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From Restoration to Retribution:

Evolution in the treatment of wrongdoing in early English law c.600 A.D. to c.1135 A.D.

by

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ABSTRACT

In England, there was a gradual shift from restorative to retributive justice over the course of the Anglo-Saxon and early Norman period. For much this period there are two approaches evident in the laws: to restore harmony through compensation and to punish offenders through retributive measures. The restorative aspect was gradually replaced by the retributive. Two factors are clearly indicated as major influences behind the shift in approaches to crime control. First is the impact of the Church, with its emphasis on punishment for moral wrongs; this is most apparent in the Penitentials. Second is the breakdown of traditional social control due to social disorders that weakened social bonds and increased centralization of political power. Traditional restorative justice had operated on a local level; as power was removed from this level to an increasingly distant king, it ceased to be seen as effective and so was replaced with retributive measures.

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CHAPTER I

INTRODUCTION

In a decision often cited as an example of the draconian acts of justice in the Middle Ages, Henry I of England in 1124 punished his minters for producing adulterated coinage by having each of them castrated and their right hands cut off. As the *Anglo-Saxon Chronicle* noted approvingly, "...it was all very proper because they [the minters] had done for all the land with their great fraud, which they all paid for."[1] Notwithstanding the harshness of the reported punishment, this observation of the chronicler does not strike a totally alien chord even today, since it is often affirmed in modern criminology and in the public at large that punishment for crime must be certain, swift and severe.

But Henry's act was likely considered worthy of mention in the *Chronicle* because it was a brutal departure from the standard response to offences in general, particularly when compared to the laws of the Anglo-Saxon period. Here, serious crimes, including homicide, were normally handled through payment by the offender of a compensatory fine (e.g. the *wergild* in case of homicide) paid to the victim or the victim's family. This, in effect, was a form of restorative justice (that is, restoring to the victim or the victim's kin what had been lost through the transgression) which was aimed at limiting the animosity between family groups. To this end, restorative justice has at its aim not only restoration of personal loss, but also reconciliation between victim and offender, with the idea of maintaining harmony with a community. When the Anglo-Saxon laws are compared to the laws of the post-Conquest period there appears to have been a notable shift in the new Norman regime to retributive justice, characterized particularly by an increase in executions. It is my intention to

[1] *The Anglo-Saxon Chronicles*. Ed. and trans. Michael Swanton. (Great Britain: J.M. Dent, 1996; London: Phoenix Press, 2000), 255.

determine when this apparent shift took place, what the motives may have been for instituting this new style of justice, and the social and political factors that influenced it. The focus will be on the period between c. 600 A.D. and c. 1135 A.D., encompassing the period of the Anglo-Saxon and early Norman law codes and the period in which the shift in judicial tactics appears to have occurred.

It is my hope that this study will be of value on several levels. The methods used to deal with transgressors reveal clues to the social, political and legal circumstances of a culture. Dispositions can also give us clues as to the social values of the period, particularly in terms of what was acceptable sentencing for specific categories of people. This course of research has the potential to broaden significantly our understanding of critical aspects of Anglo-Saxon and early Norman culture.

An examination of how wrongdoers were dealt with in early medieval England is important not just in an historical perspective; it also has relevance to the modern criminal justice system, in which there is a trend towards restorative justice initiatives. This has arisen in large part out of attempts to address the issue of native over-representation in the criminal justice system, specifically in penal institutions. Initiatives such as native sentencing circles have been employed in the hope that using traditional aboriginal restorative justice techniques will help to correct the problem of native over-representation in the prison system. This approach quickly gained popular approval, moved into youth justice programs, and has expanded beyond aboriginal offenders. The continuing growth of the popularity of restorative justice can be seen in such programs as Edmonton's Victim-Offender Reconciliation Program, which is used to divert cases from the court system.

Popularity is not, however, a reliable measure of effectiveness. Aboriginal justice systems traditionally functioned within small, tight-knit communities with strong systems of informal social control. Whether such restorative justice can be expected to function as well in our modern, urban society is a matter for debate. It is worth remembering that restorative justice is not really a new concept in our legal system. Canadian law has developed out of British common law, and can be traced back to its Anglo-Saxon roots. The Anglo-Saxon law codes that have come down to us are distinctive in their restorative approach to justice. As modern reformers stress the importance of restorative justice in dealing with crime, in a curious way returning full circle to Anglo-Saxon notions, the time is ripe for considering why and how restoration was replaced by retribution in the first place.

Up until now, scholarly focus dealing with crime and law enforcement during this formative period of English justice has generally emphasized constitutional issues: that is, how did the law develop in its particulars, and what institutions - such as the chancery, the exchequer, and eventually the court system as a whole - arose to promote it. There has been little written on why this was done or of the nature and impact of contemporary perceptions. In short, previous studies have tended to examine how the law affected society, rather than vice versa. S.F.C. Milsom wrote, "Why is it that so much less progress has been made with the law than with its institutions? Largely it is because less has been attempted. Few lawyers venture into history, and few historians deal with the law on its own terms."[2] A closer examination of the mutual interaction of law and society is thus critical for understanding the treatment of crime in this or any other period in history.

Michael Lobban writes of legal history in general,

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[2] S.F.C. Milsom, 'Introduction' in Sir Frederick Pollock and Frederick William Maitland, *The History of English Law before the time of Edward I* (Cambridge: Cambridge University Press, 1968. First Edition 1895, Second Edition 1898, Reprinted with a new introduction and Bibliography by S.F.C. Milsom 1968), xxiv.

> For many eras of legal history, we do not have treatises or long discourses concerning the law, but we rather have relatively brief records of decisions. In other words, we have a series of isolated utterances which presume but do not articulate a language: but the judgment must be made sense of in the context of this broader unstated language. The legal historian thus often has the task not only of understanding what the language used meant in its context, but also recreating the language itself. ...[the historian] might make an interpretation which no practitioner or subject made. He might also, even if unwittingly, import anachronistic concepts to help make the best interpretation. The historian should rather seek to make the interpretation which best reflects what contemporary agents understood the law to be.[3]

Lobban's words are particularly appropriate to the study of early English law. This formative period of English justice has not left us much of a record to study. Some of the early law codes have survived, but little else. As we shall see, decisions and sentences are mentioned occasionally, but only briefly and never in the sort of detail that a historian would wish. As Anthony Musson writes, there are "...evidential problems that confront historians of the Anglo-Saxon period: sometimes there is explicit evidence, but often there is only the merest hint, so careful reconstruction is required."[4] Furthermore, it was not until later that legal treatises such as Bracton and Glanvill were written. For the most part, that which would interest us was not deemed worthy of committing to writing.

As a result, most historians have shied away from deep analysis of the early medieval law and its interaction with Anglo-Saxon culture, and instead have addressed later medieval law, for which records are more plentiful. There have indeed been a number of recent works covering the later period, not the least of which include those by John G. Bellamy,[5] Barbara A. Hanawalt,[6] and Anthony Musson and W.M. Ormrod.[7] R.C. Van Caenegem's collection of

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[3]Michael Lobban, 'Introduction: The Tools and the Tasks of the Legal Historian' in *Law and History*, ed. Andrew Lewis and Michael Lobban (Oxford: Oxford University Press, 2004), 5.

[4] Anthony Musson, 'Myth, Mistake, Invention? Excavating the Foundations of the English Legal Tradition' in *Law and History*, ed. Andrew Lewis and Michael Lobban (Oxford: Oxford University Press, 2004), 77.

[5] John G. Bellamy, *The Criminal Trial in Later Medieval England: Felony before the Courts from Edward I to the Sixteenth Century* (Toronto: University of Toronto Press, 1998).

[6] Barbara A. Hanawalt, *Crime and Conflict in English Communities, 1300-1348* (Cambridge: Harvard University Press, 1979). See also Barbara A Hanawalt and David Wallace, eds. *Medieval Crime and Social*

legal cases is a very useful compilation, but he does not include any cases before 1066.[8] There has also been recent academic interest in various aspects of violence in medieval society. Again, these tend to address the later medieval period. For example, of the essays collected in *Violence and Medieval Society,*[9] none concern pre-Conquest England.

Those who have studied the Anglo-Saxon period have tended to focus on more concrete issues for which more evidence exists, such as the institutional and procedural developments in law. For example, Bryce Lyon concentrates on institutional and structural topics when discussing Anglo-Saxon law in *A Constitutional and Legal History of Medieval England.*[10] Ann Williams, in her examination of Anglo-Saxon government, including legal issues,[11] is concerned primarily with the institutional structures of kingship. Doris Stenton's earlier work on English justice is concerned with the development of the procedural elements of the law.[12] Those who have studied the Anglo-Saxon laws themselves for reasons other than such constitutional histories or procedural developments tend to do so for completely non-legal works. For example, Dorothy Whitelock has studied Cnut's laws to determine whether or not they were written by Wulfstan for the purpose of, "...understanding of the career of one of the foremost of Anglo-Saxon statesmen and for a correct interpretation of

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Control (Minneapolis: University of Minnesota Press, 1999), which likewise deals with the later medieval period.

[7] Anthony Musson and W. M. Ormrod, *The Evolution of English Justice: Law, Politics and Society in the Fourteenth Century* (Hampshire: Macmillan Press; New York: St. Martin's Press, 1999).

[8] R.C. Van Caenegem, ed. *English Lawsuits from William I to Richard I,* 2 vols. (London: Seldon Society, 1990).

[9] Richard W. Kaeuper, ed. *Violence in Medieval Society* (Woodbridge: The Boydell Press, 2000).

[10] Bryce Lyon, *A Constitutional and Legal History of Medieval England* (New York: Harper & Brothers Publishers, 1960).

[11] Ann Williams, *Kingship and Government in Pre-Conquest England, c.500-1066* (London: MacMillan Press Ltd., 1999; New York: St. Martin's Press, Inc., 1999).

[12] Doris M. Stenton, *English Justice Between the Norman Conquest and the Great Charter 1066-1215* (Philadelphia: The American Philosophical Society, 1964).

Cnut's character and of the course of events at a critical moment of Anglo-Saxon history."[13] In short, consideration of the law as it applied to controlling criminal behaviour at the time has only been addressed tangentially.

What scholarship there is on the Anglo-Saxon laws themselves owes a great deal to F. Liebermann. His *Gesetze der Angelsachsen*[14] set out the authorship and chronology for the Anglo-Saxon codes,[15] and its supremacy in the field has not been supplanted. For those who find this work, offering the Latin and Old English versions along with German translations, inaccessible, there have since been English translations of the codes. These few have set out the codes in chronological order but without an in-depth analysis of the changes from one to another.[16] The standard works on English common law treat the Anglo-Saxon laws as if they were a single unit. Frederick Pollock writes of these laws, "All they do is to regulate and amend in details now one branch of customary law, now another."[17] He goes on to examine the laws by topic[18] and does not examine the evolution of the laws through the Anglo-Saxon period. A standard starting point for any examination of early English law is Pollock and F.W. Maitland's *History of English Law before the time of Edward I.* Yet even in this work, the authors admit that their primary focus is the law in the Angevin period, and in particular

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[13] Dorothy Whitelock, 'Wulfstan's Authorship of Cnut's Laws', *English Historical Review*, 70 (1955), (extracted from *PCI Full Text*, published by ProQuest Information and Learning Company, 2003), 74.
[14] F. Liebermann, *Die Gesetze der Angelsachsen*, (Aalen: Scientia, 1960; Halle: M. Niemeyer, 1903-1916).
[15] H.C.W. Davis, 'The Anglo-Saxon Laws', *The English Historical Review*, Vol. 28, No. 111 (July, 1913), 418.
[16] Specifically, F.L. Attenborough, ed. and trans., *The Laws of the Earliest English Kings* (New York: Russell & Russell Inc., 1963), and A.J. Robertson, ed. and trans., *The Laws of the Kings of England from Edmund to Henry I* (Cambridge: Cambridge University Press, 1925; New York: AMS Press, Inc., 1974). These works, along with L.J.Downer, ed., trans. and commentary, *Leges Henrici Primi* (Oxford: Clarendon Press, 1972), are the English translations from which I worked for this paper. While Leibermann remains the authoritative compilation of the Anglo-Saxon laws, I have chosen the more accessible English works over his work which is available only in German.
[17] Frederick Pollock, 'Anglo-Saxon Law', *The English Historical Review*, Vol. 8, No. 30 (April, 1893), 240.
[18] Topics listed in Pollock, 'Anglo-Saxon Law', 242.

the thirteenth century.[19] They point out that, "This book is concerned with Anglo-Saxon legal antiquities, but only so far as they are connected with, and tend to throw light upon, the subsequent history of the laws of England..."[20] They observe, "When once a race has got its *lex*, its aspirations seem to be satisfied. In the ninth century, Alfred speaks as though Offa (757-96), Ine (688-725), Aethelbert (c.560-616) had left him little to do."[21] While this does reflect the conservative nature of the laws, it certainly neglects the fact that there were indeed changes from one code to the next, as I will demonstrate. Occasionally, when examining a specific topic, a scholar may briefly trace how one specific matter was dealt with in a few of the Anglo-Saxon codes and how it changed over the years, as Thomas Green does for homicide.[22] There has not, however, been any comprehensive examination of how the laws changed over the course of the Anglo-Saxon period.

Nor have any scholars dealt with the evolution of the recommended responses to transgressions within the Anglo-Saxon codes. There is very little attention paid to the details of sentences, or how sentences changed over time. In a 33-page article on Anglo-Saxon law, Pollock devoted only two paragraphs to punishments, with no acknowledgement of the changing nature of these measures.[23] In *History of English Law,* Pollock and Maitland wrote, "...we should have dwelt much longer in the domain of criminal law if Sir James Stephen had not recently laboured in it."[24] Unfortunately, Stephen essentially wrote off the Anglo-Saxon portion of this domain in one stroke with, "It is a matter of great difficulty, indeed I

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[19] Sir Frederick Pollock, Sir Frederick and Frederick William Maitland, *The History of English Law before the time of Edward I* in two volumes (Cambridge: Cambridge University Press, 1968. First Edition 1895, Second Edition 1898, Reprinted with a new introduction and Bibliography by S.F.C. Milsom 1968), ci and cv.
[20] Pollock and Maitland, *English Law*, 25.
[21] Pollock and Maitland, *English Law*, 13.
[22] T.A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago: University of Chicago Press, 1985), 50-51.
[23] Pollock, 'Anglo-Saxon Law', 260.
[24] Pollock and Maitland, *English Law*, cvii.

think it would be impossible, to give a full and systematic account of the criminal law which prevailed in England in early times."[25] He relies mainly on the *Leges Henrici Primi* to determine the nature of Anglo-Saxon law, and relates the history of Anglo-Saxon law thusly: "The laws of the different kings closely resemble each other in their general outline. Indeed, they are, to a great extent, re-enactments of each other, with additions and variations... To extract anything complete or systematic from such materials is obviously impossible."[26] He later covers the history of punishments in the period with, "...the punishments inflicted for what we now call treason and felony, varied both before the Norman Conquest, and for some time after it. At some periods it was death, at others mutilation..."[27] He, as others have, treated the Anglo-Saxon laws as a single entity, making broad generalizations without examining the evolution of the laws.[28] Furthermore, he viewed every measure taken to address transgressions as punishments; for example, he states that "The punishments appointed for [crimes] were either fines or corporal punishment, which was either death, mutilation, or, in some cases, flogging... The fines were called *wer*, *bot*, and *wite*."[29] This fails to appreciate the restorative nature of these payments. As a more recent example, an introductory text to English crime and punishment Anglo-Saxon compensatory measures and corporal punishments are only briefly mentioned.[30] In the following few pages, a number of changes in the centuries surrounding the Norman Conquest are explored, but there is no further comment on sentences; the move away from compensation is not covered at all. This

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[25] Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, 3 vols., (London: MacMillan, 1883), i. 52.
[26] Stephen, *Criminal Law*, i. 52-53.
[27] Ibid., i. 458.
[28] Stephen, *Criminal Law*, i. 55-58. For example, stating that "all crimes were, on a first conviction, punishable by *wer*, *bot* and *wite*", i. 57.
[29] Ibid., i. 57.
[30] John Briggs, Christopher Harrison, Angus McInnes and David Vincent, *Crime and Punishment in England: An Introductory History* (New York: St. Martin's Press, 1996), 6.

text also exemplifies the tendency to look to the Norman period when examining justice, as it states that, following the disorder during the reign of Stephen (1135-54), "It was recognized, perhaps for the first time in English history, that a lawless society in the end benefited nobody."[31] The implication is that social disorder and crime were not previously recognized as a serious problem, yet the evidence, as I will show, indicates that already in the Anglo-Saxon period, the issue had been recognized and rulers had taken steps to address it.

Further consideration of early English law codes is thus long overdue. In discussing Anglo-Saxon law, H.R. Loyn states,

> Government itself could be brutal, all the more so in the early centuries when the Anglo-Saxons were avowedly almost aggressively slave-owners. Death, mutilation, reduction to slavery, savage corporal punishment lie behind the bland statements sometimes made about discipline and peace-giving institutions. In studying government we study the slow progress made in our western societies towards the framing of a more rational order, but we should be deceiving ourselves as well as our readers if we failed to draw attention to the substantially unrecorded acts involving the irrational exercise of physical force that continued to operate near the legal surface.[32]

There are several issues in this passage that are worthy of more consideration. Loyn mentions the "progress made in our western societies", which seems to tread dangerously close to a whiggish interpretation of history. That there is an implicit belief in progress in legal history can be problematic, if not ironic, as indicated by the modern attempts to revisit the notion of restorative justice. Loyn mentions the "irrational exercise of physical force" behind recorded legal actions. This statement would appear to refer to the feuding that, especially in the early period, surrounded the 'official' legal tradition. This characterization is questionable, however, as the bloodfeud tradition operated according to what were,

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[31] Briggs et al., *Crime and Punishment*, 8.
[32] H.R. Loyn, *The Governance of Anglo-Saxon England: 500-1087* (London: Edward Arnold, 1984), 5.

especially to those involved, very rational 'rules' of conduct, and the violence was undertaken for specific reasons. Richard Fletcher tells us,

> ...accepted norms exist for the conduct of hostility within the feuding relationship: norms relating to the extent of collective liability, the acceptable degree of violence and bloodshed, the notion of approximate parity in the rhythmic alternation of hostile encounters, the condemnation of what is judged unacceptable. Convention features also in the common acceptance of an apparatus for negotiating between the hostile parties, for satisfying grievances in a mutually acceptable manner and for making...peace on terms that are satisfactory to the sense of honour of all concerned.[33]

Fletcher also uses the example in the poem *Beowulf* to demonstrate that, in the eleventh century, feuding parties were morally obliged to be open to negotiation for peace.[34] All of this indicates a level of rationality unacknowledged by Loyn.

As well, Loyn may be overstating his case. To be sure, the Middle Ages have often been characterized as brutal times; however, he provides no evidence regarding what he admits are "unrecorded acts" beneath the "legal surface". I would argue that, given the evidence, it is fair to say that the early Anglo-Saxon rulers were less brutal in their responses to wrongdoings than their successors in the late Anglo-Saxon and early Norman periods who, for reasons I will attempt to determine, turned from restorative to retributive (and often brutal) forms of punishment as a matter of course.

The most recent works in this area have been by Paul Hyams, who has addressed the issue of restorative and retributive justice to some extent in his work on feuds. In his work, the legal system (such as it is in its early development) takes second stage to the violent self-help measures of the feud. For this reason, he does not focus on the penalties imposed by

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[33] Richard Fletcher, *Bloodfeud: Murder and Revenge in Anglo-Saxon England* (London: Penguin Books, Ltd., 2002; Oxford: Oxford University Press, 2003), 9.
[34] See Fletcher, *Bloodfeud*, 11.

law. He does, however, touch on the topic briefly in an essay published in *Violence in Medieval Society:*

> ...the scanty evidence suggests that private accusers remained the norm still taken for granted in eleventh-century England. For this reason alone, I prefer to phrase the argument more in terms of the West Saxon kings having established the centrality, even dominance of what might best be termed 'Downwards Justice' in a world of essentially private accusers. The reformulation is no mere pedantry. It reopens the question of the locus within which violence occurred, around the possibility that the whole atmosphere of Law and Order in the late Old English period turned less on state-like repression of 'crime' than on feud-like pursuit of wrongdoers.[35]

Hyams notes that he makes his argument, "...in full recognition that the sources will not bear any statistical evaluation. I can show that both royal and private initiatives were present and important, but cannot establish which dominated."[36] This perspective seems to assume that violent retribution was always the norm, and the question is merely in which arena was it played out, the public or the private realms. My response is that violent reactions to wrongdoings have likely been the result of the failure of non-violent (i.e. compensatory) measures; this failure would be reflected both in the private realm in bloodfeud and in the public realm in retributive, punitive legal measures taken officially against offenders. This failure would be exacerbated by the centralization, and hence depersonalization, of government, a process that would also lead to harsher measures being taken against offenders.

I will look at the subject from a number of perspectives. I will begin by examining the sources that are the most plentiful, namely the extant law codes from the Anglo-Saxon period and that known as the *Leges Henrici Primi,*[37] from the reign of Henry I (1100-1135). The *Leges* seems a logical end point for this discussion for reasons beyond the fact that it is

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[35] Paul Hyams, 'Does it Matter when the English Began to Distinguish between Crime and Tort?' in *Violence in Medieval Society*, ed. Richard W. Kaeuper, (Woodbridge: The Boydell Press, 2000, 107-128), 117.
[36] Ibid., 117 n.35.
[37] *Leges*, ed. Downer.

the last law code we have. The early Norman kings had attempted to maintain continuity with the Anglo-Saxon past; Henry I's desire to maintain perceived continuity with the Anglo-Saxon past was expressed in his statement that he restored to England the laws of King Edward.[38] Furthermore, the Anglo-Saxon law codes, even after the Norman Conquest, are free from Roman influence, and no Roman legal influences have been found in the Leges.[39] The work known as the *Leis Willelme* will not be examined; while scholars had previously considered it to have been written in the time of William Rufus or Henry I,[40] more recent scholarship places it between 1150-1170[41] and thus outside of the scope of this paper, as the influences of Roman (Civil) law began to work their way into England in the middle of the twelfth century, and by the later twelfth century had a significant impact in England.[42]

Donald J. Black, in discussing the sociological approach to law, states that, "From a sociological point of view, law is not what lawyers regard as binding or obligatory precepts, but rather, for example, the observable dispositions of judges, policemen, prosecutors and administrative officials."[43] In the period being examined, there is little distinction between the law in writing and in practice, as the law codes were not written to establish new law so much as to codify and thus regularize the law that was in practice. This is fortunate, as there is little evidence to be had outside of what can be found in the law codes.

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[38] C. Warren Hollister, *Henry I* (New Haven: Yale University Press, 2001), 112.
[39] Ralph V Turner, 'Roman Law in England Before the Time of Bracton', *Journal of British Studies*, Vol. 15, No. 1 (Autumn, 1975), 1-2, 5. As Turner points out, the only Roman influence that can be found is "the impetus to write down laws."
[40] Leibermann dated it 1090-1135, Felix Liebermann, "Uber die leis Willelme," *Archive fur das Studium der Neuen Sprachen und Letteraturen* (Brunswick, 1901), CVI, 118-30 cited in Turner, 'Roman Law', 5.
[41] H.G. Richardson and G.O. Sayles, *Law and Legislature from Aethelberht to Magna Carta* (Edinburgh, 1966), 121 and Appendix II, cited in Turner, 'Roman Law', 5.
[42] Turner, 'Roman Law', 6-7.
[43] Donald J. Black, 'The Boundaries of Legal Sociology' in *Yale Law Journal* vol. 81 issue 6, May 1972, 1086-110, (extracted from HeinOnLine), 1091.

Such rare mentions of justice as there are in contemporary narrative sources will be examined for what they can tell us about justice as it was practiced and for what they can tell us about public opinion. The medieval penitentials will then be used to shed light on ecclesiastical punishments, both because they give further insight into the idea of punishments in general and because they express the Church's view on justice in this period when the Church had a tremendous influence.

Finally, I will look at the general social and political factors that may have influenced the punishments that were used in this period. I will briefly outline how these factors could have not only led to the failure of restorative justice but also led to more retributive, punitive forms of justice. I will examine social control in the Anglo-Saxon period including the use of restorative justice to maintain social harmony, and the breakdown of this system that likely led to the retributive justice that can be seen by the Anglo-Norman period.

CHAPTER II

THE EVIDENCE FROM THE LAW CODES

There are a number of extant law codes from both the Anglo-Saxon and Anglo-Norman periods. There is a great deal of continuity in them, as they are by nature conservative, each building on its predecessors. This can established in the words of the codes themselves; from the seventh century, for example, "Hlothhere and Eadric, Kings of Kent, extended the laws which their predecessors had made, by the decrees which are stated below."[44], or in the code of Wihtred, "...the notables, with the consent of all, drew up these decrees, and added them to the legal usages of the people of Kent, as is hereafter stated and declared..."[45] In the introduction of the ninth century code of Alfred (871-99) it is written:

> Now I, King Alfred, have collected these laws, and have given orders for copies to be made of many of those which our predecessors observed and which I myself approved of. But many of those I did not approve of I have annulled, by the advice of my councillors, while [in other cases] I have ordered changes to be introduced. For I have not dared to presume to set down in writing many of my own, for I cannot tell what [innovations of mine] will meet with the approval of our successors. But those which were the most just of the laws I found – whether they dated from the time of Ine my kinsman, or of Offa, king of the Mercians, or of Aethelberht, who was the first [king] to be baptized in England – these I have collected which rejecting the others.[46]

In part, this was a political statement: by mentioning not only Ine (688-725), a previous king of Wessex, but also Offa (757-96) of Mercia and Aethelberht (c.560-616) of Kent, and by including some of their decrees, he demonstrated to the Kentishmen and Mercians that he would respect their traditions at a time when he was establishing Wessex superiority over Kent and Mercia.[47] The passage as a whole confirms what seems logical – that the law codes

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[44] Hlothhere and Eadric, Attenborough, *Laws*, 19.
[45] Wihtred, Attenborough, *Laws*, 25.
[46] Alfred, Attenborough, *Laws*, 63.
[47] Patrick Wormald, 'The Ninth Century' in *The Anglo-Saxons,* ed. James Campbell (Phaidon, 1982; Penguin Books, 1991), 157.

were developed through a combination of long-standing traditions and new innovations to address contemporary issues. As has been mentioned, the changes in these laws have been overlooked and need to be considered along with the continuities.

These codes may not give us a definitive view of the dispositions that were actually meted out. They do, however, give us an idea of what was customary practice, and what was a theoretical ideal. For example, the level of detail laid out in establishing compensation rates (see below, page 18) indicates that this was a regular practice. On the other hand, the pointed arguments against excessive use of the death penalty that can be found in many of the law codes, often near the beginning, suggests that this was not a reflection of how things were as much as it was an attempt to change a practice. By way of illustration, in the laws of Aethelred (978-1016), dating from c. 1000 A.D. he stated,

> And it is the decree of our lord and his councillors, that Christian men shall not be condemned to death for too trivial offences, but, on the contrary, merciful punishments shall be determined upon for the public good, that the handiwork of God, and what he purchased for himself at a great price, be not destroyed for trivial offences.[48]

The very wording indicates that there was a "practice" of what Aethelred considered to be excessive use of the death penalty, and that this particular decree was an attempt to alter said practice. The wording also betrays the influence of the Church on the law, or at least on the law-maker – a matter to which I will return.

These codes thus set out long established traditions as well as whatever new decrees are felt necessary. By examining both the continuities and changes in the responses to

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[48] V Aethelred 3 in Robertson, *Laws of the Kings*, 81. Cnut repeated this almost verbatim in his code: "And we forbid the practice of condemning Christian people to death for very trivial offences. On the contrary, merciful punishments shall be determined upon for the public good, and the handiwork of God and the purchase which he made at great price shall not be destroyed for trivial offences." II Canute 2a1, Robertson, *Laws of the Kings*, 177.

transgressions stipulated in the law codes, it should be possible to determine when and to what degree there was a shift in judicial measures taken against offenders.

In the early Anglo-Saxon period, there appears to have been more importance placed on what may be labeled restorative justice: attempts to make amends, to offer compensation in order to make things right. Barlow states that, in the Anglo-Saxon period, a "...crime was considered a tort, an occasion for the payment of appropriate damages to the victim or his kin..."[49] Crimes and torts are two separate types of offences in modern law – crimes being acts (usually of an immoral nature) that violate the criminal code and are subject to public prosecution and punishment upon conviction, and torts being acts that injure a person or property for which the injured party may seek compensation privately through civil action. To avoid confusion it is best to refrain from using either word in the context of this paper, as the Anglo-Saxons would have simply understood these actions as wrongdoings. Such transgressions were to be dealt with not through punishment but rather through compensation. The basic principles of compensation (i.e. wergeld) existed in all the Germanic societies in some form.[50] The goal in pursuing this form of justice was to restore harmony to the community. This approach can be seen in the early law codes of Anglo-Saxon England; the laws themselves stipulate what can be understood to be restorative measures.

There are a number of law codes from the Anglo-Saxon kings that are extensive enough to give an idea of their overall methods of addressing wrongdoings. They will be examined in chronological order to aid in determining when there was a perceivable shift in these methods. The first Anglo-Saxon legal code that we have is that of King Aethelberht I

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[49] Frank Barlow, *The Feudal Kingdom of England 1042-1216,* (New York: Longman, Inc., 1988), 50.
[50] Loyn, *England,* 45.

(c.560-616) of Kent. Though the exact date that this code was issued is uncertain, it was in effect in the early seventh century.[51] There were ninety laws in this code, almost all of which involved compensation in one way or another.[52] Most of these laws stipulate exact compensation, for example, "He who smashes a chin bone, shall pay for it with 20 shillings."[53] Others stipulate proportional compensation, such as "If a freeman robs the king, he shall pay back a nine fold amount."[54] There are different levels of compensation depending on the status of a victim. For example, "If a man lies with a maiden belonging to the king, he shall pay 50 shillings compensation",[55] while "If a man lies with a nobleman's serving maid, he shall pay 12 shillings compensation."[56] This legal acknowledgement of status is logical given that, in the middle ages, class structure was perceived as being the natural social order of mankind. That we see it set out in black and white like this confirms the importance placed on a person's social status – it affects not only their personal worth, but also the value of any damage that is done to them. There is a very detailed breakdown of the levels of compensation due in cases where violence is done to a person. To give but a brief sample of this breakdown:

34. I f a bone is laid bare, 3 shillings shall be paid as compensation.
35. I f a bone is damaged, 4 shillings shall be paid as compensation.
36. I f the outer covering of the skull is broken, 10 shillings shall be paid as compensation.
37. I f both are broken, 20 shillings shall be paid as compensation.
38. I f a shoulder is disabled, 30 shillings shall be paid as compensation.
39. I f the hearing of either ear is destroyed, 25 shillings shall be paid as compensation.

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[51] Attenborough, *Laws*, 2.
[52] The only exceptions to this are laws 77-81, dealing with returning a maiden if there was dishonesty in the bargain (77), a woman's entitlement to half her dead husband's property if she bore him a child (78), or his relatives entitlement to them if she did not (81), and how much property she is entitled to if she leaves him after having born him a child (79 & 80).
[53] Aethelberht 50 in Attenborough, *Laws*, 11.
[54] Aethelberht 4 in Attenborough, *Laws*, 5.
[55] Aethelberht 10 in Attenborough, *Laws*, 5.
[56] Aethelberht 14 in Attenborough, *Laws*, 7.

40. I f an ear is struck off, 12 shillings shall be paid as compensation.
41. I f an ear is pierced, 3 shillings shall be paid as compensation.
42. I f an ear is lacerated, 6 shillings shall be paid as compensation.[57]

This amount of detail gives us a clue as to one motivation for starting to codify the laws – a need for some sort of guidelines when dealing with restorative measures. In order to have any hope of effecting a true reconciliation, both sides of a dispute must agree that the compensatory measure is sufficient, or else the dispute will continue. Specifying rates of compensation in a law code would thus serve to limit social disorder. As well, the very specificity of the rates indicates that these were measures that were actually applied, rather than being merely idealistic suggestions from the king.

Finally, the code also stipulates when third parties are to be held responsible for the wrongdoing, as was the case, "If a man is slain, [the lender of the weapons] shall pay 20 shillings compensation"[58] or "If a homicide departs from the country, his relatives shall pay half the wergeld."[59] All of these laws are clearly aimed at restoration. None of the laws in this code makes any reference to any penalty other than compensation; there is no mention of either corporal or capital punishments. It could be argued that the reason only compensations are mentioned is because these were the things that needed to be regulated. However, the motivation for regulation was the need or desire to standardize measures or practices; there would have been no reason not to apply such standardization to punitive measures as well had the legal system been involved with such practices. Therefore, it is logical to conclude that, at this time, official judicial measures did not include retribution.

The next sets of laws from Kent are under the names of Hlothhere (673-c.685) and Eadric (c.685-c.686). By the wording of the code itself, it was not meant to replace

[57] Aethelberht 34-42 in Attenborough, *Laws*, 9.
[58] Aethelberht 20 in Attenborough, *Laws*, 7.
[59] Aethelberht 23 in Attenborough, *Laws*, 7.

Aethelberht's code, but rather extend it.[60] These extensions consisted largely of administrative matters, such as the guardianship of a minor when the father dies,[61] procedure in the recovery of stolen property,[62] arbitration procedures,[63] and witness requirements when buying property in London,[64] as well as adding a few more laws that are compensatory.[65] In this code again, all consequences of misdeeds are compensatory rather than punitive; there is no evidence of a shift away from restorative justice at this point.

The third code from Kent is that of Wihtred (c.691-725), which seems to have been issued in 695.[66] Again, a number of the laws in this code appear to be administrative, such as how a man may clear himself of an accusation by an oath.[67] Of the twenty-eight laws in this code, six of them stipulate compensation for specific wrongdoings.[68] Unlike the previous codes, however, there is mention of more than monetary compensation in these laws. The third law states, "Men living in illicit unions shall turn to a righteous life repenting of their sins, or they shall be excluded from the communion of the Church."[69] Foreigners in this situation may be forced to leave the country.[70] This is clearly a religious offence; its inclusion in the code speaks to the influence of the Church on secular law. These consequences were aimed at restoring the harmony of the community not through reconciliation of victim and offender but rather through exclusion of the offender, which is clearly a punishment. Other retributive measures show up for the first time in this code, but

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[60] Attenborough, *Laws*, 19.
[61] Hlothere and Eadric 6 in Attenborough, *Laws*, 19.
[62] Hlothere and Eadric 7 in Attenborough, *Laws*, 19.
[63] Hlothere and Eadric 8-10 in Attenborough, *Laws*, 21.
[64] Hlothere and Eadric 16 in Attenborough, *Laws*, 23.
[65] Hlothere and Eadric 11-15 in Attenborough, *Laws*, 21.
[66] Attenborough, *Laws*, 3.
[67] Wihtred 20 and 21 are by oath alone; several others put forward different formulas. Attenborough, *Laws*, 29.
[68] Wihtred 2, 5, 9, 11, 12, and 14. Attenborough, *Laws*, 25, 27.
[69] Wihtred in Attenborough, *Laws*, 25.
[70] Wihtred 4 in Attenborough, *Laws*, 25.

in a very limited manner, relating only to thievery and to offenders who are servants or slaves. In the case of servants or slaves, the corporal punishments appear to be offered as a way of dealing with those who are incapable of paying compensation (due to their socio-economic status), rather than being punishments aimed specifically at retribution. In the three laws that mention the use of the lash for punishment, each one states that the offender must pay six shillings compensation "or undergo the lash".[71] The compensation is mentioned first, and the lash seems to be an option in case the offender cannot come up with that amount. The other two cases of corporal punishment involve the scourging of a servant, in the first case if the servant of a king or bishop cannot be cleared "by the hand of the reeve",[72] the second in the case of a bond servant, where the lord must pay the fine for the servant or "deliver him up to be scourged."[73] This introduces the idea, which will show up repeatedly in later codes, that if one cannot pay with money, he can pay with the flesh, as it were. The only instance of violent reprisal to one other than a slave or servant is if the offense is theft. If a thief is caught in the act and killed, the killer was not liable for the wergeld.[74] If the thief was caught, there was a choice of punishments of "whether he shall be put to death, or sold beyond the sea, or held to ransom for his wergeld."[75] Other than this exception for theft, the laws remained compensatory. This mention of a death penalty here is an indication of a gradual move towards punitive measures; however, I would argue that it should not be seen as a sudden, radical shift in practice. It is only one of three possible responses, with community restoration (by exiling the offender) and compensation (through wergeld) also remaining as options. There is no indication of under what circumstances which of these

[71] Wihtred 10, 13, 15 in Attenborough, *Laws*, 27.
[72] Wihtred 22 in Attenborough, *Laws*, 29.
[73] Wihtred 23 in Attenborough, *Laws*, 29.
[74] Wihtred 25 in Attenborough, *Laws*, 29.
[75] Wihtred 26 in Attenborough, *Laws*, 29.

options was to be used, nor is there any mention of the reasoning behind the death penalty, though it would be logical to presume that it became included as an option because previous measures were perceived to be ineffective, at least in some cases; the possible reasons for this (perceived) ineffectiveness of the laws will be examined in a later chapter. Another possibility, which does not explain why theft starts to be treated differently at this period, but does perhaps explain why it is one of the first crimes to be treated thus, is the nature of theft to be perceived as sneaky and underhanded. This is supported by the fact that a later distinction between amendable simple homicide ('manslaughter') and capital homicide ('murder') was that the former was done in the open while the latter was perpetrated through stealth.[76] Anglo-Saxon society seems to have held a dim view of offences committed in secrecy. Regardless, it is clear that corporal punishment was seen as being acceptable at this time, even if only in rare circumstances.

Contemporaneous with Wihtred's code in Kent are the earliest laws we have from Wessex, those of Ine.[77] In these seventy-six laws as well, compensation is the most frequently mentioned penalty for transgressions. There are, however, some more interesting consequences mentioned. While it would be tedious to list all of the laws dealing solely with compensation, those with alternate penalties are worthy of note. For fighting in the king's house, in addition to the compensation stipulated, the offender could be put to death at the discretion of the king.[78] A thief caught in the act was subject to death, but his life could, "...be redeemed by the payment of his wergeld."[79] Similarly, a stranger traveling off the

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[76] Thomas A. Green, 'Societal Concepts of Criminal Liability for Homicide in Mediaeval England', *Speculum*, Vol. 47, No. 4 (October, 1972), 669-670.
[77] Attenborough, *Laws*, 34. Attenborough dates Ine's laws to between 688-694.
[78] Ine 6 in Attenborough, *Laws*, 39.
[79] Ine 12 in Attenborough, *Laws*, 41.

highway was to be assumed a thief, and he also could be killed or "put to ransom".[80] Unlike previously mentioned laws in which options are mentioned, where corporal punishments seemed to be designed for those who could not afford to pay, here the retributive measure is mentioned first and the compensation seems to have been a method of buying one's way out of the punishment, placing the apparent focus in these instances on retribution. This may just be a peculiarity of style; however, it may also reflect a greater amount of social disorder having led to harsher punishments and more of a focus on retribution. The wording is similar in the laws that apply to slaves; if a slave worked on Sunday without his master's knowledge, the slave must "undergo the lash *or* pay the fine in lieu thereof",[81] while a freeman who worked on a Sunday would be reduced to slavery *unless* he paid a fine.[82] Slavery was also the penalty for in effect being an accessory to theft; although a man was liable to a fine for stealing if his family did not know about it, if he "...steals with the cognisance of all his household, they shall all go into slavery."[83] After being sentenced to slavery, if the offender then escapes, he was to be hanged upon recapture.[84] Pollock suggests that penal slavery, "may be regarded as the working out of a debt rather than a punishment in the modern sense."[85] This is logical given that a person could end up being enslaved because of debt. The connection is quite clear in the example of the option between a fine or slavery. Pollock's suggestion is thus quite plausible and puts an interesting spin on the modern notion that an offender must pay his debt to society. After being sentenced to slavery, if the offender then escapes, he was to be hanged upon recapture.[86]

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[80] Ine 20 in Attenborough, *Laws*, 43.
[81] Ine 3 s.1 in Attenborough, *Laws*, 37, emphasis mine.
[82] Ine 3 s.2 in Attenborough, *Laws*, 37.
[83] Ine 7 s.1 in Attenborough, *Laws*, 39.
[84] Ine 24 in Attenborough, *Laws*, 45.
[85] Pollock, 'Anglo-Saxon Law', 266.
[86] Ine 24 in Attenborough, *Laws*, 45.

There are a few other mentions of physical punishments. There are two laws stating that a commoner who has been repeatedly accused of theft is caught in the act or found guilty by ordeal shall have his hand or foot cut off.[87] Scourging is also mentioned twice; in both cases the offender liable to be scourged is one who has already been reduced to penal slavery.[88] The punitive measures, other than those in lieu of payment for those who could not afford said payment, were aimed mainly at theft, indicating that this, along with breaching the king's peace, was considered a more serious crime and thus worthy of special consideration. In spite of the above-mentioned punishments, the vast majority of the measures taken in cases of wrongdoing remained compensatory. This, along with the fact that many punishments could be avoided by paying compensation, suggests that the overall official emphasis was still on restorative justice; however, punitive measure were clearly felt to be appropriate for certain offences.

The next set of laws that we have from Wessex are those of Alfred the Great in the late ninth century.[89] In Alfred's code, compensation forms an even higher proportion of the measures to be taken than was seen in Ine's code suggesting, if anything, a move *away* from retributive measures. Unfortunately, we have no evidence from the intervening two centuries to inform us what had been happening in the legal system. Alfred's laws include some interesting additions in terms of punishments. This is the first code we have that mentions imprisonment: "If, however, he pledges himself to something which it is lawful to carry out and proves false to his pledge, he shall humbly give his weapons and possessions to his friends to keep, and remain 40 days in prison at a royal manor".[90] If a man so imprisoned

[87] Ine 18 and 37 in Attenborough, *Laws*, 43 and 49.
[88] Ine 48 and 54 in Attenborough, *Laws*, 53 and 55.
[89] Attenborough, *Laws*, 34.
[90] Alfred 1 s.2 in Attenborough, *Laws*, 63.

escaped, he was to be banished and excommunicated.[91] Another decree stipulating religious sanctions involved the defrocking of a priest who killed someone.[92] The death penalty is mentioned twice in this code; the first is for plotting against his lord or the king,[93] the second is for fighting or drawing weapons in the king's hall, and was to be applied only at the discretion of the king.[94] Here we see what was considered at this time to be the most heinous of crimes: treason (be it petty or high treason) and breach of the king's peace. There is only one mention of hands being struck off in Alfred's code, and that was for stealing from the church, though the offender could redeem his hand if it was permitted and he paid a fine according to the value of his wergeld.[95] There are new instances of maiming, though. Public slander was to be punished by the excising of the offender's tongue, though a "ransom", the price of which was set according to wergeld value, could be paid instead.[96] A slave who raped a slave was to be castrated "as compensation".[97] It is interesting to note that even this measure, which we would view as a retributive punishment, was couched in the terms of restorative justice. This is perhaps another example of 'paying with the flesh'. The rest of the consequences mentioned in Alfred's laws were strictly compensatory. Alfred's law code is thus a mixture of restorative and retributive justice, with many of the retributive measures having restorative alternatives.

After Alfred, we have no single large, comprehensive code until that of Cnut (1016-1035) – what laws we have come down in short compilations; however, some of these smaller pieces of legislation from the time of Alfred onwards must be mentioned. There

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[91] Alfred 1 s.7 in Attenborough, *Laws*, 65.
[92] Alfred 21 in Attenborough, *Laws*, 75.
[93] Alfred 4 in Attenborough, *Laws*, 65.
[94] Alfred 7 in Attenborough, *Laws*, 69.
[95] Alfred 6 and 6 s.1 in Attenborough, *Laws*, 69.
[96] Alfred 32 in Attenborough, *Laws*, 77.
[97] Alfred 25 s.1 in Attenborough, *Laws*, 75.

were two treaties with the Danes, the first was the treaty between Alfred and Guthrum, and the second was the laws of Edward (899-924) and Guthrum. The former is short, having only five sections, only one of which deals with a transgression, that of homicide, and the only consequence it mentions is the value of the wergeld,[98] a clearly restorative measure. The latter is longer, being composed of twelve sections, in which compensation is the predominant sanction for transgressions. Imprisonment is mentioned, but only for one who could not "find surety for compensation".[99] Outlawry, in which a man could be slain on sight as though he were a thief caught in the act, was stipulated for homicide.[100] Similar to what had been seen before, there are two mentions of a slave receiving the lash, both of which give the option of paying a fine instead.[101] The eleventh law is worth citing:

> If wizards or sorcerers, perjurers or they who secretly compass death, or vile, polluted, notorious prostitutes be met with anywhere in the country, they shall be driven from the land and the nation shall be purified; otherwise they shall be utterly destroyed in the land – unless they cease from their wickedness and make amends to the utmost of their ability.[102]

The specified alternatives of banishment or 'utter destruction' are retributive in nature. The use of retributive measures in the interest of "the nation" is a function of the greater centralization of state power, which will be examined in greater detail below (chapter IV). For the moment, it is sufficient to note that the primary aim of those two measures is not the punishment of the offender, but rather the well-being of the nation. The offender is punished almost as a by-product of ridding the community of a wicked person. The offender also has the option of 'making amends'. The essence of the Anglo-Saxon law – restoration becoming

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[98] Alfred and Guthrum 3 in Attenborough, *Laws*, 99.
[99] Edward and Guthrum 3 in Attenborough, *Laws*, 103.
[100] Edward and Guthrum 6 s.6 in Attenborough, *Laws*, 107. In a footnote, Attenborough explains that, according to Liebermann, this refers to the killing of a church dues collector.
[101] Edward and Guthrum 7 s.1 and 8 in Attenborough, *Laws*, 107.
[102] Edward and Guthrum 11 in Attenborough, *Laws*, 109.

increasingly supplemented by retribution - can therefore be seen to continue in their treaties with the Danes. There are two possibilities here: either the Danes were willing to accept totally the Anglo-Saxon style of justice, or their own justice was very similar and possibly complimentary to the Anglo-Saxon ways. The latter is more plausible; it would also help to explain why, aside from political considerations, the essential continuity of Anglo-Saxon law was maintained under the Danish kings.

There are two series of laws surviving from Edward the Elder in the early tenth century.[103] In the shorter of the two, penalties are mentioned twice, and both times they are monetary compensations.[104] In the longer series, five of the laws name transgressions requiring redress, and in each case, compensation is the only option mentioned.[105]

There are six series of laws extant from the reign of Aethelstan (924-39), the content of which overlap somewhat.[106] These laws continue the trends established in previous Anglo-Saxon codes. The death penalty is specified in relation to theft, plotting against one's lord, and witchcraft,[107] as well as for those who refuse to settle into a fixed residence when so commanded.[108] A slave may be scourged as a punishment, though his master can pay extra compensation instead[109]. Imprisonment is mentioned as the punishment for theft,[110] maiming is stipulated for moneyers who issue "base or light coins",[111] and for swearing a false oath the offender may lose his eligibility to be buried in consecrated ground.[112] One of the

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[103] Attenborough, *Laws*, 112.
[104] I Edward 1 s.1 and 2 s.1 in Attenborough, *Laws*, 115 and 117.
[105] II Edward s.3, 2, 5, 7 and 8 in Attenborough, *Laws*, 119 and 121.
[106] Attenborough, *Laws*, 112-113.
[107] II Aethelstan 1, 4 and 6 in Attenborough, *Laws*, 127 and 131.
[108] II Aethelstan 2, Attenborough *Laws*, 129.
[109] II Aethelstan 19 in Attenborough, *Laws*, 137.
[110] II Aethelstan 1 s.3 and 7 in Attenborough, *Laws*, 127 and 137.
[111] II Aethelstan 14 s.1 in Attenborough, *Laws*, 135.
[112] II Aethelstan 26 in Attenborough, *Laws*, 141.

innovations in this code apparently resulted from a recognition of those who were powerful enough being, in effect, 'above the law', for the code specifies:

> ...if any man is so rich, or belongs to so powerful a kindred that he cannot be punished, and moreover is not willing to desist [from his wrongdoing], you shall cause him to be removed to another part of your kingdom, as was declared in the west – whatever his station in life, whether he be noble or commoner.[113]

This is an excellent illustration of the goal of restoring harmony to the community; the obvious intent here is not to punish the offender by sending him away, but rather to relocate him to a place where he will no longer be able to disturb the peace. There are two things worth noting in the phrasing of this section. First, that it is personally addressed to the reader, unlike the normal impersonal phrasing of these decrees, i.e. 'he shall be removed..." Perhaps this was meant to draw particular attention to this decree or add emphasis to it. This makes sense in light of the second point, that it uses the phrase "as was declared in the west", which suggests that this was not in fact a law that was in force, but rather one that was imported, or perhaps an older custom that used to be in force in the west (Wessex, perhaps?), in which case it would make sense to draw particular attention to it as a new measure. The rest of the sanctions in the laws of Aethelstan remained strictly compensatory in nature. The overall focus of the code was arguably on restorative justice; however, the inclusion of corporal punishments is notable, confirming that Anglo-Saxon justice was becoming retributive in relation to some situations.

The laws of Edmund (940-946) were also largely compensatory in nature. Compensation was stipulated for homicide,[114] and for those who harbour criminals.[115] The only capital punishment mentioned for freemen is for violating the king's 'mund' and

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[113] III Aethelstan 6 in Attenborough, *Laws*, 145.
[114] II Edmund 1 in Robertson, *Laws of the Kings*, 9.
[115] III Edmund 3 in Robertson, *Laws of the Kings*, 13.

attacking a man's house.[116] Slaves, however, did face mutilation for theft, and death for leading a gang of thieves.[117] Edmund acknowledged an apparent rise in violent offenses while stating that thefts had declined: "I myself and all of us are greatly distressed by the manifold illegal deeds of violence which are in our midst."[118] and "Further, I thank God and all of you, who have given me full support, for the immunity from thefts which we now enjoy."[119] The stated rise in violent crime does not appear to have had any effect on the punishments under the law. However, two sections of Edmund's ordinances deal specifically with measures to limit feuds, and in so doing refer specifically to the compensations that must be made for homicides.[120] This indicates that restorative justice was still viewed as the appropriate response to offences, and thus measures were taken to ensure that the practice of compensation continued. When taken together with the comment on the increased violence, these laws suggest that the violence which was on the rise was related to feuds, making the appropriate approach to said violence more control over feuds rather than a change in measures regarding the violent offences themselves.

In ordinances from Edgar (959-975), we see only brief mentions of physical punishments. In the case of false accusations, the offender, "...shall forfeit his tongue, unless he redeem himself with his wergeld."[121] There remains here the idea that, although a physical punishment is mentioned, the offender is still able to opt for the payment of monetary compensation. Similarly, the only other non-compensatory measure mentioned by Edgar, the death penalty, may be avoided, as it is stated, "And the proved thief, or he who

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[116] II Edmund 6 in Robertson, *Laws of the Kings*, 11.
[117] III Edmund 4 in Robertson, *Laws of the Kings*, 15, the mutilation being scourged, scalped and having a finger mutilated.
[118] II Edmund 1 in Robertson, *Laws of the Kings*, 9.
[119] II Edmund 5 in Robertson, *Laws of the Kings*, 11.
[120] II Edmund 1 in Robertson, *Laws of the Kings*, 9 and II Edmund 7 in Robertson, *Laws of the Kings*, 11.
[121] II Edgar 4 in Robertson, *Laws of the Kings*, 25.

has been discovered in treason against his lord, whatever refuge he seeks, shall never be able to save his life, *unless* the king grant that it be spared."[122]

There are several sets of ordinances from Aethelred (978-1016). The principles of restorative justice seem to dominate over the retributive measures in these laws. The death penalty is mentioned for repeat offenders,[123] or for those who chose, instead of paying compensation, to take the matter to ordeal and fail.[124] He who committed a homicide within a church faced the death penalty, though he could escape this punishment if he, "...reaches so inviolable a sanctuary that the king, because of that, grant him his life, upon condition that he makes full amends both towards God and men."[125]

Significantly, false moneyers also faced the death penalty: "And every moneyer who is accused of striking false coins, after it was forbidden, shall go to the triple ordeal; if he is guilty, he shall be slain."[126] Also, "And moneyers who work in a wood or elsewhere shall forfeit their lives, unless the king is willing to pardon them."[127] The assumption here was that moneyers who worked in secret (in woods or such places) did so specifically because they were producing counterfeit coins. Traders dealing in false coinage faced a similar fate:

> And we have decreed with regard to traders who bring money which is defective in quality and weight to the town, that they shall name a warrantor if they can.
>
> 1. If they cannot do so, they shall forfeit their wergeld or their life, as the king shall decide, or they shall clear themselves...[128]

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[122] III Edgar 7.3 in Robertson, *Laws of the Kings*, 27, emphasis mine.
[123] I Aethelred 1.6 in Robertson, *Laws of the Kings*, 53.
[124] III Aethelred 4.1 in Robertson, *Laws of the Kings*, 67: "If then he is proved guilty, he shall be struck such a blow as shall break his neck".
[125] VII Aethelred 1.1 in Robertson, *Laws of the Kings*, 117.
[126] III Aethelred 8 in Robertson, *Laws of the Kings*, 69.
[127] III Aethelred 16 in Robertson, *Laws of the Kings*, 71. Robertson explains in notes 2 and 3 that woods are considered places for secret crimes, and that 'elsewhere' should be understood as places other than towns. A later ordinance from Aethelred words it as "moneyers who carry on their business in woods or work in other such places..." IV Aethelred 5.4 in Robertson, *Laws of the Kings*, 75.
[128] IV Aethelred 7 in Robertson, *Laws of the Kings*, 77.

The fact that the economic crimes mention death as the primary punishment indicates to us that these were considered very serious crimes, those that held the greatest perceived threat to the kingdom. Here again we see the connection between offences against the state and retributive measures. Even in these cases, however, there usually remains the possibility of compensation as a way to avoid death.

There is corporal punishment (branding) mentioned, but only for slaves (who were also to be put to death for repeat offences).[129] Banishment is occasionally mentioned, as with a decree carried forward from earlier law (see above, page 27):

> And if wizards or sorcerers, magicians or prostitutes, those who secretly compass death or perjurers be met with anywhere in the land, they shall be zealously driven from the land and the nation shall be purified; otherwise they shall be utterly destroyed in the land, unless they cease from their wickedness and make amends to the utmost of their ability.[130]

For the rest, the measures specified are compensation, wergeld and fines.

In a later set of ordinances from Aethelred, as has been mentioned, a reluctance to use capital punishment is explicitly stated:

> And it is the decree of our lord and his councillors, that Christian men shall not be condemned to death for too trivial offences, but, on the contrary, merciful punishments shall be determined upon for the public good, that the handiwork of God, and what he purchased for himself at a great price, be not destroyed for trivial offences.[131]

In this set of Aethelred's laws, the death penalty is mentioned as a *possibility* for deserters from the king's army[132] and for treason.[133] Finally, we find in X Aethelred, an explicit statement regarding what the Anglo-Saxons saw as being the purpose of the law; the laws are

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[129] I Aethelred 1.6 in Robertson, *Laws of the Kings*, 55.
[130] V1 Aethelred 7 in Robertson, *Laws of the Kings*, 93. Exile is also recommended for priests who commit homicide or other serious crimes, VIII Aethelred 26 in Robertson, *Laws of the Kings*, 125.
[131] V Aethelred 3 in Robertson, *Laws of the Kings*, 81.
[132] V Aethelred 28 in Robertson, *Laws of the Kings*, 87. "And if anyone deserts an army which is under the personal command of the king, it shall be at the risk of [losing] his life or his wergeld."
[133] V Aethelred 30 in Robertson, *Laws of the Kings*, 87: "And if anyone plots against the king, he shall forfeit his life, unless he clears himself..."

meant to, "...bring about peace and reconciliation, put an end to strife and improve the whole character of the nation."[134] This statement reflects the ideal of restorative justice – not just restoration but also reconciliation; the king apparently believed the laws should be aimed at this outcome.

The final set of law codes that we have from the Anglo-Saxon period are those of Cnut (1016-1035). Although Cnut was a Dane, he upheld the Anglo-Saxon legal traditions, as can be seen in his proclamation of 1020, "And it is my will that the whole nation, ecclesiastics and laymen, shall steadfastly keep the law of Edgar to which all have given their adherence under oath at Oxford."[135] Cnut's laws continue the mix of restorative and retributive justice found in earlier codes; while there are many mentions of punishments, these are generally mitigated by the possibility of compensation or other measures. For example,

> If wizards or sorcerers, those who secretly compass death, or prostitutes be met with anywhere in the land, they shall be zealously driven out of this land or utterly destroyed in the land, *unless* they cease from their wickedness and make amends to the utmost of their ability.
> 1. We enjoin that apostates and those who are cast out from the fellowship of God, and of men shall depart from the land, *unless* they submit and make amends to the utmost of their ability.
> 2. And thieves and robbers shall forthwith be made an end of, *unless* they desist.[136]

Similarly,

> Murderers and perjurers, injurers of the clergy and adulterers shall submit and make amends *or* depart with their sins from their native land.[137]

Other transgressions that have making amends or compensation as an alternative to punishments in Cnut's code are perjury,[138] the slaying of a priest,[139] making a false

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[134] X Aethelred 1 in Robertson, *Laws of the Kings*, 131.
[135] Canute's Proclamation of 1020, 13 in Attenborough, *Laws*, 143.
[136] II Canute 4 in Robertson, *Laws of the Kings*, 177, emphases mine.
[137] II Canute 6 in Robertson, *Laws of the Kings*, 179, emphases mine.
[138] For which "he shall lose his hand or half his wergeld" II Canute 36 in Robertson, *Laws of the Kings*, 195.

accusation,[140] and the case of a slave who works on Sunday.[141] Thus, while we see over the centuries an increase in the number of offences for which a retributive punishment may be administered, there is an apparent reluctance to remove completely the possibility of compensatory alternatives. This may indicate a continued concern with the importance of restoring harmony in the community, and/or the influence of the Church's doctrine of mercy, discussed below (chapter III).

A few punishments cannot be so avoided. As in previous laws, there is an emphasis on the seriousness of economic crime:

> Let us all likewise very zealously take thought for the promotion of public security and the improvement of the coinage – for the promotion of public security in such a way as shall be best for householders and worst for thieves, and for the improvement of the coinage in such a way that there shall be one currency free from all adulteration throughout this land; and no-one shall refuse it.
> 1. And he who henceforth coins false money shall forfeit the hand with which he made the false money, and he shall not redeem it in any way, either with gold or with silver.
> 2. And if the reeve is accused of having granted his permission to the man who coined false money, he shall clear himself by the triple oath of exculpation, and if it fails, he shall have the same sentence as the man who has coined the false money.[142]

Retributive measures had already been specified in previous codes as a method of dealing with the coinage issue; Cnut expanded on them in dealing with the coinage issue in that the time is taken to explain why this issue is being addressed, and also in calling for reeves who have allowed the crime to take place to be similarly punished. It is interesting that, as mentioned above (page 31), false moneyers were subject to the death penalty under

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[139] For which the offender was to be excommunicated and outlawed, unless he paid compensation and went on pilgrimage – both of which must be started within 30 days or all his possessions were forfeit, II Canute 39 in Robertson, *Laws of the Kings*, 197.
[140] For which one "shall forfeit his tongue, unless he redeem himself with her wergeld." II Canute 16 in Robertson, *Laws of the Kings*, 183.
[141] Who must pay a fine or undergo the lash; freemen doing the same must pay his *healsfang*, II Canute 45 in Robertson, *Laws of the Kings*, 199.
[142] II Canute 8 in Robertson, *Laws of the Kings*, 179.

Aethelred, and here we see only mutilation as a punishment. This may have been a result of a Christian backlash against executions, as reflected in Cnut's condemnation of Christians being put to death for "trivial offences" (above, page 16 n.48). Other offenders that were dealt with in a strictly punitive manner are proven thieves and those who commit treason (against lord or king), who are to be executed,[143] slaves guilty of a felony, who "shall be branded on the first occasion. And on the second occasion he shall not be able to make any amends except by his head."[144]

Finally, there is an elaborate section dealing with those that are considered "thoroughly untrustworthy men", whose reputation is such that the men of the hundred do not trust them, and who are "accused by three men at once".[145] If the lord of the accused does not stand up for him, and provide oath-givers to attest that he is law-abiding, the accused must undergo the triple ordeal, and:

3. b. And if then he (the accused) is proved guilty, on the first occasion he shall pay double value to the accuser and his wergeld to the lord who is entitled to receive his fine, and he shall appoint trustworthy sureties, that henceforth he will desist from all wrong-doing.
4. And on the second occasion, if he is proved guilty, there shall be no compensation possible to him but to have his hands or his feet cut off or both, according to the nature of the offence.
5. And if he has wrought still greater crime, he shall have his eyes put out and his nose and ears and upper lip cut off or his scalp removed, whichever of these penalties is desired or determined upon by those with whom rests the decision of the case; and thus punishment shall be inflicted, while, at the same time, the soul is preserved from injury.[146]

In spite of the emphasis that has been placed on the use of judicial mutilation in the Anglo-Saxon period, this section shows that there was a genuine reluctance to resort to such

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[143] II Canute 26 in Robertson, *Laws of the Kings*, 189. Treason against the king also resulted in the forfeiture of all possessions, II Canute 57, in Robertson, *Laws of the Kings*, 205.
[144] II Canute 32 in Robertson, *Laws of the Kings*, 193.
[145] II Canute 30 in Robertson, *Laws of the Kings*, 189.
[146] II Canute 30 in Robertson, *Laws of the Kings*, 191.

measures: those who were obvious problem offenders were not subjected to such measures without being given the opportunity to mend their ways.

On the other end of the spectrum, there remained a number of offences the responses to which were strictly restorative in nature. These included harbouring an outlaw,[147] adultery or incest,[148] violence done to a widow or maiden,[149] violation of ecclesiastical or royal protection,[150] and forced entry into a man's house.[151] In these sections, we see the continuation of an emphasis on compensation.

There is one section in Cnut's code that is of particular interest when examining the change in the focus of laws:

> If an attempt is made to deprive in any wise a man in orders or a stranger of either his goods or his life, the king shall act as his kinsman and protector, unless he has some other.
> 1. And such compensation as is fitting shall be paid to the king, or he shall avenge the deed to the uttermost.
> 2. It is the duty most incumbent upon a Christian king that he should avenge to the uttermost offences against God, in accordance with the nature of the deed.[152]

Here for the first time we see the alternative to compensation as being explicitly revenge. It can be argued from this, then, that the move to retributive justice is primarily about vengeance rather than deterrence. When compensation ceases to be an option in later law, the motive can thus be understood to be one of revenge. The expansion of penalties and the explicit mention of retribution indicate that this may be the period in which the gradual evolution of justice begins to accelerate; the possible reasons for this will be explored below.

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[147] For which one must "make amends", II Canute 15 in Robertson, *Laws of the Kings*, 181.
[148] For which "he shall make amends", II Canute 50 and 51 in Robertson, *Laws of the Kings*, 201. In contrast, if a woman commits adultery, "her lawful husband shall have all that she possesses, and she shall then lose both her nose and her ears." II Canute 53 in Robertson, *Laws of the Kings*, 203.
[149] The amends for which is the payment of his wergeld, II Canute 52 in Robertson, *Laws of the Kings*, 203.
[150] For which monetary compensation is set out, II Canute 56 in Robertson, *Laws of the Kings*, 205.
[151] For which compensation must be paid, II Canute 62 in Robertson, *Laws of the Kings*, 205.
[152] II Canute 40 in Robertson, *Laws of the Kings*, 197.

The final code to examine, which will give us some insight into how the laws had changed by the early Norman period, is with the *Leges Henrici Primi.* The *Leges* was written at some time c. 1115;[153] it is an extensive work, including not only substantive but also a considerable amount of procedural law. There has been a limited amount of scholarly attention paid to the *Leges* in general[154], and even less to any examination of the punishments found within it.

According to L.J. Downer, the author of the *Leges* apparently drew his material from a variety of sources, including customary law and documents from the older Anglo-Saxon law codes as well as other Germanic codes, and offered it up as the current laws in the reign of Henry I (1100-1135).[155] That both the laws and the penalties were based on early codes is evident; for example, the section dealing with compensation for wounds contains the same detailed breakdown found in the earliest surviving Anglo-Saxon codes. These breakdowns are lengthy, but a brief example can serve to illustrate the similarity:

[153] Downer dates the writing of the Leges to approximately some point between 1113 and 1118, *Leges*, 36.
[154] Ibid., 2.
[155] Downer, *Leges*, 2, 30.

Aethelberht	*Leges*
54. If a thumb is struck off, 20 shillings [shall be paid as compensation]. 1. If a thumb nail is knocked off, 3 shillings shall be paid as compensation 2. If a man strikes off a forefinger, he shall pay 9 shillings compensation. 3. If a man strikes off a middle finger, he shall pay 4 shillings compensation. 4. If a man strikes off a 'ring finger', he shall pay 6 shillings compensation. 5. If a man strikes off a little finger, he shall pay 11 shillings compensation. 55. For the nails of each [of the above-mentioned fingers] 1 shilling [shall be paid as compensation].[156]	93,15 For the thumb of the hand which is cut off compensation of thirty shillings must be paid; for the nail, five shillings. 93,16 Compensation for the index finger is fifteen shillings, for the nail three shillings 93,17 Compensation for the middle or 'unchaste' finger is twelve shillings, for the nail, two shillings. 93,18 Compensation for the ring-finger or 'medical' finger is seventeen shillings, for the nail four shillings. 93,19 Compensation for the 'ear' finger shall amount to nine shillings, for the nail one shilling, that is, five pence.[157]

As is evident in the above selections, in the *Leges* the arrangement of sections is somewhat different, and there has apparently been some allowance for a few centuries of inflation; however, the similarity in content is striking.

Due to the lack of evidence surrounding the *Leges*, it could be argued that the author had borrowed laws from other sources that were not in fact in effect in England at the time he was writing. In addition, as was seen in the introduction to Alfred's code, law codes can include both laws in use and those that the writer determines ought to be included. Furthermore, in the case of the *Leges* the author was not a ruler decreeing the law as it was to be followed, but rather a compiler of laws currently in use. However, similarity to earlier codes does not negate the validity of the document: as we have previously seen, the Anglo-Saxon laws tended to build on earlier codes, so repetition can be expected when all the laws of the country were compiled. By examining the contributions of previous codes to the *Leges* and how the older laws had been altered in the process, Downer determined that the

[156] Aethelberht, in Attenborough, 11.
[157] *Leges*, ed. Downer, 297.

author, "...made a conscious effort to record law which was up to date and valid." [158] Pollock and Maitland shared this view, stating, "...the more closely we examine the book, the more thoroughly convinced we shall be that its author has undertaken a serious task in a serious spirit; he means to state the existing law of the land, to state it in what he thinks to be a rational, and even a philosophical form."[159] Thus, the *Leges* can be considered for our purposes to reflect contemporary English law.

In considering whether justice became more retributive in the Norman period, one aspect to examine would be the use of judicial mutilation. Interestingly, in discussing the causes of court cases, the author of the *Leges* does not mention transgressions punishable by mutilation or other non-lethal corporal punishments:

> 9,5 There is a great diversity of causes: those punishable by death or amendable by a money payment, those which are transferred to a higher court or remain in the original court or are cognizable by two jurisdictions, and those which belong solely to the royal jurisdiction.[160]

One possible explanation for the lack of mention of mutilation depends upon the interpretation of this passage, namely, whether the section is seen as composed of two subsections or three. The author may have only meant to imply two ways to categorize cases, first by their disposition (that is, whether they were dealt with by compensation or retribution), and second by under which jurisdiction they fell, including royal jurisdiction as one possibility under the second section. The passage may also be read as containing three sections: the first section referring to cases according to disposition, the second section referring to cases according to lesser court jurisdictions, and the third referring to cases that belong to the king and thus are not classifiable according to the previous two section. In

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[158] Downer, *Leges*, 5.
[159] Pollock and Maitland, *English Law*, 99.
[160] *Leges*, ed. Downer, 107.

other words, it may be that the author did not mention such punishments specifically because they would be included in those that 'belong solely to the royal jurisdiction'. An earlier section reads, "9,1 Causes are of many kinds: those which can be compensated for by payment and those which cannot, and those which belong solely to the royal jurisdiction."[161] When section 9,1 is taken into consideration, it seems quite likely that the royal jurisdiction of section 9,5 was meant to refer to sentences as well as jurisdiction of courts. Furthermore, this would make sense if all offences punishable by mutilation fell under royal jurisdiction. Fortunately, this is can be discerned by an examination of c.10, which outlines the royal jurisdiction.[162] The only offences for which mutilation is the *only* prescribed response fall under this section, specifically the loss of a hand for "counterfeiting his coinage",[163] loss of limbs for "breach of the king's peace given by his hand or writ",[164] and loss of limbs also for "fighting in the king's dwelling or household".[165] The final offence in c. 10 Downer translates as "violation of the king's law"; however, 'violation', in modern terms, seems to imply breaking the king's law, and does not give the appropriate sense of the Latin word 'preuaricatio',[166] which refers to collusion to affect the outcome of a trial. With this translation in mind, the only other offence in the *Leges* that demands mutilation also falls under c.10:

> 59, 13 Anyone who makes a false charge against his lord before the king or against any persons making accusations in respect of the more serious and criminal matters shall make amends by losing his tongue.[167]

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[161] *Leges*, ed. Downer, 105.
[162] Ibid,, 109.
[163]The wording is from section 10, *Leges*, ed. Downer, the offence and punishment are listed under section 13,3 *Leges*, ed. Downer, 117.
[164] The wording is from section 10, *Leges*, ed. Downer, 109, the offence and punishment are listed under section 79,3 *Leges*, ed. Downer, 247.
[165] The wording is from section 10, *Leges*, ed. Downer, 109, the offence and punishment are listed under section 80,7 *Leges*, ed. Downer, 251.
[166] Given in the Latin version on the opposite page, *Leges*, ed. Downer, 108.
[167] Ibid., 187.

This wording of this section is significant: that the offender "shall *make amends* by losing his tongue." Here again is a curious mix of retribution couched in the terms of restorative justice, an issue that will be explored in more depth below. All other cases of mutilation have an option of compensation.

To return briefly to the interpretation of section 9,5 (above, page 39), if it was the intent of the author that royal jurisdiction was one possibility within the category of jurisdictions, and sentences were a separate consideration, one would have to wonder why mutilation did not get mentioned. One might argue that it is possible that they were not considered worth mentioning as part of the normal measures taken against wrong-doers because mutilation may have been rarely used; we have no way of determining how common judicial mutilation really was. For one thing, for the most part if mutilation is mentioned as a penalty, there is usually the option of compensation, as with,

> 34, 7 If anyone accuses another before a justice ... and the accusation is then revealed as a falsehood, he shall forfeit his tongue *or* redeem himself by payment of his wergeld.[168]

Thus in many cases the offender could have avoided the punishment of mutilation. Another reason mutilation may not have warranted separate mention is that it apparently could, at least by the time of the *Leges*, be considered a form of compensation, as with:

> 59, 21 Every theft, whether of livestock or other chattels, whether of one thing or of several, may be amended by making compensation or may not; of the ones which may be compensated for, some are satisfied by the loss of a limb, others by payment of money.[169]

Nevertheless, it is not likely that the author would have grouped amends through mutilation in with his "amendable by a money payment" categorization. Unfortunately, in this passage

[168] *Leges*, ed. Downer, 141, emphasis mine. Note also that this is for lesser cases of perjury i.e. not those either against one's lord or involving felonies.
[169] Ibid., 189.

it is not clear whether some amendable thefts called for mutilation and some for money, or if 'money or mutilation' was meant to be an option for all amendable thefts. The most logical conclusion is that, in the mind of the author, mutilation was not worth mentioning in and of itself because any sanction of mutilation could either be avoided through compensation or it fell under royal jurisdiction, both of which options he had covered in section 9,5. In any event, there was certainly the threat of mutilation for offences; this was clearly felt to be a powerful legal weapon.

The juxtaposition of mutilation and compensation is intriguing, as they appear to signify two radically different approaches to justice. This is not the first time such juxtaposition has occurred – a few examples have already been mentioned, and there is also once such reference in Cnut's laws:

> And if a slave is found guilty at the ordeal, he shall be branded on the first occasion
> 1. And on the second occasion he shall not be able to make any amends except by his head.[170]

One final example of such juxtaposition is worth examining. The Leges introduces a measure of brutality that was not expressed in previous codes:

> 75, 1 If anyone kills his lord, then if in his guilt he is seized, he shall in no manner redeem himself but shall be condemned to scalping or disemboweling or to human punishment which in the end is so harsh that while enduring the dreadful agonies of his tortures and the miseries of his vile manner of death he may appear to have yielded up his wretched life before in fact he has won an end to his sufferings, and so that he may declare, if it were possible, that he had found more mercy in hell than had been shown to him on earth.[171]

The justification for this brutality is explained in the next passage:

> 75, 1a For in the case of every extravagance of human wickedness the comforting alleviations of a healing legal remedy have been made available, except in the case of betrayal of one's lord ...[172]

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[170] II Canute 32, in Robertson, *Laws of the Kings*, 193.
[171] *Leges*, ed. Downer, 233.
[172] Ibid.

This is noteworthy for several reasons. We see in the initial passage what is clearly the language of retribution, expressed with a level of violence the likes of which cannot be found in the pre-Conquest codes. The follow-up passage not only singles out such betrayal as a transgression beyond any others, but also uses the terminology of healing, indicating that restorative justice was still being espoused as one of the fundamental concepts in the legal system. In these examples, we can see the line between restorative and retributive justice being blurred by the end of the Anglo-Saxon period and into the Norman period.

That these ideas of retribution and restoration are found side by side demands consideration of what was seen to be the purpose of sentences at this time. In the instance from Alfred's ninth-century code, it would be the result of an apparent move away from the more retributive slant of Ine's seventh-century code; an attempt to satisfy both the need for change and a conservative outlook by couching change in traditional language. In the later laws of Cnut and the *Leges*, this change seems to have been in the other direction, moving once again towards retribution. The idea that a law-maker would be careful to use such language implies a concern with popular opinion, raising the question of what was expected of the law at this time.

How much consideration did people give to the laws? The importance of maintaining justice and controlling crime was important to a ruler, and was seen as a necessary part of kingship, and as a yardstick with which to judge a king. For example, William of Malmesbury approved of a strong king as he viewed royal authority as a necessity for the maintenance of order, and hence approved of powerful kings as they were more likely to

effectively establish and maintain order.[173] From this, one might expect to see numerous mentions of the law in the narrative sources. However, that is not the case.

One logical place to look, in this regard, would be Asser's *Life of Alfred.* According to L.C. Jane, Asser's *Life* was written for a Welsh, rather than English, audience, to convince the Welsh that they ought to ally themselves with Alfred (871-899).[174] One would expect then, that if Asser was trying to make Alfred look 'great', given that a king was expected to maintain law and order within his kingdom, there should be some mention of crime suppression. However, there is no mention of the law or its enforcement under Alfred.[175] Asser stated only that, "...in judgment he [Alfred] sought earnestly the good of his people...",[176] and that Alfred actively supervised the judges of his kingdom.[177] On the face of it, this would seem to provide evidence that law and order were not a prime consideration of the time. However, one possible reason for this omission may be suggested by an observation of Jane, who writes, "The greatest argument in favor of a union between Welsh and English against the Dane was naturally to be found in their common Christianity, while the chief obstacles to such a league were to be found in the traditional hostility between two people and in the conviction which the Welsh entertained of the barbarism of the English ... it was necessary to insist on the community in religion between the two peoples and on the civilization of Wessex."[178] Asser was thus trying to accentuate the commonality between the two people; given that the Welsh operated under Celtic law, and the English operated under Germanic law, Asser would not have wanted to draw attention to a possible point of

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[173] W.L. Warren, *The Governance of Norman and Angevin England 1086-1272* (Stanford, California: Stanford University Press, 1987), 18.
[174] L.C. Jane, *Asser's Life of King Alfred* Trans. with introduction and notes by L.C. Jane (New York: Cooper Square Publishers, Inc., 1966), xxxi-xxxiii.
[175] In Jane's translation: Jane, *Life.*
[176] Asser, *Life*, ed. Jane, 88.
[177] Ibid., 89.
[178] Jane, *Life*, xxxiii.

contention between the two peoples. However, discussion of the law does not show up in any other writings, either, leaving us to speculate based only on indirect references.

This general silence in the sources makes a consideration of the perceived purpose behind sentencing more difficult. Central to understanding why there might have been a shift from restorative to retributive justice is understanding the rationale behind the approaches. The general reasoning behind the restorative approach is clear, and has been mentioned previously: to restore and maintain a sense of harmony in the community, necessary for the community to function effectively. The purpose behind "punishment" is more debatable. Some see punishment as serving the needs of vengeance; this is a more personal approach. Another possible purpose of punishment is deterrence; indeed, this is one of the primary motivations behind punishment.

One of the issues in the modern criminal justice system is the question of what should be the aim of sentences: is the point of the system to punish or to reform? Conflict arises as the system attempts to do both. Such a debate is nothing new. A similar question could be posed for the measures of Anglo-Saxon justice: was their aim to restore peace and encourage reconciliation through compensation, or to punish and deter through harsh sanctions. The laws often use the language of restorative justice, yet we see clearly the language of deterrence as well. For example, in discussing the laws of Alfred (specifically the requirement of the accused to produce persons as surety), William of Malmesbury states that, "... and whosoever was unable to find such surety must dread the severity of the laws."[179] Approval is given in the narrative sources for harsh justice. Perhaps it is human nature to wish to see offenders suffer in return for the suffering that they have caused. Writing of

[179] William of Malmesbury, *The Kings before the Norman Conquest*, Trans. from the Latin by Joseph Stephenson (First published by Seeleys of London; Facsimile reprint from the series 'The Church Historians of England' published in 1989 by Llanerch Enterprises), 104.

William I (1066-1087), William of Poitiers said, "Judges were appointed who could strike terror into the mass of soldiers, and stern punishments were decreed for offenders...";[180] though this was dealing specifically with military justice, it demonstrates the understanding of maintaining order through fear or reprisal. William of Malmesbury wrote of Henry I (1100-1135):

> At the beginning of his reign, in order to set a fearful example and make a lasting impression on evildoers, he was more inclined to exact loss of a limb, and later to require monetary payments... If any of the more important lords, forgetting their oath of allegiance, swerved from the narrow path of loyalty, he used at once to recall the strays by prudent counsel and unremitting efforts, bringing the rebellious back to toeing the line by the severity of the wounds he inflicted on them.[181]

The first part of this passage suggests that Henry aimed first and foremost at deterrence; he used punitive measures to strike fear into those who would offend, and only after the fear of reprisal had been burned into the collective mindset did he turn to monetary compensation. According to this passage, he also dealt harshly with the greater nobility, but there is no clarification as to what form said "wounds" took, presumably they were economic wounds, such as forfeiture of estates.

Bellamy, in discussing later medieval England, states, "That all criminals should be punished was an axiom which few men denied. Most medieval Englishmen would have agreed that on conviction a misdoer should be punished as quickly as possible and that the punishment should be so arranged that all should notice it."[182] The fact that by the later Middle Ages the populace believed that wrongdoings should be punished swiftly and severely was the result of a top-down change in perceptions. Restorative justice operated by

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[180] William of Poitiers, *The Gesta Guillelmi of William of Poitiers,* Ed. and trans. by R.H.C. Davis and Marjorie Chibnall (Oxford: Clarendon Press, 1998), 161.
[181] William of Malmesbury, *Gesta Regum Anglorum: The History of the English Kings, volume I* ed. and trans. R.A.B. Mynors, completed by R.M. Thomson and M. Winterbottom (Oxford: Clarendon Press, 1998), 743-745.
[182] John Bellamy, *Crime and Public Order in the Later Middle Ages* (London: Routledge & Kegan Paul, Toronto: University of Toronto Press, 1973), 180.

and for the lower/local section of the population; retributive justice was imposed upon them and done to them. If they came to see such retributive practices as the way things should be, there had to be a reason for that change.

Bellamy goes on to state that "The immediacy and overtness of most punishment suggest that the intention of the king, above all else, was to deter would-be malefactors. The idea of retribution was probably more in the minds of the offenders' victims and their friends than in those of the king and his justices, although they had by no means discarded it."[183] Nevertheless, the idea of retribution could have contributed to the popularity of the new measures in the minds of some victims. Furthermore, non-retributive compensatory measures could always have a deterrent effect as well. Loyn puts forward an argument for the deterrent value inherent in restorative justice. He states that, "...in all the Anglo-Saxon kingdoms prohibitive protection prices were established as a safeguard to the king and to the coincident peace of the kingdom."[184] Whether this was *intended* as a deterrent, or if such an effect was merely a fortunate consequence of the king's high wergeld is open for debate. Either way, any compensatory measures could have a deterrent effect.

While the notions of deterrence as a factor in determining punishments seems logical, and there is some evidence that the power, or at least the possibility of deterrence was acknowledged, there should not be too much emphasis placed on it. Using the notion of deterrence presupposes deliberately impacting the mind of the offender before he offends. If the law did take into account the mental processes of the offender leading up to the offence, it would be logical for the law to take motive into account as well.

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[183] Bellamy, *Crime*, 181.
[184] Loyn, *England*, 46.

Considerations of motive, however, remain absent from the law, as we see in a section from the *Leges* relating to homicide:

> 70, 12a Amends shall nonetheless be made whether these things are done intentionally or unintentionally.
> 70, 12b for the wrongs which we commit unwittingly we must set right by deliberate intention.[185]

There is, nevertheless, room for judicial discretion. For example:

> 90, 11d In these and similar cases where a man intends one thing and something else results (where what is actually done is the subject of the accusation, and not the intention) the judges shall for preference fix a compensation determined on the grounds of compassion and intended to repair any violation of honour, as appropriate to the circumstances.[186]

We see here that there remained the notion that when a harm was suffered, such as a death, the responsible party must make things right regardless of whether or not they had intended such harm. However, there is an acknowledgement that unintentional harm was less culpable than deliberate harm, and while some sanction must be made, it could be mitigated in accordance with the circumstances. As well as providing for discretion in the system, this again gives us an example of the language of restorative justice to be found in the law. And while the *Leges* offers more evidence of discretion than can be found in earlier codes, it should not be assumed that such discretion was not always at work in the courts.[187] The *Leges* was meant to be far more expansive than earlier codes, and thus could be expected explicitly to state that which previously was understood if not yet codified.

On the whole, it is evident that the concept of restorative justice remained present in the law in the early Norman period, if only in the official rhetoric. Nevertheless, notions of retribution were clearly becoming more prevalent than they had been in the early Anglo-

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[185] *Leges*, ed. Downer, 223.
[186] *Leges*, ed. Downer, 285.
[187] Through such mechanisms as jury nullification, for example as is explained in Green, *Verdict*; Green's worked will be discussed more below.

Saxon period. Overall, legal justice had become a more brutal business, with vengeance taking precedence over reconciliation.

CHAPTER III

THE LAW IN PRACTICE

A number of narrative sources, primarily chronicles, give us glimpses of the law in practice, which support and expand on the evidence of the law codes. Unfortunately, there are severe limitations on what we can discover. Sentences are rarely mentioned, and when they are, many details that we would consider relevant regarding both the transgression and the consequences are missing. As well, what we are told generally relates to the upper classes; the sources are largely silent about justice among the commoners. Related to this, the vast majority of the crimes mentioned deal with treason; there are few examples of crimes outside of treason.

We have the briefest mention of the sentencing of a thief by Edmund (940-946). William of Malmesbury, in describing the circumstances of Edmund's death, wrote, "A thief named Liofa, whom he had banished for his robberies, returned after six years..."[188] According to William, Edmund noticed Liofa at dinner and attacked him in anger, but Liofa pulled a knife and fatally stabbed him. William's purpose is ostensibly to tell us of Edmund's killing, but in the process, we see that Edmund had banished a man in response to theft. The decrees we have for Edmund do not cover theft by a freeman. However, the preceding extant code, that of Aethelstan (924-39), mandates the death penalty for theft,[189] and the next extant code after Edmund, that of Edgar (959-975), stipulates, "...the proved thief...shall never be able to save his life, unless the king grant that it be spared."[190] It would seem that Edmund granted this thief's life be spared, on the apparent condition of

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[188] William of Malmesbury, *Gesta Regum Anglorum*, 231-233.
[189] II Aethelstan 1 in Attenborough, *Laws,* 127.
[190] III Edgar 7.3 in Robertson, *Laws of the Kings,* 27.

banishment, within what the law could have been at that time. It may very well be, however, that the chronicler did not approve of this laxness in applying the law – he may have included these details as a warning to future kings not to show misplaced mercy to those who do not deserve it.

William of Malmesbury gives us yet a further glimpse into Anglo-Saxon justice when he outlines a writ from King Edgar confirming privileges to the church at Glastonbury. Included in the writ is:

> The abbot and the monks of the said monastery are to have in their court the same liberty and power that I have in my own court, both in pardoning and in punishing, in absolutely every kind of business. But if the abbot or any monk of that place meets on a journey a thief being led to the gallows or any other capital punishment, he shall have the power in all my realm to snatch him from his impending peril.[191]

There are two things we can gather from this. The first and most obvious is that a thief can always entertain the hope of a last-minute rescue from a cleric. The second is simply that, at this time, thieves clearly *were* being hanged, with the possibility that there may have been other forms of execution. This confirms the law of Edgar mentioned above.

William of Malmesbury mentions a few examples of Cnut's justice; the first in regards to those who killed Edmund Ironside (1016-1017):

> Edmund's murderers, who had themselves reported the fact in hopes of a large reward, he first kept for a while at his court in concealment, and then produced them before a large public gathering, and after they had openly admitted the treacherous methods they had used, they were duly executed.[192]

This gives us just enough details to tease us: why were they kept in concealment? Did he produce them publicly only because he was pressured to do so? Was he in fact planning to reward them? Or did he use that time to torture them so that they would confess publicly?

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[191] William of Malmesbury, *Gesta Regum Anglorum*, 245; according to William, this writ was issued in 965 AD, 247.
[192] Ibid., 321.

For all the questions it raises it does at least establish that execution was used. This falls under Cnut's provisions, "If anyone plots against the king or against his own lord, he shall forfeit his life and all that he possesses..."[193] It may not have mattered that the victim was the enemy of the king who stood in judgment, for what was at stake was the notion of the sanctity of lordship in general, and to compromise this sanctity in any way was to upset the natural balance of society and place the position of the king in jeopardy. William gives us another, similar example concerning the death of Edmund:

> High words had arisen as a result of some dispute or other, and Eadric, emboldened by the services he had rendered, reminded the king as though in a friendly fashion of his deserts: 'First I abandoned Edmund for you', he said, 'and then also put him to death out of loyalty to you.' At these words Cnut's expression changed; his face flushed with anger, and he delivered sentence forthwith. 'Then you too,' he said, 'will deserve to die, if you are guilty of high treason against God and myself by killing your own lord and a brother who was in alliance with me. Thy blood be upon thy head; for thy mouth has testified against thee, saying that thou hast lifted up thy hand against the Lord's anointed.' And then, to avoid a public disturbance, the traitor was strangled in that same chamber and thrown out of the window into the Thames, thus paying the due penalty for his perfidy.[194]

When read with critical skepticism, this passage leaves open the possibility that, had they not argued, Cnut would never have 'punished' Eadric. Furthermore, that Eadric was strangled and thrown out the window suggests that, although the author clearly means to imply that this was a calculated action of justice meant to maintain order, in fact this seems to be a killing in the heat of the moment justified afterwards with acceptable legal discourse. Regardless of the actual circumstances, whether this was an act of justice or an evil whitewashed as such, death was a justified and normal response to treason.

Finally, we have a very small number of cases from the reign of Henry I that confirm the penalties mentioned in the *Leges*. The details, as with earlier cases, tend to be limited.

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[193] II Canute 57 in Robertson, *Laws of the Kings*, 205.
[194] William of Malmesbury, *Gesta Regum Anglorum*, 321.

For example, there is the mention that in 1110, "William Baynard ... lost his barony by misfortune and felony..."[195] The nature of the felony is not mentioned, nor is Baynard's personal fate, but there is enough to confirm that forfeiture was used as a punishment (or compensatory measure); it is conceivable, for example, that this fell under section 12,4 as the punishment for a third violation of the law.[196]

Finally, in the famous case of the king's minters in 1124, Henry I, "...commanded that all the moneyers who were in England should be deprived of their limbs, that was the right hand of each of them and their stones below; that was because the man who had a pound could not buy a penn'orth at a market....and it was all very proper because they had done for the land a great fraud, which they all paid for."[197] By including castration, this punishment for debasing the coinage went one step beyond the penalty stipulated for counterfeiting in the *Leges*, which stated, "13, 3 Coiners of false money shall lose a hand and shall not redeem it in any way."[198] The mention of this incident in the *Anglo-Saxon Chronicles* raises a number of issues. It establishes that mutilation was indeed used by the king and that the king could and would go beyond the normal penalty when he deemed it necessary. However, it begs the question of whether it was included because it was an unusual and therefore noteworthy punishment, or whether the punishment was normal and unremarkable and was in this case noted only because of the effect of the transgressions on the economy. I would argue that, in either case, the application of the punishment to *all* the moneyers without exception makes this case significant. In this, we see the swift and harsh

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[195] VanCaenegem, 'Government', 154, citing W. Dugdale, Monasticon Anglicanum, eds. J .Caley, H. Ellis and B. Bandinel, 6 vols. in 8, London, 1817-1830, vi. 147.
[196] "12,4 He who violates the law shall forfeit his wergeld on the first occasion; if he does it a second time he shall pay twice his wergeld; if he ventures to do it a third time, he shall lose all he possesses." *Leges,* 117.
[197] *Chronicles*, ed. Swanton, 255.
[198] *Leges*, ed. Downer, 117.

reprisal of a king who must make his authority known from afar, as the result of both the centralization of government and the fact that he was out of the country at this time, and does so with the application of judicious brutality.

The possibility of clemency occasionally mentioned in the *Leges* can be found reflected in the chronicles as well, as with:

> Ralph, son of Walter the digger ... admitted to the crime of theft for which he lost his lawfulness and, according to the judicial usage of England, ought to lose his goods and his life. But after having implored the mercy of King Henry...and of the queen... he came to Abingdon in order similarly to obtain the abbot's pity.[199]

The penalties here do not match what is listed in under section 59,24 of the *Leges* for theft, namely, payment of wergeld.[200] There may have been other factors relating to the case about which we are not told, or the chronicler may have been mistaken about possible penalties, or it is also possible that the *Leges* is missing some possible sanctions. In any event, at least this passage demonstrates that a pardon could be obtained. Evidence from the Anglo-Saxon Chronicles, on the other hand, establishes that during Henry's reign, thieves were indeed dealt with harshly:

> ...Ralph Basset and the king's thegns held a council at Hundehoh in Leicestershire, and there hanged many more thieves than ever were before, that was in a little while forty-four men in all; and despoiled six men of their eyes and of their stones.[201]

This shows that penalties could be and were applied that were not specified in the laws. While this could be used to argue against the authority of the *Leges*, it is worth remembering that, as we have seen, previous codes had condemned the over-use of the death penalty. Instead of seeing this as throwing the authority of the *Leges* into doubt, it should be viewed as confirming the evidence of earlier codes regarding the practice of executions.

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[199] Chronicon monasterii de Abingdon, ed. J. Stevenson (*Rolls Series*), 2 vols., London, 1858, ii. 104, cited in VanCaenegem, 160.
[200] *Leges*, ed. Downer, 191.
[201] *Chronicles*, ed. Swanton, 254.

Orderic Vitalis sums up the treatment by Henry I of a number of traitors in one passage:

> Just as he was munificent in his rewards to his loyal servants, so he was implacable in his enmity to those who broke faith, and scarcely ever pardoned any of known guilt without taking vengeance on their persons or depriving them of their honours and wealth. Guilty men experienced this most wretchedly when they died in his fetters, and could neither gain release through kinship or noble birth, nor ransom themselves with money. He brought charges against Robert of Pontefract and Robert Malet, stripped them of their honours, and drove them into exile. [202]

The fines and forfeitures are familiar from the codes. This passage suggests that there were also those that were imprisoned until death, a measure that is not mentioned in the *Leges*.[203] Bellamy states that in the later medieval period, "Prison was not intended for correction but as the place where the misdoer should suffer passively society's revenge."[204] He goes on to write, "Buildings used for purposes of imprisonment must have existed in Saxon times and some may even have been constructed solely for that purpose."[205] In spite of this, we find little evidence in the codes for imprisonment. There is some mention of it in the narrative sources:

> He [King Edred, 946-955] for a long time kept Wulstan, archbishop of York, who it was said connived at the revolt of his countrymen, in chains; but afterwards, out of respect to his ecclesiastical dignity, he released and pardoned him.[206]

The imprisonment instead of harsher penalty may have also been "out of respect to his ecclesiastical dignity". It is clear, from this and previous examples, that the law code did not cover every eventuality.

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[202] Marjorie Chibnall, *The Ecclesiastical History of Orderic Vitalis*, 6 vols., (Oxford, 1969-1980), vi. 18, cited in VanCaenegem, 158-9.
[203] Imprisonment itself had, of course, appeared in earlier codes as a punishment for various offences (see above pages 25-26); however it was never with the stipulation that it would be until death.
[204] Bellamy, *Crime,* 166.
[205] Ibid.
[206] William of Malmesbury, *Kings*, 128. The revolt in question is one in which the Northumbrians "broke their oath and made Iric their king", ibid.

When it comes to treason, we have comparatively abundant examples. Treason and betrayal are transgressions that do get regularly mentioned in contemporary sources. This offence, however, does not follow the general pattern, as the penalties appear to have been far more punitive under the Anglo-Saxon kings from the time it first appeared in the extant law codes than it was under the Norman Kings at the end of the period being examined, with the death penalty being an element of the Anglo-Saxon, rather than Norman, laws. The comparative abundance of these treason cases allows for an in-depth analysis of the responses to treason to provide insight into the motives behind the judicial decisions of the English kings during the Anglo-Norman period, in order to determine whether these motives are based on notions of retribution or restoration, or on something else entirely. This analysis indicates that, rather than following any apparent penal philosophy, be it restorative or retributive, decisions at this level were based on considerations of political immediacy.

One factor in the disparate treatment of treason (as outlined below) between the Anglo-Saxon and Norman kings is undoubtedly a different vision of the importance of the lord and king. The Norman system produced a version of feudalism that encouraged much more independence in the nobility and less loyalty to the king. As Warren puts it, "The Normans were accustomed to a powerless king of France, and to a duke who exercised royal functions within his duchy without the benefit of unction."[207] For the Anglo-Saxons, in contrast, the tie to lord and king was much stronger. Part of the reason for the extent of the privilege in the position of the king is explained by Warren, who states that, "In both the laws and in later Anglo-Saxon literature loyalty to a lord was extolled above loyalty to a kin, and loyalty to a king above all."[208] There was not such importance attached to loyalty to the king

[207]Warren, *Governance*, 17.
[208] Warren, *Governance,* 3.

in Norman society. This may, indeed, be the reason why the Anglo-Saxon penalties for treason seem much harsher.

Perhaps another reason for the harshness of the Anglo-Saxon laws was the atmosphere in which these kings lived. For example, as Loyn states, "The eighth century presents a dismal story of unrest and violence with many of the Northumbrian kings deposed or dying by violence."[209] It would therefore have been in the best interests of the kings of the time to make treason as much of a taboo as possible in order to discourage such activity. One of the most effective ways to do this is to impose a harsh sanction for such a transgression. Originally, this was apparently done through the wergeld of the king. In Mercia, for example, the king's wergeld was twelve times as much as a nobleman's, and Northumbria also valued the king's wergeld high above any other man's. We should be wary of how much we read into this, however. Loyn describes the high wergelds as a "...ruinous and protective price on the king..."[210] He goes on to state that, "... in all the Anglo-Saxon kingdoms prohibitive protective prices were established as a safeguard to the king and to the coincident peace of the kingdom."[211] There is no doubt that a high wergeld would have served as a deterrent to some, as would any other penalty. To say that this was the reason they were established, however, ignores the restorative function of the wergeld to compensate for the loss of the person and what he would provide to his family. As the most powerful lord, and arguably the most important person in the kingdom, the king would have also been considered the most valuable, and hence have the highest wergeld to reflect that value. Nevertheless, a man who was wealthy enough would have been able to afford to kill a king; a harsher penalty with a stronger deterrent value would have been imposed to deal with

[209] Loyn, *England,* 9.
[210] Ibid., 46.
[211] Ibid.

the perceived failure of the wergeld system to deter the killing of kings. One can speculate that this was the motivation behind the death penalty when it was introduced.

In the written law codes that survive, we first find treason directly addressed in the laws of Alfred, who ruled in the ninth century:

> 4. If anyone plots against the life of the king, either on his own account, or by harbouring outlaws, or men belonging to [the king] himself, he shall forfeit his life and all he possesses.
>
> 1. If he wishes to clear himself [from such a charge], he shall do it by an oath equal to the king's wergeld.
>
> 2. And likewise with regard to all classes, both commoners and nobles, we ordain: he who plots against the life of his lord shall forfeit his life to him, and all he possesses, or he shall clear himself by [an oath equal to] his lords wergeld.[212]

It is worth noting here that the penalty is the same whether it is the king or another lord that is betrayed; loss of life and all possessions. The only difference is the required value of the exculpatory oath.[213] Two things can be taken from this passage. The first is that the transgression is the act of betrayal of a social superior, regardless of who that person may be. Following from that, the second is that this passage may be a reflection of the fact that the king was considered a lord, and first among lords as indicated by the value of his wergeld. Warren expresses this eloquently; "Kingship and lordship were akin. Kingship was an exalted lordship which had no superior under God; lordship was a kind of petty kingship."[214]

We later see in Aethelstan's tenth-century ordinances: "4. And we have declared with regard to one who is accused of plotting against his lord, that he shall forfeit his life if he

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[212] 4 Alfred in Attenborough *Laws*, 67-68.

[213] The concept of the value of oaths relates back to the relative value of wergelds. For example, "an oath equal to his lord's wergeld" would mean an oath from one man whose wergeld was the same as said lord's or oaths from several men whose combined wergelds totaled that value.

[214] Warren, *Governance*, 10.

cannot deny it, or [if he can deny it and] is afterwards found guilty in the threefold ordeal."[215] There is no mention of possessions, but the death penalty is the same. As well, there is no distinction here between the king and any other lord. The next law code that has survived which mentions treason is a Norman one (the *Leges Henrici Primi*), but one which was deliberately based in part on the Anglo-Saxon laws.

William I (1066-1087), the Norman conqueror of the English people claimed to rule as the legitimate successor to the last king of the Saxon royal house.[216] As such, he would have been expected to, and likely would have expected himself to, generally follow Anglo-Saxon traditions and laws. While he did not hesitate to innovate as necessary, he respected the laws of the kingdom he inherited, perhaps above all because he approved of them.[217] This desire to maintain continuity may have been part of the reason that Anglo-Saxons apparently continued to be sentenced under the old Anglo-Saxon laws while their Norman co-accused were sentenced according to Norman custom (as in the case of the 1075 rebellion discussed below).

Treason is mentioned explicitly in the *Leges*; in spelling out what offences are the sole jurisdiction of the king (c.10), the *Leges* includes, "...breach of fealty and treason..."[218] That these two are grouped together can be seen as a reflection of how closely related they are in the minds of the people of the time. The abhorrence with which people viewed the killing of one's lord is graphically reflected further on in the *Leges*:

> c. 75 Concerning those who kill their lords.
> 75, 1 If anyone kills his lord, then if in his guilt he is seized, he shall in no manner redeem himself but shall be condemned to scalping or disemboweling or to human punishment which in the end is so harsh that while enduring the dreadful agonies of

[215] II Aethelstan 4 in Attenbourough, *Laws*, 131.
[216] Loyn, *England*, 176.
[217] Ibid., 176-177.
[218] *Leges*, ed. Downer, 109.

> his tortures and the miseries of his vile manner of death he may appear to have yielded up his wretched life before in fact he has won an end to his sufferings, and so that he may declare, if it were possible, that he had found more mercy in hell than had been shown him on earth.[219]

Nowhere else in the *Leges* is found such a tirade, no other crime merits such a severe punishment. This clearly demonstrates the repugnance felt for this particular crime. The section continues:

> 75, 1a For in the case of every extravagance of human wickedness the comforting alleviations of a healing legal remedy have been made available, except in the case of betrayal of one's lord and blasphemy against the Holy Ghost (that is, impenitence of heart), which, according to the word of the Lord, shall not be forgiven to anyone, either in this world or in the world to come.
> 75, 2 Accordingly anyone who plots the death of his lord either on his own account or by means of a person whom he has harboured or of a person of suspicious character, through any direct action in the matter or through covertly sending others, shall forfeit his life and everything which he possesses. [220]

We see, then, that this crime was considered so severe that even conspirators and accomplices faced the death penalty. While the section only uses the term 'lord', as the king was first among lords this automatically extended to him. The primacy of the king-as-lord would have been reinforced by the direct oath that William I had all the major lords swear to him at Salisbury in 1085.

The written law, however, is no more than an ideal, a description of how justice ought to work. How it is put into practice is more significant. With this in mind, narrative sources can be examined to gain an idea of how the law actually operated at the time. At first glance, the dispensation of sentences seems chaotic: there are a wide variety of punishments handed out for the same transgression. Only a careful and detailed examination can suggest some reason behind the apparent chaos; with that in mind, I will examine the narrative depictions

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[219] Ibid., 233.
[220] Ibid.

of various treason cases that are available from the reigns of the Norman kings William I (1066-1087), William II (1087-1100) and Henry I (1100-1135).

After the 1075 rebellion against William I failed, according to Orderic Vitalis, "...Ralph of Gael earl of Norwich forfeited his English fiefs. So he was forced into exile; and returning to Brittany with his wife took up his patrimony, which the English monarch had no power to confiscate."[221] Although it is not specified, it seems that this forfeiture was the result of not obeying the summons to the king's court. It also seems from the passage that being 'forced into exile' in fact means that he chose exile rather than facing the king's justice. In contrast, Ralph's co-conspirator and brother-in-law, Earl Roger of Hereford, "...obeyed the summons to the king's court... was judged by the laws of the Normans, and condemned to perpetual imprisonment after forfeiting all his earthly goods."[222]

The third party mentioned in this rebellion is Earl Waltheof, whom Orderic Vitalis describes as a wealthy, respectable, and much loved lord, whose only involvement in the affair was to have been approached by Ralph and Roger. Although he did not join in their rebellion, neither did he alert the king, and he was thus accused of "...being a party to the conspiracy and proving unfaithful to his lord."[223] Waltheof was executed for this crime, and Orderic suggests that this was due to his Norman enemies at court, who coveted his lands and wealth.[224] There is some question as to Waltheof's full involvement, as there are also suggestions that Waltheof was a full party to the conspiracy, but that he afterwards confessed

[221] Orderic Vitalis, ed. Chibnall, ii. 319.
[222] Ibid.
[223] Orderic Vitalis, ed. Chibnall,, ii.321.
[224] Ibid.

to the king, who made light of it initially, but then later had Waltheof arrested; Waltheof was eventually executed.[225]

Finally, there were others involved in the rebellion, unnamed but mentioned in the account by John (a.k.a. Florence) of Worcester, "...some of those who had rebelled against him he outlawed from England and others he mutilated by having their eyes put out or their hands cut off."[226] It may be noted here that mutilation was not mentioned in the law codes as a punishment for treason; this will be discussed further below.

The next well-documented rebellion is the revolt of 1095, this time against William II. There are a wide variety of sentences recorded in this case. Gilbert of Tonbridge fared best, in spite of conspiring against the king. He warned the king of the impending ambush and revealed all the details of the conspiracy; he was pardoned. Hugh, Earl of Shrewsbury, was "privately reproached" and then forgiven in exchange for three thousand pounds.[227] Others were dealt with more harshly, but not in any obvious relation to their apparent degree of guilt. Robert de Mowbray, Earl of Northumberland, was the alleged leader of the revolt. According to Orderic Vitalis, Robert had been robbing merchants, when called to answer to the king refused the summons, and when the king moved against him, planned the ambush. For these actions, he was imprisoned.[228] Roger de Lacy was banished from England, and his land confiscated and given to his brother Hugh.[229] Odo, Count of Champagne, likewise lost his lands,[230] and, according to one source, was imprisoned.[231] The fates of unnamed others

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[225] *Chronicles,* ed. Swanton, 263. Also John of Worcester (a.k.a. Florence of Worcester): Chronicon ex chronicis (450-1117) with two continuations to 1140 and 1295, ed. B. Thorpe (English Historical Society Publications), 2 vols., London, 1848-1849, ii.10-12, quoted in Van Caenegem, *Lawsuits*, 21.
[226] John of Worcester, ed. Thorpe, ii.10-12, in Van Caenegem, 22.
[227] Orderic Vitalis, ed. Chibnall,, iv. 281, 285.
[228] Orderic Vitalis, ed. Chibnall,, iv.283.
[229] Ibid., iv.285.
[230] *Chronicles*, ed. Swanton, 232.
[231] John of Worcester, ed. Thorpe, ii.38-39 in Van Caenegem 117.

are mentioned, being imprisonment,[232] huge fines,[233] loss of lands, and the ominous but succinct, "...and some men taken to London and there destroyed."[234]

There are a few mentions of accused conspirators in the 1095 revolt opting for trial by combat. Arnulf de Hesdin was acquitted when his champion defeated the king's champion.[235] In contrast, William of Eu battled his accuser, Geoffrey Baynard, and lost. As a result, the king ordered that William's eyes be 'put out', and that he then be castrated.[236] William's steward, William of Alderi, was also convicted and subsequently hanged, even though he was said to be falsely accused and, "...the princes ... begged the king for his life and offered to pay him three times his weight in gold and silver..."[237]

Sometimes sentences seem to have been pronounced by default. Such was the case for William, earl of Mortain, who in 1103, "...went away from the land into Normandy; but after he was gone he worked against the king for which the king deprived him of everything and confiscated the land which he had here in the land."[238] There may have been little that more the king could have done once the offender had successfully fled his jurisdiction. Such also was the case of Robert, son of sheriff Picot of Cambridgeshire; he was accused in the conspiracy of Robert Curthose against Henry I. Robert chose to flee rather than face a trial, and his barony was confiscated. In this instance, there is also mention of social repercussions, "...his house became poor under the weight of this charge and all his friends

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[232] Ibid.
[233] Orderic Vitalis, ed. Chibnall,, iv.285.
[234] *Anglo-Saxon Chronicle*, A Revised Translation edited by D. Whitelock, with D.C. Douglas and S.I. Tucker, (London, 1965) , 24, in Van Caenegem 114. Swanton, in contrast, translates this as "...some led to London and there mutilated." *Chronicles* ed. Swanton, 232.
[235] Hyde *Chron.*: Chronica monasterii de Hida juxta Wintoniam ab a 1035 ad annum 1121, *in*: Liber monasterii de Hyda, ed. E. Edwards (*Rolls Series*), London, 1866, 301-302, quoted in R.C.Van Caenegem, ed., *English Lawsuits From William I to Richard I*, vol. 1, *William I to Stephen* (London: Selden Society, 1990), 114.
[236] *Chronicles*, ed. Swanton, 232.
[237] Hyde *Chron.*, ed. Edwards, 301-302 in Van Caenegem 113-114.
[238] *Chronicles*, ed. Swanton, 239.

despised it and became his enemies."[239] One can easily imagine that "his house became poor" once they lost the financial support of the barony – the loss of land as punishment had far-reaching implications in a society based on land tenure. In what likely stemmed from the same rebellion, Ivo of Grandmesnil, was convicted of, "waging war in England and burning the crops of his neighbors..."[240] The king not only fined Ivo heavily, but also, "...brought all kinds of tribulations on his sorrowing head..."[241]

The final example of this type of crime is that of Robert de Montfort.[242] According to Orderic Vitalis, Robert was accused of breach of fealty by Henry I; he admitted his guilt, gave up his lands, and obtained leave from the king to go to Jerusalem.[243] As we have seen above, in the *Leges* breach of fealty was considered the same as treason; both offences involved acting against a social superior to whom loyalty was owed. Robert's land would have been forfeit anyway; there are no further details mentioned as to why such leniency was given. One could speculate that there was some sort of plea agreement with the understanding that the offender to remove himself from the kingdom and go on crusade.

In the cases examined, the most frequent sentence passed on a person who was named was forfeiture (eight offenders). The next most frequent was imprisonment (four offenders, two of whom also suffered forfeiture) then exile (three offenders, all of whom also suffered forfeiture). The remaining punishments were comparatively rare: two executed, one mutilated and one fined. Finally, and also rare, were the full pardons (two) and one acquittal. This frequency ranking is not put forth as definitive; this is an extremely small sample, and

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[239] *Anglo-Saxon Chronicle*, ed. Whitelock in Van Caenegem, 152.
[240] Orderic Vitalis, ed. Chibnall,, vi. 18 in Van Caenegem, 159.
[241] Ibid.
[242] The end of the reign of Henry I seems a logical end point for this examination. The civil disorder that followed the death of Henry I, and the dispute over the throne, makes the terms 'rebellion' and 'treason' far too subjective, due to the number of issues that surround them.
[243] Orderic Vitalis, ed. Chibnall,, vi. 100, in Van Caenegem, 147.

there are several references to 'others' that received various penalties, without any indication of how many received what sentence. However, given that forfeiture was mentioned twice as often as any other penalty, it is safe to conclude that it was indeed the most common response to rebellion. By examining the details surrounding the sentences about which we do have more specific information, we can gather some indications about how these sentencing decisions were made.

On first examination, it is hard to find any pattern or reason for the variety of sentences. The choices made were the result of a number of factors. One factor in determining the sentence seems to have been the nationality of the offender, whether he was Norman and therefore subject to Norman law, or English and subject to English law. This would be a logical result of the idea that a kingdom consisted of a people, not a territory. This mindset is expressed in the very beginning of the *Leges*, "Henricus Dei gratia Rex Anglorum"[244]. Although Downer translates this as king of England, and points out that elsewhere in the *Leges*, *'rex Anglie'* is used instead of *'rex Anglorum'*, he also states in his commentary that "*Rex Anglorum* is the established expression in documents up to the late twelfth century, when *rex Anglie* begins to appear. It takes over as the normal practice in the reign of King John."[245] Downer explains this usage by saying, "...it is normal in Anglo-Saxon literature for a word describing the inhabitants to be used to signify the country itself."[246] Downer appears to fall into the trap of assuming that the Anglo-Saxons viewed a kingdom the same way we do now. This neglects the fact that the Anglo-Saxons saw their kings as ruling a people, not ruling a set territory; the use of terms must be seen in their context. The attitude of the period may have been a result of the level of sophistication, or

[244] *Leges*, ed. Downer, 80.
[245] *Leges*, ed. Downer, 305.
[246] Ibid.

lack thereof, in contemporary map-making. How can one claim to rule a territory when its exact boundaries are unclear? Regardless, this approach to rule may also be extended to law. As a king was king of a people, not a land, so was a law the law of a people, not of a land. It is perhaps a natural consequence of this way of thinking that a person should be judged according to what nation of people he belongs, rather than be judged according to what land he is in at the time. There are different examples of Normans and Anglo-Saxons being treated differently under the law. For example, in the *Leges* c.18, 1 we see, "If a Frenchman is accused, he shall make an oath of denial along with five others; an Englishman who is a freeman shall make his denial by means of a threefold sample oath of exculpation or a single strict oath or by the ordeal."[247]

Thus Orderic Vitalis, in describing the events leading up to the 1075 rebellion and the subsequent execution of Earl Waltheof, includes in a speech attributed to Waltheof the information that, "The law of England punishes the traitor by beheading, and deprives his whole progeny of their just inheritance."[248] Under Norman law, in contrast, the punishment was forfeiture and imprisonment.[249] Waltheof's execution, therefore, may be a matter of an English punishment for an English lord. Marjorie Chibnall, in comparing the execution of Waltheof to the forfeiture and imprisonment that Roger of Hereford received and the ethnic justification of this difference writes, "So clearly and explicitly is this stated that it suggests a deliberate report to that effect, possible officially put out to justify the harshness of an execution that was universally condemned."[250] In fact, after the execution, an informal cult

[247] Ibid., 121.
[248] Orderic Vitalis, ed. Chibnall,, ii.315.
[249] Van Caenegem, *Lawsuits*, 17.
[250] Orderic Vitalis, ed. Chibnall,, ii. xxxix.

grew up around Waltheof,[251] which may have been perceived as a threat to royal power and therefore had to be addressed. It may be the case, therefore, that this was a deliberate report, but that does not refute the fact that ethnicity was a perfectly legitimate factor in sentencing. This may explain why Earl Ralph, whose mother was a Breton but whose father was English,[252] would have fled, possibly fearing he may find himself subject to English punishments due to his father's English blood. Ethnicity clearly could be a factor in sentencing decisions; however, as few of the sources specify the ethnicity of the offender, a closer examination of this factor is impossible.

Another variable that may be considered is the relationship of the offender to the king. A king may be disposed towards leniency for a kinsman, whether for sentimental or political reasons, even though such a betrayal may be felt more deeply. We do have several examples of the king's relatives being convicted of various forms of treason. Earl Waltheof was related to William I only by marriage; he was wed to William's niece Judith, the daughter of William's sister Adelaide.[253] This relationship may have allowed him to survive the first accusation of conspiring against the king, which was reported in the Chronicle of Hyde.[254] However, after being accused of involvement in the conspiracy of 1075, he was executed.[255]

Twenty years later, William of Eu was accused of treason. According to the *Anglo-Saxon Chronicles*, he was a kinsman of the king, although there is no explanation of how close this relationship was. Nevertheless, having opted for trial by battle and being defeated,

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[251] Hugh M. Thomas, *The English and the Normans: Ethnic Hostility, Assimilation, and Identity 1066-c.1220* (Oxford: Oxford University Press, 2003), 49.
[252] According to *Chronicles*, ed. Swanton, 210.
[253] Van Caenegem, *Lawsuits,* 19 n.10.
[254] Hyde *Chron.*, ed. Edwards, 294-295, in Van Caenegem, 20
[255] Orderic Vitalis, ed. Chibnall, ii.323.

by order of William II had his eyes put out and was castrated; there is nothing in the sources to explain why this particular punishment was chosen. Another accused party in this conspiracy was Odo, Count of Champagne and the king's uncle; for his role he had his lands confiscated,[256] and may have been imprisoned as well.[257] In either case he fared far better than William of Eu, and his closer relationship to the king may have played a role in that fact.

There is one more case of treason by a relative of a king. In 1103, William, earl of Mortain, was convicted of treason against Henry I. As a result, all his goods and lands were forfeited.[258] Swanton identifies the earl as the son of William I's half-brother Robert.[259] This is, of course, a limited sample of cases involving relatives, and spans the reigns of three kings, as well. Nevertheless, it does seem that close relationship to the king may at times be a mitigating factor, though, as Waltheof found, the mercy of a king will only go so far.

Another factor that might be expected to have an effect on sentencing would be the severity of the offense. In the case of treason, one might expect those who physically acted against the king to be more seriously punished that those who were involved in a conspiracy. Furthermore, if a conspirator had repented and acted to warn the king of the plot, one might expect some mitigation of the punishment. However, there is no such constant correlation found in the sources. The best way to illustrate this is through the cases of the 1075 and 1095 rebellions, as the sources for both of these cases name numerous parties and describe both their involvement and their sentences.

As has been seen, in the matter of the rebellion of 1075, Ralph de Gael and Roger of Hereford both conspired and rebelled against the king, while Waltheof appears to have

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[256] *Chronicles*, ed. Swanton, 232.
[257] John of Worcester, ed. Thorpe, ii.38-39 in Van Caenegem, 117.
[258] *Chronicles*, ed. Swanton, 239.
[259] Ibid., n.11.

refused to join them.[260] At worst, Waltheof's crime was not informing the king of this plot, and in fact he may indeed have carried word to the king, according to the *Anglo-Saxon Chronicle*.[261] In the end, Ralph lost his lands in England and was exiled, Roger lost everything and was imprisoned, and Waltheof, whose crime was the least, was executed.[262]

In the rebellion of 1095, Robert de Mowbray was the leader of the revolt and arguably the worst offender; he had been robbing merchants, refused the king's summons, and finally laid an ambush for the king.[263] For these crimes, he was imprisoned. In comparison, William of Eu and William of Alderi were convicted only of conspiracy. William of Eu was blinded and castrated, William of Alderi was hanged.[264] They paid heavier penalties even though their crimes were seemingly lesser. Furthermore, Gilbert of Tonbridge, who revealed the ambush to the king, admitted his own role in the conspiracy and appears to have received a full pardon (perhaps to demonstrate that following the higher loyalty due to the king would be rewarded).[265]

Another consideration in deciding sentences would have been deterrence. The law-makers of this time do seem to have had a sense of the importance of deterrence and its impact. Hence we see, for example, in the laws of Edward and Guthram, "And they also fixed secular penalties because they knew that otherwise there would be many people whom they would not be able to control, and that otherwise many men would not be willing to submit as they ought to do, to the amends required by the church."[266] Although this refers to

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[260] Orderic Vitalis, ed. Chibnall, ii. 315.
[261] *Anglo-Saxon Chronicle*, ed. Whitelock, i. 210-211 in Van Caenegem, 21.
[262] Orderic Vitalis, ed. Chibnall, ii. 319-325.
[263] Ibid., iv., 279-283.
[264] Hyde *Chron.*, ed. Edwards., 301-302 in Van Caenegem, 113-114.
[265] Orderic Vitalis, ed. Chibnall, iv. 281.
[266] Edward and Guthram 2 in Attenborough, *Laws*, 103.

religious transgressions, the idea of deterrence is clearly expressed: the penalty exists to ensure compliance.

The value of deterrence was also clearly recognized in the twelfth century. Again in the *Leges,* there is a direct reference to deterrence:

> 82, 2b The situation is met with a more powerful system of deterrence than all these methods in circumstances where the question is one of the slaying of relatives or kinsmen or physical or pecuniary damages.[267]

This passage was referring to blood feuds and justice. Nevertheless, the relevant fact is that deterrence was not only an understood concept, but a deliberate principle.

If one is aiming for deterrence, one should consider how powerful a deterrent a given punishment is. Losing lands, while a dreadful blow, is not a personal punishment in that it does not affect the physical person, and thus might not have a strong, physical deterrent effect on some potential offenders; besides which, lost lands may be restored if the offender was returned to favour.. More significant regarding the loss of lands is the impact that is has on the offender's family, but again this may lack the immediacy necessary to affect many of the offenders. Imprisonment is much more personal, however in the period in question, wealthy and powerful relatives could ensure that the confinement was a comfortable one.[268] The immediacy of the Anglo-Saxon punishment of death must have seemed a more powerful deterrent. And the severe torturous death described in the *Leges* seems the most powerful deterrent of all. It would be difficult to witness such a death and think easily of plotting against one's lord, knowing that such a fate awaited the unfortunate soul who was discovered and convicted of such a crime.

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[267] *Leges*, ed. Downer, 257.

[268] See for example Hollister who describes the comfort in which Ranulf Flambard was imprisoned, stating he had "such a festive time in his captivity" Hollister, *Henry I*, 133.

Consideration of the deterrent value of sentences moves the discussion of justice into the political realm, as imposing a sentence for the purpose of deterrence can be seen as a political decision. As well, an examination of sentencing decisions will show the importance of politics in these matters. Rebellion, of course, is a highly political crime to begin with. Nevertheless, the principle is the same for all types of crime. The aim behind the harsh sentences may have been deterrence, but not out of altruistic concern for public good. The motivation was political. Public order was necessary to maintain rule, a necessity for the kingship. Crime control and politics cannot be considered separately.

In *Discipline and Punish*, Michel Foucault states, "We must first rid ourselves of the illusion that penalty is above all (if not exclusively) a means of reducing crime... We must analyse rather the 'concrete systems of punishment', study them as social phenomena that cannot be accounted for by the juridical structure of society alone, nor by its fundamental ethical choices; we must situate them in their field of operation, in which the punishment of crime is not the sole element..."[269] To this end, we must keep in mind that, whatever claims to legitimacy there may have been, William I and his successors were subduing a conquered land. Political considerations would have always played a hand in the decisions that the kings made in sentencing, especially when it came to such a serious matter as rebellion.

One case that has been examined in which politics are explicitly mentioned is that of the execution of Earl Waltheof. Orderic Vitalis states, "... it was generally supposed during the year's delay that he would be released from imprisonment. But a powerful group of his enemies met in the king's court and after long discussions judged him worthy of death..."[270] The motivations behind this are put forth: "...the Normans ... coveted the wealth and wide

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[269] Michel Foucault, *Discipline and Punish: The Birth of the Prison,* translated by Alan Sheridan, 2nd edition (New York: Vintage Books, 1995), 24.
[270] Orderic Vitalis, ed. Chibnall, ii. 321.

fiefs of Waltheof..."[271] Another case with blatantly political sentencing choices was the rebellion of 1095. Orderic Vitalis mentioned Hugh, earl of Shrewsbury, buying his way back into royal favour, and went on to say that the king, "...punished many others similarly, receiving huge pecuniary fines from them, and out of respect for their exalted kinsfolk who might have sought vengeance in Normandy he carefully concealed his real wishes."[272] Politics may have also been behind something mentioned earlier: even though they are not mentioned in the laws, mutilations and fines were part of the punishments meted out for treason. Political factors may have motivated the alternate choices in punishments for some offenders.

The final issue remaining is the question of how justice was viewed in the general public opinion. We can gain some sense of this from the writings of the chroniclers. Orderic Vitalis, at least, viewed Henry I as a harsh but fair judge. He writes: "Just as he was munificent in his rewards to his loyal servants, so he was implacable in his enmity to those who broke faith, and scarcely ever pardoned any of known guilt without taking vengeance on their persons or depriving them their honours and wealth. Guilty men experienced this most wretchedly when they died in his fetters, and could neither gain release through kinship or noble birth, nor ransom themselves with money."[273] Mercy does not seem to have been considered much of a virtue; it is not mentioned.

In the *Anglo-Saxon Chronicles*, we also see approval for firm justice. William is described thus, "...a very wise man, and very powerful, and more worshipful and stronger than any of his predecessors were. He was kind to those good men who loved God, and stern

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[271] Ibid.
[272] Ibid., iv. 285.
[273] Orderic Vitalis, ed. Chibnall, vi. 18 in Van Caenegem 158.

beyond all measure to those who opposed his will."[274] He is later described as "...a very stern man, and violent, so that no one dared do anything against his will."[275] Henry I is also praised for his firm response to crime, "He was a good man and was held in great awe. In his time no man dared do wrong against another; he made peace for man and beast; no man dared say anything but good to whoever carried their load of gold and silver."[276] Implicit in these statements is that no man *dared* these things for fear of the consequences, or, in other words, the justice meted out served as an effective form of deterrence. It would seem, then, that the chroniclers approved of the approach taken towards crime control.

There is no doubt that deterrence was one reason for the harsh penalties imposed for treason, perhaps connected to the centralization of power in the Anglo-Saxon kingdoms (as will be discussed in chapter IV). Nevertheless, the primary reason for the lenience or harshness of individual sentences in the cases of treason examined seems to have been political issues. If we were to generalize this to other offences, the primary motivation behind judicial decisions at the highest level, that of the king, were being made not on the basis of deep legal-philosophical considerations, but rather an individual decision of what was politically expedient.

[274] *Chronicles*, ed. Swanton, 219.
[275] Ibid., 220.
[276] Ibid., 263.

CHAPTER IV

THE INFLUENCE OF THE CHURCH

Important considerations in the examination of the transformation of justice are the views that influenced the change. We have already seen something of how the kings approached justice and of how justice might have been viewed by the people (as voiced by the chroniclers); it remains to examine the opinion of the Church. The Anglo-Saxons who had originally settled in what is now England were pagans, however at the end of the sixth century the Church had sent a mission, led by Augustine, to convert them to Christianity – a mission that was ultimately successful; by the late Anglo-Saxon period, the influence of the Church was undeniably strong. The Church was thus in an ideal position to influence justice in the period. The impact of Christianity on the laws would have been effected not only indirectly through the teachings of the Church and the influence that these teachings had on the minds of Christian rulers, but also through the direct influence of clerics who were close to these rulers.

In 597, Pope Gregory sent Augustine to England to convert the Anglo-Saxons to Christianity.[277] Augustine started with King Aethelberht of Kent, who had married a Christian Frank and thus already had a Christian presence in his court in the form of her chaplain and attendants.[278] The king's example of conversion was followed by many of his people, and Christianity then spread outward from Kent. Campbell points out, "In Kent and elsewhere where the power of kings was put behind that of the Church it may well have

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[277] Though this conversion was likely assisted by the efforts of the Celtic Church which existed on the periphery (Wales, Ireland and Scotland), it was the Roman Church that gained the upper hand and became the single ecclesiastical authority for England; thus the evidence we find comes from the Roman tradition. For concise coverage of how the Roman Church ended up with this supremacy, see Kenneth O. Morgan, *The Oxford History of Britain*, (Oxford: Oxford University Press, 1988; updated edition 1993), 77-81.

[278] R.H. Hodgkin, *A History of the Anglo-Saxons,* 2 vols. (Oxford: Clarendon Press, 1935), i. 264.

sufficed to ensure conformity – not conviction."[279] However, significant changes in burial practices (as evidenced in the archaeological record) indicate that there was a general conversion to Christianity in the seventh and early eighth centuries.[280] After the arrival of Augustine, kings always had with them clergy whose education surpassed that of the king or any of his lay followers.[281] Clergy were often recognized as being learned in the laws, and were therefore consulted on legal matters.[282] Furthermore, the Church was in a unique position in England to influence the law during the time in question, as secular and ecclesiastical courts were not separated in the Anglo-Saxon period.[283] For these reasons, it is worth examining the Church's stand on justice.

The fact that leading churchmen were included in the witenagemot along with members of the king's household[284] demonstrates that the influence of the Church was well established in Anglo-Saxon England. In fact, the very appearance of written laws is often credited to the ecclesiastical influence.[285] The earliest Anglo-Saxon law codes that survive, those of Aethelberht and of Hlothere and Eadric, which date from the seventh century, do not mentioned ecclesiastical participation. Such involvement is acknowledged beginning with the laws of Wihtred codified at the end of the seventh century, which includes two bishops among the "notables" who were present and active in the drafting of the laws.[286] The religious influence is even clearer in the preamble of Ine's laws:

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[279] James Campbell, 'The First Christian Kings' in *The Anglo-Saxons,* ed. James Campbell (Phaidon, 1982; Penguin Books, 1991), 51.
[280] Campbell, 'Christian Kings', 51.
[281] Hodgkin, *Anglo-Saxons*, ii. 452.
[282] Dorothy Whitelock, *The Beginnings of English Society* (London: Penguin Books, 1952, Second impression, 1954), 135.
[283] Pollock, 'Anglo-Saxon Law', 252.
[284] Williams, *Kingship*, 56.
[285] See for example, Williams, *Kingship*, 58 and Whitelock, *Beginnings*, 134.
[286] Wihtred in Attenborough, *Laws*, 25.

> "I, Ine, by the grace of God king of Wessex, with the advice and instruction of Cenred, my father, of Hedde, my bishop, and of Erconwald, my bishop, and with all my ealdormen and the chief councillors of my people, and with a great concourse of the servants of God as well, have been taking counsel for the salvation of our souls and the security of our realm, in order that just law and just decrees may be established and ensured throughout our nation..."[287]

Here not only do the bishops apparently merit special mention among the advisors, the salvation of souls is mentioned even before the security of the realm, perhaps indicating the importance that religious matters have, at least in the minds of the rulers, by that time.

Loyn says of Alfred (871-899), "He referred to the many synods held throughout England after the reception of Christianity at which were established, for the mercy which Christ taught, prices of compensation in money for almost every misdeed at the first offence. Only treachery to a lord was excluded from these merciful decrees: Almighty God adjudged none for those who scorned him, nor did Christ for those who gave him over to death."[288] This would seem to indicate that the more benevolent restorative justice was the doing of the Church. On the contrary, as has been mentioned, such justice practices pre-date conversion, being instead a feature of Germanic societies; there is evidence (as will be discussed below when penitentials are examined) that the Church in fact favored punishments as they served to cleanse the soul. Avoiding the death penalty, even if it meant mutilation, gave an offender the opportunity to save his soul by doing penance on this world.[289] Nevertheless, the fact that traditional practices were already being defended and defined in terms of Christian values demonstrates the general influence of the Church in society.

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[287] Ine in Attenbourough, *Laws*, 37.
[288] Loyn, *England*, 64.
[289] Whitelock, *Beginnings*, 143.

By the eleventh century, the government was run primarily by churchmen.[290] The influence of the Church over justice at every level can be seen in Canute's Proclamation of 1020:

> And likewise I enjoin upon all my reeves, under pain of forfeiting my friendship and all that they possess and their own lives, to govern my people justly everywhere, and to pronounce just judgments with the cognisance of the bishops of the dioceses, and to inflict such mitigated penalties as the bishop may approve and the man himself may be able to bear.[291]

In this, we see that churchmen are involved not only in the codification of the laws, but also are expected to be consulted with regards to dispositions of cases.

It must be mentioned that the Church had selfish as well as altruistic motives when it came to addressing the laws of England. Clergy had not been part of the traditional Anglo-Saxon society and thus did not fit into the established system of wergeld; it was necessary to establish in law the value to be assigned in relation to offences against clergy and in this manner establish legal protection for their persons and property.[292] Hence we see, as the first decree in the first law code that we have, that of Aethelberht (c.560-616):

> [Theft of] God's property and the Church's shall be compensated twelve fold; a bishop's property eleven fold; a priest's property nine fold; a deacon's property six fold; a clerk's property three fold. Breach of the peace shall be compensated doubly when it affects a church or a meeting place.[293]

Also, we have from Wihtred (c.691-725):

> The *mundbyrd* of the Church shall be 50 shillings like the king's.[294]

These passages established, in the minds of contemporaries, the value to be ascribed to the Church and the clergy. Particularly powerful is the second example, which places the house

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[290] Eric John, 'The Return of the Vikings' in *The Anglo-Saxons,* ed. James Campbell. (Phaidon, 1982; Penguin Books, 1991), 207.
[291] Canute's Proclamation of 1020, sec. 11 in Robertson's *Laws of the Kings*, 143.
[292] Hodgkin, *Anglo-Saxons*, ii. 452.
[293] Aethelberht 1 in Attenborough, *Laws*, 5.
[294] Wihtred 2 in Attenborough, *Laws*, 25.

of the Church on the same level as the house of the king. The self-interest of the Church when it came to the law codes is all too evident here. What remains to be examined is how ecclesiastical attitudes affected punishments.

Some indication of these attitudes can be found in Bede's *Ecclesiastical History.* Bede writes of several questions that Augustine asked of Pope Gregory in the seventh century, one of which was how a person who robs a church should be punished. Bede provides Gregory's response as follows:

> My brother, you must judge from the thief's circumstances what punishment he ought to have. For there are some who commit theft though they have resources, while others transgress in this matter through poverty. So some must be punished by fines, some by a flogging, some severely and others more leniently. And when the punishment is more severe, it must be administered in love and not in anger, for it is bestowed on the one who is punished so that he shall not be delivered up to hell fire. We ought to maintain discipline among the faithful as good fathers do with their children according to the flesh; they beat them with stripes for their faults and yet the very ones they chastise, they intend to make their heirs... So we must always keep love in mind and love must dictate the method of correction, so that we do not decide on anything unreasonable. You should also add that they ought to restore whatever they have stolen from a church.[295]

It is interesting to see here consideration of the motives behind the crime, as this is a factor that is not mentioned in the law codes we have seen. In fact, motivation does not appear to be a factor in English law until much later.[296] Bellamy, writing in regards to the later medieval period, states that, "Medieval records tell us very little about the social origins of criminals or why men ventured into crime in the first place. Not until the Tudor chronicler Holinshed considered the matter was there any real interest or eager speculation."[297] We can however find, as a result of the influence of the Church over centuries, some consideration of

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[295] *Bede's Ecclesiastical History of the English People* ed. Bertram Colgrave and R.A.B. Mynors (Oxford: Clarendon Press, 1969), 83.
[296] Bellamy, *Crime*, 31. Bellamy comments on the lack of concern with motivation in society, as reflected by law, until a 1390 statute differentiates between pardonable and non-pardonable homicide. Downer, however, points out that sections in the *Leges Henrici Primi* refer specifically to unintentional injury, Downer, *Leges*, 4.
[297] Ibid., 29-30.

circumstances by the time of Henry I. The *Leges* includes, in covering theft valued over eightpence by an offender over the age of twelve:

> 59, 20a Within this age span and in the case of a theft of this value it shall be possible sometimes through a favourable application of the law to help him on the first occasion on the grounds of rank, sex, degree of complicity, result and nature of the theft.[298]

It could even be argued that the wording of this section takes into account the possibility of motive as a mitigating circumstance. Also in the *Leges*,

> 68, 7 Anyone who kills a monk or cleric shall give up his arms and enter the service of God; and if he has done this accidentally and unintentionally, he shall do penance for seven years; if he did it intentionally he shall do penance until his life's end.[299]

The consideration of motives was the result of the different focus of the Penitentials when compared to the original law codes. The Anglo-Saxon laws had been developed to address the damage done by *acts*, the 'mens rea' was irrelevant in this regard. The Church, however, was concerned with the well-being of the soul; considerations of motive were important from this perspective. For these considerations to find their way into the laws required a shift in the perceived purpose of the laws to include morality and the condition of the soul; it should therefore not be surprising that it took so long for these notions to become evident in the laws.

Returning to Gregory's response to Augustine (above, page 79), the restoration of stolen goods was added almost as an afterthought. The rationale behind the punishments here seems to be reforming the transgressor "so that he shall not be delivered up to hell fire". Although it is also possible that this sentiment arose from the idea that suffering on earth could replace suffering after death, the rest of the passage uses concepts such as "discipline"

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[298] *Leges*, ed. Downer, 189.
[299] Ibid., 217.

and "correction", which would really suggest that the aim was to change the pattern of behavior.

There is no evidence that these judicial concepts moved from the ideology of the Church into the laws of the realm at that time. As discussed above, in his laws Alfred did link compensatory measures for first offences to "for the mercy which Christ taught".[300] However, we do not have any pre-Christian law codes for comparison; the earliest code we have is that of Aethelberht, which was issued after his conversion to Christianity.[301] It is thus not possible to establish that compensation was due to Christian influence rather than a continuation of earlier Germanic practice. Furthermore, the idea of compensation in the laws consistently appears to be closely tied to the notion of wergeld, which was a much older Germanic concept that predated the introduction of Christianity to England. As well, if the restorative nature of the laws was due to Christian influence, we would expect it to have a more noticeable effect on the laws as Christianity became more entrenched in English culture, and hence we would expect that the laws to become even more restorative. However, the evidence contradicts this. Aethelberht's code, written at the start of the Christian conversions, is the most restorative, mentioning only compensation and no punitive measures. In comparison, the later legal codes from Kent, as Christianity was spreading, have an increasing number of punitive measures. Although such a complex matter as judicial practice is influenced by dynamics of various factors, given the evidence we have to consider, there is no reason to believe that the restorative approach found in Anglo-Saxon laws was the result of the influence of Christianity. Rather, it seems to have been a continuation of an older Anglo-Saxon legal tradition. In fact, it is possible that the spread of

[300] Loyn, *England*, 64.
[301] Attenborough, *Laws*, 2.

Christianity hastened the shift to retributive justice, with an emphasis on pain and suffering. This would be consistent with the idea that all must suffer for their sins, if not in this world then the next.

Wulfstan (d.1023), archbishop of York and bishop of Worcester, favoured avoiding the death penalty.[302] His influence must be taken in to consideration, as he, "...was a prominent advisor, especially in legal matters, first to Aethelred (978-1016) then to Cnut (1016-35). The characteristic rhythms of his prose have been surely identified in the statements of law issued during the reign of Ethelred and it is quite certain that his was the shaping mind behind the laws of Cnut."[303] It is therefore plausible that the admonition to avoid the death penalty for "trivial offences" and instead administer "merciful punishments" was in fact the voice of Wulfstan. Wulfstan believed that a king's responsibilities included, "...to protect Christendom and God's Church with all his might, to help the righteous and to afflict the evil-doers, especially thieves, robbers and bandits."[304] In other words, Wulfstan was concerned with punishing wrongdoers rather than enabling reconciliation. This is perhaps the result of the Church's normal response to transgressions, as evidenced in the Penitentials: there punishment is found hand in hand with compensation.

The Church's stand on matters of justice can certainly best be seen in the medieval Penitentials. R.H. Hodgkin describes the Penitentials as "one of the greatest schemes for the regeneration of man".[305] Through the Penitentials, Christian morality was imposed on laymen and clerics alike.[306] Because of the influence of the Church on matters of justice, the

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[302] Whitelock, 'Authorship', 76.
[303] Loyn, *England,* 86.
[304] Ibid.
[305] Hodgkin, *Anglo-Saxons*, ii. 432.
[306] Ibid.

morality enforced through the Penitentials then became enforced in the public at large through the law codes.

Penitentials were in use in England by the late seventh century[307]. As these outlined the suitable measures for numerous transgressions that were confessed to priests, it stands to reason that they can therefore be interpreted as the Church's notion of appropriate justice. The focus in the penitentials ostensibly is on healing, and in light of this, they can be seen as being aimed at restorative measures. These documents, "...promoted the substitution of pecuniary satisfactions for revenge..."[308] In these ways, they were in sync with traditional Germanic practice as reflected in the early Anglo-Saxon law codes.

It is worth briefly mentioning here how ecclesiastical penance interacts with legal measure. As Hyams states, "...though all ecclesiastical crimes were also sins, the converse was not true. All sins rendered the sinner liable to perform penance. Only those classified and prosecuted as crime made the sinner subject, in addition, to punishment."[309] Therefore, the same transgression may be mentioned both in a penitential and in a law code, with different penalties mentioned in each. The wrongdoer was liable to both penalties, one being imposed by civil authorities, the other by ecclesiastical authority.

The ecclesiastical focus on the concept of healing is explicitly laid out in the Penitential of Cummean, c.650, which was still in circulation in the ninth century:[310]

> Here begins the Prologue of the health-giving medicine of souls.
> As we are about to tell of the remedies of wounds according to the determinations of the earlier fathers, of sacred utterance to the, my most faithful brother, first we shall indicate the treatments by the method of an abridgement.[311]

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[307] John Thomas McNeill, *Medieval Handbooks of Penance* (New York: Columbia University Press, 1938), 26.
[308] McNeill, *Penance*, 35.
[309] Hyams, 'Crime and Tort', 109.
[310] McNeill, *Penance*, 98.
[311] *Cummean*, in McNeill, *Penance*, 32.

Similarly, the main body of the *Bigotian Penitential* is entitled, "Eight Chapters on the Remedies of the Vices",[312] suggesting that sin is an illness to be cured, and thus restoring harmony to the body. In the introductory section of this penitential is written, "...sin and unrighteousness receive healing according to the nature of the faults after the wounds of sin and unrighteousness."[313]

In spite of the rhetoric of healing, the penitentials fall more on the 'retributive' than 'restorative' end of the spectrum: many of the measures specified are designed to inflict suffering, and thus are true punishments. This may be because, in the eyes of the Church, transgressions are not just actions that do damage, they are also immoral. The penances mentioned in these sources vary far more than do the penalties mentioned in the law codes. The most common penance mentioned is fasting. As an example of fasting, we see "Those who are drunk with wine or beer, contrary to the Savior's prohibition...if they have taken the vow of sanctity, they shall expiate the fault for forty days with bread and water; laymen, however, for seven days."[314]

Alternative penalties were prescribed for those physically unable to undergo the prescribed fast.[315] For example, in the *Penitential of Theodore,* regarding a year of penance, "...in the case of sick persons, the value of a man or of a female slave for a year, or to give the half of all his possessions..."[316] More severe practices, such as uncomfortable and fatiguing positions to be assumed during the fast, were designed to shorten the period of the

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[312] McNeill, *Penance*, 148. McNeill states that the *Bigotian Penitential* dates to around 700-725, and is preserved in a single manuscript which dates from the tenth or eleventh century.
[313] *Bigotian Penitential* ed. John Thomas McNeill in *Medieval Handbooks of Penance* (New York: Columbia University Press, 1938), 149.
[314] I.1, *The Penitential of Cummean* ed. John Thomas McNeill in *Medieval Handbooks of Penance* (New York: Columbia University Press, 1938), 101.
[315] McNeill, *Penance*, 31-32.
[316] VII.5 of *The Penitential of Theodore,* ed. John Thomas McNeill in *Medieval Handbooks of Penance* (New York: Columbia University Press, 1938), 190.

penance. Flogging with a rod or lash was also mentioned, including self-flagellation.[317] From the Anglo-Saxon penitential of Theodore of Tarsus,[318] we see for example, "As for boys who mutually engage in vice, he judged that they should be whipped."[319] Other penances may include monastic vows, servitude, alms-giving, or the emancipation of a slave.[320] In this vein we see, "If any layman carries off a monk from the monastery by stealth, he shall either enter a monastery to serve God or subject himself to human servitude."[321] and likewise, "He who has committed many evil deeds, that is, murder, adultery with a woman and with a beast, and theft, shall go into a monastery and do penance until his death."[322] For the most serious offences, such as homicide, exile was recommended, often under the name of 'pilgrimage'.[323]

Various terms of exile are mentioned in reference to fornication: "But if after the offense he wants to become a monk, he shall do penance in this way in a designated place of exile for a year and one-half."[324] and "He who defiles his mother shall do penance for three years, with perpetual pilgrimage."[325]

In regards to theft, we see,

> 5. He who plunders another's goods by any means, shall restore fourfold to him whom he has injured.
> 6. If he has not the means of making restitution, he shall do penance as we have stated above.

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[317] McNeill, *Penance*, 33.
[318] Theodore was archbishop of Canterbury from 668-90; the penitential was not written by him, and is written in the manner of answers to questions posed to Theodore by a presbyter. As with all the penitentials mentioned, it circulated for centuries after it was penned. McNeill, *Penance*, 179-180.
[319] *Theodore* II.11 in McNeill, *Penance*, 185.
[320] McNeill, *Penance*, 33-34.
[321] *Theodore* III.1 in McNeill, *Penance*, 186.
[322] *Theodore* VII.1 in McNeill, *Penance*, 190.
[323] McNeill, *Penance*, 34.
[324] *Cummean*, II.5 in McNeill, *Penance*, 103.
[325] *Cummean*, II.7 in McNeill, *Penance*, 103.

> 7. He who steals consecrated things shall do penance as we have said above, but in confinement.[326]

Here we see a truly restorative aspect in the penitentials, with penance only for those who cannot make restitution; this is very similar to what we have seen in early law codes where punishments are meted out only to those who cannot afford to pay compensation. There is reference to penal confinement; though there were no prisons in the modern sense, there were clearly places set aside for such confinement. For example, the Iona monastery had a nearby colony specifically for penitential separation, and McNeill suggests that this may have been common.[327]

As mentioned above (pages 79-80) in regard to other ecclesiastical writings, there was one glaring discrepancy between secular and ecclesiastical practice of the period: the penitentials explicitly took into account motivation, something that was not reflected in legal writings until much later.[328] For example, we see, "He who eats unclean flesh or a carcass that has been torn by beasts shall do penance for forty days. But if the necessity of hunger requires it, there is no offense, since a permissible act is one thing and what necessity requires is another."[329] This principle carried over to what we could consider more serious offences, in determining how liable the offender was to be considered:

> 5. He who commits murder through nursing hatred in his mind, shall give up his arms until his death, and dead unto the world, shall live unto God.
> 6. But if it is after vows of perfection, he shall die unto the world with perpetual pilgrimage.
> 7. But he who does this through anger, not from premeditation, shall do penance for three years with bread and water and with alms and prayers.

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[326] *Cummean*, III in McNeill, *Penance*, 106
[327] McNeill, *Penance*, 34.
[328] There is some mention of discretion in sentencing in Aethelred's laws, in that the more powerful shall be punished more heavily, and that mercy should be shown to those who need it (VI Aethelred 52 and 53 in Robertson, *Laws of the Kings*, 107), however motive is not mentioned as a consideration there.
[329] *Theodore* VII.6 in McNeill, *Penance*, 191.

> 8. But if he kills his neighbor unintentionally, by accident, he shall do penance for one year.[330]

In this section, we see the equivalent of our modern differentiation between first degree murder, second degree murder, and manslaughter depending on degree of intent and premeditation, with the penalties to be paid being varied accordingly. There is a similar acknowledgement of mitigating circumstances in the penitential of Anglo-Saxon origin, which states that if one man should cause the death of another, "If through anger, he shall do penance for three years; if by accident, for one year; if by a potion or any trick, seven years or more; if as a result of a quarrel, ten years."[331] As mentioned above, the consideration of motives fell more naturally into the realm of the Penitentials than that of the law codes, where it would appear only much later.

We can see in these things, then, that the church was in some ways far more enlightened (at least to our modern sensibilities) than the secular authorities, in that there was consideration of motivations behind transgressions. On the other hand, while acknowledging and incorporating many principles of restorative justice, the corporal punishments recommended in the penitentials predated such measures in the secular legal system. Given the early dates of both the penitentials and the English conversions to Christianity, it is likely that this influence was exerting itself throughout the Anglo-Saxon period. Considering the amount of influence that the Church had both with the lawmakers themselves and in the courts, the Church was likely one of the key forces behind the move from restorative to retributive justice.

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[330] *Cummean*, IV in McNeill, *Penance*, 107.
[331] *Theodore*, IV.7 in McNeill, *Penance*, 187.

CHAPTER V

SOCIO-POLITICAL FACTORS

W.L. Warren comments that peace-keeping was a long-standing issue for Anglo-Saxon kings and points to two major factors that contributed to this concern: prolonged warfare with the Danes resulting in social disruption and demoralization, and the growing size of the kingdom, which made personal enforcement by kings unattainable.[332] These are the easiest factors to point to, but it remains to be explained how these factors affected what could be termed 'crime control'. Essentially, there was a breakdown in the social bonds which form the foundations for effective restorative justice.

As can be expected, we have the most evidence about these issues from the period after 1066. Warren tells us that there was an increase in crime following the Norman Conquest.[333] Such an increase is to be expected in any period of social upheaval; however, the circumstances of this disorder can be examined to give us an idea of how such matters were dealt with in the early medieval period. Warren cautions that "The Norman conquest of England did not take place in 1066."[334] While William took the crown as a result of his victory at Hastings, he only gained effective control of England after dealing with the revolts that occurred between 1068 and 1072. William may at first have expected Englishmen to co-operate in his rule, as they had done for Cnut 1016-1035.[335] William aimed, at least initially, at maintaining legal continuity in England, in accordance with his claim to be the legitimate successor of Edward. This is often interpreted as a deliberate attempt to preserve the Anglo-

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[332] Warren, *Governance*, 39.
[333] Frank Barlow, *William I and the Norman Conquest* (London: The English Universities Press Ltd., 1965), 133.
[334] Warren, *Governance*, 55.
[335] Ibid.

Saxon past of the realm.[336] Such an attempt was likely also the politically expedient stand to take under the circumstances. The revolts changed William's attitude as well as his policy towards the English.[337]

Contemporary writers all appear to have agreed that William was determined to regain and maintain order and justice within his realm. Before his conquest of England, William had already learned the value of deterrence.[338] Orderic Vitalis writes of a speech delivered by William to his son Robert, in which William is reported to have said, "The Normans are a turbulent people, always ready to cause disturbances. They provoke you to foolish ambitions, so that when order breaks down they may do as they please and commit crimes without fear of retribution."[339] This reflects quite clearly the belief that order was maintained primarily through fear of retribution. William applied this lesson to his dealings with his new Anglo-Saxon subjects.

Frank Barlow writes, "In the eleventh century crime and disorder could only be repressed by force. William's strength had been used to produce order."[340] In examining ethnic relations between the English and the Normans, Thomas explicitly emphasized "the scale and nature of the violence and brutality involved [in the Norman Conquest]".[341] William of Malmesbury excused William I's savageries against the English with the following:

> It perhaps provides some proper justification for the king's policy if he was somewhat too harsh towards the English, that he found almost none of them trustworthy – behaviour which so exasperated his ferocity that he deprived the more powerful

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[336] For example, see Loyn, *England,* 176.
[337] Warren, *Governance*, 55.
[338] Barlow, *William*, 20, 133.
[339] *Orderic Vitalis*, ed. Chibnall, v. 99.
[340] Barlow, *William*, 173.
[341] Thomas, *The English and the Normans*, 58.

> among them first of their revenues, then of their lands, and some even of their lives.[342]

This grudging admission that William's actions may have been "somewhat too harsh" seems an understatement. This passage suggests only forfeiture and the occasional death penalty for treason, a far cry from the realities of actions such as what has come to be known as the harrying of the North. The important point is the tendency to respond to a breakdown in order with the use of retributive punishments. However, in spite of William's retribution for the disobedience of his new subjects, as we have seen there is no evidence that this marked a radical shift in the laws, as they related to punishments.

The social upheaval surrounding the Norman Conquest did not alter the direction of the trend in justice, nor should it be expected to have done so. After all, the Anglo-Saxons had experienced continual social upheavals and significant disorder throughout their history in England. To begin with, internal violence had long been common, including not only the local-level bloodfeuds but also the larger-scale warfare between kingdoms. Furthermore, this was not the first time the Anglo-Saxons experienced significant social disorder caused by invaders; the Viking invasions resulted in considerable social upheaval, as they had "relaxed social order and encouraged crime".[343] The Anglo-Saxons were conquered first by the Danes briefly under Swein in 1013 (until Swein died and Aethelred returned) and again under Cnut in 1016. Then, after having returned briefly to Anglo-Saxon rule under Edward the Confessor in 1042, they were conquered again in 1066 by the Norman William. Therefore, there must not be too great an emphasis put on the Norman Conquest in terms of laws. As with Cnut, William strove to preserve (at least officially) the English laws as part of his claim to legitimacy. Perhaps far more significant in the matter of punishments is the degree of

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[342] William of Malmesbury, *Gesta Regum Anglorum*, 471.
[343] Pollock, 'Anglo-Saxon Law', 248.

centralization of power. There was, under the Anglo-Saxon dynasties, a gradual trend towards such centralization in England; at the same time, we see the trend towards retributive justice. This is surely more than just coincidence.

Over the course of the Anglo-Saxon period, the Anglo-Saxon kingdoms gradually became amalgamated under one central power. This was not a straightforward progression by any means – various small kingdoms rose and fell while the larger kingdoms vied for supremacy with their kings claiming primacy and their dominance rising and falling like the tides. James Campbell describes a hierarchical pyramid of power in the seventh century, with petty kings at the base and progressively greater kings above them. Patrick Wormald suggests English high-kingship atop this pyramid may have been akin to Irish high-kingship at Tara as it existed in the tenth through twelfth centuries, "a political myth for which rival kingdoms competed vigorously."[344] If it was a myth, it was one that the Church encouraged as it offered the prospect of uniform control and resultant peace.[345]

This power structure was in constant flux. The most powerful kings from the fifth to seventh centuries were based in Sussex, Wessex, Kent and Northumbria. From the mid-seventh century onwards, dominance alternated between Northumbria, Mercia and Wessex.[346] The evidence points to an increasing consolidation of power in this period. A surviving letter, written in 796, from King Charlemange of the Franks (768-814) to King Offa of Mercia (757-96) gives insight into the political situation in England at the end of the eighth century; Charlemagne recognized only two kings in England – Aethelred in

[344] Patrick Wormald, 'The Age of Bede and Aethelbald' in *The Anglo-Saxons,* ed. James Campbell. (Phaidon, 1982; Penguin Books, 1991, 99.
[345] Wormald, 'Age of Bede', 99.
[346] Campbell, 'Christian Kings', 53-54.

Northumbria and Offa ruling everything in the south.[347] Indeed, Offa seems to have been a relatively effective overlord of Kent and Sussex.[348] Beginning in the ninth century some sort of consistency could be found in the positioning of power, with the rise of the influence of Wessex. The superiority of Wessex over Mercia had already been developing prior to the reign of Alfred.[349] Wormald says of the house of Wessex in this period, "If they did not actually dominate the other kingdoms, they were nearer to doing so than their rivals."[350] Alfred's successful resistance of Viking incursions gave him preeminence among the Anglo-Saxons, and his willingness to treat with non-hostile Scandinavians (such as Guthrum) paved the way for the amalgamation of Wessex and the Danelaw.[351] English national solidarity was something that Alfred created.[352] Towards the end of Alfred's reign, he described himself as king of the Anglo-Saxons, rather than just the West Saxons.[353] Even in areas where he did not exercise real sovereignty, the perception of Wessex dominance had been established.[354]

The amalgamation of the Anglo-Saxon kingdoms concluded rapidly under the power of the house of Wessex. John offers 886, the year that Alfred (871-899) seized London, as the conceptual beginning of the kingdom of England.[355] During his reign, Alfred began the conquest of middle and southern England, his son Edward the Elder (899-925) expanded on

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[347] Patrick Wormald, 'The Age of Offa and Alcuin' in *The Anglo-Saxons,* ed. James Campbell (Phaidon, 1982; Penguin Books, 1991), 101.
[348] Wormald, 'Offa and Alcuin' 101.
[349] Hodgkin, *Anglo-Saxons*, ii. 647.
[350] Wormald, 'The Ninth Century', 142.
[351] Hodgkin, *Anglo-Saxons*, ii. 647.
[352] Wormald, 'The Ninth Century', 143.
[353] Hodgkin, *Anglo-Saxons*, ii. 603; Wormald, 'The Ninth Century', 155.
[354] Hodgkin, *Anglo-Saxons*, ii. 652.
[355] Eric John, 'The Age of Edgar' in *The Anglo-Saxons,* ed. James Campbell (Phaidon, 1982; Penguin Books, 1991), 160.

this and "converted the kingdom of Wessex into a kingdom of England".[356] Edward's eldest son, Aethelstan (924-39), consolidated this kingdom.[357]

The unification of the English nation in the tenth century stands in stark contrast to the disintegration of France in the same period.[358] The weak monarchies and general disorder on the continent serve to highlight the comparatively powerful state, coherent royal administration, and internal peace to be found in England. Van Caenegem states, "The foundation of a solid national monarchy was a notable Anglo-Saxon achievement and its consequences were far-reaching. When in the twelfth century the rebirth of the state became a general European phenomenon, the existence of these Anglo-Saxon antecedents gave Norman and Angevin England an advantage..."[359]

The Church supported this ongoing centralization of power. During the reign of Aethelred (978-1016), the English monastic reformers Wulfstan and Aelfric relied on the protection of royal power, as clerics in England had done since the conversion. For this reason, the Church could be depended upon to endorse the principals of strong central (royal) power. The "powerful governmental machine" that the Anglo-Saxons built, and that was largely run by clerics, was to be passed on virtually intact to the Danish conquerors.[360]

During the early Anglo-Saxon period, law was personal, local and generally operated independently of the king.[361] The king and his representatives were merely expected to provide support to this system, as part of their obligation to provide peace; with this in mind, they encouraged compensatory resolutions to disputes in order to avoid violence that could

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[356] John, 'Edgar', 164.
[357] Ibid.
[358] R. Van Caenegem, 'Government, Law and Society' in *The Cambridge History of Medieval Political Thought c. 350 – c. 1450* ed. J.H. Burns (Cambridge: Cambridge University Press, 1988), 183.
[359] Van Caenegem, 'Government', 184-185.
[360] John, 'Vikings', 200-202, 207.
[361] Barlow, *Feudal Kingdom*, 50.

escalate and generally weaken the kingdom.[362] Warren views the Anglo-Saxon approach thusly:

> Securing justice for all men was a necessary aspect of peace-keeping and a primary function of kingship. The king's duty towards most men was, however, discharged not in doing justice but in seeing that it was done. The method adopted was to draw into the organization of shires and hundreds the ancient customary procedures by which men in primitive society arbitrated disputes, recognized rights and arranged settlements for injuries and wrongs, that peace might be restored between kindreds and neighbours.[363]

Along with an increased centralization of power came an increased involvement in matters of crime control. Already in early Anglo-Saxon times, the king was expected (in practice if not in law) actively to suppress theft and violence. This was particularly true when other redress was uncertain, as was the case with traders, widows and orphans: they fell under royal responsibility.[364] Royal involvement in justice was far more evident in England in the seventh century than it was in Scandinavia, Scotland or Ireland for many centuries to come.[365] Wormald sees the two issues, law and royal power, as fundamentally intertwined for the Anglo-Saxon kings in the seventh century:

> Ultimately, it does seem probable that being made solemnly and permanently responsible for the statement of law enhanced a king's power. Law was issued in the king's name, and became the king's, in a way it may not have been before, and was never to be in Scandinavia. If the early laws are most important as evidence for a stage in the history of English society, they are also a powerful symbol of the post-conversion transformation of English kingship.[366]

Once the balance of responsibility for maintaining order had shifted from the community to the crown, it became necessary for the king to maintain constant vigilance in this regard. In order to maintain law and order, not only did the king have to be a dominant

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[362] Loyn, *England*, 69.
[363] Warren, *Governance*, 42.
[364] Loyn, *England*, 44.
[365] Wormald, 'Age of Bede', 99.
[366] Ibid.

force within the kingdom, he also had to intervene personally and often in crime control.[367] There was a clear connection between justice and royal power, as they sustained each other and developed together.[368] The Church supported both the attempts of the rulers to establish and maintain peace and order and the attempts to expand the authority of the kings.[369]

Fletcher views the shifting role of the ruler as a gradual evolution, without addressing the cause of the change. He points to King Edmund's ordinance on feuds, and says, "Kings therefore sought to insert themselves into the feuding process in the role, so to say, of umpires or referees; and as time went by they did so, or wanted to do so, in a more assertive way. But we are still a long way from a legal culture in which all crime is crime against the king."[370]

Fletcher does, however, point out that the kings were actively involved in the suppression of crime in the Anglo-Saxon period:

> The peace that kings swore to maintain was something that had to be striven for. It didn't just happen. Everything that we know about early medieval society, in England or elsewhere in Europe, suggests that this was an extremely violent world. Peace was something that had to be imposed by authority in a blunt and hard-nosed fashion. When merchants from York were imprisoned and robbed on the Isle of Thanet in east Kent in about 970 the perpetrators of this breach of the peace were deprived of their property, and some among them of their lives, on King Edgar's order. A contemporary writer attributed to the same king a 'very severe' law under which convicted felons were to be blinded, mutilated and scalped, after which what was left of their bodies was not to be given Christian burial but to be devoured by beasts and birds. In these savage measures one can see kings responding to violence with violence in an attempt to impose the king's peace. How effectively it worked one may legitimately wonder.[371]

In this example, one can clearly see the reaction of a king trying to control a population with which he no longer has a personal relationship.

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[367] Bellamy, *Crime*, 199.
[368] Lyon, *Legal History*, 42.
[369] Hodgkin, *Anglo-Saxons*, ii. 454.
[370] Fletcher, *Bloodfeud*, 116.
[371] Ibid., 28-29.

The expectation that the king will be actively involved in the suppression of wrongdoing is reflected in the coronation oath. A tenth-century[372] Anglo-Saxon coronation oath reads as follows:

> In the name of the Holy Trinity! I promise three things to the Christian people who are under my authority:
> 1. Firstly, that true peace shall be assured to the church of God and to all Christian people in my dominions.
> 2. Secondly, I forbid robbery and all unrighteous deeds by all classes of society.
> 3. Thirdly, I promise and enjoin justice and mercy in the decision of all cases, in order that God, who liveth and reigneth, may in his grace and mercy be brought thereby to grant us all his eternal compassion.[373]

Increasing royal concern with wrongdoings can be seen by the tenth and eleventh centuries. This is reflected in Aethelstan's and Edgar's concern with suppressing theft, and Cnut's employment of outlawry.[374]

The idea that a ruler was responsible for peace and order was thus a long-standing idea in medieval society. When dealing with small tribal groups, this was not much of a problem. However, with consolidation of larger and larger territories, and centralization of power with the larger kingdoms, maintaining order within a restorative justice system becomes more problematic. In essence, the king was increasingly expected to take responsibility for the actions of a populace with which he was becoming decreasingly involved. The Anglo-Saxon kings delegated responsibilities, including maintenance of order, to their earls.[375] Those in these positions, however, were still separate from the commoners. The one ultimately responsible for justice (the king) was, for the most part, no longer personally involved in the lives of those at odds with each other. When harmony cannot be

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[372] While this particular oath is from the late tenth-century, the words have been used in coronations from the tenth to the fourteenth centuries, and may have been in use as early as the ninth century. Robertson, *Laws of the Kings*, 40-41.
[373] Promissio Regis in Robertson, *Laws of the Kings*, 43.
[374] Loyn, *England*, 106.
[375] Barlow, *Feudal Kingdom*, 45.

maintained, and social order breaks down, the ruler must use what tools he has available to regain social control, in this case, the threat and use of physical punishments.

Hugh Kearney, in examining justice in Ireland under the Normans, related punishment to the monarchy, in contrast with the traditional system of justice:

> Monarchical government, in contrast, stood for law enforcement from above and for exemplary punishment, not compensation. The king or the royal justices decided whether a crime had been committed and carried out the punishment, which could include hanging or mutilation. From the monarchical viewpoint the vendetta represented anarchy. To those adhering to the traditional kinship code, monarchy might well stand for savage and institutionalised injustice.[376]

The idea of relating the imposition of justice from above with the erosion of compensatory measures and the increase in punitive measures is worth considering in the English context. After all, we see the first punitive measures showing up in the law codes as power is becoming centralized. The increase in retributive justice under the Normans may in fact be a function of the increased political control wielded by the king.

Black defines law, "...simply as *governmental social control.*"[377] In examining patterns of behavior in the modern criminal justice system, Black proposes,

> Law tends to become implicated in social life to the degree that other forms of social control are weak or unavailable. Hence, what we discover in the behavior of policemen turns out to be simply an instance of a much more general pattern in the conditions under which the law acts upon social life. ... the likelihood of legal control is greater where other forms of social control are absent...[378]

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[376] Hugh Kearney, *The British Isles: A History of Four Nations* (Cambridge: Cambridge University Press, 1989; reprinted 1995), 61.
[377] Black, 'Boundaries', 1096.
[378] Black, 'Boundaries', 1099.

In the early Norman period, when the rulers were strong kings, royal help was perceived to be more effective than self-help.[379] In this manner, we see the royal retributive justice replacing traditional informal social control in this period.

Warren argues that "...the kings who united England set their faces against kindred organization."[380] He identifies three main factors in weakening the kindred system: organizing the realm into shires and thus erasing tribal divisions, individual rather than family ownership of land, and the limits on and eventual outlawing of the blood feud. Significant in this regard is that loyalty to the king became more important than loyalty to kin, as seen both in law and in literature.[381] Part of this becomes a chicken-or-egg debate: did the kings erase tribal organization with the organizations of tithings, hundreds and shires, or did this system evolve to bolster a system that was already failing? We do not have a precise date as to when the new system began, only that it was in place during the late Anglo-Saxon period. It is thus plausible that this new system of social control evolved to take the place of traditional social bonds that had been broken by the decimation of the Viking invasions.

Warren does warn that "...we should hesitate before relegating kindreds to the sidelines of English history. They did not lose all *raison d'etre* because they were denied a formal place in the organisation of society."[382] Many social functions remained, particularly (in the interest of this topic) the disciplinary functions, which Warren suggests survived well into the twelfth century. For instance, kinsmen were required to support (with oaths) an

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[379] Stenton, *Justice*, 23-24. Stenton was referring in particular to disseisin, and the custom in which someone violently ejected from their land had four days to gather friends and take it back; it would be safe to generalize that royal help would be seen as more effective in other matters of justice as well.
[380] Warren, *Governance*, 3.
[381] Ibid.
[382] Ibid.

accused who protested his innocence, thus motivating them to restrain constant troublemakers.[383] In the late Anglo-Saxon period, social control was enforced by a pledge system; every male over twelve years old had to have "designated sureties for good behavior."[384] These pledges were responsible not only to ensure that the man would appear in court if accused, but also to cover any financial penalty if he were convicted and unable to pay himself. Warren states that these pledges replaced the kindred before the law.[385] However one can imagine that this came about as a way to bolster rather than replace the kindred system; surely a man's kindred were among those who served as pledges for him. As well, fines and compensation often involved more money than an individual alone could pay, forcing him to turn to his kinsmen who could then impose conditions on such aid, theoretically placing controls on his behavior. Warren goes on to say that,

> Such measures could be effective, but not reliably so, and the trend in later Anglo-Saxon laws was to seek alternatives to the kindred in the matter of peace-keeping: requiring a lord to be among the oath-helpers, and requiring men to find pledges among their neighbours for their appearance to answer charges, and to discharge financial penalties. While, therefore, kinship remained one of the important bonds of society, it was no longer one which by the time of the Norman Conquest had an explicit function in English governance.[386]

The fact that the law makers felt it necessary to impose further controls on an individual did not necessarily mean that the kinship structure was breaking down so much as that it was no longer perceived to be an effective method of social control. As well, even though social control can be seen to be developing slowly from a kinship system to a more formally structured one, there is still a clear emphasis on informal social control. In this case, the control is merely being imposed by a wider section of the community that the

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[383] Warren, *Governance*, 3-4.
[384] Warren, *Governance*, 41.
[385] Ibid.
[386] Warren, *Governance*, 4.

immediate kinship group. The modern reader must keep in mind that communities were smaller and more tightly knit that those that exist for the most part in today's urban environments. Individuals were much more dependent on the community, and therefore more influenced by the opinion of, and pressure from, the community.

The system of group pledging was meant to ensure men would stand before the courts for justice, but it also obliged men to act in a manner that ensured his neighbours would hold a good opinion of him.[387] In this way, the law served to enforce and reinforce social control in its original form; it was a formal system that mirrored the informal kindred system.

Pollock wrote:

> Step by step, as the power of the State waxes, the self-centred and self-helping autonomy of the kindred wanes. Private feud is controlled, regulated, put, one may say, into legal harness; the avenging and protecting clan of the slain and the slayer are made pledges and auxiliaries of public justice. ... We have to conceive, then, of the kindred not as an artificial body or corporation to which the State allows authority over its members in order that it may be answerable for them, but as an element of the State prior to the State itself.[388]

Pollock was projecting modern concepts into Anglo-Saxon legal institutions when he saw the kindred as "an element of the State". In essence, what he is seeing is the social control function of the kindred. This function of the kindred was not, and still has not been totally appropriated by the State (an acceptable term when applied to the modern era, regardless of how anachronistic it was when Pollock applied it to Anglo-Saxon times). Pollock recognized that self-help measures and feud decreased as the power of the State increased, but he did not offer an explanation as to how or why this happened. It appears that it came about as a result of the depersonalization of justice that accompanies the centralization of power.

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[387] Warren, *Governance*, 41.
[388] Pollock, 'Anglo-Saxon Law', 244.

There was a complex dynamic of social and political factors that influenced the practice of justice during the Anglo-Saxon period. Social disorders weakened the social bonds necessary for the traditional system of justice to work; the increased centralization of government further compromised traditional justice by making justice more impersonal while emphasizing the role of the king in social control. Finally, increases in disorder, in part the result of the aforementioned weakening of traditional justice, were met with retributive measures that were perceived as being more effective. These factors serve in part to explain why there was an observable shift in the practice of justice during the Anglo-Saxon period.

CHAPTER VI

CONCLUSION

Campbell has suggested that, "...very often, to consider the Anglo-Saxons is to end in speculation."[389] To be sure, many of the issues surrounding justice in the Anglo-Saxon period will remain matters of speculation, but some concrete findings can be drawn from this examination of the evolution of Anglo-Saxon justice.

Although at first blush the period surrounding the Norman Conquest seems to have been pivotal in the shift from restorative to retributive justice, due in large part to the manner in which the Anglo-Saxon laws have been treated by scholars, there was clearly a gradual shift over the course of the entire Anglo-Saxon period. The earliest code, that of Aethelberht, contained strictly restorative measures. Retributive measures began to appear, however, as early as 695 in the laws of Wihtred. Thereafter for much of the Anglo-Saxon period there are two approaches evident in the laws: to restore harmony through compensation when social order broke down and to punish offenders through retributive measures. The restorative aspect was gradually replaced by the retributive, at least in official sources.

There is some suggestion that, in spite of the official position after the end of the Anglo-Saxon era, when notions of restoration and reconciliation tended to disappear from the laws, the populace continued to cling to traditional notions of restorative justice. Restorative justice continued to operate informally well into the Norman period, as under Henry II, "Society was self-policing. The humbler folk were still organized into tithings and hundreds and were under social and ecclesiastical pressure to settle their differences peacefully."[390] In

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[389] James Campbell, 'Epilogue' in *The Anglo-Saxons,* ed. James Campbell.(Phaidon, 1982; Penguin Books, 1991), 246.
[390] Barlow, *Feudal Kingdom,* 311.

both 'Societal Concepts of Criminal Liability for Homicide in Mediaeval England'[391] and *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800*[392], Green argues that, when the possibility of compensation for "open" homicide (manslaughter) was removed and capital punishment extended to replace it, juries responded by acquitting or finding for self-defence.[393] As he words it, "The introduction of novel and strict official rules of liability meant the destruction of the traditional means of dispute settlement in simple homicide, but it did not obliterate traditional societal attitudes of liability."[394] He concludes that it seems, "...an informal, extra-judicial system of monetary compensation long outlived the demise of formal *wergeld* settlement."[395] Green is looking at the period after 1300, as this is when he can find the evidence for his position; however, he speculates that this form of jury nullification (of the death penalty) had existed for quite some time and only became visible in the fourteenth century due to a greater availability of evidence.[396]

There is thus likely a wealth of developments that went on beyond what is reflected in the official sources. Unfortunately, we do not have the luxury of such evidence when examining justice in the Anglo-Saxon period. We are restricted to what we find in the official approaches to justice that, as has been demonstrated, underwent a fundamental shift in orientation from restorative to retributive measures during the period of Anglo-Saxon law codes.

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[391] Green, 'Societal Concepts'.
[392] Green, *Verdict.*
[393] Green, 'Societal Concepts', 670. Green draws his evidence from cases after 1390, and states that there is a lack of evidence to prove the argument before then, p.674.
[394] Ibid., 671.
[395] Ibid., 694.
[396] Green, *Verdict,* 31-32.

There are many factors behind the shift in approaches to crime control that can be found in the official sources; the official sources, royal and ecclesiastical, clearly indicate two of them. First is the influence of the Church, with its emphasis on punishment for moral wrongs. Due to the success of the mission to convert the Anglo-Saxons and the prominent positions that clergy attained within the Anglo-Saxon kingdoms, the Church was able to directly and indirectly impact legal practice. This is most apparent in the Penitentials, which introduced much more strongly the notion of punishment that eventually worked its way into Anglo-Saxon law. Second is the breakdown of traditional social control – the breakdown itself resulting from social disorders that weakened social bonds and increased centralization of political power. Traditional restorative justice had operated on a local level; as power was removed from this level to an increasingly distant king, it ceased to be seen as effective and so was replaced with retributive measures. These issues call for greater examination; hopefully this paper has pointed the way for future research.

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