

The Lessons of Anglo-Saxon “Justice”

Daniel R. Coquillette

TODAY WE FACE unprecedented problems in our system of justice and in our legal profession. The experience of the centuries is available to us, as it was to the founders of our legal order in ages gone. It is, as Felix Frankfurter said, only necessary to reach out to make it part of our own strength. Full of dark and stormy pages, as well as pages of courage and compassion, it is part of what it means to be an American lawyer today.

This essay is excerpted from a forthcoming book whose purpose is to provide a “road map” into this vast resource, covering the diverse strands of what Maitland called “the web” of the Anglo-American legal system. I also include in the book numerous original materials, since too often legal historians try to get between their students and the lawyers of the past.¹ In this essay, I discuss the Anglo-

Saxon period in our history, about which most lawyers know far too little.

“PRIMITIVE” ORIGINS

In 410 A.D. the Roman Emperor Honorius wrote his famous letter to the English *civitates* telling them to look “to their own defense.”² True cultural “darkness” fell over England a generation after the Roman departure. Savage invasions wiped the remaining “Romanized” peoples away. By the time St. Augustine arrived as a Christian missionary in 597 A.D., he reported that Saxon tribes were literally living in the Roman ruins at Canterbury and elsewhere. True, there were romantic legends of stout resistance by Romanized Britons. These even may have been the foundation of the tales of King Arthur. In cold reality, how-

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¹ Several of these are included here, immediately following the text of this essay.

² Three fine paperback accounts of this period are Peter H. Blair, *BRITAIN AND EARLY ENGLAND* (New York, 1963); J.A. Richmond, *ROMAN BRITAIN* (London, 2d ed., 1963); and Malcolm Todd, *ROMAN BRITAIN* (London, 1981).

ever, the land was divided among invading tribes, who constantly warred with each other and with new invaders. Except for the work of a handful of Christian priests, who were in frequent danger, there was almost no written record. Indeed, the number of surviving Anglo-Saxon records, even just before the Norman invasion, remains minuscule compared to all other historical periods, including the Roman. This, in itself, makes it hard to know enough about this period, which lasted from Honorius abandoning the Romanized Britons to the Norman Invasion of 1066 A.D., a period of more than six centuries.

We do know some things. The first invaders were Angles and Saxons from Germany who came, not as a united people, but as a group of separate tribes. These tribes were called "kin" and their leaders were called "chief kin" or "kings." Anglo-Saxon "kingdoms" were little more than tribal territories, and there were dozens of them.

During the period from 600 to 800 A.D., some of the more powerful "kings" were able to consolidate their kingdoms into fairly big units, such as the kingdom of Wessex in the south, Mercia and East Anglia in the Midlands, and Northumbria in the north. Christian missionaries, such as St. Germanus and St. Augustine, also visited at this time, and succeeded in converting most of the tribes to a fairly rude form of Christianity, although some evidence of paganism persisted for centuries alongside the new religion. In the period 800 A.D. to 900 A.D. there were even more invasions, this time by Vikings and Danes. The Danes drove the Anglo-Saxons out of much of the North and also settled down, creating a region still known as the "Danelaw." Anglo-Saxon kingdoms in the South united under the leadership of Alfred, King of Wessex (878-900 A.D.), "Alfred the Great," who succeeded in reaching a truce with the Danish in 879 A.D. which included the conversion of the Danish leaders to Christianity. Later, under King

Cnut (1016-1035 A.D.), large areas of England were actually united with Norway and Denmark, and many Scandinavian cultural traditions took root. The word "law" itself is of Danish origin.

From Alfred's death in 900 A.D. to the Reign of Cnut in 1016-35 A.D., England was divided into two customary areas, English and Danish, and there was constant struggle between the two regions. It is truly ironic that a Dane, King Cnut, was the first to unite the country, following major military victories over Wessex and Mercia, assisted by treason in the English court. But Cnut recognized the integrity of the English customs. A treaty at Oxford in 1018 A.D. began a long period of peace between the two groups, now under a national "king." When Cnut died in 1035 A.D., however, warring nobles of his Court again divided the country. Cnut's succession was disputed. Eventually the kingdom was inherited by Edward "the Confessor" (1042-66 A.D.), son of the last English King, Ethelred. Edward succeeded in restoring unity, but his death in 1066 A.D. once again left the country disorganized and divided, ripe for the Norman Conquest.

ANGLO-SAXON "LAW"

The warring tribes of the English and the Danes all had customs and traditions for resolving disputes, but we know very little about them because there were almost no written records. Only as the English and Danes were able to consolidate their tribes into larger "kingdoms," from about 880 A.D. to the end of the period in 1066 A.D., do we get better information.

Anglo-Saxon records fall into roughly three categories: 1) *dooms* or "laws" of particular kings; 2) customary oaths; and 3) *bocs*, or grants of land. Almost all of these were written by clerics, and many, particularly the *bocs*, were kept in churches. Not surprisingly, many of the surviving *bocs* involved grants of land to

the Church itself or to ecclesiastical foundations. Each of these different types of records tells us something about the evolution of law.

Dooms, or "laws," were promulgated by Anglo-Saxon and Danish kings. The earliest surviving example is from Ethelbert of Kent (c. 601-604 A.D.), but the most famous and best preserved are those issued by the great unifying kings, Alfred (between 890 and 900 A.D.) and Cnut (between 1016 and 1035 A.D.). (Sections from the *dooms* of Alfred follow this essay.) *Doom* referred to a judgment, hence our current usage of "Doomsday" for "Judgment Day." Most of Alfred's *dooms* were formulas for settling disputes, and they were often very graphic and technical, i.e., "44. For a wound in the head if both bones are pierced, 30 shillings shall be given to the injured man." They also focus almost exclusively on reimbursement to victims, except for specific provisions relating to the Church or the King himself.

There is a good reason for this. Most disputes involved tribal squabbles between rival kin groups. The King was often powerless beyond the immediate vicinity of his own stronghold, and there was no regular system of police, jails, or professional judges. Most cases involved direct injury and were resolved by settlements negotiated between kin groups. The King's *dooms* were little more than guidelines for such settlements. But why would tribal kin groups settle such disputes in the absence of any official force? The answer lay in the central role of the blood feud. Like many "primitive" people – i.e., peoples without much formal government – Anglo-Saxon clans, or extended families, felt a strong moral duty to retaliate for any wrong done to one of their own. The revenge could be directly to the perpetrator, or to a member of the perpetrator's clan who was "equivalent" in value to the victim. "Value" was determined by custom, and was expressed as the *wergeld*, or the "man price" of an individual, usually in shillings (i.e., "a 1200 shilling man").

Family members subject to blood revenge, or required to administer such revenge, might be less enthusiastic than say, the perpetrator. It is one thing to seek revenge in your own quarrel, but what about having to fight because of a stupid act by your dim nephew? In addition, blood feuds could go on and on, and use up time and energy. There was a clear incentive to resolve them peacefully, by making the payments set out in the *dooms*.

The occasions for these negotiations were the customary "courts," which met regularly at local sites, often a "Law Rock." These were called *moots*, and it was an obligation of all freemen in a particular neighborhood to attend (*moot worthy*). The most local of these courts, the courts of the "hundred" or, in the Danelaw, the *wapentake*, met every four weeks. (A "hundred" or *wapentake* was a group of villages – whether consisting of a hundred families or a hundred hides of land remains unclear. A hundred court was convened by a deputy of the sheriff.) There were also *shire moots*, run by the King's representative in the shire, the *shire-reeve* or sheriff, and – at the top – *moots* convened by the King himself.

At these *moots*, the freemen attending – the so-called *doomsmen* ("judgment men") – would discuss cases and suggest resolution of problems. In extreme cases, individuals would be declared "outlaws," and could be killed by anyone without any duty by kin to retaliate. Usually, however, kin were able to control the renegade relations and to hold them to settlements reached with the victim's kin.

While we are not sure exactly how these sessions proceeded, the *dooms* of the kings do give us some hints. In addition, there are descriptions of "Law Rock" meetings in some *bocs*, such as the *boc* written at Aegelnoth's Stone in 1036 A.D. and included at the end of this essay. Finally, traditional *moots* persisted in some remote parts of Scandinavia, particularly Iceland, until after writing was more common. *Njal's Saga*, written by an unknown

Icelandic author in about 1280 A.D., contains many descriptions of "Law Rock" negotiations, and of blood feuds when such negotiation failed. Although these Icelandic proceedings occurred long after the Anglo-Saxon period, they seem to fit closely the evidence left by the *Dooms* of Alfred and Cnut as to how proceedings occurred in Anglo-Saxon England.³

Finally, we have written records of "customary oaths," taken by accusers and by defendants alike at the Law Rock (and excerpted below). *Moots* were often attended by the local priest and ordeals arranged by the priest were sometimes used to establish the truth of a statement. Indeed, there is some indication that choice of ordeal was intended to obtain confessions, when appropriate, and thus were covertly "rational." Certainly, fear of lying under a holy oath was very real. Further, fear of blood feud led to serious efforts to arrange victim compensation, even when oaths clashed, as the passages in *Njal's Saga* indicate.

"CIVILIZING INFLUENCES"

Two factors gradually led to a change in this rudimentary system of victim compensation through fear of revenge. First, as the Kings developed more power, there were offenses which could not be discharged by paying a blood price, or *bot*. These were originally offenses against the King's own peace, the "King's Peace," or against the Church. They were called *botless* offenses, and required paying a fine directly to the King or Church, as well as paying victim compensation. For serious offenses, people could be executed. The "King's Peace" originally just extended to his own hall, or to the market places or roads under his protection. Later, the concept

expanded to include violent acts almost anywhere. This was, of course, the birth of our criminal law.

The Church had no kin. It relied, therefore, on the King for retaliation for harm to its priests and nuns. The Church also was the only institution where many people could read and write. The Anglo-Saxon *bocs* (hence our term "book") were probably invented by the Church to prove grants of land to itself and to provide a record to gain royal support if someone tried to steal Church property or land.

Thus the growing power of the King and the Church led to more *botless* "crimes" and more written records. Still, the *moot* system had no trained judges or lawyers. Much of its effectiveness rested on local negotiations, sometimes guided by the King's *dooms*. This was true right up to the Conquest, and even afterward.

WAS THIS A "LEGAL" SYSTEM AT ALL?

Assume that the so-called Anglo-Saxon "law" consisted of customary norms that were followed by tribal groups as an alternative to blood feuds. Is this "law" properly so called?⁴ Certainly there were no police, no institutional jails, no professional lawyers or judges, very little writing of any kind, and a high degree of informality of process. Those written laws that did exist – *dooms*, customary oaths, and *bocs*, or land grants – were not really rules backed by official sanctions, such as modern criminal codes. They were more like statements of customary norms, effective because of voluntary acceptance.

Of course, the growing power of the King led to fines and *botless* offenses that began to resemble modern criminal rules. In addition,

³ Interested readers can find *NJAL'S SAGA* excerpted in the book.

⁴ For a good summary of the academic controversy around this question, see Robert Redfield, *Primitive Law*, 33 U. CINN. L. REV. 1 (1964).

the Church – standing as it did outside the protection of the "kin" – gradually encouraged centralized royal power and written records for its own purposes. But were the negotiations at the "Law Rock" really a legal process?

One thing is certain. The Anglo-Saxons themselves called the customary system "law." That is the origin of our word. Secondly, we can recognize in it incipient elements of a formal legal system, including the regularly scheduled *moots* and the oath process. Most importantly, it was a system that defined and protected the value of each person in an increasingly formal way. It is, indeed, from the Anglo-Saxon *folc riht* that we derive our notion of "rights," and the word itself.

As we have mentioned before, to an Anglo-Saxon every person had a value, usually defined by the *wergeld* or blood price. The value might differ greatly from King to slave, but even slaves had value recognized by the "law." Secondly, every person had a personal "space" or "peace." The King's "peace" was quite large, and was expanded to include roads and markets, but even a slave or laboring *coerl* had a defined "space." The custom defining this "space" and value was called the *folc riht*. From this idea we get both the concept of personal "rights" and of "freedom" itself. Indeed, these are all Anglo-Saxon words. If we owe to the Romans the ideas and words for "justice," "legal," "codification," "judge," "equity," and "constitution," we owe to the Anglo-Saxon the concepts of "rights" and "freedom." In fact, the *folc riht* of the Anglo-Saxons was so important that the Norman conquerors, from William on, swore to uphold it.

If we deny the title "law" to such a system, we must do the same for much that we call

"law," especially "international law."⁵ "International law," like Anglo-Saxon law, is largely consensual, and survives because the alternative is risk of combat. There are often no genuinely effective "international jails," or "police," but we perceive the system as at least using the terminology and symbols of a legal system. When international punishments are administered for human rights violations, it is usually when a state is overthrown, defeated, or coerced by other sanctions. Those proceedings often are described as "legal" if they follow the customary norms.⁶

Of course, some elements of the Anglo-Saxon system are also compatible with the total vacuum of orderly government. Conditions in Albania before World War I led to a blood feud system.⁷ Indeed, whenever there is no credible police power, or where parties cannot make use of a formal system of sanctions, the same patterns emerge. Thus, even today the "families" of organized crime negotiate to avoid bloody retaliation in ways sharply reminiscent of the *dooms* of Alfred! Perhaps the best example is our own "Wild West," where the Anglo-Saxon sanction of *outlawry* was also found, and where *shire reeves* or sheriffs administered a rough justice. Even the words were the same as in Anglo-Saxon England! Whether called "law" or "no law," the dynamics of incipient legalism are very much worth studying, because they reoccur with regularity throughout time.

ANGLO-SAXON ISSUES

It has been said that legal history is merely a specialized form of comparative law. Instead of comparing different existing systems, i.e.,

5 As Redfield observed: "The road to the right recognizes law to exist only where there are courts and codes supported by the fully politically organized state. This road quickly becomes a blind alley, for only a few preliterate societies have law in this sense." *Id.*

6 See Telford Taylor, *NUREMBURG AND VIETNAM* 76-94, 154-182 (New York, 1971).

7 See Margaret Hasluck, *The Albanian Blood Feud*, in Paul Bohannon, ed., *LAW AND WARFARE* 381 (Natural History Press, 1967).

a “horizontal” comparison, legal historians make “vertical” comparisons, i.e., between systems separated by time, rather than by space. Anthropologists, such as Margaret Mead and A.S. Diamond, have made extensive studies of “primitive” legal systems existing today among remote peoples.⁸ But these systems, instructive as they may be, can never tell us as much about ourselves as the study of *our* own special primitive system, the ancestral forebear of our present legal science. Whether we discuss “murder,” “moots,” “shires,” “books,” “sheriffs,” etc., we are still using the language of the Anglo-Saxon law, just as our system of county government in many states has many features inherited directly from the Anglo-Saxons.

The crucial questions with regard to the Anglo-Saxon Period, however, are fundamentally “comparative,” i.e., they concern differences and not similarities. How could a non-compulsory criminal process work? How did the early communism of “the hundred,” so romanticized by Marxist writers, actually operate and why did it disappear? What lessons of effectiveness and justice can our society learn from a system whose principle sanctions were blood feud and outlawry? Are all “primitive” systems inherently inferior, and what do we mean by “primitive” anyway? Given the great inherent problems facing Anglo-Saxon society, a society without a trained judiciary or any form of professional law enforcement, there was a distinct utility, and even efficiency, to the legal institutions that slowly evolved. Certainly, it seems doubtful that either an Anglo-Saxon or a Roman would be entirely impressed by the present operation of our allegedly “advanced,” and very costly, system of dispute resolution, whether it

be criminal or civil. In any event, should we judge the “operation” of a legal system by its efficiency – i.e., social ordering – or its moral legitimacy, i.e., “justice?” Study of Anglo-Saxon law is fascinating in part because such fundamental issues are always present, even in this so-called “primitive” system.



ORIGINAL ANGLO-SAXON MATERIALS⁹

↪ *Dooms* ↪

THE LAWS OF ALFRED (890 – 900 A.D.)

I, Alfred king of the West Saxons, showed the following laws to all of my *Witan* and they declared that all of them are satisfied that they be observed. ...

- 4 If anyone plots against the life of the king, either on his own account or by harboring outlaws ... he shall forfeit his life and all he possesses ...
- 7 If anyone fights or draws his weapon in the king's hall and is for this arrested, it is for the king to decide on his death or on his life in the event the king wishes to grant him life ...
- 8 If anyone takes a nun from the cloister without the permission of the king or the bishop, he shall give 120 shillings, half to the king and half to the bishop or to the lord of the church in whose charge the nun is ...

⁸ See, e.g., Margaret Mead, *ed.*, *COOPERATION AND COMPETITION AMONG PRIMITIVE PEOPLES* (Boston, 1961); A.S. Diamond, *THE COMPARATIVE STUDY OF PRIMITIVE LAW* (London, 1963).

⁹ These come from C. Stephenson & F.G. Marcham, *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY* (Harper Brothers, 1937), with some additional editing by John P. Dawson.

10 If anyone lies with the wife of a 1200 man [i.e., a man whose *wergeld* is 1200 shillings], he shall pay the man 120 shillings, to a 600 man he shall pay 100 shillings, to a common free man 40 shillings. ...

12 If a man burns or cuts down the trees of another without permission, he shall pay 5 shillings for each big tree and 5 pence for each of the rest no matter how many there may be; and 30 shillings as a fine.

13 If one kills another unintentionally while they are engaged in common work by a blow from a falling tree, the tree shall be given to the dead man's kindred and they shall remove it from the land within 30 nights; otherwise the owner of the wood shall take it. ...

19 If one lent to another his weapon, by which he kills another, they may if they wish combine to pay the *wergeld*.

1 If they do not combine, he who lends the weapon shall pay one-third of the *wergeld* and one-third of the fine.

2 If he wishes to purge himself by swearing that in lending he knew nothing evil, he may do so. ...

24 If a cow or bull injures a man, its owner must hand it over to the injured person or settle with him for payment. ...

44 For a wound in the head if both bones are pierced, 30 shillings shall be given to the injured man.

1 If the outer bone [only] is pierced, 15 shillings shall be given.

45 If a wound an inch long is made under the hair; one shilling shall be paid.

46 If an ear is cut off, 30 shillings shall be paid. ...

47 If one knocks out another's eye, he shall pay 66 shillings, 6½ pence.

1 If the eye is still in the head but the injured person can see nothing with it, one-third of the payment shall be withheld. ...

↪ Customary Oaths ↪

(A) OATH OF A MAN TO HIS LORD

By the Lord before whom this holy thing is holy, I will to N. be faithful and true, loving all that he loves and shunning all that he shuns, according to the law of God and the custom of the world; and never by will or by force, in word or in deed, will I do anything that is hateful to him; on condition that he will hold me as I deserve and will furnish all that was agreed between us when I bowed myself before him and submitted to his will.

(B) OATH OF AN ACCUSER

By the Lord before whom this holy thing is holy, I thus bring my charge with full folkright, without deceit and without malice, and without any guile whatsoever, that stolen from me was this property, N., which I claim and which I seized in the possession of N.

(C) OATH OF ONE THUS ACCUSED

By the Lord ... neither by counsel nor by deed had I knowledge of or part in this, that the property, N., was carried off. On the contrary, I possess the property for this reason, that I lawfully inherited it. ... that *he*, having the lawful right to sell it, sold it to me. ... that it is the offspring of my own animals, my private property raised under my care.

(D) OATH OF ONE SEIZING PROPERTY

By the Lord ... I seize N. neither through hate nor hostility, nor through unrighteous greed, and I know nothing truer than what my spokesman has said for me, and what I now myself state as truth, that *he* was the thief of my property.

(E) OATH IN REPLY TO SUCH SEIZURE

By the Lord ... I am guiltless, both in thought and in deed, of the accusation made against me by N.

(F) OATH OF AN OATH-HELPER

By the Lord ... the oath which N. has sworn is clean and without falsehood.

↪ *Bocs* ↪

CANUTE: GRANT TO ST. PAUL'S, LONDON
(1036 A.D.)

I, King Canute, give friendly greetings to my bishops, my earls, and all my thegns in the shires where my priests of St. Paul's monastery hold land. And I make known to you my will that they shall enjoy their *sac* and *soc*, *toll* and *team*, within tide and without tide, as fully and continuously as they best had them in any king's day, in all things, in borough and out of

borough. And I will not permit any man in any way to do them wrong. And of this the witnesses are Aegelnth, archbishop; Aelfric, archbishop; Aelwi, bishop; Aelwine, bishop; Dudoc, bishop; Godwine, earl; Leofric, earl; Osgod Clapa, Thored, and many others.

May God curse him who shall pervert this [grant]!

CONFIRMATION OF A TITLE TO LAND IN
THE SHIRE COURT OF HEREFORD
(1036 A.D.)

Here, in this writing, it is made known that a shire court sat at Aegelnth's Stone in the time of King Canute. There sat Aethelstan, bishop; Ranig, alderman; Edwin, [son] of the alderman; Leofwine, son of Wulfsige; and Thurcil the White (*Hwita*). And thither came Tofig the Proud (*Pruda*) on the king's errand. And there were Bryning the sheriff, Aegelweard of Frome, Leofwine of Frome, Godric of Stoke, and all the thegns of Herefordshire. Then came faring to the court Edwin, son of Eanwen, and there claimed as against his own mother a portion of land, namely, Wellington and Cradley. Then the bishop asked who would speak for his mother. Then Thurcil the White answered, saying that he would if he knew the defence [that she cared to make]. Since he did not know the defence, three thegns were chosen from the court [to ride to the place] where she was, and that was Fawley. These [thegns] were Leofwine of Frome, Aegelsige the Red (*Reada*), and Winsige Sceaighthman. And when they had come to her; they asked her about the land which her son claimed. Then she said that she had no land which in aught belonged to him, and she burst into a noble rage against her son. Then she called thither her kinswoman Leoflaed, Thurcil's wife, and before those [present] thus addressed her: "Here sits Leoflaed, my kinswoman, to whom, after my day, I give both my lands and my

gold, both gear and garments, and all that I possess." After which she said to the thegns: "Do nobly and well. Announce my message to the court before all good men, telling them to whom I have given my land and all my belongings; and [that] to my own son [I have] never [given] anything. And bid them be witness of this [gift]." And they then did so, riding to the court and declaring to all the

good men what she had directed them [to say]. Then Thurcil the White stood up in the court and prayed all the thegns to grant his wife a clean title to all the lands which her kinswoman had given her, and they did so. And Thurcil then rode to St. Aethelberht's monastery, with the leave and witness of all folk, and caused this [grant] to be set forth in a Christ's book. 