79, 88, 94, 101, 111, 143.

³² LS 53, 50–1. No. 100 is reasonably seen as a confiscation by a sheriff on the king’s behalf; and if 99 was not, this was sharp shrieval practice.

more orthodox means.³³ Particular significance attaches to cases where property on lease reverted to the king rather than to the landlord. It will be recalled that the Helmstan saga reached its climax with Fonthill's owner trying to protect himself from the consequences of his tenant's forfeiture.³⁴ In a 'feudal' regime there would be no question but that such land escheats to the lord. This is important. It casts considerable doubt upon the prominence of 'private' justice in pre-conquest England. It also, as will appear shortly, raises problems about what the laws ordain for a criminal's possessions.

The evidence of forfeiture has barely featured in earlier studies of Old English Law. It is not to be regarded as a legal historian's panacea. Its interpretation poses serious difficulties. To return to the continent for a moment, forfeiture is more apparent in documents from eastern Francia, even under the Carolingians, than in those of the western kingdom.³⁵ One cannot easily see why this should be so: Charles the Bald ran an at least equally ruthless regime. Its prevalence might in some way be affected by the rules of land tenure. It might even be a matter of diplomatic usage. The same applies, more obviously perhaps, to the absence of forfeiture from English charters after 1066.³⁶ Nevertheless, these records are the nearest an early medievalist will ever get to the Pipe-and Plea-roll evidence that has transformed the study of early 'Common Law'. It does seem reasonable to conclude that more Anglo-Saxons than Franks or Saxons were directly answerable to royal authority for a greater range of offences. And if one accepts that the Franks had by Carolingian times acquired a strong notion of afflictive punishment, it is an inescapable conclusion that the English had too.³⁷ The case of Dumbleton (Gloucs.) will serve as an eloquent epitaph. Two and a half hides there were

³³ LS 40.

³⁴ LS 25, and above, pp. 000. Cf. LS 29, where the property was supposedly leased from Winchester. See below, p. 000 and n. 50.

³⁵ Of the cases listed in n. 8 above, Hübner nos. 121 + 132, 123, 133–4, 176, 201, 218, 326, 363, 439, 442, 445, 462, 464, 466–7 relate to lands of Middle or Eastern kingdoms. It may not be simply because of their relative weakness that western kings after Odo have nothing to set beside the wealth of Ottonian and Salian chartered forfeitures.

³⁶ See below, pp. 000.

³⁷ J. Goebel, *Felony and Misdemeanour. A Study in the History of English Criminal Procedure* (New York, 1937), pp. 81–117. See below, pp. 000.

forfeit by 995 for the theft of an ealdorman's pigs. They were acquired in exchange by Wulfric Spott, founder of Burton Abbey, whose will bestowed them on Archbishop Ælfric (995–1005). He in his turn left them to Abingdon along with twenty-four hides he had been given for life by King Æthelred (1002). These twenty-four had themselves been forfeited by an anonymous woman for *fornicaria praevaricatione*. It would be many centuries, if ever, before English governments could lay hands on more than 3,000 acres of prime Cotswold countryside on grounds of pig-stealing and sexual misconduct.³⁸ How is this situation, beyond contemporary or subsequent parallel, to be understood?

(ii) The Oath

Criminal law was the dominant concern of legislation in the tenth and eleventh centuries. But, unlike the law on ecclesiastical rights, it is nowhere deployed as a coherent whole. Whether because it never was set out in that way, or because the relevant codes are lost, the 'law and order' policy of kings between Alfred and Cnut is illuminated only in a series of legislative flashes, like the scene of a nocturnal thunderstorm. For this reason, the best way to grasp its essentials is to lay out all the relevant material in sequence, and then to isolate the underlying trends. What follows is a selection of decrees from Alfred onwards, edited only with an eye to immediate relevance, and arranged in chronological order.

1. Alfred 1 – 1: 7: First we teach, as is most necessary, that each man carefully keep his oath and pledge (*we lerað, þæt mæst þearf is, þæt aghwælc mon his að 7 his wed wærlíce healda*) If ... he pledges what is right for him to perform, and he refuses it, let him humbly give his weapons and possessions into his friends' (*freondum*) keeping, and be forty nights in prison in a king's *tun*, do penance there as the bishop prescribes for him, and his kin (*magas*) feed him If he has to be forced there, and otherwise will not, if one binds him, let him suffer loss of his weapons and property (*ierfes*). If one kills him,

³⁸ LS 54, 68; cf. Sawyer, *Burton Charters* (as n. 19 above), p. xxiii. The acreage is premised

he is to lie unpaid for. If he flee away within the time-limit and ... gets free, he is to be banished (*afliemed*) and excommunicated.

2. Alfred 4: If one plots against the king's life, either in himself or by harbouring exiles (*wreccena feormunga*) or his men, he is liable for his life and all that he owns (*sie be his feores scyldig 7 ealles þæs ðe he age*).

3. II Edward Fr. – 1:1: King Edward exhorted his *witan* that they ... ponder how their peace (*frid*) might be better kept then before He asked them who would turn to its amendment (*bote*), and be in the fellowship (*geferædene*) that he was, and love what he loved, and shun what he shunned (*ascunien ðæt he escunode* – Latin: *et nolle quod nolit*), *whether on sea or land* (*ægðer ge on sæ ge on lande*).

4. II Edward 4 – 5:2: Let each man have ... those that guide men that wish to seek their own, nor are they to hinder them for any bribery, nor shield crime anywhere nor harbour it willingly or deliberately (*ne ful nawar fridian ne feormian willes ne gewealdes*). If anyone neglects this and breaks his oath and his pledge that the whole people has given (*his að 7 his wæd ... ðe eal ðeod geseald hæfð*), let him amend as the lawbook teaches (*bete swa domboc tæce*). If ... he will not, let him suffer loss of the friendship of us all and of all that he owns. If anyone then harbour him, let him amend as the lawbook says, and as he who harbours a fugitive.

5. II Æthelstan 1 – 1:5: Let one not spare any thief over twelve years old that is caught in the act (*æt hæbbendre honda*) And if anyone does it, let him pay for the thief with his wergeld But if he wishes to defend himself or flee away, one is ... not to spare him. If one brings a thief [*sc.* convicted at

on the standard (if by no means sure) equation of a hide and 120 acres.

ordeal, cf. clause 7] to prison, he is to be in prison 40 nights, and one may then let him out with 120 shillings And if he steals after that, let [his kin *magþ*], cf. 1:3] pay for him with his wergeld or bring him therein again And every man of those that stand alongside is to pay the king 120 shillings as fine.

6. II Æthelstan 20 – 20:8: If anyone neglects a meeting (*gemot*) thrice, let him pay the king's disobedience (*ðæs cynges oferbyrnesse* [120 shillings]) If ... he will not ... let the senior men (*yldestan*) ride there and take all he owns If anyone will not ride with his fellows (*geferan*), let him pay king's disobedience. And let one command at the meeting that one keep all peace that the king wishes kept (*ðæt mon eal friþige þæt se cyng friþian wille*), and forgo theft by his life and all he owns. And he who will not desist, let the senior men ride there and take all he owns, and let the king take half, and those on the ride half. And if he will not accept [surety, cf. 20:4], let them kill him If anyone will avenge him or be at feud (*falæce*) with any of them, then be he an enemy (*fab*) against the king and ... all his friends. If he escape, and anyone harbour him, he shall be liable for his wergeld ...

7. II Æthelstan 26: He who swears a false oath is never again to be oathworthy, nor is he to lie within any hallowed grave when he dies, unless he has the bishop's witness that he has amended as his confessor has prescribed for him.

8. V Æthelstan Pr. – Pr.:3: King Æthelstan says that I have found out that our peace (*frið*) is worse kept than would please me Now I have laid down that all [criminals?] be ready to go wherever I wish ... on ... condition that they never again come home. And if anyone ever again meets them at

home, they are to be as guilty as [a thief] who is caught in the act. And he who harbours them or any of their men ... shall be liable for his life and all he owns. This is because the oaths, pledges and sureties (*ða aþas 7 þa wedd 7 þa borgas*, cf. *iuramenta et vadia*, IV Æthelstan 3:2) which were given [before] are all disregarded and broken.

9. IV Æthelstan 6: Let the thief who has stolen since there was tan earlier] council ... in no way be held worthy of life, neither through trial (*socnam*) nor payment (*pecuniam*) ... whether free or slave, noble or commoner, lady or maid ... whether caught in the act or not (*sic handhabbenda, sic non handhabbenda*), if It is known for sure, whether by lack of refutation (*si ... non dixerit ut andsaca sit*), whether he is guilty in an ordeal or in any other way publishes his guilt.

10. VI Æthelstan PR – 1:4: This is the decree that the bishops and the reeves belonging to London have ... confirmed with pledges in our peace-guild (*mid weddum gefæstnod on urum friðgegyldum*) ... That one do not spare any thief ... whom we discover to be guilty at law (*on folcriht*): that we kill him and take all that he owns; and we first take the value (*ceapgyld*) from his goods, then ... one share goes to the wife if she ... is not an accessory (*gewita*) ... and of the rest ... the king gets half, the fellowship (*ferscipe*) half; if it be bookland or bishop's land, then the landlord (*landhlaforð*) has the half share in common (*gemane*) with the fellowship. And he who secretly harbours a thief, and is accessory to crime and guilt, one should do the same to him. And he who stands by a thief and fights alongside him, one should kill him with the thief. And he who has often before been openly convicted of theft (*þyfdæ ... forworht ... openlice*) and go to the ordeal and be there found guilty (*ful weorðe*), that one

kill him, unless the kin or the lord wish to take him out with his wergild ...
 If he ... steals after that, let the kin then give him up to the reeve ...
 ... and one should kill him in theft-punishment (*on þa þeofwrace*).

11. VI Æthelstan 10: The *witan* [of the London guild] all together gave their pledges (*wedd*) to the archbishop that each reeve take that pledge in his own shire, that they would all keep that *frid* just as King Æthelstan ... enacted.

12. III Edmund 1–2: All swear In the name of the Lord fidelity to King Edmund, just as a man should be faithful to his lord (*sicut homo debet esse fidelis domino suo*), without any dispute or deceit, in open or in secret, in loving what he will love, shunning what he will shun (*nolendo quod nolet*), and from the day on which this oath is given, that no one conceal that [breach] in his brother or neighbour, any more than in stranger. When a thief is known for sure, [all] are to gather together and take him, alive or dead.

13. III Edgar 7 – 7:3: He who is accusation-laden and untrustworthy for the people (*tibthysig ... 7 folce ungetryme*) and avoids the meeting thrice ... let one select ... those that ride to him if ... he cannot [find surety] let one seize him ... alive or dead, and take all that he owns, and pay the accuser the *ceapgild* ... and the lord gets half the rest, the hundred half And whatever [*sc.* refuge] the manifest thief (*se abæra þeof*) seek, or he who is met in treachery to his lord (*blafordsearwa*) ... he shall never his life [unless the king grant him life-refuge (*feorhgeneres*)].

14. III Æthelred 7 – 7:1: And if anyone wishes to clear (*clænsian*) a thief, let him ... go to the threefold ordeal. If he be clear at the ordeal, let him take up his kinsman; if he be guilty (*ful*), let him lie where he lies

15. IV Æthelred 4: The man who commits *hamsocn* ... and ... the greatest breach of peace (*summa infracturam* ... *de placito*), or attacks another innocent on the king's highway, if he die, let him lie in unredeemed ground (*ungildan ækere*).

16. V Æthelred 22 – 28, 30 [VI Æthelred 27 – 33, 35, 37]: Let each Christian man do as is necessary him (*swa him þearf is*). Let him make a habit of frequent confession ... and eagerly amend (*bete*) as one instructs him. And let everyone also prepare himself often and frequently to go to communion. Let [each of our friends] order word and deed justly, and carefully keep his oath and pledge (*ad 7 wed wærlíce healde*); and let one eagerly eject from the country all injustice ... and let one very much shun deceitful deeds and loathsome abuses, that is false weights and wrong measures, and lying witnesses, [and shameful frauds, and foul adulteries,] and horrible perjuries, and devilish deeds of murder and of manslaughter, of stealing and of spoliation, of grasping and of greed, of over-eating and of over-drinking, of deceits and of various violations to law, of violations to clergy and to marriage, [to festivals and to fasts, of sacrilege,] and of misdeeds of many kinds. And let one eagerly love God's justice (*riht*) in word and deed And let one be eager about amendment of the peace (*frides bote*) and ... of coinage ... [so that it is best for the husbandman (*bondan*) and worst for the thief] and ... of boroughs ... and ... of bridges and about military service (*firdunga*) and about ship-service ... so that they are all ready each year soon after Easter. And if anyone desert the army ... with the king ... present, he stakes his life (*plihthe bim silfum*) or wergeld And if one plots against the king, he is liable for his life [and all that he owns]

17. Cnut (1020) 13 – 15: I will that the whole people, ordained and law, hold firmly to Edgar's law which all men have approved and sworn to (*gecoren 7 to gesworen*) ... For all bishops say that it must be very deeply atoned for with God when one breaks oaths and pledges (*aðas 7 wedd*). And they also teach (*lærað*) us ... that we should shun all injustice, that is kin-slayers and murders and perjurers and witches and valkyries and adulterers and incest

18. I Cnut 19 – 20:1: Let every Christian man do as is necessary for him. Let him prepare himself to go to communion thrice a year. And let every one of our friends order word and deed justly and carefully keep his oath and pledge. And let one eagerly eject from the country all injustice ... And let one love God's justice hereafter in word and deed Let us be ever loyal and true (*hold 7 getreowe*) to our lord For all that we ever do out of just loyalty to our lord is of great necessity for us, because God is the more ... loyal to him who is justly loyal to his lord.

19. II Cnut 13 – 13:1: He who does an outlaw's deed, let the king [alone?] have power of [i.e. to grant?] peace. And if he have bookland, let that be forfeit into the king's hands, whosoever's man he is (*sy ðæs mannes man he sy*).

20. II Cnut 21: We wish that each man over twelve years old gives the oath that he would not be thief or a thief's accessory (*gewita*).

21. II Cnut 26 – 26:1: Whatever the manifest thief (*se ebæra ðeof*) seeks, or he who has been met in treason against his lord, that he shall save his life. And he who steals after this, whatever he seek, that he shall never save his life in open theft (*æt openre ðyfdæ*).

22. II Cnut 64: House-breaking (*husbryce*) and open theft (*open ðyfd*) and

manifest murder (*æbere morð*) and betrayal of lord are without amendment (*botleas*) in secular law.

23. II Cnut 77: The man who desert his lord or his fellows (*geferan*) ... whether in ship-service or land-service, is to suffer loss of all that he owns and of his own life, and the lord gets the goods, and the land that he earlier gave him. And if he have bookland, let that go to the king's hands.

The sequence begins with Alfred's first law on 'oath and pledge' (1). This has usually been thought to refer to general legal duty and religious principle, the obligation to keep one's word: its nature for Liebermann was 'zivilrechtliche neben halbreligiösem'.³⁹ But a 901 charter records the forfeiture of Ealdorman Wulphere (and his wife) for deserting 'both his lord King Alfred and his *patriam*, against the *fusurandum* he had sworn to the king and all his magnates'. This sounds very like an oath of loyalty; it is a fair deduction that the *að* of the laws was one too.⁴⁰ Other non-legislative usage is also revealing. *Að* and *wedd* recur as a conjoined phrase only in Wulfstan (of whom more in a moment), the *Orosius* and the *Chronicles*. In the *Orosius*, they accompany the 'disgrace' of the Roman subjection to the Samnites; they also signal the Spartans' ill-advised vow not to return to their wives until they had taken Messene (to maintain the population, they had to send home the reinforcements that had arrived after the oath was taken).⁴¹ The *Chronicles* use the phrase for the Northumbrian submission to Æthelflæd (918), and that of 'all the kings in this island' to Æthelstan (927); and when the archbishop of York with the Northumbrian *witan* accepted Eric Bloodaxe as king (947/8), they broke 'their pledge(s) and also their oaths' to King Eadred. Later on, King Æthelred and his people were reconciled on his return after Sveinn's death in 1014 *mid worde 7 mid wedde*, and the

³⁹ *Gesetze* III, p. 000.

⁴⁰ S 362; cf. *Alfred the Great. Asser's Life of King Alfred and other contemporary sources*, translated with an introduction and notes by S. Keynes and M. Lapidge (Penguin Classics, Harmondsworth, 1983), p. 306.

⁴¹ *The Old English Orosius*, edited by J. Bately (Early English Texts Society, S.S. 6, Oxford, 1980) iii 8, i 14, pp. 66–7, 35.

1016 treaty of Cnut and Edmund Ironside was secured *ge mid wedde ge mid aðe*.⁴² In addition, the submission of the East Angles to Edward (918) meant that they *eal þæt woldon þæt he wolde, 7 eall þæt friðian woldon þæt se cyng friðian wolde ægðer ge on sa ge on lande*, echoing 3 and 6 above; and similar formulae characterize submissions by the Scots in 945–6, by the Welsh in 1063, and by six/eight kings to Edgar at Chester after his imperial coronation in 973.⁴³ The phraseology of Alfred’s first law, and also that used by his son and grandson, is thus appropriate for solemn and binding agreements, especially those involving acceptance by one party of the other’s lordship. On this evidence, one would already suspect that it denotes something more formal and specific than the duty to be a man of one’s word. It seems to mean acknowledgement of sovereignty, undertaking to be loyal, and even promising to maintain social peace.

Turning to the laws of Alfred’s successors, Edward says (4) that *að 7 wed* has been ‘given by the whole people’, and shows that it is broken when one ‘shields or harbours crime’. This evokes the terms of Alfred’s treason law (2), decreeing death and forfeiture for the ‘harbouring of exiles’; but the context, strikingly, is one of crimes against property. Æthelstan (6) orders localities to ‘command’ the keeping of ‘all peace that the king wishes kept’, and avoidance of theft on pain of death and forfeiture. In response (10), the London ‘peace-guild ... confirmed with pledges’, undertakes (11) that reeves will take pledges of Æthelstan’s *frið* in their own shires. The prologue to his Exeter code explains (8) that his draconian policy (cf. 9) on disorder and theft was prompted by breaches of the *apas 7 þa wedd 7 þa borgas* taken earlier. Edmund gives (12) the formula of an oath of loyalty. It recalls Edward’s wording (3), hence that of submissions in the *Chronicles*. Especially important is the fact that this oath imposes an obligation to *expose*, as well as avoid, disloyalty. Cnut is then found (20) ordering all over twelve to swear to be neither a thief nor a thief’s accomplice. Finally, Edgar (13) and Cnut (21) both take

⁴² *Two of the Anglo-Saxon Chronicles Parallel*, edited by J. Earle and C. Plummer (2 vols, re-issued by D. Whitelock, Oxford, 1952) I, 918 CD, p. 105; ‘926’ D, p. 107; 947 D, p. 112; 1014 CDE, p. 145; 1016 CDE, p. 153.

⁴³ *Chronicles I*, ‘921’ A, p. 103; 945 ABCD, p. 110; 946 ABCD, ‘948’ E, pp. 112–13; 1063 D, p. 191; ‘972’ DE, p. 119.

‘manifest theft’ as tantamount to treason, as if it too was a breach of loyalty. The last part of this chapter argues that these provisions on the oath were bound up with elaborate machinery for the maintenance of order. As will be seen, it strongly reinforces the case that the sequence represents a continuous and coherent campaign against crimes beyond or below treachery. Even as things stand, Cnut’s laws are detectably interlinked with Alfred’s. An oath to avoid theft in oneself or others is associated with a view of theft as treason, which looks back through the same conception in Edgar to Edmund’s formula, where loyalty means not concealing the disloyalty of others, and loving/shunning in harmony with the king, as already demanded by Edward. Pledges of peace required and enforced at local level under Æthelstan also recall Edward’s language, while the king connects persistent theft and disorder with broken oaths and pledges. ‘Oath and pledge’ appears under Edward as something given by everyone and prohibiting relations with the guilty. The same formula is declared ‘most necessary’ in the opening law of Alfred, who goes on to characterize consorting with exiles as treason. The linkage raises a strong presumption that *að 7 wed* registered not merely an oath to be loyal, but one specifically designed to restrain a whole range of serious crimes, and above all theft.

Að 7 wed recurs in Wulfstan’s laws for Æthelred II, in Cnut’s 1020 proclamation with which he was somehow associated, and in other parts of the code he compiled for Cnut (16–18). They are also found in his ‘Sermon of the Wolf’, in another homily he perhaps addressed to the king’s council, and in his *Institutes of Polity*.⁴⁴ The context is throughout much the same. ‘To carefully keep one’s oath and pledge’, in words Wulfstan may be quoting from Alfred’s law (1, 16, 18), is one of the duties owed by the Christian citizen, along with regular resort to the sacraments and avoidance of all imaginable vices (the list in 16 and elsewhere takes much the same form as in the *Sermo Lupi* passage cited at the start of this chapter). Not even Wulfstan’s warmest admirers could acquit him of

⁴⁴ *Sermo Lupi* line 141 (as n. 1), lines 201–7, pp. 66–7; *The Homilies of Wulfstan*, edited by D. Bethurum (Oxford, 1957) XIII, lines 65–74, p. 229; *Die “Institutes of Polity, Civil and Ecclesiastical”*. *Ein Werk Erzbischof Wulfstans von York*, edited by K. Jost (Schweizer Anglistische Arbeiten, general editors O. Funke *et al.*, 47, Bern, 1959) 126/232, pp. 162–3.

waffle about civil and religious duties. If the phrase were confined to Alfred's law and to those Wulfstan drafted, or if it regularly appeared in other homiletic material, one would have to conclude that its traditional interpretation is correct. Because it is used *only* in Wulfstan's homilies, and also in laws and narratives as described above, the argument boomerangs. The lawmaking archbishop instinctively integrated an aspect of secular legal organization into his view of spiritual obligation. 'Oath and pledge' do accompany 'realistic' laws in Æthelred's code (16), a reference to sworn acceptance of Edgar's law in the 1020 proclamation (17), and a strong point about loyalty to the king in the religious part of Cnut's code (18). Likewise, a moment's further contemplation of Alfred's law hardly suggests concern merely with 'civil and half-religious duty'. Provisional loss of goods to friends is envisaged by Edward the Elder for those accused of theft who have no surety.⁴⁵ Forty days imprisonment is laid down by Æthelstan (5) for thieves convicted at ordeal. Permanent loss of property, unamendable death and outlawry await those resisting arrest or refusing cooperation later in the series (6, 13).⁴⁶ These sanctions imply something deeply serious. They are appropriate for an oath that promised both loyalty and avoidance of major crime. For undertakings of gentlemanly behaviour, they are, in current jargon, 'over the top'.

It is as well to be honest about the method of this enquiry so far. If Alfred had specified that oath and pledge were to be taken by all over twelve, and covered theft as well as disloyalty, denunciation as well as avoidance, this case would have been made long since, if it ever needed to be made at all. Hence the relevance of the arguments advanced in Part I of this book. Alfred's lawbook was seen to be a self-consciously traditionalist text. Innovatory detail would be out of place when the aim was reassurance about the solidity of West Saxon and English legal tradition. More generally, it is in the nature of Anglo-Saxon legislation, anyway as it survives, to leave even basic principles to be reconstructed from a set of glimpses, like different surfaces of a half-submerged tree-trunk; just as it is typical of a twelfth-century culture which, conquest or no conquest,

⁴⁵ II Ew. 3 – 3:1, pp. 142–3. See pp. 000 below.

⁴⁶ Cf. I Eg. 3:1, pp. 192–3; I Atr. 4:1–2, pp. 220–1.

was learning new legislative standards from the Learned Laws, to clarify what was hitherto obscure. The defects of the evidence do not of course give a free run to historians' imagination. But they do allow them to take a hint. Legislation on the oath from Alfred to Cnut offers a series of suggestive hints.

The case is in any case upheld by further buttresses, none strong enough to bear its weight alone, but imposing as collective parts of the edifice. The first of these is the pattern of punishment studied in the opening section of this chapter. One inconsistency must be registered at the outset. Charter evidence regularly implies that forfeited property went to the king. Some of the excerpts above (10, 13), together with others, appear to encompass forfeiture to the 'landlord' as well as to the hundred. The point will be tackled when 'private' jurisdiction and the role of lordship are examined, in chapters 10 and 11 respectively. Meanwhile, it can be noted that bookland at least (19, 23) *does* go to the king. Otherwise, laws and charters match well. The all-embracing scope of loyalty would explain the remarkable prominence of 'ordinary' crime in property records. If one had sworn not only to be loyal but also to avoid, indeed expose, crime, then active or passive participation in any serious offence put one in breach of one's oath. It was, in effect, disloyalty. Loss of land and goods, the consequence of betraying lords in epic as in law, was the logical penalty. So, of course, was death, the sanction of treachery in most societies. Alfred treated the invaders of 893 with some chivalry; but when he finally caught two of the East Anglian or Northumbrian 'criminal bands (*stæl bergum*)', whose breach of their '*apas ... 7 ... treowa*' was stressed in the *Chronicles*, he hanged them outright.⁴⁷ Breaking an oath taken before God and his saints was also sacrilege. In an extra clause of the Grately code (6) which, as was seen in chapter 5, may actually have been inspired by a notorious recent case of treason, Æthelstan forbade Christian burial for the perjurer. He was echoed in his brother's first code, with regard not only to

⁴⁷ *ASC* 893 ABCD, pp. 201–3; 896 ABCD, p. 206. Hæsten too was eventually an oath-breaker twice over; it is interesting to speculate what Alfred might have done had he caught him. Cf. K. Leyser, 'The Battle at the Lech, 955. A Study in Tenth-Century Warfare', *History* L (1965), pp. 1–25, at pp. 000 (reprinted in his *Medieval Germany* (as n. 13), pp. 43–67, at pp. 63–4), on Otto I's hanging of Magyar generals.

perjury, but also to uncelibate clergy and nuns, conventional adultery, sorcery and homicide.⁴⁸ Æthelred (14) decreed ‘unredeemed ground’ for those guilty of major breach of the peace. His intention emerges gruesomely from another of his codes (13), where a thief’s kinsmen must go to threefold ordeal in order to ‘clear’ him, by which is meant to ‘take him up’ from ‘where he lies’, i.e. transfer him from one grave to another. Alfred’s pledge-breaker, who ‘lies unpaid for’, may face the same fate.⁴⁹ This, then, would be why Æthelwif and Wynsig were at fault in laying the Ardley brothers *inter christianos*, and why Ecgferth’s wergeld was needed to buy him a ‘clean grave’ (on the above evidence, this was indeed a concession by Edgar to Dunstan). Criminals were traitors and perjurers. They lost life and wealth in this world, and salvation in the next.

It is important, secondly, that the forfeiture sequence begins at the same time as that of laws about loyalty and peace. There is no authentic charter proclaiming forfeiture for crime before Alfred’s reign. The first clear instance is the 901 charter already mentioned. Very soon afterwards comes the Helmstan case. It will be remembered that when Helmstan was convicted of cattle-theft, ‘the reeve took all his property that he owned’; and when Ordlaf asked why, he was told that ‘he was a thief and the property was adjudged to the king because he was the King’s man’. If forfeiture for theft by ‘king’s men’ were already a well-established principle, Ordlaf would hardly have been puzzled. It is thus a possible interpretation that the penalty was a new departure, and that the significance of *cinges mon* was precisely that Helmstan had taken an oath of loyalty that covered theft. At all events, it is clear that the Helmstan saga would not be known at all, unless Ordlaf’s rights as the owner of the land that Helmstan now held on lease had not been called in question by his forfeiture. This adds to the interest of the judgement of 896 in favour of Bishop Wærferth of Worcester. Æthelwald, the loser, asked that he and his son be allowed life-interests in the property at issue, and this was agreed, on the understanding that the land would revert to the bishop ‘If one should prove against him

⁴⁸ I Em. 3 – 4, 6, pp. 184–7. See pp. 000 above.

⁴⁹ Cf. II Atr. 3:4, pp. 222–3: *ungylde*; V Atr. 31:1/VI Atr. 38, pp. 244–5, 256, etc. (*Gesetze* II(i), p. 5): *ægyldē*.

(the son) [a charge such] that he could not be worthy of land (*þæt he ne moste londes wyrðe beon*).⁵⁰ This clause is another without previous precedent, though leasing documents had by then been drawn up for more than a century. The point can be put beside another made in chapter 3: formulae disqualifying title vested in earlier documents also appear in charters from c. 900. The implication is that title was being lost in ways that it had not been before. If the only reason were Viking bonfires of monastic archives, there would have been no need to fear the resurrection of claims based on surviving charters.⁵¹ In short, it is unlikely to be a coincidence that forfeiture becomes directly or indirectly an issue in property records just when there are other reasons to suppose that the range of offences penalized by forfeiture was being appreciably widened.

Thirdly, there is the ticklish question of the relation between Carolingian and Anglo-Saxon systems. Most aspects of this problem are discussed in chapter 13. But it has a direct bearing on English oaths and their implications. From 792 at the latest, Charlemagne demanded that all over twelve should swear an oath of loyalty; those who did not comply were to be led before the king by means of sureties, or be kept in custody.⁵² When repeating the instruction in 802, he explained that the oath involved not only *fidelitas* to the emperor, not inviting in enemies, and no consent or reticence as to others' infidelity, but also (among other things) observance of baptismal promises, non--

⁵⁰ LS 25, S 1445, Harmer, *Documents* xviii, p. 32; LS 21, S 1441, Harmer, *Documents* xiv, p. 25. Cf. S 981 (a spurious text but in near-contemporary script), 1224. Earlier leases with no such provision include S 1254–5, 1261–2, 1270, 1272–5, 1278.

⁵¹ The first examples of disqualifying formulae relate specifically to loss of earlier texts: S 277, 367, 371, 361, 222, 225, 395 (see discussion by Sawyer, *Burton Charters* (as n. 19), pp. 4–5); from S 429 (935), there is rarely reference to lost texts (though cf. S 811, 744, 803, 835). S 884 appears to envisage the possibility of forgery.

⁵² *Capitularia* 25:4 + 23:18, I, pp. 67, 63. Following C.E. Odegaard, *Vassi and Fideles in the Carolingian Empire* (Harvard Historical Monographs xix, Cambridge Ma., 1945), p. 56, I accept the distinction not only between vassalage (with or without an oath) and fidelity, but also between oaths of *fidelity*, sworn by the privileged, and general oaths (here called oaths of *loyalty*), taken by all subjects: contrast the two formulae, *Capitularia* 261, II, p. 278, and 269, II, p. 296. F.L. Ganshof's celebrated 'Charlemagne's use of the oath', in his *The Carolingians and the Frankish Monarchy* (translated by J. Sondheimer, London, 1971), pp. 111–24, originally 'Charlemagne et le serment', *Mélanges d'histoire du Moyen Âge dédiés à la mémoire de Louis Halphen* (Paris, 1951), pp. 259–70) mainly concerns the tension between illegal and official oaths; for which cf. Af. 1:1, pp. 46–7.

concealment of the emperor's fugitive serfs, fulfilment of military service and not obstructing justice by bribery or favouritism. If these terms resemble those of Alfred's treason law (2) and Edward's on *ad 7 wæd* (4), the proposed oath formula, like Edmund's (12), has the phrase 'as a man ought in right to be loyal to his lord'.⁵³ These provisions were rehearsed in Charles the Bald's 853 capitulary of Servais. Charles claimed to be following his predecessors' custom, but insisted more explicitly than his grandfather that fidelity encompassed not assisting *latrones*, who might be killed without feud or wergeld. The oath's wording now included not only the Charlemagne/Edmund formula but also a specific promise not to conceal, or consent to, *latrocinium* or theft (both given vernacular labels).⁵⁴ These instructions were undoubtedly accompanied by a sustained legislative campaign against *latrones*, albeit one that does not show up in diplomas as in England.⁵⁵ The existence of such arrangements in ninth-century Francia is not of course proof that they existed in England too. Nevertheless, they raise that possibility. Loyalty covering serious crime was 'in the air'. Resemblances not easily put down to shared common-sense (like oath-taking at the age of twelve) arguably convert possibility into plausibility. Specification of an age in ninth-century Francia which appears only in eleventh-century England strengthens the case for thinking that what is not made explicit until later is already inherent under Alfred. It is easier to postulate the exertion of influence within living memory of the Frankish system's viability than when it had vanished almost completely from view.⁵⁶

Finally, and regardless of any of the arguments put forward so far, legislation itself

⁵³ *Capitularia* 33: 2–9 + 34: Add., I, pp. 92–3, 101. Charlemagne's own words (33:2–3, p. 92) seem to show clearly that the new ingredient in that oath of 802 was represented by chapters 3–9, which follow in the text; hence it seems unlikely that the new feature is *sicut per dRICTUM debet esse homo domino suo*, as E. Magnou-Nortier argues, *Foi et Fidélité. Recherches sur l'évolution des liens personne personnels chez les Francs du VIIe au IXe siècle* (Publications de l'Université de Toulouse-la Mirail, série A 28, Toulouse, 1976), pp. 38–41.

⁵⁴ *Capitularia* 260:2–8, Add., 261, Add., II, pp. 271–3, 274, 278 (it is admittedly unclear what the relationship is between the oath in the Capitulary of Servais (using the words '*scach*' and '*tesceiam*') and the more traditional formula in that of Attigny. The terms of Servais were repeated again at Quierzy in 873: *Capitularia* 278: 1–3, II, pp. 344–5).

⁵⁵ Cf. Goebel (as n. 37), pp. 94–8.

⁵⁶ See above, pp. 000, below, pp. 000.

gives a strong impression of new departures in criminal law, particularly as regards theft. The basic West Saxon law of theft as recorded by Ine was that thieves caught *in flagrante* could, perhaps should, be killed, though they could redeem their lives with their wergeld, or by enslavement if unable to pay. Wergeld was also payable for connivance, whether this meant harbouring thieves or letting them escape.⁵⁷ But thieves convicted by legal process seem to have owed only restitution and a sixty shilling fine.⁵⁸ The published laws of Alfred add little, as usual. But he may possibly have raised the fine to 120 shillings, in which case it could be significant that this would soon be, if it was not already, the sum payable for ‘the king’s disobedience’ (5–6); and a law of Edward’s implies that convicted thieves could be enslaved like those caught in the act.⁵⁹ The visible changes come with Æthelstan. In a first phase, flagrant thieves over twelve *must* be killed (5). Wergeld, hitherto the penalty for abetting a thief, is now due for sparing him. Highly suggestive is the re-appearance in this context of the age of twelve. Ine had made ten the age when one might be accessory to theft. If twelve-year-olds were now under oath to abstain from theft, the change of age has a logic which it otherwise seems to lack – not least as the king and his *witan* eventually found it ‘cruel (*breowlic*)’ to kill those so young, and raised

⁵⁷ Ine 12, 16, 35, pp. 94–7, 104–5; the odd implication of Ine 18, 37, pp. 96–7, 104–5, that those often accused and at last caught in the act should only lose hand or foot presumably applies to those otherwise able to redeem their lives by wergeld or slavery. Something like the royal discretion of Wi. 25–7, p. 14, may be implied by Ine 28, pp. 100–1; for enslaved debtors, see Ine 24 – 24:1, 48, pp. 100–1, 110–11 on the *witeðow*, and 72 – 74:2, pp. 120–3 on the *wergildðeof*; and for harbouring or allowing escape, see Ine 28:1–2, 30, 36, pp. 100–5. See the generally persuasive discussion by C.H. Riggs, *Criminal Asylum in Anglo-Saxon Law* (Florida, 1963).

⁵⁸ Ine 7, 10, pp. 92–5, and cf. the significant implications of Ine 43, pp. 108–9; also of Ine 4, 46, 53, pp. 90–1, 108–9, 112–13. The terms of Ine 7:1, pp. 92–3, decreeing slavery for a whole household (*hired*), if theft occurs with its cognizance, is difficult to reconcile with the 60 shilling fine for thieves acting alone in Ine 7 (cf. the innocent wife’s retention of her share of property, Ine 53, pp. 112–13). The presumption must be that the *hired* consisted of more than a nuclear family, so that its activities as a group constituted a *blot* or even *here* in the famous definition of Ine 13:1, pp. 94–5. Under the terms of Ine 14, participants in a raid owed wergeld; and there may be a presumption that a whole *hired* was in no position to find the money. Alternatively, theft by a *hired* might by definition be flagrant, hence subject to wergeld redemption or slavery.

⁵⁹ Af. 9:2, pp. 54–5 (for 120 shillings as fine for all thefts, not *mandeof* alone, see below, p. 000, n. 125); II Ew. 6, pp. 144–5.

the age to fifteen.⁶⁰

At this stage, convicted thieves get forty days in prison, like breakers of Alfred's *ad 7 wed* (1, 5), before release on payment of 120 shillings into their kin's surety; recidivist thieves are simply locked up again, with wergeld due (as under Ine) from kins that fail to manage this. But faced, like law enforcers of other times, with the failure of severity to achieve his purpose, Æthelstan reacted as they have. The whole scale of sanctions was ratcheted up (8–10). There is no further distinction between flagrant and proven theft. Just as the flagrant thief could no longer buy life with wergeld, so now accessories or harbourers forfeited life rather than its price. Even those who spare thieves are to be treated like thieves themselves. The enmity (i.e. outlawry, presumably) incurred by those who avenged slain thieves (6) was now spelt out as death.⁶¹ The Ardley brothers were disbarred from Christian burial, because they had 'stood by a thief and fought alongside him' (10, cf. 6). The one loophole relates to those proved guilty at the ordeal whose lord or kin can buy them out (10). What they now owe is not 120 shillings but wergeld, like one-time harbourers. Second offences mean not a return to jail but death. There is an obsessional, even fanatical, tone in Æthelstan's theft legislation. Thieving women must be thrown from cliffs or drowned. Male slaves are to be stoned, slaves throwing the stones must be scourged if they miss three times, and they must compensate the owner when the job is done; similar arrangements apply to the burning of female slaves.⁶² Nothing so systematically savage is found anywhere else in early medieval European legislation. The Roman emperors whose near-hysterical effusions constitute the ninth book of the Theodosian Code would have been impressed. If later laws have a somewhat

⁶⁰ Ine 7:2, pp. 92–3; VI As. 12:1, pp. 182–3. Sir Frank Stenton, *Anglo-Saxon England* (Oxford History of England, 1st series, general editor G.N. Clark, 3rd edition, Oxford, 1971), p. 354, noted the 'general tendency towards uncompromising severity' of Æthelstan's laws, but without marking their significant changes compared with earlier codes. The laws, for him, were raised 'above the commonplace' by the 'suggestion of a humane mind (*sc.* Æthelstan's own) in revolt against the grimmer aspects of government'. There seems to be no way of knowing whether the raised age of execution in VI As. represented Æthelstan's 'revolt' against his councillors, or *vice versa*.

⁶¹ But II As. 6:3, pp. 154–5, shows that the 120 shillings of excerpt 5 applied only if no damage was done. To excerpt 10, compare V As. Pr.:3, pp. 166–7, IV As. 3:1, p. 171.

⁶² IV As. 6:4–7, p. 172.

milder atmosphere by these extreme standards, that, as will emerge in the next section, is not through any 'quality of mercy', but because of a growing sense of the value of a pound of flesh. Edgar and Cnut, as has been noted, still see *abera* theft as treason (13, 21). It is possible, if not likely, that this meant proven rather than just flagrant theft. Cnut goes on to speak of 'open theft' in a pointless tautology unless the first denoted conviction. In any case, Edgar certainly demanded death for a cattle-dealer whose dishonesty was exposed by the formal process of vouching to warranty.⁶³ Anglo-Saxons had decisively and undeniably moved from seeing theft as feud, i.e. dispute over property resulting in compensation or violence, to thinking any form of theft punishable, in principle capitally, by the community at large. If further evidence of that development is still needed, it may perhaps be found in a most unexpected quarter.

(iii) Burials

In 1935, the loyal citizens of Stockbridge, Hampshire, decided to celebrate King George V's silver jubilee with a large bonfire on the neighbouring Down. In digging its foundations, they unearthed a skull. The ensuing archaeological excavation yielded between forty and fifty skeletons, buried without orientation in small and shallow graves over a period of years. All were 'males in the prime of life' (though one was perhaps as young as seventeen). All had clearly or probably been executed, by means varying from beheading to 'a crude method of garrotting'. At least sixteen died with their hands tied. Two large post-holes argued the one-time presence of a gibbet. Associated with one hole (though not so as to pre-date it) was a pitcher 'of late Saxon type, not met with after the twelfth century', and whose green glaze suggested a Norman origin. Other small finds, bronze buckles and a wrist-fastener, could be reconciled with this period. The excavator preferred to date the grisly *ensemble* after the Conquest. He knew the fierce pronouncements of Anglo-Saxon kings against theft, but called special attention to the savage Forest Laws that would have applied in the area under Rufus and Henry I.

⁶³ IV. Eg. 11, pp. 212–13.

However, skeleton 'no. 19' had other implications. He had been decapitated, and was apparently buried with a large dog, also headless. He seemed to have died with six coins of Edward the Confessor in a 'strip of linen rather like a modern finger bandage ... stuck ... with wax to the hairs in his armpit'; in any event, the coins had eluded his executioners. They were fresh from the Winchester mint, and can be closely dated to the period between 'Michaelmas 1065 and Midsummer 1066', probably 'before rather than after Christmas 1065', but 'at least a few weeks after the introduction of the ... type (*sc.* at Michaelmas)'. The story behind this little episode sorely tempts the imagination. If the dog does indeed imply illicit forest activity, the concealed coins arouse suspicions of theft, and proven rather than flagrant theft in that they were not discovered. Equally, the sheep's skull beside 'no. 37' evokes rather humbler quarries than the king's deer. But whatever the crimes involved, there can be no doubt that Stockbridge Down had opened for business before the Norman Conquest – albeit within less than a year of 'no. 19's' demise, his executioners had more on their minds than poaching or theft.⁶⁴

Stockbridge Down's excavator was aware of two or three comparable cemeteries along the Winchester-Salisbury road: at Meon Hill nearby, at Roche Court Down, Wiltshire, and at Old Sarum.⁶⁵ Over recent years, the phenomenon of 'execution cemeteries' has attracted fresh interest. As at Stockbridge Down, these are guddles of skeletons, reduced to a more or less advanced state of disrepair either by the executioner or because the corpses had rotted before burial. Graves are usually disoriented and nearly always shallow. Hands are often tied; when they are not, as at Bran Ditch, Cambs, this

⁶⁴ N. Gray Hill, 'Excavations on Stockbridge Down, 1935–6', *Papers and Proceedings of the Hampshire Field Club and Archaeological Society* XIII (1937), pp. 246–59; R.H.M. Dolley, 'The Stockbridge Down Find of Anglo-Saxon Coins', *British Numismatic Journal* 3rd series VIII (1955–7), pp. 283–7. The quoted suggestion about the location of the coins is that of the excavator's sister, the future Professor Rosalind Hill (no less), who was present when the coins were discovered. I owe the idea that such burials had an important bearing on my subject to Dr David Hill; and I have been greatly assisted by (among others specified below) Dr Sonia Chadwick Hawkes.

⁶⁵ D.M. Liddell, 'Excavations at Meon Hill', *Papers, Hants Field Club* XII (1934), pp. 127–62 (to whom belongs the credit for first identifying this type of site); J.F. Stone, 'Saxon Internments on Roche Court Down, Wiltshire', *Wiltshire Archaeological and Natural History Magazine* 45 (1932), pp. 568–99, at pp. 560–76, 587–91; H.P. Blackmore, 'On a barrow near Old Sarum', *Transactions of the Salisbury Field Club* 1 (1893), pp. 49–51.

may be explained by stripping of corpses when finally buried (though one Bran Ditch victim is found with his hands reaching up towards a stretched neck).⁶⁶ Skeletons are very largely male, but women and ‘young persons of about twelve and upwards’ also feature.⁶⁷ In some cases, they overlie burials of the pagan Anglo-Saxon period and/or earlier. This may be because barrows were not infrequently the meeting-place of hundreds, or simply because they afforded a good view of (and from) a gallows. The existence of gibbets is etched in local tradition or detectable in a place-name, as at Gally Hills, Surrey (where a large post destroyed the upper torso of the seventh-century warrior whose barrow it was).⁶⁸

The difficulties of interpreting this material are of course immense. Small finds like those of Stockbridge Down are naturally rare; there may, as at Gally Hills, be little or nothing to date the burials before the later Middle Ages.⁶⁹ Deposits in barrows are very likely to be contaminated by earlier furniture, and *vice versa*, as at ‘Five Knolls’,

⁶⁶ C. Fox and W.L.H. Duckworth, ‘Excavations in the Cambridgeshire Dykes. V, Bran or Heydon Ditch’, *Proceedings of the Cambridgeshire Antiquarian Society* XXVII (1924–5), pp. 16–42, at p. 31; T.C. Lethbridge and W.M. Palmer, ‘Excavations in the Cambridgeshire Dykes. VI, Bran Ditch, 2nd report’, *ibid.* XXX (1927–8), pp. 78–96, especially at p. 84; W.M. Palmer, C.S. Leaf and T.C. Lethbridge, ‘Further excavations in the Bran Ditch’, *ibid.* XXXII (1932), pp. 54–6; and for the re-interpretation of the site, D. Hill, ‘Bran Ditch reconsidered’, *ibid.* LXVI (1975–6), pp. 126–8.

⁶⁷ As at Bran Ditch (Lethbridge and Palmer as above, p. 87; Hill, p. 127); or Roche Court Down (as above), where the skeleton expert has some exceptionally unamusing comments on female behaviour, p. 589; or Meon Hill (as above) pp. 138–9; or Guilddown (below, n. 72).

⁶⁸ J.F. Barfoot and D.P. Williams, ‘The Saxon barrow at Gally Hills, Banstead Down, Surrey’, *Research Volume of the Surrey Archaeological Society* 3 (1976), pp. 59–76. On place-names, cf. L.V. Grinsell, *The Ancient Burial Mounds of England* (2nd edition, Oxford, 1953), pp. 66 (reference to a gibbet which stood until blown down in 1949, when it was re-erected), 156 (a gibbet post which had become a ceiling beam in the local pub taproom). See also below, nn. 72, 75, 90.

⁶⁹ ‘Gally Hills’ (as above), p. 68; the secondary burials are ‘seen as post-Saxon’ by the excavators, but they do not seem to say why. The ‘complete and unwelcome surprise’ of a mass of disordered and mutilated skeletons at Oliver’s Battery, near Winchester, is ascribed to the English Civil War by W.J. Andrews, ‘Report of the first excavations at Oliver’s Battery in 1930’, *Papers, Hants Field Club* XII (1930), pp. 5–19. Likewise, the evidence at Maumbury Rings, Dorchester, (R. Bradley, ‘Maumbury Rings, Dorchester: the Excavation of 1908–13’, *Archaeologia* 105 (1976), pp. 1–97, at pp. 82–3, 98–90), seems to come from the seventeenth century.

Dunstable.⁷⁰ Until lately, few archaeologists were on the look-out for them. They turned up either by complete chance, as at Stockbridge Down, or because barrows were being explored for more substantial items (that may be why association with a barrow is a regular feature, and why at present their distribution coincides largely with downland areas).⁷¹ When unearthed, they tended to be understood in accordance with prevailing canons in Anglo-Saxon studies, *viz.* battle and massacre rather than law and order. Bran Ditch inspired a colourful reconstruction of Viking depredations in 1010, with the notorious 'Blood Eagle' making another swoop through the literature. Guilddown, Surrey, (where the excavator knew that gallows had been sited) was interpreted as the detritus of Earl Godwine's 'massacre of Normans' when Ætheling Ælfred was captured in 1036.⁷² Despite these problems, a pattern does emerge. Granted that isolated executions extend well back into the pagan period, and that carefully arranged ritual (?) killings may be found, as in the latest excavations in mound 5 at Sutton Hoo, disorderly assemblages of Stockbridge Down type can never be securely dated earlier than *c.* 900. Thus, finds at Dunstable include pagan Saxon and Roman material, but also late Saxon items in especially close relation to victim skeletons: it is fair to say that the elements from earlier burials may have been de-stratified by intrusion of the later execution cemetery.⁷³ Three such cemeteries, on the other hand, were at least as old as the

⁷⁰ G.C. Dunning and R.E.M. Wheeler, 'A barrow at Dunstable, Bedfordshire', *Archaeological Journal* 88 (1931), pp. 193–217, giving a sub-Roman date; but they appear to have changed their minds: C.L. Matthews, *Ancient Dunstable* (Dunstable, 1963), pp. 83–4.

⁷¹ Thus, the discoveries at Bran Ditch arose from Sir Cyril Fox's investigations of East Anglian dykes; and the barrows at Gally Hills were dug (doubtless for what one hopes to find in barrows) when they were threatened with damage from the local golf-course.

⁷² A. Gray, 'The Massacre at Bran Ditch, AD 1010', *Proceedings Camb. Ant. Soc.* XXX (as above), pp. 77–87; Lethbridge and Palmer (as above), pp. 87–8. A.W.G. Lowther, 'The Saxon Cemetery at Guilddown, Guildford, Surrey', *Surrey Archaeological Collections* XXXIX (1931), pp. 1–50: the excavator's conviction that a large party of Normans was indicated by brachycephalic skull shapes would not commend itself to modern approaches. Lowther may also have been influenced against a purely Gallows solution by Sir Arthur Keith's observation, *op. cit.*, p. 46, that 'we find children and women, young and old, as well as men of all ages'; it seems at least as unlikely that the Ætheling's escort included women and children as that they were victims of execution.

⁷³ Dr Hawkes tells me that 'the buckle (fig. 7, no. 8, p. 209) found by ... skeleton 31 is definitely late Saxon, so probably is the iron arrow-head found close by and the iron buckle by burial 21' (fig. 6, no. 5, p. 207). For the remarkable discoveries of 1988 in

Confessor's reign: at Meon Hill and Guilddown, coins of Edward occur in the *upper* levels. Building tentatively on these foundations, one can identify seven late Saxon execution sites: Bran Ditch, Dunstable, Guilddown, Meon Hill, Roche Court Down, Stockbridge Down, and one just recently found at Goblin Works, Leatherhead.⁷⁴ Four further candidates are Gally Hills, Cross Hill at Willoughby-on-the-Wolds, Notts, White Horse Hill, Uffington, and Old Sarum.⁷⁵ As things stand, there are also a half dozen or more remoter possibilities.⁷⁶ It begins to seem that there is an archaeology of early English criminal law. The executions speak for themselves. And those thus dispatched were self-evidently denied Christian burial.

Dawning awareness of these possibilities has recently prompted a proposal with major implications. It has been known since Kemble's day that the boundary clauses of Anglo-Saxon charters frequently refer to 'heathen burials (*hapene byrgelse*)'. The obvious interpretation is that they were cemeteries of the pagan Saxon period or before. A more modern argument is that observable or excavated barrows (OE *beorgas*) and 'lows (*blawa*)' were sited with statistically significant frequency on known pre-conquest boundaries; this has suggested to some that the boundaries were as old as the pagan period, and that burials were placed there as symbols and guardians of the delimited community's

Sutton Hoo 5, see *Bulletin of the Sutton Hoo Research Committee* 6 (1989), p. 7; and for what now seems a likely counterpart at Cuddesdon (as Dr Dickinson points out to me), T. Dickinson, *Cuddesdon and Dorchester-on-Thames: two early Saxon "princely" sites in Wessex* (British Archaeological Reports, 1, Oxford, 1974), pp. 19–24.

⁷⁴ For Goblin Works, see 'Archaeology in Surrey, 1985–6', *Surrey Arch. Coll.* (as above) LXXVIII (1987), p. 136 (again later intrusions into an earlier cemetery).

⁷⁵ For Cross Hill, definitely a Gallows site on a Roman tumulus containing a pagan Saxon burial and later 'less careful' burials, see *Journal of Roman Studies* XXXIX (1949), p. 104; and for White Horse Hill, Uffington (q.v. below, n. 82), see A. Meaney, *A Gazetteer of Early Anglo-Saxon Burial Sites* (London, 1964), p. 53 (a very inadequately recorded mid-nineteenth-century dig).

⁷⁶ Further to Oliver's Battery (n. 69 above): Great Bedwyn, Wiltshire (Aldsworth and Welsh, as n. 78, p. 177); Mount Down, Hampshire (Aldsworth and Welsh, p. 178); Pakenham and Wortham, Suffolk (N. Smedley and E. Oakes, 'Archaeology in Suffolk, 1961', *Proceedings of the Suffolk Institute of Archaeology* 29 (1962–4), pp. 100, 109); Passenham, Northants ('an Anglo-Saxon "war cemetery" which is tentatively dated 921', D. Wilson, 'Medieval Britain in 1965: I Pre-conquest', *Medieval Archaeology* X, 1966, p. 172); Upton Grey, Hampshire (Aldsworth and Welsh, p. 176).

identity.⁷⁷ But re-examination of an important pagan Saxon cemetery at Droxford has concluded that, while this may be identical with the ‘heathen burial’ of Droxford’s charter bounds, other such references in Hampshire charters cannot be linked with known cemeteries. It was suggested instead that these other ‘heathen burials’ were execution sites. The thesis had some slight archaeological support. Moreover, all heathen burials in Hampshire charters are located on the boundaries not just of estates but of hundreds, the administrative units that were also courts of first instance. If estate bounds might well be guarded by ancestral sentries, a hundred’s boundaries were the proper repository for those whose crimes had banished them to the community’s furthest edge.⁷⁸ Overall, forty-nine sets of bounds, distributed over fifty-four charters, refer to forty-five distinct ‘heathen burials’. Most are in Berkshire, Hampshire and Wiltshire, but they are also found in Buckinghamshire, Dorset, Gloucestershire, Northamptonshire, Nottinghamshire, Oxfordshire, Sussex, Warwickshire, Worcestershire and perhaps Staffordshire.⁷⁹ If such sites indeed consigned criminals to Hell rather than ancestors to

⁷⁷ J.M. Kemble, ‘Notices of Heathen Interment in the *Codex Dipomaticus*’, *Archaeological Journal* XIV (1857), pp. 119–39; D. Bonney, ‘Pagan Saxon burials and boundaries in Wiltshire’, *Wiltshire Archaeological Magazine* LXI (1966), pp. 25–30; ‘Early Boundaries in Wiltshire’, in P.J. Fowler, editor, *Archaeology and the Landscape* (London, 1972), pp. 68–86; ‘Early boundaries and estates in southern England’, in P.H. Sawyer, *English Medieval Settlement* (London, 1979), pp. 41–51. Bonney’s case is defended against severe criticism by A. Goodier, ‘The Formation of Boundaries in Anglo-Saxon England: a statistical study’, *Medieval Archaeology* XXVIII (1984), pp. 1–21.

⁷⁸ F. Aldsworth and M. Welsh, ‘Droxford Anglo-Saxon Cemetery, Soberton, Hampshire’, *Papers Hants Field Club* XXXV (1978), pp. 93–182, at pp. 175–9. The Droxford charters are S 276, 446, 600: it should be noted that the first of these is a forgery, probably of c. 1000, and is thus the *latest* of the series. Again, I owe the idea of investigating this issue to Dr David Hill; and I have been very much helped by Dr Joy Jenkins and her data-base of charter bounds.

⁷⁹ In (ostensible) chronological order (but see n. 81) S 104 + 1568, 43, 179, 276, 301 + 1580, 312–13 + 1588, 317, 367, 368, 377, 379, 381, 413, 414, 427, 438, 446, 449, 496, 487, 495, 503, 517, 523, 541, 558, 582, 585, 590, 605, 647, 651, 575, 608, 673, 1587, 1662–3, 586, 685, 690, 695, 699, 738, 744, 784, 820, 1566, 1664 + 1590, 956, 977, 1013, 1573, 1599. Effectively identical sets of bounds (for these purposes) repeated in separate charters are S 276 + 446, 317 + 503, 368 + 647 + 685, 517 + 523; the same burials may be seen from different angles in S 438 + 586, 449 + 784, 503 + 575, 695 + 699. Counties other than Berks, Hants and Wilts: S 43 (Sussex), 104, 738 (Oxon), 179, 414 (Gloucs), 367 (Bucks), 495, 1566 (Northants), 608 (Staffs?), 744 (Dorset), 977 (Notts), 1573 (Warks), 1590, 1599 (Worcs).

Beowulf's 'judgement of the righteous', that would be clamorous testimony to the vigour with which Anglo-Saxon society had come to pursue its deviants.

It seems too much to believe. It *is* too much to believe, until more 'heathen burials' have been located and some at least have been dug. But even at this stage, two significant points can be made. The first is that *beorgas* and *blawe* (or their Latin equivalents) turn up among the very earliest charter bounds; some are associated with personal names ranging from Woden himself to what might be Peada son of Penda.⁸⁰ But there is no single mention, or what could be construed as a mention, of heathen burial in an authentic charter of the eighth or ninth century.⁸¹ The earliest possibility is dated 903, and this comes from bounds that may well have been added when the charter was copied later in the tenth century. The next, in a grant of Stanton St Bernard to the Ealdorman Ordlaf who is so prominent in the Helmstan case, refers to a 'burial', which only became 'heathen' when the bounds were re-drafted fifty years later. The first clear cases are in charters of Æthelstan, thus coinciding with the intensified campaign described above.⁸² Secondly, the barrows and lows of charter boundaries can often be Identified to this day. But extremely few 'heathen burials' have ever been located. Grundy perambulated the bounds of much of southern England, and was categorical that 'heathen burials' were not barrows. He could only guess that they were cemeteries of the pagan Saxon period, marked out in some other way.⁸³ It is of course possible that memory of pagan burials

⁸⁰ In probably chronological order of bounds' composition, and this time disregarding interpolated or forged texts: S 84 (+ 109), 142, 264, 267, 268, 79, 275, 237, 326, 340, 214 (*Peadan beorge*), 334, 1276, 347, 103 and 1513 (*Wodnes beorg*).

⁸¹ S 43, 179, 1568 and 1588 are certainly later compositions (note *le betheneburiels* in S 1580!). S 317 (856) could conceivably be authentic, but its formulae are suspiciously like those of the Old Minster forgeries, S 229, 275, 312, and the witness-list has a seven-year old Alfred, as well as evident mistakes; the bounds are in any event identical with those of S 503 (944), and the latter is the most likely date of their composition.

⁸² S 367, 368 + 647, 413. S 379 is acceptable as an Æthelstan charter; it is possible that New Minster scribes simply substituted the name of Edward, their founder, for Æthelstan, a king whose existence was ignored in their *Liber Vitae* (above, pp. 000).

⁸³ Grundy's comments can be traced through the Sawyer entries for the charters listed above. H.P.R. Finberg, *Early Charters of the West Midlands* (Studies in Early English History, as n. 24 above, Leicester, 1961), p. 192, identifies the Hawling 'Heathen Burial' with three small round barrows. D. Hooke, 'Burial Features in West Midland Charters', *Journal of the English Place Names Society* 13 (1980–1), pp. 1–40, has considerably more

was preserved down the generations, either by erecting a fence or simply by steering the plough sway. But it may be that ‘heathen burials’ needed no signposts, because they accommodated a different kind of heathen. The fact that the general area of the ‘heathen burial’ near Brightwell, Berks, is still known as ‘Dead Man’s Acre’ implies something more sinister than a grandparents’ graveyard.⁸⁴ Ancient tombs anyway served to dispose of the victims of justice, as was observed above. It is not unreasonable to suppose that genuinely ancient sites attracted fresh notice in the tenth century because they now had new uses.

However that may be, charter boundaries have yet more to interest legal historians. Kemble long ago pointed out that the names given to barrows and lows are by no means always drawn from the Germanic pantheon or heroic cycle. For any one *Cerdices beorg*, there are many more such as *Byrthferthes blaw*. ‘The smith’s low’ at Newnham, Notts, might well be a cryptic reference to Weland, but ‘the ceorl’s low’ in the Downton, Wilts, series is almost a contradiction in terms.⁸⁵ Perhaps it goes too far to assume that the names attached to these features were those of people buried within them; conceivably, they could be something as mundane as the name of a one-time owner of the abutting property. But the ten or a dozen places actually called a person’s ‘burial (*byrgels, byrgen*)’ must, rightly or wrongly, have meant just that. The most famous case is the Crondall charter (973x 974): ‘so to the heathen burial, then west to the bank (*mearce*) where Ælfstan lies in a heathen burial’. The indicated spot is still called ‘Burel’s copse’; in the nineteenth century, it was known as ‘no man’s land’. It could well have been the final destination of a counterpart to Ecgferth, who had no powerful patron to buy him a ‘clean grave’. Yet more suggestive is *Tatemannes beorgelese* in a grant (963) of Washington, Sussex. In a charter of sixteen years before, the spot was known as ‘Tatemann’s apple-

success with ‘*beorg*’ and ‘*blaw*’ than with ‘heathen burials’; likewise, L.V. Grinsell, ‘Berkshire Barrows, part III: the evidence from the Saxon charters’, *Berkshire, Buckinghamshire and Oxfordshire Archaeological Journal* XLII (1937), pp. 102–16. But see the suggestions of Aldsworth and Welsh (as nn. 76, 78 above); also n. 90 below.

⁸⁴ S 523; G.B. Grundy, ‘Berkshire Charters’, *Berks, Bucks, and Oxon. Arch. Jnl.* XXVII (1922–3), p. 214.

⁸⁵ S 977, 229.

tree'. It is perhaps not inconceivable that Tatemann elected to be buried at the foot of his favourite tree. But it seems rather more likely that, like Jefferson Davis in *John Brown's Body*, he ended up hanging from it.⁸⁶

Boundaries undoubtedly were marked by execution sites. Chalke, Wilts, granted to Wilton in 955, was bounded, *inter alia*, by 'where one killed the ceorl for the goats (*buccan*)'. Had a goat-thief, caught in the act, been hauled off to the nearest boundary for execution, or was he cut down as he tried to cross it?⁸⁷ In the mid-tenth-century draft of Stanton St Bernard's bounds (though not in that of 903), there was a 'gallows (*wearh rode*)' on Wansdyke. Another 'rogue-rood' marked the boundary of Bleadon, Somerset (956); Twyford, Worcs (in a late-eleventh-century Evesham forgery) had a 'rogue-tree (*waritroe*)'; and Littlebrook, Kent (995), a 'rogue-barrow'.⁸⁸ There was a *Cwealmstow* (meaning execution-place, the term applied to Golgotha) in grants of Chilcomb, Hants (forged c. 1000), Fen Stanton, Hunts (1012), and Little Hinton, Wilts (confectured in the mid-eleventh century). *Morþdic*, *Morð crundel* and *Morþblau* ('killing-ditch/quarry/low') delimited lands at Rimpleton, Somerset (938), near Wilton, Wilts (968) and at Kineton, Warwicks (969).⁸⁹ A spot near the Trent figured in an authentic text of 1008 as 'where the thieves hang' and in a forgery of '1012' based upon it as 'where the thieves lie'. In the eighteenth century, there were still a 'Gallows flat' and a 'Gallows Lane' in the area – a singular comment on the longevity of English arrangements for dealing with enemies of property.⁹⁰ Thus, it was surely an echo of familiar procedures when Cynewulf has St

⁸⁶ S 820 (Grundy, *ad loc.*, and personal communication from Dr Jenkyns); S 525 (947), 714 (963). Other 'burials' charters of this type are S 317 + 503, 366, 585, 756, 800, 874, 1248 (+ 645), 1588, 1598, 1599 (another Ælfstan, also associated with a 'no man's land').

⁸⁷ S 582.

⁸⁸ S 647 + 685, 368; 606; 1174; 885. Cf. also *wearge dune*, S 495.

⁸⁹ S 376, 926 (cf. A. Campbell, *Charters of Rochester* (Anglo-Saxon Charters I, as n. 19, 1973), 33, p. 47), 1588. S 441, 767, 773.

⁹⁰ S 920, 930; Sawyer, *Burton Charters* (as n. 19) 31, 35, pp. 59–60, 68–9. In this connection, one might re-consider the reference in the bounds of S 1001 (*þær þa cnihtas licgað*), which has been made famous by the Shakenoak excavations: see M. Gelling, 'The Place-name evidence', in A.C.C. Brodribb, A.R. Hands and D.R. Walker, editors, *Excavations at Shakenoak III* (Oxford, privately printed, 1972, pp. 134–9, at p. 135). The villa-site at Shakenoak is on the bounds of the estate at Witney granted by S 1001. The suggestion is that the bounds refer to the burial of 'soldiers'; and the phrase has been related to the discovery (1) of at least nine human skeletons in 'Building A' and (2) the

Juliana led out for execution 'to the estate boundary (*londmearce*)'.⁹¹

Cynewulf is normally dated in the later-eighth or ninth century. If this is right, executions on property boundaries were no new departure in the tenth. There is a grisly portrait of a hanging man in *The Fortunes of Men*, a poem sometimes dated to the tenth century, though on no secure evidence. *Beowulf* itself has a famous vignette of an old man helplessly lamenting his son swinging on a gallows.⁹² One has learned to hesitate before using *Beowulf* as evidence of pre-tenth-century conditions. But it would be disingenuous to see this episode as hitherto absent proof of its later date. As was noted above, there is no reason to deny that individual executions for the most heinous crimes had been carried out since the time of Tacitus. Nonetheless, the grain of the burial evidence aligns with that of the laws. On the ground as in the texts, capital penalties are visibly directed with a new intensity against a wider range of offences.

There had surely been a time which knew no 'distinction between crime and tort'. But those days had passed by Æthelstan's reign. In its perception of crime as a matter for community vengeance, the system of criminal law operated by Alfred's dynasty looks a great deal closer to that of the Angevins. If it was, one of the great riddles of English

presence on the same site of items of equipment worn by fifth-century 'mercenaries'. In other words, the *cnibtas* were fifth-century mercenaries, and the reference is further proof of Shakenoak's remarkable 'continuity'. However, at least one of the nine corpses in 'Building A' was decapitated; all were buried very shallow; and 'where the *cnibtas* lie' appears in S 1001 (1044) but not in the closely similar bounds of S 771 (969). The *primary* meaning of *cnibt* (like that of *thegn* and *vassus*) is 'boy, lad' (whence the bifurcated evolution into 'servant' and 'warrior'). The *cnibtas* of Shakenoak could have been 'the lads, the gang'; and they could have been executed (for highway robbery?) on the estate boundary between 969 and 1044. However else heathen burials were identified and remembered, it is something of a strain on the imagination to suppose that whatever led to the disposal of these men in the fifth century persisted in folk memory for six-hundred years, and re-appeared in the eleventh century having missed its change in the tenth. The importance of the alternative interpretation offered here is that a boundary reference *would* be tied in with archaeological evidence of execution.

⁹¹ Juliana, l. 635 (and cf. ll. 670–1 for her decapitation), edited by G.P. Krapp and E. v K. Dobbie, *The Exeter Book* (The Anglo-Saxon Poetic Records III, Columbia, 1936), pp. 131–2. This reference and the next come from D. Whitelock's fine chapter on The Law, *The Beginnings of English Society* (Pelican History of England 2, Harmondsworth, revised edition, 1965), pp. 134–54, at p. 144. But here, as elsewhere, there is no hint of change over the Anglo-Saxon period.

⁹² Fortunes of Men, ll. 33–42, *Exeter Book* (as above), pp. 154–5; *Beowulf*, ll. 2444–9, edited by F. Klaeber (Lexington, 3rd edn, 1950).

legal history may at last be solved. ‘Felon’ and ‘felony’ were French words, derived from late Latin. They denoted a breach of faith with one’s lord. In the *Chanson de Roland*, they are terms of general abuse, but the arch-felon is Ganelon, the traitor; and so are those who stand up for him at his trial.⁹³ It accords with this usage that ‘*felonia*, breach of the feudal bond’ was *among* the grave crimes for the *Leges Henrici Primi*, along with theft, treason and desertion. But felony’s classical Common Law meaning covers ‘every crime of any considerable gravity’: in Maitland’s list, ‘treason, homicide, arson, rape, robbery, burglary and grand larceny’. Its consequences were forfeiture of life or member, loss of land to lord or King, outlawry if the felon flees, and burial – if at all – in unconsecrated ground. The change of meaning is already evident by the time of the Assize of Northampton (1176). For Maitland, the transformation was ‘a process that is obscure’. Professor Milsom finds it a ‘mystery’.⁹⁴

Given the origins of the word, it was logical for scholars to seek those of the concept in the sub-Carolingian world. There is a similarity between the felonies and the jurisdiction once exercised by the *vicarius*, derived from the Carolingian *bannum*.⁹⁵ Yet there is an at least equally striking resemblance between Maitland’s list and Cnut’s crimes ‘without amendment’ (22 in the list of excerpts above). On the evidence already considered, transmission from Francia in the ninth century to England in the tenth, and thence back to Normandy in the eleventh or twelfth, is at least as plausible as the almost untraceable route from the Carolingian empire to post-conquest England *via* Normandy or Anjou. Now, there is an obvious reason for doubting whether the origins of the transformed ‘felony’ can be continental. As a word for serious crime in general, its use,

⁹³ *La Chanson de Roland*, edited and translated by G. Moignet (Bibliothèque Bordas, Paris, 1969), lines 69, 213, 910, 942 (*‘felun ... traiteur’*), 1191, 3829 (*‘Vus estes mi felun’*), etc.

⁹⁴ *Leges Henrici Primi*, edited by L.J. Downer (Oxford, 1972) 43:7, 46:3, 53:4, pp. 152–3, 156–7, 170–1. Assize of Northampton 3, edited by W. Stubbs, *Select Charters Illustrative of English Constitutional History* (Oxford, 9th edition by H.W.C. Davis, 1924), p. 179. Pollock and Maitland (as n. 2) I, pp. 303–4; II, pp. 464–6; Milsom (as n. 2), p. 355.

⁹⁵ J. Yver, ‘Contribution à l’étude de la compétence ducale en Normandie’, *Annales de Normandie* VIII (1962), pp. 139–83; P.R. Hyams, ‘The Common Law and the French Connection’, *Proceedings of the Battle Conference on Anglo-Norman Studies* IV, edited by R. Allen Brown (Woodbridge, pp. 77–92, at pp. 84–5. Yver notes the Cnut parallel, but without further comment.

whether in French or Latin, is almost exclusively literary and extremely rare. The one probable legal instance, in Latin, is in a decree of the Emperor Henry VII, dated 1312. The only French writers to employ it in this sense were Wace and Garnier of Pont-Saint-Maxence – both writing about England.⁹⁶ If the word had acquired its new meaning on the continent, one would reasonably expect to have found it there. There is also a very powerful reason why the application of a word meaning breach of faith to the whole class of serious crimes is likely to be English. For that was exactly the point of the Alfredian oath. It did, literally, pledge subjects to avoid serious crime. Criminal activity, even tolerance of neighbours' criminal activity, lost Anglo-Saxons citizenship of both earthly and heavenly kingdoms. Theft was indeed a breach of faith with one's lord: the troth plighted at the age of twelve to the King of Heaven as well as to his 'deputy' on earth. Felony was punished like treason because felony *was* treason: it aroused Divine Anger, beside which the fury of the Northmen paled into insignificance. The oath, as will soon be seen, lived on after 1066. Its ferocious ideology was a much more potent brew than the mere 'feudalism' whose terminology it borrowed from the new ruling class.

Doubts about propositions that 'modern' institutions have remote origins focus around questions of feasibility. That issue is reviewed in chapter 12. But something can be said now about one factor. The major ideological inspiration of most emergent sub-Roman states was not Rome itself but Israel. Jehovah, not Jove, was the God of their understanding. Alfred had given the English a uniquely clear vision of the relationship between God's law and their own. But that was not all. Alone among the peoples of post-Roman Europe, the unity of the English was an idea before it was a political fact. It was made an idea of compelling power by Bede, who directly related English destinies to the observance of God's plan. More even than Franks or Visigoths, and much more than Saxons, Englishmen could see their image in God's Chosen People. Kings could invoke

⁹⁶ A. Tobler and E. Lommatzsch, *Altfranzösisches Wörterbuch* (Wiesbaden, 1915 –) III, pp. 1694–1700. J.F. Niemeyer, *Mediae Latinitatis Lexicon Minus* (Leiden, 1984), p. 412; one hesitates to challenge this great work, but the force of '*noluit ministrum ... habere quem fillonem non audeat appellare*', quoted from Rather of Verona, is surely that 'servants' are said to be 'traitors' to their masters. If so, Rather's usage would be consistent throughout, and a possible example of '*fillo*' as 'criminal' would be removed.

that image in rigorous pursuit of their political and cultural objectives. The triumphant tenth-century elite would respond as a class to programmes which, as individuals, it might well find dangerous. Still to acquire better experience of God's mysterious ways, it easily identified one Holy Society with another. Its experience from 865 to 975 was exactly that disregard of the divine will invited savage punishment, while obedience brought unparalleled success. After 975, things began to go wrong again. But the lesson had by then been hammered home. Sin must again be rampant. One result was the hectic political vicissitudes of Æthelred's reign, where conventional crime and sin played an unusually prominent part in the language of high politics. Another was Wulfstan's legislating sermons and sermonizing legislation. Each expressed a view of law as winning God's mercy for society. Fifty years later, it all happened once more. Not the least of the English kingdom's bequests to its new Norman masters was a people conditioned to accept its history as God's judgement on its behaviour.

The Quality of Mercy

The saga of Sunbury and Send, which ended in Egferth's brush with eternal damnation and Archbishop Dunstan's costly purchase of what should originally have been his anyway, had begun in the early 950s with the theft of a *wimman* at Yaxley, Huntingdonshire. Her owner found her in a neighbour's possession. The latter vouched Æthelstan of Sunbury (Middlesex) to warranty for her; that is to say, he showed that he had acquired the woman from Æthelstan. Æthelstan asserted that he could take the process further, i.e. cite a vendor of his own. But he failed to meet the deadline for doing so. He was thus obliged to surrender the woman to the original owner, and '*forgeald* (pay compensation)' of £2. But Æthelstan had also been exposed as a thief. The local Ealdorman therefore demanded his wergeld. Æthelstan's reply was that he did not have the money. His brother, who possessed the Sunbury title deeds even though Æthelstan had the land, offered to pay instead. Æthelstan declared that he would see the land wasted by fire or flood before he allowed that. The brother in vain observed that his behaviour would cost them both the property. 'Then that was what happened (*þa was þæt*

so).⁹⁷ But Æthelstan did not give up. He returned to Sunbury when King Eadwig succeeded (955), only to be expelled again. He revived his case before the royal court when Edgar became king in Mercia two years later. Once more, he was told to pay his wergeld, and refused to pay himself or let his brother do so. Sunbury was therefore lost to his family for ever. It passed to the king, with the consequences examined earlier in this chapter.⁹⁷

Much about this case is intriguing, indeed baffling. How did it happen that one brother had the charters for land held by the other? Why was the brother unable to pay up in Æthelstan's despite? Why was Æthelstan so pig-headed? How, above all, did he escape execution? According to King Æthelstan's laws, those convicted of theft by due process were to be killed and forfeit. Only payment of their wergeld by kin or lord could save them, and Æthelstan had prevented that. One possibility is that Wulfgar, the patron to whom Æthelstan is said to have commended himself, was powerful enough to protect him, and took responsibility for his future good behaviour. The laws allowed that. Ely documentation offers parallels.⁹⁸ But there is another consideration. Æthelstan's property was forfeit in any case. When Ealdorman Ælfheah eventually sold Sunbury to Dunstan, its price was 200 mancuses, or 6000 pence. 6000 pence was not only £25 but also 1200 West Saxon shillings, which was the wergeld of a thegn. It is a not unreasonable assumption that this is what the land would have cost the archbishop, had he bought it from the king direct. If so, Edgar would have received Ecgferth's wergeld once for his 'clean grave', and again for one of his estates. In other words, the government could raise a sum equivalent to a thegn's wergeld from what was once Æthelstan's property, whether Æthelstan himself disbursed it or not.

For all its puzzles, the case is symptomatic. Capital punishment is not in fact as prominent in case records as the legal texts (and perhaps the archaeology) lead one to

⁹⁷ LS 38–9.

⁹⁸ E.g., LS 124: use by Æthelstan *presbyter* and his cousin of the patronage of Wulfstan so as to hold on to the minster at Horningsea that would otherwise be forfeit on Æthelstan's conviction for theft. The verb *gebeh* used for Æthelstan of Sunbury's commendation suggests acceptance of lordship, as in Helmstan's case (LS 24); for lords as sureties of dependents' good behaviour, see pp. 000 below.

expect. Seven executions and two equivalent mutilations are said to have been carried out. Another four or five apparently would have been, but for supernatural intervention.⁹⁹ These few cases are enough to reveal the fervour with which sanctions could be applied. The prosecutors of two potential victims could not be bought off by their friends. A Suffolk sheriff, said to have been mainly concerned to increase his revenues, pursued a woman right into St Edmund's sanctuary; a pointless as well as disastrous risk unless he intended her bodily harm.¹⁰⁰ When there was hesitation about subjecting three moneyers, 'caught with false money', to the full rigour of the law on Pentecost, Dunstan gave a stirring homily to the effect that such a crime was theft from the whole people (though not without shedding a tear at their cruel fate); then washed his face and celebrated mass in the cheerful expectation that God would the more readily accept the sacrifice at his hands for the knowledge that the law had been obeyed. A white dove duly endorsed his sense of priorities by settling on his head.¹⁰¹ The small number of such cases is nonetheless significant. Most are in hagiographical or quasi-hagiographical sources. Of the rest, an executed Essex smith in Domesday Book has the distinction of being the smallest recorded forfeiture; while charters and *notitiae* offer only a woman with less than ten hides drowned for witchcraft at London Bridge, and the owners (note the plural) of seven hides in Somerset, condemned for theft.¹⁰² Granted that the death penalty may often have been enforced without texts saying so, recorded cases are usually small fry. Exceptions are those 'proscribed and exterminated' by Cnut for alleged treason to his predecessor, and perhaps the Northumbrian arraigned by

⁹⁹ Executions/mutilations: LS 31, 43, 100, 144, 148, 155, 157, 174, 178; the same frustrated: LS 154, 156, 158 (?), 171, 173; see also Helmstan and Æthelstan of Horningsea as above, plus LS 127 (intercession of Cambridge citizens for Leofstan).

¹⁰⁰ LS 154, 173 (see n. 103), 171.

¹⁰¹ LS 174: the story is Eadmer's, which would incline one to see it as echoing Henry I's campaigns against moneyers; but Osbern's passing reference to the Pentecost punishment of *populi seductores argentarios* shows that the tale circulated by his time. Wulfstan opposed Sunday executions: EGu 9:1, pp. 132–3, II Cnut 45, pp. 342–3.

¹⁰² LS 100, 43 (cf. *DB* i 221bc, *Northants* 6:5, 6a:3), 31.

Tostig.¹⁰³ The circumstances were in each case unusual; and Tostig's vigour, as was suggested above, may be one reason why his regime was unacceptable.

The Dumbleton pig-thief and the witch's son are both described as escaping into outlawry in terms which imply that the alternative would have been death. But outlawry/exile is otherwise the lot of those leading figures under Æthelred and the Confessor who seem essentially victims of high politics.¹⁰⁴ Lack of any hint of capital penalties in these cases must be significant. Ideology here confronted the sort of elite solidarity which meant that, for two and a half centuries after 1066, the greatest men were not even executed for treason. It seems unlikely that Earl Godwine would have been beheaded by Harthacnut or Edward, even if he had not appeased the former by presenting him with a superb ship, and had not eluded the latter's clutches.¹⁰⁵ Whether or not Edward hated him as much as some contemporary sources imply and many modern historians assert, the events of 1051–2 show that it was politic to leave scope for pardon. A case at the outset of the period makes the same point. If the Ealdorman Wulfhere of the 901 forfeiture was the uncle of Alfred's dispossessed nephew, as is possible, he was a very dangerous enemy indeed. It is thus no surprise that the will of Wulfgar, Æthelstan's 'loyal thegn', disposes of lands in Wiltshire that were once Wulfhere's, and arranges for the commemoration of a Wulfhere who seems to have been his grandfather. Such a family needed placating by a still vulnerable king.¹⁰⁶ Yet the most important factor of all may well have been that big men had assets that could absorb or deflect royal anger.

¹⁰³ LS 144, 173; it is interesting that the *Vita Ædwardi* stresses Tostig's refusal 'to spare anyone, however noble': *The Life of King Edward the Confessor*, edited and translated by F. Barlow (Nelson's Medieval Texts, London, 1962) vii, p. 51. See above, pp. 000.

¹⁰⁴ LS 56, 43, 63, 71–2, 75–6, 97, 101, 160–5. However, the forfeiture of Wulfgeat (no. 72?) was accompanied by the blinding of Wulfheah and Ufegeat, while Ealdorman Ælfhelm of Northumbria, their father, was 'ofslagen (executed?)': *ASC*, p. 240. Likewise, it is a possible implication of Earl Waltheof's execution as against Earl Roger's imprisonment, after the 1075 rebellion, that English noblemen were liable to capital punishment as Normans were not: *Ordericus* (as chapter 3, n. 79) iv, II, pp. 314–23; see below, pp. 000.

¹⁰⁵ LS 175, 162.

¹⁰⁶ LS 27; Robertson, *Charters* XXVI, pp. 52–3; see J.L. Nelson, 'A King across the sea: Alfred in continental perspective', *Transactions of the Royal Historical Society* 5th series 36 (1986), pp. 45–68, at pp. 54–6, and cf. pp. 000 above for Æthelstan's insecurity.

Estates of those who never returned knitted new webs of patronage. Those restored to favour had been reminded (as had the rest of the political nation) what the source of their wealth was. Hence, Flodoald's servant had to be saved from certain death for an unnamed crime by saintly tampering with the ordeal, not by Flodoald's offer to pay. But Ealdorman Leofsige's murderous attack on Æthelred's chief reeve at home, allegedly beyond even pagan tolerance, clearly did not cost him his head. That contrast prompts a doubtless cynical conclusion that one could better afford the price of mercy than the other.¹⁰⁷ Æthelstan of Sunbury had already paid the price of life. It was perhaps a matter of indifference that he pay his life itself.

Historians have characterized the pre-conquest legal regime as one of '*bot* and *wite*'. The very words evoke the numinous groves of the Forests of Germany. The meaning is that compensation (*bot*) took precedence over punishment, even if a fine (*wite*) was paid *regi vel civitati*, as in the days of Tacitus. But all depends on who got *bot*, and how this related to *wite*. To make amends to society's constituted authorities is by no means the same as compensating an affronted kin. Paying the price of life as a fine to the king and (lesser) damages to a victim, like Æthelstan, is quite different from paying a kin blood-money, and a lesser sum to the king whose peace had also suffered. If the second might bespeak a world innocent of much beyond tort, the first denotes a real perception of crime, though one still reckoning with a victim's interests. Modern scholars, drawing inspiration from the Plains of Africa rather than the Forests of Germany, speak of 'kin-based society', with much the same meaning as that traditionally conveyed by *bot* and *wite*. Law and Order depends, in relatively 'stateless' societies, on the rhythms of compensation and feud, where the primary initiative is that of the kin. Social anthropology has offered medieval historians much. But the analogy's premiss is in this case open to question. Æthelstan of Sunbury might well have been surprised to hear that he lived in a 'stateless' society.

The best way to appreciate the place of the kin and its dues in later Anglo-Saxon

¹⁰⁷ LS 154, 71 (75 implying Leofsige's exile, not execution).

law is to consider not theft, the main topic so far, but homicide and its concomitant, feud. Alfred's promulgated changes to established custom are, as usual, relatively marginal. He aimed not to stop violence altogether, but to defer its outbreak for as long as possible. Men might fight alongside their lords or kin (though not against their lord), and kill those caught in compromising position with their wives, daughters, sisters or mothers. But force should not otherwise be used until all peaceful means of redress were exhausted. Adversaries should be besieged at home for a week, and should be kept, if willing to surrender their weapons, for a month, so that kin and friends could be notified. If resources were inadequate to sustain a siege, the ealdorman, or in the end the king, could be asked for help. Pursuants failing to follow these procedures must pay the appropriate compensation for wounding or killing, together with a fine; they and/or their kin lost their rights in feud.¹⁰⁸ This is an intelligent attempt to restrain violence. But most of it is common form in early medieval *Volksrechte*. An enemy's inviolability at home was a widely recognized principle, as was the undesirability of actual violence.¹⁰⁹ Implicit in Alfred's law is a right to kill uncooperative adversaries. There is no overt ideological hostility to feud. The Carolingians, by contrast, expressed a vivid horror at the prospect of violence in a Christian society. Charlemagne saw hatred and homicide as a breach of God's law, and incompatible with hope of His mercy. For the bishops assembled at Paris in 829, those who avenged Christian blood arrogated God's own prerogative.¹¹⁰ Where Alfred offered only official help in a siege, the Carolingians made themselves personally responsible for redress, by demanding that recalcitrants be brought before them, and

¹⁰⁸ Af. 42 – 42:7, pp. 74–7; Liebermann and *EHD I* understand the precipitate avenger's loss of the compensation otherwise due; loss of kin-protection, so outlawry, is Attenborough's less plausible version.

¹⁰⁹ *Leges Alamannorum* xlv, edited by K. Lehmann (as revised by K.A. Eckhardt) (*Monumenta Germaniae Historica, Legum Sectio I, V(i)*), pp. 104–5, and cf. *Lex Baiwariorum* iv 23, edited by E. de Schwind (*ibid.*, V(ii)), pp. 331; *Lex Frisionum*, *Additio Sapientum* i 1, edited and translated by K.A. and A. Eckhardt (*MGH, Fontes Iuris Germanici Antiqui*, new series XII), pp. 80–1; *Lex Saxonum* xxvii, edited by C. Fr. von Schwerin (*MGH, FIGA in usum scholarum*), p. 27; *Lex Thur.* xlviii (*ibid.*), p. 65; above all, *Edictus Rothari* 45, 74, 143, edited by F. Bluhme (*MGH Legum* (folio series) IV), pp. 20, 23–4, 32–3, which closely echo Alfred.

¹¹⁰ *Capitularia* 33:32 (802), I, p. 97; 196:29 (829), II, p. 38; cf. 22:66–7 (789), I, p. 59 (= *Ansegisus* i 63, iii 89, I, pp. 402, 434).

sent where they could do least damage; those that killed after peace was made must not only pay compensation along with the royal *bannum* (sixty shillings), but also lose their hands for perjury.¹¹¹

Something much more like Carolingian ideology does appear in the laws of Edmund. His first ‘ecclesiastical’ code forbade access to the king (and, as has been seen, Christian burial) to homicides who had not made spiritual amends. Louis the Pious had said much the same.¹¹² Edmund’s ‘second’ code was almost entirely devoted to feud. So as to ‘promote *Cristendomes*’, and ‘that we most steadfastly keep our peace and concord between us’, and because ‘the unjust and manifold fights that there are among ourselves much distress me and us all’, the king again ordered that no homicide come near his person ‘until he have undertaken godly compensation (*bote*), and have compensated (*gebet*) the kin ... as the bishop whose shire (*scyre*) it be instructs him’.¹¹³ He went on to allow kins to opt out of the obligation to support their members in feud or compensation. Kinsmen who provided support after opting out were liable to the vengeance of the victim’s kin, and also forfeit to the king as if they had helped an outlaw. Likewise forfeit and ‘*gefab* against the king and ... all his friends’ (as in excerpt 6 of section 1, above), was a victim’s kin that attacked a kin who disowned its homicidal member.¹¹⁴ Edmund still permitted compensation for the victim’s kin. But the priorities of his code’s final clauses, and also of the tract, *Wergeld*, which gives them explanatory glosses, are striking and, so far as one can see, new. *Healsfang*, the initial payment emphatically confined to those ‘within the knee’ (i.e. children, siblings, parents), is paid first; then *manbot*; then – according to *Wergeld*, though not the extant text of II Edmund – the ‘fight-fine (*fjhtewite*)’;

¹¹¹ *Capitularia* 20:22 (779), 44:5 (805) (= *Ansegisus* iii 5), 139:13 (818–19) (= *Ansegisus* iv 25), I, pp. 51, 123, 425–6, 284, 440; 192:7, 193:8 (from *Ansegisus* iv 25), II, pp. 15, 20.

¹¹² I Em. 3, pp. 184–5. *Capitularia* 146:3, I, p. 298: those who introduce such malefactors to the palace are to carry them on their neck once around the palace, then to the ‘*cippum* (pillory?)’ whither the criminal is destined!

¹¹³ II Em. Pr – Pr:1, 4, pp. 186–9. Cf. VI Atr. 36, pp. 256–7, a more explicit decree than the corresponding V Atr. 29, pp. 244–5.

¹¹⁴ II Em. 1 – 1:3, pp. 186–9.

and only then the first installment of the wergeld's outstanding balance.¹¹⁵ There is more provision here for crime's main sufferers than at any other time in English law between the twelfth century and the later-twentieth; but authority is clearly staking its claim. And legislation has turned against the cardinal principle of a feuding society, the liability of an offender's kin or associates for the harm he had done. Without this liability, an injured party's chance of obtaining redress was seriously reduced, as was an offender's opportunity to provide it. 'Peace in the feud' was endangered. Not even the Carolingians went so far. To find anything comparable, one must look to the codes under most Roman influence, like those of the Visigoths and Burgundians, or a famous pronouncement (penned by a Roman referendary) of the Merovingian King Childebert.¹¹⁶ It will be argued later that influence from at least one of these quarters is not inconceivable. But it is better to see such attitudes as another symptom of the rise of a new view of society in tenth-century England, influenced not only by the Franks but also, like the Franks, by the Bible. This view put a premium on society's unity. A people of God could no more be rent by internecine conflict than by discordant observance of the monastic rule.¹¹⁷

The evidence, for what it is worth, is that official attitudes to feud and violence took effect. The nearest thing to a feud in all 160 recorded disputes from the heartland of the Old English kingdom is the story of the Ardley brothers. The ultimate disgrace

¹¹⁵ II Em. 7 – 7:3, pp. 188–91; cf. Wer. 3 – 6, pp. 392–3 (and, for the relationship of this text with Edmund's, see above, pp. 000).

¹¹⁶ *Lex Visigothorum* VI i 7 (an *Antiqua*), edited K. Zeumer (*Monumenta Germaniae Historica, Legum Sectio I, I*), p. 256; *Lex Burgundionum* ii 7, edited by L. de Salis (*MGH, Leg. Sect. I, II (i)*), p. 43; *Decretio Childeberti* ii 3, edited by K.A. Eckhardt (*Pactus Legis Salicae, MGH, Leg. Sect. I, IV (i)*), p. 268.

¹¹⁷ The overlap of the two concepts of unity are variously discussed by J. Semmler, 'Reichsidee und kirchliche Gesetzgebung', *Zeitschrift für Kirchengeschichte* 71 (1960), pp. 37–65, especially at pp. 45, 57–61; D.A. Bullough, 'The Continental Background of the Reform', *Tenth-Century Studies. Essays in Commemoration of the Millennium of the Council of Winchester and Regularis Concordia*, edited by D. Parsons (Chichester, 1975), pp. 20–36, at pp. 23–6; P. Wormald, 'Æthelwold and his Continental Counterparts: Contact, Comparison, Contrast', *Bishop Æthelwold. Studies in his Career and Influence*, edited by B. Yorke (Woodbridge, 1988), pp. 13–42, at pp. 16–19, 31–2. For the general ideological context, see J.M. Wallace-Hadrill, *Early Germanic Kingship in England and on the Continent* (Oxford, 1971), pp. 104–8.

that they narrowly escaped is significant. Historians must otherwise fall back on the notorious Northumbrian saga of Carl and Thurbrand. Even this feud is not all it seems; and, however understood, it is scarcely typical of England at large.¹¹⁸ Feud does break out in some post-1066 sources. In a remarkable story, St Wulfstan and the Gloucester populace so pressurized five brothers to come to terms with ‘William the Bald’, that one went mad and the rest were reconciled. Judging from William’s name and post-conquest circumstances, it seems highly likely that both parties to this feud were Norman. With the case of Abbot Scotland’s kinsmen, this is certain. There is reason to think that England’s eleventh-century conquerors were more familiar with bloodfeud than their new subjects.¹¹⁹ Similarly, matters of feud and kindred, which did preoccupy early Anglo-Saxon law-makers to the extent that they sought to tackle recurrent problems and anomalies, almost vanish from the later series.¹²⁰ The exceptions are revealing. Kins may exonerate a member slain as a thief. Powerful kins are seen as a major threat to law and order.¹²¹ Slayers in cases of *open morð* (which should mean ‘proven secret killing’) must be surrendered to the victim’s kin, and the bishop has jurisdiction, just as, for Edmund, he gave instructions as to what homicides owed by way of compensation to God and the

¹¹⁸ *De Obsessione Dunelmi*, in *Symeonis Monachi Opera Omnia*, edited by T. Arnold (2 vols, Rolls Series 75, London, 1882–5) I, pp. 215–20; now best discussed in W. Kapelle, *The Norman Conquest of the North* (London, 1979), pp. 17–24. As will be seen below, pp. 000, and chapter 12, pp. 000, Northumbria was largely without the typical organs of pre-conquest peace-keeping.

¹¹⁹ *Vita Wulfstani* ii 15, edited by R.R. Darlington (Camden Society, 3rd series XL, London, 1928), pp. 38–9; *Vita et Miracula Sancti Dunstani auctore Osberno* ii 17, edited by W. Stubbs, *Memorials of St Dunstan* (Rolls Series 63, London 1874), pp. 142–3. For feuding in the France of the period, see now S.D. White, ‘Feuding and Peace-Making in the Touraine around the year 1100’, *Traditio* XLII (1986), pp. 195–263.

¹²⁰ E.g. Abt. 22–3, 30, pp. 4–5; Hl. 1–4, p. 9; Wi. 25, p. 14; Ine 16, 21, 23–23:2, 24:1, 28, 54–54:1, 70, 74 – 74:2, 76 – 76:3, pp. 96–7, 98–9, 100–1, 112–15, 118–19, 120–3; Af. 20 – 31:1, 27 – 28, pp. 64–7. The dominant concerns are (i) methods of payment, (ii) problems of kinless men, (iii) kin of penal slaves, (iv) liability of distribution among several killers, (v) non-vengeance for the slain thief: all but the first are thus problems that occur around the margins of feud, and take its main principles for granted. See also the ‘Penitential of Theodore’ I iv, edited by A.W. Haddan and W. Stubbs, *Councils and Ecclesiastical Documents relating to Great Britain and Ireland* (3 vols, Oxford, 1871) III, p. 180, which anticipates Alfred in seeing slaying on a lord’s behalf as more acceptable than other homicides.

¹²¹ II As. 11, pp. 156–7, III Atr. 7, pp. 230–1; III As. 6, IV As. 3, pp. 170–1.

kin (in that order).¹²² Especially interesting are laws penned by Wulfstan on clerics and vendetta. Monks, very properly, ‘go out of their kin-law (*mæglage*) when they submit to rule-law’. But a man in orders who is accused of homicide must be supported by his kin, in clearance-oath, vendetta or compensation.¹²³ The archbishop could not contemplate rigid application of the ‘opting out’ rule to clergy. It would seem, as with what would later be called ‘criminous clerks’, that clerical privilege or clerical vulnerability demanded special consideration.

There is, as always, a danger of arguing from silence in Anglo-Saxon legislation. One is not entitled to assume that the obligations of the kindred under vendetta – still less, its rights – had receded entirely from view. But, in the light of what later Anglo-Saxon law does and does not say about feud and compensation, this can hardly be described as a kin-based regime. By contrast, the codes have a very great deal to say about amends due to society’s rulers (including God). The sum of 120 West Saxon shillings was the same, in real terms, as 50 Kentish shillings. This last was the Kentish king’s ‘*mundbyrd* (protection-value)’. 120 shillings may have had a similar role in Ine’s Wessex. It was payable as a king’s (or bishop’s) ‘*burhbryce* (enclosure-penetration)’, for fighting in monasteries, for false witness or an unfulfilled pledge before the bishop, for ‘secret agreements’, and by noblemen with land who withheld military service.¹²⁴ The sum’s special significance is somewhat clearer with Alfred, who may well have known that in monetary terms it fell not far short of the sixty-shilling Carolingian *bannum*. Though now restricted to the king’s *burhbryce*, it was extended to ‘*ciricfrið* (church-peace)’ in general, to unpermitted change of lord, to disruption of an ealdorman’s court, to breach of ‘holy Justice’ during Lent, and probably to all theft of goods worth more than

¹²² II Cn. 56 – 56:1, pp. 348–9.

¹²³ VIII Atr. 23 – 25, p. 266; I Cn. 5:2b–2d, pp. 286–7. Cf. also VIII Atr. 33, p. 267 (king as protector of a kinless priest or stranger); and II Cn. 39, pp. 340–1 (compensation for kin of a slain ‘altar-thegn’).

¹²⁴ Abt. 2, 5–6, 8, p. 3; Wi. 2, p. 12; Ine 45, 6:2, 13, 52, 51, pp. 108–9, 90–3, 94–5, 112–13; note that 120 shillings in 6:3–4, pp. 92–3, may be a mistake for 30 shillings: above, chapter 5, n. 22. For Kentish and West Saxon equivalents, see chapter 5, pp. 000.

thirty shillings bar ‘*mandeofe* (kidnapping?)’.¹²⁵ But from Edward’s time, 120 shillings is actually described as ‘*cyninges oferbyrnesse*, king’s disobedience’.¹²⁶ It is owed for judicial abuses, whether by parties or by presiding reeves, and for maladministration of the ordeal; for assistance to thieves and as the price, at first, of a convicted thief’s freedom; for refusal of summons to an assembly and for neglect of the hue and cry; for withheld tithes and Peter’s Pence, and (under Wulfstan) for breaking a penitential fast or denying confession to a man under sentence of death; for desertion by anyone of an army not under royal command; and for trading outwith an authorized market or below the fixed price of wool.¹²⁷ As spotted by the ever percipient Brunner, there are striking similarities between applications of the English royal fine and the Frankish *bannum*.¹²⁸ The important thing for present purposes is that later Anglo-Saxon kings, like the Carolingians, had widened the range of the heavy fine that was in a special sense their own to cover the revenues of the Church, the integrity of justice and the security of property.

Alfred had also specified £5 as ‘*cyninges borh* (royal security)’. As remarked in

¹²⁵ Af. 40, 2:1, 37:1–2, 38 – 38:1, 40:2, 9:2, pp. 72–3, 48–9, 70–3, 74–5, 54–5; the possible alternative, that ‘*mandeof*’ was fined 120 shillings, other thefts presumably less, is more unlikely, in that the penalty is nowhere else stipulated for kidnapping, whereas it squares as a fine for general theft with II As. 1:3, pp. 150–1. 120 shillings is also payable for seduction of a nun: Af. 8, pp. 54–5. For the Carolingian 60 shilling *bannum* (720 pence after reform, versus the 6000 pence comprised by 120 West Saxon shillings), see *Lex Ribuaria* lxxviii, edited by F. Beyerle and R. Buchner (*Monumenta Germaniae Historica, Legum Sectio I*, III (ii)), p. 119; *Capitularia* 27:1–2 (797), 33:31, 38, 40 (802), 34:18 (802), 35:57 (802), 57:7 (801 x 814), 59:1 (803 x 813), 68:1–3 (801 x 813), 77:2–3, 9 (801 x 813), 104:6 (n.d.), 110: 1–8 (n.d.), 139:1, 2, 4, 12, 17 (818/19) (= *Ansegisus* iv 13–14, 16–17, 21, 24, 29), 143:1, 144:4 (820), I, pp. 71, 97–8, 101, 104, 144, 146, 157–8, 171, 214, 224, 281, 283–5, 437–40, 294, 295–6.

¹²⁶ I Ew. 1:1, 2:1, pp. 138–9, 140–1, II Ew. 7, pp. 144–5, I As. 5, pp. 148–9.

¹²⁷ I Ew. 2:1, pp. 140–1, II Ew. 1:3, 2, 8, pp. 142–5, II As. 3, 11, 20, 25:1, pp. 152–3, 156–7, 160–1, 164–5, V As. 1, 1:2–4, pp. 166–9, IV As. 7, p. 172, VI As. 8:4, 11, pp. 179 182, III Em. 2, 7:2, pp. 190–1, III Eg. 3, pp. 200–1, I Atr. 4:3, pp. 220–1, II Cn. 15:2, 33:2, pp. 320–1, 336–7, *Ord.* 6, p. 387; II As. 1:5, pp. 150–1, VI As. 1:5, pp. 174–5, II As. 1:3, pp. 150–1; II As. 20, 20:2, pp. 160–1, III Em. 2, 6:2, pp. 190–2, III Eg. 7:2, pp. 204–5, II Cn. 29, pp. 330–1; I As. 5, pp. 148–9, II Eg. 4:1, pp. 198–9, VIII Atr. 10:1, 11:1, p. 265, I Cn. 9:1, 10:1, pp. 292–3, VII Atr. 2:4, pp. 260–1, II Cn. 44:1, pp. 342–3, V Atr. 28:1, pp. 244–5, II Cn. 65, pp. 352–3; I Ew. 1:1, pp. 138–9, III Eg. 8:2–3, pp. 204–7.

¹²⁸ H. Brunner, *Deutsche Rechtsgeschichte* (2nd edn, revised by C. von Schwerin, Leipzig, 1928), pp. 47–54. Cf. J. Yver, ‘Les premières institutions du Duché de Normandie’, *I Normanni e la loro Espansione in Europa nell’ Alto Medioevo. Settimane di Studio del Centro Italiano di Studi sull’ Alto Medioevo* XVI (1969), pp. 299–366, at pp. 357–9.

chapter 5, it was this sum that was elsewhere in the code called ‘the king’s *mundbyrd*’, and it was twice the value of the ‘king’s disobedience’ (or a Kentish king’s *mundbyrd*).¹²⁹ It is hard to say what Alfred hoped to achieve with this second and higher royal fine. Perhaps it was meant to serve as the sanction of special, or privileged, royal protection, now that 120 shillings was becoming generalized. But it already appears as the payment due for first-time defiance of Æthelstan’s Grately decrees.¹³⁰ Then, under Æthelred and Cnut, it is levied for toll-evasion and for breach of the king’s peace in London, for harbouring outlaws and for *hamsocn*. Context implies that it was also payable, in London and generally, for *forsteal*. Despite the patchiness of its incidence, there is little doubt that by 1066 £5 was established in its Domesday and later role as *gridbryce*, penalty for (lesser) offences against the King’s Peace; and that it was the sum appropriate for most if not all those royal pleas that were amendable rather than ‘bootless’.¹³¹

Beyond these fines, but still short of total forfeiture, was wergeld, the one alternative (for those with the resources) to death for a proven theft like Æthelstan of Sunbury’s. His royal namesake had demanded wergeld for a second defiance of his decrees, with total forfeiture to follow a third. A 200-shilling wergeld was a mere 1000 West Saxon pence, where the £5 fine was 1200; so Æthelstan’s £5 fine-wergeld-forfeiture sequence suggests that he was anticipating trouble from those of higher status.¹³² But wergeld became payable for first-time violation of Cnut’s laws. Æthelred and Cnut, modifying the unbridled fury of Æthelstan’s second phase, allowed those who let a thief escape pay with their wergeld, not their life; this was probably a side-effect of the surety arrangements studied in the final part of this chapter.¹³³ But again, wergeld was also due

¹²⁹ Af. 3, 5, pp. 50–1: *mundbyrd* is made synonymous with *borb* for the archbishop and ealdorman; cf. VIII Atr. 5:1, pp. 264–5, I Cn. 3:2, pp. 282–3, Grið 6, p. 470, and chapter 5 above, pp. 000.

¹³⁰ II As. 25:2, pp. 164–5.

¹³¹ IV Atr. 3:2, 4:1, pp. 234–5, II Cn. 13:2, 62, pp. 316–17, 350–1; cf. VI Atr. 34, pp. 254–5: *mundbrice* to the king for damaging a warship. DB i 1b [*Kent* D:12–13, 15, 23] etc: see below chapter 12, pp. 000.

¹³² II As. 25:2, pp. 164–5; as noted by Attenborough, p. 209.

¹³³ II Cn. 83 – 83:1, pp. 366–7; I Atr. 1:7, 11, 13, pp. 218–19, II Cn. 30:6, 8–9, pp. 334–5. See below, pp. 000.

by then for incest and for precipitate second marriage, as well as for the special variety of ‘robbery’ considered shortly.¹³⁴ The underlying principles of all this deserve emphasis. Sums once the mark of people and places under the king’s special protection were now due from those disobeying his general instructions. Payment once meant to compensate an aggrieved kin was now owed as a fine to an outraged crown. Blood-money, once the value of one’s life, was now its price.

The other face of brutality in later Anglo-Saxon criminal law was not mercy, therefore, but fiscality. What Edgar and Wulfstan saw as ‘mercy’ was discussed in chapter 3; its ‘beneficiaries’ must have sighed for the gibbet.¹³⁵ The codes of Æthelred and Cnut do lay rather more stress than Æthelstan on a first-time proven thief’s right to redeem himself.¹³⁶ But they make up for this with more stress still on ‘the king’s *geribat* (legal dues)’. One would expect such a regime to lead to the same sort of complaints about abuse and promises of redress as the not dissimilar post-conquest system. It did. Edgar is found commanding that ‘for no amendable (*botnyrdum*) crime is one to forfeit more than one’s wergeld’.¹³⁷ If this law referred to actual malpractice, it is remarkable that sums greater than wergeld but short of the total forfeiture that went with ‘bootless’ crimes could even be demanded. The ‘redress’ section of Cnut’s code penalizes reeves who levy unauthorized fines when administering royal property, and who treat children in their cradle as if they were cognizant of their father’s thefts.¹³⁸ There is a strong overall impression that English government in the tenth and early-eleventh centuries had little to

¹³⁴ II Cn. 51, 73a:1, 63, pp. 346, 360–1, 352–3; cf. also IV Atr. 7:1 for traders in bogus coin. A revealing illustration of graded penalties are the compensations (in this instance transferred from ‘Christ’s deputy’ to His Church) payable for violating sanctuary by homicide: wergeld is in any case due (*‘pam cyninge 7 Christe’*, so perhaps twice over) from those spared their lives; thereafter, £5 goes to the ‘head-minster’, 120 shillings to ‘medium minsters’, 60 shillings (? an earl’s fine: II Cn. 15:2, pp. 320–1) for smaller churches with graveyards, and 30 shillings for ‘fieldchurches’: VIII Æthelred 1:1 – 5:1, pp. 263–4, I Cn. 2:3 – 3:2, pp. 280–3.

¹³⁵ V Atr. 3 – 3:1, pp. 238–9, VI Atr. 10 – 10:1, pp. 250–1, II Cn. 2:1, pp. 308–9; with, as an example, II Cn. 30:5, pp. 332–5. For Edgar, see chapter 3 above, pp. 000.

¹³⁶ I Atr. 1:5, pp. 218–19 (but compare III Atr. 4:1, pp. 230–1); II Cn. 30:3b, pp. 332–3.

¹³⁷ III Eg. 2:2, pp. 200–1.

¹³⁸ II Cn. 69:1–2, 76:2, pp. 356–7, 364–5; cf. V Atr. 32:4, pp. 244–5 on excessive accusations of homicide, one of the prevalent abuses ‘in the North’ inserted in the ‘D’ text of this code.

learn from Richard Fitz Neal about *iustitia* as *magnum emolumentum*.

Two important manifestations of Anglo-Saxon judicial fiscality can be illustrated from ‘ground-level’ evidence. The first concerns the Geld. In a hostile account of the machinations of Abbot Æthelwig of Evesham, the Worcester cartularist, Heming, says that Cnut’s policy had been that anyone defaulting on the huge geld payments he demanded lost the relevant land to whoever paid instead. Those with designs on church property thus paid the sheriff and took possession, even if its liability would in fact have been met on time. This was how Worcester had lost half Milcote. ‘By his usual devices’, Æthelwig then procured that half from its sitting tenant. He went on to promise the bishop of Worcester (whose advisers he had suborned) that he would meet the annual payments due on the rest, and would one day return both halves. He kept his promise for barely a year. It seems that by paying geld for Milcote, Æthelwig simply transferred title to himself. It is more than likely that this was what he did to the frightened Englishmen who sought his ‘protection’ from the Normans. Given his exalted judicial status under William I, he was well-placed to do so.¹³⁹

Now, one of William I’s ‘Ten Articles’ provides, as was earlier seen, that his subjects have the ‘*legem Eadwardi regis* in lands and in all things’. One thing that the ‘law of King Edward’ meant, on this chapter’s evidence, was forfeiture for a whole range of serious crime. England’s first ruling class could thus be forfeited out of existence. More specifically, ‘Edward’s law’ must have embodied the Cnut decree giving secure tenure to land ‘defended (*generod*)’ before the shire, and implying (as is made clearer in one MS) its denial to those who could or would not do so.¹⁴⁰ ‘Defend’ has strong connotations of fiscal obligation in Domesday Book. Cnut’s law may thus reflect the fiscal policy

¹³⁹ *Hemingi Chartularium Ecclesiae Wigorniensis*, edited by T. Hearne (2 vols, Oxford, 1723) I, pp. 277–80, and cf. pp. 269–73. The Evesham view, complementary in that it has exactly the opposite bias, is in *Chronicon Abbatiae de Evesham*, edited by W.D. Macray (Rolls Series 29, London, 1863), pp. 88–96. The pioneering discussion of these matters is R.R. Darlington, ‘Æthelwig, Abbot of Evesham’, *English Historical Review* XLVIII (1933), pp. 1–22, 177–98; but the credit for seeing the point of the Heming passage goes to M.K. Lawson, ‘The collection of Danegeld and Heregeld in the reigns of Æthelred II and Cnut’, *ibid.* XCIX, pp. 721–38, at pp. 723–4, 728–9. I hope to return to this matter.

¹⁴⁰ Wl. art. 7, p. 488; II Cn. 79 (G), pp. 366–7.

described by Heming. Nor is Heming's the only evidence that the policy was pursued after 1066. A famous passage in the *Anglo-Saxon Chronicle* describes how the Conqueror 'sold land on very hard terms: then came someone else, and offered more than the other had given, and the king let it go to (that) man ... then came the third and offered still more, and the king gave it into (his) hands ... and did not care how sinfully the reeves had got it from poor men'.¹⁴¹ One can well imagine that in post-1066 conditions 'defending' property became almost an auction. The incoming elite used their conquerors' loot to meet fiscal liabilities now beyond the incumbents, so finding a pretext to dispossess them. The harsh rules of the Anglo-Saxon geld gave the 'Norman settlement' the legal veneer it needed. It is significant that the first person seen operating this mechanism to his advantage was an English abbot, who died within a dozen years of 1066.

The intimate relation between government revenue and criminal law is further shown by the outcome, or potential outcome, of some 'civil' suits. The best example, despite many obscurities, is the dispute of Wynflæd and Leofwine over Hagbourne and Bradfield, analysed in chapter 3. In the story as told, Wynflæd's victory was a foregone conclusion.

Then the *witan* said that one would better set the oath aside because thereafter would be no friendship, and one would demand the robbery, that [Leofwine] should give it up, and pay as much again, and his wergeld to the king (*man wolde biddan þæs reaflices þat he hit sciolde agyfan 7 forgyldan, 7 þam cyninge his wer*). Then he set the oath aside and handed over the land uncontested, and [said] that he would thenceforth say nothing about it.¹⁴²

The published translation appears to take this passage as meaning that the court would

¹⁴¹ *ASC* 1087, p. 169.

¹⁴² LS 49; Robertson, *Charters LXVI*, pp. 136–9; above, pp. 000.

(i.e. *did*) ask Leofwine to surrender his plunder, compensate, and pay the king his wergeld. Yet that verdict would have been a very strange basis for the future friendly relations that were desired. The sum due from Leofwine could have come to £129 (compared with £110 paid by Dunstan himself for Sunbury and Send), and might at a minimum have been £75, 16,000 silver pence.¹⁴³ It may thus make better sense to read that, if the oath were taken, one *would then* (subjunctive) make such demands of Leofwine that friendship could very well have been ended. There was a chance that this ‘civil’ dispute would come to be seen as in effect a ‘criminal’ plea, with Leofwine’s very wergeld at stake. One can imagine few more pressing spurs to the compromise that emerged.¹⁴⁴

Two other suits support this interpretation, and are illuminated by it in turn. Wulfbald’s case is notorious for its demonstration of Æthelred’s failure to enforce his will. But though it ended in mayhem and murder, its victim yet another of Æthelred’s luckless reeves, it evidently began as an interlocking dispute between Wulfbald, his stepmother, and his paternal uncle and cousin. Wulfbald’s seizure of his kinsmen’s land need originally have been no more than a vigorous assertion of what he no doubt saw as a just claim. But it was at once described as *reaflac*, and penalized as such with wergeld. The word and the penalty are both the same as those brandished at Leofwine in the Hagbourne case.¹⁴⁵ *Reaflac* must also correspond to the *rapina* of which Leofsige stood accused by Bishop Æthelwold in the dispute over Peterborough’s property. Again, the penalty was explicitly wergeld (*genealogia*).¹⁴⁶ Several other cases can now be examined in

¹⁴³ DB i 60d, 61c, 63b [*Berkshire* 22:2, 31:5, 61:1]; the maximum total assumes that Leofwine’s wergeld was that of a thegn, and that E. and W. Hagbourne were one estate at this date; the minimum, that he was a ceorl, and that only W. Hagbourne was involved.

¹⁴⁴ Confirmation that the oath would have somehow put Leofwine in danger comes from Wynflæd’s subsequent refusal to swear to have handed over all the treasure of Leofwine’s father which she acknowledged to be his due, paying only ‘as much as she dared to protect her oath’. This might possibly, for one reason or another, have meant admitting some weakness in her original case, such that she would herself be exposed as a potential perjurer, and criminal law could not ignore the potential perjury involved even in any offer to ‘prove’ a wrong. I am grateful to Dr Bruce Mitchell for guidance on possible meanings of this most elliptical of texts; not that he would necessarily wish to commit himself to the interpretation offered here.

¹⁴⁵ LS 57–8; Cf. S. Keynes, ‘Crime and Punishment in the Reign of Æthelred the Unready’ (forthcoming), pp. 000.

¹⁴⁶ LS 111.

the light of these three. First, Uvi, whose dispute with Ely was also reviewed in chapter 3, was judged to owe four marks *pro forisfactura* because of a false claim. Professor Whitelock thought that these could not be gold marks, the upper-class wergeld under Alfred's treaty with Guthrum, because Uvi's 'offence can hardly have involved so heavy a penalty as wergild'. Yet she also noted that silver marks would constitute an 'unlikely fraction of four-fifteenths [of a "hundred of silver"]'. On the Leofwine/Wulfbald/Leofsige analogy, wergeld is just what Uvi might have had to pay. It may also be the *forisfactura* due to the king from Beahmund in his Ely dispute.¹⁴⁷ Third, Goda's sons successfully resurrected their father's claim against the dowager queen Eadgifu under King Eadwig; Edgar and his witan found that they had committed '*manfull* (wicked) *reafllac*'; and one now sees what they meant. Fourth, the angry threat of total forfeiture levelled at Goda himself by Edward the Elder, Eadgifu's reigning husband, was perhaps expressed in similar terms.¹⁴⁸ Fifth, it is possible to see how the bishop of Rochester was 'compelled ... to give up ... title-deeds, under pain of losing all his property', in his dispute with Brihtric and Brihtwaru.¹⁴⁹ Sixth, one can understand how 'all the property and chattels of Ælfnoth were adjudged to the mercy of the king *pro falsa calumnia*' by the wrathful (and scarcely impartial) Ealdorman Æthelwine. Finally, the sequence explains the Abingdon chronicler's statement that the wicked reeve at Lewknor, Oxfordshire, 'fell into the queen's mercy with all his property *pro commisso*'.¹⁵⁰

These cases explain an otherwise puzzling law of Cnut:

¹⁴⁷ LS 117, 120. D. Whitelock, 'Foreward', *Liber Eliensis*, edited by E.O. Blake (Camden Society, 3rd series XCII, 1962), p. xv. Professor Whitelock noted that *Lib. El.* ii 25, p. 99, has 'a horse worth three marks', commenting that 'this can only mean silver', as a horse worth three gold marks is 'inconceivable'. That would still not prove that silver marks were indicated for Uvi's fine. Besides, the word used for horse is *dextrarius*; and, in the light of Professor R.H.C. Davis's remarkable recent study, *The Medieval Warhorse* (London, 1989), e.g., p. 57, three gold marks for such a creature (supposing, as against some conventional wisdom, that the Anglo-Saxon aristocracy had any knowledge of them) may not be altogether 'inconceivable'.

¹⁴⁸ LS 35, 33.

¹⁴⁹ LS 46.

If anyone commits robbery, he is to restore and pay as much again, and be liable for his wergeld to the king. (*Gif hwa reaflac genyrce, agyfe 7 forgyldre, 7 beo his weres scyldig wið þone cincg*).¹⁵¹

This, in effect, was Æthelstan of Sunbury's sentence. But *reaflac* seems too strong a word for first-time theft. That offence had anyway been amply covered earlier in the code. If, however, one turns to the Hagbourne document, the identical phraseology is found: *reaflaces, agyfan 7 forgyldan, þam cyninge his wer*. *Reaflac* in Cnut's law may thus have a quasi-technical sense, not of theft or worse, but of unjustified, or falsely defended, tenure. So far in this chapter, such cases have been described as 'unjust pleading'. Equally, they might be labelled with a meaning closer to *reaflac*: disseisin. The implications, either way, are deep. 'It should be known that the losing party ... shall always be liable to amercement by the lord king (*in misericordia domini regis*) on account of ... *violentam desaisinam*': thus, Glanvill.¹⁵² As is well known, Henry II's possessory actions have a distinct 'criminal' quality. The phrase in Novel Disseisin writes, 'unjustly and without judgement' has been taken as referring to a lord's 'feudal court'.¹⁵³ In the light of pre-conquest evidence, the critical factor may well, after all, be the action's 'criminal' ancestry. Anglo-Saxon justice, widely (and in this context rightly) held innocent of 'feudalism', apparently saw unjustified tenure as a species of theft. It was punished as

¹⁵⁰ LS 143, 134. The status of nos. 33, 35, 46, 49 and 57–8 as vernacular texts (nos. 33, 35 and 49 as originals) removes any temptation to see the other five as back-projections of post-conquest arrangements.

¹⁵¹ II Cn. 63, pp. 352–3; the next clause records that 'open theft', in principle not easily distinguished from the semi-professional crime presumably indicated by *reaflac*, is *botleas*. *Reaflac* did also retain its more usual general sense, in legal texts and elsewhere; nevertheless, it may be suggestive that *Leges Henrici Primi*, edited and translated by L.J. Downer (Oxford, 1972) 57:7a–7c, pp. 178–9, uses '*reaflac*' in the particular context of unjustified legal proceedings.

¹⁵² *The Treatise on the Laws and Customs of England commonly called Glanvill*, edited and translated by G.D.G. Hall (Nelson's Medieval Texts, London, 1965) xiii 38, p. 170. Cf. Pollock and Maitland, *History of English Law* (as n. 2) II, pp. 44, 52, 519.

¹⁵³ Milsom, 'Introduction', Pollock and Maitland (as n. 2), pp. xxxix–xliv. As Dr John Hudson has pointed out to me, the important criminal element seems to have disappeared from Professor Milsom's later work, *The Legal Framework of English Feudalism* (Cambridge, 1976).

such by payment of wergeld, the cost of royal mercy on a (first-time) thief's life. The post-conquest forfeiture for 'default of right (*penuria recti*)' was £10, a much higher sum than the 200-shilling wergeld (though equating, by an interesting coincidence, with 200 *Norman* shillings). The principle remained the same.¹⁵⁴ There was therefore nothing irredeemably archaic in Anglo-Saxon confusion of 'criminal' and 'civil' pleas. Confusion arose, not because 'crime' was submerged in 'tort', but because land, like any other property, could be 'stolen'. It is a simple – oversimple – idea. But it has a future as well as a past.

Bot and *Wite* reverberate through Maitland's compelling pages on early criminal liability, a keynote of all that is inflexible, remote, unreal about the world transformed with 'marvellous suddenness' in the twelfth century. But the later Old English distinction between Cnut's 'bootless' and Edgar's 'bootworthy' crimes, whatever it once meant, no longer meant the difference between offences which were beyond redemption and those for which amendment could be offered to a kin. The simplest illustration is the use of the word *bot*. In the early laws, down to and including Alfred, *bot* almost always describes compensation payable to the victim or his kin (the one exception, if indeed it is exceptional, is Alfred's *ciricfrides to bote*).¹⁵⁵ The picture changes completely, and significantly, with the reference in the preface of Edward's second code to *bote* of the disturbed peace. Thereafter, recipients of *bot* are usually God, the Church, the king or the community at large. Exceptions are excerpts from *Hadbot* (sevenfold *bote* for injured clergy), passages dealing with Anglo-Danish injuries in Æthelred's treaty, a passing demand by Wulfstan, repeated in three texts, that worldly debts not be settled on holy festivals, and the text from 11 Edmund whose relatively limited regard for the kin was

¹⁵⁴ R.C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill* (Selden Society 77, London, 1959), pp. 147–8, and (e.g.) no. 3, p. 414. As a possible parallel to Norman muddle over Old English wergelds (albeit one not shared by the *Leges Henrici* author), note that Henry I's London charter, HN Lond 7, p. 525, sees the '*were*' above which Londoners would not be amerced as 100 schillings (i.e., £5)!

¹⁵⁵ Af. 2:1, pp. 48–9. For this and the next note, cf. *Gesetze* II (i), pp. 26–7; the shift in usage is all the more striking, in that compensation to an injured party was *not* excluded by Old English law.

cited above.¹⁵⁶ *Wite*, by revealing contrast, is used uniformly throughout. *Botleas* crimes, then, are those discussed in the first section of this chapter, for which authority enforced death and forfeiture. *Botwryðe* offences are those studied in this section on which authority had ‘mercy’. For that mercy, it demanded payments ‘inflexible’ chiefly in their severity. The *Botleas/Botwryðe* distinction is not a symptom of kin-based society. It is essentially the ancestor of the distinction between felony and misdemeanour.

As Maitland noted, a well-known clause in the Coronation Charter of Henry I implies that the Conqueror and Rufus had exploited their *misericordia* to exact what might in principle be unlimited sums:

If any of my barons or my men shall forfeit (*forisfecerit*), he shall not give a pledge of his movables (*pecuniae*) in mercy, as he did in the time of my father or brother, but shall amend according to the measure of the forfeit (*modum forisfacti*), as he would have amended back beyond (*retro a*) my father’s time, in the time of my other predecessors. But if he shall be convicted of breach of faith (*perfidiae*) or [serious?] crime (*sceleris*), let him amend as will be just.

There is more to this passage than a promise of a ‘return to the old English system of pre-appointed wites’. Maitland’s footnote observed that ‘a germ of (1) treason, (2) felony, (3) misdemeanour, may be seen in (1) *parfidia*, (2) *scelus*, (3) *forisfactura*’.¹⁵⁷ Henry professedly endorsed the pre-conquest regime here (for by no means the only time in his pronouncements). It would follow that this triplicated germ was a feature of that regime. Besides, ‘pre-appointed wites’, as has often enough been sold by now, were not the fossils that Anglo-Saxon terminology makes them seem. Amercement beyond a culprit’s means was an ever-mounting anxiety of government critics in the century leading up to *Magna Carta*. A ‘fixed wite’ amounting to one’s wergeld was of course a much blunter instrument than the arrangements for individual assessment that were largely in place before their formal endorsement in 1215. But the equation of ability to pay with status in society had a certain brutal logic. That was presumably why it was preferred to the

¹⁵⁶ II Ew. 1:1, pp. 142–3, Had, pp. 466–9, II Atr. 6:1, pp. 224–5, V Atr. 20, pp. 242–3, VI Atr. 25:2, pp. 254–5, I Cn. 17:3, pp. 298–9, II Em. 4, pp. 188–9. It could, as Professor Brooks points out to me, be an indication of the date of change that S 223, the 890s Worcester fortification charter, gives the fines for crimes where *bot* is payable to the church, but keeps the rest, by implication, for the king.

¹⁵⁷ C Hn Cor 8, p. 522; Pollock and Maitland II, p. 514, and n. 2.

whimsical levies of the Conqueror and Rufus.¹⁵⁸ In any case, the crucial point is not the contrast between ‘fixed wites’ and the flexible (or arbitrary) sums soon levied by Henry too. It is a shared philosophy that ‘mercy’ must pay its way. If ubiquitous gibbets are one way that the Old English regime anticipated the twelfth century, another is that the hangman’s loss was already the treasurer’s gain.

The Dynamics of Prosecution

The reeves Æthelwig and Wynsige were charged with abuse of Christian burial by Ealdorman Leofsige. His personal interest in the offence is not obvious – unless it were political rivalry with one whose standing in the King’s favour was revealed by the outcome. But this still looks like an individual’s accusation, not a charge brought in an official capacity, still less one levelled by the community at large. It was thus, in the parlance of medieval English law, an appeal, not an indictment.¹⁵⁹ Similarly, it seems clear from the fact that the bridle’s theft led to *bellum* between its owners and the Ardley brothers, that the owners had taken responsibility for bringing the thief to book. The vouching to warranty that exposed Æthelstan of Sunbury as a thief was also, of its nature, a ‘private’ process. This chapter’s leading cases therefore support the view that it was the victims of crime or their associates who supplied the dynamics of prosecution in pre-conquest justice.

That view would of course dovetail with the notion that ‘crime’ was essentially tort: injury to a *part* of the community, amended largely by compensating that part at its own insistence, not offence against the *whole* community, punished by authority in that community’s name. Like received perceptions of *bot* and *wite*, the idea that ‘public’ prosecution was unfamiliar to pre-conquest law has an awesome pedigree. As was shown

¹⁵⁸ Cf. A. Lane Poole, *Obligations of Society in the Twelfth and Thirteenth Centuries* (Oxford, 1946), pp. 77–91, especially p. 80.

¹⁵⁹ LS 54; C.R. Hart, ‘Ealdordom of Essex’, in K. Neale, editor, *An Essex Tribute. Essays presented to F.G. Emmison* (Cambridge, 1987), pp. 57–84, at p. 76, sees Leofsige as exercising authority over Buckinghamshire and Oxfordshire solely on the basis of this episode; see below, p. 000, and n. 174. For appeals and indictments, see Pollock and Maitland, II, pp. 598–620, 632–48. The Ailsworth witchcraft case (LS 43), involving some of the same people as that of the Yaxley *wimman*, may also have proceeded by appeal, in that forfeited Ailsworth was granted to the witch’s intended victim.

in chapter 1, Brunner's emphatic demonstration that the origins of the English jury lay in the Frankish inquest was a turning-point in the study of early English law. In a probable echo of Roman process, Carolingian kings deployed sworn local witness against notorious malefactors. Likewise, the 1166 Assize of Clarendon ordered panels of reputable men to identify on oath to royal justices or sheriffs those in their locality 'accused or notoriously suspect (*rettatus vel publicatus*)' of major crimes (in effect, the felonies), or receiving those who committed them.¹⁶⁰ Instead of leaving wrongs to be remedied by the action of their victims, the community's central and local arms launched a pincer movement against its common enemies. There was more to Frankish inquests than pursuit of crime, but the hot core of the energetic dispute over their English debut has long been the 'jury of presentment'. Was it new in 1166? Brunner's critics caught a fleeting glimpse of it in the 'twelve senior thegns' of Æthelred II's Wantage code, who must 'swear ... not to accuse any innocent man nor to conceal any guilty one'. Inconclusive debate then arose, whether the twelve are among this code's many Scandinavian features, and irrelevant as such to mainline Anglo-Saxon law.¹⁶¹ Meanwhile, the most effective defence (actually a re-formulation) of Brunner's case has traced the development of 'public prosecution' in Norman England. Quite apart from questions of ancestry, Clarendon has seemed, even to modern scholars with an otherwise very different perspective from Brunner's, 'the beginning of a genuine machinery of criminal justice', a crucial step in differentiating crime from tort.¹⁶² If it was only in 1166 that

¹⁶⁰ Assize of Clarendon 1–7, edited by W. Stubbs, *Select Charters ... of English Constitutional History, from the Earliest Times to the Reign of Edward I* (9th edition, revised by H.W.C. Davis, Oxford, 1913), pp. 170–1. H. Brunner, *Die Entstehung der Schwurgerichte* (Berlin, 1872); see above, pp. 000, below, pp. 000.

¹⁶¹ III Atr. 3:1, pp. 228–9. The debate is usefully reviewed, still without final resolution, by R.V. Turner, 'The Origins of the Medieval English Jury: Frankish, English or Scandinavian?', *Journal of British Studies* VII (1968), pp. 1–10; to the works there cited, add those in nn. 162–3, and F. Joüan des Longrais, 'La Preuve en Angleterre', *Receuil de la Société Jean Bodin XVII: La Preuve; ii: Moyen Age et Temps Modernes* (Brussels, 1965), pp. 193–274. The classic anti-Brunner case is N. Hurnard, 'The Jury of Presentment and the Assize of Clarendon', *English Historical Review* LVI (1941), pp. 374–410; cf. n. 191 below.

¹⁶² R.C. Van Caenegem, 'Public Prosecution of Crime in Twelfth-Century England', in C.N.L. Brooke *et al.*, editors, *Church and Government in the Middle Ages. Essays presented to C.R. Cheney on his 70th Birthday* (Cambridge, 1976), pp. 41–76.

‘private’ and ‘individual’ made way for ‘public’ and ‘communal’ proceedings, then it is understandable that the change has seemed to symbolize, even to embody, the substance of the ‘Angevin Leap Forward’. And, clearly, there could then be no real question of an aggressive ‘official’ pursuit of crime before 1066.

However, three different sets of considerations warn, in their various ways, against giving 1166 strategic rather than tactical significance in the campaign to isolate and eradicate crime.¹⁶³ In the first place, there is indeed no doubt that individual accusations were prominent in Anglo-Saxon criminal procedure. The evidence lies in legislation, where Cnut’s code supplies an epitome, as usual:

One is to set in motion a simple clearance with a simple fore-oath (*anfealde foraðe*), and a threefold clearance with a threefold fore-oath.

Oaths of accusation and defence must exactly match, as in *Rechtsschule* theory. Æthelstan, echoed by Edmund, earlier declared that the tracks of stolen cattle leading onto a man’s land and no further will ‘serve instead of the fore-oath’ against him. Three of the fourteen formulae in the collection known as *Swerian* are oaths of accusers, and another might suit plaintiff as well as defendant.¹⁶⁴ Yet ‘appeal’ remained important long after 1166. The Lincolnshire eyre of 1202 heard 353 prosecutions brought by personal appeal as against 77 by jury presentment.¹⁶⁵ ‘Bracton’s’ discursive treatment of criminal law has very much more to say of appeals than indictments. In the section on homicide, six folios about appeals are followed by two about inquests. Appeal, with a full dossier of

¹⁶³ J.M. Kaye, ‘The Making of English Criminal Law. (1) The Beginnings – a General Survey of Criminal Law and Justice down to 1500’, *Criminal Law Review* 16 (1977), pp. 4–13, at p. 5. Cf. P.R. Hyams, ‘Crime and Punishment in Medieval England’, an unpublished paper which he has kindly shown me. Significantly, both these scholars seek, in different ways, to show that the approach to crime allegedly displaced by Angevin reform nonetheless survived in important respects – i.e. ‘old’ and ‘new’ might co-exist, as argued below for the pre-1066 era.

¹⁶⁴ II Cn. 22:1a, pp. 324–5, V As. 2, pp. 168–9, III Em. 6:2, p. 191, *Swerian* 2, 4, 7, 6, pp. 396–9. See below, n. 195.

¹⁶⁵ Lane Poole, *Obligations* (as n. 158), p. 87.

accusatory oaths, dominates discussion of other crimes.¹⁶⁶ The introduction of the judicial duel by William the Conqueror in one of his less questionably authentic decrees, may actually have enhanced the role of the ‘appeal’: an instructive point in itself, as it was in Normandy that Brunner and others have supposed that inquests sat out the obscure and turbulent period from Carolingian times to the twelfth century.¹⁶⁷ In any event, there is no doubting the longevity of ‘wager of battle’. Unlike other ordeals in England, it outlived the prohibition on recourse to the ‘judgement of God’ by the 1215 Lateran council.¹⁶⁸ One general effect of this evidence is to raise a question whether 1166 was so decisive a moment in the history of English criminal law as is usually supposed. Another, more important for present purposes, is that individual accusation and communal indictment are evidently not mutually exclusive. The presence of the one in pre-conquest codes is certainly not, therefore, proof of the absence of the other.

A second set of grounds for questioning the pivotal importance of 1166 have their foundation in evidence of ‘public’ prosecution earlier in the century. The *Leges Henrici Primi* knew of prosecutions by the ‘royal justices’ who were evidently local officials equivalent to the sheriff, not the sort of itinerant expert employed on the Assizes of Henry II, and who operated independently either of personal plaint or communal suspicion.¹⁶⁹ The *Leges* author saw these, characteristically, as unwelcome innovations. As always with this learned source, one’s reaction should be tempered by the consideration that his knowledge of pre-conquest circumstances did not necessarily extend any further than the texts he incorporated in his *Quadripartitus*; in other words, it went only as far as

¹⁶⁶ *Bracton on the Laws and Customs of England*, edited by G.E. Woodbine, translated by S.E. Thorne (4/5 vols, Cambridge, 1968–77) II, pp. 385–403, 403–6; cf. pp. 406–36 on other felonies, viewed almost exclusively in terms of appeal or ‘approval’, but also pp. 370–1.

¹⁶⁷ *Wl lad*, pp. 483–4; *Glanvill* (as n. 152) xiv 1, pp. 171–3; *Bracton*, p. 386. See below, pp. 000.

¹⁶⁸ R. Bartlett, *Trial by Fire and Water. The Medieval Judicial Ordeal* (Oxford, 1986), pp. 103–26.

¹⁶⁹ *Leges Henrici Primi* (as n. 151) 6:4, 63:1, pp. 98–9, 200–1; van Caenegem, ‘Public Prosecution’ (as n. 162), pp. 53–4. But see the doubts of C.W. Hollister, ‘The Rise of Administrative Kingship: Henry I’, *American Historical Review* 83 (1978), pp. 868–91, at pp. 882–4, reprinted in *Monarchy, Magnates and Institutions in the Anglo-Norman World* (London, 1986), pp. 223–45, at pp. 236–8.

that of modern scholars who have restricted their researches to legislative evidence. However, important additional evidence for 'local justiciars' comes from twelfth-century case-law, especially the hagiographical sources where they were duly outpaced by a supernatural defence. These sources, unlike the *Leges*, have their pre-conquest counterparts. Both the Suffolk sheriff unwise enough to pursue his female victim into St Edmund's purlieu and the *satelliti regis* frustrated by St Edith at Wilton are known only from texts that may have been written after 1066, and so conceivably influenced by new conditions.¹⁷⁰ But it is Lantfred, a strictly contemporary source, who tells of Flodoald's servant *comprehensus a regis praeside*, and saved by St Swithun from the consequences of an adverse ordeal, or of the receiver of the king's corn rescued by the same agency from the chains in which he was confined by a *regis dispensator*.¹⁷¹ These unlovable officials are the exact equivalents of the infamous Gervase who plagued St Æthelthryth's tenants at Ely, or the aptly-named Robert 'Malarteis' who, in another story from the Æthelthryth cycle, charged Bricstan with concealing treasure.¹⁷² Such evidence deserves no more, but also no less, credit before 1066 than afterwards.

More obviously credit-worthy are charters or writs, like that in which Rufus remitted Ramsey Abbey's 100 shillings (i.e. £5, the full royal fine), impleaded by Ralph Passelew, Norfolk's justiciar.¹⁷³ For the Anglo-Saxon period, the three cases cited at the outset of this section are almost the only ones where the prosecution agency is even relatively evident. But it is instructive to linger for a moment over another case involving Ealdorman Leofsige. When Æthelred II charged Æthelric of Bocking with connivance in Sveinn's invasion plans, he declared that 'Ealdorman Leofsige and many others were cognizant of the suit (*þære spæce gecnawe*)'. The king had been told of Æthelric's alleged

¹⁷⁰ LS 171, 169.

¹⁷¹ LS 154, 156: it may be important to the case argued below for 'communal' enterprise that the arrested man in the latter instance was guarded pending execution by a *paterfamilias cum coniuge*.

¹⁷² *Ordericus* (as chapter 3, n. 79) vi 10, III, pp. 346–59; *Lib. El.* (as n. 147), iii 33, ii 132, pp. 266–9, 212–3. For this, and for the next note, cf. van Caenegem, 'Public Prosecution', pp. 55–8.

¹⁷³ *Chronicon Abbatiae Rameseiensis*, edited by W.D. Macray (Rolls Series 83, London, 1886) 188, p. 211.

behaviour ‘many years before’. It is at least possible that Leofsige was the informant. He was ealdorman of Essex. This time, by contrast with the Ardley case, he could have been discharging official duties. Besides, the text says in three or four different ways that Æthelred himself was the prosecutor. It would be *reductio ad absurdum* to see this suit as brought in ‘privately’ by the king.¹⁷⁴ In that light, one could perhaps take at face value the rhetoric of other Æthelred charters, where a defendant is ‘accused by the whole people’, or where the king sought judgement from his ‘wise men’ on Leofsige himself.¹⁷⁵ This is tenuous evidence of course. But it is not much more so in the tenth century than in the twelfth, allowing that books like *Leges Henrici Primi* were apparently not written before the dawn of the Jurisprudential Renaissance. At all events, the later sources do show that there could be ‘public’ prosecution without inquests. If this was true after 1066, it could equally well have been true before.

That point introduces the third, and much the most important, reason for challenging the significance attached to the Assize of Clarendon: the possibility that the Assize’s objectives were achieved before the Conquest by other means. The argument here means returning to detailed exegesis of the legislative texts; much the same texts, in fact, as were thus examined earlier in this chapter.

1. Alfred 1 – 1:8: First we teach, as is most necessary, that each man carefully keep his oath and pledge If ... he pledges what is right for him to perform, and he refuses it, let him humbly give his weapons and possessions (*æhta*) into his friends’ (*freondum*) keeping, and be forty nights in prison in a king’s *tun*, do penance there as the bishop prescribes ... and his kin (*mægas*) feed him If he has to be forced there let him suffer loss of his weapons and property. If one kills him, he is to lie unpaid for If however, there is other human surety (*mennisc borg* – Latin: *plegius*) for

¹⁷⁴ LS 62.

him, he is to pay for breach of surety (*borgbryce*) as justice directs (*swa him ryht nysie*), and for breach of pledge (*wedbryce*) as his confessor prescribes.

2. II Edward 3 – 3:2: If one is accused of theft, then they who have commended him to a lord are to take him in surety (*borh*) in order that he shall clear himself of it; or other friends (*frynd*), if he have [them], are to do the same. If he does not know who would take him in surety, those whose business it is are to take surety on his property (*æhtan*). If he has neither property nor other surety, then one may hold him for judgement (*dome*).

3. II Edward 4 – 5:1: Let each man always have the men ready on his land that guide men that wish to seek their own, nor are they to hinder them for any bribery, nor shield crime nor harbour it willingly or deliberately. If anyone neglects this and breaks his oath and his pledge (*his að 7 his wæd*) that the whole people has given, let him amend as the lawbook teaches. If, however, he will not, let him suffer loss of the friendship of us all and of all that he owns.

4. II Æthelstan 1:3: If one brings a thief to prison, he is to be in prison 40 nights, and one may then let him out with 120 shillings; and the kin are to go surety for him (*7 ga seo mæg him on borh*) that he desist ever afterwards.

5. II Æthelstan 20 – 20:1, 5–6: If anyone neglects a meeting thrice, let him pay the king's disobedience If, however, he will not let the senior men, all that belong to the *burh*, ride there and take all that he owns and put him in surety (*borh*) If he does not know who will be surety for him (*hine aborgie*), let them take (*hæfton*) him. If he will not accept it,

¹⁷⁵ LS 72(a), 71. Cf. the accusations against Sweyn and Tostig in Edward the Confessor's reign, LS 162, 165.

let them kill him.

6. III Æthelstan 7 – 7:2: That every man hold his own men in surety (*fideiussione*) against all theft And if the reeve dares not trust anyone of those men, let him find twelve pledges of his kin (*plegios cognationis suae*) who may stand for him in his surety (*fideiussione*).

7. VI Æthelstan Pr. 1:4: This is the ordinance that the bishops and the reeves belonging to London have ... confirmed with pledges (*weddum*) in our peace-guild He who has ... been ... convicted of theft that one kill him, unless his kin or lord wish to take him out and also have him afterwards in surety that he desist from all evil.

8. VI Æthelstan 3 – 4: That we always count ten men together, and the senior (*se yldesta*) is to ensure that the nine perform all we have said; then [we count] hundreds of them together, and a hundred-man (*syððan þa hyndena heora togædere, 7 ænne hyndenman*), who shall remind the ten [senior] men of the common good of us all. And these eleven shall hold the money of the hundred (*þære hyndene feoh*), And let them also ensure that each payment is forthcoming of those that we have all laid down to the good of us all, on payment of 30 pence or an ox That each of those that hear the summons is to help others, whether in tracking or in riding And when the track breaks off, let one find one man (from each two tithings) where there are more people, from one tithing where there are less ... to ride or walk wherever there is most need.

9. VI Æthelstan 8:1, 5: That we, the hundred-men and those in charge of tithings, assemble every ... month whether at butt-filling or whenever else suits us, and examine how our decrees are performed. Let the twelve

[eleven?] have ... dinner together And let such as neglects [pursuit] ... be liable for 30 pence if he disregard ... what stands in our writings, and we have confirmed with our pledges.

10. III Edmund 2: When a thief is known for sure, twelve-hundreders and two-hundreders are to assemble (*consocientur*) and take him, alive or dead And if anyone refuses to be present let him pay the king 120 shillings and the hundred 30 shillings.

11. III Edmund 7 – 7:1: Every man is to make trustworthy (*credibiles*) his men and all who are in his peace and land (*in pace et terra sua*). And all infamous men and those loaded with accusations (*infamati et accusationibus ingravati*) are to be subjected to surety (*plegio*).

12. I Edgar (Hundred Ordinance) 2 – 3:1, 7:1: (That men go without delay after thieves). If the need is pressing, let one declare it to the hundred-man (*hundredesmen*), and ... he to the tithing-men (*teodingamannum*), and let them all go out till they can catch up. Let them do justice to the thief as it was previously Edmund's decree And the man who neglects this, and forsakes the hundred's judgement let him pay 30 pence to the hundred And he who breaks the appointed day (*andagan*) [for a hundred meeting] is to compensate with 30 shillings.

13. III Edgar 6 – 7:1: Let each man find for himself that he has surety, and let the surety lead ... him to all justice (*se borh hine ... to ælcum rihte gelæde*). And if anyone then does wrong and escapes, let the surety incur what he should incur (*abere se borh þæt he aberan scolde*). If it is a thief, and if he can seize him within twelve months, let him give him up to justice, and let him be given what he paid before. And he who is accusation-laden and untrustworthy for

the people (*tyhtbysig ... 7 folce ungetrywe*), and avoids the meeting thrice, then let one select from the meeting those that may ride to him, and find him then yet surety if he can. If, however, he cannot, let one seize him however one can, whether alive or dead, and take all that owns.

14. I Æthelred 1 – 1:1, 1:5–7, 1:10–13: That each freeman (*freoman*) have trustworthy surety (*getreowne borh*), that the surety hold him to all justice, if he be accused. If, however, he is *tyhtbysig*, let him go to the threefold ordeal If he is ... found guilty, on the first occasion let him pay the accuser twice over, and his wergeld to his lord, and let one set trustworthy sureties that he afterwards desist from all evil. And on the second occasion, let there be no other amend (*bot*) there but his head. If, however, he escapes and avoids the ordeal, let the surety pay ... damages (*ceapgyld*) ... and his wergeld to the lord who is entitled to his fine. Let each lord have his household men (*hiredmen*) in his own surety. If [someone] is ... accused and escapes, let the lord pay the man's wergeld to the king If the clearance (*lad*) fails for him, let him pay the king his [own?] wergeld, and let the man be outlaw.

15. I Æthelred 4 – 4:1: If there is any man ... untrustworthy for the whole people, let the king's reeve go ... and bring him under surety, that one may lead him to justice against them who accused him. If, however, he has no surety, let one kill him, and lay him in unconsecrated ground (*on ful*).

16. II Cnut 20 – 21: We wish that every freeman be brought into hundred and tithing (*alc freoman beo on hundrede 7 on teodunge gebroht*), that wishes to be entitled to clearance or wergeld if anyone wish to accuse/undermine (*teon nylle/afylle*) him, once he is twelve years old, or he be not worthy of any freeman's rights (*freorihtes wryðe*). Be he householder or follower (*beorðfast ...*

folgere), that each be brought into hundred and into surety, and the surety shall hold and lead him to all justice. Many a powerful (*strec*) man wishes to defend his man, whether as free man or as slave, but we will not tolerate that injustice. We wish that each man over twelve years old gives the oath that he would not be a thief or a thief's accessory.

17. II Cnut 25 – 25a: He who is *tibthysig* and untrustworthy for the people, and avoids the meeting thrice ... then let one select from the fourth meeting those that may ride to him, and find him then yet surety if he can. If, however, he cannot, let one seize him however one can, whether alive or dead, and take all that he possesses.

18. II Cnut 30 – 30:6, 31 – 31:2: If any man is so untrustworthy to the hundred to *tybthysig*, and three men together then accuse him, let there then be nothing else there but that he go to threefold ordeal If ... he is found guilty, on the first occasion let him pay the accuser twice over, and his wergeld to the lord that is entitled to his fine, and let one set trustworthy sureties that he afterwards desist from all evil. And on the second occasion, let there be no other amend there if he is found guilty but that one cut off his hands or feet or both If, however, he escapes and avoids the ordeal, let the surety pay ... damages to the accuser, and his wergeld to the king or to him who is entitled to it. Let each lord have his household men in his own surety If [someone] is ... accused and escapes, let the lord pay the man's wergeld to the king If the clearance fails ... let him pay the king his [own?] wergeld, and let the man be outlaw.

19. II Cnut 33 – 33:2: If there is any man ... untrustworthy for the whole people, let the king's reeve go ... and bring him under surety, that one may

lead him to justice against them who accused him. If, however, he has no surety, let one kill him, and lay him in unconsecrated ground (*on ful*).

20. William I's 'Ten Articles' 8: Every man who wishes to be held a freeman is to be in pledge (*plegio*), that the pledge hold and have him to justice if he offends; and if any such escape, the pledges are to see that what is charged is repaid (*ut simpliciter solvant quod calumniatum est*).

21. *Leges Henrici Primi* 8:1–3: Let all freemen, both householders and followers (*hur[ð]efest ... folgarii*) assemble twice a year in their hundred to determine among other things if the tithings (*decanie*) are full, and who has withdrawn or been added, how, and for what reason. A tenth man is to preside over each set of nine men, and so also one of the better over the whole hundred, and he is to be called alderman It has been decreed by far-seeing provision for the common good (*communis ... causa commodi provida dispensatione statutum est*) that, from the twelfth year of his age, anyone who cares to be thought worthy of wergeld or fine or free right (*iure liberali*) shall be in hundred and tithing or free pledge (*decima vel plegio liberali*). Let hired men, paid men or retainers (*conducticii vel solidarii vel stipendiarii*) be held in the pledge of their lords. And let every lord have with him such as are justiciable to him, so that he can hold them to right if they sin, or if necessary render account for them.

Examination of these excerpts must reckon, as before, not only with what is said but also with what is implied. Historians who can be satisfied by nothing but the evidence of their eyes might fairly be thought to be merely doing their job. Yet, to exchange the metaphors of the nocturnal thunderstorm and the half-submerged log for the more hackneyed image of the iceberg, navigation by reference to its visible tip is

unwise and there is reason to think that the bulk of Anglo-Saxon law was either submerged by subsequent catastrophe or frozen into obscurity by an essentially oral legal climate.

The first thing to note in the sequence is that *að* is conjoined from the outset with *wed* (1, 3, cf. 7, 9, and p. 000, 8, 11, 16–18). *Wed* usually means pledge, in the sense of surety or security. It translates *pignus* in Alfred's Mosaic preface.¹⁷⁶ The word implies reinforcement of the oath by some material sanction. At the least, it lent the oath added solemnity; Ælfric used it for God's covenant with Israel and for the Eucharist, Wulfstan for baptism.¹⁷⁷ The admittedly otherwise impenetrable references in Alfred's law to breach of surety and pledge (*borhbryce*, *wedbryce*), to 'bishop' and to 'confessor', confirm that some such notions were in his mind. Edward then makes it explicit that the 'friends' of Alfred's law must use the 'possessions' that he had ordered pledge-breakers to surrender so as to find 'surety (*borb*)' for a thief who is otherwise without it; Æthelstan shows that these friends are, as one would expect, kinsmen (2, 4). Æthelstan and Edmund go on to order lords to assume the same responsibility (6, 10).

By Edgar's time, men are obliged to find their own *borb*, with no mention of kins or lords as such. Not only, moreover, must these sureties 'lead them to justice'; they are also declared liable for financial penalties incurred by fugitive criminals, though they may recoup their outlay from those recaptured (13, cf. 1?). In that connection, Edmund and Edgar direct attention for the first time to those often accused, hence of ill repute (11, 13); they above all must be found surety, with dire consequences for failure. Æthelred's contribution is to set out a more detailed procedure for dealing with the *tibthysig*, and also

¹⁷⁶ Af. El. 36, pp. 38–9.

¹⁷⁷ E.g. *The Homilies of ... Ælfric*, edited by B. Thorpe (2 vols, London, 1844–6) i 6, I, pp. 90–5 (numerous instances); *Ælfric's Catholic Homilies. The Second Series*, edited by M. Godden (Early English Texts Society, Supplementary Series 5, Oxford, 1979) ii 15, p. 154, lines 153–4; 'Ælfric's version of Alcuin's *Interrogationes Sigewulfi in Genesis*', ed. G.E. Maclean, *Anglia* 7 (1884), pp. 1–59, at p. 53; 'Genesis' 6:18, 9:9–17, 15:18, 17:2–21, *The Old English Version of the Heptateuch*, edited by S.J. Crawford (EETS 160, 1922), pp. 101, 106–7, 123, 125–7 – the usage extending to parts not by Ælfric, 'Leviticus' 26:9, 15, 42, 'Deuteronomy' 4:23, 31, 5:2, pp. 301–2, 339–40; Wulfstan's *Institutes of Polity* (as n. 44), 123/229, pp. 160–1. Hostages are *to wedde* in A Gu 5, pp. 128–9; and Alfred's Will (Harmer, *Documents* xi, pp. 16–7) has *wedd* securing the West Saxon royal succession.

to put a new emphasis on a lord's equivalent responsibility to provide surety for his own household (14–15). With pledge as with oath, the series culminates in Cnut, where 'householder or follower' (Æthelred's equivalents) are put into 'hundred and *borb*' in the context of their enrolment in 'hundred and tithing'; that in turn is the time when they take the oath 'not to be thief or thief's accomplice' (16). Cnut proceeds to rehearse with some refinements the laws of Edgar and Æthelred on those of ill repute (17–19, cf. 13–15). Persistent echoes of language and content strongly suggest that, from Edward to Cnut, the same sort of procedures are being aimed at the same end. There are changes, but they look more like developments than new departures. As with the oath, the link from Alfred to Edward is not so clear; but overlapping formulations are detectable; and differences must be expected in such different types of legislation. The Alfredian *ad/wed* pairing is highlighted by the recurrence of eight excerpts after his own in both the 'oath' and the 'pledge' sequences. When law-makers covered oaths and their implications, pledges were seldom far away.

But there is more. At least from Æthelstan's time, the series interlocks with laws demanding group activity against recalcitrants. Already under Edward, it is an implicit aspect of an 'oath and pledge that the whole people has given' that one arrange to cooperate in the pursuit of stolen cattle (3). In Æthelstan's first legislative phase, triple defiance of summons means that the community's leaders ride out to put the contumacious into surety (having confiscated their property); arrest and death are the ultimate sanctions (5). In the second phase, the communal responsibility of any *burh* has become an elaborate set of arrangements by London, which are a specific function of the pledges that have been given to the king's officials (7–8, cf. p. 000, 11). The 'peace-guild' is a system of common activity and mutual insurance against theft of property, human or animal. Some of its features, like monthly dinners for its officers, could be unique to London (9).¹⁷⁸ But its main business, tracking cattle and hunting thieves, is that already

¹⁷⁸ There is an interesting parallel here with Henry the Fowler's instructions on regular *convivia* for the *agrarii milites* garrisoning his *urbes*, organized by the one in every nine that was permanently on duty there: *Die Sächsegeschichte Widukinds von Korvei*, edited by P. Hirsch and H.–E. Lohmann (*Monumenta Germaniae Historica, Scriptores Rerum Germanicarum*

envisaged in Edward's and Æthelstan's laws.

It is almost an article of faith for students of Anglo-Saxon law that London's tithings and hundreds have little or nothing to do with the hundredal system as such. But one glance at the Hundred Ordinance attributed to Edgar shows that its hundreds and tithings too pursue thieves and triple absentees (12). The two codes also share a thirty pence fine for the uncooperative; London's text, revealingly, makes that sum the minimum property qualification for guild-membership.¹⁷⁹ The London code has no sign of the Hundred Ordinance's thirty shilling fine for shirking a meeting of which due notice has been given (12). But that fine did already play some such role for Alfred, as shown in the next chapter; and it was applied by Edmund to Hundred activities, in a law to which the Hundred Ordinance seems to refer (10).¹⁸⁰ These activities closely parallel the way that, with Edgar and Cnut as with Æthelstan, representatives of a 'meeting' go about finding surety for the obstreperous or suspect (5, 13, 17). Æthelred, also echoed by Cnut, makes the king's reeve responsible when a man's record is such that prudent sureties will not touch him (15, 20). Once again, the threads knit together under Cnut. At the same age as they take the oath to avoid theft, those wishing to have the legal rights of free men must join a hundred and tithing. It is then, to repeat, demanded that they be brought into hundred and surety (16). In sum, oath was associated with pledge, which was itself associated with membership of groups of ten and a hundred with the power and duty to enforce it.

Legal writers of the thirteenth century, including those who are still conveniently

in usum scholarum) i 35, pp. 48–9. A connection between English and East Frankish fortification systems is distinctly possible, as has long been recognized.

¹⁷⁹ VI As. 2, pp. 174–5. It could be significant that Wl. Art 8:1, p. 488, gives an ox as penalty for non-cooperation with hundred and shire; this is the London peace-guild's equivalent to 30 pence, but not the Hundred Ordinance's. In any event, the fact that the London text in particular happens to envisage actual groups of ten, and to concentrate on policing activities, is not, in the light of the known limitations of surviving Anglo-Saxon legislative evidence (above, pp. 000) to be regarded as proof that it described a quite different kind of institution from the tithing (i.e., one-tenth of a hundred) or surety-group: see pp. 000 below, and chapter 10 (1), pp. 000.

¹⁸⁰ I Eg. 2, pp. 192–3. The law of Edmund's here cited is usually supposed lost; but there is no reason why it should not be the abrupt instruction for action against thieves quoted above as excerpt 10.

characterized as 'Bracton', describe 'Frankpledge' as follows. All free males who had reached the age of twelve were to take an oath of fealty to the king and his heirs, plus an oath 'that he does not wish to be a robber (*latro*), nor to consent to a robber'. Those in frankpledge are to be 'all who hold land or house, who are called *husfastene*, and also all who serve others, who are called *folgheres*'. In cases of flight from felony, 'careful enquiry must be made if he was in frankpledge and tithing (*decenna*), and then the tithing will be amerced before the justices because it did not hold that malefactor to right'. Further, 'according to the laws of King Edward, archbishops, bishops, earls and barons ... ought to have their knights and their household servants ... within their frankpledge ... so that, if they owe fine to anyone, their lords may produce them for trial or pay the fine (*forisfacturam*) for them.¹⁸¹ In twelfth-century accounts, of less certain authority, the sum to be found by the surety might be as high as the fugitive's wergeld (cf. 14) or £5; it would certainly include restoration of a stolen object's value.¹⁸² A tithing must call out the hue and cry after criminals, and keep them locked up pending trial. Records as they become available, from Pipe and Eyre Rolls down to those of the manorial court, show that this did actually happen. W.A. Morris, who gave the system its last full study as long ago as 1910, asserted roundly, and (give or take the odd adjective) rightly, that 'no more highly centralized and thoroughgoing scheme of suretyship to secure order was ever

¹⁸¹ *Bracton* (as n. 166) II, pp. 350–2. The fealty oath, absent from 'Bracton', is in the 'Bracton' commentary known as *Fleta*, edited and translated by H.G. Richardson and G.O. Sayles (3 vols – numbered Vols II–IV! – Selden Society 72, 89, 99, 1953, 1972, 1983) i 27, II, p. 69; also in *Britton*, edited and translated by F.M. Nichols (2 vols, Oxford, 1865) I, p. 48, where, however, the oath is taken at 14. Cf., further, Statute of Malborough (1267) 25 (*Statutes of the Realm*, Record Commission, 1810) I, p. 25. 'Bracton' elsewhere, II, p. 327, gives 15 as the age when *tam milites quam alii* swear not harbour outlaws, robbers and burglars: this had been the age of legal responsibility in *Lex Ribuarica* (as n. 125) 84, p. 130, and Louis the Pious' *Ordinatio Imperii* of 817 specified '*annos legitimos iuxta Ribuaricam legem*' as the age for full succession, *Capitularia* 136:16, I, p. 273. The Normans perhaps added another skein of Frankish custom to the pattern; whatever, relevant ages were by this time in a tangle like other parts of the Frankpledge tapestry: see below, pp. 000.

¹⁸² *Leges Henrici* (as n. 151) 41:8, pp. 148–9; *Leis Wl.* 3:2, pp. 496–7 (Wessex, where £1 goes to the accuser, and £4 to the king).

devised on European soil'.¹⁸³ It now seems distinctly possible that the system was, in all essentials, that whose outlines can be traced in legislation from Alfred to Cnut.

The suggestion is not new; but nor has it found much favour. Morris admitted significant Saxon elements in Frankpledge, but thought that it only reached full flower after 1066. His view is endorsed, with modifications, in the most recent account.¹⁸⁴ The grounds boil down to two. First, a *compulsory* 'duty ... to serve as a surety ... in ... tithing without right of refusal or withdrawal ... can be explained only by governmental action of a deliberate and rigorous nature'. In other words, it must be Norman.¹⁸⁵ Yet the element of choice before the Conquest was always somewhat theoretical. Those unable to find their own surety had every reason to hope that it would be found for them. Nor would many modern scholars accept Morris's implied view of pre-conquest capacities. A government that created the Midland shires was evidently up to 'deliberate and rigorous ... action'. As it is, the Conqueror's one recorded decree on the matter seems wholly traditional (20). The latest exponent of Morris's position plausibly replaces his 'legislative act' with 'fading understanding of Anglo-Saxon practice'. But the detectable post-1066 trends are what one might call a 'feudal' view of lordly responsibility for a household's 'mainpast', as in *Leges Henrici* on '*conducticii*' (21); and on evident sense that the system was better suited to the English than to their new masters. 'Bracton' can thus say that 'every man, whether free or bond, is or ought to be ... in frankpledge or in mainpast', just after mentioning those 'who ought not to be in tithing and frankpledge, as magnates or knights and their kinsmen, a clerk, a free man and the like'. Each trend is to be expected of a Norman regime; neither accords with the basic 'Frankpledge' principle. For, if 'Frankpledge' as such was in effect a new system concerned with 'disciplining the peasantry', why was its name a Normanized form of the Anglo-Saxon word, *friborh*,

¹⁸³ W.A. Morris, *The Frankpledge System* (Harvard Historical Studies XIV, New York, 1910), p. 1.

¹⁸⁴ W.L. Warren, *The Governance of Norman and Angevin England 1086–1272* (London, 1987), pp. 39–42, elaborating the case made by his 'The Myth of Norman Administrative Efficiency', *Transactions of the Royal Historical Society* 5th series 34 (1984), pp. 113–32, at pp. 119–20.

¹⁸⁵ Morris, pp. 29–30.

which expressed the link with free status basic to Cnut's law?¹⁸⁶

Morris's more substantial and durable point was that tithing and surety groups were different things before 1066. Groups of ten and a hundred were responsible for policing, as in the Æthelstan and Hundred texts (8, 12), but the *borh* specified in other excerpts was arranged separately. The modern refinement here is that medieval frankpledge 'is to be found either as a territorial unit identified by place, or as a group of ten or a dozen ... men identified by the ... headman'; the point is presumably that territorial and numerical units had different origins.¹⁸⁷ That frankpledge was variously organized in various parts of the kingdom is certainly true. In more remote parts, it was indeed wholly absent. Yet, remoter areas, by and large the same as those lacking frankpledge, were not shired, and this is no reason to doubt tenth-century shiring of the Midlands. Similarly, the tithing is a territorial unit in precisely those shires of Wessex, Kent and 'Old' Mercia where the hundred is a new name for an old organization without regard to hidage, and where a tenth of a hundred (which is the primary meaning of *tithing*) *could not* come to ten hides; but is a numerical unit (usually, not always, ten) in the areas of tenth-century conquest with artificial hundreds of 100 hides and the appropriate multiples or fractions. The variable organization of the indubitably tenth-century hundred discourages ascription of frankpledge's inconsistencies to the eleventh.¹⁸⁸ On the contrary, to find the same inconsistencies with both tithing and hundred in almost

¹⁸⁶ *Bracton* (as n. 166), pp. 350–1; Warren, *Governance*, p. 42, 'Myth', p. 120. One can thus accept Professor Warren's view of post-1066 Frankpledge with enthusiasm, but without sharing his pre-conquest assessment. Use of Frankpledge to discipline peasants is all the easier to understand if it was once a functional Anglo-Saxon system to less humiliating effect. *Murdrum*, Wl. Art. 3 – 3:2, pp. 486–7, is simply a specific application of Old English communal activity. Like Norman recourse to English taxation law, above, pp. 000, this is an instance of turning the Anglo-Saxon machine against its inventors.

¹⁸⁷ Morris, pp. 10–29; Warren, *Governance*, p. 42.

¹⁸⁸ Morris, pp. 42–68. Pre-conquest shires without frankpledge were Yorkshire (i.e. the one part of Northumbria that had been 'shired'), Herefordshire, Shropshire and (presumably) Cheshire (i.e. lands in or adjacent to what would become the Marches). It is no easier (arguably more difficult in Yorkshire) to explain these gaps if Frankpledge were Anglo-Norman as such, than if it were essentially Anglo-Saxon. See chapter 10, pp. 000 for diversities of hundredal organization (and chapter 12, pp. 000, for other variables). Since a tithing is, in the first instance, a tenth of a hundred, it is no problem that they numbered twelve and were called *douzaines* in some regions.

exactly the same places encourages one's faith that both are of the same sort of date.

Morris himself faithfully presented a wealth of circumstantial evidence against his own case. He saw that Anglo-Saxon arrangements and post-conquest frankpledge were very closely similar. He admitted that the necessary transition was 'easily accomplished no doubt in many cases by [Cnut's time]'. Turning the tables on those who might draw the beckoning conclusion (and describing a neat circle himself), he finds 'such strong points of identity that had Frankpledge existed in England prior to 1030, the Saxon *borh* system ... would have been a superfluity'. As against these other indicators, Morris rested his case that tithing and surety were distinct before 1066 on the view that they are separately described by Cnut (16), but not by the *Leges Henrici* (21). The Anglo-Saxon code does not set the system out in coherent detail; the Anglo-Norman jurist does. The proof that police and pledge groups were separate under Cnut is the 'otherwise useless repetition' of 'hundred and tithing ... hundred and surety'. The argument puts more weight on an Anglo-Saxon legal text's exact wording than it can reasonably be expected to bear. A primary message of this book's first part was that pre-conquest codes, anyway in extant form, were not precisely formulated statutes; whereas twelfth-century collectors did aim, however misguidedly, to codify and clarify. In short, the pattern of the evidence is just what one would expect, regardless of the facts of the matter. Specifically, Cnut's laws were written by Wulfstan. 'Otherwise useless repetition' was his stock-in-trade. 'In tithing and frankpledge' remained the thirteenth-century formula. The repetition perhaps shows that they were once distinct. But it does not show that they still were in 'Bracton's' time. Nor need it do so in Cnut's.

The *Leges Henrici* clearly says that a combined 'tithing and free pledge' was *statutum* (21). If the post-1066 ghost-statute is not to be conjured up after all, the *Leges/Quadripartitus* author can only be referring to Cnut's law (16) – as anyway suggested by *hurðefest* ... *folgarii* and other echoes. It follows that he understood Cnut to have meant just that union of tithing and surety groups which modern scholars deny. That might of course be another of his continental misconceptions. But a final witness is altogether more formidable:

Because, as a result of the barbarians, even natives were inclined to robbery ... [Alfred] ... organized centuries that they call hundreds and tens that they call tithings, so that every Englishman that lived lawfully would have both hundred and tithing. Thus, if anyone was charged with any crime, he would at once show who would pledge him from hundred and tithing; but he who could not find a pledge of this sort would suffer the severity of law. And if any criminal took flight, whether before or after pledging, everybody from the hundred and tithing would pay the king's fine.

William of Malmesbury is undoubtedly describing frankpledge. In attributing the system to Alfred, he has met with universal ridicule. Morris, following Stubbs, talked of 'an old-time tendency to explain institutional beginnings by a single act of some great lawgiver'.¹⁸⁹ No scholar has considered the possibility that here, as elsewhere in his works, William was simply reporting the evidence as he found it. Yet chapter 3 showed that he had very probably read an Anglo-Saxon law collection. His knowledge of Old English, unlike that of the *Leges/Quadripartitus* author, has never been impugned. He was half-English; one of his grandfathers must have experienced the Old English regime. What he wrote about Alfred and frankpledge, may very well represent an interpretation placed on the chain of excerpts given above by someone much better qualified to understand their elliptical formulation than nineteenth- or twentieth-century commentators. It can therefore be argued that his remarks merit not patronizing dismissal but the sort of respect due to any well-informed master of the historian's craft.

¹⁸⁹ *Willelmi Malmesburiensis ... De Gestis Regum Anglorum*, edited by W. Stubbs (2 vols, Rolls Series 90, London, 1887–9) ii 122, I, pp. 129–30; Stubbs, 'Introduction', *ibid.* II, p. li; Morris, pp. 6, 34. The latter notes the near unanimity with which twelfth-century writers put frankpledge back into Anglo-Saxon times, a 'mistake' which becomes difficult to account for it, as seems clear from excerpt 20, it cannot be ascribed to the Conqueror either. On the other hand, the fantasies of one source need not discredit them all (least of all if it is the *Leges Edwardi*), and Morris's claim that William of Malmesbury ascribed the murder-fine to Alfred seems unwarranted by William's text.

That is not to say that he was entirely right. It is reasonable, may well seem responsible, to hold that this powerful engine of social control took time to construct, each scion of Alfred's dynasty fitting further cogs into place. The later clauses of Alfred's law certainly imply that surety was not yet universal (1). His 'friends' evolve into Æthelstan's 'kin' (4) or 'lord' (6); they, into Edgar's *borh*, regardless of other ties (13). Odd details of hundred administration seem evident under Edward, even Alfred. But the word 'hundred' comes later, and decimal organization may have accompanied the name. At the same time, the nature of the texts is such that the blueprint can only be seen when the machine is already ticking over. An oath very likely to have begun with Alfred gets its formula from Edmund, its age from Cnut. The hundred was certainly known to Edmund (10), yet codified only after his time (12). As with so many aspects of Old English law, it will never be known exactly when particular details were first laid down. But there is a good case, here as elsewhere, that the basics go back to Alfred. It is not, *prima facie*, an outrageous proposition that a thirteenth-century oath of loyalty and abstinence from crime, combined under the generic label of 'frankpledge' with a duty to go surety for one's neighbours and in pursuit of criminals, had an origin in something which in the ninth century was called 'oath and pledges'.

Most participants in the debate on pre-conquest prosecution have tentatively admitted communal elements in Anglo-Saxon approaches to crime. This is sometimes coupled with equally tentative scouting of frankpledge's potential. Tentativeness is always in order on forays into law's prehistory. But it is no more needed here than with issues where it has been less observed.¹⁹⁰ Having regard to the gist of the material (the spirit, so to say, not the letter of the laws), the case for Frankpledge as a functioning pre-conquest system is as good as can be expected. That being so, it is no surprise that evidence for pre-Angevin Inquest is exiguous. Anglo-Saxon Frankpledge did the same job as the

¹⁹⁰ So, Maitland, no mean ally for exponents of pre-1066 Frankpledge, put his endorsement in a footnote: Pollock and Maitland (as n. 2) II, p. 529. So also, Sir Frank Stenton, *Anglo-Saxon England* (3rd edition, Oxford, 1971), p. 410, hardly gave his perceptive comments the weight the matter deserved. Older views of communal action tended to start from the 'peace-theory' upended by Goebel (as n. 202). Cf. next note.

Inquest. The oath at twelve created a standing obligation not to be accessory to (i.e. to denounce) theft (12, 20). There was no need for further oaths in particular instances. Sureties had the best possible reason for presenting suspects to justice, namely their own financial liability. The notion of ‘ill-fame’, central to inquest procedure whether Roman, Carolingian or Angevin, is much in evidence throughout the Anglo-Saxon texts. That is what *tibthysig* (literally ‘charge-laden’) really means. Lest there be any doubt of this, Edgar and Cnut couple the word with the phrase ‘untrustworthy to the people’; and Cnut goes on to imply that three separate charges make one ‘charge-burden’ (thus nicely illustrating how individual appeals might become a general indictment) (13, 17, 18). A pre-1066 tithing must pursue the *tibthysig*, put him in surety or custody, or send him direct to an ordeal; failure at any stage led ultimately to a suspect’s forfeiture and death or outlawry, executed by a reeve or a tithing itself. Post-1166 tithings must also chase and incarcerate; but the duty to identify a *rettatus vel publicatus* now belonged to a weightier body of twelve men from the hundred and four from the vill (at a guess, the twelve and/or four would often have been tithing headmen); while enforcement of ordeal and sentence fell to royal justices. Such changes are no doubt important, but they do not amount to a new philosophy of crime. Nor need the Inquest be seen as a typically tough Angevin response to Frankpledge’s failure to do its job. Henry II’s would not be the last regime panicked into new measures by subjective perception of a ‘crime-wave’.¹⁹¹

It remains to consider the one apparent reference to the Inquest that there is. Æthelred’s ‘twelve senior thegns’ pose a problem not only to disbelievers in Anglo-Saxon juries, who must account for their presence, but also to believers, who must explain why they stand alone. A first step is to set the passage in its legislative context:

¹⁹¹ The great strength of Hunard’s case (above, n. 161), as conceded by her critics, is her stress that Henry II’s policy fits a context of long-term resort to communal responsibility (notably the *murdrum*); the same goes for the different line taken by Professor van Caenegem, one of those critics (above, n. 162): what Frankpledge and Inquest had in common, as against such collective action against malefactors as is indicated by earlier Germanic evidence, is official organization. Joüan des Longrais (as n. 161) is also particularly effective on this.

I Æthelred (Woodstock)

1 – 1:6: That each freeman have trustworthy surety, that the surety hold him to all justice if he be accused (*betyhtlad*). If ... he be *tibthysig*, let him go to the threefold ordeal. If his lord say that neither the oath nor the ordeal broke down for him since there was the meeting at *Bromdun*, let the lord take two trustworthy thegns within the hundred, and swear that the oath never broke down for him, nor had he to pay thief-payment. If the oath is forthcoming, let the man that is there accused then choose whichever he wants, whether simple ordeal or a pound's worthy If they dare not give the oath, let him go to the threefold ordeal. If he is ... found guilty, on the first occasion let him pay the accuser twice over, and his wergeld to his lord ... And on the second occasion, let there be no other amend there but his head. If, however, he escapes and avoids the ordeal, let the surety pay his accuser *ceapgyld*, and his wergeld to his lord.

III Æthelred (Wantage)

3:1 – 4:1: Let one have *gemot* in each wapentake; and let the twelve senior thegns (*þa yldestan XII þegnas*) go out, and the reeve with them, and swear on the relics in their hands that they will not accuse any innocent man nor conceal any guilty one. And let them ... take the *tibthysian* man with whom the reeve has a suit. And let every *tibthysig* man go to the threefold ordeal or pay four times over. If ... his lord is willing to clear him with two good thegns, that he never had to pay thief – payment since there was the meeting at *Bromdun*, nor was he accused, let him go to the simple ordeal or pay three times over. If, however, he is guilty, let one strike him so that the neck breaks. If, however, he avoids the ordeal, let [...] pay *angyld* to the owner, and twenty marks to the landlord.

The relationship of these two texts was discussed in chapter 5. There is no doubt that, in this instance, they have the same objectives, and broadly similar methods, though wording and phrasing differ apart from a few echoes, and variations in content extend from what may be local custom (twenty marks for a *landrica* as against wergeld for a lord) to generally fiercer sanctions (three- or four-fold, as opposed to double, restitution; death at a first rather than second offence).¹⁹² The clearance processes of the two codes are closely similar, down to the common relevance of the *gemot* at *Bromdun*. It is therefore only logical to conclude that the accusation process was at least roughly the same. Granted the greater severity of III Æthelred, one is hardly to suppose that the government would altogether forswear within the area covered by *Engla lage* an approach unhesitatingly applied to the Danelaw. The parallels illustrate the point that sureties, backed up by a reeve, played the same role as local panels on oath. That is why the twelve thegns of Wantage's code are absent from Woodstock's.

What sort of body, then, were these twelve thegns? They may, as many scholars have thought, be Scandinavian custom, like many elements of the code. The main difficulty here is that the (*very much* later) Scandinavian texts could well be affected by Danelaw arrangements.¹⁹³ The Wantage panel is more plausibly compared with Domesday's twelve 'judges' at Chester, its twelve 'lawmen' at Lincoln and Stamford, and perhaps its four 'judges' at York, or the Cambridge 'lawmen' who may correspond to the twenty-four 'judges' in the Æthelwold *Libellus*.¹⁹⁴ Less frequently invoked in this connection are Edgar's stipulations in his *Wihthordesstan* code, to apply both in Danish and English England, but directed, as they stand, at the office-holders of the Danelaw:

Witness (*genitnes/fidele testimonium*) is to be fixed for each borough and

¹⁹² I Atr. 1 – 1:6, pp. 216–19, III Atr. 3:1 – 4:1, pp. 227–31. The 'pound's worth oath' of I Atr. may be equivalent to an oath of twelve helpers (Whitelock, *EHD I*, p. 367); and whatever the difference between presentment and oath-helping, an oath of twelve, on Cnut's principle, n. 164 above, would balance an accusation by twelve (see also n. 195).

¹⁹³ See now, C. Neff, 'Scandinavian elements in the Wantage Code of Æthelred II' (forthcoming); and below, chapter 13, pp. 000.

hundred. For each borough, 36 are to be chosen (*gecorene/eligantur*), for small boroughs and for each hundred 12, unless you wish more. And every man is to buy and sell all goods ... with their witness, whether in *burh* or wapentake. And let each of them when one first chooses him as a witness give the oath that he will never, neither for money nor for love nor for fear, deny any of the things of which he was witness, nor say any other thing in his witness except that alone which he saw and heard If [a purchaser of stock] declares that he bought it with the witness [of those named to witness, whether in *burh* or hundred], and that is a lie, he is a thief and shall suffer loss of his head and of all that he owns.

Contestants in the Anglo-Saxon jury controversy customarily assert or deny, each with more confidence than any evidence warrants, that the Domesday ‘lawmen’, Edgar ‘witnesses’ or Wantage thegns are specialist ‘doomsmen’, not the gentlemanly amateurs thought basic to Carolingian or Angevin Inquests. That, however, is beside the point. Edgar’s are duodecimal local experts making sworn depositions which would lead, as a matter of course, to convictions for theft. That their role was in the mind of the Wantage draftsmen looks the more likely, in that III Æthelred’s previous clause relates to sworn witness, and its next to ‘suretyless stock’.¹⁹⁵ But, whatever they were, Edgar’s and Æthelred’s panels each represented local opinion under oath. This discussion has not

¹⁹⁴ DB i 262d [*Cheshire* C:201]; 336a, 336d [*Lincolnshire* C:1, S:5]; 198a [*Yorkshire* C:1a]; 189a [*Cambridgeshire* B:13], to which cf. *Lib. El.* (as n. 147) ii 11, 24, pp. 88, 97.

¹⁹⁵ IV Eg. 3:1 – 6:1, 10 – 11, pp. 210–13; III Atr. 2 – 2:1, 5, pp. 228–31. The ‘majority verdict’ of II Atr. 13:2, pp. 232–3, is called a ‘*dom*’, which does not prove that it was delivered by judges rather than witnesses, but does prove that it was not the business of oath-helpers. Further, ‘Swesian’ 8, pp. 398–9 (above, n. 164) looks more like a witness’s oath than an oath-helper’s. If, on the other hand, oath-helpers were now selected by the court (cf. chapter 8, pp. 000), the difference between twelve oath-helpers, twelve witnesses and twelve presenters may not have been so obvious to contemporaries as it has seemed to modern scholars.

sought to argue that pre-conquest arrangements were *just the same* as Henry II's; merely that Anglo-Saxon kings, like Henry II, found ways of mobilizing the local community in their war on malefactors. Regardless of their ancestry, posterity or inter-relationship, the *Wihthordesstan* and Wantage bodies may be counted among their methods.

The final point reverts to Brunner's Carolingians. He was able to demonstrate Carolingian employment of a locality's 'better and more truthful men' to give sworn responses on fiscal rights and their abuse by government officials; though it might be added that his best texts came not from capitularies (where it is largely confined to ten years under Louis the Pious) but from charters alienating such rights to churches.¹⁹⁶ His argument then took him on a mighty sweep through Norman ducal prerogatives, before returning finally to the *Rijgejury*, the 'Jury of Presentment'. The undoubted weaknesses of his undeniably impressive thesis need not be rehearsed here. But it is very much to the present point that he could adduce no unambiguous case of inquest techniques used in Carolingian criminal justice. Italian texts offer the best possibilities. In the later-eighth century, Pippin ordered a judge to make 'as many trustworthy men as he can foresee (*homines credentes iuxta quantos previderit*)' swear that 'no one would conceal those known to them to [be guilty of] murder, theft, adultery and illicit association'. Two generations later, the Emperor Louis II had those generally suspected of harbouring robbers clear themselves with twelve oath-helpers; and 'wherever such were said to live, let there be inquest on oath through the whole people around about (*inquisitio per sacramentum per omnem populum circa manentem fiat*); and whatever the race or condition of those through whom this enquiry can best be made, they are not to have the power to refuse to give the oath when summoned by the count'.¹⁹⁷ These passages *could* be taken to indicate a

¹⁹⁶ Brunner, *Schwurgerichte* (as n. 160), pp. 60–126, 458–68; e.g. *Capitularia* 139:10, 141:1–2 (818 x 819), 144:2 (c. 820), 148:2 (821), I, pp. 282–3, 289, 295, 300; 187 (829), 188:2 (829), 192:3 (829), II, pp. 8, 10, 15. Cf. F.L. Ganshof, *Frankish Institutions under Charlemagne* (translated by B. and M. Lyon, New York, 1968), pp. 91–2.

¹⁹⁷ *Capitularia* 91:8 (782 x 786), I, pp. 192–3; 213:3 (850), II, pp. 86–7. D.A. Bullough, 'Europae Pater. Charlemagne and his achievement in the light of recent research', *English Historical Review* LXXXV (1970), pp. 59–105, at p. 95, takes the first text as indicating a criminal inquest, while making a good case, against Ganshof (as n. 196), p. 76, that the inquest was domiciled in Italy, and exported northwards for certain specific purposes;

criminal inquest of Angevin type. But it should be noted that there is no real suggestion here of selecting community representatives; oaths are administered to all, or to as many as possible. Brunner's third instance is from Charles the Bald's Capitulary of Servais:

About robbers: *Missi* are to make clear to all, on that fidelity which everyone ought to and has promised to God and the king, and on that Christianity whereby each ought to keep peace with his neighbour, that, without exception of any person, whether for friendship, kindred, love or fear, no one conceal a robber, but make him manifest to their *missi*; and let everyone offer as much assistance as they can in taking him; and let their *missi* make this sure (*firmare faciant*) through an oath, as was the custom in the time of their ancestors.

The capitulary is followed by the relevant oath formula, to be taken by 'Frankish men'. Earlier in this chapter, the same passage was seen as evidence of a *general oath*.¹⁹⁸ The reference to *antecessorum consuetudo* makes it seem probable that Charlemagne's general oath was indeed what his grandson had in mind. If so, the Italian texts could just as well be read the same way.

The implications of this are immense. The structure of Brunner's argument has set a century's historians searching for evidence of the Angevin criminal inquest in the Anglo-Saxon material. The failure to find it, or the difficulties facing those who thought they had, left a strong lingering impression that Henry II's Jury of Presentment was

hence, his view of *Cap.* 91, even if right, does not establish the use of criminal inquests north of the Alps.

¹⁹⁸ *Capitularia* 260:4, + Addit. 1, II, pp. 272, 274; above n. 54. Cf. *Cap.* 187 (829), II, p. 8, where there is a clear reference to *fidelitatem promissam* in the context of arrangements for an inquest proper. In *Deutsche Rechtsgeschichte* (as n. 128), pp. 639–44, Brunner returns repeatedly to this select coterie of texts without managing to expand it. The famous stipulation (c. 906) for presentment of sinners to the bishop by seven sworn *maturiores* of a diocese, in Regino of Prüm's, *De Synodalibus Causis*, edited by H. Wasserschleben (Leipzig, 1840) ii 2, p. 207, may be of great long-term importance, but proves nothing about Carolingian royal arrangements.

indeed Frankish and was probably not Anglo-Saxon. Yet, not only is there *no* Carolingian evidence of juries of Angevin type; the evidence Brunner used is arguably evidence of a general oath: something that very probably is attested in Anglo-Saxon texts. Putting it another way, Brunner gave scholars a fixation with inquest panels, the litmus-test of collective or 'private' pursuit of crime. That Carolingians had a well-developed sense of 'public' hostility to crime is beyond doubt. Therefore, difficulties in proving the inquest panel's use by Anglo-Saxon kings have been fatal to claims that they had such a sense themselves. Daunting as are the difficulties of tracing such panels through from the Carolingians to the Angevins, they have all in all seemed less than those of finding them in pre-conquest England. But there may never have been any need to look for inquest panels. Carolingian methods were literally communal; the whole community was recruited to denounce malefactors under oath. Whether or not such methods are to be found in Normandy or Anjou, they can surely be found in England.¹⁹⁹ The wheel of the argument thus comes full circle. The claim of Old English kings to have seen crime as 'public business' are as good as those of the Carolingians, let alone the Norman dukes. In the light of case-law, they are actually better. The founders of the English kingdom were the most visible heirs to the Carolingian legacy. They did the most to preserve it through European law's 'Dark Age'.

A pair of historiographical illustrations will serve to underline that point and conclude this chapter. Walther Kienast's *Untertaneneid und Treuvorbehalt in England und Frankreich* is one of the best modern exercises in the noble tradition of German *Verfassungsgeschichte*.²⁰⁰ Seeking further light on the much-discussed, and for German history crucial, problem of overriding loyalty to one's king rather than feudal lord,

¹⁹⁹ Tracking Carolingian institutions on the continent belongs not to this book's remit but to its intended sequel (but cf. chapter 10(2), pp. 000, chapter 11(2), pp. 000, for other types of inquest). It should, however, be noted here that the 1096 Rouen synod ordering twelve-year old males to swear to keep the peace (*Ordericus*, as chapter 3, n. 79) ix 3, V, pp. 20–1) is, on the above evidence, *very much* more likely to have been borrowed into Normandy from England than to have survived in Normandy, otherwise unrecorded, since Carolingian times.

²⁰⁰ W. Kienast, *Untertaneneid und Treuvorbehalt in England und Frankreich* (Weimar, 1952), especially at pp. 172–89, 234–9.

Kienast rightly stressed that there was never any doubt of the principle's validity in England. Naturally, he had much to say of the 1086 'Oath of Salisbury', when the Conqueror's 'councillors came to him, and all the people occupying land who were of any account over all England, no matter whose vassals they might be, and they all submitted to him and became his vassals, and swore oaths of allegiance (*bold aðas*) to him, that they would be loyal to him against all other men'. But Kienast was left with a puzzle. It was impossible to find survivals of this Carolingian-style general oath in Normandy. Where, then, did the Conqueror's Oath, with all that it was to mean for English feudal monarchy, come from? Kienast noted the oath of the codes of Edward the Elder and Edmund, which he called a 'Peace-Oath (*Friedenseid*)'. But, missing Cnut's clause and the other evidence cited in the first part of this chapter, he doubted whether the memory of this practice could have survived from the first half of the tenth century to the penultimate decade of the eleventh. The most critical question of his whole enquiry had therefore to be left in the air. On this chapter's argument, however, his problem is solved. English practice most closely reflected the Carolingian prototype, because the prototype had survived in England.²⁰¹

Yet more striking is the case of Julius Goebel's *Felony and Misdemeanour*. It is difficult to be sure just where Goebel's argument was leading him, because the planned further volume(s) of this study were never published. However, the book's original subtitle, 'A study in the History of English Criminal Procedure' implies a search for the origins of the vigorous public campaign against the whole gamut of crime which is considered a hallmark of the early Common Law. What he argued in the extant volume was, first, that the Carolingian (up to a point, even the Merovingian) regime developed a sense of crime as a threat to the community at large which was *not*, as Brunner and others

²⁰¹ *ASC* 1086, p. 168. J.C. Holt's stimulating reassessment of this episode, '1086', in J.C. Holt, editor, *Domesday Studies. Papers read at the Novocentenary Conference* (Woodbridge, 1987), pp. 41–64, is not affected by this argument. Oaths of overriding loyalty, regardless of vassalage, could still have been new to the incoming French nobility, even if common form in England (what struck the Chronicler was perhaps the spectacle of so many swearing at once); but Professor Holt's *quid pro quo* would hardly be needed if they were also familiar in Normandy.

had thought, inherent in early Germanic society; second, that Carolingian procedures did survive post-Carolingian chaos; and third, that Anglo-Saxon justice was meanwhile not eroded by grants of public jurisdiction to the same extent as Frankish royal rights. One would guess that he aimed to show that Angevin ‘felony and misdemeanour’ arose from exploiting surviving English public jurisdiction to give surviving Frankish principles new substance in the criminal ‘Pleas of the Crown’. Among his many insights are an appreciation of the role of a broadly defined ‘fidelity’ in generating a communal concept of crime, and a perception of the chilling relevance of Biblical views on the descent of the ‘Sins of the Father’ when disinheritting a felon’s heirs.²⁰² His was also the best account till then of the half-life of sub-Carolingian institutions, in that he foreswore Brunner’s constant recourse to late evidence. Erudite, incisive and humane, it is surely the twentieth century’s best book in English on early medieval law.

On Anglo-Saxon law, Goebel was generally thought less commanding; though it is only fair to say that his was the first of three assaults on Maitland’s theory of pre-conquest franchises, which between them have made that the one wholly revised aspect of the Maitland approach. But it is not for this reason that his book had less impact than it deserved. The problem was rather that his sub-title deflected the attention of the continental legal historians who had most to learn from what there is of it, while historians of English law were put off by its extended discussion of Frankish issues. Here is a profound irony. One by no means needs to accept all this chapter’s arguments to see that an extremely powerful case can be made for a concept of afflictive punishment in pre-conquest England. That concept was what Goebel so brilliantly elucidated in Frankish evidence, then painfully traced into twelfth-century Normandy. It is unnecessary to deny the Norman case. But nor is it really necessary to believe in it. Anglo-Saxon evidence could have done Goebel’s job for him. Odd hints, like some wafts at pre-conquest arrangements that do not reach his usually rigorous standards of

²⁰² Goebel (as n. 37), pp. 117–22, 258–66.

argument, suggest that he had a distant sense of their possibilities.²⁰³ But he was locked by the dominant orthodoxy into digging up Frankish and Norman roots for which he need never have hunted at all. He could have spared himself the insularity of either bank of the Channel by aiming the same formidably iconoclastic arsenal at Brunner's inquests, as he fired so lethally at his 'Peace-theory'. That he failed to see more than a glimpse of evidence that is not so very elusive is perhaps the most telling of all illustrations that it is early English legal history, not early English law, that lay fossilized in the Forests of Germany.

²⁰³ The 1976 re-issue has the new sub-title '*A Study in the History of Criminal Law*'! For Goebel and his critics on private jurisdiction before 1066, see chapter 10 (3), pp. 000. Less than commanding remarks on issues discussed above include: (1) pp. 411–14, for 'crimes involving outlawry ... where outlawry is process, the harsh principle ... of purgation by ordeal ... [is a] ... radical change in criminal procedure ... Norman kings would never have been satisfied with the Anglo-Saxon rules for failure at the ordeal ... Anglo-Saxons although familiar with infamy did not treat forfeitures as a general consequence of infamy but specified it from time to time as punishment for this or that particular offense'; the argument (n. 268) is that III Eg. 7:1 and II Cn. 25a – 25:1 give the *tithbysig* a last chance to find surety: 'obviously the state of being *tithbysig* does not disqualify a man from capacity to own property' (!). It is extremely hard to reconcile such propositions with excerpts 13, 15, 17, 19 above: if the surety option is foreclosed, as presumably inevitable for the truly *tithbysig*, then forfeiture and outlawry (not to mention death) follow as a matter of course, i.e., process, and more or less brutal sanctions awaited double failure of *tithbysig* at ordeal. (In n. 266, Æthelstan's awareness of procedural disadvantage for recidivists is considered, but rejected on the grounds that the pertinent pseudo-Isidore text could have been available but was not (!), while influence from secular Frankish texts is excluded by Æthelstan's 'clumsy' formulation: thus, awkwardness of legislative language is again made to bear a crushing load.) (2) pp. 424–5, peace pronouncements 'do no more than express the objective of good government ... They cannot be said to create a legal order because there are no sanctions which did not exist before'; yet, p. 359, on tenth-century law, 'noteworthy is the reconstruction of the whole system of thief-catching and the radical sharpening of the sanctions taken upon thieves'; (3) p. 426, Cnut's oath is 'simply [*siz*] not to be a thief or an abettor of thieves'; yet [at Servais] 'the oath of fidelity was made the basis of men's duty to report thieves and to aid in their pursuit', p. 121. Goebel anticipated other above arguments: 'we have assumed throughout chattel forfeiture is intended be ... "all he has" [but] charters ... show the king takes [land] upon forfeiture', p. 368, n. 108; 'Anglo-Saxon law had generally given wite payments a priority over bot', p. 383. One has the impression, towards the end of the book, of unwelcome evidence being brushed away. It is possible that writing his last chapter gave Goebel a mounting sense of the case for a Carolingian-style regime in Anglo-Saxon England (cf. pp. 378, 436); and that this is one reason why he aborted his project?

Chapter 10. The Machinery of Justice

Introductory

Effective legal systems need effective judicial machinery. One way in which legal historians marginalize Anglo-Saxon law is in thinking that pre-1066 justice worked quite differently than under Henry II. Thus:

- a) A Court spoke with the voice of the community rather than the king. The shire or county, and its subdivision, in southern England the hundred, and in the Danelaw the wapentake were in essence ancient folk units, whose custom might vary to quite a considerable extent from one to another, and which expressed a communal or 'popular' instead of an 'official' or royal verdict.
- b) The shire was also the focus of judicial administration under the Angevins (justices on circuit or on eyre hold petty 'assizes' etc. there). But by then these judges were nominated royal officials, who literally laid down the law. Tenth-century courts were unsupervised, with very limited rights of appeal from locality to centre.
- c) For Maitland, royal judicial rights had largely been alienated by Anglo-Saxon kings; so justice was massively 'privatized' by 1066.

Shire and Hundred

(i) Courts before the Tenth Century

Two extracts are of particular importance here:

1 a. Ine 39: If one goes unpermitted from his lord (*blaforde*), or steals into another *scir*, and one discovers him, let him go where he was before, and pay his lord sixty shillings.

1 b. Alfred 37–37:2: If one wishes to seek a lord from one district (*boldgetale*) to another, let him do that with the witness of the *ealdorman* in whose *scir* he

served before. If he do it without his witness, let he who supports him as his man pay 120 shillings as fine; yet he is to divide that, half to the king in the *scir* which he served before, half in that which he reaches. If he have done any wrong where he was before, let he who then took him as man pay for it, and to the king 120 shillings as a fine.

If we start with these extracts, we at once realize something of crucial importance: Alfred's law is clearly based on Ine's, yet Alfred has to find another word, *boldgetal*, for Ine's *scir*, a very rare Mercian word which means 'province'. This *must* mean Alfred's recognition that his shire was something different from Ine's; hence, the *scir* of Ine's code is something else, and Alfred's shire is (relatively) new. This point goes with two more crucial facts:

- a) There is no evidence throughout Ine's long code (nor in Kentish seventh-century laws) of a *hierarchy* of courts: we have merely a local court under some sort of official (the *scirman* in extract in extract **2i** below).
- b) In pre-tenth-century lawsuits, we find no references to shire courts, or any courts below the level of the king's council. Cf. the point in my 'Lawsuits' paper that there were two suits over Inkberrow in Worcestershire (LS nos. 4, 77); the first (789x823) was repeatedly heard by a council of king, archbishop, southern bishops and Mercian lords but the second (1023) went before a shire court.

(ii) The Tenth Century Revolution in Local Government

Thus, before the tenth century, we have a local court and a king's court, with nothing called either shire or hundred court. The tenth-century pattern is well illustrated in an Ely case (LS 120): the abbey had been granted a fishery by a widow. After the death of King Edgar, her kin withheld it, 'without adjudication or consent of the citizens or hundredmen'. Ealdorman Æthelwine came to Ely, and summoned the kin to a plea, 'once, twice and indeed many times without result'. Finally, he summoned a *grande*

placitum at Cambridge, with successful result. So a case that had defeated the hundred court was eventually resolved before the shire.

We find this pattern clearly prescribed in Cnut's laws, based on those of Edgar:

2 a. II Cnut 17 – 19:1 (III Edgar 2, 5 – 5:2, except where **in bold**): Let no man seek the king unless he cannot achieve any justice **within his hundred.**

Let one seek one's hundred on pain of the fine. And let one hold the borough court (*burhgemot*) thrice, and the shire court (*scirgemot*) twice [III Edgar 5:1: per year] **on pain of the fine, unless more often be necessary.**

And let the bishop of the *scire* be there and the *ealdorman*, and let them there teach (*taecan*) both God's law and the world's law. **And let no one make any distraint neither within nor beyond the shire before he has asked for justice (*rihtes*) thrice in his hundred. And if has no *riht* on the third occasion, then let him go the fourth time to the shirecourt, and let the shire fix the fourth appointment (*andagan*).**

2 b. II Cnut 15:2: He who refuses just law and just judgement let him be liable whether to the king for 120 shillings or to the hundred for 30 shillings.

2 c. Hundred Ordinance 1: That they are to assemble every four weeks, and each man is to do *riht* to another.

2 d. Hundred Ordinance 7 – 7:1: In the hundred, as in any other court (*gemote*), we will that one teach the *folcriht* in each suit, and *andagie* (i.e. fix a day) when that is to happen. And let he who fails to appear on the *andagan* pay 30 shillings.

2 e. III Edmund 2: If anyone refuse to be present and assist [in thief catching], let him pay 120 shillings to the king and 30 shillings to the hundred.

2 f. II Edward 1:23: That no one obstruct another's *ryhtes*. If anyone do that, let him pay [the king] at the first offence 30 shillings, and at the second as much, and at the third 120 shillings [that is king's disobedience]. [cf. I Edward 2:1]

2 g. II Edward 8: I will that each reeve hold a meeting *gemot* every four weeks, and manage that each man be worthy of *folcryhtes*, and that each suit have its *andagan*.

2 h. Alfred 38 – 38:2: If one fights before a king's *ealdorman* at a *gemote*, let him pay wergeld and fine as is just, and above all (*lit.* before that) 120 shillings to the *ealdorman* as fine [cf. 15: fine for fighting before an *ealdorman* is 100 shillings] If any of this happens before a king's *ealdorman's* deputy or king's priest, 30 shillings as a fine.

2 i. Ine 8: If anyone asks for *ryhtes* before any shireman (*scirman*) or other judge, and cannot achieve it let pay 30 shillings.

2 j. Ine 36:1: If an *ealdorman* [allows a thief to escape or keeps the theft secret], let him suffer loss of his *scire*.

Cnut's code (**2 a**) does lay down a hierarchy of shire and hundred courts, shires meeting twice a year under bishop and *ealdorman*. Also in or around Edgar's reign comes the 'Hundred Ordinance' (sometimes called 'I Edgar'), which we met when discussing policing procedures last time. Note now the provisions for a meeting of its court every 4 weeks (**2 c**), and that we have here the same 30s fine for defiance as we meet later under Cnut (**2 d, b**). So there is a mid-tenth-century system that is *not* apparent in the earliest laws. We must now trace it backwards through less explicit legislation in between.

The Hundred is first described in detail in the Hundred Ordinance, but it is already referred to under Edmund, with its 30s fine (**2 e**), as is the 120s fine more appropriate for defiance of royal justice. If we then go further back to Edmund's father, Edward the

Elder, we find (2 f) exactly the same terms on obstruction of *riht*, 4 weekly meetings, fixing of a day in advance, and a hint that the king's 120s is the result of the sort of appeal Cnut envisages (2 a); this *looks* like the hundred but is not so called. Turning right back to Ine (2 i), we find the 30s fine for obstruction of justice in the local court which is this code's only type of court. It seems logical, therefore, to see the tenth-century hundred court as essentially the old local court with a new name, and a more regulated system.

We cannot be so sure of the shire court before Edgar, and the first cases clearly heard by shire courts date to about his time. There is no doubt of the shire's existence as a *military* unit in ninth century or even eighth-century Wessex, but no evidence of its *judicial* role. Yet we *have* found Alfred referring (1 b) to an *ealdorman* and his *scir* in a context where the *scir* is something different from Ine. Furthermore, at (2 h) we have an important stipulation for a 120s fine for fighting in an *ealdorman's* court that is not the same as the *compensation* due to an *ealdorman* for the insult of fighting before him covered by an earlier law. And here too is a deputy's 30s fine. This seems to be *prima facie* evidence that a hierarchy of courts was incipient at least under Alfred. A further sign that the *ealdorman* with shirecourt may go back to the early C10th at least is the provision (2 a) that bishop and *ealdorman* preside. The only known time and place that bishopric and *ealdorman* coincided is early-tenth-century-Wessex: there were a mere two bishoprics before 909, and only six or seven *ealdormen* in all of Edgar's kingdom; thus, Edgar's provisions seem to hark back to earlier arrangements.

The signs are, therefore, that what becomes explicit under Edgar about shire and hundred was already implicit under Edward the Elder and perhaps Alfred. Since there is no trace of a hierarchy of courts or of the name hundred under Ine, we may be looking at one more innovation of Alfred's time, its extent is almost hidden by inadequate legislative evidence. To this *fairly* secure point, add three more:

First, the hundreds of Wessex do *not* consist of 100 hides. Since they did come to be called hundreds, this amounts to virtual proof that the local courts of Wessex are renamed *earlier* units. The paper by Helen Cam on your bibliography suggests what the early units

were: groups of settlements organized around, and owing suit of court to, a royal manor.¹ The equally important paper by Geoffrey Barrow on your bibliography,² points out that this type of unit is very common in the northern and western borderlands of England, and also in Scotland itself, and that it may well correspond to what in Kent was called the 'lathe'. This makes a good case that it is essentially a pre-Saxon, probably indeed pre-Roman, type of local organization. More to our point is that in northern England and Scotland, it was called a *scir*. This could mean that Ine's *scir* was simply the early southern English central manor or *lathe*. In other words, an ancient, perhaps *very* ancient, unit of local jurisdiction receives the new name of 'hundred', with *scir* now reserved for the bigger, so far purely military, district meanwhile given its own court.

Second, at the same time as this happened, the West Saxon kings were moving as would-be liberators into Mercia and East Anglia. Here, they are known to have created new and artificial shires centered, unlike those of Wessex, around a *burh*; and we may guess that they also formed new local districts, because north of the Thames, these are not just called 'hundreds', they actually consist of 100 hides, or divisions and multiples of 100: the logic of the new name here, unlike in Wessex, influenced the structure.³

Third, these new West-Saxon arrangements once again reproduced the pattern found in Carolingian Francia. The 'county' here survived, on the whole, from the old Roman 'city', and so did a subordinate system frequently called 'hundred' and corresponding in its arrangement to the structure and *operations* of the English tenth-century hundred. The coincidence is to say the least suggestive, particularly (I repeat) because there was nothing in the *structure* of the West-Saxon hundred to invite the name of hundred. We seem to have more Frankish borrowing.

¹ H.M. Cam, 'Manerium cum Hundredo: the Hundred and the Hundredal Manor', *EHR* XLVII (1932), repr. in her *Liberties and Communities in Medieval England* (1944), pp. 64–90.

² G.W.S. Barrow, 'Northern Society in the twelfth and thirteenth centuries', *Northern History* IV (1969), p. 1–28; and 'Pre-feudal Scotland: Shires and Thanets', in his *The Kingdom of the Scots* (1973), pp. 7–68.

³ H.R. Loyn, 'The Hundred in England in the tenth and eleventh centuries', in H. Hearder and H.R. Loyn (eds), *British Government and Administration. Studies presented to S.B. Chrimes* (1974), pp. 1–14.

The essence of the West Saxons' innovation, therefore, was that the local court was reorganized and surnamed 'hundred' at the same time as it was made subordinate to a new court of the 'shire' proper, which corresponded to older military districts. In the conquered Mercian and East Anglian lands, shires and hundreds were artificially created by literal replication of the West Saxon pattern. The model and part of the terminology followed was Carolingian. It was one of the most influential and lasting achievements in the whole illustrious history of English government (until 1974). Yet it is not so complete an innovation as to seem implausible. It is no more nor less than an intelligent answer to the new problems of government 'at a distance'.

Centre and Locality

In terms of the questions with which we began, we now see that neither hundred nor shire courts can be seen as ancient, communal or popular units. Even where units were perhaps ancient, these were reorganized from above. To see these as systematic governmental creations already moves some way away from taking them as expressing folkjustice over which kings had no particular say. But we must now tackle head on the issue of the extent of royal supervision and control. The first point to make briefly is that it is simply wrong to see the stress on initial hearings before shire and hundred as excluding royal interest:

a) The laws quoted to support this (2 a) mean only that Anglo-Saxon kings disliked being pestered, like Roman emperors.⁴ And, contrary to what I there said in ignorance, there are just as many suits (31) recorded as heard before the king's own court as in the shire. That position does not change until after 1154. You will remember from the case of Wynflæd and Leofwine in the first lecture that, even when a king did refer a case back to the shirecourt, he did so by his own writ, carried by his own representative.

⁴ P. Wormald, 'Giving God and King their Due: Conflict and its Regulation and the early English state', *Settimane di ... Spoleto* XLIV (1997), pp. 549–83.

b) Also in that paper, I make the point that, though judicial *rhetoric* is usually plural, i.e. communal, the role of court presidents was undoubtedly most important. The decisive proof of this is the oft-expressed anxiety (e.g. the Asser chapter which began this course), about judicial corruption and incompetence. Tenth-century law is full of warnings to unsatisfactory reeves. There is a whole law-tract on 'Judging'. To return to Ealdorman Æthelwine, his role in the Ely chronicle is one of an official deeply suspected of prejudicing the outcome of Ely's cases (not least by refusing its own bribes (LS 1223)). But Æthelwine was founder of Ramsey; and LS 143 sees a Ramsey opponent ruthlessly quashed by Æthelwine's direct intervention. I'll now add two more points to these:

c) It is an illusion that the office of *ealdorman* was always heritable in pre-conquest England. Æthelwine succeeded his father but not as eldest son, so his appointment involved an element of royal choice, and he was not succeeded by his son. No ealdormanly title runs for more than two generations. In any case, ealdormen preside beside *bishops*, and there is of course no question of inherited or usually even of local status for them. You may already have noticed how the bishop plays a strikingly prominent role in what look to us like secular cases. I happen to possess Dorothy Whitelock's copy of Attenborough's *Laws of the Earliest English Kings*. In the Grately code of Æthelstan, where the king ordered *bishops* to exact the 120s fine from reeves who failed to enforce it (II Æthelstan 25), she plaintively writes 'why not the *ealdorman*?': an episode nicely revealing how a tenth-century king's priorities differ from a twentieth-century scholar's.

d) In that article, I drew attention to the increasing importance for eleventh-century cases of the role of the sheriff, also increasingly addressed by royal writs. You have [in the handout] a list of pre-1066 sheriffs recorded in Domesday Book: the central column is value of land in the shire of office, the minimum what is specifically ascribed, the maximum covering land of all men with that name; the right column gives value and distribution of lands held elsewhere, lords of whom held, and writs addressed.

Table 1. List of pre-1066 sheriffs recorded in Domesday Book

Name	Shire	Min value	Max value	Value and distribution of lands held elsewhere, lords of whom held, and writs addressed
Alfred	Dorset	£6	£27 2s 6d	addressed in S 1063
Ælfric	Hunts	£10	£27	held of king, addressed S 1107
Ælfrwig	Oxon	£2	£9 10s	held 'freely'
Æthelwine	Glos	£19 18s	£43 4s	held of king
Æthelwine	Hereford	£2	£6 3s 6d	? described as 'son of Eadwig'
Æthelwine	Hunts	£2	£4 15s	possibly a priest
Æthelwine	Norfolk	£2 11s	£44 10s 4d	addressed S 996 (as borough-reeve?)
Æthelwine	Warks	£19	£29 13s 4d	held 'freely'
Total Æthelwines		£ 45 9s	£128 5s 14d	
Asgar	London	£448		land in Beds, Berks, Bucks, Cambs, (Middlesex?, Essex?) Essex, Herts, Middx, Norfolk, Northants, Oxon, Sffk, Warks; addressed S 1119 etc.
Blacuin	Cambs	£11 1s 8d		held of king; 'King Edward's man'?
Eadric	Wilts	£7	£39 10s	held in Wilts of king; probable lands in Dorset, Glos, Hants, Somerset, total value £63; addressed <i>Regesta</i> i 9
Eadsige	Hants	£1 5s	£8	held of king, witnessed S 1476
Eadwine	Oxon	£2 12s 6d	£16 12s 6d	held 'freely'
Eadwine	Warks	£1 5s	£16 18s	held 'freely'
Total Eadwines			£33 10s 6d	
Godric	Berks	£30 10s	£38	held of king; probable lands (and even office?) in Beds, Bucks and Wilts, total value min £39 18s max £55 18s; addressed S 1066
Heca	Devon	£16 15s		
Cyneward	Worcs	£10 10s		£7 worth held of Bp. Worcester.
Merlosveinn	Lincs	£71 10s		? held of king; lands in Cornwall, Devon, Glos, Somerset and Yorks, total value £214; witnessed <i>Regesta</i> i 8.
Ordgar	Cambs	£8	£16 1s 5d	minimum held freely, the rest of Earl Harold; 'later' Asgar's man
Osward	Kent	£64 10s		held of king (and £12 worth of Abp); lands in Essex, Surrey, Sussex, total value £108 12s 6d; addressed S 1090, 1092
Robert	Essex	£57 10s	£103 10s	lands in Cambs, Hereford, Herts, Hunts, Shrops, Somerset, Sffk, Wilts, total value £204
Toli	Norfolk	£1 7s	£19 7s	'free'
Toli	Suffolk	£1 16s	£3 5s	free', but commended to Robert fitz Wymarc for 10s worth
Total Toli		£3 3s	£22 12s	addressed S 1070, 1078, 1080, 1083–5
Tovi	Somerset	£1	£13 5s	addressed S 1115–16, 1240, 1263, <i>Regesta</i> i 7, 160

The trouble here is that most of the later Old English nobility had the same names. For example, Æthelwine of Warwickshire, father of the Thorkel of Warwick/Arden who is the best known of 1066's ruling-class survivors: he has the same name as sheriffs of Gloucestershire, Herefordshire, Huntingdonshire and Norfolk. Norfolk's was *certainly*, Huntingdonshire probably, Herefordshire possibly a different man; but that of Gloucestershire may well be the same as Warwickshire's man. However, I give the sum holding of all Æthelwines, so as to make it even clearer that *most* pre-1066 sheriffs are relatively 'small' men: even after consolidation of all homonyms, 11 out of 18 hold less than £40, and only three have more than £200. The big exception is Asgar the Staller, and London's post-1066 sheriff, one Geoffrey de Mandeville, was also much the richest of the class. Yet more to the point, almost all sheriffs owe their standing to relations with the king, holding 'of the king' or 'freely' (meaning the same), not the earl; the exception is Worcester's Cyneweard, the bishop's man. Sheriffs, lineal descendants of tenth-century shire-reeves, are king's representatives as much the familiar 'new men' of Henry I or John.

Even *ealdormen*, bishops and sheriffs are not the whole picture. Often a further royal representative is present, if not supervisory (further cases in my paper). If you want evidence of any more *systematic* royal control of justice, you will have to wait for the continuous series of Henry II's piperolls.

'Public' and 'Private'

We turn to the vital question of the extent of *private* jurisdiction in pre-conquest England. Now, this, I'm afraid is a real *snorter*, which has given me as many hours of agony as minutes that you're about to experience. The best advice is to keep an eye on the *overall* picture. Essentially, in eleventh-century 'feudal' France, and in England after 1066, lords 'owned' courts, to the extent that they were entitled to insist that certain cases came before a court that they controlled, and from which they took fines. These cases would typically be those involving the property of their dependents, or all but the most serious

of their crimes (and sometimes even these). Was this true in England before 1066? Your only other compensation for the difficulties of this issue (a rather half-hearted one I fear) is that it has been much discussed: Maitland, exposed to multiple and devastating critiques by Hurnard and Cam, so my tensile yet superficial survey is for once buttressed by expert commentary.⁵ I have also given you yet another *catena* of quotes from the laws, which you may afterwards go away and mull over.

(i) The ‘Pleas of the Crown’

So we come to Maitland’s crucial (and because his, long influential) misconception about pre-1066 justice. Unlike many subsequent students of Anglo-Saxon history, Maitland was soaked in continental evidence and scholarship. *Like* most students of Anglo-Saxon history, he had an irresistible compulsion to find explanations for the 1066 catastrophe. He thought he found one by showing that late Old English kings pursued the same reckless alienation of judicial resources as Merovingians and Carolingians. He did this by putting eleventh-century ‘sake and soke’ charters and writs, granting hundredal rights, alongside the laws of Cnut you have at **3 a**.

3 a. II Cnut 12: These are the dues (*gerihta*) that the king has over all men in Wessex, *mundbryce* (breach of [king’s] peace) and *hamsocne* (assault on a man at home), *forstal* (assault in public) and *fyrdwite* (army-fine), except when he wishes to honour [someone] further. And in Mercia he has just as is written above over all men. And in Danelaw he has *fihtwite* (fighting-fine, cf. *forstal*) and *fyrdwita*, *gribryce* (peace-breach, cf. *mundbryce*) and *hamsocne*, except when he

⁵ F.W. Maitland, *Domesday Book and Beyond* (edn with intro. by J.C. Holt, 1987), Essay II chapter 3 (pp.307–45); N.D. Hurnard, ‘The Anglo-Norman Franchises’, *EHR* LXIV (1949), pp. 289–322, 435–460; H.M. Cam, ‘The Evolution of the Medieval English Franchise’, *Speculum* XXXII (1957), pp. 427–42; and ‘The “Private” Hundred in England before the Norman Conquest’, *Studies presented to Sir Hilary Jenkinson*, ed. J. Conway Davies (1957), both repr. in her *Law-Finders and Law-Makers in Medieval England* (1962), pp. 22–43, 59–70; P. Wormald, ‘Lordship and Justice in the early English kingdom: Oswaldslow revisited’, *Property and Power in the Early Middle Ages* (1995), pp. 114–36.

wishes to honour [someone] further.

3 b. *Leges Henrici Primi* 10:1,4: These are the rights (*iura*) that the king of England alone has over all men in his land, the proper arrangements for peace and security being made: **breach of the king's peace**, Danegeld; the plea of contempt for his writs or orders; the death or injury of his servants wherever; disloyalty or betrayal; disrespect or evil speech about him; fortifications of three walls; outlawry; theft punishable by death; secret-slaying; falsifying his money; arson; *hamsocn*; *forstal*; *fyringa* (army?); harbouring fugitives; premeditated assault; robbery; *stretbreche* (damage to the highway?) treasure trove; shipwreck; rape; abduction fighting in the house or retinue of the king; **breaking peace in the army; failure to perform boroughwork, bridgework or army service**; maintaining an excommunicate or outlaw; **violation of the king's protection; desertion of service on sea or land**; unjust judgement; defect of justice; defiance of the king's law. These are the crown pleas of the king, nor do they belong to his sheriffs or officials or servants without definite prior arrangement.

Maitland saw these (not unreasonably, given the way that they are formulated) as listing the king's judicial perquisites. Since these rights are alienated by writ, alongside 'sake and soke' etc., Anglo-Saxon 'pleas of the crown' were being given away. However, Maitland's views have been demolished by the combined scholarly assault of Cam ('Franchise') and (more difficult, but also more telling) Hurnard. What it comes to is this:

a) Cnut's laws do *not*, first appearances to the contrary, list all the inalienable pleas, i.e. those always reserved for the crown's own jurisdiction. It is sufficient here to look at what *Leges Henrici Primi* have to say. This is, as we'll see in Lecture VIII, a text with a lot of time for private jurisdiction. But its crown pleas (**4 b**) are extremely full. You can see from the

passages marked in bold that it's clearly based on Cnut's list, and its repetition of items covered by the Anglo-Saxon technical terms it uses shows that the author no longer understood their meaning. But the main point is that the *Leges* include so much more: not just such obvious ones as treason but theft, murder, coining, arson, rape, treasure-trove and shipwreck: in short, *all* major criminal pleas (and some civil).

b) Cnut's concern is thus with essentially *minor* pleas. The Hurnard thesis is that because these *were* minor pleas, whose punishment was 'amendable' (i.e. were discharged by paying a fine), they were apt to be confused with the hundredal jurisdiction inherent in 'sake and soke', where only *infangtheof* was capital. Cnut is therefore saying is that, *though* amendable, these pleas are *not* usually granted away, barring exceptional royal favour. In other words, Cnut's law means almost exactly the opposite of what Maitland thought. For our purposes, there is a yet clearer moral, bearing on last time's message: an honest appreciation of Anglo-Saxon law texts by an all-time great scholar has proved utterly misleading.

(ii) The Judicial Duties and Perquisites of Lordship

We begin with many references in the laws to the entitlement of lords to fines. We have to distinguish here between three different, yet confusingly similar, types of reference; I have tried to make things a little easier by once again laying them out in different series [ranged to the left, centrally and right for reasons explained below].

4 a. Ine 50: If a nobleman makes terms with the king ... for his householdman ... let the nobleman not have any fine-entitlement there, because he would not control the wickedness at home.

4 b. II Æthelstan 1:5: If any one stands up for [a recidivist thief], let him pay amends for him by his wergeld, whether to the king or to whom it rightly belongs.

4 c. II Æthelstan 2: We say about lordless men from whom one can get no justice, that one command their kin that they find him a home for the

purposes of justice and find him a lord.

4 d. II Æthelstan 10: And let no one exchange any goods without witness, either of a masspriest or of a landlord (*landblafordes*) or other trustworthy man.

If anyone do so, let him pay ... a fine, and let the *landblaford* take over the exchange.

4 e. II Æthelstan 20:4: [Against those persistently defiant], let all the chief men ride ... and take all that he owns, and let the king take half, and those who were on the ride half.

4 f. V Æthelstan 1: He who receives another man's man, whom he put away from him for his wrong, and could not restrain him from his wrong, let him compensate him whom he followed before, and give the king 120 shillings.

4 g. VI Æthelstan 1: [From a thief] we shall take all that he owns. First we take the *ceapgyld* (value of the stolen goods), then one divides the residue into three: one share goes to the wife if she is ... not an accessory to the crime, and then ... the king takes half and half the fellowship. If it be bookland or bishop's land, then the *landblaford* has the half share in common with the fellowship.

4 h. III Edmund 3: I do not wish that anyone receive another's man before he is quit as regards every hand that sought justice from him. And whoever maintains and feeds him in his crime is to make sure that he presents him for compensation or compound himself for what the other should have compounded.

4 i. Hundred Ordinance 2:1: Let the *ceapgyld* be paid to him who owns the goods, and let one divide the rest in two, half to the hundred, half to the lord

(*blaford*). [cf. III Edgar 7:1, II Cnut 25:1]

4 j. II Edgar 3:1: If anyone will not render the tithe as we have decreed, let the king's reeve and the bishop's and the minster's masspriest go there and divide the eight parts in two, with the landhlaford taking half and the bishop half.

4 k. I Æthelred 3: Let no man either buy or exchange unless he has surety and witness. And if anyone do so, let the landhlaford take and hold the goods until one knows who rightly owns it. [cf. also IV Edgar 3 – 11].

4 l. II Cnut 30:3b,6 (I Æthelred 1:5,7, except where **in bold**): If [the suspect] is guilty, let him on the first occasion pay his accuser twice over and his wergeld to his lord **that is worthy of his fine** ... If however he escape ... let the surety pay the accuser his ceapgyld and his wergeld **to the king or to** (his lord) who is worthy of his wergeld.

We can start by getting out of the way excerpts I range to the right (**4 d** and **4 k**, etc). They have nothing much to do with the topic. From Edward's time kings were acutely aware that their campaign against theft meant being particularly sure about legitimate property transactions, so that everything above-board must have secure witness. The *landhlaford* here is simply a typical trustworthy type: merely a trustee for the goods at stake until the issue is settled.

Now look at the excerpts marked ranged to the left. We see at once that lords have taken fines from dependents from the time of Ine (**4 a**). The typically elliptical meaning is that noblemen *are* entitled to fines from their 'household men' *if* they restrain their criminal proclivities; but if a case reaches the king's ears (i.e. if lords have *failed to keep it in the household*), they lose the right since their performance as lords has been unsatisfactory. The word used leaves no doubt that it was those actually *living in* with lords who are covered here. We then turn to the Alfred law considered early in this lecture (**1 b**): lords receiving

another lord's defaulter without official permission are *fined* by authority. We thus move into another set of complex tenth-century laws understandable only as a group (4 b, c, f, h, I). Part of the same campaign to control crime as surety arrangements studied last time is insistence that all must have lords. These are therefore responsible for their dependents' behaviour, by which token (b cf. I) they're entitled to the criminal's wergeld. An implication of f and h is that one reason why men might leave lords is that they were kicked out by lords in exasperation with the adverse consequences of consistently antisocial behaviour; but if this happens, or if the antisocial decamp for any other reason, it is only reasonable that previous lords be recompensed for whatever has been lost so far, and equally appropriate that kings insisting on such arrangements should exact a fine when they are disrupted. This is the single best example of how difficult later Anglo-Saxon laws can be. The points to sink your teeth into and *bite hard* are (i) that lords in Wessex could always have been penalized for their dependents' behaviour; (ii) that from Alfred's time, other lords taking on such delinquents must not only discharge all outstanding obligations, including what is due to the old lord, but also pay a fine to the king whose law and order depends on effective lordship. When I put it that way, you can see that, whatever else is going on, lordship is not being detached from government; but so closely integrated that to breach lord-man relations means paying the king's disobedience itself.

Then turn to the laws ranged down the middle. The first is 4 e, a law of Æthelstan, whereby the forfeited property of those who persist in refusing cooperation with surety arrangements is divided between those who enforce it and the king. But later in the reign (g) we encounter an important new principle: if the land is bookland or bishop's land, the king is replaced by a 'landlord' as the recipient of a half. Then (i, j), the hundred explicitly replaces the 'fellowship', i.e. those on the ride. What we learn from this is (i) unmistakable evidence that Æthelstan's riding-group *is* the hundred/tithing group in an as yet unspecified form, and (ii) that, if bookland is involved, the lord of the land is entitled to what had hitherto been the king's. We'll consider 'bookland' in general next time (and 'bishop's land' needn't bother you). What is relevant here is that, from the late eighth and early ninth centuries, grants of bookland bequeathed rights to the fines of the incriminated

within an estate. This means that the tenth-century laws are not making a *new* concession to bookland holders. In fact, they are doing exactly the opposite. Rights to such judicial revenues are hitherto vested *exclusively* in holders of bookland. Now, they are shared (just as royal rights in unchartered land would be) with the king's local police group, i.e. hundreds, normal instruments of public justice.

Complex as the matter is, you *can* still grasp two essential points:

(i) A lord's entitlement to fines for his household dependents was probably ancient. From Alfred's time, it becomes part of his duty to public order. If he *fails*, the important implication of **1**, at the very end of your series, is that the king, repository of public order, will still collect. We are not looking at a special privilege, but at an extra duty.

(ii) Likewise, privileges attached to possession of bookland had long included entitlement to judicial fines and forfeitures. From Æthelstan's time at least, these privileges are now *shared* with the normal official policing group.

In other words, we couldn't, either way, be looking at anything *less* like a surrender of public authority to lordly rights. Lordship is being marshalled and dragooned. These arrangements are once more very like those of Carolingian kings, and arguably imitative. By the tenth and eleventh centuries in Francia, such arrangements had *become* privatized justice. This is an important lesson about what *could* eventually have happened in England. It doesn't mean that it *did*. On the contrary, everything points to royal exploitation of lords.

(iii) 'Sake and Soke': the Private Hundred

One of the things that occurred to me as I compiled my list of pre-1066 lawsuits, followed by a more rudimentary equivalent for the period 1066-1135, is that I was dealing with the same sorts of source each time, but was encountering almost none of the references to 'private' courts of lords before 1066 that I was meeting afterwards. If you take the Ely case I mentioned earlier, you find that the royal official Ealdorman Æthelwine held a court of the hundred at the north gate of Ely Abbey. This would have been quite out of the question for any of his counterparts after 1066. By then, Ely had

one of the few great 'liberties' or 'franchises' of England. Nowhere in the rich corpus of Anglo-Saxon lawsuits in Ely's cartulary-chronicle do we encounter any reference to its judicial privileges, a silence that one can only call deafening, and one with massive implications.

We have to start where Maitland started: with the very many later Anglo-Saxon writs etc. granting the famous formula 'sake and soke and toll and team and infangtheof'. These were what Maitland saw as alienations of key royal judicial privileges to private lords. Yet Hurnard made an effectively unanswerable case that Maitland massively overestimated the extent of private justice (franchises) in England between 1066 and 1166. The franchises whose existence she is prepared to concede, apart from marcher lordships and some northern churches, are limited to Ely, Glastonbury, Ramsey and Bury St Edmunds. Only implicit in her argument though made explicit in her Oxford lectures, I gather is that Anglo-Saxon franchisal justice was even more limited than this; which is also what Ely (and Ramsey) evidence implies. The best way to reconcile these two points is to see 'sake and soke' etc. as amounting only to *hundredal* jurisdiction cases, including executing the thief caught red-handed, that could be despatched in the court of first instance: pre-1066 references to cases heard in the hundred court are almost as scarce as those to private courts. This would mean that the sort of judicial rights that are alienated in tenth- and eleventh-century England are confined to those that had already been alienated under the terms of bookland since the eighth, and which we've already seen being recognized in tenth-century laws. The judicial responsibility and revenue of the new shire court, by contrast, was *never* alienated.

In this light, we can look at the 'private' hundred before 1066, as discussed by Cam. Domesday Book shows that some lords had built up blocks of bookland such as to become landlords of whole hundreds; and some of Edward the Confessor's writs are grants of these whole hundreds outright. Cam's discussion opens with the significant statistic that 388/628 hundreds (nearly 62%) were in private hands by 1316. The 131 private hundreds in 1086 are thus one third of those 230 years later, and not much above 20% of the overall total.

Table 2. Pre-conquest ‘private’ hundreds

Category	‘Owners’	Total no. of hundreds
Local Bishop	Canterbury, Dorchester, Elmham, Exeter, Selsey, Sherborne, Wells, Winchester (i.e. Old Minster), Worcester	54
Royal monastery or nunnery	Abingdon, Bath, Bury St Edmunds, Chertsey, Ely, Evesham, Glastonbury, Peterborough, Ramsey, Romsey, St Albans, Shaftesbury, Westminster, Wherwell, Wilton, Winchester (New Minster)	43
Royal family	Queen Edith, Countess Gytha, Earl Harold, Earl Gyrth	25
Other	Lady Godiva 1, Earl Ralph 1, Robert fitz Wymarc 2, St Benet’s Holme 1, St Mary’s Stow 1, St Ouen 1, Earl Waltheof 2	9

Looking at the distribution of these 131 hundreds, we find that bishops hold most, then abbots and abbesses of thoroughly royal foundations, so that 74% are in safe ecclesiastical hands; and, of the remaining 34, 25 ‘belong’ to King Edward’s wife or in-laws, while just six are ‘owned’ by other lay noblemen and three to abbeys under their patronage. This is all as much as to say that, marginal though hundredal jurisdiction seems to have been, it was rarely left in other hands than those a king could easily trust. Charlemagne’s immunity policy was much the same, and the erosion of royal jurisdiction in eleventh-century France is an illustration of how the pattern might nonetheless develop. This is why it is important to invoke the legislative evidence that kings were extremely careful about just what jurisdictional rights they did grant out.

What we therefore learn from the arrangements about tenth- and eleventh-century judicial systems is therefore consistent, whether we look at lords and their judicial privileges or at shires and hundreds. Alfred’s dynasty not so much replaces as adapts the systems that they have inherited: the hundred court is the old local court renamed and systematized; the shire court is an old military unit with a new judicial dimension; traditional lordly responsibilities are recognized but *extended*; long acceptable private justice is acknowledged but *restricted*. It is not unreasonable to say that private rights in

England might have gone the way they did in Francia. But they cannot yet have gone very far in that direction, because, as we'll see in Lecture VIII, an incoming nobility that *was* accustomed to private jurisdiction in its old home found these rights significantly restricted in its new one.

Chapter 11. The Foundations of Title

You may have thought, after last time's jaunt through pre-1066 private justice, that there was nothing more complex that Anglo-Saxon law could throw at you. So it must have been with a sinking feeling that those with any experience of the subject confronted a lecture on land law. This, unlike most parts of pre-Conquest law, has been discussed *ad nauseam*, and with anything but appetizing results. But for once, I actually think that the issues are *less* complex than they have often been made to look; and that there is one principle particularly which will, if grasped, make most of the rest of the subject *fairly* clear.

'Bookland and Folkland'

We have to start with 'Bookland and Folkland', one of the most hideously rusty and toothy saws in the Anglo-Saxonist's woodshed. I have tried a new approach to this, and what I'll try to do now is to amplify, but also I hope further simplify, what I have argued there.¹

(i) Folkland

I'll begin with what I hope is an elegant as well as accurate solution to Folkland's half of the problem. The first point to make is that it only occurs four times in the whole body of pre-Conquest evidence (apart from an unimportant poetic reference).

1. The Wassingwell charter (S 328 (858)): [*Endorsement:*] The king gave and booked (*gebocode*) five sulungs at Wassingwell to Wullaf in exchange for five sulungs at Mersham, and when they had exchanged the estates, the king made the land at Mersham into folkland for him (*dyde him to folclande*). [Cf. *boundary clause of Latin text*: on the west the king's folkland that Wighelm and Wullaf

have].

2 Will of Ealdorman Ælfred (S 1508 (871x89): I give to my son Æthelwald three hides of bookland, and if the king will grant him the folkland as well as the bookland, then let him have it and enjoy it.

3 I Edward, 2, 2:1: We have laid down of what [penalty] he is worthy who obstructs another's justice either in bookland or folkland, and let him fix a day as regards folkland when he will do justice to him before the reeve. If however he has no *riht*, neither in bookland nor folkland, let him who has obstructed *rihtes* be liable to the king for 30 shillings.

4 Otho Appendix to Alfred-Ine: And on your question about adulterers, whether with nuns or lay wives, the forfeited woman and man go respectively to the bishopric with her third, and to the lord, whether it be bookland or folkland, whether of the king himself or of any man, he goes with his two parts to his lord if he has wicked intercourse, and they are both forfeit.

This suggests, whatever it means, that it mattered less than most solutions pre-suppose. If you look at the four occurrences above, the two to concentrate on for the moment are numbers **3** and **4**. It seems obvious from these that bookland and folkland are regarded as *exclusive but in combination comprehensive* categories: i.e. folkland is whatever isn't bookland. This means that it could in principle mean *all* the different things that it's supposed to, and, as a matter of fact, that is what I think. The alternative, that you may prefer, is that it doesn't mean anything much. Either way, it can now be returned to the obscurity where Anglo-Saxons preferred to leave it.

¹ P. Wormald, *Bede and the Conversion of England: the Charter Evidence* (Jarrow Lecture, 1984), pp. 19–23.

(ii) Bookland

Bookland, the new and intrusive element contrasting with ‘folk’ (i.e. ‘unwritten’ or ‘traditional’ tenure) is not to be dismissed so glibly. What it means of course is tenure underwritten by charter, i.e. title deed, in Latin, witnessed by king, bishops and senior laymen. But what actual rights did charters convey? What did a charter do? I will try to answer this by discussing first what it’s *not*, then what it *may be*.

The first thing it *is not* is Stenton’s proposition: an *immunity*, or privileged property, in the sense that it was exempt from services to the crown that fell on most freemen’s property. The issue of exemption/services has also preoccupied his critics, so amplifying confusion. But the riposte to this approach is relatively simple: One: immunities are an acknowledged form of seventh-century tenure on the Continent. Charters were brought to England by Continental churchmen who could therefore have specified immunity if they wanted to. Since they didn’t, immunity cannot be the central point of chartered tenure. Two: exemption from service, bar the three obligations (*Trinoda necessitas*) of military service, bridge building and fortification, was indeed a feature of bookland tenure from the later eighth.² By the later Anglo-Saxon period, it was certainly normal form in a charter. But, most significantly, we have many documents, especially from ninth-century Worcester, that *grant immunity to lands the Church already owned*. Had immunity been part of the original deal, there would have been no point in this exercise. It must then follow that immunity *was not* part of the original deal. Misconceptions arise here not so much from the charters as from a famous letter of Bede’s, where aristocratic founders of false monasteries are said to be thus ‘free from divine as well as from human service’,³ but this arises from their status as (pseudo-)monk, not from their tenure (i.e. their *tenants*

² N. Brooks, ‘The development of military obligations in eighth- and ninth-century England’, in Peter Clemons and Kathleen Hughes (edd.), *England Before the Conquest: studies in primary sources presented to Dorothy Whitelock* (1971), pp. 69–84.

³ Bede’s Letter to Ecgberht, *EHD I*, no. 170, xi–xii: ‘Those who are totally ignorant of the monastic life have received under their control so many places in the name of monasteries that there is a complete lack of places where the sons of nobles or of veteran thegns can receive an estate. Others under the pretext of founding monasteries buy lands on which they may more freely devote themselves to lust, and cause them to be ascribed to them in hereditary right by royal edicts. And thus, having usurped estates and villages, and being henceforward free from Divine as well as human service, they gratify their desires alone.’

are not necessarily freed). Bede's point in fact is clearly that these grants are depriving kings not of services but simply of lands; in that what kings could previously revoke was now irrevocable, and one thing early charters particularly stress is *perpetuity*, an eternal tenure of what is given to an eternal God. Immunity is thus a red herring; it *came* to matter but was not the core of bookland tenure.

The second thing bookland is *not* is Eric John's alternative thesis: this takes its stand on the implication of Bede's letter that what kings were giving by charter was now lost to them for good.⁴ It must be said that his case makes sense of most of the excerpts listed above, and two more:

5. Alfred, 41: The man who holds bookland, and his kinsmen left it to him: then we lay down that he may not give it away from his kindred, if there is document or witness that it was enjoined that he might not do so by those who originally acquired it, and by those who gave it to him; and let him give account of that (*Dæt gerecce*) before his kinsmen with the witness of king and bishop.

6. Soliloquies (pref.): Every man likes, when he has built a hamlet (*cothyf*) on his lord's lease (*lane*) with his help, to stay there some time and to work for himself on the lease both on sea and land, until the time when he shall earn bookland and perpetual possession (*æce yrfē*) through his lord's kindness.

Alfred in the *Soliloquies* (6) certainly contrasts revocable lease/loan with bookland. Ealdorman Alfred (2 above) must seek the king's consent that his son have folkland but not his bookland. Sense has at last been made of King Æthelberht's charter (1) by a German scholar, noting that Anglo-Saxon '*him*' means objective *him*, as well as reflexive *himself*, so we can dispense with the baffling king's making folkland *for himself*: the folkland

⁴ E. John, 'Folkland Reconsidered', in his *Orbis Britanniae* (1966), pp. 64–127.

goes to Wullaf as part of the deal and is duly identified as such next door in the charter's boundary clause: thus, royal consent is again specified for a folkland grant. But John goes on from Bede's description of false monasteries as held 'by hereditary right' to the improbable thesis that Anglo-Saxons had no such thing as inherited land tenure of any type until charters gave it them. Apart from the fact that this would make them unique among Europe's early medieval peoples, it fails to spot that Bede is echoing – in *disgust* – his founder's belief that monasteries should *not* descend like 'carnal' property along hereditary lines. He thought that hereditary transmission of land was one thing, and transmission of chartered property was (or *should be*) another. In any case, Bede's usage is at that date unique: early charters do not talk about 'hereditary right'. On the contrary, what they most stress (after perpetuity) is a donee's right to do *what he likes* with land, where family land was tied by *customs* of inheritance. You should note too the implications of Alfred 41 (5): despite the usual obscurity of Alfred's legislation, it seems that *special* provision is made for those who want their bookland to be hereditary.

My view of what bookland *may be* starts off from there, and from an older thesis attacked by John: that bookland did not have to be passed onto kin by hereditary right. It also brings me to my sovereign solve-all principle. Many societies, as far back (I gather) as Linear B Mycen, distinguish *inherited* land, subject to claims of kin according to whatever customs society applies, from *acquired* land (bought, given, exchanged), which can be disposed of however its owner wishes. What the missionaries who brought charters with them needed above all was extensive endowment on a permanent basis. An early name of bookland is '*ius ecclesiasticum* (ecclesiastical right)'. What they thereby got was (i) permanent gift: John is quite right that the implication of the evidence I have cited, and also of some episodes in heroic poetry, is that royal gifts of land were hitherto revocable; and (ii) freedom of disposition, so that land could be provided without arousing family challenges. Yet what most people will wish to do, when they have free disposition, is to *choose their own heirs*, not those dictated by custom (in practice, close family as opposed to distant and doubtless disliked cousins).

The virtue of my solution is that it is, I think, the only one which takes its stand on

the main points stressed by the early charters that are certainly authentic: *no* immunity; but *permanence* and *alienability*. I'll now take you through some implications of this solution.

First, we can explain the behaviour of Bede's pseudo-monks. They want more property like most aristocrats. But family land is subject to customary restraints, and royal gifts are revocable. They can thus *pretend* to be monks, with the bonus of choosing their close heirs. Pretence became unnecessary when, during the second half of the eighth century, bookland came to be granted to laity with no ostensibly devout aim. Second, because the *normal* choice of heir is one's own close family, Bede could use the phrase 'ius hereditarium' *ironically*; and it in fact stuck, to the extent that it became normal from the late eighth century. One of the charms of this issue is that land can be called *hereditary* (in the Latin or vernacular) when it was clearly acquired bookland. Third, therefore, we can well understand what was worrying Bede and his kings: gift-giving, in land as in treasure, was the pulse of early medieval power. The various aggressions of Æthelbald and Offa make sense. Finally, we don't have to disbelieve in Anglo-Saxon inherited property. The land-lust of any warrior aristocracy (not to mention its desire to invest in the new religion without too drastic a sacrifice of the aristocratic values that made the Church rich in artistic creativity as well as wealth) is a sufficient explanation of its acquisitiveness. But it does have to be added that we know very little about inheritance customs. I'll return to this.

The role of the king

Before we turn lastly to what *can* be known of inheritance norms, we've one further important thing to note about bookland and wills. This is that a very high proportion of grants seek the king's endorsement of their terms in what often seem almost wheedling tones: 'first he prays his royal lord for the love of God and for his kingly dignity that he may let his will stand as regards those *'things* (i.e. terms?) that he has deserved of you and your predecessors' (below, Table 3, no. 12), or (more bluntly, perhaps revealingly) 'And I pray my dear lord, for God's love, that he will not allow that any man alters our will' (Table 3, no. 11). The pattern begins to fade in the almost exclusively East Anglian (Bury) wills of Cnut's and the Confessor's reigns (Table 3, nos. 24–36) but holds good

after the first three for four-fifths of the rest (also for some bishop's wills, and indeed that of the Ætheling Æthelstan, son of King Æthelred II: 'I thank my father with all humility for the answer that he sent me that I might, with God's permission and his, bequeath my goods and possessions as seemed most advisable to me'). If it's true that these properties could freely be disposed of, anxiety about the king's blessing is hard to understand. But there may be an answer in the special relationship established by then between bookland and royal jurisdiction. This point brings me to conflict with the generally excellent paper of Kennedy, which argues that such a relationship was a misconception of older scholarship.⁵

The first point to make (e.g. as against John) is that bookland may not have been a royal monopoly *from the outset*. There are quite a number of early charters that are not apparently issued in the name of a reigning king; more important, cases that involved bookland were heard, throughout the eighth century and early ninth, by councils of the Southern English church, where a king was usually present, but where the archbishop invariably (sometimes exclusively) presided. Bookland began as *ius ecclesiasticum*, and logically was disputed before an ecclesiastical forum. It is true that a king like Offa claimed the exclusive right to make grants, as one of his various land-grabbing devices, and that the appearance of immunity clauses in charters, especially once regularly granted to laity, made it urgent that the king keep some sort of check. Nonetheless, documents describing disputes down to 825 continue to be set out in the traditional way. The break comes in Alfred's reign, though initially with Worcester cases heard by his deputy and son-in-law, Ealdorman Æthelred. And at just this time, one of the earliest complete wills (Table 3, no. 2) announces itself as a set of instructions 'to King Alfred and all his wise men and advisers, and likewise to my kin and close friends, about his possessions (*erfes*) and bookland'.

This brings us back to Alfred's law (5), which as you can see lays down more or less what Ealdorman Alfred's will actually does (in fact it is largely confined to bequests of land

⁵ A. Kennedy, 'Disputes about *bocland*: the forum for their adjudication', *Anglo-Saxon England* 14 (1985), pp. 175–95.

within his (sometimes quite distant) kin. Kennedy denies that either Alfred's law, or that of Edward (3), necessarily means that cases of bookland had to be heard by the king. You'll have met enough Old English legislation by now to know that many laws cannot be said *necessarily* to mean anything. Nonetheless, the *prima facie* meaning of Edward's law is that bookland cases have already been provided for; and whether Alfred's law refers (as usually assumed) to declaration by someone wishing to alienate land from the kin, or (as Kennedy thinks) by someone wishing to reserve it within the kin, the fact remains that bookland proceedings are considered to be the king's business as well as a kin's (also a bishop's, recalling bookland's ecclesiastical origin); this squares not only with what Ealdorman Alfred actually did, but also with the anxiety about royal consent manifested in most wills. Kennedy also ignores the later laws:

7. I Æthelred, 1: 14: Let the king be entitled to each of those fines which men who have bookland pay, and let no one compensate for any charge (*tibtlan*) unless he have the witness of the king's reeve.

8. II Cnut, 77: The man who deserts his lord or his comrades on an expedition, let him suffer loss of all that he owns and of his own life, and let the lord succeed to his land that he previously gave him; and if he have bookland, let that go to the king's hands. [Cf. II Cnut, 13 on the deed of an outlaw.]

In I Æthelred (7), 'accusation/charge' can be read as dispute about lawful ownership (remember that unjust tenure is penalized as crime). So the king's jurisdiction over a king's thegn comes to the same thing as his reeve supervising cases about bookland.

Kennedy concedes that it may not be unreasonable to read Alfred and Edward as implying royal jurisdiction over bookland. The burden of his case is that recorded disputes were not always heard *before the king personally*, but in county courts. This is a

crucial fallacy: as I argued last time, the shire court *was* a royal court, just as much as those shire courts who heard Henry II's possessory assizes. The principle in operation (and evidently covered by Edward's law as well as Alfred's) is that lawsuits about land are the business of the king's justice, not a private (or archbishop's) court: they go with the whole drift of the laws about just dealings by public courts that we encountered last time.

The point to emphasize in conclusion is that the laws are consistent, at least, with the *observed* fact that Anglo-Saxon land law suits were heard in public courts, and bookland dispositions invoked royal consent. Kings took over *ius ecclesiasticum*, as they also took a bishop's pastoral role.

Heirs and Legatees

(i) Wills

More pertinent and interesting is to approach the subject of later Old English property law through the fascinating corpus of Anglo-Saxon wills. I've supplied you with another treasure, a list and summary of surviving laymen's wills: I confine the list to bequests after death where we have reason to think that we have a fairly complete picture, omitting those of kings, king's sons and ecclesiastics because these were arguably special cases. The resulting 36 have their Sawyer no., and date, with women marked with an asterisk. The first column covers any mention of sons, the second other kin directly or indirectly mentioned, and the third unrelated beneficiaries (only recipients of *land* get mentioned, unless otherwise specified; the recipient that preserved the text is indicated in bold). Even as it stands, the implications of the list are considerable:

Table 3. Dispositions in Anglo-Saxon Laymen's Wills

No.	Source	Date	Testator	Son(s)	Other kin	Other beneficiaries
1	S 1482	833x9	Abba the reeve	[child if any]	Wife (while widow), brothers and heirs if any, sisters' sons	Folkestone (render), Christ Church (reversion)
2	S 1508	871x89	Ealdorman Alfred	3 hides	Wife and daughter (104+ hides); other kin	Renders to Christ Church , Rochester
3	S 1533	931x9	Wulfgar	-	Wife (?); 'young kinsmen'	Named laity; Old (and New) Minster
4	S 1504	946x7	Æthelwold	-	2 brothers, 2 nephews	Old Minster
5	S 1483	946x51	Ælfgar	-	2 daughters and their children if any, son-in-law, mother	Bury St Edmunds , Stoke, Barking, St Paul's
6	S 1539	c. 950	* Wynflæd	-	Daughter, son-in-law, their son; refs to son's daughter	Shaftesbury , other churches (renders)
7	S 1485	968x71	Ælfheah	2 sons (1 estate each)	Brother (2 estates), nephew, wife,	Old Minster , Bath, queen, <i>atheling</i>
8	S 1484	966x75	*Ælfgifu	-	Brother(?s), sister, sister-in-law	Old (& New) Minster , Abingdon, <i>atheling</i>
9	S 1498	971x83	Æthelmær	2 sons (1 estate each)	Wife (1 estate)	New (& Old) Minster , Christ Church etc.
10	(<i>Chr. Ram.</i> , 59-60)	c. 986	Æthelstan	1 estate (permission of friends)	Wife (4 estates to revert), 3 daughters, nephew	Ramsey , Ely
11	S 1511	973x87	Brihtric and Ælfswith	-	Kinswoman, kinsmen	Rochester , Christ Church, laity who need not be kin
12	S 1505	c. 987	Æthelwold	1 hide	Wife 10 hides	New Minster ; money to Abingdon
13	S 1494	962x91	*Æthelflæd	-	Sister and brother-in-law, kinsmen and kinswoman	Bury St Edmunds , St Paul's, Stoke, her <i>cnicht</i> , priests
14	S 1501	961x95	Æthelric	-	Wife	Christ Church, St Paul's, Sudbury

No.	Source	Date	Testator	Son(s)	Other kin	Other beneficiaries
15	S 1522	998	Leofwine	-	Aunt and nephew	Westminster , Bishop Wulfstan and his lord
16	S 1497	985x1002	* Æthelgifu	?	?grandson, nephews, stepdaughter, kins- woman and her daughter	St Alban's , Welwyn, priest, laity who need not be kin
17	S 1486	1000x02	* Ælfflæd	-	?in-laws	St Paul's, Bury St Edmund's , Stoke
18	S 1534	c. 1000	Wulfgeat	-	Wife with reversion, 2 daughters, grandson	Renders to Worcester , Wolverhampton, Hereford, etc.
19	S 1536	1002x4	Wulfric Spot	-	Brother, daughter, nephews, niece and husband, goddaughter	Abp Cant., Burton , (? Lichfield, his <i>cnibt</i>)
20	S 1518	c. 1007	Godric	younger (1 estate)	-	Ramsey
21	S 1487	975x1016	Ælfhelm	2 estates (free disposal)	Wife (8 estates), daughter, brothers, nephews, other kin?	Ely, Westminster , his <i>cnibt</i>
22	S 1538	984x1016	* Wulfwaru	2 sons (2/3 estates)	2 daughters (1.5 estates apiece)	Bath , (elder son and younger daughter share main home)
23	S 1520	1017x35	* Leofflæd	-	3 daughters (2 to revert, 3rd if chaste)	Ely
24	S 1525	C10th/11 th	* Siflæd	-	Brothers [loads of wood]	Bury St Edmunds , local church, render to Norwich
25	S 1528	after 1020	Thurketel Heyng	-	Daughter, nephew, great- nephews	Bury St Edmunds , St Benet's Holme
26	S 1527	before 1038	Thurketel	-	Wife, nephews, kinsman	Bury St Edmunds , Bp of Elmham, laity probably not kin
27	S 1537	1022x43	Wulfsige	-	Brother's children	Bury St Edmunds , Bp Elmham, dependents

No.	Source	Date	Testator	Son(s)	Other kin	Other beneficiaries
28	S 1490	1042x3	Ælfric Modercope	-	[ref to brother]	Bury St Edmunds , Ely, Ramsey etc.
29	S 1521	1035x44	* Leofgifu	-	Daughter, nephews, kinsmen/women, brother-in-law	Bury St Edmunds , Bp London, stewards, ?reeve, chaplain
30	S 1531	1043x5	Thurstan	-	Wife	Christ Church, Bury St Edmunds , Ely, <i>cnibt</i> , chaplains
31	S 1537	1046x53	* Wulfgyth	2 sons (4 estates, 1 to revert)	3 daughters (2 estates for one, 1 for others)	Earls Godwine and Harold, , Christ Church
32	S 1517	1042x66	Eadwine	(son seems a minor)	nephews, 'always on the spearside'	St Albans , Abingdon 'whence I bought it'
33	S 1516	mid-C11th	Eadwine	-	Brother, nephew (with reversion)	Bury St Edmunds , St Benet Holme, Ely,
34	S 1532	1042x66	Ulf	-	-	St Albans , <i>sodales</i> (= companions?)
35	S 1519	1052x66	Ketel	-	Uncles (to revert), sisters, brother, step- daughter, 'kinsman priest'	Christ Church, Abp Stigand, St Benet Holme, Bury St Edmunds , Harold
36	<i>Wills</i> , 39	1066x68	Ulf and Madselin	-	Mother, brother, kinsman/woman	Peterborough (+ abt), Abp York, Crowland

Nb. *Early reversionary grants*: S 153 (798), 1500 (805x32), 1510 (845x53, cf. S 296), 1514 (c. 855), 1200 (867x70), 1513 (c. 900), 1533.

The first thing you'll note (my chief purpose in drawing it up thus) is the remarkable paucity of Anglo-Saxon noblemen's sons. If wills give anything like a total picture of the descent of family property, we should have found a wonderful new explanation for *1066 and All That* in an acute demographic crisis within the warrior class. Just ten out of thirty-six wills mention sons at all; two of these are women's wills, one specifies a younger son alone (no. 20), five grant sons significantly less than wives, daughters, brothers and sometimes other kin too (nos 2, 7, 10, 12, 21); two of these make important reservations,

no. 10 that the one estate going to a son was subject to consent of *amici* (perhaps 'kin', but clearly not an automatic descent even so), and no. 21, that the son could do whatever he liked with the granted estates after his own death - again not automatic descent. That leaves two: no. 9, where sons do no better than their mother; and the important case of no. 32. This was hitherto extant only as a Latin summary, but the Anglo-Saxon original has just been found in a seventeenth-century transcript; it shows (i) that Eadwine's son was 'in care', with his inheritance at risk; (ii) that many other family members get life interests as a condition of protecting him; and (iii) that this is an otherwise rare case of stipulations for descent within the male line, such as Alfred allowed; so an exception, but one that proves the rule.

It's possible of course that most of these people did not have sons, which is why they made a will in the first place. But even if that is the answer, it tells us only that wills did not cover the normal patterns of inheritance. Just as likely is that most testators *did* have sons, who were largely provided for in other ways (note the significant fact that no. 6 refers to the daughter of a son who need not necessarily be dead). That's why, when they do get mentioned, most are given less than others, and it's a much better explanation than his putative illegitimacy why Ealdorman Alfred's son seems to get such a raw deal under no. 2 (cf. above).

The answer to this conundrum is in fact made simple by what I've now said about *bookland*. It was above all land that was freely disposable because *originally* for giving to God. The clue to wills is that they dispose of bookland as its owners were by definition entitled to: cf. words of nos 9, 16, 26, and specific charters for nos 3, 7, 8, 12, 13, 21. The first indication that this is right is provided by the date at which wills begin to appear, i.e. early ninth century, when bookland was at last granted outright to laymen regardless of any religious intent. It is significant that the earliest so-called wills (Sawyer 153, 1500, 1514 and 1533) are put on the foot or back of the original 'booking' grant (the first is itself a Latin grant); while S 1510 is in the same Canterbury hand as that which had previously drafted the king's grant of the same property to the testator. This document calls the property being bequeathed his *ærfel lond*, which Miss Robertson most *unhelpfully* translates as 'heritable

land': quite apart from its probable connection with the grant in S 296, the testator goes on to say that it is land which he 'acquired and bought from King Æthelwulf with full freedom in eternal possession' (*ærfē* again, the same phrase as Alfred uses for bookland in the *Soliloquies* (6)). The word is cognate with, if not indeed the same as, *yrfe* meaning cattle, which is not of course heritable in the sense that land is; it can translate Latin *hereditas*, but that is merely because the concept of land *acquired by charter* (permanently, and also with *choice of heir*) tended to merge with land permanently heritable *by custom*).

This of course is why we have wills at all. No pre-1066 charter (and very few for some while after) has reached us without having passed through a church's archive. All these wills without exception made some sort of grant to the Church, as is shown by my having marked in bold the recipient that actually preserved the text in each case. In other words, a will only survives *because* it deals alienable property.

A third important point arising concerns Professor Holt's typically incisive paper about the effect of 1066 on family structures.⁶ He stresses that Anglo-Saxon wills scatter property through and beyond a kindred, whereas the Norman aristocracy confined its transactions to close family, concentrating increasingly on *primogeniture*. But wills must be wholly misleading guides to Anglo-Saxon *inheritance custom*, because they dealt in land by definition available for wide distribution, and customary inheritance was another issue. If the pre- and post-1066 contrast must mean something, it's not that.

On a fourth and more positive note, we have an explanation for what is to modern eyes an attractive feature of Anglo-Saxon land law, women's rights. Over 30% (counting two halves) of the corpus deal with women's bequests. The reason is partly apparent in the number of wives, daughters, sisters etc. in the third column (all but nos. 4, 20, 278, 334 of the 30 male wills, so over 80%, discounting fragmentary no. 20). Wills were evidently used to provide for female kin and since what is acquired in a will is by definition 'booked', so disposable, women could deploy their own property strategy. (A further opportunity of this sort was provided by the 'morning-gift' awarded to a wife by a husband 'the morning

⁶ J. C. Holt, 'Feudal Society and the Family in Early Medieval England: I The Revolution of 1066', *TRHS* 5th series 32 (1982), pp. 193–212.

after?': this also was hers absolutely, though not always uncontroversially: see no. 16).

What we therefore learn from Anglo-Saxon laymen's wills is above all the relative freedom of the pre-1066 property market. What we do *not* learn (unfortunately) is about the structure of an Anglo-Saxon kindred and its inheritance customs.

(ii) Litigation

We can understand not only why King Alfred made the law that he did but why too so high a proportion of Anglo-Saxon disputes are between churches and founder's kin. Kins might *genuinely* be misled by the fact that land had passed down in a family for generations, forgetting that, as bookland, it was *always* alienable. Charters with stipulations such as Alfred prescribed are uncommon because the charters we possess tend to concern land which did pass to the Church; but LS no. 22 is an example from 897, Alfred's own time.

(iii) Inheritance

After all that I've been saying in the second part of this lecture, it is obvious enough that we're going to be able to say very little about *normal* patterns of inheritance. The only lands we catch sight of are those passing though the Church's hands, which means a likelihood that they will be bookland. Even the words *hereditas/yrfe* may be traps, reflecting no more than the unsurprising fact that most people *chose* to keep their bookland within the kin. In fact, our only real window on customary norms is what Domesday says about pre-Conquest practices. Though this could itself be distorted, there is a suggestive frequency about the pattern found:

9. DB i 375d, *Lincolnshire* CS:38: [Candlehoe Wapentake and the S. Riding, with the men of Bolingbroke, testify that:] Sighvatr, Æthelnoth, Fenkell and Asketill equally and jointly (*pariliter*) divided their father's land (*terram patris sui*) between themselves in King Edward's time; and they held in such a way

that, if there was need for a king's expedition, and Sighvatr could go, the other brothers helped him: after him, another went and Sighvatr helped him with the rest: and so with them all; but Sighvatr was the king's man.

10. *DB i 376a, Lincolnshire CN:30:* [(Ludborough) Wapentake (N. Riding) with the County testify that:] The Bishop of Durham ought to have the land of three brothers with sake and soke, and Eudo fitz Spirewic the land of the fourth brother likewise with sake and soke; their names are Sighvatr (or Godwine), Æthelnoth, Fenkell and Asketill.⁷

11. *DB i 354a, Lincolnshire 22:26:* Ketill and Thorfrothr were brothers, and after the death of their father they divided the land, but in such a way that, as Ketill did the king's service, he had the help of his brother Thorfrothr. William de Percy had the land of Ketill (and Ælfsige) from the king, but the same William bought the land of Thorfrothr from Asketill, a cook.⁸

These extracts illustrate firstly *partition* of father's property among male heirs; note, in **11**, the fact that the father is dead but is probably Ælfsige, written over Ketill's name, and all properties in question are still listed under Ælfsige, making a point of their oneness (no problem about Thorfrothr's loss of his inherited land to Asketill, as this could well happen in post-1066 chaos). Note also, in **10**, the roughly equal value of the three junior brothers' share, anyway at 1086 values. The extracts also indicate the *seniority* of one brother among the rest, presumably (though admittedly not necessarily) the eldest: one of the four/two does the king's service, with the other(s) helping. Thus it's significant that the land of Sighvatr was worth two to four times that of his brothers, and also that his

⁷ Æthelnoth held land worth 20s. in 1066 (*DB i 340d, Lincolnshire 3:21, 3:25*); Fenkell held land worth 40s. in 1066 (*DB i 341b, Lincolnshire 3:43–7*); Asketill held land worth 20s. in 1066, (*DB i 340d Lincolnshire 3:22, 3:26*); all this was recorded in the fee of the bishop of Durham in 1086. Sighvatr/Godwine held land worth 80s. in 1066 (*DB i 359d–360a, Lincolnshire 29:10–11, 29:30–2*); this was recorded in the fee of Eudo Spirewic in 1086.

⁸ Ælfsige held land worth £15 in total in 1066 (*DB i 354ab, Lincolnshire 22:21, 22:24, 22:26–9, 22:35*); this was held by William de Percy in 1086.

land went to one post-1066 successor, while that of the other three went elsewhere.

Two further comments on this pattern: first, there's reason to think that this had been Anglo-Saxon custom since Bede's day. Thomas Charles-Edwards has drawn out the significance of Bede's *Historia Abbatum*, xi here.⁹

Those who have children of the flesh seek fleshly heirs to a fleshly inheritance. But let those who beget spiritual sons to God think him the greatest who is endowed with the more abundant grace in the same way as earthly parents are accustomed to think that their first-born son should be preferred to the others in dividing out their inheritance.

A law of Ine (38) implies that the eldest gets the 'principle home'; cf. above, Will no. 22. The contrasting Kentish custom known as *gavelkind* tends to allot this favoured place to the youngest.

Second, the custom of a responsible senior is known as *parage*, and it's a very important point that it was probably still the predominant custom through much of France for most of the eleventh, the effect of the pressure on essentially partitionary principles of obligations imposed by lordship (whether 'state' or 'feudal'); furthermore, in the final shift to primogeniture, it's now known that inheritance of the family seat (increasingly fortified) was a main influence.

Tenant and Lord

I'll finish by saying something about a third category of property, *lanland* or, simply, leasehold (see 6 above for Alfred's *Soliloquies*). There's no doubt that, from the later eighth century and increasingly perhaps in the tenth, one of the things that bookland's owners did was to lease it out. We have a very large body of such leases from Archbishop Oswald of

⁹ T. M. Charles-Edwards, 'The Distinction between Land and Moveable Wealth in Anglo-Saxon England', *English Medieval Settlement*, ed. P. H. Sawyer (1979), pp. 97–104.

York/Worcester (961–92), but he's unlikely to have been so exceptional: it's simply that Worcester's archive was not only exceptionally well-preserved but also, uniquely, preserved in a cartulary from shortly after Oswald's death. By the time more churches came to compile these, after 1066, the relevance of leases had of course passed. Terms were usually a lease of three lives: typically, the tenant, his wife and their son, but often renewable.

However, mention of terms unfortunately permits 'feudalism' to poke its unlovely proboscis into this subject. I shall treat this as briefly as it deserves by noting simply three things. First, military service is not specified as such in Anglo-Saxon leases nor in Oswald's famous letter about terms. But charters of feudal type exist nowhere in Europe before the early twelfth, which does *not* mean that churches and their tenants owed no military service. Second, on the contrary, we've seen that military service was excepted nearly always from an immunity's terms. If we doubted that withheld service would mean a forfeited grant, Cnut's laws leave no doubt. Third, if military service was expected of bookland's holders, and if those holders leased it out to laymen, it is simple suspension of disbelief to suppose that tenants were not required to serve and we have some positive evidence that they did. Whether or not you call this a feudal society, I leave to your judgement ... and taste.

Chapter 12. The Viability of Law Enforcement

[Chapters 12, 13, 14 and 15 are represented by the text of a single lecture, printed here under chapter 15]

**PART IV: IMPLICATIONS AND SPECULATIONS: THE BIRTH OF A DISTINCTIVE
ENGLISH LAW**

Chapter 13: The Timing of Continental Influence

[Chapters 12, 13, 14 and 15 are represented by the text of a single lecture, printed here under chapter 15]

Chapter 14: Emerging Lineaments of a 'Common Law': Possible Turning-points

[Chapters 12, 13, 14 and 15 are represented by the text of a single lecture, printed here under chapter 15]

Chapter 15. Epilogue: Glanvill, Father and Son

[Chapters 12, 13, 14 and 15 are represented by the text of a single lecture, printed here under chapter 15]

Introductory

Today, I shall at last try to show you why what I have been arguing so far matters. The history of a distinctively English law – ‘Common Law’ – has for more than a century begun with Henry II. This is still the case, with Milsom’s revision of Maitland’s classic story.¹

One of the puzzles this leaves is one of time. Why was it in the second half of the twelfth century that changes came? If we suppose that law resisted change by seemingly no less powerful earlier kings, Norman and English, we are driven to conclude that the decisive factor was the twelfth-century Renaissance in Learned Law, but we must then ask why English law is by continental standards uninfluenced by Roman or Canon law.

Another puzzle is place. If it was the Angevin Henry II who made all the difference, we must wonder why he made it in England, not his homeland on the Loire. Angevin (and Norman) law were, until (in effect) Napoleon’s *Code Civile*, repositories of the sort of provincial *Contumes* brought conveniently into focus by Paul Hyams.² He shows that this sort of law was not without influence in England after 1066. But he cannot show that Henry changed the *contumes* of his French homeland, as he apparently did the laws of England.

The Anglo-Saxon heritage

I’ll begin with a short *resume* of what seems to be established so far and with a couple of further questions about it. Anglo-Saxon legislation from Alfred to Cnut is relatively

¹ S.F.C. Milsom, ‘F.W. Maitland’ (Lecture on a Master-mind), *PBA* 66 (1980), 265–81.

² P.R. Hyams, ‘The Common Law and the French Connection’, *ANS* 4 (1981), 77–92.

prolific, but there is good reason to doubt whether, as it now stands, it is a fair reflection of the law as it operated; either because of codes' attenuated survival rate, or because written law had a relatively limited role. This legal heritage evidently remained important for some at least after 1066, but found its most influential expression in *Leges Henrici Primi*, a learned commentary by a Frenchman, where much was misunderstood and not a little was interpolated. Carefully examined, not least in the light of non-legislative texts like charters, late Old English law is found to be characterized by:

- (i) A vigorous ideology using ordeals in confident expectation of God's intervention, and treating sexual offences like other crimes;
- (ii) an emphatic sense of crime, not only savagely punished by the authorities in society's name, but also insured against by means of an elaborate system of neighbourhood surety;
- (iii) a hierarchical system of courts, over which kings retained ultimate supervision, and in which only the lowest levels were allowed to pass into the hands of private lords;
- (iv) land law partitioning inherited land among male heirs to the eldest's advantage, with chartered (book) land alienable however owners wish, subject to royal supervision.

All these features reflect deliberate change (if not always in written form) by the first kings of the English. The remaining questions relate to enforcement and variation.

(i) Enforcement

In introducing the question of how far laws were really enforced, it is helpful to remember, first, that the majestic justice of high medieval Common Law was often defied with impunity; and second, that we should not assume that government is necessarily more effective for its being fully documented. Recording in Pipe Rolls makes it easier for kings to remember their dues, not necessarily to enforce them. In claiming efficiency for Anglo-Saxon justice, one claims no more than for later.

That said, we clearly have something to learn from coinage. Modern appreciation of the power of the Anglo-Saxon state began with coin, because coins are evidence *on* (or *in*) *the ground* – evidence not just of what was intended but of what happened. Anglo-Saxon royal law on coin was evidently enforced. This creates expectations.

We also learn something from the incidence of forfeiture of estates that clearly passed into other hands, so presumably *via* the king's.

Table 4. Forfeitures of property, 897–1066

LS no.	Approx. date	Shire	Hidage etc. of land (sometimes from DB)
23	897x9	Wilts	5+
25	899x900	Wilts	?20
27	871x899	Wilts	10
29	c. 909	Hants	?40
33, 35	909x24, c. 959	Kent	2 sulungs +
30	c. 933	Somerset	25
31	pre-938	Somerset	7
131	939x46	Cambs	10+
38–9	951x5	Middx	10
40	957x62	Middx, Surrey	30
132	?pre-970	Cambs	1
37	c. 967	Surrey?/Essex?	1
124	957x71	Cambs	5
53	957x71	Yorks	5 carucates
127	966x71	Suffolk	2
41	c. 973	Northants	1
129	957x75	Herts	70 acres
116	960x75	Cambs	1
43	963x75	Northants	9
45	963x75	Kent	10
118	970x75	Cambs	£12 10/- worth
44	c. 982	Hants	13
107	pre-983	Cambs	5
48	c. 988	?Berks	7
50	966x92	Northants	6
63	985	Glos	27+
578	978x90	Kent	16.75 sulungs
54	c. 995	Oxon	5
56	c. 995	Glos	2
60	c. 998	Kent	6
61	c. 998	Warks	3
62	c. 999	Essex	10.75+
64	c. 999	Oxon	4 to 10
68	c. 1002	Glos	24
71	1002	Herts, Hunts	24+
75	1002/c. 1012	Hunts	15
70	c. 1003	Oxon	12
72a)	1006x8	Wilts	20

LS no.	Approx. date	Shire	Hidage etc. of land (sometimes from DB)
72b)	1006x15	Berks	5
73	c. 1011	Derbys	2
76	993x1012	Oxon	10
81	978x1016	Worcs	5
144	1017	Cambs	9.75
79	1017?	Worcs	5
145	1017x34	Hunts	9
88	1016x35	Oxon	15
97	1042x65	Shrops	10
94	1055x65	Worcs	3
173	1055x65	Durham etc.	?
100	1051x66	Essex	30 acres
102	1051x66	Suffolk	?
99	1066	Lincs	12
Average of 56 cases: approximately 9 hides			

If you look at this table, you find firstly that there is a good case to set Northumbria apart with only two prosecutions (nos 53, 173, the last certainly controversial); but secondly that an impression of a gradual spread of forfeiture from a Wessex heartland is misleading: we are in fact looking at a *spread of evidence* (East Anglia from Edgar, Lincolnshire only in Domesday). In other words, forfeiture appears south of the Humber as soon as it has a chance to. Note too distribution throughout society. Five hides is a thegn's holding, so thegns are not exempt; but Domesday Book (no. 100) shows that there was forfeiture at low levels too.

(ii) Variation

A subtler attack on the efficacy of pre-conquest law questions its universal *applicability*. Inspiration here comes partly from seemingly constant stress on variations between Wessex, Mercia and the Danelaw, and partly from belief in ancient 'communal' courts. However, it is a very striking fact that the variety of the three regions in *pre-1066 sources* tends to evaporate on close examination. Cnut's Law has merely terminological differences:

II Cnut 12: These are the dues (*gerihtā*) that the king has over all men in Wessex, *mundbryce* (breach of [king's] peace) and *hamsocne* (assault on a man at

home), *forstal* (assault in public) and *fyrðwite* (army-fine), except when he wishes to honour [someone] further ... And in Mercia he has just as is written above over all men. And in Danelaw he has *fihtwite* (fighting-fine, cf. *forstal*) and *fyrðwita*, *griddbryce* (peace-breach, cf. *mundbryce*) and *hamsocne*, except when he wishes to honour [someone] further.

It is *post*-Conquest sources like the *Leges* that make most of these; and it may be that writers familiar with the diversity of French *coutumes* exaggerated it. The *Leges Henrici* itself asserts that ‘the empire of royal majesty presides over laws’.

This is also true of the shire customs recorded by Domesday.

Table 5. Shire customs in Domesday Book

Shire	King's peace	Violent entry	Highway	Adultery	Theft	Exile harbouring	Refusal of service	Homicide (king's peace)	Other
Kent	£8 (kg/lord)		£5 (king/abp)	kg and bp	forfeiture; kg	kg	£5 (shire court) (kg)		
Berks		£5; kg					50s. (for hunt) (kg)	forfeiture (kg)	
Somst	bp	bp			bp		bp		
Oxon	outlawry; forfeiture (slayer)	£5 (kg)					£5 (expedition) (kg)	outlawry and forfeiture (kg)	
Worcs	outlawry/£5 (kg)	£5 (kg)	£5 (kg)				forfeiture (or £2 via lord)		mutilation (for rape)
Herefs	£5 (kg)	£5 (kg)	£5 (kg)				£2 (sheriff's expedition)		
Warks							£5 (expedition) (kg)		
Shrops	outlawry/£5 (kg)	£5; kg	£5; kg				£2 (sheriff's expedition)		£2 (bloodshed, arson)
Chesh	£5/£2 (kg and earl)	£4	£4/£2		£2	£2	10s. £2	forfeiture/£4/£2	10s./£1 (bloodshed); £2 (rape, arson)
Derbys/ Notts	£8 (per hundred) (kg and earl)								
Yorks	£8 (per hundred) (kg and earl)		kg and earl						
Lincs	£8 (per hundred) (kg and earl)								

We have customs only for some (often fringe) counties, and variations even here are largely a matter of expression or emphasis rather than real contrast; only Cheshire (future Marches) begins to look odd. Is this a less 'Common' law than the high medieval? You should also note that fines are *higher* in Danelaw counties (though also Kent) than elsewhere. This casts new light on Stenton's view that Danes had their own customs. *III Æthelred*, directed at them, is *tougher*, as we saw, than *I Æthelred*, its equivalent for English law.

The Place of 1066

For Richard fitz Neal's *Dialogue of the Exchequer* (1170s), the Norman Conquest had meant the subjection of the English to written law: it is a *topos* of Roman (i.e. civilizing) conquest, found (e.g.) in Einhard. Historians, on the whole, disagree, preferring to give the credit for transforming English law to the Angevins. The legislation of William I and Henry I consists on the one hand of short decrees in writ form on particular subjects, and on the other of 'unofficial' collections, one of which, *Leges Henrici Primi*, we've discussed; another, maybe a bit closer to official status, is the so-called 'Ten Articles' of William. The keynote of Norman propaganda was the preservation of the 'Laws of King Edward' (cf. Cnut's 1018 agreement 'according to Edgar's law'). It is crucial to remember here that each of the three most important collections of Anglo-Saxon law were made in Henry I's reign. What we can see of Norman legislation by and large bears out the impression of continuity. Nonetheless, two particular contributions are isolated:

(i) Inquest

Brunner's proposition that the English jury originated in Carolingian use of sworn panels of local men for inquests into fiscal rights and their abuse usually presupposes its introduction by the Normans – who certainly used the technique in Domesday Book. Two points should be made here.

One difficulty is that evidence for an inquest only post-dates 1066 *in Normandy as in England*. The usual argument is that Norman evidence is so much sparser than English that it's easier to accept its hidden existence there than here. Yet even if Norman cases *are* fewer than English, they are not *few*. The position seems to be one of *impasse*, with a possibility of innovation in *both* spheres (under Lanfranc's Italian example?). It is worth adding that we should resist the temptation to see this as introduction of a 'rational' mode: one unquestionable Norman innovation was the Duel, or 'Ordeal by Combat', unknown before 1066 but familiar afterwards. One of William's authentic decrees obliges

Englishmen to use battle or hot iron when proferring *or rebutting* accusations of Frenchmen.

Second, you will remember [see chapter 9] that the Carolingians did not use panels of sworn locals to present criminals, as Henry II was to, nor in fact did Normans. What they, *and* the Anglo-Saxons, did do was to make a whole community responsible for bringing malefactors to justice by the terms of its ‘oath and pledge’. And a second thing William did decree was the famous *murdrum* fine, whereby, if a Frenchman is killed, the local lord or hundred must present the killer (assumed to be English) in 5 days or pay 46 marks.³

(ii) ‘Feudalism’

The other alleged Norman innovation is of course ‘feudalism’, stressed not by Maitland but Milsom as a factor in early English legal history.

There is no doubt that the principle that all land was held from the king (a political necessity for William), and under him from other lords (a social instinct for his followers) became critical in the eleventh and twelfth centuries. Take, for example, the Holt proposition about a change in structure of the kin after 1066. I argued in Chapter 11 that Anglo-Saxon wills tell us nothing about patterns of inheritance within a kin because they dispose of acquisitions, which are by definition alienable away from the kin. The reason why wills like this become scarce after 1066 is that acquisitions were thereafter mostly from lords – who of course retained a legitimate interest in what was done with them. The superior rights of lords in land are undeniably important for several centuries after 1066.

Consider, on the other hand, a celebrated event in William’s reign: the Oath of Salisbury (1086). The *Anglo-Saxon Chronicle* is anxious to stress, whatever your secondary authorities say, that this was an oath taken by lesser as well as greater landowners, regardless of ties to other lords. It is rightly linked by Maitland and others to a central

³ Cf. the admirable paper by G.S. Garnett, ‘*Franci et Angli*: the legal distinctions between peoples after the Conquest’, *ANS* 8 (1985), 109–37, except that he misses the extent to which communal responsibility is already a well-established feature of pre-Conquest law.

principle of English, as opposed to French, feudalism: that fidelity to the king overrode loyalty to other lords, so that no English rebel could ever plead that he was only 'obeying orders' – it is one of the ways in which English feudalism is so unusually 'state' orientated. The best discussion of the issue is understandably reminded of the Carolingian General Oath; but he cannot find it in Normandy, and is very unsure about England.⁴ Now that we can feel confident of the Anglo-Saxon use of a Carolingian general oath, all falls into place: English feudal lordship after 1066 was decisively affected by the bonds of Anglo-Saxon statehood, vested in the concept of a general oath, borrowed from the Franks.

The effects of 1066 on English law, all in all, are more or less what you'd expect from what had in fact happened. We have a new French ruling class, but also significant institutional survival which Norman kings could and did adapt both to provide the new elite with security, and to modify that new elite's own potential for disruption. This is the lesson to carry forward to the Angevins.

Essence of the 'Angevin Leap Forward'

We should begin consideration of Henry II with what is unquestionably new in his time, namely the quality of the evidence. Henry's pivotal role in English legal history rests essentially on three new elements:

a) Roger of Howden, author of the *Gesta Henrici Regis* once ascribed to Benedict of Peterborough and of a full *Chronicle* running to 1202. Roger gives full texts of all Henry's 'Assizes'; for those of Northampton (1176) and 'of Arms' (1181), he gives the *only* texts. He also gives our first detailed account of the organization of circuits of royal justices, and of a 'central' court at Westminster. Now Roger was himself a Justice of the Forest, and the first historian to write from within government circles. There *may* have been more by way of legislation for any historian to write about. Alternatively, he may simply supply more evidence than hitherto because he was better informed than his predecessors.

b) Pipe Rolls, supplying copious evidence of the activity of judges on circuit, and also of

⁴ W. Kienast, *Untertaneneid und Treuworbehalt in England und Frankreich* (1952).

the fines levied as a result of the Possessory Assizes (from 1166, but more especially 1176).⁵ Pipe Rolls exist in continuous annual sequence from 1155 (until 1834!), but not before; the possible significance of this is brought out by the fact that, when Lady Stenton and others argue that Henry I used judicial circuits, they depend heavily on the *one surviving* Pipe Roll of his reign, for 1130. Would we think Henry II original if we had annual pipe rolls for Henry I too?⁶

c) Ranulf Glanvill's *Treatise on the Laws of England* (1180s), of which it's been nicely observed that we have no certain knowledge of the author's identity except that he was *not* Ranulf Glanvill (Henry's chief justiciar). This is a sophisticated lawbook, in which a full range of stereotyped writs appropriate for the various foreseeable actions at law are set out in a logical sequence with commentary. But it is nowadays seen as the culmination of a gradual process by which writs issued from the royal court in answer to the petitions brought before it were standardized in the course of the twelfth century. We have no reason to doubt that the collection and commentary *are* new, nor the wording of some writs (like Novel Disseisin, drafting of which was said to have taken king and advisers all night), but we may have reason to wonder if the processes themselves are so new.

These changes prompt a suspicion that the evidence makes Henry II look more like an innovator than he really was. But there is a different way of seeing them, which makes less of a break with traditional views. Histories by royal clerks, bureaucratic documentation in continuous series and books by law officers on how law works are all facets of the new professionalism brought to government by the twelfth-century Renaissance.

At several stages in the first part of this course, I stressed ways in which, already in the early twelfth century, the nature of the evidence is being changed by increasing familiarity with what is called Learned Law: that of the Church, Canon Law, reaching a

⁵ R.C. van Caenegem, *Royal Writs in England, from the Conquest to Glanvill*, Selden Society 77 (1959).

⁶ D.M. Stenton, *English Justice between the Norman Conquest and the Great Charter* (1965).

new sophistication in the twelfth century, most obviously with Gratian's *Decretum*, and that of Rome, the *Corpus Iuris* of the Emperor Justinian, rediscovered in late-eleventh-century Italy and studied with ever increasing intensity thereafter. The developments of the later twelfth century are the culmination of the process. 'Glanvill' opens by quoting Justinian's opening words in the edict introducing his legal textbook. He follows Justinian in classifying the law by *actions*, i.e. forms of process. Royal judges aimed to make their master's law a fitting counterpart to that of Rome and the Church, not just by copying it (as later on the continent), but by reproducing their own legal heritage in a comparable format. This of course meant more concentration on the use of written forms of law-making, and elaborated intellectual analysis of what law was. If evidence does make Henry II look an innovator, then, as the lady might have said, it would wouldn't it.

There is no reason to deny that enhanced professionalism had a real effect on the nature of law itself, especially in the medium/longer term.⁷ Those who represented the king's justice in court at Westminster or on judicial Eyre were increasingly legal experts, in the sense of trained in the formal procedure and doctrine enshrined by 'Glanvill': if not Ranulf Glanvill himself, then Geoffrey fitz Peter, Martin of Pattishall, William Raleigh, Henry de Bracton (the reputed author of the great Commentary *On the Laws of England* where he is now thought to have revised Pattishall's and Raleigh's work). From the very end of the twelfth century, we increasingly see what one might fairly call a legal profession, taking fees for its expertise. To this extent a change in evidence means a real though gradual change in ethos. It was this change that made 'Glanvill' and his colleagues so contemptuous, or even suspicious, of the old country courts with their sheriffs; hence the attitude that helps to persuade scholars today that shires were ancient communal courts, not the appropriate forum of the king's justice in an earlier less professional phase.

The extent of change was nonetheless exaggerated by another side of this new professionalism, its confidence that it was making a break with the past. 'Glanvill' makes the startling claim that 'the laws of England are not written' (going on to stress that they

⁷ P.A. Brand, 'The Origins of the English Legal Profession', *Law and History Review* 5 (1987), 31–50.

may still reasonably be called laws). The author can hardly not have known about the long sequence of Anglo-Saxon codes underlying the early twelfth-century treatises that he certainly knew. We must therefore conclude that he was just not prepared to take earlier texts seriously as forms of written law; and, given the many shortcomings that modern legal historians see in *Leges Henrici Primi*, this is perhaps no surprise. In other words, Angevin judges were proud of the English king's justice, but embarrassed, in this new jurisprudential age, by the form which it had taken. Again, their attitude has prompted modern commentators to see a clean break in many more respects than form. But earlier ages knew better. You wouldn't think, from all you read about the glowing contrasts between *Leges Henrici Primi* and 'Glanvill' that *all* the MSS of the *Leges* post-date 'Glanvill'; and that one of the earliest is in the government's own *Red Book of the Exchequer*. Sometime in John's reign, a Londoner made a collection of the Laws of England, featuring *Quadrupartitus*, *Leges Henrici*, and 'Glanvill'. The whole was decked out with a strikingly imperialist historical and geographical commentary, drawing upon Geoffrey of Monmouth's remarks about the sources of Alfred's law, and so taking the whole tradition back to the Ancient Britons. It was the treasuring of this tradition in London's Inns of Court that would culminate in Coke's famous insistence to James I on English law's origins among Ancient Britons. In the end, therefore, the medieval English legal profession itself preferred to stress continuity instead of 'Glanvill's change – as, of course, lawyers usually do.

So much for the evidence that has persuaded historians of change. The change was real, but initially a matter of form; in a single word, it amounts to Michael Clanchy's 'bureaucratization'. The basics of law as actually administered are another matter; as we shall now see.

(i) Crime and 'Felony'

The decisive document in the 'Angevin Leap Forward' is traditionally the Assize of Clarendon (1166). The edict is exclusively about crime, but Henry's introduction of the Sworn Inquest (Jury) as prosecutor of notorious criminals in his own name has seemed

to most historians the first key step in the direction of a royal (so 'Common') Law. I tried to show in lecture V [Chapter 9] that the use of *panels of leading local men* might well be new, but that the Anglo-Saxons (and Carolingians before them) had made pursuit of crime an aspect of general fidelity sworn by the oath of every twelve-year-old subject. If I established nothing else in that lecture, I should have proved that Anglo-Saxon kings had a very well-developed sense of crime, and were ruthless in prosecuting it. The relevance of this is brought out by the peculiar English idea of 'felony'. The word originally comes from Late Latin/Old French, in which it means betraying a lord; it was thus *among* grave crimes for *Leges Henrici Primi*, *along with* theft. But from 1176 onwards, it has its classical Common Law meaning of serious crime, encompassing theft, homicide, arson, rape, robbery, burglary and grand larceny, as well as treason, penalties for all of which were forfeiture, death or at least mutilation, and burial (if any) in unconsecrated ground. The change has baffled Maitland and Milsom alike. It does not seem likely that the new meaning itself comes from the French world, because rarely if ever on the continent does 'felony' have its wider sense. But it does look likely that the extension of a word meaning breach of faith to the whole gamut of serious crime reflects the fact that the Anglo-Saxon oath had made *all* serious crime into a breach of faith – the faith plighted aged twelve to the King of Heaven as to his 'deputy' on earth. If so, a word drawn from French 'feudal' vocabulary reflected a sense of loyalty much wider than 'feudal', whose origins were Anglo-Saxon. So one key principle of 'Common Law' *is* apparently English.

(ii) Disseisin

The glory of emergent Common Law is usually found in its remedies for property dispute – above all in the writ of 'Novel Disseisin', which begins to appear in the records from 1166, and becomes ever commoner after 1176. The point here was basically that, if you could show, by oath of the usual local twelve, that you'd been *recently* dispossessed of a tenure, then you recovered it *pro tem.*, regardless of the rights and wrongs of the matter, until (if ever) these were established by other means; this is done by buying a writ ordering the sheriff to assemble the twelve, and the king makes a further fiscal gain in

that the party responsible for perpetrating the disseisin is fined. Now huge amounts of intellectual energy have gone into finding origins for this ingenious procedure, e.g. tracing the key distinction between absolute ownership rights and the mere possession that gave temporary title. But it's all needless. The crucial point is that recent disseisin is *ex hypothesi* criminal; if indeed, it had not involved violence but due process, the action could hardly arise. Defeat in an action for novel disseisin is the penalty (on top of the fine) for having used extra-legal means: Milsom admits a criminal element in Novel Disseisin procedure. Now, you may remember from lecture V [Chapter 9] that Anglo-Saxon kings saw a sense in which land could be 'robbed': they called it *reaflac*, and penalized it by an offender's wergeld. If you render *reaflac* by another word with the same meaning, *disseisin*, you can perhaps see my drift: the root of Henry's masterly proprietary action lies in Anglo-Saxon criminal law.

(iii) Writ of Right

Perhaps the *most* fundamental principle of the new 'Common Law' was the one embodied in the 'Writ of Right'. As 'Glanvill' says, 'By custom of the realm (*consuetudine regni*), men need not answer for their freehold in their lord's court without an order from the king'. What this means is that even a case heard in a 'private' court had to have royal endorsement and was always subject to transfer to a royal court. This is rightly seen as the seminal statement of royal judicial prerogative in proprietary actions, the source from which all else in the Angevin overhaul of land law flows. It is another issue that baffles experts. There is no trace of the principle in earlier twelfth-century legislation. It's hard to reconcile with the prevailing view deriving Angevin reforms of property law from 'feudalism': not even the broadest definition of that much-defined word can make the principle feudal. But 'Glanvill' calls it '*custom* of the realm'. Lawyers of course like to call even the most sweeping innovations customary. But in this instance, we have already met a custom like that which 'Glanvill' enunciates: the principle that cases involving bookland were the special business of kings. We need not suppose that Anglo-Saxon kings always used writs (though they sometimes did, as perhaps in the Wynflæd/Leofwine case); in

any case, ‘Glanvill’'s own word here is *preceptum* which is why I have translated it as ‘order’, not ‘writ’. Bookland itself was by now a notional concept, but it had indeed been ‘freehold’, and was associated with a jurisdictional principle most welcome to Henry’s judges. Admitting that there was certainly change by the late twelfth century, it seems possible to take fundamentals of Angevin property law back to the Anglo-Saxons.

(iv) Control of courts

Above all, it is readily intelligible *why* Henry II and his judges were able to push through a scheme to make English law a worthy counterpart to the Learned Laws, when their ever more formidable Capetian rivals turned to Roman law for their legal ideology. French justice in the tenth and eleventh centuries had as we saw become heavily ‘privatized’, a word unpleasant in sound and for some of us nowadays in association, meaning here that legal powers once possessed by Frankish kings devolved first on their officials and thereafter on mere lords. The lord’s court was a fact of French feudal life, with the result, already seen, that French provincial customs were diversified almost beyond recognition, and the Paris *Parlement* judged cases according to the customs of the province of its origin. This was not a problem in England.⁸ Lecture VI [Chapter 10] told you that the justice of the major Anglo-Saxon court, the shire, was *never* privatized. Lords’ courts appear in post-Conquest England, as the French background of the new ruling-class leads us to expect. *Leges Henrici Primi*, a Frenchman’s work, has a great deal to say about it, and was indeed described by Maitland as a ‘treatise on soke’. But a famous writ of Henry I’s seeks to preserve the jurisdiction of shire and hundred courts over disputes between men of different lords; by feudal custom, such cases would go to the court of a defendant’s lord. Public justice remained relatively vigorous post-1066; lords’ justice was never as prominent as Stenton made Milsom think, with disastrous results: recorded cases in lords’ courts amount to a maximum of one third, and perhaps as little as one tenth, out of *c.* 225 cases down to 1135. English law offered the king a mastery of judicial apparatus that his French counterpart could find only in the principles of Justinian. So it

⁸ Hyams, ‘The Common Law and the French Connection?’.

is that Henry II's assertion of his sovereignty over legal process was no new departure either by design (Maitland) or accident (Milsom). It was a function of the fact that Normans and Angevins alike controlled a viable machinery of state justice; and fully intended to keep it.

Conclusion

Concluding this course, it is helpful to go back to the historiography. What looks to lawyers such as Professor Milsom like the coming of the sort of legal system that modern lawyers can recognize struck Stubbs as the appearance in England of a structure very like that operated by Charlemagne. When Brunner came up with a Frankish origin of the Sworn Inquest, this seemed to Maitland to slot into place: it could now be said that Angevins (or Normans) had brought the legacy of Carolingian institutions with them. But the overwhelming objection to this is not so much that there is very little evidence of these institutions in sub-Carolingian France; it is that there is so little evidence because in most of France, even Normandy, Carolingian institutions had patently collapsed. In these terms, my new model for the growth of a distinctly English legal system, the 'Common Law', means three things:

1) That transition from the early to the high medieval legal system is more gradual and so more plausible than lawyers have thought. The combination of the Twelfth-Century Renaissance in the Learned Laws with the revival of French royal power and English obsession with 1066 has persuaded lawyers of the almost complete gulf between one system and the other. My model does involve a pretty significant transition in and after Alfred's reign, but one which exploited so traditional a repertoire as oath, surety, wergeld and ordeal, and thus made much less of a break than is usually seen in the twelfth century; and it in turn helps to give the 'Angevin Leap Forward' less of the 'marvellous suddenness' that so beggared Maitland's own belief.

2) That the Carolingian transmission is less of a strain on credulity. As soon as we start to look for the right things, we can find most aspects of a Carolingian-style regime in tenth- and eleventh-century England; there is a distinct likelihood that they were directly

borrowed at a time when the system was a good deal less moribund in Francia, the late-ninth or tenth centuries, than it was by William I's time, let alone Henry II's. In other words, England, not Normandy or Anjou, was the Carolingian successor-state *par excellence*. That is how it achieved the sort of continuity argued in my first point.

3) That the English legal system became and remained different because it was the only part of Europe where the heritage of early medieval legal development remained vibrantly alive into the age of the Renaissance of Learned Law. The law of Rome and the Church could thus serve as an example, not a necessary substitute, for what went before. Put another way, a distinctively English law is as old as a distinctively English state. You may not unreasonably think, as I think, that there is a certain logic in supposing that English law is unlike anyone else's, because England (for better or worse) has been a state for much longer than anywhere else.

Appendix 1. Plan and Prospectus I

[This electronic copy of this document concludes with a letter dated 18 August 1998, which indicates that it was sent to Blackwell Publishers Ltd on or near that date].

This is a book that could and should have been written eighty years ago. That it was not was the fruit of the genius of two remarkable men, Frederic William Maitland and Felix Liebermann. Each was in a different way the child of the powerful German tradition that had dominated the study of early law since Savigny and the Brothers Grimm. Two of its primary convictions were a) that there was a primal system of ‘Germanic’ law comparable to that of any other *Volk*, and expressive like any law of that people’s *Geist*; and b) that this ancient system was more or less gradually overwhelmed from the twelfth century by the coming of the Learned Laws of Imperial and Papal Rome. The first presumption prompted a quest for all possible shards of the immemorial ‘Germanic’ tradition. The great beauty of the Old English Laws was that they were, almost uniquely, preserved in a Germanic vernacular (Anglo-Saxon) rather than Latin. Their value was therefore as a quarry of anything authentically ‘archaic’; from which it was a short step to the view that most of what was in them *was* archaic. At the same time, the second presumption raised an *a priori* objection to any connection between law as experienced and enforced before 1100 and that of the High Middle Ages.

Maitland, the greatest legal historian of all time, of course knew that whatever changed in twelfth-century England, it was not the advent of Roman and Canon Law (he was later to (over-)dramatize the conflict between Roman and English Law at the time of the Renaissance). But it seems almost certain that he was affected, even sub-consciously, by a notion of the twelfth century as a time of dramatic legal change. And in his case, the instinct was compounded by prodigious labours in the Public Record Office which established that it was indeed from the twelfth century and not before that there could first be found a range of documentation recognizably ancestral to that of the Common Law in its medieval heyday. The twelfth century revolution in law was thus for England

the coming not of Learned but of Common Law. In England as on the Continent, what went before was doubtless interesting but ultimately irrelevant. (Pollock, his somnolent partner in the great *History of English Law* (1895), was meanwhile combing the pre-conquest records for ‘archaisms’.)

As Pollock and Maitland were concluding their work, Liebermann was completing his stupendous million-word edition and glossary of *Die Gesetze der Angelsachsen* (1898–1916). Where Maitland was a historian of immortal genius, Liebermann was a prodigiously skilled and industrious editor with no detectable historical instinct at all. Since there axiomatically was a ‘Law of the Anglo-Saxons’ as of any *Volk*, all that was necessary was to bring out its pristine purity by panning all conceivable streams of evidence for any available nugget (ironically, many of his sources were actually of twelfth-century date, when a range of writers created a spurious impression of a coherently ancient system). In Liebermann’s immense commentary, there is practically no sense of historical development. The best of his reviewers pointed out that the one entry where such development does appear (the ‘County’) was the result of his reading the remarkable *Studies on Anglo-Saxon Institutions* by a young H.M. Chadwick. The huge entry on theft makes almost no distinction between the law of the seventh century and that of the twelfth; even though the legislation of the early tenth-century proclaims aloud that it is turning a new and fierce heat on thieves. Once again, therefore, Anglo-Saxon law was an statuesque monument to an absorbingly interesting but irretrievably lost past: a museum piece. Once again, it could merely cast a shadow over the brightly lit and vibrantly mobile twelfth century.

Since 1916, there have been a number of very important discoveries on the *margins* of this picture. Two are of special importance to this book: Neil Ker’s great *Catalogue* established the date, content and so far as possible provenance of all manuscripts containing Anglo-Saxon, those of law-codes therefore included (Liebermann misplaced many manuscripts and dated most of them too late); Dorothy Whitelock’s researches into Archbishop Wulfstan of York and Worcester (1002–23) demonstrated his responsibility for a high proportion of both manuscripts and texts. But if the margins have shifted, the structure has not. For English legal historians of the generation of Lewis Warren (+1995)

and Raoul van Caenegem, the history of English Law begins when it began for Maitland: with the 'Angevin Leap Forward' inspired by the genius of Henry II (1154–89).

Yet it should have been obvious all along that the structure was fundamentally flawed. In England there was a vigorous and more or less continuous tradition of legislation throughout the tenth and early-eleventh century: precisely the period when on the continent there was no secular legislation at all. Is this not likely to be connected with the fact that there was a strongly active English royal law in twelfth-century England, whereas Henry II's contemporaries had to turn to the Roman Emperor Justinian as a model of princely law-making? There is a generally obvious family relationship between Carolingian and Angevin judicial styles; and it was strongly believed by Maitland and his German master, Brunner, that a key element of Henry II's 'reforms' was the 'Inquest Jury', the panel of witnesses under oath, derived from the Carolingians. But if this portent were an import by William the Conqueror or Henry II himself, why is it so fiercely difficult to find on the continent between 900 and 1150 (a period when it would be generally agreed nowadays that Carolingian government was atrophying or worse)? If it was an instrument devised or resurrected by the Angevin Henry, why does one find it in England but not Anjou? If the new law of the twelfth-century continent was Learned Law, then *why and how* was that of twelfth-century England so distinctive, so ultimately 'English'? The only obvious way to make sense of the fact that the Angevins could act in England as they could not in their preferred continental homes is to suppose that they had an inheritance in England which at home they lacked. Contrary, then, to the paradigms of nineteenth-century German scholarship, there is an *a priori presumption* that the Anglo-Saxon past was highly relevant in twelfth-century England, however great the break between early and high Middle Ages overseas.

Yet a final important point in the traditionalists' defence is that it *is* extremely difficult to trace the connection. This is mostly because the Anglo-Saxon law-codes, however numerous, present a very uneven impression of the law in force. And once the 1066 cataclysm had eliminated the ruling-class who could understand and operate the system, whatever the gaps in its documentation, royal legislation was replaced for three

generations by unofficial writers who, learned and ingenious as they were, seem to have known little more about that system than they (or we) could read about it. A basic reason why Old English law has seemed marginal is that its materials are rebarbative. Maitland was much too great a historian not to be able to read good evidence. Reconstruction must start by explaining why the evidence is so poor.

The classic legal histories of Brunner, Maitland and others begin with an account of the texts – and in Maitland’s case with the continental setting too. In this book, the continental setting is given much closer and more detailed preliminary attention. If it is accepted that Carolingian influence was somehow at work, it *deserves* close study. Furthermore, Maitland’s classic method of exploring the obscurities of earlier periods was to ‘work back from known to unknown’, i.e. to proceed chronologically (backwards) within an English framework. Given the inherent teleology of this approach, an equally legitimate angle is to ‘work *across* from the known (continental) to the unknown (English)’: the ‘alien’ need no more threaten understanding than the anachronistic. Hence, Part I of *The Making of English Law*, ‘Preliminaries’, sets a scene that is not only seventh-to-ninth-century English but also ninth-century Carolingian. The fact that the long Carolingian section is actually the first detailed study of the full range of the evidence for Carolingian justice ever published in any language might make this section a marketable product in its own right.

We then proceed, following the classic models, to the Texts. But it is an essential point that we cannot assume that a law-code in the ninth or tenth century was what a law-code would be in the twelfth or nineteenth. The texts must be approached as artefacts of their own time; which means approaching them so far as possible through the eyes of their own time. The method adopted here is to work in from the most external to the most internal evidence. Chapter 3 enquires what would be known of English legislation from historians and law-reports if there were *no* law-codes; the answer, significantly, is very little, while at the same time there is much evidence of royal law in vigorous action. Chapter 4 then asks what can be learned of the perception and application of legislation from the manuscripts in which it survives. Apart from making the obvious point that there was a high risk of material being lost, the most striking discovery is the complete lack of books

devoted exclusively to law until an obsessive quest to collect the by then vanishing materials began after 1066, or more particularly 1100; but it also appears that the bishops responsible for collecting nearly all materials were much less embarrassed by the muddles they created than we might expect of men to whom the system allotted major judicial responsibilities. Next and at last (chapter 5) there are the texts proper, which are reviewed individually and serially in as close as possible to chronological order; this section includes not only an account of the post-conquest texts as a body, not previously attempted in such detail, but also the first full review of any kind of the wide range of 'anonymous and unofficial' codes; if, as seems inherently likely, these are evidence of law as actually applied and experienced, they are very important indeed. But again, the Anglo-Saxon law-codes leave many puzzles: seriously tangled lines of transmission; arbitrary and inconsistent arrangement; close attention to some topics (like theft) alongside virtual silence on others surely no less pressing (like landed property); finally, the entire tradition is highjacked from 1008 to its effective termination in 1023 by the great homilist Wulfstan, who turned legislation into a vehicle of moral instruction as much as social discipline. One is thus once more left with an impression of materials that are hard at work yet not doing the job they would be expected to. Is this a culture that is not yet attuned to the rhythms of written law?

The last main chapter (6) of Part II, Vol. I therefore takes a new line in pondering how far law-texts make sense in literary/ideological if not strictly legislative terms. We find that they do to a very marked degree: as a series of powerful manifestos on the identity and duties of a brand new kingdom which sought at once to be an empire and a new Chosen People (much as the Carolingians had). Twelfth-century writers fall into place as products of a European intellectual movement just beginning the rebirth of Learned Law. It follows from all of this (chapter 7) that there can be no certainty whether there are gaps in the record because so much was so easily lost or because surprisingly little was ever systematically produced. But the inaugural comparison with continental patterns suggests that the English were even further from the model of literate law-giving as evident in southern Europe than were the Franks. Old English legislation came from before the time when law in northern Europe was *ever* systematically expounded or preserved. This whole

section (Part II) is very long and often very technical. But, quite apart from the fact that it does many things never done before – from a comprehensive review of each legal text, available henceforth as a work of reference, to a chronological list of dated and placed royal councils that turns out to have major implications for the history of English royal ceremonial – it is absolutely central to the argument that follows. Without understanding why the artist is bad, we cannot be justified in reconstructing his artefact. It would be hoped that Vol. I might serve on its own as a source book for those working with Old English laws for as long as Liebermann's colossus has; hard going though it be, it will be a lot more user-friendly than his, and not only because in English.

So we can finally proceed to the section which Pollock and Maitland call 'Doctrines', the core of any self-respecting legal history. The difference is that, where classic legal histories naturally make this the longest section, the effect of needing to weigh the evidence so painstakingly before saying anything else makes Parts III and IV, even taken together, barely two-thirds the length of Part II. The arrangement of Part III really speaks for itself: after a brief introduction, picking up from where Vol. I left off by emphasizing the inevitability that legislative evidence alone will give a misleading impression of the early English legal system, there will be successive chapters on Church law, crime and punishment, courts, and property. The Church comes first because predictably the best documented area, but also the source of the ideological impulse whence all else proceeds. The chapter on crime has particular significance, in that it reveals a regime of brutal action against the socially deviant in the name of the community as a whole. The days of blood-feud, when families settled their injuries by private payment or violence have given way to an age when payment and violence alike belong to the king. The period also turns out to be one of thorough-going institutional reorganization, marked by an acute concern to keep the levers of justice in 'official', that is in effect royal, hands. Property law is characterized by a freedom to dispose of major slices of one's lands that is much greater than became possible under the more monolithic lordship of post-conquest ('feudal') society; the significant proviso is that kings are direct lords of all 'booklands' (chartered endowments) just as they would notionally be after 1066 of all 'fiefs'. The argument throughout exploits the

maximum range of *non*-legislative evidence, from charters and wills to the grisly remains of executed criminals. When law-codes are used, they are often set out in chains of serial measures, giving a general impression of policy and removing the risk of depending on possibly misleading isolated clauses.

It is no mere ‘hype’ to claim that the general impression left by Part III is of a legal system which, if more amateurishly regulated than by Henry II’s specialist judges, was no less effective in imposing its disciplines on its subjects. One can thus proceed to a chapter 12 which surveys, and up to a point tries to explain, the effectiveness of the system. (This is the stage to confront the point that studies of early medieval law nowadays like to dwell on mechanisms other than executive action; the response is that this is entirely justified when all that has hitherto been discussed *is* executive action; but until executive action has been given its own place, as in early England it as yet has not, the balance will be skewed in the opposite direction.) The way is thus clear for Part IV to put the proverbially \$64,000 question when one can best date the emergence of a distinctive English legal system, and how one can best explain it. In an approach that is now avowedly more speculative than in Parts I–III, the questions asked are, first, when it is most sensible to date the *début* of Carolingian-style institutions in England, the answer of course being earlier rather than later; and then what key changes can be ascribed to the three watersheds of (proceeding backwards) the ‘Angevin Leap Forward’, the Norman Conquest, and the foundation of the English kingdom from the late-ninth century. The upshot, again predictable, is that the Angevin Age is that of any change arising from the new professionalism of an increasingly trained cadre of specialists, and the Norman Conquest that of whatever bears the heavy imprint of the explosive lordship which is found all over fields far beyond England. But the changes enshrined in the notion of a King’s Peace, a Justice that was both instrument and glory of the lord of society at large, is naturally most reasonably dated to the very time when a kingdom of the English itself came to exist. English law began to be distinctive when England became a markedly precocious state. Part IV then concludes with a deliberate lightening of tone. The father of Henry II’s famous Justiciar Glanvill was a crusader who was himself a ‘lawyer’, but one who deployed his expertise over decades in

the shire-court, as recorded in a famous case of Stephen's time. His is the justice of the world as the Old English kingdom knew it. He could have given a son who was Henry's lieutenant first in battle and then in ever more specialized law-courts many clues to the functioning of the pre-Angevin system. It is a vignette of continuity within contrast that epitomizes the argument of this entire work. The combination of Parts III and IV in Vol. II would make a monograph of roughly standard length. Assuming that it was separately marketed, it would be the book read by legal historians, historians in general and indeed students. But even they would need to refer back to the meatier earlier sections in order to understand why they are being asked to believe what they are. If, on the one hand, Vol. II is much less obviously a book for specialists, it may well be, on the other, that Vol. I. has the longer 'shelf-life'.

It is for these intellectual reasons that I consider it essential to publish this as a coherent or at least closely interlinked project. Without the Carolingians there is no context; without the anatomization of the evidence, no logic; without the legal system as it can be shown to work, no point. I can see that a single 410,000 word book would be off-putting in appearance as well as price. But I would devoutly hope that closely successive (not immediately concurrent) books of 270,000 words, and then of 140,000 words would be feasible. I would hardly urge this unless as convinced as any author that the project has a value that will endure. On a final presentational point, the contents page will be set out in almost as much detail as in the accompanying pages; readers should be able to find their way easily to what they want. I also hope for *good* lists of abbreviations, MSS, sources, and modern commentaries – and meeting a need I often feel, that these could themselves be indexed so that one can locate an opinion previously registered only in passing. And a work likely to become one of reference should have a separate 'subject index'.

To be wrong about the origins of English Law is to be wrong about the origins of England itself. It is highly probable that the received view *is* wrong, and that it needs the thorough reconsideration it here at last receives. This book is about 'the making of law', especially in Parts I–II. But the case made in Parts III and IV is that it was thus and then that there was 'made' The Law of England. The emergent kingdom of the English had an

extraordinarily rich legislative tradition, which has suffered, on the whole, from extraordinary neglect. Between its foundation by King Alfred in the 880s and its overwhelming defeat in 1066, the rulers of this brand new kingdom were the only European kings who made written law at all. Yet this book is the first full-length analytical study of their efforts.

[Proposed blurb]

Nineteenth-century approaches to medieval law sought for evidence of the archaic system that prevailed among the early Germans. The Anglo-Saxon laws were in the vernacular, and were thus treasured as primitive vestiges of pure Germanic jurisprudence. Felix Liebermann's magnificent edition of the texts was supplied with *three* glossarial commentaries, as if all that was necessary to establish the early English legal system was to pan the codes for the relevant nuggets. The seminal *History of English Law* by Pollock and Maitland regarded pre-conquest texts as archaic evidence of what Henry II improved by his development of the Common Law.

Wormald shows that the nature of pre-conquest legal sources has been consistently misunderstood, so that their necessary limitations as evidence have never been recognized. If these limitations are registered, and if the resulting perceptions are juxtaposed with what can be learned of Anglo-Saxon law in action, it can be seen that Old English law had a creatively aggressive approach to the organization of justice and the pursuit of crime, with effects that transformed the character of rights in property. The implication, to be further pursued in a sequel on the century after 1066, is that English 'Common Law' owes much more to what was achieved by the Anglo-Saxon makers of England than has yet been realized. It can be argued that the main reason why England's legal system is unique is simply that the English state is Europe's oldest political creation, and the only one that drew directly upon the Carolingian system, without an intervening period of disruption. It is at any rate demonstrable that the first kings of England operated a judicial system that they consciously and deliberately brought into being as a response to their fiercely religious ideology of government.

Appendix 2. Plan and Prospectus II

The Making of English Law: King Alfred to the Twelfth Century

II. From God's Law to Common Law

Synopsis

PART III, THE ORIGINS OF AN ENGLISH ROYAL LAW

1 [7B]. Introductory: The Limits of Legislative Evidence

The point that will briefly be stressed here, both as carry-over from *Legislation and its Limits* and as introduction to *From God's Law to Common Law* is that, however one *explains* the nature of the Old English legislative record, it has obvious and unavoidable shortcomings as a guide to the law as experienced and enforced. The most constructive approach to the law itself is thus to look for *patterns* in the legislation, while deploying a *maximum* of non-legislative evidence.

Projected wordage, 2000 text, 500 notes; so far only in lecture-draft.

NOTE: The idea is to use Chapter 7 as a *bridge* between the two volumes. [7A] will have concluded Vol. I by sewing its themes together at the same time as seeking to bring out that written law was very important in pre-conquest England *but not as important as law itself*; if comparison suggests that the English were less *legally literate* than the Franks, it also suggests that they were even more *legally active*. The point is that in the early Middle Ages the history of *legislation* must always be a different thing from the history of *law*. This will lead naturally (though with a perfectly satisfactory caesura) into chapter 1/7B, the introduction to Vol. II.

2 [8]. Church and King: Ideology and its Impact

1) What is due to God:

- (i) Payment for His help: Ecclesiastical Taxation
- (ii) Sharing His pain and pleasure: Fast and Festival
- (iii) Emulation of His purity: Sexual offence as Public Crime

2) What is due from God

- (i) Ritual invocation of His judgement: workings of the Ordeal
- (ii) Acknowledging His discretion and mercy: effects of Equity

- Text existing only as lecture-draft

3 [9]. The Pursuit of Crime: Punishment by the Community for the Community

1) The Meaning of Treason

- (i) Forfeiture of property for the 'disloyalty' of crime
- (ii) An oath that makes a king's enemy of a thief
- (iii) The unmarked graves of traitors to God and king

Conclusion: traitor and felon

2) The Quality of Mercy

- (i) From feud and compensation to disorder and fine
- (ii) The Origins of Amercement: buying back a forfeit life or limb

- Conclusion: justice as 'great profit'

3) The Dynamics of Prosecution

- (i) Officials in action: reeves as exactors of bodily and pecuniary penalty
- (ii) Neighbourhood responsibilities: pledging good behaviour by self and neighbour
- (iii) Denouncing the deviant: specialist witnesses and general oath-takers

Conclusion: 'jury' or non-'jury', the irrelevance of a distinction

- Projected wordage 20,000 text, 5000 notes, 3 columnar tables, text complete but unrevised and unchecked.

4 [10]. The Machinery of Justice: Seeing that Justice is done

1) Shire and Hundred

- (i) Ancient units of jurisdiction: manor, soke and 'scir'
- (ii) Reorganization of the ancient (hundreds), regulation of the new (shires)

2) Centre and Locality

- (i) Court presidency: personal frailties revealing institutional strength
 - (ii) The new sheriff, a 'king's man'
- 3) 'Public' and 'Private'
- (i) The prominence of the 'popular'/'public'
 - (ii) The invisibility of the lord's court

Conclusion: the struggle for independent jurisdiction *after* 1066

Text existing as lecture-draft

5 [11]. The Foundations of Title: Lords of land, lords of men

- 1) Tenure by charter ('Bookland') and by any other right ('Folkland')
- (i) Varieties of 'Folkland'
 - (ii) Chartered property: the right to keep and dispose
 - (iii) The Coming of 'Immunity' - from *c.* 750

2) Heir and Legatee

- (i) Wills and the heirs of choice
- (ii) Custom and the inheritance of the entitled

Conclusion: primogeniture, partition and parage

3) Tenant and Lord

- (i) Commendation and its obligations
- (ii) Tenure by 'customs'
- (iii) Leasehold

Conclusion: a complex structure of interlocking lordships confused by historians as (and because) by the Norman incomers' sense of the 'fief'

Text existing as lecture-draft

6 [12]. The Viability of Law Enforcement

- (i) Evidence for enforcement: the ubiquity of forfeitures and the limits of regional variation
- (ii) Means of enforcement: a shire gentry and a 'national' ideology

- Text existing as lecture-draft.

Chapters 8, 10–11 to be of similar length to 9, 12 much shorter; Part III OVERALL WORDAGE 110,000 MAXIMUM

PART IV, IMPLICATIONS AND SPECULATIONS: THE BIRTH OF A DISTINCTIVE ENGLISH LAW

[Back to Maitland and Chapter 1: What changed, When and How?]

7 [13]. The Timing of Continental Influence: Possibilities of pre-conquest transmission

(i) Anglo-Saxon England and the Continent: Comparison of Institutions

(ii) Anglo-Saxon England and the Continent: Channels of Contact

Conclusion: reasons for thinking that knowledge of continental arrangements was reaching England are about as good for 1000 as for 1100; and the nearer in time to the Carolingian heyday that contact occurred, the more likely is its influence to have been inspirational and efficacious.

Text in very rough pre-lecture draft

8 [14]. Emerging Lineaments of a 'Common Law': Possible turning-points

(i) 1166–76: ? innovations of judicial expertise and the returnable writ; disseisin and amercement; felony and public prosecution? YES, NO, NO

- Roger of Howden herald and symbol of a justice expert because educated in law and trained in government

(ii) 1066: ? innovations of centrality and consolidation of lordship in land; narrowing of succession to property; loyalty to king before all others? YES, NO, NO

- Æthelwig of Evesham tutor to Odo of Bayeux in unscrupulous management of the Old English system to human and divine profit

(iii) '886': ? innovations of a thoroughly documented and centralized administration; a supervised system of 'public' justice; a King's Peace because God's Peace? NO, YES, YES

- The Cambridgeshire gentry giving evidence: in the 970s for abbey and king; in the

1080s for their own dispossession as potentially disloyal

- Conclusion: the Coming of a Common Law was Angevin if by that is meant the Coming of Common Lawyers; the Norman Conquest was a turning-point in that it made lordship over land the central issue and instrument of law and government. But the power of Common Law courts, and their regulation of the rights of lords was possible because, from the very origins of an English kingdom under Alfred and his heirs, kings had at once established their right, their ability and their duty to direct the behaviour of their subjects. It was a power that English government would never afterwards lose.

Text extant as series of fairly full lecture drafts

9 [15]. Epilogue: Glanvill, Father and Son.

- Hervey, conqueror of Lisbon: legal expert because for long knight of the shire - Rannulf, captor of William the Lion: legal expert because king's chief justice

- Conclusion: to move from father to son is to move from a world as old as Alfred to one recognizable through all later centuries of English law. Yet to think of father and son together is to perceive how an older world could dovetail with a new.

Text roughly sketched out

Chapters 13 – 15 are intended as sketches; 13–14 of similar length at 12,000 each, including notes, chapter 15 at no more than 6000 with notes. VOL II OF PARTS III–IV WOULD HAVE 142,500 WORDS.

[Consolidated indices of Abbreviations, Manuscripts, Bibliography, Persons and Topics for the whole project – cf. Pollock & Maitland (1968 version!)].

WORDAGE OF COMPLETE PROJECT, INCLUDING NOTES, LESS TABLES AND INDICES: 408,500

Appendix 3. Fragment of ‘Chapter 11: Foundations of Title’

Heming, monk and cartularist of Worcester Priory in the 1090s, had a good number of villains; and one of them was the last bishop of Worcester but three, Brihtheah (1033–8). He was, explains Heming, a West Saxon, specifically from Berkshire; and as such effectively without kin or *hereditas* in ‘this shire (*provincia*)’.¹ Hence, he distributed a whole series of choice Worcester properties to his kinsmen and followers; Lippard, for example, was leased to Herluin, a ‘dear *minister*’ of his who had been part of the escort whereby he conveyed Cnut’s daughter to her imperial marriage, and who had badgered him for a grant of landed assets. All too often, as in this case, the invading Normans moved in and the land was effectively lost to the Church.²

Another such estate was Elmley Castle. It was part of the bishop’s very large manor of Crothorne-with-Netherton, itself a member of his pivotal – if diffuse – ‘triple hundred’ of Oswaldslow.³ Brihtheah had ‘given (*dedit*)’ it to ‘a certain *minister* of his’, and his successor, Lyfing (1038–40, 1041–6) had to recover it by ‘lawful pleading (*iuste placitando*)’. Lyfing was nevertheless subsequently persuaded to lease it to a *minister* of his own named Æthelric *Kiu*. The charter whereby he did so is extant, dated 1042, and is one of the few Worcester leases of the period witnessed by a relatively full complement of the royal council. The terms included that Æthelric should at his death pass the property on to two ‘clergy (*cleronomis*)’ of his choice, and that it should then revert, ‘without any

¹ *Hemingi Chartularium*, ed. Hearne, p. 266. For the background to what follows, see Williams, ‘Introduction’, *Worcestershire Domesday*, pp. 20–31; Williams, ‘Spoliation of Worcester’; and Baxter, *Earls of Mercia*, pp. 000. I am grateful for further enlightenment on the subject to personal comment from both authors.

² *Heming*, p. 267. Heming does not in this instance name a Norman usurper, but *DB* i 174a (*Worcs* 2:71) says that Hugh de Grandmesnil held the land, and Baldwin (evidently Herluin’s son) from him, though ‘it was of the bishop’s soke’, and paid 8d a year as ‘church-scot and as recognition of the land’ (cf. chapter 8 above, pp. 000).

³ *DB* i 174a (*Worcs* 2:72–3); the Survey does not identify the manor as such, but it features among the appurtenances of Crothorne in (e.g.) the charter forged at Worcester (S 118) in connection with Bishop Wulfstan’s great suit against Evesham Abbey over Bengeworth and Hampton; on which see Round, ‘Introduction to the Worcestershire Domesday’, pp. 252–6; Wormald, ‘Lordship and Justice’, pp. 121–5 (318–22); and Baxter, ‘Representation of lordship and land tenure’, pp. 000.

suit (*placito*) or opposition' (as Heming glosses), to the priory. Something like this may have begun to happen: after Æthelric, Elmley was, says Heming, held for the priory by Provost Witheric. Then, however, it was taken away 'through the power of the king' by Robert 'the Bursar (*Dispensator*)', brother of Urse d'Abetot, Worcestershire's infamous sheriff.⁴

Heming may have got Brihtheah's origins in the male line right. Otherwise, his account was seriously misleading. John of Worcester and the *Liber Eliensis* tell us that Brihtheah was the nephew – sister's son – of his predecessor-but-one, Archbishop Wulfstan no less (Wulfstan was buried at Ely). He had previously been abbot of Pershore and perhaps a monk in the region.⁵ His (?Berkshire) father's name is unknown, but the marriage agreement between his mother and her second husband, Wulfric, survives. It is evident from the dispositions made in her favour that Wulfric had local property and strong local connections.⁶ Thus, Orleton and Ribbesford were granted for her lifetime, and Knightwick was to be procured for three lives from Winchcombe; while Alton (-in-Rock) was given to her outright. According to Heming, Alton and Lower Sapey were 'conceded' by Bishop Brihtheah to his unnamed brother-in-law. Subsequently, Lower Sapey was 'invaded' by Richard fitz Scrope, and is duly recorded by Domesday Book in the hands of his son Osbern; while Æthelric, Brihtheah's *germanus* (which must mean 'half-brother') 'seized' Alton and shortly afterwards gave it to his son Godric. Ralph de Bernay then grabbed Alton in turn ('fortified by his lord, Earl William [fitz Osbern]'); and though he soon lost it 'as an invader of ecclesiastical possessions' (actually as one of

⁴ LS 105, *Heming*, pp. 267–8; S 1396. Elmley Castle (rated at two hides in S 118, 1396) was thus among the eleven hides detached from Cropthorne-with-Netherton by Robert *Dispensator*, DB i 174a (*Worcs* 2:73), so previously held by Sheriff Cyneweard and Godric (see n. 10 below). For attestations to the Worcester leases, see Keynes, *Atlas of Attestations* LXXVIII: S 1392 (Lyfing to Æthel..., 1038) and ? S 1394 (also Lyfing to Æthelric, 1042) are the only real counterparts.

⁵ *JW* II, pp. 518–19, *Lib. El.* ii 87, p. 156; 'Brihtheh munuc' witnesses the marriage agreement, S 1459, and S 1423 (Evesham lease, 1016x23); this may be the future bishop, but there is no trace of him in attestations to Worcester leases 1000–33, so Evesham seems to be indicated: Atkins, 'Church of Worcester', p. 16–117. Cross-references to Archbishop Wulfstan in this book should be superfluous, but see chapter 6, pp. 449–65, chapter 8, pp. 000.

⁶ S 1459.

the 1075 rebels behind Earl William's son, Roger), Ralph de Tosny then acquired it from the king and not long afterwards gave it to Saint Evroul.⁷ Himbleton and Spetchley, Whittington and Lower Wolverton also came into Æthelric's hands through his half-brother's patronage; Bentley/Holt, once leased by Archbishop Wulfstan to his brother, was passed by Bishop Lyfing to an Æthelric who looks like the same man; while Perry Wood near Worcester was leased in an extant 'original' by Wulfstan to a Wulfgifu who could very well be his sister, and was in 1066 held 'at the bishop's will' by a Godric who might well be Æthelric's son, that is Wulfgifu's grandson, Wulfstan's great-nephew and Brihtheah's half-nephew. The first group was then occupied by William fitz Osbern and in 1086 held by Roger de Lacy; the second and third were in the hands of Sheriff Urso or his tenants.⁸ To round everything off, Charlton, itself part of Cropthorne and Netherton, was said to have been bought for three lives by 'a certain rich man', who was succeeded by his son and then by one Godric 'Finc'; St Wulfstan was able to retrieve it and hold off initial 'French' interest by securing a royal writ in return for a precious gold chalice; but sure enough, the manor ended up 'with the help of the Queen', in the hands of Robert *Dispensator*.⁹

To return finally to Elmley Castle, Domesday Book (not Heming) says that the relevant part of Cropthorne was held not only by Godric but also by Cyneweard – albeit 'they gave service as they could beg from the bishop'. This must be the pre-conquest sheriff who was the bishop's tenant for other manors, in particular, Laugherne, a manor with which his name was still associated in 1072, and which, avers Heming, he had inherited from parents who had leased it for 'fidele servitium' from the church; it too fell

⁷ Alton, *Heming*, p. 255, *DB* i 176b (*Worcs* 15:4: still Ralph de Tosny's at this stage); Lower Sapey, *DB* i 176d (*Worcs* 19:9). For Orleton, cf. *DB* i 177a, (*Worcs* 20:5); for Ribbesford, *DB* i 172b (*Worcs* 1:2: quite close to Alton, perhaps associated with it; it was seized from the priory by the Danes, later annexed by Thurstan of Flanders, *Heming*, p. 256); for Knightwick, see below n. 11.

⁸ *Heming*, p. 266, *DB* i 172d, 173d (*Worcs* 2:3–4, 70); S 1384, 1395, *DB* i 172d, 177c (*Worcs* 2:7, 26:4; S 1385, *DB* i 173d (*Worcs* 2:61) – Perry's 1086 tenant, Erlebold, also held a series of estates in Sheriff Urso's fief, *DB* i 177c (*Worcs* 26:1–2,5,7,15).

⁹ *Heming*, pp. 268–9, *DB* i 273 (*Worcs* 2:73) and S 118.

to Robert *Dispensator*.¹⁰ In the circumstances, it seems more than possible that Cyneweard was another son of Æthelric or some other close relative of Godric.¹¹ That in turn could well imply that Bishop Lyfing's Elmley lessee, Æthelric *Kiu*, was identical with Brihtheah's half-brother and Godric's father.¹² The relentless homonymy of the Old English ruling-class means that its prosopography is almost always a trial. But its yield in this instance important. So far from being an outsider, Bishop Brihtheah belonged to a family of considerable political and social significance in Worcestershire. He used the landed capital of his see and its priory to make that position stronger yet.¹³

Most Anglo-Saxon churchmen used their churches' property as landowners had used their holdings for centuries past, and would for hardly fewer to come: as a resource wherewith to enrich their family and to build up a body of dependent support. Other Worcester bishops did as Brihtheah had, if not quite so obviously (from Heming's angle), in favour of their own kins.¹⁴ All after 957 were far more clearly 'outsiders' than

¹⁰ *DB* i 174a (*Worcs* 2:73); cf. i 172d, 173a (2: 13,19), *Heming*, pp. 252–3, and for his shrievalty, *ELS* 15B, p. 38 (where, like Godric 'of Perry', he showed himself a supporter of Worcester's case: Wormald, 'Lordship and Justice', pp. 124–5 (322)).

¹¹ As argued by Williams, 'Introduction', *Worcestershire Domesday*, pp. 25–6, and 'Spoliation', pp. 397–8. It is another good guess, if no more, that the nun Eadgyth who was pre-conquest tenant of Knightwick, also part of Wulfgifu's marriage settlement (above, nn. 6–7), and held in 1086 by Robert *Dispensator*, *DB* i 173d (*Worcs* 2:67), was Godric's sister or near kinswoman – an Eadgyth was 1066 tenant of Greenhill, itself an Urso usurpation, *DB* i 172d (*Worcs* 2:12), *Heming*, pp. 257–8; cf. Williams, 'Spoliation', pp. 387–8, n. 94.

¹² Cf. Williams' table of Sheriff Cyneweard's lands, 'Introduction', p. 25, and her genealogy of Brihtheah's kin, 'Spoliation', p. 403; also, Baxter's 'Exhibit 11', 'Earls of Mercia', p. 000.

¹³ Also to be fitted somewhere into his kin is the Azur, a *cognatus* and his chamberlain, to whom he leased half the fateful estate of Bengeworth, ultimately another of Sheriff Urso's captures, *Heming*, p. 269, *DB* i 174a (*Worcs* 2: 75); his links with Brihtheah and eventual fate is suggested by the fact that Urso held one and a half hides from Pershore, Brihtheah's one-time abbacy, which had been leased by an Azur who became an outlaw after 1066, *DB* 175b (*Worcs* 9:1b).

¹⁴ S 1381 (Ealdwulf's *miles*), 1384–5 (Archbishop Wulfstan's brother and sister), 1388 (Leofsige's *minister*), 1399 (Brihtheah's *cnihð*), 1392–7 (Lyfing for two or three beneficiaries, one Æthelric as above, one or two others 'fidelis'), 1405–9 (Ealdred's *minister*, *fidelis*, etc.); *Heming*, pp. 256–7, 261 (St Wulfstan himself), 267–8 (Lyfing for Æthelric, as n. 4). These prelates were spared Heming criticism, but a tradition later surfaced at Worcester that Archbishop Wulfstan was 'reprobus' and 'greatly erred in robbing us of property', *Hemingi Chartularium*, pp. 516–17 (cf. *Hom.*, pp. 65–8; *Sermo Lupi*, ed. Whitelock, pp. 8–9); and William of Malmesbury thought that Ealdred had defrauded

Brihtheah, apart from St Wulfstan himself; Heming's explanation of Brihtheah's policy may be a perverse reading of their dilemma into his.¹⁵ Not even the great St Oswald (961–92) was above such considerations.¹⁶ The idea was to construct a social and political position to vie with that of other local competitors for power. It was no less one's duty to the church and its patron saint than to oneself and one's relatives. The result was naturally that bishops were caught up in a long series of disputes with lords, gentry and officials, whether as their rivals or as beneficiaries of their predecessors' patronage who were regarded as breaking the terms of their agreement; some issued in actual lawsuits.¹⁷ The erosion of the bishop's political power-base, not merely 'kleptocratic' greed, was what underlay the assaults on the Worcester affinity by ealdormen and Norman sheriffs – especially as Ealdred and/or Wulfstan managed to 'pocket' the pre-1066 sheriff.¹⁸

Worcester's is an altogether exceptionally well-endowed archive. Not only did a number of 'original' documents exceed only by Christ Church Canterbury's survive there until the eighteenth century at least; it was also the only church to preserve a pre-conquest cartulary; and Heming's extension of it is the earliest extant post-1066 collection.¹⁹ There is no reason, then, to think its recorded experiences different in any

Worcester in York's interest, *Vita S. Wulfstani* i 13, pp. 19–20. See also King, 'Ealdred, Archbishop of York', pp. 132–6.

¹⁵ Archbishop Wulfstan was from the eastern Danelaw, as (probably) was Ealdwulf, 992–1002; Lyfing and Ealdred (1046–62) had been abbots of Tavistock and had other West Country contacts, see King, as n. 14.

¹⁶ Oswald's huge and fundamental series of leases is S 1297–1367, 1369–75, their governing memorandum S 1368. On the policies involved and their tendency to favour (mostly maternal, West Mercian) kinsmen, see Wareham, 'Saint Oswald's family', pp. 53–61, and King, 'St Oswald's tenants', pp. 103–11.

¹⁷ LS 103–5; this is the substance of Heming's 'Codicellus', pp. 248–81, most of which is usefully summarized by Frank and Caroline Thorn in Appendix V G to *DB (Worcs)*. We can take the view that Heming's account was severely biased; but, if contrasting his with Domesday evidence, we need to bear in mind that *its* report of the Worcester fief was probably in effect dictated by St Wulfstan: Baxter, 'Representation of lordship and land tenure', pp. 000.

¹⁸ So, classically, John, 'King and the Monks'; but an important reassessment is Williams, 'Spoliation', especially pp. 398–400.

¹⁹ See Keynes, *Archives and Single Sheets*, pp. 000; Ker, 'Hemming's Cartulary'. BL, Cotton MS Tiberius.A xiii, ff. 1–109, 111–18 comprises a cartulary, the last dated item in which is S 1381 (996) (n. 14, above), hence evidently compiled under Archbishop Wulfstan; ff. 119–42, 144–52, 154–200, and blank spaces in Part I, contain documents copied by Heming himself and other scribes in the 1090s or earlier-twelfth century.

other respect from those of Old English churches in general. The Chronicles of Abingdon, Ely and Ramsey register similar troubles at the hands of donors, lessees or their families. That post-conquest incomers should regard lands held, however precarially, by potentially or actually rebellious laymen as fair game was a grievance for most of the old order's ecclesiastical landlords.²⁰ The fortunes of Anglo-Saxon secular property holders will not, *mutatis mutandis*, have been substantially different (see section 3 below, and chapter 14, section 2)), even if their fate at and after the Battle of Hastings was altogether more drastic.

Nor would we be justified in drawing too strong a line, in these general respects, between the policies and problems of English and continental property owners over the Middle Ages as a whole.²¹ Nonetheless, there are marked singularities in the English evidence, and they reflect very real differences in the rules, if not the ethos, of the disposition of land. These arise above all from the special circumstances in which titled landholding was introduced to Anglo-Saxon Britain. To understand them, we must once more return for a time to the seventh century.

1. 'Bookland' and 'Folkland'

The beginning of wisdom in Old English property studies is to realize how steeply slanted is the evidence. There is, by early medieval Europe's standards (let alone Rome's), extremely little legislation. A seminal law of Alfred's (below, pp. 000), which had slight

²⁰ E.g. LS 86, DB i 60c (*Berks* 21:15), and *Chron. Ab.* I, pp. 484–5, II, pp. 3–4, 9, 20–1; LS 108–17, 119–23, 125–6, 128, 130, 135, *Lib. Æth.* 46, 54–7, 60 (*Lib. El.* ii 35, 43–6, 49b, pp. 110, 114–15, 117), DB i 191b, 196b–c, 197d, 198c, 199c, 201a, 201c, 202a, 202c, ii 19a, 51a, 54a, 60ab, 73b–74a, 186a, 201b, 214a, 346b, 373a, 403a, 406a–b, 431b (*Cambs* 5:29, 17:2–3, 18:4,7, 19:1, 25:9, 26:29–30, 28:2, 32:29,37,39–40, 40:1, 44:2, *Essex* 10:3, 25:20, 27:14, 30:27, 34:19,30, *Norfolk* 9:167, 10:93, 15:12, *Suffolk* 8:8, 16:3, 28:2, 31:8,13a, 47:3), *Lib. El.* 96–7, pp. 165–7; LS 136–8, 142, 146(!), 147, 150, DB i 137b, 196a, 200b, 204d, 207a + 208a, 208c, 212a, 348b + 377d, ii 115b, 159b (*Herts* 17:1, *Hunts* 6:17, 22:1–2 + D:7–8,27, *Beds* 19:1, *Cambs* 17:1, 32:1, *Lincs* 12:59 + CK:65, *Norfolk* 1:59, 8:17), *Chron. Ram.* 105, 107, pp. 171–2, 174–6 – all of which is to evade, in this context, the ticklish issue of 'soke' (chapter 10, pp. 000, below, section 3), pp. 000. See also Bates, *Regesta* 129 (in defence of all bishoprics and abbeys), with Henry I's effective confirmation, *Reg.* ii 1543 and *Lib. El.* iii 14, pp. 255–6.

²¹ Such is rightly the central postulate of Reynolds, *Fiefs and Vassals*, and, more specifically, 'Bookland, Folkland and Fiefs'.

seventh-century precedent, was followed by one of Edward's (pp. 000). A further period of silence was interrupted by a single decree of Æthelred, then by a short set of pronouncements in Cnut's code (pp. 000). The Visigothic, Lombard, Frankish, even the Old Saxon, pictures are appreciably clearer.²² Most of the available evidence therefore takes the form of one or other type of 'charter'. In itself, this might be a boon rather than a problem. Among the arguments of this book's first volume was that the early medieval West's legal history has been as much distorted by extant legislation as by its absence (cf. above, chapter 7B). Nor is it an unusual difficulty that there are few enough charters, and none before the 660s; there are no reliable documents from Francia until the second quarter of the seventh century, or Italian texts in any number (except from Ravenna) till the second decade of the eighth, and none from the rest of the West (including relatively 'literate' Visigothic regions) before the ninth. It is not even an insuperable obstruction that what survives needs to have been mediated by the archives of a major church. This was near-universally true until the second half of the twelfth century at the earliest, and scholars have learned to allow for the resulting malformations in their evidence.²³

The real idiosyncrasy of the English materials is that they are so dominated by royal diplomas. In the surviving documentary corpus for the four centuries before 1066, 72.4 per cent of authentic texts stand actually or effectively in the name of a king.²⁴ There

²² *Leg. Vis.* has a whole book (V) on varieties of tenure, plus a shorter one (X) on property disputes; *Ed. Ro.* 235–41 concerns land transactions, preceded by a long section on children with much to say about inheritance (e.g. 153–4, 158–60, 167–70, 182–3, 187–8, 199–200, 216–17, 225) and gifts (171–6), while the legislation of Liutprand is dominated by the subject (e.g. the very important *Leg. Liutpr.* 1–6 (713) (below, pp. 000), 19, 22 (721), 43 (723), 57–9 (724), 65, 67 (725), 70, 73–4, 78 (726), 101–3 (728), 113 (729), 133–4 (733), cf. *Leg. Ab.* 10, 12–14, 18 (755); *Lex Sal.* 'A'/'C' lix (chapter 2, above, pp. 44–5), cf. *Lex Rib.* lvii, lix:4, lxii–lxiii, *Leg. Alam.* i–ii, xviii–xix, liv–lv, lxxxv, *Lex Bai.* i ;1–2, xv:6–10, xvi:1–2,4.8–10,15–17; *Lex Sax.* xli–xlvi, lxi–lxii, lxiv. See also *Leg. Burg.* i, xiv, xlii–xliii, li, liii, lxxiv–lxxv, lxxviii–lxxix, lxxxiv. Carolingian capitularies have much to say of 'benefice' (mostly rather moralistic in tone), rather less of 'alod': e.g. *Cap.* 15:9, 18:5, 34:10, 35:49, 46:6–7,18 (= *Ans.* iii 19–20, i 126), 48:1, 49:4, 50:5, 59:3, 74:5 (= *Ans.* iii 71), 132:6 (= 256:10), 148:9 (= *Ans.* iv 9), 191:2, 203:8, 210:10, 218:4, 242 (*Ad. Kar.*, p. 158) (= 270:D5), 259:2,5, 270:3, 273:22, 281:20, 293:20,41–2, 297:25.

²³ Cf., in general, *Disputes*, especially 'Conclusion: the rôle of writing in the resolution and recording of disputes' (by Roger Collins), pp. 207–14.

²⁴ It should assist discussion throughout the rest of this chapter if I here list the items which I discount as more or less outright fabrications of a later date. Royal diplomas: S*

must be something wrong here. In what other recorded human society have almost three-quarters of property relationships directly depended on government patronage?²⁵ Royal charters in Francia preponderate only until records become plentiful in the ninth century (in Italy the turning-point is in the eighth). They heavily prevail in the English total right down to the Conquest. No English archive corresponds to the vast repositories of Cluny, Cuxa, Farfa, Lorsch, Lucca or Weißenburg, wherein royal patronage features quite scantily. The Old English era has no counterpart to the

1–6, 17, 22, 43, 47, 54–5, 59–61, 64, 66–70, 72–5, 77–83, 90, 93, 104, 107, 110–12, 115, 117–19, 121–2, 124–5, 127, 132–3, 135–6, 136a, 138, 142, 145, 147, 150–1, 156, 162, 166–7, 174–6, 179, 181, 183–4, 189, 191, 195, 200–3, 209, 211, 213, 216, 226–30, 232–4, 239–42, 246–7, 249–50, 252, 254, 257–8, 270, 273–6, 278, 280, 284–5, 294b, 295, 301, 306, 309–13, 317–18, 320, 322, 325, 337, 342a, 343a, 349, 351, 353, 357, 360, 370, 375–8, 381–4, 386–93, 398, 401–2, 406, 408–10, 414–15, 420, 427–8, 432–6, 439, 443–4, 451–4, 456–7, 477, 479, 499, 515–17, 521, 536–8, 540, 553, 567, 573, 576, 579, 583–4, 605, 616, 629–30, 648, 661, 664–5, 669–73, 686, 688, 728, 731–4, 741, 751–3, 756–61, 766, 772–4, 779, 783, 787–8, 792, 796–9, 804, 806–9, 814–27, 838, 854, 873, 879, 894, 897, 907–8, 914, 917–18, 927, 930, 935–6, 938, 941, 951–4, 957, 959, 965–7, 972, 976, 978, 980–4, 993, 995, 997a, 1000, 1002, 1009, 1011, 1016, 1020, 1023, 1025–6, 1029–30, 1035, 1037a, 1038–41, 1043, 1045–9, 1051–3, 1055–60, 1062; royal writs: S* 946, 989–90, 992, 1065–6, 1070, 1086–7, 1089, 1093–5, 1098, 1107, 1109–10, 1114, 1117–18, 1120–2, 1124, 1133–5, 1137–8, 1144–50, 1152, 1154–5; charters issued by bishops or other clerics: S* 1175, 1244, 1250–1, 1251a, 1282, 1293–5, 1378, 1382, 1398, 1418–19, 1424, 1428; memoranda and *placita*: S* 1428a, 1430a, 1448, 1463, 1477, 1480; charters (and ‘wills’) issued by laymen: S* 1166, 1172–4, 1181, 1185–6, 1189–92, 1205a, 1208, 1212–14, 1217, 1226, 1230, 1233, 1238, 1495–6, 1509. I am guided in these judgements by the views of Dr Kelly and Professor Keynes in the ‘Revised Sawyer’ (S*) and by their ‘pers. comms’ to me, as well as (much less) by my own researches; the analysis in my *Bede and the Conversion of England*, pp. 24–6, is now out-dated but still broadly reflects my views. In calculating proportions, I count as ‘royal’ early texts with most hallmarks of a royal diploma (S* 1164–5, 1167–8, 1177–8, 1180, 1183–4, 1201, 1803, 1805), ‘bishops’ charters’ and ‘memoranda’ arising from decisions by a royal council (S* 1257, 1260, 1271, 1274, 1429–30, 1432–9, 1441–3), and royalty’s wills (S* 1503, 1507, 1515); of the as yet not fully calendared ‘lost and incomplete texts’ (cf. Kelly, *New Anglo-Saxon Charters*, pp. 45–60), I count only those with some extant text: S* 1602a–e,h (Abbotsbury, royal), 1602f (Abbotsbury, lay), 1604c (Abingdon, lay), 1640a (Christ Church, royal), 1651a (St Augustine’s, clerical), 1655a (St Augustine’s lay), 1781a (Gloucester, royal), 1796a–d (St Paul’s, royal), and 1811a (Old Minster, royal), along with S 1803–6 (Peterborough, all royal), and 1861–3 (?Winchcombe, Christ Church, ?Tavistock, all royal). This gives a total of 875 largely genuine royal documents, as against 334 that would in continental scholarship count as ‘private’ charters, 212 (17.5%) essentially the initiative of ecclesiastics, and 122 (10.1%, including S 1445, 1446a, 1454, 1454a, 1459, 1461, 1462, 1469, 1473, 1479) of non-royal laymen.

²⁵ In post-1066 ‘feudal’ England, all tenure derived in principle from the crown, but the several thousand royal *Regesta* are hugely outnumbered, anyway from c. 1150, by ‘private’ documents.

formularies of Francia, Spain or Italy, some of very early date, which bear witness to the citizenry's making of grants, leases, wills and judgements as a matter of routine; the lack of any such English routine may indeed be *why* there is no such English collection.²⁶ Granted an Englishman's tendency to be exceptionally throne-minded in the Middle Ages (and since), it is not likely that this eccentric disproportion is entirely a function of archival priorities. Something about royally bestowed title made it more prone to survive. What?

(i) Chartered property

The placid consensus that has settled for more than a century over most aspects of Old English law shatters abruptly when it comes to the privileges arising from written title to property – or, to use a term current by the 830s, 'bookland (*bocland*)'.²⁷ Since its importance was first signalled by the remarkable John Allen's *Inquiry into the Rise and Growth of the Royal Prerogative* (1829), there have been repeated reassessments.²⁸ The orthodoxy prevailing through most of the twentieth century, which (as usual in Anglo-Saxon studies) was that of Sir Frank Stenton, was sharply challenged in the 1960s by the late Eric John and never wholly re-established.²⁹ Such a chorus of dissent makes it impossible to eschew some of the polemic this book has usually sought to avoid. Fortunately, the fact that we now have a more reliable corpus of acceptable documents than was available to previous generations makes it possible to focus attention on the

²⁶ See above, chapter 2, pp. 37, 88–91; and on the scanty formulaic ingredients in English *placita*, chapter 3, pp. 145–6, and LS, pp. 273–8 (279–83), with Cubitt, *Anglo-Saxon Church Councils*, pp. 77–87.

²⁷ S 1622, and cf. Brooks, *Early History of Canterbury*, p. 139; this obviously problematic text aside, the earliest usage seems to be the will of Ealdorman Ælfred, S 1508 (871x89); but 'boc' appears as early as S 153 (dorse, post-798).

²⁸ Allen, *Rise and Growth of the Royal Prerogative*, pp. 000; the first major re-interpretations were those of Vinogradoff, 'Folkland', and Maitland, *DBB*, pp. 226–317, and see also next two nn.

²⁹ Stenton, *Anglo-Saxon England*, pp. 306–12; E. John, *Land Tenure in Early England* (Leicester, 1960), pp. 1–79, and 'Folkland Reconsidered', in his *Orbis Britanniae*, pp. 64–127; the most recent assessment is Reynolds, n. 21 above.

arena whence it should never have strayed: the texts themselves.³⁰

1. In the name of the Lord God and of the Saviour Jesus Christ. I Hlothere king of the Kentishmen, in the first year of our reign, third indiction [673/5], on the 1st April, with the counsel of the venerable Archbishop Theodore and the consent of my chief men, grant and confirm (*concedimus et confirmamus*) to the abbot and monastery of the blessed Peter prince of the apostles that is sited in a suburb near the city of Canterbury, land of three ploughs in the marsh that is called Stodmarsh near Fordwich, with ... all things belonging to it, to the same aforesaid extent as my predecessors as kings held it of old; such that neither we nor any of our successors as kings or princes or any ranks of the Church's orders should be allowed to infringe upon our donation in any way or reduce it to any degree, but that for the saving of my soul and the forgiving of my sins everything aforesaid is to remain stable for ever for the servants of God, just as I have said before ... + I Hlothere king of Kent have by my own hand corroborated with the sign of the afore-written holy cross; + I Theodore, archbishop by the grace of God, have subscribed at the king's request; + I Hadrian unworthy abbot have subscribed; + the manual sign of Ecca; + the sign of Osfrith.

2. In the name of our Lord Jesus Christ the Saviour. Those things which are wholesomely defined according to ecclesiastical discipline and synodal decrees, although the word alone should suffice, yet to avoid the uncertainty of time to come ought to be committed to most trustworthy writings and

³⁰ See n. 24. To my two earlier efforts at making my case, *Bede and the Conversion of England*, pp. 19–23, and *How do we know so much about Anglo-Saxon Deerhurst?*, pp. 4–6, add now 'On *Da wæpnedhealf*: Kingship and Royal Property', pp. 000. What follows aims to be a little less foggy as well as less condensed.

documents. Wherefore, I Coenred, for the saving of my soul and the remission of my misdeeds, would command to give (*decreverim donare*) a certain piece of land, that is thirty hides (*manentes*) to the venerable man Abbot Berhthun ... For I have put sods of the same aforementioned [lands] on the Gospel, such that from this day he have the free and firm power (*liberam et firmam potestatem*) to have, hold and possess in everything ... I Coenred, who have signed this charter of gift in all things in my own hand, and have handed it to faithful witnesses for corroboration +; I Leuthere, though an unworthy bishop, have subscribed this charter of gift +; I Abbot Cyniberht have subscribed +; I Abbot Hædde have subscribed +; I Wynberht the priest, who have written this charter at the request of the aforesaid abbot, have subscribed; and the others + [670x6].

3. In the name of the Lord God, the Saviour Jesus Christ. I Æthelmod, with the consent of King Æthelred, for the saving of my soul, give to you the venerable Abbess Beorngyth and to Folcburh, and through you to your monastery, twenty hides (*manentes*) by the river that is called Cherwell, that you might have it by right and by your authority (*iure dominioque vestro*) as you may claim it for your monastery ... And that this my gift persist in its firmness, I have underneath made the sign of the holy cross with my own hand and have asked the most holy archbishop Theodore that he subscribe, and at the same time I have asked King Æthelred that he subscribe. Done in the month of October, ninth indiction (680). Sign of the holy cross of Æthelmod +; Æthelred, king by the grace of God, ascription +; Theodore, by the grace of God archbishop, have subscribed +; Putta, by the grace of God bishop, have subscribed +; Bosel, by the grace of God bishop, have subscribed +.

4. + In the name of our Lord Jesus Christ the Saviour. As often as we bestow anything on the members of Christ as a work of piety, we believe that we benefit our soul, because we give back to Him His own, we do not make a present of what is ours. On which grounds I Cædwalla, by the Lord's dispensation king of the Saxons, for the saving my soul confer on you, Cedde, Cisi and Crispa, in your control (*vobis ... in potestate confero*) land for constructing a monastery whose name is Farnham, totalling sixty hides (*cassatos*), of which ten are in Binton, two in Churt, and the rest are assigned to their own places and names, that is *Cusanweob*; with everything belonging to them ... that you may have from me free permission to give and exchange, and that is put at your choice (*in arbitrio vestro sit posita*). Never at any time will I and my heirs try to come against this charter of gift ... Done at the place whose name is *Besingabearh* in the year 688 from the Incarnation of the Lord Jesus Christ, the first indiction. Sign of the hand of Cædwalla king and donor; I Bishop Wilfrid have subscribed this gift; I Earconwald bishop have subscribed the gift of the same; I Hædde bishop have subscribed the gift made by the king; I Aldhelm, unworthy abbot, have subscribed this cyrograph; I Hagona abbot ... I Guda priest ... Sign of Wudda's hand ... Sign of Snocca's hand; Sign of Mocca's hand.

These are among the twenty earliest substantially genuine Anglo-Saxon charters to survive.³¹ They respectively represent the four main 'provinces' of early Anglo-Saxon

³¹ S* 7, 1164, 1167, 235. Others pre-688 are (Kentish) S* 8 (679), 9 (686); (West Saxon) S* 1245 (675), 1249 (680), 71 (681), 236 (681), 237 (682), 1169 (685), 1170 (688), 231 (688); (Mercian) S* 1168 (671x2), 51 (675), 52 (680); ('Earconwald') S* 1165 (672x4), 1247 (678), 1246 (687). For the dating of 1., 2., see Kelly, *St Aug. Ch.*, pp. 27, 29, *Shaft. Ch.*, p. 6; for 3., 4. (with the important point that S 1167 probably drew on S 1168, thus the earliest extant text of all), see Edwards, *Charters of the early West Saxon Kingdom*, pp. 211–18. My translation policy for charters as for laws (vol. I, p. xiii), is to follow *EHD I*

diplomatic, Kentish, West Saxon, Mercian (i.e. Hwiccian) and London/Earconwald.³² That charter drafting had already diverged to this degree in Theodore's time is the best of several reasons for thinking that the technique must have arrived at an earlier stage in the making of the English Church.³³ The texts are characteristic in their brevity and relatively plain – if far from grammatically impeccable – language. The land granted is given an assessment in hides (in Kent ploughlands/ 'sulungs') and roughly located, but there is no trace of the elaborate, and soon vernacular, 'boundary-clauses' found from the earlier-ninth century. It is emphasized that the grant covers all 'appurtenances' attaching to the land (fields, woods, waters, etc.), but there is no hint for at least a century of any particular privileges accorded to it (see sub-section 2 below). As always in the first century of the Anglo-Saxon charter, these are grants to churchmen or would-be clerics: **1.** to a celebrated and already well-established foundation, **2.** and **3.** to unknown houses (unless **3.** was Bath), and **4.** to a planned creation (*ad construendum monasterium*) by three aristocratic brothers. That is why Old English diplomatic is so tirelessly pious, and indeed remains so down to the Conquest. An invocation in God's or Christ's name is normal, and soon reinforced by a 'proem'/'arenga' offering sententious observations on the transitoriness of earthly things (**2.**, **4.**); in Kent, where this is less regular, the donor's pious motives are still stressed (**1.**, cf. **3.**). Almost universal is a 'sanction' threatening

where available, but aim where possible for extra literalness, the better to reflect the original's clumsinesses.

³² For this, see Brooks, *Early History of Canterbury*, pp. 168–70, 327–30; Wormald, *Bede and the Conversion of England*, pp. 9–11; Edwards, *Charters of the early West Saxon Kingdom*, pp. 309–13; and Kelly, *St Aug. Ch.*, pp. lxxi–lxxxv. It should be noted that S 1164 may also be in certain respects the fruit of 'Earconwald diplomatic'; and that S 1167 is preserved in the West Saxon Bath cartulary (for the link and its significance, see Sims-Williams, 'Continental influence at Bath monastery in the seventh century', p. 3).

³³ Another being that the 'proem' of Cædwalla's charter, which is also found in two other 'Earconwald' charters (S* 1165, 1171), had been used by the future Pope Gregory when founding the monastery whence he despatched his missionaries in 596, *Gregory I, Registrum*, 'Appendix', II, p. 437. See Chaplais, 'Who introduced Charters into England?', with 'Some early Anglo-Saxon diplomas', p. 328; Scharer, *Die angelsächsische Königskunde*, pp. 56–7; Wormald, *Bede and the Conversion of England*, pp. 11–19; and Kelly, 'Anglo-Saxon lay society', pp. 40–2. It deserves more stress than I or anyone else has yet given it that, but for the preservation by the abbey of St-Denis in special circumstances of seventeen papyrus records (*Ch.L.A.*, xiii, 549–63, 569, xiv, 592), we should think that the history of Merovingian diplomatic began in the 670s.

eternal punishment, but nothing more immediately disagreeable, for anyone interfering with the gift, and sometimes invoking blessings too on those who augment it (1).³⁴

Also typical – and no real qualification to what was already said about royal domination of the Anglo-Saxon charter-tradition – is that, like half the other early records, two of the four are only ambiguously royal. This probably reflects the sheer fluidity of early Anglo-Saxon politics, major rulers still loom somewhere in the background. Coenred (2.), appears as ‘king of the West Saxons’ in a largely genuine Selsey charter of 692, and as King Ine’s father and guide in the prologue of the latter’s code; he is best regarded as one of the *subreguli* who, according to Bede, took over the West Saxon kingdom for a time after Cenwalh’s death (672).³⁵ Subscriptions tend, except in most Hwiccian cases, to distinguish between ‘signa manus’ by laymen and the actual ‘subscription’ of clerics.³⁶ Comparison with the sub-Roman documents from which the Anglo-Saxon material clearly derives shows that a signatory’s role was in the first instance that of a witness.³⁷ Kings, however, who might be represented by either a ‘subscription’ (1., 2.) or a ‘sign’ (3., 4.), consent or corroborate even when not the outright donor; and it is not clear whether the advice and consent of the archbishop and other great men of the kingdom in 1. is another mark of their testimony, as in Roman notarial practice, or has yet acquired the (as it were) constitutional status that it evidently had later.³⁸

³⁴ The (already essentially formulaic) sanction, and the details of appurtenances, are all that is omitted from the above quotations.

³⁵ S* 45 (692), with Edwards, *Charters of the Early West Saxon Kingdom*, pp. 297–9; Ine Pr.; Bede, *Hist. Eccl.* iv 12, pp. 368–9. S* 1165 is granted by Frithuwald ‘sub-king of the province of the men of Surrey’ but confirmed by Wulfhere of the Mercians; in S* 1246 the East Saxon kings in fact attest; S* 1169–70 are, like S 1167, grants by sub-kings with Mercian and West Saxon royal assent; S* 51 was gifted by ‘King’ Osric, but presumably this was the ‘sub-king’ witnessing S* 1165, and King Æthelred again attested; Wigheard, donor of S 1168 (‘per consensum Wulfheri regis’) was another S* 1165 ‘subregulus’. See in general Campbell, *Bede’s Reges and Principes*.

³⁶ The Bath ‘foundation-charter’ (S* 51, 675) has the ‘signum manus’ / ‘subscripti’ divide, but it has gone by S 53 (693). The distinction does not affect the point that, as appears from almost all extant Old English ‘originals’, signatory crosses were *not* autograph.

³⁷ Chaplais, ‘Some early Anglo-Saxon diplomas’, pp. 318–23, 326–7.

³⁸ S* 8, the earliest ‘original’, has the ‘consensus’ of Theodore and ‘omnium principum’, along with the king’s nephew (and successor), Eadric, the ‘signatories’ being laymen making a ‘signum manus’; S* 9 claims the ‘consensu omnium patriciorum’ and declares that Eadric had ‘asked’ Theodore to subscribe, and they are the only signatories to

What, then, do these documents actually do? The answer may seem obvious enough. They convey lands. No. **1.** specifies that the marshland at stake is the king's to give.³⁹ No. **2.** has the intriguing and highly unusual detail that the act of giving involved putting bits of real estate on a Gospel-book.⁴⁰ At least four early texts mention payment of a price, though otherwise using the language of gift. This need not mean that everything else claiming to be a donation was in fact a sale.⁴¹ Much the most important issue, however, is the terms of the land's tenure; and this needs spelling out with reference to the early charter corpus as a whole.⁴²

Of the quoted charters, only no. **1.** actually says that the gift is 'for ever (*in evum*)', though **4.** echoes its promise that neither the donor's heirs nor his agents would infringe it. Similar variations on the theme of perpetuity are found in ten other early Kentish charters, five more of those from the Earconwald connection, though only three apiece from Wessex and Mercia, and none from Sussex.⁴³ Given that transactions are sustained

appear; S* 236 records the consent of the bishop who had appointed the grantee abbot (with royal agreement); S* 1169's donor invites King Æthelred's 'testimony' as a mark of 'consent and confirmation', while S* 1170 has the 'counsel and confirmation of King Centwine and all his chiefs and senators'. Hodilred, donor of S* 1171 (690x3), is a 'kinsman' of King Sebbi of the East Saxons and has his consent, Sebbi's 'confirmation' heading the witness-list and his 'signum manus' appearing first of three East Saxon kings below. Of bishops' charters, Earconwald claims to be dealing in royal gifts (S* 1246–8); S* 1245 and 1249 are too mutilated to sustain argument. See also n. 34; and on the 'corroboratio' clause and its diplomatic background, Chaplais, 'Some early Anglo-Saxon diplomas', pp. 323, 331–2.

³⁹ Cf. S* 8, 10, 12–13. In S* 9, Eadric, Hlothere's successor, adds three more hides near the same marsh.

⁴⁰ Cf. S* 1165, where King Wulfhere 'has put his hand on the altar' (super-imposing it on the document?).

⁴¹ S* 9, 10 (689), 1804 (675x92), 1177 (704x9); cf. Kelly, *St Aug. Ch.*, pp. 31–2, and Campbell, 'Sale of Land'.

⁴² To the pre-688 corpus itemized in n. 31, add S* 10 (689), 12 (689), 11 (690), 13–14 (690), 15 (694), 16 (696/711), 18 (697), 19 (697/712), 20 (699) 21 (700/15), 87 (?716x17) (Kentish); S* 1171 (690x3), 1248 (693), 65a–b (699x709), 65 (704), 1428b (704/5) (London); S* 45 (692), 44 (?705x17), 42 (?717) (South Saxon); S* 238 (693), 243 (701), 244 (702), 245 (704), 248 (705/6), 1176 (708), 1179 (705x26), 1253 (712) (West Saxon); S* 53 (693), 76 (697x9), 1252 (699x717), 1177 (704x9) (Mercian); together with the 20 pre-688, this gives a total of 53 exploitable texts from the first half-century of Anglo-Saxon diplomatic; of these, 15 are Kentish, 10 London, 3 South Saxon, 17 West Saxon, and 8 Mercian.

⁴³ S* 8–9, 12, 14–16, 18–21, 87; S* 1165, 1246–7, 1171, 65; S 231, 238, 245; S 51–3.

by threats of endless doom against whoever might even think of disrupting them, permanence seems intrinsic to the bargain. Anything given to an Eternal God must perforce be immutable. Other terms of tenure tend at first to be vague, as in **2.** or **3.:** 'ecclesiastical' or 'monastic' 'power', 'right' or even 'service'.⁴⁴ More often, especially in West or South Saxon charters, land is merely said to be 'given'. However, **4.** marks the arrival of a formula that will become widespread: beneficiaries have a 'choice' to give or exchange the property in their turn.⁴⁵ Freedom of disposition soon extends to the right to leave it to whoever one wishes.⁴⁶ The fact that Kentish or 'Earconwald' charters are the first or likeliest to spell out these points is not to be taken as indicating that south-eastern practice differed from that inland. These were also the early charters most likely to be precisely dated and placed, as Roman law required.⁴⁷ No early text comes close to suggesting that any sort of restriction or condition applied.⁴⁸ There is no reason, that is to say, to doubt that what was invariably being conveyed was complete control of the property, recipients being guaranteed undisturbed possession and absolute discretion to deal with it as they wished.

That indeed is what was in effect argued by one of the greatest Anglo-Saxon historians, Hector Munro Chadwick.⁴⁹ But it was no longer the orthodoxy when he wrote, and has not been the accepted view since. Sir Frank Stenton was to maintain that charters 'were not in the strictest sense grants of lands. Each of these gifts empowered the man who received it to exact within a definite area the dues and services which the local peasantry had formerly rendered to the king himself. A king's companion ...

⁴⁴ S* 1168, 8, 1246, 10–11, 53.

⁴⁵ S* 9, 1171, 16, 65, 1253.

⁴⁶ S* 1165, 13, 15, 1177. But the first of these texts is under suspicion of having been 'worked over'.

⁴⁷ Cf. above, chapter 6, nn. 56, 108; Chaplais, 'Some early Anglo-Saxon diplomas', pp. 324; Wormald, *Bede and the Conversion of England*, pp. 13–14. Note, however, that the early Hwiccan S* 1168, 51–2, and West Saxon S* 1249, 238, as well as Kentish S* 7, 10, 13, 18 have an *inaugural* dating-clause, as required by Justinian.

⁴⁸ Exceptions are the early possibilities of reversionary grants, S 1179, 1252, though neither is by any means unimpeachable.

⁴⁹ Chadwick, *Studies on Anglo-Saxon Institutions*, pp. 367–77: a thesis of timeless value, to which my interpretation adheres closely. For notable endorsement, see Aston, 'Origins of the Manor', pp. 63–5, and Bullough, 'Anglo-Saxon institutions', p. 652 (pp. 5, 13–15).

received the food-rent which the land of his endowment had previously yielded to the king ... the entertainment of his servants represented the *feorm* once given to the king's fowlers and huntsmen'. 'Being derived in the last resort from Roman private documents of the sixth century, these charters always take the form of a simple conveyance of land, and ignore the fact that the gifts which they record meant, in effect, the alienation of rights by a king for the benefit of a subject ... His immediate purpose is to show that he has released a particular territory from all except the most fundamental of common burdens ... The king's object is to record what may conveniently be called an "immunity", to make what in the tenth century would be described as a *freols boc* – a charter of liberties.' Bookland, therefore, was 'land exempted from public burdens by a royal charter.'⁵⁰

There are two salient objections to this case. First, it is not clear *why* early charters should not have said that they were alienating rights if that were what they did. Stenton duly asserted that 'it is only by slow degrees that the Old English charter advances towards precision of style'; 'charters of an earlier age often fail to make their real meaning apparent'.⁵¹ It certainly does not look as though trained notaries were regularly in the entourages of those who brought Christianity to the Anglo-Saxons, whether from Rome or elsewhere (though Theodore himself was an evident exception).⁵² Yet the immunity was becoming a recognized form of tenure on the continent at the time when the Anglo-Saxon tradition emerged.⁵³ The churchmen who brought charters to England should thus

⁵⁰ Stenton, *Anglo-Saxon England*, pp. 306–7, 309.

⁵¹ *Anglo-Saxon England*, pp. 307, 308.

⁵² *Bede, Hist. Eccl.* iv 5, pp. 352–3; Chaplais, 'Origin and Authenticity', pp. 49–50.

⁵³ Marculf i 3–4, *Formul.*, pp. 42–5, with the categorical 'whatever the fisc could anticipate thence from free men ... is for ever to be of benefit in lighting that church'; which is quite clearly distinct from the '*cessio* for a holy place', 'that both they and their successors should have, hold and possess that estate in full integrity (*in omni integritatem ... habeant, teneant et possideant*), with its lands and the rest in the same way...' Marculf i 15, p. 53; cf. the Carolingian 'Donatio imperialis' as against the 'Inmunitas monasterii', Form. Imp. 2, 4, *Formul.*, pp. 288–9, 290–1. The earliest extant original Immunity charter is Theuderic III's for St-Denis (688), *Cb. L.A.* xiii 570. Two recent and important discussions of the Immunity to rather opposite effects are Murray, 'Immunity, Nobility and the *Edict of Paris*', and Fouracre, 'Eternal light and earthly needs', the former giving a full conspectus of a huge literature. The topic is re-opened in sub-section 2 below; but it may be said

have been able to specify 'exemption from public burdens' if they had wanted to. Since they did not then do so, there must be some presumption that this was not the central point of chartered tenure at that stage. Secondly, it was not in fact long before Anglo-Saxon charters did begin to declare property exempt from royal services, though seldom 'the most fundamental' of these. A diploma of 788 provided Stenton's one illustration of a transfer of 'all tribute that was before owed to kings'. Actually, a formula to this effect was already used in one St Augustine's and two Rochester charters in 761x4.⁵⁴ But earlier still, Wihtried of Kent and Ine of Wessex announced the Church's freedom from 'tax (*gafol*)', and 'public tribute', 'of fiscal agents' (even if it is not entirely clear that churches could then collect the payments for themselves).⁵⁵ It seems safe to say that, had churches been automatically guaranteed receipt of royal resources by the mere fact of being granted land, there would have been no need for kings to make such separate stipulations. We shall see in sub-section 2 that a good case can be made for the special circumstances that led to the development of explicit immunities in the mid-eighth century. Why, meanwhile, need we doubt that charter draftsmen could have made their meaning clear in the 670s and '80s, when they found no difficulty in doing so by the 760s?

Stenton's view of such things would always command respect. But in this instance, he implicitly invoked the genius of Maitland. Maitland it was who laid down the still prevalent interpretation that what charters conveyed was a species of 'political power', or in his own chosen word, 'superiority'. His argument must be faced head-on. His understanding of the position in early Christian England was unashamedly primitivist. We read of the 'hitherto naked savage' donning a white man's hat; and 'that if the England of the sixth century had been visited by modern Englishmen, the Saxon

now that, since the Roman origin of the principle is common ground, there need be no anxiety that immunities as such are unattested from late-sixth or seventh-century Italy.

⁵⁴ S 128; S* 28, 33, 105, and cf. also S 1182 (762), alienation by a 'minister' of an estate given him by the king 'with its tribute'.

⁵⁵ Wi. 1 (695); S* 20 (699), 245 (704). In S* 23 (732), Wihtried's son promised that in land he thereby granted to Lyminge, 'no royal right (*ims*) at all would be registered thenceforth, apart of course from what is known to be general on ecclesiastical lands in Kent'.

chieftains would have been awakened to a consciousness of their “booking” powers by offers of gin and rifles’.⁵⁶ Such language can be taken to condemn this broadest of Victorian minds only by damning the whole culture that brought him forth. For all that, it is as well to unearth the intellectual roots of the notion that early English charter-draftsmen did not know what they were saying. Maitland’s more serious and substantial point was that the lands involved were simply too big:

If we loyally accept this seeming fact [that what ... the king ... gives to the churches is ownership and nothing less] ... to what conclusions shall we not be brought, when we remember how wide were the lands which the churches acquired ... how by virtue of royal gifts the church of Worcester acquired a quarter of a county? ... One of two conclusions seems to follow. Either the king really did own these large districts, and the tillers of the soil were merely his slaves or *coloni*, who were conveyed along with the soil, or else the clear and emphatic language of the charters sadly needs explanation. ... If we say that the king really does confer landownership ... there will be small room left for any landowners in England save the king, the churches and perhaps a few great nobles. This is a theory which for many reasons we can not adopt ... The only alternative course seems that of saying that many of the land-books even of the earliest period ... convey not the ownership of land, but (the term must be allowed us) a ‘superiority’ over land and over free men. ... Are we to believe that the free owner of Kemble’s ‘ethel, hide or alod’ might have above him ... a landlord; one who would ... give that land to a church and tell the bishop or abbot to do whatever he pleased with it? If we believe this, shall we not be believing that so far as English history can be carried there is

⁵⁶ *DBB*, pp. 225, 242.

no age before 'feudalism'?⁵⁷

One of the beauties of Maitland's argumentation is that he leaves no question about the assumptions with which he sets out. This seminal passage is sustained by two: that 'free owners', distinct on the one hand from 'slaves and *coloni*' and on the other from 'kings, churches and a few great nobles', were an indispensable element in early English social structure; and that this feature distinguished the era from that of 'feudalism'. Yet, taking the second assumption, it is an illusion fostered by the silences of Domesday Book that the 'feudal' period itself knew little of free men who, even if in one legal sense tenants, could in another claim a status entitling or obliging them to appear in the king's courts. Who else constituted the suers of their lords over minute parcels of land, that were heroes of the key chapter in Maitland's *History of English Law*? This question is another that must be resumed later in this chapter (sub-section 3). For now, we may note that Ine's laws, however prone to the archaism of much of the early medieval West's 'primary' legislation, clearly envisage someone coming to terms with a 'lord (*blaford*)' over a 'yardland', and at liberty to leave should the lord try to raise his payment (*gafol*) and require labour – so long as the lord had not housed him. If this is indeed the 'root of medieval English villeinage', it is still a long way from the fully-grown plant.⁵⁸ The inhabitants of what has now been brilliantly isolated and described as 'warland' were in one way dependent but in others obviously free.⁵⁹ It need in no way follow, then, that royal command of broad acres implied their tenure exclusively by 'slaves or *coloni*'. Nor need we be as hesitant as Maitland in attributing broad acres to early kings. Seventh-century conditions cannot be deduced from estates as huge as Worcester's Oswaldslow, which took centuries to build up – and which by Oswald's time did of course have free tenants (above, pp. 000). Early grants of 100 hides or more occur but are hardly

⁵⁷ *DBB*, pp. 231–2, 233.

⁵⁸ Ine 67; cf. Aston, 'Origins of the Manor', pp. 70–2; Charles-Edwards, 'Distinction between Land and Moveable Wealth', pp. 101–3; Faith, *English Peasantry*, pp. 76, 119–20.

⁵⁹ Faith, *English Peasantry*, chapter 4. If this thesis seems to rest on the concept of 'soke', that is not to resurrect the phantasm of 'superiority' in a new guise; soke as normally now understood (and certainly as understood by Maitland and Stenton) is *not* to be identified with 'immunity' (below, sub-section 3).

common; and why should we doubt that kings on record as conquering vast tracts of lowland Britain disposed of resources that might almost compare with a Merovingian's?⁶⁰ To turn to that angle, *Lex Salica* seems to insist that we find room for many a 'small face-to-face community' amidst the great estates of the Merovingian world; why may we not do as much for Ine's Wessex?⁶¹ In short, even were Kemble's 'free owner' truly at risk from a literal reading of the earliest English charters, his free *man* can be quite safe, 200 shilling wergeld and all. That being so, Maitland's first assumption is sustainable even if his second is discarded. In the seventh century as in the eleventh, kings might bestow tenants as well as slaves and serfs with their lands. That they loom so large as donors was not because they were disposing of their prerogatives.

Maitland anticipated Stenton not only in his general theory of transferred power but also specifically in the proposition that what kings primarily alienated was the 'tribute' they could previously exact from an estate's inhabitants. The *feorm*, the 'food-render', that a king had hitherto enjoyed from lands in his own hands was switched by virtue of a charter to its recipient. Inasmuch as *feorm* was the nearest government got to taxation, there was no real difference between tax, paid to kings when in possession, and rent, collected by the land's new lord.⁶² The problem, as before, is why this is hardly spelled out in charters before the 760s: was it because it took that long for fundamentals to be made clear, or because tenure in the second half of the eighth century truly represented new departures? Full consideration must once again be deferred to the next sub-section. But King Alfred may here be given the first of his three telling interventions

⁶⁰ Chadwick's sense of the military quality of early Anglo-Saxon society was doubtless a reason why he had no such doubts: *Studies on Anglo-Saxon Institutions*, p. 374.

⁶¹ Wood, 'Disputes in late-fifth and sixth-century Gaul', p. 11, as cited by Wickham, 'Problems of Comparing Rural Societies', pp. 232–6. Professor Wickham forcefully restates Maitland's thesis, refining the basic case by referring to modern topographical studies that can actually divide whole eleventh-century shires into contiguous estates – though this has in fact been challenged: Costen, 'Settlement in Wessex'; yet it remains unjustified to argue the structure of early estates from the size of later ones; and it is beside the point that in Angevin times, 'when free peasants were certainly mostly tenants, [the law] focuses on disputes about feudal tenure': the 'oath and pledge' anchoring pre-conquest criminal justice pre-supposed the 'law-worthy' (i.e. free) status of those involved, even if also the 'men' of lords: II Cn 20 – 20:1, and above, chapter 9, pp. 000.

⁶² *DBB*, pp. 234, 236–40.

in this debate:

If anyone for some crime seek any of the minster-houses to which the king's *feorm* belong, or any other free community (*frione hiered*) that be worthy of respect, let him have a period of three days as a protection...⁶³

The implication of this law is that as late as the 890s there were minsters that did not receive the king's *feorm*, communities that were not 'free'; otherwise, why enter the rider at all? And as Maitland noted, it is demonstrably not the case that *feorm* was all that kings levied on their peoples. Military and labour service was (or became) due, whatever else was alienated. If rulers granting land held on to some of their subjects' obligations, they could in principle retain *feorm* too, until the time when they came to give that too away. Land was indeed assessed in 'hides' – or 'sulungs', or *manentes*, or *cassati*, or indeed 'tribute-units (*tributarii*)' – that is in measures of yield, not of area. This need not mean that only a single sort of render was extracted from it. It could have continued to supply a new lord while still finding *feorm* for a king on the same reckoning: 100 eels from ten hides for his Grace, so to speak, and however many more (or, less probably, fewer) for his Lordship.⁶⁴

'Superiority' as the touchstone of early English landlordship was postulated on quite different grounds by the lamented Eric John. Ideas of proprietorship expressed in charters necessarily derived from the world of 'Roman Vulgar Law'. John thus concluded that the 'power' or 'right' of which they speak must have experienced that implosion of all categories of property into a single type of vague and in certain ways qualified

⁶³ Af 2.

⁶⁴ Ine 70:1; note that this famous list of renders 'to fostre', usually equated with *feorm*, is not found especially onerous by one expert in Anglo-Saxon material culture: Hodges, *Dark Age Economics*, p. 136. For interpretation of the king's 'fedesl' (Abt 20) to the same effect, see Oliver, '*Cyninges fedesl*'. Professor Wickham's vigorous discussion, 'The Other Transition', could be read as arguing that a landlord's revenues replaced a king's in the wiring of the power structure, but not that one just became the other. Cf. Charles-Edwards, 'Early medieval kingships in the British Isles', pp. 28–33, on 'tribute' and food-renders in the British Isles as a whole.

'possession' which characterized sub-Roman land law. Because the 'dominium' of Classical jurisprudence had long ago vapourized, it was naturally unknown to the clerics who introduced the Anglo-Saxons to charters, whatever their vocabulary. Maitland's view was thus far vindicated.⁶⁵ And thus far, the argument can hardly be faulted. It is a small step from observing that early English diplomatic used the legal language of post-Roman notaries to claiming it partook of their legal ideas. But Maitland would have been startled to hear that *this* is what justified his 'superiority' thesis; he seems to have thought just the opposite.⁶⁶ If Ravenna, Franco-Gallic or Lombard documents had conveyed something better characterized as political power than as ownership, what (to repeat) would have been the point of authorities subsequently offering 'political power' in the form of Immunity? It is of course entirely likely that 'possession' in late-seventh-century England did not mean quite what it did in contemporary Italy or Gaul. Yet neither the English nor the continental evidence entitles us to conceptualize its dimensions in wholly disparate ways.⁶⁷

All the same, Eric John did make one absolutely crucial point, insufficiently acknowledged by his critics, which happily serves to terminate the 'superiority' debate. If appropriation of renders, however understood, was the hallmark of 'bookland', how did a king's lay followers live on what he gave them?⁶⁸ Charters were at first restricted to clerical beneficiaries. That, as we shall see, is why laymen in Bede's day made themselves out to be clergy. Yet warriors were clearly rewarded with land by grateful chiefs from the

⁶⁵ John, *Land Tenure*, chapters I–II. Like all students of these matters in the second half of the twentieth century, John took his lead from the epoch-making studies of Ernst Levy, above all *West Roman Vulgar Law. The Law of Property*. His position in this respect was to some degree anticipated by Vinogradoff, 'Buchland'.

⁶⁶ Levy's view, e.g. *West Roman Vulgar Law*, pp. 87–90, was that it was the (ongoing) relation of *possessor and donor* which distinguished 'Vulgar' from Classical *proprietas*. By contrast, John's adoption of Maitland's position ironically brought him into line with his major target, Stenton (nn. 50–1 above). It is a curiosity of his case that his 'anti-Germanist' position would have been much better supported by readiness to countenance the incipient 'manor', with its implied post-Roman continuities, of Aston and his own master, Finberg.

⁶⁷ For apt comment on the truism that no form of medieval land-ownership corresponded either to the *dominium* of Classical Roman Law or to the modern English freehold, see Bullough, 'Anglo-Saxon Institutions', n. 16.

⁶⁸ *Land Tenure*, 33–8.

earliest times.⁶⁹ If Maitland's 'great nobles' (scholars no longer incline to think them 'few') were maintained by 'slaves and *coloni*' alone, then the latter must have been almost as significant as on the model he repudiated. If, on the other hand, they were sustained by free tenants, wherein lay the distinctiveness of bookland? It is perfectly clear that the Church's chartered tenure was somehow new, and not merely by token of its being in the Church's preferred written medium. Yet diversion of resources till then garnered by kings cannot have been new, unless these had not been diverted to warrior aristocrats; which is inconceivable. The whole 'immunity'/'superiority' theory is predicated on pushing early aristocracies to the margin (where Stenton, unlike Chadwick, always liked to leave them). But we have to find space for lords as well as free men in post-Roman Britain. We cannot do that if we suppose any form of landlordship to have been a function of imported 'bookland'.

John's main argument was that it is therefore the 'intangible rights of free disposition and perpetual possession' that most clearly distinguished 'book-right' from 'folk-right'.⁷⁰ Had this remained his case, he would again have left little to argue against. As we have seen, that is just what the early charters say they bestow. It is also the message of their continental counterparts.⁷¹ But for reasons that his prose leaves almost inscrutable, John went on to insist that *ius perpetuum*, the 'greater' right, was in effect incompatible with freedom of disposition, the 'lesser', and must be given precedence. There is a logical inconsistency between giving a church possession for ever, and making it free to alienate the gift; canon law had indeed long since forbidden it to do that.⁷² 'Perpetual right' must therefore mean precisely what it said, to whomsoever it was given. Laymen received permanent possession, though they might – for at least a century it was

⁶⁹ A case in point is that Benedict Biscop received 'possessionem terrae' on retiring from Oswiu's service; only when he returned to Northumbria meaning to found a monastery was he given 'land of 70 hides', implicitly by charter: Hist. Abb i 1, 4, pp. 364–5, 367–8.

⁷⁰ *Land Tenure*, p. 38, and chapter III.

⁷¹ E.g. *Nichliterarischen Papyri*, ed. Tjäder, pp. 000; *CDL*, pp. 000; Pardessus, *Diplomata Chartae* 365, II, pp. 155–6; also 'Charte de Comte Eberhard', *Bibliothèque de l'École des Chartes* 99 (1938), pp. 5–41, at p. 000.

⁷² Cf. Reynolds, 'Bookland, Folkland and Fiefs', pp. 217–18.

assumed they *would* – found or endow a church therewith, i.e. alienate it. The charter created a perpetual entitlement to property that they would not otherwise have had. In other words, the laity had no *hereditary* property rights until bookland gave it to them. Charters created inheritance in real estate, anyway at the aristocratic level. ‘The powers of bequest and alienation conferred on the early churchmen were not intended to remove land from the family but to remove it from the royal power for ever, so that by allowing an abbot to give or sell his land, *and still more to pass it on to the next generation* [my italics], a clear demonstration was made that land granted out by the king had gone for good’. This was John’s explanation of why, as will be seen in a moment, noblemen began to set up fraudulent monasteries.⁷³

It comes as no surprise that this thesis has been controversial. It is not merely that barbarian peoples overall were quite familiar with hereditary family tenure, anyway to judge from Tacitus’ *Germania* (nowadays questionable on principle), and the continental *Volksrechte* (hardly less problematic).⁷⁴ It would not be easy to find any society at a comparable cultural stage which had no cognizance of inherited property. All of that apart, John’s case can be challenged both on the evidence and on its internal logic. In the first place, no sound charters before the 740s call booked property ‘hereditary’; like transfer of ‘tribute’, this looks like a secondary development, whose context we shall examine shortly.⁷⁵ Second, a very revealing passage of Bede’s ‘History of the Abbots’ describes the deathbed dispositions of his founding abbot, Benedict Biscop:

“Those who have carnal children in the carnal way (he is quoted as saying) inevitably seek carnal and earthly heirs to a carnal and earthly inheritance. But let those who beget spiritual sons to God ... think him the greatest among

⁷³ *Land Tenure*, pp. 44–9, and p. 49.

⁷⁴ Tacitus, ‘De Origine et Situ Germanorum’ 20, p. 00; cf. above, n. 22; and, for new light on the notorious ‘alod’ clause, *Lex Sal.* lix, Anderson, ‘Roman military colonies’.

⁷⁵ The earliest authentic text to use the phrase ‘hereditarie perpetualiter’ is apparently S 259 (749) for Winchester’s Old Minster – S 258 is the beneficiary’s fabricated adaptation of it.

their spiritual children who is endowed with the more abundant grace, just as earthly parents are accustomed to think that their first-born son should be preferred to the others in dividing out the inheritance.”⁷⁶

Here, then, ‘carnal’ or ‘earthly’ property owners are said to do what should metaphorically or spiritually, *not* literally, be done by churchmen. Biscop’s dominant pre-occupation was that he should in no circumstances be succeeded by a brother, real or imagined. It is a little hard to see how a type of property devised to endow churches like Biscop’s could as early as 690 have become the sort of secular inheritance with which he implicitly yet emphatically contrasted it.

John, moreover, appears to confuse two issues, so conflating two different restrictions that might govern landed property. One issue is unrestricted *gift*. This was the notion which Levy believed to have been introduced to barbarian peoples *via* Roman Vulgar Law.⁷⁷ ‘Germanic’ custom seems to have expected gifts to be reciprocated, on the principle made famous by social anthropologists.⁷⁸ Having quoted Levy on gift, John went on to supply an illuminating set of instances from secular poetry, the gist of which are that royal donors might well revoke a gift if faced with the death or other shortfall of the recipient.⁷⁹ Gifts by rulers were thus traditionally precarious. Hence, there was every

⁷⁶ Hist. Abb i 11, pp. 375–6; cf. Charles-Edwards, ‘Distinction between Land and Moveable Wealth’, pp. 100–1.

⁷⁷ Levy, *West Roman Vulgar Law*, pp. 164–8.

⁷⁸ E.g. well-known clauses in *Ed. Ro.* 172–5, concerning ‘thinx’ and ‘launegild’ (the reference to the disinheritance of ‘ingrati filii’, 174, is by way of analogy with clause 169 on disinheritance proper).

⁷⁹ *Land Tenure*, pp. 40, 53–6 (citing Chadwick, as n. 49). The most helpful texts for John’s purposes are *Widsith* 93–5, ‘Eadgils, my lord ...[who] granted me land, my father’s estate (*mines fæder epel*)’; and (not in fact cited by him) *Beowulf* 2606–8, Wiglaf ‘pondered over the honours that [Beowulf] had previously bestowed upon him, the opulent seat of the Wægmundings, every right (*gebnylc folcrihta*) that his father had possessed’. If it is seldom wise to deduce social norms from poetic dilemmas, there is no gainsaying the presumption of these passages that lords might withhold ancestral property. Yet one can observe in turn (i) that Widsith’s father’s estate might have been a (presumably ‘unbooked’) gift, so as revocable in principle as a ‘fief’; (ii) that it is here explained that Wiglaf’s father was a prince of the Swedish house who had been rewarded by their king for warlike deeds against Beowulf’s Geats (*Beowulf* 2602–3, 2611–19), so that for Beowulf to restore his lands was indeed magnanimous. Besides, for evidence that, by the time

reason why lands granted to God's immortal Church should be guaranteed the permanence of Roman ('Vulgar') Law; and why anathemas underlying grants tended to pinpoint a ruler's successors or agents as the chief threats to that permanence.⁸⁰

But this need not in the least mean that 'Germanic' law knew no such thing as tenure whose permanence consisted in inheritance from one generation of a family to the next. Levy for one certainly did not think that it did.⁸¹ There is no clear evidence before the early-twelfth century that English custom drew the distinction between inherited and acquired property that was basic to many legal systems, ancient and recent: the point being that land inherited from a family must be passed on to members of that family, whereas land obtained by gift, sale, exchange or whatever, could be given, sold, exchanged or otherwise transmitted to a party of the owner's choice.⁸² Nevertheless, there is every sign that the distinction was accorded great importance. On the one hand, we have just seen evidence that 'carnal and earthly' inheritance was a fact, one contrasted by Biscop and/or Bede with the norms of ecclesiastical tenure. On the other, we have also seen that from the outset Anglo-Saxon charters regularly insist that the land in question was alienable, as acquired property should have been and inheritance should not.⁸³ Kinsmen did challenge dispositions in favour of churches (or other 'outsiders') throughout the Anglo-Saxon period, as if family rights of reversion were thereby infringed. Because royal gifts now acquired a quality of permanence, kins were liable to equate them with what had 'always' been theirs. Æthelric son of Æthelmund's entitlement to bequeath his minster of Westbury to the bishop of Worcester, was

these lines are likely to have been written, there was a tendency to describe as hereditary what was nothing of the sort, see below, pp. 000, and nn. 000.

⁸⁰ As in **1., 4.;** and cf., e.g., S* 8–10, 12, 14–15, 19, 21; 1165, (1246–7), 65.

⁸¹ E.g. *West Roman Vulgar Law*, pp. 90–4: Levy's point here is that species of *conditional* tenures might be hereditary, as they would not of course have been in Classical Law.

⁸² Hn 70:21, and cf. Holt, 'Politics and Property', pp. 14–15, 50–1 (pp. 000); for an analogous position in early Irish law, see Charles-Edwards, *Early Irish and Welsh Kinship*, pp. 67–70, 82–4.

⁸³ See above, nn. 45–6. Relevant examples from the tenth and eleventh centuries are listed by Kelly, *Formulas in Anglo-Saxon Diplomas*, pp. 39–42; and for West Saxon examples 778–824, see Edwards, *Charters of the Early West Saxon Kingdom*, p. 310.

disputed by the 'Berkeley people' to whom his mother was arguably related.⁸⁴ Ely had regular trouble with donors' families. In one of the last disputes of the Old English era, the abbot of Ramsey saw off a patron's kinsman, if not without the aid sweeteners for the king and queen).⁸⁵ In these circumstances, production of a charter put one 'nearer to the oath' (justified in clinching one's case by compurgation).⁸⁶ A charter was *ipso facto* proof of acquisition, and so of alienability. The last word may again be left with King Alfred's laws:

The man who holds bookland, and his kinsmen left it to him: then we lay down that he may not give it away from his kindred, if there is document or witness that it was enjoined that he might not do so by those who originally acquired it, and by those who gave it to him; and let him give account of that before his kinsmen with the witness of king and bishop.⁸⁷

If kinly control of the descent of 'bookland' had been the norm, why it would it have to have been specially allowed for here?

The evidence, in short, is that the Church needed as much protection from kindreds attempting to engorge its endowments as from kings seeking to revoke them; and that charters gave it the one as they gave it the other. Bookland was irrevocable unlike traditional royal gift; it was alienable unlike traditional family property. From the new Church's viewpoint, it had to be both. Unless the likes of Cediti, Cisi and Crispa could alienate what was unalterably theirs (4.), nobles could only join kings as Church patrons by confronting the entrenched interests of their families. The sheer illogicality of the formula ostensibly permitting church land to be given away shows how crucial it was.

⁸⁴ LS 11–12, S 1187, 1433; Wormald, 'Charters, Law and Settlement of Disputes', pp. 152–7 (pp. 292–8), and *Deerhurst*, pp. 2–7. A king like Offa, on the other hand, might lay claim to the 'hereditas' of his 'propinquus', King Æthelbald, even though it had been alienated with Æthelbald's consent and indeed his own: LS 3, S 1257, 89, 1411.

⁸⁵ LS 150, and cf. 108, 116–17, 120, 122, 130; see above, chapter 3, pp. 153–7.

⁸⁶ LS 121; cf. 11–12, as above; also 24 (Helmstan's case, as chapter 3, pp. 144–8).

⁸⁷ Af 41.

A further consideration thus arises. We have seen (above, pp. 000) that a singularity of the Anglo-Saxon diplomatic corpus is its dominance by the instruments of kings. We can now see one reason why this should be so. Bookland let laymen as well as kings endow the churches whose archives monopolize the extant evidence. Only bookland could incontrovertibly allow them to do so. It would do a church no harm to have (or forge) a text which formally put it in possession.⁸⁸ But so long as it had the charter which lay behind a donor's gift, it could at least prove its right against that donor's kin, always its most likely opponents. It might indeed be well advised to hold on to the document after selling or exchanging the property, so as to protect its entitlement to have done that. It is then no surprise that church archives are full of royal grants to laymen, by no means all of which remained church possessions.⁸⁹ All of which indeed adds up to a revolution in Old English land-tenure; but hardly to so seismic an upheaval as the invention of inheritance.

At a couple of points in the discussion so far, reference was made to the fact that laymen before long came to pose as clergy in order to enjoy the special benefits that bookland bestowed. The evidence for this lies in Bede's great letter to Bishop Ecgberht, a text whose importance for the understanding of early English history in some ways compares with that of the *Ecclesiastical History* itself. It was critical in different ways both for the Maitland-Stenton 'immunity' thesis and for John's 'inheritance' theory. Its bearing on the former may be left to the next sub-section of this chapter. Its importance for the latter is that Bede says in so many words that laymen 'causing lands to be ascribed to them in **hereditary right** (*ius hareditarium*) by royal edicts' (my emphasis).⁹⁰ **Through most foolish donations it has come about that it is not easy to find a vacant place** for a new episcopal see. The answer lies in the monasteries, one or more of which should be converted into bishoprics by a council of king and bishops. For, **there are**

⁸⁸ See Kelly, *Ab. Ch.*, pp. 000, for this feature in the Abingdon cartulary; and compare the assessment of S* 1496, 1509 by Millar, *NM. Ch.*, pp. 000.

⁸⁹ Kelly, *Ab. Ch.*, pp. 000, thus explains the eccentric balance of Abingdon muniments (but for other possibilities, see below, n. 000).

⁹⁰ Epist. Bede 12, p. 415.

innumerable places, as we all know, allowed the name of monasteries by a most foolish manner of speaking, but having nothing at all of a monastic way of life.'

Bede goes on to ask, 'how can it be considered a sin if ... *the lying pen of wicked scribes* be deleted and made void by the discreet pronouncements of prudent priests'. Ecgberht should 'annul *the irreligious and unjust acts and writings of our predecessors*'. 'Laymen not experienced in the usages of life according to the rule', he goes on, 'give money to kings, and under the pretext of founding monasteries buy lands, and in addition, and even get those same documents of their privileges confirmed by the *subscription of bishops, abbots and secular persons*'. Finally, the scandal could easily be ended, 'if the very bishops did not prove rather to give help ... for not only do they not trouble to annul unjust decrees of this kind by just decrees, but rather are *eager to confirm them with their signatures*, driven at the dictates of avarice to confirm the same wicked documents'. 'A synod of king and bishops is to transform these places from *wanton living to chastity, from vanity to truth, from over-indulgence of the belly and from gluttony to continence and piety of heart*'. Laymen have bought their lands under the pretext of founding monasteries, 'on which they might more freely devote themselves to lust ... It is not monks that they collect there, but whomsoever they may perchance find wandering anywhere, expelled from true monasteries, or whom they can allure out of the monasteries, or indeed *those of their own followers whom they can persuade to promise to them the obedience of a monk and receive the tonsure*. With the unseemly companies of these persons they fill the monasteries which they have built, and a very ugly and unheard-of spectacle ... *the very same men now are occupied with wives and the procreation of children*, now rising from their beds perform with assiduous attention what should be done within the precincts of monasteries. Moreover, with like shamelessness, *they procure for their wives places for constructing monasteries, and these with equal foolishness, seeing that they are laywomen, allow themselves to be mistresses of the handmaids of Christ*'. So it is that, in the thirty years since King Aldfrith died (704), 'there has hardly been one of the reeves who has not procured for himself during his time of office a monastery of

this kind, and involved his wife with him in the guilt of this hateful traffic and thus by a perverse state of affairs, *numberless people have been found who call themselves abbots and at the same time reeves or thegns or servants of the king ...* And indeed ... such persons suddenly receive the tonsure at their pleasure, and *at their own judgement are made from laymen not into monks but abbots*'. According to Bede, 'there are many and large places of this kind, which are useful neither to God nor man, in that neither is there kept there *a regular life according to God's will*, nor are they *owned by thegns or companions of the secular power who defend our people from barbarians*'. Closing them down would 'provide for those things which may be most useful to our province ... lest in our times by the ceasing of religion, love and fear of him who sees into the heart be abandoned, or else, *by the dwindling of the supply of secular troops*, there arise a lack of men to defend our troops from barbarian invasion. For ... those who are totally ignorant of the monastic life have received under their control so many places in the name of monasteries ... that *there is a complete lack of places where the sons of nobles or of veteran thegns can receive an estate*; and thus ... *they either leave the country for which they ought to fight and go across the sea*, or else, with greater guilt and shamelessness, devote themselves to loose living and fornication ... and do not even abstain from virgins consecrated to God'. But the bogus monks, 'having usurped for themselves estates and villages, and being henceforward *free from divine as well as from human service* gratify their own desires alone'.

As King Alfred put it:

Every man likes, when he has built a hamlet on his lord's lease (*on his blafordes lane*) with his help, to stay there some time ... and to work for himself on the lease, until the time when he shall earn bookland and eternal inheritance through his lord's kindness (*De he bocland and ace yrfe Durh his blafordes miltse*

geearnige).⁹¹

The underlying analogy is with temporal and eternal life, Alfred praying that God 'grant to me that I be fit for both'. There can be no question, then, but that *ærf*/*yrf* had come to mean 'bookland', just as *hereditas* now did. So what is termed *yrf*/*hereditas* is at least as likely to have been acquired by charter as by inheritance properly so called.

⁹¹ Carnicelli 1969: 48; cf. Keynes and Lapidge 1983: 139.