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Regulation in English Law, c. 850 – c. 1250.*

THOMAS BENEDICT LAMBERT

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# Protection, Feud and Royal Power

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Violence and its Regulation in English Law

c. 850 – c. 1250

T. B. Lambert

Thesis submitted for  
the Degree of Doctor of Philosophy.  
Durham University, 2009.

# Abstract

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The thesis analyses the change in the way that violence was addressed in English law between the late ninth and early thirteenth centuries. It attempts to explain how a system largely based on feud, in which violence was a matter primarily for the parties involved, became one in which all serious violence was punished by the crown as crime. It does so through the examination of all the relevant legal material in the period: mostly royal law-codes and private legal compilations alongside more limited records of real-life cases. The central argument is that the concept of protection – or “protective power” – is crucial to understanding both how violence was regulated as a whole and how royal jurisdiction over violence grew. It emphasises not just royal jurisdiction but the real power that was exercised by other parties such as lords, churches, guilds and kindreds.

The thesis is split into two parts, divided chronologically by the Norman conquest of England in 1066. Part one begins by assessing the situation at the beginning of this period, outlining the core elements by which a case of homicide would be settled in the system of feud. It criticises the arguments for the introduction of a royal crime of homicide under the Anglo-Saxon kings, arguing instead that the core elements of feud remained relatively unchanged before 1066. The second chapter then examines the ways in which royal jurisdiction over violence did advance in this period, and finds that these almost invariably involved the extension of specific limited protections, such as that which made violence in a house an offence punishable by the king. This picture of expanding royal jurisdiction is combined with the evaluation of the significance of feud from the first chapter to produce a new model of the regulation of violence in pre-conquest England. The third chapter applies these findings to the wider debate about the distribution of legal power under the Anglo-Saxons. It concludes that a misunderstanding of the role of protection has, in part, led historians to underestimate the significance of the powers exercised by ecclesiastical institutions, lords and free kindreds, skewing assessments of legal power heavily in the king’s favour.

Part two opens with an assessment of when we can first securely demonstrate the existence of a royal prohibition of homicide. Using a variety of sources it identifies a significant shift at around the time of the Assize of Clarendon in 1166. The fifth chapter looks at a number of possible legal mechanisms that might have contributed to the shift from a system of protections to a general

royal prohibition on violence. The development of the murder fine; the introduction of the concept of infamy for those defeated in judicial duels; the significance of the protection inhering in charters; and the possibility that specific royal protections merged and expanded into a general peace are all examined. The picture that emerges is once again one in which protective power plays a major role. The final chapter looks at wider ideological trends, such as the Peace Movement and the representation of crime as treachery to the king, examining the likelihood of their influencing legal developments. It argues that the ideal of a general peace against violence, which was central to the Truce of God, may well have been important in twelfth-century England. Overall, it is argued that, throughout the period, royal jurisdiction over violence increased through the expansion of royal protective power within a wider system of protections. When that expansion reached a point where the system was wholly dominated by royal protections, however, protection was swiftly replaced by a general prohibition of “violent crime”.

# Acknowledgements

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It is impossible to undertake a project of this size and duration without incurring many debts of gratitude. I would like, in particular, to thank my supervisors, David Rollason and Christian Liddy, for their patience and unstinting support throughout the process. Many thanks must also go to Pat Musset, David Ashurst, Cynthia Neville, Clare Stancliffe, David Pratt, Helen Lacey, Stefan Jurasinski, Giles Gasper, Len Scales and the members of Durham's Medieval and Renaissance Postgraduate Discussion Group for various forms of help, advice and friendly debate, as well as to my father, Peter Lambert, for his generous efforts in seeking out obscure books. Meredith Bacola, my closest companion in medievalism, deserves a special mention both for her sympathy and understanding, and for her incredible capacity for cheerful optimism. It would have been a much lonelier journey without her company. My greatest debt, however, is to my wife, Ruth, because of whom I will always be able to look back upon my postgraduate years as a time of true happiness. She has put up with a great deal without complaint and I don't know if I could have done this without her. Finally, grateful thanks are due to those institutions whose financial support has made this work possible: to the Arts and Humanities Research Council ([www.ahrc.ac.uk](http://www.ahrc.ac.uk)) for its Doctoral Award and to Durham University for its Doctoral Fellowship.

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# Abbreviations

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## A Note on the Citation of Laws:

This thesis follows the now standard system of citation for Anglo-Saxon and Anglo-Norman legal texts established by Felix Liebermann in his *Die Gesetze der Angelsachsen* (Halle: Max Niemeyer, 1903-1916). For many of the texts, the *Gesetze* remains the most authoritative edition. There are, however, other editions and a number of different translations available. These are all indicated here, with the first reference indicating the primary edition. The translations employed here tend to be based on the modern editions noted below, with any modifications aimed at producing a more literal rendition of the text. Where the use of a particular translation is significant, this is noted in the footnotes.

Abt	Laws of Æthelberht. Edited: Oliver (2002); <i>Gesetze</i> ; Attenborough (1922). English translations: Oliver (2002); Attenborough (1922); <i>E.H.D.</i> i, no. 29. Though Oliver (2002) introduced a new system of numbering the clauses, Liebermann's is retained here because of its presence in all the other editions.
Af	Laws of Alfred. Edited: <i>Gesetze</i> ; Attenborough (1922). English translations: Attenborough (1922); <i>E.H.D.</i> i, no. 33.
[I-VI] As	Laws of Æthelstan. Edited: <i>Gesetze</i> ; Attenborough (1922). English translations: Attenborough (1922); <i>E.H.D.</i> i, nos. 35-37 (II, V and VI As).
A.S.C.	Anglo-Saxon Chronicle, cited from J. Earle and C. Plummer, eds., <i>Two of the Saxon Chronicles Parallel</i> (2 vols., Oxford: Clarendon, 1892-99). It is cited by <i>corrected</i> year (supplied from translation in Swanton (2000)) and by version. So, A.S.C. 946(D) refers to the 'D' version of the chronicle in the year 946.
[I-X] Atr	Laws of Æthelred. Edited: <i>Gesetze</i> ; Robertson (1925). English translations: Robertson (1925); <i>E.H.D.</i> i, nos. 42-46 (II, III, V, VII and VIII Atr).
Að	The anonymous legal text "Að". Edited: <i>Gesetze</i> .
Blas	The anonymous legal text "Be Blaserum". Edited: <i>Gesetze</i> .
Boretius <i>Capitularia</i>	Alfred Boretius, ed., <i>Capitularia Regum Francorum</i> (2 vols., MGH Legum Sectio II; Hanover: Hahn, 1883-97).
Cons Cn	<i>Consiliatio Cnuti</i> . Edited: <i>Gesetze</i> .
[I -II] Cn	Laws of Cnut. Edited: <i>Gesetze</i> ; Robertson (1925). English translations: Robertson (1925); <i>E.H.D.</i> i, no. 50.

## Abbreviations

- Cn 1020 Cnut's letter to the English of 1020. Edited: *Gesetze*; Robertson (1925). English translations: Robertson (1925); *E.H.D.* i, no. 48.
- D.B.* *Domesday Book*. Entries are cited by folio. The standard editions of the text are A. Farley, ed., *Domesday Book* (London, 1783), and, on a county by county basis, John Morris et al., eds., *Domesday Book*, 39 vols. (Chichester: Phillimore, 1975-86).
- DofExchequer* Johnson, C., Carter, F. E. L. and Greenway, D. E., eds., *Dialogus De Scaccario* (Oxford Medieval Texts; Oxford: Clarendon, 1983).
- DNBonline* Lawrence Goldman, ed., *Oxford Dictionary of National Biography Online* (Oxford: Oxford University Press, 2004-): [www.oxforddnb.com](http://www.oxforddnb.com).
- DOEonline* Cameron, A., Crandell Amos, A. and diPaolo Healey, A., eds., *Dictionary of Old English: A-G Online* (Toronto: University of Toronto, 2007): [www.doe.utoronto.ca](http://www.doe.utoronto.ca).
- ECf *Leges Edwardi Confessoris*. Edited: O'Brien (1999); *Gesetze*. English translation: O'Brien (1999).
- [II-IV] Eg Laws of Edgar. Edited: *Gesetze*; Robertson (1925). English translations: Robertson (1925); *E.H.D.* i, nos. 40-41.
- EGu The legal text known as "The Laws of Edward and Guthrum". Edited: *Gesetze*; Attenborough (1922). English translation: Attenborough (1922).
- E.H.D.* i Dorothy Whitelock, ed., *English Historical Documents, 1, c. 550-1042*, 2nd edn. (London: Eyre Methuen, 1979).
- E.H.D.* ii D. C. Douglas and G. W. Greenaway, eds., *English Historical Documents, 2, 1042-1189*, 2nd ed. (London: Eyre Methuen, 1981).
- [I-III] Em Laws of Edmund. Edited: *Gesetze*; Robertson (1925). English translations: Robertson (1925); *E.H.D.* i, no. 38 (II Em).
- [I-II] Ew Laws of Edward. Edited: *Gesetze*; Attenborough (1922). English translations: Attenborough (1922).
- Gesetze* Felix Liebermann, ed., *Die Gesetze der Angelsachsen*, 3 vols. (Halle: Max Niemeyer, 1903-1916).
- Gepyncðo The anonymous legal text "Gepyncðo". Edited: *Gesetze*.
- Glanvill* G. D. G. Hall, ed., *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (London: Nelson, 1965).
- Grið The anonymous legal text "Grið". Edited: *Gesetze*.
- Hl Laws of Hlophere and Eadric. Edited: Oliver (2002); *Gesetze*; Attenborough (1922). English translations: Oliver (2002); Attenborough (1922); *E.H.D.* i, no. 30. Though Oliver (2002)

## Abbreviations

introduced a new system of numbering the clauses, Liebermann's is retained here because of its usefulness for all previous editions.

- Hn *Leges Henrici Primi*. Edited: Downer (1972); *Gesetze*. English translations: Downer (1972); *E.H.D.* ii, no. 57.
- Hn cor Henry I's coronation charter. Edited: *Gesetze*; Robertson (1925); Stubbs*Charters*. English translations: Robertson (1925); *E.H.D.* ii, no. 19.
- Hn Lond Henry I's London charter. Edited: *Gesetze*; Robertson (1925); Stubbs*Charters*. English translations: Robertson (1925); *E.H.D.* ii, no. 270.
- In Cn *Instituta Cnuti*. Edited: *Gesetze*.
- Ine Laws of Ine. Edited: *Gesetze*; Attenborough (1922). English translations: Attenborough (1922); *E.H.D.* i, no. 32.
- Leis Wl *Leis Willelme*. Edited: *Gesetze*; Robertson (1925). English translations: Robertson (1925); *E.H.D.* ii, no. 18.
- Nor Grið The anonymous legal text "Norðhymbra Ciricgrið". Edited: *Gesetze*.
- Norðleod The anonymous legal text "Norðleoda Laga". Edited: *Gesetze*.
- Pax The anonymous legal text "Pax". Edited: *Gesetze*.
- PR [5-34] HII The Pipe Rolls of Henry II's reign, published by the Pipe Roll Society. Anon, ed., *The Great Roll of the Pipe for the Fifth Year of the Reign of King Henry II, A.D. 1158-1159 to the Thirty-Fourth Year of the Reign of King Henry II, A.D. 1187-1188* (Pipe Roll Society, 1, 2, 4-9, 11-13, 15, 16, 18, 19, 21, 22, 25-34, 36-38; London, 1884-1925). Pipe Rolls are cited by regnal year and the page number of the relevant edition. PR 20 HII means the Pipe Roll for the twentieth year of Henry II (1173-74).
- PR 31 HI The Pipe Roll of 1130. Joseph Hunter, ed., *Magnum Rotulum Scaccarii... de anno tricesimo-primo regni Henrici primi* (London: Record Commission, 1833).
- Quadr *Quadripartitus*. Edited: *Gesetze*.
- RamseyChronicle* W. D. Macray, ed., *Chronicon Abbatiae Rameseiensis*, Rolls Series 83 (London: Longman, 1886)
- S. Anglo-Saxon charters are usually referred to by their "Sawyer numbers", from P. H. Sawyer, ed., *Anglo-Saxon Charters: An Annotated List and Bibliography* (Royal Historical Society Guides and Handbooks 8; London: Royal Historical Society, 1968). An updated version is now available online at [www.esawyer.org.uk](http://www.esawyer.org.uk).

## Abbreviations

<i>SourcesYorkHist</i>	Rollason, D. W., Gore, D. and Fellows-Jensen, G., eds., 1998. <i>Sources for York History to AD 1100</i> (The Archaeology of York 1; York: York Archaeological Trust).
<i>StubbsCharters</i>	Stubbs, W. and Davis, H. W. C., eds., <i>Select Charters and Other Illustrations of English Constitutional History</i> , 9th edn. (Oxford: Clarendon Press, 1921).
<i>ThorneBracton</i>	S. E. Thorne, ed., <i>Bracton: De Legibus et Consuetudinibus Anglie</i> (4 vols. Cambridge, Mass.: Selden Society, 1968-77).
<i>Wer</i>	The anonymous legal text "Wergeld". Edited: <i>Gesetze</i> .
<i>Wi</i>	Laws of Wihtred. Edited: Oliver (2002); <i>Gesetze</i> ; Attenborough (1922). English translations: Oliver (2002); Attenborough (1922); <i>E.H.D.</i> i, no. 31. Though Oliver (2002) introduced a new system of numbering the clauses, Liebermann's is retained here because of its usefulness for all previous editions.
<i>Wl art</i>	William I's "Ten Articles". Edited: <i>Gesetze</i> ; Robertson (1925). English translation: Robertson (1925).
<i>Wl lad</i>	William I's "Regulations Regarding Exculpation". Edited: <i>Gesetze</i> ; Robertson (1925). English translation: Robertson (1925).

# *Introduction*

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The legal position of violence in English society underwent a major shift between the ninth and thirteenth centuries. From a point where it was expected to result in feud – and thus either further violence or a settlement between the parties involved – we arrive at a situation where all killings and the more serious forms of violence were punished by the crown as “felonies”, with felons forfeiting both their lives and their property. Though this transition was certainly not a black-and-white matter, there being elements of royal punishment for violence in the ninth century, just as there was room for some private compensation in the thirteenth, its significance remains hard to overstate. This was the period in which feud ceased to be legitimate and in which, for the first time, it becomes reasonable to use the term “violent crime” in a way similar to that which is familiar today. We should not, as Paul Hyams emphasised in a recent study, believe that men ceased to resent perceived wrongs or to desire vengeance as a result of these legal changes, but nor should we underestimate their real effect. This is a point that Hyams makes well when summing up his view of thirteenth-century England:

During the period of a flourishing eyre system that brought royal justice into the shires as a solemn, periodic part of normality, the king’s men managed to keep themselves informed of virtually all unnatural death and to deter concealment along with most efforts at private settlement out of court. For these reasons, overt feud action, whether for blood or money, became so much rarer—a feat to be accounted no small success for the king and his law.<sup>1</sup>

There can be no doubt that, in terms of the practical operation of the law, there was a significant shift over the course of the tenth, eleventh and twelfth centuries. It is this long-term process of legal change that is investigated here. The thesis is, fundamentally, an attempt to describe and explain the transition from a system in which violence was addressed primarily through “feud” to one where royal law sought to punish all serious forms of violence as “crime”.

First, however, we need a clear understanding of the terms “feud” and “crime”. On feud there are currently two competing interpretations, resulting from an attack on the traditional broad

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<sup>1</sup> Hyams (2003), p. 265.

definition of feud by Guy Halsall. Halsall argues that historians have used the term “feud” much too broadly. Instead, he suggests a more precise definition of feud – as “a relationship of lasting hostility between groups, marked by periodic, cyclical, reciprocal violence” – based on the understanding of feuding in the modern world. On this basis, he points out, feud was “not generally practised in the early Middle Ages”.<sup>2</sup> What was present in the medieval period is what many other scholars have termed feud and what Halsall hoped to rename “customary vengeance”; that is, situations in which compensation serves as an alternative to violence, with the threat of vengeance serving as motivating force for the payment of such compensation in a composition settlement.<sup>3</sup> This is, as Halsall acknowledges, fairly close to what was meant by early medieval Germanic terms such as *faithu*, *faida* and, for the Anglo-Saxons, *fæhðe*.<sup>4</sup> Halsall’s contribution is valuable in drawing attention to the potential for confusion in the existence of two different understandings of the term. However, many scholars, among them Hyams, have chosen to continue to use “feud” in this early medieval sense, avoiding confusion by being explicit in what they understand by the term.<sup>5</sup> This is the approach taken here; “feud” does not necessarily require long-term enmity or tit-for-tat killings but can, rather, include much more limited examples of wrongs followed by compensation payments where the threat of vengeance is merely implied. If for instance, one man kills another in a fight and then, fearful of vengeance, offers compensation to the kinsmen of the slain man – and if they then accept it and take no further action – in the terms employed here we are still looking at an example of feud. It is, of course, still a feud if the slain man’s kinsmen reject compensation and resort to violence which then settles into a prolonged enmity lasting several generations, but for this study, at least, this is not compulsory.

“Crime” is another difficult concept to apply here. The Roman distinction between criminal and civil law, and the related common law categories of crime and tort, after all, only emerge in English sources towards the end of the twelfth century. And indeed, even the common law distinction was, in Hyams’s assessment, only “incompletely assimilated into the English system”

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<sup>2</sup> Halsall (1998), pp. 19-20.

<sup>3</sup> Halsall (1998), p. 22.

<sup>4</sup> Halsall (1998), p. 28; *DOEonline*, sv. “fæhþ, fæhþu”.

<sup>5</sup> Hyams (2003), pp. 6-11, 32-33.

even in the 1290s.<sup>6</sup> Yet the term has frequently been used by historians of earlier periods to refer to offences that were primarily subject to punishment by authority, provided that any element of compensation to the victim was relatively minor.<sup>7</sup> Patrick Wormald, arguing that Anglo-Saxon England had a “developed notion of crime and punishment”, illustrated the distinction:

There is a very significant difference between buying security of life from an injured party, with a cut for the king whose peace had also suffered, and redeeming one’s life from an angry king though without (as yet) ignoring one’s victim.<sup>8</sup>

This is rather subtle. Offences which are solely punished by a central authority are, in his view, clearly worthy of being termed “crime”, whilst on the other hand those involving only compensation between the parties involved plainly do not qualify. In the terminology used here they would be seen as matters purely for “feud”. It might help to imagine “crime” as characterised by the “vertical” relationship of punishment by authority and “feud “ by the “horizontal” relationship of roughly equal parties coming to a negotiated agreement. In between the two categories, however, is a substantial grey area occupied by offences involving both punishment by authority and compensation between equals, and in practice much of early medieval law looks like this, containing both horizontal and vertical elements. Wormald’s contention here is that where it is perfectly clear that punishment by the king is the dominant relationship, with those compensations that do exist playing a minor role, we should not be afraid to think in terms of “crime”. Broadly speaking, this interpretation is accepted here, though out of caution the neutral term “offence” tends to be preferred where there is any doubt, “crime” being reserved for situations where the compensatory element is either negligible or entirely absent.

The transition between feud and crime in English laws on violence, then, was not necessarily a sudden or dramatic one. We should probably think in terms of a continuum between the two concepts. This thesis attempts to chart the steps that English society took along this continuum – in both directions – as it underwent this long-term shift in its approach to violence from one characterised by feud to one dominated by crime. The fundamental premise underlying this attempt is that what I term “protective power” is not only helpful for explaining the shift in

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<sup>6</sup> Hyams (2003), pp. 223-24. See Hyams (2000), pp. 126-28; Donahue (2003).

<sup>7</sup> See Keynes (1991); Pollock and Maitland (1968), pp. 558-557; Wormald (1999e).

<sup>8</sup> Wormald (1999e), p. 342.

England's understanding of violence, but essential. The thesis seeks to show not only how royal protective power was the means by which the crown's thirteenth-century criminal jurisdiction over violence was established, but also how protection fitted into the earlier system based on feud. That system, it argues, is itself best interpreted as one of protective power.

***a) Protective Power***

So, what is protective power? The end result of the centuries-long process under investigation here may have been in effect a prohibition on violence but, it is argued here, the route that was taken to reach this stage was far more "protective" than it was "prohibitive". The distinction between these two concepts is a crucial one. Both protective and prohibitive power can be found in law, but they can be used in other contexts and, consequently, are best understood on a more general basis. Each of them is used to influence the behaviour of others by the use of a deterrent: their aim is to stop people doing certain things or harming certain people and each achieves its aims by imposing a penalty on those who violate their orders. The distinction is based on how an offence is defined. Using prohibitive power, it is a specific act that is defined. It does not matter who commits the act or who is its victim – if indeed there is a clear victim at all; what is significant is whether or not the offender committed the deed that is prohibited. In the case of protection the act is much less significant than the protected status of the victim. Protection can be very general indeed, possible to violate by a wide range of different acts, often but not necessarily involving violence. Though clearly there must be some definition of what acts constitute a breach of protection, it is not the precise nature of the act that matters, it is simply the fact that it has been committed against a protected person.<sup>9</sup>

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<sup>9</sup> The concepts deployed here are drawn from medieval sources, not from the vast literature on sociological and philosophical approaches to power. Protection and prohibition do, however, fit rather well with the work of Talcott Parsons, in that the efficacy of both protective and prohibitive power depends not on the capacity of the protector or prohibitor to use force but on the perceived likelihood of their doing so. True power, as Parsons saw it, was altering people's actions simply by maintaining the credibility of the threat of force (Parsons (1967), pp. 264-96). To my mind, at least, this seems helpful, but Parsons' work has been criticised heavily for a number of reasons. Key among these is that his conception of power is limited to power over others, to attempts to change others' behaviour, which is precisely the context we are interested in here anyway, but his implication that all power is necessarily legitimate is more troublesome. See Giddens (1968), pp. 264-68; Barnes (1988), pp. 12-20; Lukes (2005), pp. 29-37; Clegg (1979), pp. 65-68. More modern interpretations of power – for example, the emphasis on knowledge in Barnes (1988), that on "Design" and "Concept" in van Ginkel (1999), the linguistic approach in Morriss (2002), and the multi-dimensional one in Lukes (2005) – seem less likely to be helpful here.

## *Introduction*

Structurally, then, protection and prohibition are very different. For protection a protector must define a protected person or group against whom any harm constitutes a breach of protection. If anyone then does harm to a member of the protected group the protector has a duty to inflict a penalty on that person. The identity of the attacker in this scenario should be irrelevant: in its purest form a protection protects against the entire world. For prohibition the prohibitor defines the act which is forbidden, but his power will be limited to a group that he can command. For small scale examples the difference is obvious enough: a mother can prohibit her child from chewing gum but she cannot do so for other children, let alone for adults. Nor would she naturally feel any right to do so, those outside her care being evidently beyond her authority. Should anyone, however, attempt to harm her child such restrictions would be utterly meaningless. Though authority to prohibit may be limited, protection is absolute. It is only when these ideas are scaled up to the level of a kingdom or state that the dividing lines blur. A protection from violence covering the entire population of England, for example, is virtually identical to a prohibition on all violence within the country. The only way we could tell the difference would be to look at exceptional cases: what happens when a someone who kills in England escapes abroad? How is violence to people who are present illegally in England regarded? What is the reaction when an English person is harmed overseas? Today the answers to these questions seem overwhelmingly prohibitive – if a killer is beyond the reach of English justice he is generally not hunted down for vengeance by the state, and protection from violence extends to illegal immigrants just as much as to British citizens – but if we look hard enough in the modern world we can still find protective mindsets. Take, for example, the case of Jean Charles de Menezes, the Brazilian man mistaken for a suicide bomber and shot by British police in 2005, whose immigration status was clearly felt by some people to be pertinent to how the killing should be viewed.<sup>10</sup> Alternatively, we might look at Israel's policy of assassinating those it held responsible for the massacre of its athletes at the 1972 Munich Olympics, or perhaps its pursuit of Nazis such as Adolf Eichmann after the Second World War.<sup>11</sup> The idea that states protect their legitimate inhabitants from violence, rather than prohibiting violent acts within their borders, does still exist in spite of modern law's overwhelmingly prohibitive character.

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<sup>10</sup> Examples of this mindset can still be found in online sources, for example  
<<http://hardright.blogspot.com/2005/08/jean-charles-de-menezes-was-illegal.html>> and  
<<http://devilskitchen.me.uk/2006/03/jean-charles-de-menezes.html>> (viewed 08/05/2009).

<sup>11</sup> Black and Morris (1991), pp. 188-91, 272-77.

Today, then, we are familiar with the idea that the state prohibits violence just like it prohibits theft, fraud, dangerous driving and the consumption of certain species of mushroom. Protective power, if we think of it at all, is an extra-legal concept. We might associate it with the “protection rackets” by which criminal gangs exert their power over territories. The protection involved here may well often be a fiction for what amounts to little more than extortion, but some sociologists have argued that long-established groups such as the Sicilian mafia do, in fact, provide a valued service in return for their payments.<sup>12</sup> We might, otherwise, be familiar with protective power from its role in modern international relations and the concept of the “protectorate”, or from alliances that were clearly of a protective nature. Britain’s entry into the twentieth century’s two world wars can easily be interpreted as having been prompted by breaches of its protection, first over Belgium in 1914 and then Poland in 1939. Protection as a legal concept, however, is not so familiar. Indeed, to modern minds protective power is almost the very opposite: something that thrives in situations where law has little influence.<sup>13</sup> Law today is very much about prohibition; we expect legal power to consist of a recognised authority prohibiting specific acts. Indeed, we tend to see this sort of prohibitive law as “advanced” whereas more protective models might be termed “archaic” or at least associated with a degree of lawlessness and disorder.

This general impression of the relative merits of protection and prohibition can, perhaps, be detected even in modern scholarship on the Middle Ages. Wormald, at any rate, explicitly linked his case for the extensive use of prohibitive power by Anglo-Saxon kings to the argument that England in this period was unusually advanced and deserving of the title “state”.<sup>14</sup> The idea that protective power was always seen as more archaic than prohibition, however, is questionable: Wendy Davies, in any case, suggests that in certain contexts it only became common in the tenth century, so it might be more just to view at least some manifestations of protective power as novel and innovative.<sup>15</sup> There is also quite a strong tendency to interpret royal law as prohibition wherever possible, even when a protective interpretation is more plausible. For example, when we find a law setting a royal penalty for attacking someone in a house, we have two options: we

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<sup>12</sup> Gambetta (1993), pp. 28-33, cf. Hess (1973), pp. 139-43. Gambetta’s model is applied to Russia in Varese (2001). For a characterisation of modern states as protection rackets, see Tilly (1985).

<sup>13</sup> It is, in fact, a key element in attempts to model a utopian anarcho-capitalist future. See Sutter (1995).

<sup>14</sup> Wormald (1999e), pp. 352-54.

<sup>15</sup> Davies (1996), p. 12.

could look at it as an example of protection with “people in houses” being the protected group, or we could see it as a prohibition where the prohibited act is “attacking someone in a house”. If we understand it as a prohibition we have the sort of legal power we are comfortable with – a situation roughly equivalent to the current model of the “state” punishing “crime” – and this is what many historians have done.<sup>16</sup> If we look at it as protection, on the other hand, we are confronted with something that feels much more alien and archaic; something, to borrow a phrase from the late Patrick Wormald, that “pulsates to the rhythm of feud”.<sup>17</sup>

Protective power seems to have been linked to emotional concepts far more than prohibition. Davies drew this out well in an article looking at the protection offered by churches in Wales, where it is clear that a breach of protection was conceptualised as an insult (the Welsh word is *sarhaed*) to the protector, which legally required compensation to be paid to him according to his status.<sup>18</sup> As Davies has pointed out, there are many parallels to this conceptual framework surrounding protection in other cultures, though some are more explicit than others.<sup>19</sup> The link between protection and honour is, in fact, very well known. Many scholars have remarked upon its presence in literature, a notable example being Stephen White’s recent examination of “warranty” in the *Chanson de Roland*. White shows that “warranty” in this context is explicitly about the protection that lords were meant to offer their men, and draws out how the poet juxtaposes honourable vengeance with shameful inactivity and neatly balances the breaches of protection made and the vengeance taken by both sides.<sup>20</sup> Indeed, protection’s connection with honour and shame is extremely logical. How else could it be understood? A breach of protection does not directly harm the protector, he has no claim to have suffered materially as a result of it, but it does cast the efficacy of his protection into doubt, openly challenging his power and his ability to avenge the breach. It would be extraordinary for it to have been understood in emotionally neutral terms; indeed the sort of anger displayed by King Harthacnut upon hearing of the killing of two of his *huscarls* whilst collecting taxes in Worcester seems far more natural. Of

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<sup>16</sup> See Hurnard (1949), pp. 289-310; cf. Colman (1981).

<sup>17</sup> Wormald (1999a), p. 39.

<sup>18</sup> Davies (1995), pp. 144-47.

<sup>19</sup> Davies (1995), pp. 146-7; Davies (1996).

<sup>20</sup> White (2009); Lambert (2009a), pp. 3-8.

course, not everyone can make their sense of outrage felt through the merciless slaughter of the local population, but it seems unlikely that their feelings in cases close to their own hearts would have been any less acute.<sup>21</sup>

Protection as a concept is thus a long way from the dry impartiality that we currently expect from the workings of our legal systems, but this is just another sign that emotional concepts like honour and shame have not always been as repressed as they are in modern Western societies.<sup>22</sup> Indeed, John Beckerman has noted, in a remarkably insightful article on the concept of insult in the English common law, that these ideas are central in rather a surprising way. In one sense, insult is notably absent from the common law tradition, which awards compensation for damage or loss suffered but ignores affronts to honour entirely. Beckerman shows that this is both an English peculiarity – other European legal traditions that emerged from Roman law making free use of the concept of insult or outrage – and that it dates from the thirteenth century, when records of compensation for wounded honour disappear.<sup>23</sup> However, on another level he also shows that these ideas are absolutely central:

Though royal justice would protect subjects against losses occasioned by violent and forcible wrongs on the theory that they were acts of dishonor to the king, the royal courts had no interest at all in the personal honor of the king's subjects. On the criminal side, as the writ *de odio et atia* taught so clearly, royal justice was not supposed to be used for purposes of private retribution. On the civil side, the king's courts provided no remedy by which subjects could vindicate personal honor. ... Throughout the Middle Ages the common law ignored dishonor to anyone but the king.<sup>24</sup>

Thus, Beckerman argues, it was precisely because royal jurisdiction was founded upon the idea of affront to the king's honour that, for everyone else, honour and shame ceased to be legally meaningful categories. This theory may seem today like an innocuous legal fiction, but for the king's honour to have so completely displaced that of all others it must have been real enough in

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<sup>21</sup> A.S.C. 1041 (C, D). On emotions, see Hyams (2003), pp. 34-68; Miller (1993b), (1993c); Althoff (1998); White (1998); Barton (1998); Kaeuper (2009).

<sup>22</sup> On this see Miller (1993a), pp. 6-7.

<sup>23</sup> Beckerman (1981), pp. 161-81.

<sup>24</sup> Beckerman (1981), pp. 180-81.

the twelfth and thirteenth centuries. If, as seems certain, this idea of dishonour to the king was based on the allegation of the breach of his peace (i.e. his protection), a necessary precondition for royal jurisdiction in both felony and trespass cases, we can see again how intimately connected with protective power ideas of honour, shame and insult were.

With this context in mind, it is easy to see how protection fits in with feud. The urge to avenge a slain kinsman fits rather neatly into our definition of protective power – the kindred collectively protecting its members from all external attackers – as well as carrying with it all the associated ideas of honour and shame that, as Beckerman demonstrated, existed even on the grandest scale with the idea of the king's peace. This association of protection with feud is not controversial, indeed it is a commonplace of the literature, just like the association of protection with the king's peace; the difficulty comes in combining the two.<sup>25</sup> Vengeance and compensation in feud are not things that we tend to associate with the workings of a legal system. We are comfortable with the king's peace as something approaching a legal fiction, just as we are comfortable enough with the idea of feud as a more or less illicit activity that the law aimed to eradicate. Indeed, if we look at them in this way they never really have to meet; we can see royal jurisdiction as essentially prohibitive power and feud as one of the many bad things that it came to prohibit. But if we look at both as examples of protective power, as I am proposing here that we should, we get a rather different picture. We have to consider that royal jurisdiction could take the form of a protection, and thus involve the same range of emotional concepts, as feud could. Conversely, we have to accept that the protective power being exercised by kindreds in feud was, in an important sense, equivalent to royal protective jurisdiction. By making this conceptual leap and focusing on the exercise of protective power without privileging any particular group, I believe we can come much closer to understanding violence and the way that its regulation changed in English society over this period.

### ***b) Research Context***

Though in some ways the focus on protective power here is innovative – it does, at any rate, draw on some relatively modern ideas<sup>26</sup> – in others it is rather old-fashioned; concerned, as it is, with overarching systems and fundamental long-term shifts in their operation. I make no apology for

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<sup>25</sup> For example, Stenton (1971), p. 315; Hyams (2003), p. 224.

<sup>26</sup> Specifically, the discussions of “protected space” in Davies (1995) and (1996) have been highly influential.

this, agreeing for the most part with S. F. C. Milsom that “the orthodoxy of the last half-century by which most kinds of historian project essentially still and close-up pictures, assembling all the evidence for narrow subjects in short periods, is inimical to comprehending the largest legal developments.”<sup>27</sup> Milsom’s opinion of those who come to medieval law from historical rather than legal backgrounds is clearly not the highest – and his characterisation of modern historians may be slightly unfair as a result<sup>28</sup> – but his main point is a good one: fundamental, long-term legal changes need to be analysed directly, not inferred from a series of detailed but narrow studies. My approach, however, is also rather old-fashioned in that it requires considerable use of normative sources, mainly law-codes and other legal compilations, if only because there is a serious lack of sources in this period showing how people behaved in practice. This scarcity is easy enough to illustrate. If we turn to compilations of case-narratives from England in the central period of this investigation – the tenth, eleventh and twelfth centuries – we can find very few recorded instances involving homicides. Wormald listed a total of nine in his handlist of all Anglo-Saxon “lawsuits”, whilst R. C. van Caenegem’s compilation covering the period from 1066 to 1199 has only seventeen.<sup>29</sup> Hyams’s collection of feud case-narratives, being free of restrictive criteria for what constitutes a “lawsuit”, can add a few extras to these, but no more than a handful.<sup>30</sup> Yet even these meagre results are rather flattering to the evidence, much of which is extremely terse, touching on the point of homicide only tangentially, or problematic in a number of other ways (a fair proportion of these cases, for example, come from miracle-stories). Some of this material, of course, is useful and relevant but there simply is not enough of it, in my view, to mount a full-scale inquiry into violence which does not make significant use of normative legal sources.

The scholarly trends of recent years, however, are strongly against such an approach. The preference of early medievalists looking at conflict, to use terminology borrowed from anthropology, has been very much for a “processual” approach over a “normative” one. Piotr Górecki and Warren Brown explain the distinction as follows:

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<sup>27</sup> Milsom (2003), pp. 75-76.

<sup>28</sup> Milsom (2003), pp. xix-xxi.

<sup>29</sup> Wormald (1999d), nos. 50, 54, 58, 60, 61, 71, 145, 148, 161; Van Caenegem (1990-91), nos. 5, 134, 139, 172, 321, 330, 409, 411, 416, 419, 461, 470, 493, 494, 501, 506, 644.

<sup>30</sup> Hyams (2003), pp. 267-308.

The normative approach takes as a given, that is, assumes an autonomous existence and importance of norms, then inquires into their convergence with the behavior they purport to regulate. The processual begins by reconstructing the behavior of participants in disputes, and then situates the role of norms within that behavior as a dependent variable.<sup>31</sup>

In the latter situation, they further explain, norms can be seen as generated by behaviour, or at least can be inferred from it; they are, in effect, subsumed within the study of processes and – in practical terms – largely sidelined.<sup>32</sup> As Górecki and Brown point out, the processual approach has been dominant since at least the early 1980s, with “an intuitive distrust” of normative approaches being shared by both anthropologists and medievalists specialising in conflict.<sup>33</sup> The result has been a sharp focus on discovering what actually happened in the course of disputes, violent and otherwise, with interpretations of behavioural norms being based on the findings of such studies. Additionally, the usefulness of written laws from the early Middle Ages has been questioned by Wormald, who argued the following:

*Lex scripta*, as the various contexts of its issue seem to hint, was not so much practical as ideological in its inspiration. ... Germanic kings made laws, first and foremost, partly in order to emulate the literary legal culture of the Roman and Judaeo-Christian civilisation to which they were heirs, and partly in order to reinforce the links that bound a king or dynasty to their people.<sup>34</sup>

Laws, then, tend to be viewed with scepticism by modern scholars as untrustworthy guides to the realities of disputing, more useful for what they tell us about kings’ ideological pretensions than their practical engagement in the maintenance of social order.<sup>35</sup>

There can be no doubt that much of the research that forms part of this trend has been extremely productive, not least in its repeated highlighting of the fact that, in practice, norms were not

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<sup>31</sup> Górecki and Brown (2003), p. 7.

<sup>32</sup> Górecki and Brown (2003), pp. 7-8.

<sup>33</sup> Górecki and Brown (2003), p. 8. See Roberts (1983).

<sup>34</sup> Wormald (1999b), pp. 37-39.

<sup>35</sup> See Hudson (1996), pp. 249-50.

followed rigidly. In allowing for a subtler picture in which participants in disputes manipulated norms for their own ends, this work has made a valuable contribution. However, there is a problem with this approach, at least for medievalists, in that it tends to privilege certain types of conflict that appear most frequently in our sources. Stephen White explains the situation very clearly:

Excluding or at least marginalising not only “political” conflicts that did not have readily identifiable “legal” dimensions, but also certain documented disputes that did, explicit or implicit models of medieval dispute-processing were largely based on a restricted class of “cases” in which a prior relationship between two upper-class parties of relatively equal status (usually a religious community and a group of nobles) was disrupted by a dispute over property rights.<sup>36</sup>

These, of course, are the conflicts that monastic houses had a clear interest in recording. Obviously these cases could involve violence but they frequently did not, and even when they did it was always incidental to the primary issue of property. They do not, and simply cannot, reveal to us the conduct or settlement of feuds waged to avenge killings or other wrongs. A processual approach, therefore, would not be without serious drawbacks even if the problems with evidence were not so great.

The problems with normative sources, in any case, are not so great as to render them useless to sensitive historical investigation. Wormald’s critique of royal law-codes, though put forward in characteristically robust and forthright style, did not show that all early medieval laws were of purely ideological significance, with no practical application. Nor was it meant to: Wormald’s target was mainly what he termed “primary legislation”, the totemic national codes such as the *Lex Salica* or, in an English context, the laws of Æthelberht and Alfred’s *domboc*. He believed that there was an important ideological context even to codes which had “strictly practical and legal objectives”, but he did not deny those objectives.<sup>37</sup> Indeed, his treatment of Edmund’s laws directed against feud and Æthelstan’s campaign against theft show that he was entirely alert to the possibility that kings had practical legislative intentions and, furthermore, might well have had

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<sup>36</sup> White (2001), p. 11.

<sup>37</sup> Wormald (1999b), p. 38.

a practical legal impact.<sup>38</sup> Certainly some normative texts have real problems with them, but so too do the sources which we would need to conduct a processual analysis; it is our task as historians to assess them critically and make of them what use we can. A dogmatic opposition to normative source material would not, in my view, be a helpful way to proceed, even if it were a plausible option.

A brief examination of historians' views of the *Leges Henrici Primi* will highlight some of the issues here. It is a source with many potential problems. The author, writing in the 1110s, was the same man who translated much of the corpus of Anglo-Saxon law into Latin in the document known as the *Quadripartitus*, and his clear commitment to the pre-conquest system of law makes it reasonable to suspect him of archaizing in places. Furthermore, he quite brazenly draws on continental texts, such as the *Lex Salica*, which seem very unlikely to have had an impact on the English legal system. To top it all, the earliest extant manuscripts come from the early thirteenth century, making tampering in the century following the text's composition a possibility.<sup>39</sup> Nonetheless, with the exception of the well-known interpolation in some manuscripts of material relating to London, there is little reason to believe that the text we have today differs substantially from what the author wrote, and it is perfectly possible both to detect foreign intrusions and to tread carefully around possible archaisms. Indeed, there are many places in which there is no known source for the author's words and where, therefore, we might reasonably think he wrote from personal knowledge of contemporary practice. Given that we know he was a lawyer of some sort, possibly even a judge, his personal knowledge should carry considerable weight for us. Why, then, ought we not to make as full a use of the *Leges Henrici* as we can?

John Hudson – though he is certainly not alone in doing so<sup>40</sup> – is unusually explicit about his rationale for dismissing the *Leges Henrici* and the other Anglo-Norman legal collections in favour of processual evidence:

Faced with very limited case-materials, writers on the Anglo-Norman period have been lured by the mirage of plenty offered by the *Leges*. However, these are archaizing texts,

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<sup>38</sup> Wormald (1999e), pp. 337-41; Wormald (1999a), p. 308.

<sup>39</sup> Downer (1972), pp. 1-78; Wormald (1999a), pp. 411-15.

<sup>40</sup> For example, *E.H.D.* ii, p. 459; Richardson and Sayles (1966), pp. 43-53.

and I prefer to use them only when they are congruous with other contemporary material, or with the general pattern of legal development revealed by the more plentiful later sources. Setting aside the *Leges*, we are left mainly with anecdotal material from ecclesiastical narrative sources. They have obvious disadvantages, including an ecclesiastical bias, and a preference for the unusual. They resemble newspaper stories rather than law reports. However, since it is unlikely that any great shift in the nature of offences occurred, conclusions can be tested against the much more plentiful sources emerging from c. 1200. Moreover, reliance on anecdotal evidence can have some positive advantages. It discourages concentration on the royal administration of justice or the genealogy of certain common law actions, compelling instead an interest in the settling of individual disputes, the relationship of offence and offenders to society.<sup>41</sup>

I would not dissent from Hudson's assessment of both the drawbacks and potential advantages of the anecdotal evidence he prefers, and the archaising tendencies of the *Leges Henrici* are clearly a genuine problem, but I would question whether the problem is so great that the best solution is to resort to sources from the thirteenth century. To state that it is unlikely that any great shift in the nature of offences occurred is surely prejudging an issue that we ought to be using the evidence to resolve. Fundamentally, why should law in the Anglo-Norman period be interpreted in the light of its thirteenth-century future rather than its Anglo-Saxon past? In practice, Hudson's approach yielded an account of violence and theft in Anglo-Norman England that was just as sensitive to what came before as what would follow, but it is a brief survey that makes the very most of the case-narrative evidence he prefers. The preference itself I do not object to – there is nothing wrong with a processual approach where the material is used carefully – but the suggestion that we should go to such lengths to avoid having to use contemporary normative source material (whose only identified weakness was potential for anachronism) seems unreasonable.

My preference is for a much simpler approach. I aim to use all available material, but to do so critically and whilst maintaining as great an awareness of the limitations of the evidence as can be mustered. I see no reason why we cannot draw perfectly valid conclusions from looking carefully, cautiously and sceptically at normative sources. We should not think that laws were applied to the letter, indeed we might want to think of them in some circumstances as mere starting points

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<sup>41</sup> Hudson (1996), p. 57.

for negotiation, but no-one would suggest they were works of fantasy; they must, surely, often have reflected the genuinely practical intentions of lawmakers with regard to the problems of social order that they perceived. Anglo-Saxon laws, at any rate, seem most frequently to have been the product not just of a single mind but to have been, at least in part, influenced by the major assemblies at which they were promulgated. Can we really think that the laws discussed and approved by such assemblies of the powerful were, as a rule, utterly unrelated to the realities of their society? Obviously we cannot. The written texts that such meetings left to us must, then, have value to us as evidence and it seems especially important, for a period in which sources are so scarce, that we use them to the limits of their potential. The studies of the last thirty or forty years may have revealed more about the problems of using normative sources for studying the realities of early medieval conflict but they have not, nor could they ever have, rendered it valueless. What they have done is raise some crucial issues about their interpretation. Our response to this should not, however, be to shun them but to return to them and attempt to apply the insights that decades of processual dominance have produced.

***c) The Plan***

This study is divided into two chronologically defined parts, each consisting of three chapters, with the Norman conquest of England in 1066 forming the dividing line. This is not, I want to emphasise, because of any assumption that this marks a moment of particular significance for my subject but for two specific reasons. Firstly, there is the fact that the existing historiography does respect that dividing line in some very significant ways. Anglo-Saxonists such as Wormald and James Campbell have made important arguments for the stability and strength of the pre-conquest kingdom relative to its much more “feudal” and decentralised successor.<sup>42</sup> The argument pursued here challenges these Anglo-Saxonist interpretations directly on a number of points, something that is controversial and requires detailed discussion, so it seemed most practical not to try to do this at the same time as looking at post-conquest material where the issues were different. Secondly, and relatedly, it seems to me that the best way to assess the validity of interpreting the Norman conquest as a caesura in English history cannot be to ignore it and to conduct an analysis on the assumption that it had no impact. Far better, I think, to create a reliable picture of the pre-conquest period and then to assess what did change with the advent of Norman rule. This does not, of course, mean that I intend to present a static picture of “pre-

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<sup>42</sup> Wormald (1999e), (1999c); Campbell (1994).

conquest England” to be compared with another equally static account of “post-conquest England” – doing this would indeed unduly privilege the conquest as a cataclysmic event. Rather, the aim is to provide dynamic accounts of the patterns of development in both periods. The test, then, for whether the Norman invasion does represent a major turning point with regard to the regulation of violence is not whether Norman kings made any significant changes, but whether those changes represent a departure from the patterns of change visible under their Anglo-Saxon predecessors.

Throughout the thesis then, the main concern is with assessing processes of change and, in particular, evaluating the role that protective power played in it. In each of the two parts we have chapters (the second and fifth) analysing in detail the specific legal changes that affected the treatment of violence followed by chapters that take these specific findings and look at wider interpretative questions (the debate around legal privileges in chapter three, the influence of ideological trends in chapter six). However, in both parts these analyses are founded on detailed discussions of the extent and nature of the changes in the relevant periods; these chapters (the first and fourth) open each part and serve to anchor the broader investigations that follow. Quite simply, in order to explain a development we need first to have a clear idea of what it entailed and, as far as possible, when it occurred. We cannot, for example, analyse post-conquest developments until we have a reasonable picture both of when serious violence becomes unambiguously criminal, the main focus of chapter four, and what situation was inherited in 1066, which the first part as a whole should provide. For the Anglo-Saxon period the task is even more difficult. We have to establish not only the character of the system of feud that obtained in the time of King Alfred, but also to assess the historiographically-charged question of whether violence came to be thought of as crime in the tenth and eleventh centuries. The accuracy, indeed the applicability, of the analysis that follows in the rest of the thesis depends to a great extent on getting the answer to this question right. It is to this vital task that we now turn.

# Part One

## *Violence and Power in Late Anglo-Saxon England*

# Chapter One

## Feud, Crime and Homicide

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### Introduction

This chapter has two main functions. It aims first of all to create a picture of the basic system of feud by which violence and, in particular, homicide were addressed in the late ninth and early tenth centuries. This involves looking at the methods that the laws envisage would be used to settle the simplest cases of homicide, as distinct from more complex affairs that had been aggravated by some special circumstance, like the breach of a royal protection or prohibition. These cases are referred to here, borrowing a later term, as “simple homicide”.<sup>1</sup> The result of limiting ourselves to cases of simple homicide, of course, is that we only get a partial impression of how feud worked, based on the most generic of cases. From this perspective what we see is only the centre, the very core, of the system of feud, around which a veritable constellation of exceptional circumstances with different rules was gathered. This, however, is all we need for current purposes, this examination of the core of feud being in large part an essential foundation for the next chapter’s analysis of all these potential aggravating factors. It is also all that is necessary for this chapter’s second task: to assess whether there was any fundamental change to these central aspects of feud in the Anglo-Saxon period. The question here, it is important to note, is not whether there was any change at all in the way that violence was viewed in this period – as the following chapter will show, there was a great deal – but whether there was any shift that applied in general terms, affecting not just specific types of homicide but homicides in general. In other words, it assesses the idea that Anglo-Saxon kings might have outlawed feud – or placed major restrictions on it – by modifying, adding to, or replacing entirely the old system of composition settlements. Was there, as some historians have suggested, a royal crime of homicide before 1066?

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<sup>1</sup> The term is borrowed from the late twelfth-century text known as *Glanvill*, which reports that the term *simplex homicidium* was in common use to designate killings that did not constitute murder (*Glanvill*, xiv.3).

The view taken here is that there was not, and this is crucial for the analysis that follows in the rest of the thesis. After all, if there was a royal prohibition of homicide in this period – as Patrick Wormald and Naomi Hurnard have suggested<sup>2</sup> – it becomes very difficult to argue for the significance of protective power with regard to violence. What would be the significance of a royal protection if even violence against the unprotected was subject to severe penalties from royal justice? We might have to imagine a situation like that pertaining in the later Middle Ages where protections were valued for the legal privileges associated with them, not as deterrents to violent attack.<sup>3</sup> If a royal prohibition of homicide did appear in the Anglo-Saxon period, the idea that after that point protective power had an important role to play in regulating violence would simply not be worth pursuing. The issue, then, is of the highest importance, and will require detailed analysis of the cases put forward by both Wormald and Hurnard. However, before we can do this we need a solid idea of the point from which we are starting.

## **The Core of the System of Feud**

It is, then, to the core features of the Anglo-Saxon system of feud that we turn first. What follows is relatively uncontroversial. Even those who argue for the introduction of a royal crime of homicide in the Anglo-Saxon period would recognise the system outlined as the one that prevailed in at least the first half of the tenth century – it is the starting point for all discussions of feud and its increasing regulation in the Old English kingdom. A key part of this chapter's purpose is to show that this core system still applied in 1066, but for now the controversial elements of this will be put aside in favour of a discussion that illuminates the system itself. Two features in particular will be highlighted: the way that the system allows for the possibility of violent feuding and the degree to which the system was dominated by protective power.

### ***a) Wergild and Composition Procedure***

Feud, as understood here, does not necessarily involve revenge, only the plausible threat of revenge. Indeed, at the very centre of any analysis of feud must come the concept of wergild: the money payable to the kin of a slain man for the taking of his life. Sir Frank Stenton's description of

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<sup>2</sup> Wormald (1999e), pp. 340-42; Hurnard (1949), p. 300n.

<sup>3</sup> Lacey (2009), pp. 86-90.

the wergild and the vital importance it affords to the kin as protectors offers a good introduction to the concept:

Of [the kin's] importance as a protection to individuals there can, of course, be no doubt. Among the English, as among all Germanic peoples, it was a fundamental convention that the killing of a free man brought his kin into immediate action in order to avenge his death, or to enforce the payment of his wergild. It is also clear that the slayer's kin were expected to join with him in paying the wergild or bearing the feud that was its alternative. Many passages in the Old English laws are concerned with the application, which generally meant the limitation, of this principle.<sup>4</sup>

Wergilds are visible in the laws from the very beginning. They first appear, albeit under another name, in the late sixth-century laws of King Æthelberht of Kent, where we find the following basic statement of law: "Gif man mannan ofslæhð, medume leodgeld C scillinga gebete" which Lisi Oliver translates "If someone kills someone, let him pay an ordinary person-price, 100 shillings."<sup>5</sup> In the same code we also find the terms *leodgeld* and *wergild* used to describe compensations payable for killing a royal smith or herald (seemingly included because it pertained to the king), lying with a freeman's wife, and damaging the "genital organ" (a triple wergild), as well as what evidently are wergilds (without being specifically called anything) for killing various ranks of *læts* ranging from forty to eighty shillings.<sup>6</sup> Clearly the wergild was commonplace enough a concept for it to be applied to offences other than killings that were thought to be suitably grievous. The later Kentish code of Hlophere and Eadric notes a higher wergild of 300 shillings for a noble-born, *eorlcund*, man.<sup>7</sup> Kentish law thus has a scheme of wergilds covering three classes, nobles, freemen and the more obscure *læts*, a term which occurs only in Æthelberht's code and is interpreted as meaning freedmen by Oliver.<sup>8</sup>

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<sup>4</sup> Stenton (1971), p. 315.

<sup>5</sup> Abt 21.

<sup>6</sup> Abt 7, 31, 64, 26.

<sup>7</sup> HI 1.

<sup>8</sup> Oliver (2002), pp. 91-2.

In the West Saxon legal tradition with which we are primarily concerned here there is a similar pattern. Ine's code also outlines a scheme with three classes of society but it does so only incidentally in a discussion of another subject, in this case the level of *manbot* to be paid to the slain man's lord:

When a wergild of 200 shillings has to be paid, a compensation of 30 shillings shall be paid to the man's lord; when a wergild of 600 shillings has to be paid, the compensation shall be 80 shillings; when a wergild of 1200 shillings has to be paid the compensation shall be 120 shillings.<sup>9</sup>

Though the class for which 600 shillings is paid seems to have disappeared fairly swiftly – it appears in the laws of Alfred but not thereafter<sup>10</sup> – this scheme is the one that persists throughout all later legislation and becomes so commonplace that Cnut could address his 1020 letter to England to Earl Thorkel, all his archbishops, bishops and earls and all his subjects “*twelfhynde* and *twyhynde*, ecclesiastics and laymen.”<sup>11</sup> Other passages in Ine's laws, detailing how payment of the wergild may be made in kind (with weapons, armour and slaves), the share of the wergild due to the king in the case of a slain foreigner and the compensation to be paid for killing a pregnant woman, make it clear that the primary purpose of the wergild was compensating the kindred for killings.<sup>12</sup> We also, however, find payment of wergild as a means by which a captured thief might redeem his own life, a usage that recurs and becomes more commonplace in later laws.<sup>13</sup>

Wergilds, then, already had a long history by the tenth century. It is, however, only in the 940s that we get our first description of the procedure for their payment or even such vital detail as who is liable to pay or receive them. This comes in two closely related texts: King Edmund's second law-code (II Edmund) and the text known as *Wergeld*.<sup>14</sup> The two, though never

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<sup>9</sup> Ine 70.

<sup>10</sup> Af 10, 39, 40.

<sup>11</sup> 1020 Cn 1.

<sup>12</sup> Ine 23, 54.

<sup>13</sup> Ine 12. See Wormald (1999e), pp.341-42.

<sup>14</sup> The textual links between the two are tabulated in Wormald (1999a), pp. 375-7. The translation there given forms the basis of the following description.

contradicting one another, do offer some different details so they will be used in conjunction here. First, states II Edmund, the slayer should give a pledge to his advocate (*forespeca*), and then the advocate to the kinsmen of the deceased, that he will pay the wergild. After this the kinsmen of the slain should give the advocate a pledge that the slayer may approach in security (*mid griðe*) to pledge the wergild.<sup>15</sup> After this the two texts agree that the slayer must find wergild-surety (*wærborh*) and *Wergeld* adds that for a 1200 shilling wergild this means twelve men, eight from the paternal kin and four from the maternal.<sup>16</sup> Next, the two texts agree, the king's *mund* (protection) is to be established, which *Wergeld* explains involves all the kin of each side giving a common pledge on a single weapon that this *mund* will stand.<sup>17</sup> Finally they both state that payments shall then be made at intervals of twenty-one days, first the *healsfang*, then the *manbot*, then the *fihtwite* (though this is absent from II Edmund), and then the first instalment of the wergild proper (the *frumgyld*). At this point II Edmund ends but *Wergeld* continues: "and so on, until full payment is made within the time-limit that wise men (*witan*) have ordained".<sup>18</sup> *Wergeld* also explains that the *healsfang* for a 1200 shilling wergild is 120 shillings and that it is for the children, brothers and father of the slain man only; adds that after full payment is made they may depart in love if they want full friendship; and states that a ceorl's wergild should be dealt with in accordance with the example of the twelve-hundredmen.<sup>19</sup>

The picture that emerges from these sources is very clearly one of feud, the possibility of further violence being implicit in every step. The slayer needs to send a representative to the opposing kin to ensure that he can approach safely to pledge the wergild – clearly approaching without such a precaution would have been risky indeed. Then, even after he has given his pledge to pay the wergild, the king's *mund* is to be levied. The implication is quite clear – if any violence occurs after this point the king's *mund* is breached and the culprit has thus committed *mundbryce* and must face the consequences. According to II Edmund, this means the forfeiture of his life and property to the king. This may well represent a rather ambitious attempt at royal intervention in

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<sup>15</sup> II Em 7-7:1.

<sup>16</sup> II Em 7:2, Wer 3.

<sup>17</sup> II Em 7:3, Wer 4.

<sup>18</sup> II Em 7:3, Wer 4:1, 6. Wormald (1999a), p. 377.

<sup>19</sup> Wer 5, 6:1, 7.

the feuding process – it is analysed in this respect in the following chapter – but more importantly for current purposes it definitely does serve to emphasise the risk of a renewal of violence during (or perhaps even after) the composition proceedings. We have a rather dangerous-looking picture of the settlement of feud through wergild, one involving many precautions and a serious risk of violence, and one which involves extended kin groups on both sides in the settlement whilst simultaneously offering a privileged place to the slain man's immediate family.

Finally, one question remains: was the wergild, conceptually speaking, a protection? At face value it seems entirely reasonable to suppose that it was, the kindred as a whole protecting its individual members. It was, after all, the kindred that both received the payment and enforced it through the threat of violence, and it was a man's kindred that defined his rank and hence the value of his wergild. Guy Halsall, however, does suggest an alternative explanation based on a law from Visigothic Spain which affords the elderly a wergild lower than that of adults in their prime; this, he argues, "reinforces the point that the laws' concern was usually to penalize damage to a family rather than to protect the individual".<sup>20</sup> Though Halsall's concern was more with the distinction between the family and the individual than with that dividing protection from compensation for loss, his point remains strong. If the wergild was defined by the value of the person killed rather than the status of the kindred that protected him, the wergild looks rather more like compensation for damage than compensation for breach of protection. In England, however, there is no equivalent of this Visigothic law, nor – as Halsall notes – was there in Merovingian Gaul, so this may well be a regional peculiarity.

The closest Anglo-Saxon law comes to differentiating between the values of different members of the same kindred is in measures that allow men to gain the right to higher wergilds by their own efforts, either in the accumulation of wealth and favour or by ascending the ranks of the church.<sup>21</sup> However, at least in the case of the priest – who as a "mass-thegn" deserved, we are told, the wergild of a "world-thegn"<sup>22</sup> – there is evidence that this privilege did not extend so far as to allow situations in which priests' ceorlish kindreds were able to claim thegnly wergilds. The *Leges Henrici Primi* state that if a priest's status entitles him to a higher wergild this does not apply if he

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<sup>20</sup> Halsall (1998), p. 15.

<sup>21</sup> See *Gebyncðo* 2-7; *Að* 2; *Norðleod* 5.

<sup>22</sup> *Norðleod* 5.

is slain, the priest's slaying being compensated according to the wergild he was born with, that of his paternal kindred.<sup>23</sup> Though there is no evidence bearing on this question for secular wergild promotions, this exception does seem to prove the rule that wergild was defined more by the rank of the kindred than by personal status.

The wergild system does, then, look rather protective, and there is good evidence that this is how at least some contemporaries saw it. This is quite explicit in laws authored by Wulfstan II, archbishop of York, which require the king to act as "kinsman and protector" (*for mæg 7 for mundboran*) for any foreigner or man in holy orders "unless he has some other" (*buton he elles oðerne hæbbe*).<sup>24</sup> This role as a substitute for the kindred, it is explicitly stated, involved either the extraction of compensation or the taking of vengeance.<sup>25</sup> Here, in effect, we have a definition of the role of the kindred: a man's relatives were his primary protectors and, in the event of his death, they therefore had the duty either to extract compensation or to exact vengeance. The balance of the evidence, then, suggests that wergild can indeed be regarded as a compensation payment for a breach of the kindred's protection over its members.

#### **b) Manbot**

From the evidence of II Edmund and *Wergeld*, then, it seems that the payment of wergild was crucial to the resolution of cases of homicide, and that the threat of violence hung over the procedure for making such a settlement. The potential for conflict between the opposing kindreds seems the central feature of a case of simple homicide. However, to concentrate on this alone would produce an unfairly limited picture of the basic system of feud. Other parties were involved and, importantly, had a financial interest in a settlement. II Edmund and *Wergeld* make this clear in their schedules for the payments to be made. As was noted above, after the first instalment of the wergild – the *healsfang* – is paid, the next obligation is to pay the *manbot* to the slain man's lord. It seems there may have been some mutation in the way that this was calculated. The laws of Ine, dating from the late seventh century, give a scheme based on the wergild of the slain man, with *manbots* of 30, 80 and 120 shillings for men with 200, 600 and 1200 shilling wergilds.<sup>26</sup>

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<sup>23</sup> Hn 68:3-68:3b.

<sup>24</sup> On Wulfstan see Wormald (1999f), (1999a), pp. 330-366; Whitelock (1941), (1948), (1955), (1968a); Bethurum (1966); Lawson (1994, (2004), pp. 59-66.

<sup>25</sup> VIII Atr 33-34; EGu 12.

<sup>26</sup> Ine 70. This is quoted in full above, p. 21.

Though they crop up frequently enough in the laws – Cnut, for example, lists *manbot* as the final compensation to be paid in the event of a killing in a church<sup>27</sup> – their financial value is not discussed again before the Norman period. Then we find a slightly more confused picture. The *Leis Willelme* gives the *manbot* of a freeman as 10 shillings, which equates to 30 Mercian shillings and thus directly reflects Ine’s provisions.<sup>28</sup> The *Leges Henrici Primi* also draw on Ine, repeating the 30 and 120 shilling *manbots* for ceorls and thegns and converting them into mancuses for contemporary readers.<sup>29</sup> However, other passages in the *Leges Henrici* appear to contradict this, stating in relation to compensation to spiritual kin that the payments “shall increase in accordance with the wergild, just as the *manbot* does in relation to the lord.”<sup>30</sup> This is supported by a later passage that explains as follows:

As the law stood *manbot* used to be received, depending on the status of the person slain, according to the amount of his wergild, rather than according to the amount payable for *ouerseunesse* (i.e. insubordination, disobedience) towards the lord or according to the lord’s status.<sup>31</sup>

Though these passages are unambiguous in their present forms there is a possibility that they have been corrupted.<sup>32</sup> They are, however, supported by the *Leges Edwardi Confessoris* which offer a scheme based on the status of the slain for the Danelaw and for the “law of the English” one in which the king and archbishop can expect 3 marks, bishops, earls and the king’s steward 20 shillings and the rest of the barony the standard 10 shillings.<sup>33</sup> It seems, therefore, logical to suggest that at some point between the drafting of Ine’s laws and of these post-conquest texts there was a shift to a system in which it was the rank of the lord that determined the amount of compensation he deserved. Though it is tempting to locate the shift at the time of the conquest

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<sup>27</sup> I Cn 2:5.

<sup>28</sup> Leis WI 7.

<sup>29</sup> Hn 69:2.

<sup>30</sup> Hn 79:1a.

<sup>31</sup> Hn 87:4a.

<sup>32</sup> Downer (1972), p. 396.

<sup>33</sup> ECf 12:4-12:5.

there is no real basis for this. The *Leges Henrici's* reference to how the law stood could simply refer to Ine's regulations as quoted earlier – it may be that the shift to compensation based on the lord's status was an Anglo-Saxon one.

As with wergild, the way in which *manbot* was calculated can help us understand how it was conceived. Compensation based upon the value of the slain man makes it fairly clear that this was intended to recompense the lord for his loss, whilst compensation based on the lord's status indicates that the compensation was not so much for the man lost but for the offence caused to the lord by daring to harm a man under his protection. Our evidence is, therefore, rather interesting. What it suggests is that in the seventh century *manbot* was more about compensation for the loss of a valuable man than remedying the insult to a lord's honour implicit in the homicidal breach of his protection. In the twelfth century, on the other hand, there was an understanding of *manbot* that can only be based on protective power. A shift certainly occurred at some point and, though the evidence is very slight, I would suggest that sometime around the tenth century is not an unreasonable guess as to when. This is founded on the general emphasis on protective power in the laws of this period (on which the following chapter shall say a great deal) and on a few specific hints in the laws. We find in II Cnut, for example, a law demanding that those who bind or beat holy men pay compensation to either the king or the man's lord specifically for breach of protection, just as we find references to the king acting as *mundbora* for a priest or stranger "unless he has some other".<sup>34</sup> This does seem to indicate, albeit rather weakly, that lords were understood as legal protectors of their men in this period, and this seems a good context in which to place a shift to an understanding of *manbot* in terms of protective power.

### c) **Fihtwite**

The other payment associated with the settlement of a feud is the *fihtwite* – literally the fine for fighting. This is absent from Edmund's scheme but it seems reasonable to believe this is accidental given its presence in *Wergeld* and the fact that fines for fighting are evident in the codes of both Ine and Alfred.<sup>35</sup> In *Wergeld* the *fihtwite* is to be paid twenty-one days after the *manbot*, clearly signifying its importance, whilst II Edmund puts it on a par with the *manbot* as a

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<sup>34</sup> II Cn 42; VIII Atr 33-34; EGu 12.

<sup>35</sup> Wer 6; Ine 6:1-6:4; Af 7, 42:4. Cf. Wormald (1999a), p. 377.

fine which must henceforth be paid in full and not forgiven.<sup>36</sup> Unlike *manbot*, however, the identity of the recipient of *fihtwite* is not a clear-cut issue. Ine's regulations on this are a good starting point. The code begins its approach to the subject by stating that any fighting in the king's house results in total forfeiture of property and the offender's life being at the king's mercy. Next it states that fighting in a *mynster* requires compensation (*bot*) of 120 shillings and follows this by ruling that fighting in the house of a ealdorman or other distinguished *witan* should result in the payment of *bot* of 60 shillings and a fine (*wite*) of 60 shillings. In the house of a *gebur*, it continues, a *wite* of 120 shillings should be paid with what seems to be a further 6 shillings to the *gebur*. Even if the fight takes place in the open (*on middum felda*) the 120 shilling *wite* must still be paid.<sup>37</sup> These provisions, it emerges, are more concerned with the destination of the standard 120 shilling *wite*, due to the king for fights occurring even in the middle of fields, than the offence to a householder caused by fighting within his premises. Essentially Ine is allowing monasteries to claim the entirety of the *fihtwite* and the ealdormen and other high status nobles half of it. However, his experiment in merging house protection with the general penalty for fighting is not entirely successful; to the lowly *gebur* Ine was unwilling to give up any part of his *wite*, but nor does he think that the *gebur* should go uncompensated for the breach of his protection over his home, allowing him an additional six shillings for the affront.<sup>38</sup> The result is that fighting in a *gebur's* house is more costly than in a *mynster*. The scheme, ultimately, is something of an oddity and it is unsurprising that it does not feature in any later laws, but even at this seemingly nascent stage the *wite* that would eventually become the *fihtwite*, though it seems to pertain to the king in most cases, would in certain situations be shared with other high-status individuals or institutions.

There are indications as early as the laws of Æthelstan that this situation had advanced and that certain lords were able to receive payment of *wite* as a matter of course. II Æthelstan stipulates that it is possible to come to a financial agreement with your accuser to avoid an ordeal but adds that this is not possible for the *wite* "unless he to whom it is due is willing to consent".<sup>39</sup> The clear implication is that this person was not always the king. Indeed, even earlier in the same code

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<sup>36</sup> II Em 3.

<sup>37</sup> Ine 6-6:4.

<sup>38</sup> See Seebohm (1911), pp. 393-94.

<sup>39</sup> II As 21.

there is a regulation forbidding the defence of fleeing thieves on the penalty of payment of the thief's wergild "either to the king or to him to whom it is legally (*mid ryhte*) due".<sup>40</sup> It certainly was not that unusual for the recipient of fines, and even the more substantial forfeitures of wergild, to be someone other than the king. That *fihtwite* was even then one of these fines is relatively clear from II Edmund's order that all *fihtwites* and *manbots* be paid in full: if all *fihtwites* came to him anyway, why would he need to command this?<sup>41</sup> Indeed, there is a host of references in codes from Æthelstan's time onwards to a class of lords who had the right to receive the *wite* and wergild payments of their men – lords who were *wites wyrðe* (literally, "fine-worthy").<sup>42</sup> Some of these references, indeed, do not mention the king at all, it being assumed that such fines would in the normal course of events go to a lord.<sup>43</sup>

This, as will be discussed in more detail in chapter three, seems to be the root from which the later privilege of "sake and soke" (often simply referred to as "soke") evolved. From post-conquest sources it seems quite clear that in most normal circumstances the *fihtwite* would go to the lord who held soke over the slayer, the only exception being when the killer was caught on the spot, in which case it went to the lord with soke over the location.<sup>44</sup> "Sake and soke" itself is a rather late concept. It occurs first in two Yorkshire charters of the late 950s, which appear to be genuine, but it does not recur in any charters or writs until the reign of Cnut.<sup>45</sup> From his reign onwards, however, it becomes extremely common and by the conquest it is clearly a very widely held privilege indeed.<sup>46</sup> By the end of the Anglo-Saxon period, then, after this proliferation of grants of sake and soke under Edward and Cnut, it seems more likely than not that the recipient of the *fihtwite* would be a lord other than the king. The existence of lords who were considered *wites wyrðe* suggests that this was common in the tenth century as well, before the introduction of sake and soke.

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<sup>40</sup> II As 1:5.

<sup>41</sup> II Em 3.

<sup>42</sup> II As 1:5, 21; II Atr 1:5, 1:7; II Cn 30:3b, 30:6, 73a:1.

<sup>43</sup> II Atr 1:7.

<sup>44</sup> Hn 80:6; cf. Hn 20:2.

<sup>45</sup> S. 659, 681. For the first genuine writ containing sake and soke see Harmer (1989), no. 28; S. 986.

<sup>46</sup> See Harmer (1989), pp. 74-76.

The *fihtwite* looks, then, as if it originated as a royal fine before falling into the hands of lords. It is, as such, the closest that we have yet come to the idea of a royal punishment for homicide but, rather than being something introduced by the powerful West Saxon monarchy in the tenth century, it seems that it had been substantially alienated perhaps long before then. The golden age for the royal prosecution of homicide in Anglo-Saxon England thus looks more likely to be the pre-Viking period from which we get the laws of Ine and of the Kentish kings. Interestingly, the closest Kentish equivalent of the West Saxon *fihtwite* is 50 shillings, the amount payable to the king for killing a freeman, which is the same sum as the king's *mundbyrd* – the fine payable for breach of his *mund*, his protection.<sup>47</sup> This is roughly the equivalent of the West Saxon *fihtwite* both in terms of function and in terms of size relative to wergilds – each sum is approximately half a ceorl's wergild in the relevant legal tradition. Furthermore, H. M. Chadwick argued in considerable detail that the sum of 120 shillings was initially the value of the West Saxon king's *mund*, and that the West Saxon *fihtwite* therefore “had its origin in a compensation for violation of the king's *mund*”.<sup>48</sup>

That this figure of 120 shillings remained the value of the *fihtwite* after Ine's reign (688-726) is something we can only assume as, despite its numerous appearances in later texts, the fine's value is never again specifically stated. The most we can say is that the 120 shilling sum remained current for some offences and seems to have been the maximum value for a *wite* – it is referred to in laws written by Archbishop Wulfstan for both Æthelred and Cnut as the *cyninges wite*, the “king's fine”.<sup>49</sup> It is possible, then, that the lack of specificity in references to *fihtwite* was the result of an awareness of differing local customs of the wide variety of lordships that were its prime beneficiaries. Indeed, there is room for doubt as to whether the 120 shilling “king's fine” was really what the majority of *wites wyrðe* lords and, later, holders of sake and soke did in fact receive. Both Ine's laws and the *Leges Henrici Primi* do make it clear that the *fihtwite* applied to fighting more generally, not just to killings, but the impenetrable vagueness about the level of the fine after the seventh century does make it rather difficult to interpret.<sup>50</sup> Should we really, on this basis, believe that lords were exacting 120 shilling fines from men who had inflicted no more than

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<sup>47</sup> Abt 6, 8.

<sup>48</sup> Chadwick (1905), p. 131.

<sup>49</sup> VIII Atr 5:1; I Cn 3:2. It also occurs repeatedly in the *Leges Henrici Primi*, for example at Hn 34:1.

<sup>50</sup> Ine 6-6:4; Hn 94-94:1b.

bruising on their opponents (worth only a single shilling in compensation)?<sup>51</sup> Possibly not. Indeed, Maitland believed that the *fihtwite* applied only to cases of homicide.<sup>52</sup> This would be supportable on the Anglo-Saxon evidence alone but as the *Leges Henrici* state the opposite quite explicitly, it is a hard position to maintain. The post-conquest evidence may represent a degree of novelty, of course – the unusually high level of confusion in the *Leges Henrici's* discussion might suggest this, as could the fact that post-conquest sources introduce a new term, *blodwite*, into the equation<sup>53</sup> – but even so it is hard to dismiss it entirely. What we do know is that *fihtwite* definitely applied to homicide, that it was to begin with associated with the sum of 120 shillings, and that it eventually came to be applied to even very minor acts of violence. The details of its operation in the tenth century must, it seems, remain obscure.

**d) The Practicality of the Feud System**

If these three core elements of the system of feud indicate anything, it is that feuding was an expensive business. Killing a ceorl in a situation with no additional aggravating circumstances would result in a wergild of 200 shillings, a *manbot* of 30 shillings (following Ine's scheme) and (again, following Ine) a *fihtwite* of 120 shillings – a grand total of 350 shillings. Converting this into real terms is neither simple nor foolproof but it is worth attempting. 350 West Saxon shillings amount to 1750 pence, or a little over 145 Norman shillings.<sup>54</sup> The *Leges Henrici Primi* equates forty sheep with sight and horns and no physical imperfections with 20 Norman shillings, and a horse likewise.<sup>55</sup> By this reckoning a ceorls life would cost the slayer's kin over 280 sheep or seven horses. If we use the tariff given in the *Iudicia Civitatis Lundoniae* we can arrive at alternative figures of 350 sheep, 140 pigs, 70 cows or about 47 oxen.<sup>56</sup> Such exercises can, of course, only give a very rough idea of the sort of wealth that a kindred might have had to produce to end a feud through full payment. Clearly it was substantial and would have required the resources of an

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<sup>51</sup> Hn 94:1 puts compensation at 5 pence (one West Saxon shilling) per blow, up to a maximum of three blows.

<sup>52</sup> Maitland (1897), p. 88n.

<sup>53</sup> For attempts to unravel the mess see *Gesetze*, ii, s.v. "blutig fechten" (pp. 318-20); Downer (1972), pp. 435-37.

<sup>54</sup> See Seebohm (1911), p. 12.

<sup>55</sup> Hn 76:7e-76:7f.

<sup>56</sup> VI As 6.2.

extended kin group but it is not entirely unbelievable that richer ceorlish kindreds might have managed full payment without being reduced to total poverty, especially if we consider the possibility that land, weaponry and other precious objects might have been included – Ine’s laws even suggest slaves.<sup>57</sup>

We must suspect, however, that in reality there was much more room for negotiation in such composition agreements than the laws suggest, and that a plethora of factors including the relative strengths and wealth of the feuding parties would in fact determine the amount to be paid, the law serving in many cases as a guide or a starting point for negotiations. As has been noted, the very fact that Edmund had to order that *fihtwite* and *manbot* be paid in full is a sign that they were considered flexible, by some at least, and there is no reason to believe that the even more “private” transaction of the wergild was any less so.<sup>58</sup> Indeed, the references in II Edmund and *Wergeld* to the role of *witan* – usually translated in this context as “wise” or “leading” men – in setting the time limits for the final payments of wergild and, more generally, “settling” feuds, suggest that local notables (most likely including churchmen) played an important role in peacemaking.<sup>59</sup> It is reasonable to suspect that they had a more pragmatic attitude to the task than lawmakers did and would have worked towards solutions that were both financially and politically realistic rather than slavishly following the written laws – something of which there is no record even in cases that were settled in court.<sup>60</sup>

Indeed, there is even evidence in the laws that judges were expected to exercise some discretion when it came to such sums – Edmund’s insistence on full payment is rather unusual. There is, in fact, a notable trend in the more religiously inclined laws, those of Edgar and of Archbishop Wulfstan, towards the recognition that some flexibility with regard to punishments was probably a good thing. Indeed, it was regarded as so important an issue that, combined with a command that all men rich or poor have access to justice, it was given pride of place at the opening of Edgar’s secular code. He stipulated that there be such remission (*forgifnes*) of compensations “as

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<sup>57</sup> Ine 54:1.

<sup>58</sup> II Em 3.

<sup>59</sup> Wer 6; II Em 7.

<sup>60</sup> Wormald (1999a), p. 160.

it may be justifiable (*gebeorglic*) before God and tolerable (*aberendlic*) before the world”.<sup>61</sup> This phrase is borrowed by Wulfstan and used in both VI Æthelred and II Cnut as part of a more general push for merciful punishments. In VI Æthelred he orders that “every deed shall be carefully distinguished and judgement meted out in proportion to the offence”, whilst in II Cnut he states that even for grievous offences the punishments should be similarly becoming (*gebeorhlic*) and tolerable (*aberendlic*).<sup>62</sup>

Indeed, Wulfstan’s codes contain many references to compensation being “tolerable” and in accordance with the nature of the offence, something which has often made his laws appear weak to modern commentators: to quote Richardson and Sayles, “Legislation was never so loquacious, so vague or so futile”.<sup>63</sup> Part of this is undoubtedly Wulfstan’s legislative style, which did not differ very markedly from his homiletic style, but it seems probable that it also reflects a concern to promote the moderation of penalties and compensations to levels that were realistic and acceptable to all parties. That this emerged first in Edgar’s laws, in what may well have been the next secular code after II Edmund, may be significant. Perhaps this trend grew out of a reaction against the sort of “zero-tolerance” policy visible in Edmund’s insistence on full payments, and maybe also in Æthelstan’s brutal punishments for thieves.<sup>64</sup> Given that Edmund’s code implies that there had previously been some room for compromise with regard to *fihtwite* and *manbot* and that Edgar’s code orders that this should be the case, it is justifiable to conclude that if Edmund did have any impact on the way these compensations were negotiated it was rather short-lived.

Finally, there is the issue as to the arena in which feuds were settled. II Edmund and *Wergeld* are vague on this point but there is certainly not much to indicate that the business of composition was meant to take place in court. The only possible sign of this is the opening reference to *witan* – the wise – settling feuds,<sup>65</sup> but the argument that this necessarily implied that it was to take place in court is tenuous in the extreme. Rather, we find that the slayer has to use an advocate or

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<sup>61</sup> III Eg 1:2. See *DOEonline*, s.vv. “*gebeorglic*”, “*aberendlic*”.

<sup>62</sup> VI Atr 10:1; II Cn 2. Cf. V Atr 3, II Cn 2:1.

<sup>63</sup> Richardson and Sayles (1966), p. 27. See, for example, I Cn 3-3a; II Cn 2-2:1; Cn 1020 11; VIII Atr 4-4:1.

<sup>64</sup> II Em 3; IV As 6-6:7.

<sup>65</sup> II Em 7.

*forespeca* to contact the opposing kin before he can approach in safety, which tells against the idea that this was usually expected to be transacted within the security of a *gemot*.<sup>66</sup> A similar sort of situation can be found in II Edward which states that if any man withholds from another man his rights he shall pay 30 shillings on the first and second occasions, and 120 shillings on the third, to the king.<sup>67</sup> Taken at face value this could be read to mean that a refusal to pay wergild when it was demanded in court by the kindred of a slain man would result in a series of fines to the king. From such a viewpoint wergild becomes less an element of feud and more an item of royally enforced compensation. However, such an interpretation is very difficult to square with the evidence of II Edmund. If this was the case it seems remarkable that Edmund did not include such a key piece of anti-feud legislation in what is without doubt an anti-feud code, and even more remarkable that there is no indication of such procedure in either its or *Wergeld's* account of composition procedure. Fortunately an explanation is to be found in I Edward where exactly the same scheme of fines is applied to withholding someone else's rights specifically in either "bookland" or "folkland".<sup>68</sup> In this light the ruling in II Edward looks more like an abbreviated restatement of a law forcing holders of land to answer pleas regarding its title. Similarly, there is a rule in the laws of Ine that nobody should resort to *wracu* before demanding justice of someone.<sup>69</sup> As *wracu* usually means vengeance, this could be interpreted as applying to taking vengeance without first demanding wergild from the killer. However, in this instance, as Whitelock argues, it is perfectly clear that once again what is referred to is not precipitate vengeance but distraint of property, as the penalty for doing so involves paying back double what has been taken.<sup>70</sup>

Nevertheless, despite the lack of evidence, it would be unwise to discount the possibility that feud-related matters could be pursued in court. How else could ecclesiastical institutions have participated? They must have needed to claim *manbots* for their dependants often enough, and towards the end of the period a great many possessed soke and sake and would thus have

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<sup>66</sup> II Em 7-7:1. Cf. II Cn 82.

<sup>67</sup> II Ew ProL 1:2-1:3.

<sup>68</sup> I Ew 2:1.

<sup>69</sup> Ine 9.

<sup>70</sup> *E.H.D.* i, p. 365n.

needed to claim *fihrtwite* too. There is nothing to suggest that Anglo-Saxon monasteries had secular “advocates” like their Frankish counterparts so the only real option left for the enforcement of payments is the system of “public” courts. The payment of wergild, however, is another issue. Maybe this could be extracted without the threat of violence from the kindred simply by making a demand for it in court, but if it could be it is surprising that this is not referred to in *II Edmund*. At most it can have represented an option for the aggrieved kin to be placed alongside feud and the threat of violence that is so strikingly present in *Edmund’s* composition regulations. If this was the case, then the choice of whether to feud or to press the case in court must have depended on a number of factors, not least an assessment of the relative strengths of the parties involved.<sup>71</sup> It could be, however, that if the opposing kin brazenly refused to pay in court the only viable option involved the aggrieved kindred threatening violence. There is nothing in the laws that suggests any agent of the crown would be prepared to do this for them. Indeed, Michael Clanchy has argued that even in the thirteenth century royal justices had great difficulty in imposing their judgements on unwilling litigants, meaning that in practice matters often had to be settled by private agreement.<sup>72</sup> Though it is not impossible, there seems little reason to assume that royal justice was any more capable in our earlier period.

Records of real-life events, unfortunately, cannot give us much help here. We have only one good example of a feud for this period: the multi-generational struggle between the families of Uhtred, earl of Bamburgh, and Thurbrand the Hold described in the tract *De Obsessione Dunelmi*. The basic story is that Uhtred entered into an alliance with a certain Styr Ulfsson, a wealthy Yorkshire Dane, marrying his daughter on the condition that he kill Thurbrand, lord of the region known as Holderness (Yorkshire, East Riding) and Styr’s greatest enemy. However, with the connivance of King Cnut, Thurbrand pre-empted this by killing Uhtred, ambushing him and his retinue as they entered the king’s hall in the spring of 1016. Uhtred’s son Ealdred then took vengeance by killing Thurbrand, but we have no details as to how, where or when he did so. The next act involved Thurbrand’s son Carl killing Ealdred. After some time spent in trying and failing to kill each other, the two decided to make peace; they swore brotherhood and apparently set off together on pilgrimage to Rome. This was in 1038. There was, however, some sort of delay and Carl took Ealdred back to his hall to entertain him; he then clearly had a change of heart and killed the

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<sup>71</sup> This, in essence, is the how Paul Hyams represents Anglo-Saxon feuding. Hyams (2003), pp. 109-110.

<sup>72</sup> Clanchy (1983), pp. 56-61.

unsuspecting Ealdred in some nearby woods. The final act in the feud, so far as we know, was many years later. In the winter of 1073/74 Earl Waltheof, Ealdred's grandson, sent a large band of men to catch the sons and grandsons of Carl feasting together at their hall, they succeeded in taking them unawares and conducted a great massacre, sparing only a certain Cnut, apparently "because of his innate integrity", and returning home with much booty.<sup>73</sup>

There is a lot that is of interest here but in terms of wider feuding practices this story does not offer much.<sup>74</sup> These men were of the highest possible rank and seem not to have had any fear of legal penalties affecting their actions. There is treacherous killing aplenty, as well as killing in the royal presence, and a massacre in a hall; most of which, as shall be seen in the next chapter, were by this point unequivocally offences that should have been seriously punished by the king. There is no sign that this occurred at all, which must surely be a result of the fact that both families were extremely wealthy and politically powerful, and perhaps also a reflection of the English monarchy's relative weakness in Northumbria. This exceptional status makes it impossible to generalise with any confidence from what occurred here. The peace-making efforts of Ealdred and Carl –including sworn brotherhood and a pilgrimage to Rome – may well be indicative of the sorts of strategies that less influential kindreds might have adopted, but the utter absence of any agents of the crown (indeed, of any external restraint) in all this seems very unlikely to be typical. Likewise, the national political dimension signalled by the role of King Cnut, and drawn out in William Kapelle's study, makes this a highly unusual case.<sup>75</sup> We cannot take the independence shown by these families – the seeming irrelevance of the core structures of *wergild*, *manbot* and *fihtwite* as well as the utter disregard in which royal laws seem to have been held – to be in any way representative of wider conditions.

### ***e) Interpretation***

It seems, then, that our best evidence for the core of the system of feud is indeed to be found in normative sources. We find a core of three payments that were, it seems, meant to be present in the settlement of every case of homicide: *wergild* going to the victim's kindred, *manbot* going to the victim's lord and *fihtwite* going, in all likelihood, to the killer's lord. Protection seems to have

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<sup>73</sup> Morris (1992), pp. 1-5.

<sup>74</sup> For discussion, see Morris (1992); Fletcher (2003); Kapelle (1979), pp. 3-26.

<sup>75</sup> Kapelle (1979), pp. 3-26.

played a large part in this. The protective characteristics of wergild seem clear, and the signs are that *manbot* was conceived in a purely protective fashion for at least some of the late Anglo-Saxon period. Even *fihtwite* may have grown from protective roots. The picture, however, is not a simple one. There are indications that *manbot* and maybe also for wergild, initially designed simply to give compensation for harm, were being reinterpreted as protections in the tenth and eleventh centuries. This, interestingly, fits with Wendy Davies's observation that protective power, at least in the form of what she termed "protected space", is very difficult to locate before around 900, both in England and more widely in the British Isles.<sup>76</sup> In the case of *fihtwite*, however, prohibitive power is at the fore, with any protective element that had existed seemingly long forgotten by the tenth century. If indeed *fihtwite* had initially been based on a royal protection covering the entire free population, we have an early example of a generalised protection from violence losing its protective character and becoming a general prohibition.

We should, however, be wary of overestimating the significance of the conceptual differences visible in the structure of specific penalties. Did it make a great deal of difference to the way a lord or his men thought about *manbot* to know that it was calculated on the basis of the lord's status rather than his men's? Quite probably most never even contemplated it; regardless of the precise method of calculation the *manbot* still functioned as a protection and was, presumably, still thought of as giving legal force to the protection offered by lords to their men. The difference between the two methods of calculation in terms of how they would have been thought of is extremely subtle, possibly even illusory: at most a rather vague sense that in cases of breached protection there was a shameful affront to honour and a duty to avenge that was not so prominent in a mere entitlement to compensation for loss. Protection is a far more personal and emotive concept than the precise reckoning of damage suffered visible in the Visigothic law that reduced the wergilds of the elderly.<sup>77</sup> Whether in practice the structure of a compensation payment in such a document can really tell us how a lord would feel about the loss of his man, or for that matter a son about the slaying of his father, is highly doubtful. What we get in these texts is an insight into the way that lawmakers thought about power when, we might suppose, they were in contemplative moods – a long way from the high passions that would accompany real violence. This is interesting and useful in itself, it gives us a picture of how some of the most

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<sup>76</sup> Davies (1996), pp. 9-10.

<sup>77</sup> Halsall (1998), p. 15.

capable and worldly men of their time understood the way power worked in their societies, but to take these rather small distinctions so seriously as to imagine that they affected the experience of families who had lost loved ones could be a mistake.

A comparison of the law on homicide with that on non-lethal violence illustrates this well. On the surface they appear quite different. Putting aside the *fihtwite*, whose workings in this regard are obscure, killing someone in Anglo-Saxon England results, as we have seen, in a wergild that varied depending on the rank of the victim's kin and a *manbot* that came to depend on the rank of his lord. Protection, it has been argued, played a strong part in this; the killing is an offence against both kindred and lord. In the case of non-lethal violence, however, this complexity evaporates. Compensation for personal injury depends on nobody's status, but is just a matter of comparing the severity of the injury against a tariff – for Wessex that in Alfred's great law-code, the *domboc*. Personal injury is unequivocally about compensation for personal loss; there is nothing in the laws to suggest that even serious injuries like tearing a man's tongue from his head, knocking out his eye or forcibly castrating him would constitute an offence against his kindred and lord – the attacker simply has to compensate the individual for his suffering.<sup>78</sup> By the late Anglo-Saxon period, then, there is good evidence for seeing the wergild as protective power, and some suggestion that the *manbot* was seen in the same way, but these only applied to homicide; non-lethal violence was represented entirely differently, as compensation for damage with no regard for the status of the victim or his protectors. The contrast is stark, but is it real? I think not. If kinsmen and lords were, as Wulfstan's laws imply, thought of as protectors (*mundboran*) in cases of killings then surely they were thought of similarly in other cases of serious harm. The kinsmen, after all, had a large role in the prosecution of any claim for compensation for injury, both in providing supporting oaths and in supplying a credible threat of violence to help motivate the opponents to pay up.<sup>79</sup> They would, in essence, have functioned in exactly the same way as when a wergild was at issue, and in return for their efforts they quite probably shared, to an extent, in the resultant payment. The victim's lord seems, from Anglo-Saxon sources, not to have a role, but in one passage of the *Leges Henrici Primi* it is stated that *blodwite* was payable to the lord of the victim in cases of assault involving bloodshed, though it must be admitted that this does seem to

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<sup>78</sup> Af 44-77.

<sup>79</sup> For a discussion of procedure in personal injury cases see Oliver (2009).

contradict other statements on the subject and that the role of *blodwite* remains obscure.<sup>80</sup> It is possible, however, that *blodwite* was meant to represent the protection from serious violence that a lord offered to his men.

It is, then, interesting to note that personal injury tariffs – quite probably one of the most deeply-rooted and traditional elements in early medieval law – take a rather cool and calculating approach to violence, basing compensation on the damage caused, just as the seventh-century evidence for *manbot* does. The comparison with the emphasis on protection that is visible in late Anglo-Saxon and Anglo-Norman accounts, where compensating the offence to the honour of a protector takes a greater role, is certainly instructive. There is, perhaps, an important long-term shift in attitudes to violence and power detectable in this. However, this shift should not be overestimated. No matter how compensation payments were calculated their presence, combined with that of kinsmen and lords willing to enforce them, must have provided some degree of protection to individuals which both protector and protectee would have appreciated. The reality of wergild, *manbot* and personal injury payments to those involved clearly would have involved protective power rather heavily, as well as some valuation of harm suffered. Even *fihtwite*, seemingly originating in the protection offered by the king to all his free men, may have retained some protective connotations.

There are, then, a few important points to be made here. Firstly, most simply and most importantly, it should be emphasised that as far as the laws were concerned, wergild, *manbot* and *fihtwite* were the three essential elements in dealing with cases of homicide. In any given case there may have been other liabilities arising from special circumstances but these three would always be present unless there was something particularly justifiable about the killing – if the victim was killed in the act of theft, for example. They were, in this sense, the core of the system of feud. Secondly, protection figured very strongly in these core powers: however they are represented, in practical terms kindreds and lords would have used threats of violence to impose penalties on those who harmed people they had a duty to protect. Thirdly, this protective function became more, not less, explicit in the laws as time wore on; protection is something that is coming to the fore in the late Anglo-Saxon period, not something archaic that is fading away. The exception to this is *fihtwite*, which may have had roots in a royal protection, as Chadwick

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<sup>80</sup> Hn 37:1; 39:1; 70:4; 81:3; 94-94:5. For discussion see *Gesetze*, ii, s.v. “blutig fechten” (pp. 318-20); Downer (1972), pp. 435-37.

argued, but was clearly a prohibition by the tenth century, and one increasingly exercised by lords. Here, and this is the final point, we see that the king's role in general is a minor one and that it was tending to decrease in favour of local elites. The trend towards understanding lords and kindreds as exercising their own protective power, rather than just collecting the compensation for loss to which they were entitled, could be seen as fitting in with this. The core of the late Anglo-Saxon system of feud, then, involved the exercise of power by the kindred and lord of the slain as well as, it seems likely, the lord of the killer. If we believe II Edmund and *Wergeld* this was power in a very real and raw sense, the prospect of an eruption of vengeful violence clearly being implied by the elaborate precautions in the composition procedure. The king, on the other hand, had no clear role unless he happened also to be a lord or kinsman. This is the picture painted by the laws of how homicide cases were to be settled, and at least up until the early tenth century most historians would find it fairly uncontroversial. There are, however, arguments for a very different picture in which homicide was not a matter for this system of feud but an offence – a crime – punished by the crown.

## A Royal Crime of Homicide?

We now turn to the more controversial side of this chapter, the historiographical arguments in favour of the introduction of a royal crime of homicide in late Anglo-Saxon England. There are two different arguments that need to be looked at here: that made by Naomi Hurnard in 1949 in her two-part article on “The Anglo-Norman Franchises” and the more recent case made by Patrick Wormald in both his 1999 book, *The Making of English Law*, and in an article entitled “Giving God and King their Due”.<sup>81</sup> As is explained above, if these interpretations are accurate they render the system of feud outlined here largely irrelevant, any killing being a matter first and foremost for royal forfeiture. The aim here is to refute the arguments of Wormald and Hurnard, maintaining instead that the system of wergild, *manbot* and *fihtwite* remained at the heart of the system of dealing with simple homicide throughout the Anglo-Saxon period. The arguments will be taken in turn here, beginning with Wormald's which is the most recent as well as the more detailed and far-reaching of the two. His argument is analysed here in two parts, one looking at his interpretation of II Edmund, which Wormald represents as a crucial turning-point, and the other looking in detail at the evidence for the existence of the system of feud after Edmund's reign.

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<sup>81</sup> Hurnard (1949), Wormald (1999a), Wormald (1999e).

**a) II Edmund**

The picture painted above of the procedure for settling a homicide case by payment of wergild was largely based on the two closely related texts known as *Wergeld* and II Edmund. These texts unambiguously show homicide being settled in the context of feud, with very little royal involvement and with a constant danger of further violence erupting. Though this clearly is important evidence, it obviously cannot simply be accepted as an accurate description of all Anglo-Saxon feuds. Indeed, Wormald goes so far as to argue that this scheme is completely at odds with the original intent and overall significance of II Edmund as a code intended as an offensive against feud. The first stage of this argument is to detach this final passage on composition procedure from the rest of the code. Wormald argues that this final section shows signs of being out of place:

It was hardly logical to return to the topic of feud after a clause thanking his subjects for the peace they were upholding, and another on *mundbrice* and *hamsocn*. The law making person changed [from the first person], outsize initials appear in the manuscripts, and there was perhaps a shift of emphasis from the exemption that kins were allowed in the early clauses to an account of their rights and duties.<sup>82</sup>

There is some force to this argument but it is overstated, particularly in the notion that the code moves away from the subject of feud. As was noted above, *mundbryce* is far from being irrelevant to feud, the king's *mund* playing a key part in the composition procedure described later in the text and, as shall be seen in the next chapter, *hamsocn* (the offence of attacking someone in a house) is no different. The clause thanking Edmund's subjects for the peace they are upholding specifically refers to theft but it concludes with a statement that because of this he believes they will be all the more willing to give their support towards "this", which can only refer to the current project of the closer regulation of feud.<sup>83</sup> The point about the change from the first person has more weight but there is room for doubt. Though the first person is used frequently there are some clauses where it is not, and alongside them the final section does not look quite so unusual.<sup>84</sup> Cumulatively these points may give us some grounds for suspicion, but they do not

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<sup>82</sup> Wormald (1999a), p. 377. Cf. p. 311 and Wormald (1999e), p. 338.

<sup>83</sup> II Em 5.

<sup>84</sup> II Em 1, 1:2, 1:3. Also, II Em 6 switches to the first person plural.

demonstrate that the description of wergild payment procedure was not part of Edmund's laws in their original form.

Shorn of this final passage II Edmund appears a lot less friendly towards feud. Indeed, Wormald, in his seminal *Making of English Law*, went so far as to place it in the Carolingian tradition:

Charlemagne, in a text which could by then have been accessible to English law-makers, saw what Christian "peace and unanimity" implied for vendetta; in principle at least, he prohibited feud outright. Edmund now followed suit.<sup>85</sup>

Is this really what Edmund did or even what he was aiming to do? The argument that he was responding to ideas of Christian "peace and unanimity" is perfectly plausible, but that he actually prohibited feud in principle is very difficult to accept. Indeed, this statement does seem rather extreme by comparison to the more moderate assessment in one of Wormald's earlier essays:

Edmund has reduced the liability of an offender's associates for the harm he does: without such a liability, an injured party's chance of obtaining redress is seriously reduced, as is an offender's opportunity to provide it.<sup>86</sup>

This, though far from "prohibiting feud outright", is still a heavily anti-feud interpretation. What this sentence implies is that feud, if conducted according to Edmund's strictures, offered the injured kin a seriously reduced opportunity to exact vengeance or wergild because the liability of the killer's kindred either to pay or to bear the feud has been attacked. It logically follows that in many cases only the killer was liable and, being unable to pay the sums involved on his own, would have to flee or be killed. Homicide under such a scheme leads, in effect, to banishment, not to feud.

Wormald then goes on to look at evidence of how violent disputes were conducted in practice and draws the following somewhat speculative but far-reaching conclusion:

So the same sources or types of sources which tell us about Norman feuding offer nothing for the late Anglo-Saxon era except punished homicide. This could of course be the result of the far richer wealth of post-conquest evidence. But it might also indicate that

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<sup>85</sup> Wormald (1999a), p. 311.

<sup>86</sup> Wormald (1999e), pp. 337-8.

Edmund's strictures on feud took effect; even that the Old English "state" had begun to claim Weber's "monopoly of legitimate violence". If so, it was a monopoly that kings had no hesitation in exploiting vigorously. There is, to say no more, reason to think that the English scene was quite unlike that in Professor White's Touraine: until, that, is conquest superimposed the French scene upon it.<sup>87</sup>

This passage makes a number of extremely important suggestions. Firstly, that simple homicide was demonstrably punished by the crown in late Anglo-Saxon England; secondly, that this might be the result of the regulations of II Edmund; thirdly, that there was a "state" in Anglo-Saxon England that could conceivably claim Weber's "monopoly of legitimate violence"; and finally, though closely related to the first point, that feud was so non-existent in England that it was actually reintroduced after the Norman conquest. These will all be examined in this chapter but for now the pertinent issue is II Edmund – can this text really support the claims being made for it?

II Edmund is traditionally divided into a prologue and seven clauses of unequal size. The final clause on wergild, which Wormald argues was a later addition, has already been analysed whilst the fifth and sixth clauses, which respectively thank his subjects for upholding the peace and set the penalty for *mundbryce* and *hamsoch* as forfeiture of life and property, have also been touched upon. The prologue begins as a fairly formulaic address informing all Edmund's people, high and low, that he has been considering with his witan how best to promote Christianity. It goes on to stress the importance of peace and concord and states that he and his witan are greatly distressed by "the unjust and manifold fights between us", identifying this as the reason for the laws that follow. The second clause concerns those who flee to churches or to the king's *burh* and states that anyone attacking such a person will forfeit his property and become, essentially, an outlaw; the third clause is an injunction that *fihrtwite* and *manbot* should be paid in full and not forgiven; and the fourth prohibits anyone who has spilt the blood of a man from having the protection (*soc*) of the king's household until he has begun penance, compensation of the kin and submitted to justice (*rihte*).<sup>88</sup>

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<sup>87</sup> Wormald (1999e), p. 341. He is referring to White (1986).

<sup>88</sup> II Em 2-4.

It is the first clause, however, together with its three sub-clauses, that forms the basis of Wormald's argument. It begins:

If henceforth anyone slay a man, he is himself to bear the feud, unless he can with the aid of his friends within twelve months pay compensation at the full wergild, whatever class he [the slain man] may belong to.<sup>89</sup>

Though this seems to imply that it is solely the killer who is to bear the feud – that is, be liable to suffer violent vengeance from the victim's kin – this is not how the text should be read. Indeed, Wormald himself is careful not to employ such a reading.<sup>90</sup> The reasons for this are primarily the lack of any penalty for deviation from the rule – for killing anyone other than the slayer in revenge – and the logical implications of the following clauses. It, and indeed the stipulation of twelve months, should rather be read as a statement of ideals serving to introduce more concrete measures. Essentially it is saying that vengeance really is best directed at the slayer and wergild really ought to be paid within a year.<sup>91</sup>

It is the following sub-clauses that bear the weight of Wormald's analysis. The first reads:

If, however, the kindred abandons him, and is not willing to pay compensation for him, it is then my will that all that kindred is to be exempt from the feud (*unfah*), except the actual slayer (*handdæda*), if they give him neither food nor protection (*mund*) afterwards.<sup>92</sup>

This, then, is the great innovation of Edmund's code. If a kindred group wishes to disown one of its members who has provoked a feud then it can do so, as long as it then shuns him to the extent of no longer feeding or protecting him. The next two sub-clauses give penalties for violating this

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<sup>89</sup> II Em 1. Translation from *E.H.D.* i, no. 38.

<sup>90</sup> Wormald (1999e), pp. 337-8.

<sup>91</sup> The other readings for this are simply not viable. If twelve months were a strict time-limit for the payment of wergild it would imply that after twelve months composition was no longer licit, in effect making violent feud mandatory – an outcome entirely at odds with the code's goals. To posit that the twelve months are a grace period in which vengeance is prohibited so that the wergild can be collected, though it accords with the code's aims, would be an unjustifiable inflation of the text's meaning. The reading that this limits liability to the slayer alone would render the following sub-clauses superfluous.

<sup>92</sup> II Em 1:1. Translation from *E.H.D.* i, no. 38.

rule. Firstly, should any one of his kinsmen thereafter harbour the *handdæda*, that kinsman shall then bear the feud with the victim's kin and, because he had previously disowned him (*forðam hi hine forsocan ær*), also forfeit all his property to the king.<sup>93</sup> Secondly, should any from the other kin take vengeance on anyone other than the true killer (*rihthanddæda*), that person will become the enemy of the king and all his friends and lose all his property.<sup>94</sup> Dorothy Whitelock believed that the effect of this was to limit vengeance to the actual killer in all circumstances, effectively making the rest of the kindred immune to all feud violence, but the context makes it clear that this is incorrect: it is only once his kinsmen have disowned the *rihthanddæda* that they cease to be liable for his actions.<sup>95</sup> This, indeed, as Wormald quite clearly understood, is the reward that was expected to motivate kindreds to abandon their homicidal members in the first place.<sup>96</sup>

Less clear is the significance of these statements. The picture Wormald paints is rather difficult to support. This is a measure a long way from outlawing feud and in no way establishes royal punishment of homicide. What it does establish is an option for a kindred to discard a troublesome member and thereby escape the violent or financial consequences of the feud he has provoked. This, however, is only an option and not necessarily an attractive one. In order to take advantage of this the kin needed to refuse the killer food and protection from that point on. From that point the opposing kin, or indeed anyone else, could kill the ejected kinsman and expect no reprisals from his erstwhile family. He would, clearly, have to flee the area. Quite probably his old kin would assist him to some degree in this, perhaps with money, maybe before disowning him, but even so it cannot have done much to restore honour to what must have been seen as a cowardly act of abandonment – a refusal to fulfil the obligations of kinship. It is easy to imagine that in some circumstances such an act would be socially justifiable, but we must equally suspect that in many others it would not – leaving the abandoning kindred dishonoured and the slain man's relatives unsatisfied. Even if it were accepted, following Wormald's logic, that this measure offered an attractive option and was taken up by the majority of kins in such situations, then there are still no grounds to posit royal punishment of homicide. Instead, in such a situation, the initial killer faces either exile or death at the hands of the injured kin. It is only if a member of

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<sup>93</sup> II Em 1:2.

<sup>94</sup> II Em 1:3.

<sup>95</sup> See *E.H.D.* i, p. 402n (no. 43, n. 1).

<sup>96</sup> Wormald (1999e), p. 337.

this kin, frustrated by the absence of the original killer, slays someone declared *unfah* that we find royal punishment – but this is not simple homicide it is aggravated by the special circumstances of *unfah* status.

It is, nonetheless, fair to conclude that if this measure were commonly employed in the form set out in II Edmund it would have had serious consequences for feud. As Wormald notes, these measures seem to remove the possibility of either revenge or compensation: the killer is likely to flee, his kin is no longer liable to pay compensation and the injured kin can do nothing to avenge the dead man. However, we perhaps ought to show some scepticism here. The workability of the law depends on how realistic the threat of royal intervention was. If a kin did not believe that their *unfah* status would be respected after abandoning an individual member and any breach firmly punished by the king, then there are problems. If the threat of royal intervention is not credible then the opposing kin have no need to respect the abandonment and there is little to restrain them from taking whatever vengeance they feel appropriate, or coming to some sort of financial settlement with the kin that remain.

If such was the situation, there was little to entice the kin to abandon the killer in the first place. The tradition in Anglo-Saxon law up to this point looks more realistic in this light. Æthelberht states that if the killer departs from the land his kinsmen still have to pay half the wergild.<sup>97</sup> Alfred is less generous to the kinsmen, but follows a similar logic when discussing those without paternal relatives. In such a situation his maternal relatives are to pay their third and his *gegyldan* another third, for the final third he must flee (*for ðriddan ðæl he fleo*).<sup>98</sup> Similarly, if he also lacks maternal kin his *gegyldan* must pay half but for the rest he must flee.<sup>99</sup> Some of this older tradition, in fact,

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<sup>97</sup> Abt 23.

<sup>98</sup> Af 27.

<sup>99</sup> Af 27:1. The identity of the *gegyldan* mentioned here is obscure to say the least. In this context they seem quite clearly to be associates of the killer, distinct from the kindred, that were bonded to him so tightly that they shared liability for his deeds. The term itself, of course, literally means “guild members”, so it is possible that we should, as Liebermann suggests (*Gesetze*, ii, s.v. “Genossenschaft”, pp. 445-46) look to models such as London’s “Peace Guild” (whose regulations can be found in VI As). There we can see groups of ten men, which later would be termed tithings, with legal responsibilities for one another’s behaviour (VI As 3). Possibly, then, the *gegyldan* here are in some sense the ancestors of later surety arrangements. Though this is a fairly good explanation of what is an obscure concept it should be noted that the main aim of this “Peace Guild” seems to have been the suppression of theft, there being no mention at all of liability for others’ violent deeds, so it is possible that the Cambridge Thegns’ Guild (see *E.H.D.* i, no. 136; Thorpe (1864), pp. 610-13; and discussion below), coming a century or so later than Alfred’s laws but addressing

seems to be reflected in poetry where the theme of exile as a result of feud is a strong one. We might think, in particular, of the exile of Beowulf's father Ecgðeo at Hroðgar's court, which we are told he was forced into by his kindred because he had killed Heapolaf, a Wulfing, and they wished to avert a feud.<sup>100</sup> The indications of a feud context for exile in the *Husband's Message* are also strong.<sup>101</sup> Had flight by the actual killer not offered some amelioration in the situation of those left behind, it is difficult to understand its being regarded as anything other than cowardice, which is clearly not the case. The important point here is that though Edmund's measures do stand in a tradition allowing killers to flee and their kindreds to then pay less than the full wergild in compensation, they are more extreme than anything that had come before as, in effect, they relieved the kin of all responsibility.

**b) Feud after Edmund**

If we now understand the content and pedigree of Edmund's legislation, what remains is to assess its effect. To do this both subsequent laws and the actual cases of which we have some record will be examined. First, the legislation. The possibility that the idea of allowing a killer to flee and be entirely disowned by his kin turned out to be both an impractical and unpopular innovation is perhaps indicated by the fact that it is not found in any other Anglo-Saxon law-code. In particular its absence from Cnut's codes, which draw very widely from the corpus of laws that preceded them, is puzzling if we are to believe that it had far-reaching effects.<sup>102</sup> Even its appearance in the *Leges Henrici Primi* is rather unusual as rather than simply stating his measures as law, as is done in most of the work, the author introduces it "Scriptum est in legibus regis Eadmundi".<sup>103</sup> It could be that his doing this is a sign that he did not regard it as "living" law, something which might also explain his immediate resorting to *Lex Salica* for a slightly contradictory law allowing kinsmen to

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this subject directly, might offer a better model in some respects. The interpretation given in Attenborough (1922), p. 196, that those lacking in relatives would somehow have *gegyldan* associated with them in their stead is unsatisfyingly vague, but in a sense it matches the near impenetrable obscurity of the evidence well. For a good account of the difficulties of interpretation here, see Morris (1910), pp 8-9.

<sup>100</sup> Fulk, Bjork and Niles (2008), lines 456-72.

<sup>101</sup> Krapp and Dobbie (1931-42), iii, 225-7; Muir (2000), pp. 354-46.

<sup>102</sup> See Wormald (1999a), pp. 356-60.

<sup>103</sup> Hn 88:12-88:12d. Cf. II Em Prol. 2; II Em 1-1:3.

disown their kindreds.<sup>104</sup> In any case, even without such doubts, the simple repetition of an Anglo-Saxon measure in the *Leges Henrici* can certainly not be held to demonstrate contemporary relevance. It must also be remembered that Edmund's reign was a brief one (939-46) and that this code seems to have been a secular response (though not a counterpart) to the ecclesiastical I Edmund, which because it mentions Archbishop Oda cannot have been made earlier than Easter 942. II Edmund must, then, have been produced at the very earliest towards the end of 942; at the very outside he can have had only three and half years in which to enforce this potentially unpopular law before his stabbing on 26 May 946. Indeed, this could just as easily have been only six months or a year.<sup>105</sup> If his successor, Eadred, lacked the will to enforce Edmund's measures it is easy to imagine that they might have fallen into disuse. We do, at any rate, have some grounds to suspect that this legislation may not have had any great impact on reality.<sup>106</sup>

If there is no evidence to support the continued application of Edmund's laws, the same cannot be said for the continued existence of feud. Instead there are many indications that feud and kin responsibility remained standard. The most notable of these occurs in VIII Æthelred and I Cnut, which state that any man in holy orders who is charged with feud (*fæhþe*) and accused of having killed or instigated a killing can clear himself (by oath) with the help of his kin, who must otherwise bear the feud with him or pay compensation.<sup>107</sup> Those without kin can clear themselves with the help of fellow churchmen or must face the ordeal of the consecrated host (*corsnæde*),<sup>108</sup> whilst monks cannot either receive or pay feud compensations (*fæhðbote*) having left their kin-law (*mægðlage*) when they accepted rule-law (*regollage*).<sup>109</sup> If Archbishop Wulfstan, the author of both these codes and a staunch defender of ecclesiastical privilege, can countenance feud for the secular clergy it surely cannot have been effectively prohibited by Edmund's laws over seventy years beforehand. Indeed, in a discussion of tithings in II Cnut, he specifically highlights the value

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<sup>104</sup> Hn 88:13.

<sup>105</sup> *Gesetze*, iii, pp. 124, 126; Robertson (1925), p. 3; Wormald (1999a), pp. 310-11; A.S.C. 946(D).

<sup>106</sup> This subject is looked at again from a slightly different angle in the discussion of complex protections below, pp. 63-70.

<sup>107</sup> VIII Atr 23; I Cn 5:2b.

<sup>108</sup> VIII Atr 24; I Cn 5:2c.

<sup>109</sup> VIII Atr 25; I Cn 5:2d.

of a wergild, ordering that every man over twelve years of age must be in one if he wants to be “lade wyrðe” (to have the right to make an exculpatory oath) or “weres wyrðe, gyf hine hwa afylle” (to have the right to wergild if anyone kills him).<sup>110</sup> It is a key part of Wormald’s argument that your wergild, from the tenth century, increasingly appears in laws as the sum you would forfeit to the king for a variety of offences, and in this light the possession of a high one looks more like a burden than a privilege.<sup>111</sup> Here, however, we see the other side of the story, a clear statement that the wergild remained valuable for its original purpose – compensation to a man’s kindred in the event of his being killed.

Even more convincing is the evidence of the Cambridge Thegns’ Guild, whose regulations are preserved on a detached leaf of a gospel book that once, in all probability, belonged to the Abbey of Ely. They were entered there after a grant that can be dated between 970 and 999, making it clear that they date from either the eleventh century or the end of the tenth. The guild, like the others about which we have information, existed to provide for the funerary expenses of its members but, uniquely among the surviving records, it also served to help its members in feud:<sup>112</sup>

And if anyone kill a guild-brother, nothing other than £8 is to be accepted as compensation. If the slayer scorns to pay the compensation, all the guildship is to avenge the guild-brother and all bear the feud. If then one avenges him, all are to bear the feud alike. And if any guild-brother slays a man and does it as an avenger by necessity and to remedy the insult to him, and the slain man’s wergild is 1200 [shillings], each guild brother is to supply half a mark to his aid; if the man is a ceorl, 2 ores; if he is servile [or Welsh?] (*wylisc*), 1 ore. If, however, the guild-brother kill anyone foolishly and wantonly, he is himself to be responsible for what he has done.<sup>113</sup>

This, shows the responsibility of even a seemingly "private" guild for feud, and clearly demonstrates the importance of feud in post-Edmundian England. The responsibility of the wider

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<sup>110</sup> II Cn 20.

<sup>111</sup> Wormald (1999e), pp. 341-42.

<sup>112</sup> *E.H.D.* i, p. 557 and nos. 137, 138, 139 (for the regulations of less violent guilds).

<sup>113</sup> *E.H.D.* i, no. 136; Thorpe (1864), pp. 611-12. See Althoff (2004), pp. 90-101. It should be noted that, though it is unhelpful to his argument, Wormald fully acknowledged the presence of these texts. See Wormald (1999e), pp. 338-39.

kin (or in this case of guild-members) for the actions of individuals, the legitimacy of revenge killings, and the alternative of compensation via wergild, are constants in English laws. At no point is there any legislation providing for prosecution of simple, unaggravated homicide by the crown.

This is hardly a revolutionary discovery – indeed, for a long time it was the standard interpretation – but in the light of recent scholarship it has needed reasserting. Wormald’s picture of late Anglo-Saxon England as a society to which feud had to be reintroduced by the Normans does, however, require one final step before it can be safely set aside. The key to his argument is not so much that the laws suggest feud was eradicated but rather that the “evidence of how things *were*”<sup>114</sup> shows this to have been the case:

It is not because kings made rules for the control of feud, the holding of courts and the punishment of “crimes”, which might even encompass “false” pleading, that I believe these things to have happened. It is because I *find* them happening, in ground-level conflicts.<sup>115</sup>

If indeed Wormald had found ground-level conflicts that could demonstrate royal punishment of simple homicide as “crime” his arguing for such a situation in spite of the evidence of the codes would not be unreasonable. However, the evidence he does put forward is very weak indeed. Of the nine cases of homicide that he has assembled for the entire Anglo-Saxon period only two have any hope of being regarded as “simple”: five involve the killing of people whom we might expect to be under royal protection (two royal reeves, a king’s thegn, an earl and an abbot), one involved slaying in defence of a thief, and one was a case of infanticide – in which the crime was proved by means of a beard miraculously falling off when its erstwhile owner unwittingly swore a false oath – and which involved no royal punishment at all, only a penitential grant of land.<sup>116</sup>

Wormald’s case thus rests entirely on two, very poorly documented, cases. The first occurs in the Anglo-Saxon boundary-clause of a bilingual charter from 998 in favour of Ealdorman Leofwine, which mentions that three hides of land had been forfeited by a certain Wistan to King Æthelred

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<sup>114</sup> Wormald (1999e), p. 339. Emphasis in original.

<sup>115</sup> Wormald (1999e), p. 352. Emphasis in original.

<sup>116</sup> Wormald (1999d), nos. 54, 58, 60, 71, 145, 148, 161. For this final point (referring to no. 145) see *RamseyChronicle*, ch. 74.

for “*unrihtum monslithe*”.<sup>117</sup> We know nothing more about this case than that the man-slaying that took place was considered *unriht*. We do not know what it was that made this killing *unriht* and we cannot be sure that there were no aggravating factors involved. It is possible, indeed, that the reference to this as *unriht* killing is in itself an indication that there was something especially heinous about it. We cannot be certain, either, that this forfeiture did not relate to a penalty we already know about, perhaps the *fihtwite*. The second case, also from the late tenth century, offers slightly more detail. It comes from a list of sureties for estates that had been acquired for Peterborough Abbey by Abbot Ealdwulf in the late tenth century. The relevant passage is as follows: “These are the sureties that Osgot found for Abbot Ealdwulf for the land at Castor that he paid over to him for the outlawry that he incurred through slaying Styrçyr”.<sup>118</sup> Here there is certainly something rather odd going on. This is not, in the first instance, a royal forfeiture at all but one to an abbot who seems to have the right both to take the property of outlaws and, a later passage in the same document explicitly states, to pronounce outlawry himself.<sup>119</sup> This, in its own right, is potentially important evidence for the possession of significant judicial powers by monastic houses, but quite apart from this the same considerations apply here as did to Wistan’s case. Osgot may have killed Styrçyr but how he did so is unclear; it could have been, as Wormald assumes, a case of simple homicide or this could be a tersely functional allusion to a much more complex situation. Possibly Abbot Ealdwulf was involved because Styrçyr was under his protection in some way, in sanctuary perhaps, or maybe he also had the right to forfeitures for an offence such as *hamsocn* (which was at first punished by outlawry under King Edmund and may still have been so at this point).<sup>120</sup> These sources, in short, are far too terse and ambiguous to demonstrate the existence of a royal crime of homicide.

There is, then, a very good chance that both incidents can be explained without having to posit a royal crime of homicide, punished by land forfeiture, which somehow managed to exist without ever being explicitly mentioned in any of the law-codes. The word *unriht* may actively tell against Wormald’s interpretation in Wistan’s case, and the involvement of Abbot Eadulf certainly does in Osgot’s, but even if these references were absent these would still be still very flimsy grounds on

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<sup>117</sup> S. 892; Napier and Stevenson (1895), no. 8; Wormald (1999d), no. 61.

<sup>118</sup> S. 1448a; Robertson (1956), no. 40; Wormald (1999d), no. 50.

<sup>119</sup> S. 1448a; Robertson (1956), no. 40; Wormald (1999d), no. 51.

<sup>120</sup> II Em 6.

which to base such a far-reaching theory. In such terse records that do little more than associate a homicide with a land transaction, offering no description of the events surrounding the killing at all, it does not seem at all unlikely that the sort of aggravating circumstance that is the key to this issue would fail to be recorded. It is, then, the ideas of vengeance and compensation for homicide, not of punishment by the crown, that come through most strongly in the evidence for what came after Edmund's reign. Edmund had not outlawed feud, he had offered the kindred a means to escape from it and there are no indications in later law that even this proved to be a successful measure. As Wormald later wrote, rather undermining his earlier argument, "Edmund's second code is generally conspicuous for its lack of effect".<sup>121</sup> With regard to his measures allowing kindreds to opt out of feud by abandoning their members, at least, this seems a fair judgement. Kin-responsibility may not exactly resound throughout later legal texts, but why should it? It was traditional, a value or assumption shared by society, not an innovation that needed to be set out in detail, and it surfaces often enough for us to be assured of its continuing presence through to the latest extant Anglo-Saxon laws. Wormald's article makes some very good points regarding royal prosecution of theft, and is valuable in its highlighting of how even very prominent individuals had to go through the system of courts. Indeed, if we look at offences relating to property and those which can be interpreted as treason, Wormald's picture of a powerful royal ideology of crime and punishment is a convincing one.<sup>122</sup> However, where he attempts to promote the idea of the Anglo-Saxon "state" yet further, by assigning to it a monopoly of jurisdiction over homicide, he goes beyond what the evidence can support.

**c) Hurnard's Case**

Hurnard's case for the existence of a royal crime of homicide is considerably less detailed than Wormald's, appearing only in one extended footnote in a larger article about immunities.<sup>123</sup> It can thus be dealt with more swiftly. To the best of my knowledge it has never been analysed in detail by other historians; though Wormald knew the article well, describing it as "masterly", he at no point mentions Hurnard's contribution on this issue and his own argument on the subject does

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<sup>121</sup> Wormald (1999a), p. 363.

<sup>122</sup> On this see below, chapter six. The evidence of widespread execution cemeteries presented in Reynolds (2009) is, at any rate, hard to dispute.

<sup>123</sup> Hurnard (1949), p. 300n.

not reuse any of Hurnard's points.<sup>124</sup> Her case relies almost entirely on her interpretation of one passage in the *Leges Henrici Primi*, within which is the phrase "homicidium wera soluatur uel werelada negetur", which is translated by Downer "homicide shall be compensated for by the amount of the wergild or it shall be denied by an oath of exculpation equal in value to the wergild".<sup>125</sup> Hurnard's argument is that this referred not to the victim's wergild being paid to his kinsmen but to the culprit's wergild being paid to the king. Obviously, the passage alone neither says nor implies this, so her argument relied entirely on context. The phrase is part of a list of ten offences where all the others involve the offender forfeiting his own wergild to the king. Furthermore, it is in a section that is followed by the statement "the matters decided above are those which are assigned to the justice or mercy of the king and to his treasury."<sup>126</sup> Logically, then, Hurnard argued, the *Leges Henrici Primi* author must be telling us that *homicidium* had become a royal crime where the offender was punished by forfeiting his wergild.

This, to my mind, is to place a great deal of reliance on the structural integrity of the *Leges Henrici Primi*, a notoriously complex and convoluted document. Furthermore, if we look at the passage in full in the original Latin more problems emerge:

Hec emendantur wera si ad emendationem ueniat: qui in ecclesia fecerit homicidium; persolutio uel robarie; qui furem plegiatum amiserit; qui ei obuiauere et gratis sine uociferatione dimiserit; qui ei consentiet in aliquo; *homicidium wera soluatur uel werelada negetur*; si uxoratus homo fornicetur; qui uiduam duxerit ante unum annum; qui in hostico uel familia regis pacem fregerit, si ad emendandum uenire poterit; si prepositus pro firme adiutorio wita exigat.<sup>127</sup>

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<sup>124</sup> Wormald (1999c), p. 317.

<sup>125</sup> Hn 12:3.

<sup>126</sup> Hn 19:1.

<sup>127</sup> Hn 12:3. Downer (1972) translates: "Compensation is effected by payment of the wergeld, if compensation should be allowable, in the following cases: if anyone commits homicide in church; if payment is made as amends for theft or robbery; if anyone lets a thief who is under his surety escape; if anyone comes upon a thief and deliberately lets him go without raising the hue and cry; if anyone is his accomplice in any respect; homicide shall be compensated by the amount of the wergeld or it shall be denied by an oath of exculpation equal in value to the wergeld; if a married man commits fornication; if anyone marries a widow within a year or her husband's death; if anyone breaks the peace of the king's

If we look at the structure of this passage, the italicised text is unique among the other items in the list in that grammatically it forms a complete sentence, not beginning with a “qui” or “si” like the other passages. Whereas all the other entries require the introductory passage, stating that they are to be compensated by wergild if compensation is allowable, in order to make sense, the passage on homicide states it all again, albeit concisely. What does this mean? Possibly the author is trying to indicate that there is something unusual about this particular entry, that unlike the others the wergild was intended for the victim’s family and not the king. Possibly it is a sign that this was a well known phrase, a pithy way of stating the rules for denying or compensating homicide, that has been inserted into the passage because it is indeed, as the sentence opens by explaining, an instance in which wergild is the appropriate compensation. It looks, at any rate, out of place and we might well suspect that this is because the passage was not present in the first draft, perhaps added later as an afterthought. Thus, though the relationship of this passage to the statement that all the above are assigned to the justice or mercy of the king (which occurs six pages later in the printed edition) is logically correct, the possibility that this does not represent the author’s meaning seems high. Whatever else this passage is, it is not conclusive evidence of the existence of a royal crime of homicide. Indeed, if we were relying on this evidence alone we would be left in considerable doubt as to what the author’s view on the subject was.

Fortunately, though, the author of the *Leges Henrici* was perfectly willing to make his understanding of homicide plain on other occasions. The clearest example of this is from the opening of chapter 69:

Concerning the slaying of an Englishman. If any Englishman is slain without fault on his part, compensation shall be paid to his relatives according to the amount of his wergild and the custom of the district relating to wergild. *Wite* and *manbot* shall be paid to the appropriate lords as justice requires, in accordance with the amount of the deceased’s wergeld.<sup>128</sup>

This, to my mind, is clear enough. The *Leges Henrici* supports precisely the approach to homicide that is to be found in the pre-conquest legislation: the old system of wergild, *manbot* and *fihtwite*.

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troop or household, if payment of compensation can be allowed; if a reeve demands a fine when supplies for the king’s maintenance are not provided.”

<sup>128</sup> Hn 69-69:1a. Also, Hn 68:1-68:2.

I can see no reason to prefer Hurnard's extremely uncertain interpretation of the passage analysed above to this uncomplicated and wholly explicit statement. Once this is established, Hurnard's supporting evidence collapses very swiftly. It consists of the *Domesday* entry for Kintbury in Berkshire, which states that Walter FitzOthere held half a hide exempt from all customs "excepta forisfactura regis sic est latrocinium, homicidium, heinfara et fracta pacis".<sup>129</sup> This does appear to imply that *homicidium* was a royal forfeiture but it is a single, isolated case and could simply be an error, perhaps a mistaken rendering of *fihtwite* or, as Hurnard herself suggests, a case of "*homicidium* being confused with *murdrum*, the fine payable by the district".<sup>130</sup> This seems to me to be significantly more likely than Hurnard's suggestion that there was a royal crime of homicide which left no record whatsoever in the legal texts of the day except for this one *Domesday* entry and one ambiguous statement in the *Leges Henrici*. There is, in short, no more reason to follow Hurnard's reasoning than Wormald's in positing the existence of such a crime. The reason we are not explicitly told of it is the simple one: it did not exist.

## Conclusions

As this analysis has shown, the system of feud is evident in the Anglo-Saxon law-codes with no sign that it had, in principle, been proscribed at any point before the conquest. Indeed, the evidence of Anglo-Norman legal texts would suggest that this was still the case for some years after 1066. The evidence that we have for violent feuds with tit-for-tat vengeance killings occurring in practice is, admittedly, slight – the one good pre-conquest example is that of Uhtred, Thurbrand and their descendants, and in featuring such powerful men and in occurring in Northumbria it may well be far from typical.<sup>131</sup> However, the absence of examples of long-term, violent feuds in Old English sources is, to some extent, unsurprising. These sources tell us about what interested their writers and contemporary readers, and this almost always meant churchmen and most often it meant monks. Our accounts of disputes in Anglo-Saxon England are thus inevitably skewed towards land disputes involving the monastic houses that recorded them – even the feud of Uhtred and Thurbrand is only known to us because of the writer's interest in certain lands alienated from the bishopric of Durham. Indeed, we probably only know about it

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<sup>129</sup> *D.B.* i. 61v; Fleming (1998), no. 126.

<sup>130</sup> Hurnard (1949), p. 300n.

<sup>131</sup> See Morris (1992), Fletcher (2003), Kapelle (1979), pp. 3-26.

because the writer happened to find it an interesting diversion; he could easily have accomplished his main task without including most of the violent details. Other than this, we do find records of aristocratic violence in narrative sources such as the Anglo-Saxon Chronicle but these tend to be very brief – we would have no idea about the feud of Uhtred and Thurbrand if we relied on them alone – and their interest is invariably in the highest levels of the nobility. There is no particular reason that we would expect to find details of lower-level feud violence in the documentation that survives to us from the period before 1066.

It should be emphasised, however, that even such a poor haul of evidence of violent feuding in practice easily outweighs the evidence that simple homicide tended to be dealt with in any other way than through the core system of feud consisting of *fihtwite*, *manbot* and *wergild*. As we have seen, the case for its being punished by the crown as “crime” is tenuous at best. But this is the sort of black or white approach to the issue that we really need to get away from. There are more than just two options here – with prevalent violent bloodfeuds on one side and comprehensive royal jurisdiction over violence on the other. What we need is a much more subtle picture of the grey area in between. There is no convincing evidence for an outright prohibition of homicide, let alone violence in general, by English kings, but this does not mean that these kings did not try, and succeed, in limiting outbreaks of feud violence by other means. This chapter has found that the basic system of feud outlined here continued up to 1066, and probably beyond, with the threat of violence from slain men’s kindreds and lords remaining, at least in theory. The West Saxon monarchy never attempted to destroy this system, but – crucially – that does not mean it was inactive. Rather, the following chapter argues, tenth- and eleventh-century English kings gradually carved themselves a major role in the system of feud and worked within that system to make the use of violence an increasingly difficult, dangerous and expensive option.

## *Chapter Two*

# Protection, Prohibition and the Regulation of Violence

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### **Introduction**

The previous chapter has shown that the core of the system of feud, essentially the three payments for simple homicide, *wergild*, *manbot* and *fihtwite*, persisted throughout the Anglo-Saxon period. It argued that there is no convincing case for a royal crime of homicide before the conquest, something which would have removed most of the relevance from these payments. These are important points but they are only the foundation of a full understanding of how violence was regulated in Anglo-Saxon England. In *wergild*, *manbot* and *fihtwite* we have only the core of the Anglo-Saxon system of feud, not the full picture. In knowing that they remained the central legal means of settling cases of simple homicide, we know that we have to afford significant emphasis to the context of feud in our understanding of violence in Anglo-Saxon society. We cannot envisage a context consisting purely of prohibition by central authority and we certainly cannot, as Wormald did, talk about the Anglo-Saxon “state” having a “monopoly of legitimate violence”.<sup>1</sup> This gets us only so far, however. We know about the core of the system of feud, which remained fairly constant throughout the period, and we know one way that Anglo-Saxon kings *did not* try to change it; but what we do not know about are the more peripheral elements of the system of feud and what exactly it was that kings *did* try to do. This is the purpose of this chapter. It is an investigation into the ways that Anglo-Saxon kings did manage to extend their jurisdiction over violence to a point where it would have been relatively difficult to seriously assault anyone, let alone kill them, without offending royal justice.

Though kings did not, as was shown, have a very great involvement in the settlement of cases of simple homicide, it does not follow that they were not greatly involved in the regulation of violence. Many homicides would not have been simple, they would have incurred additional

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<sup>1</sup> Wormald (1999e), p. 341.

penalties because of some particular feature or combination of features. The killing could, for instance, have been committed in a particular way that was prohibited by the crown, or it might have taken place in a protected space, or the victim might have been under specific royal protection – there was a multitude of ways in which violence could incur penalties beyond the core payments of wergild, *manbot* and *fihtwite*. The theory put forward by this chapter is that it was with these extra rules working alongside the system of wergilds that kings gained a major – possibly even dominant – role in the regulation of violence. More specifically, it argues that it was through the innovative use of protective power, not through prohibition, that this role was created. The chapter aims to do this by creating a reasonably complete picture of the extra rules governing violence, looking not only at protections but also at prohibitive powers and even some measures which could be characterised as hybrids of both protection and prohibition. In providing this comprehensive account of royal jurisdiction over violence, it will also identify the areas in which there were innovations and give assessments of their success. It will, I hope, give a broader picture of the development of the Anglo-Saxon system of feud, not only of the increase in royal powers but also of their relationship to other key players such as the church and the nobility. The aim is to provide not only an account of the growth of royal power but also a sober assessment of its limitations. This chapter attempts to do this in three sections. Firstly, it looks at what seems quite clearly to be a royal prohibitive power, that of *morð*, or murder. Secondly, it looks at what I term “complex protections”, hybrid measures, with both protective and prohibitive elements, intended to prevent violence breaking out between parties with a pre-existing relationship of some sort. Most often this means preventing violence between hostile parties in a feud. Finally, and most extensively, it looks at protections and the way that they were expanded across this period.

## Prohibitive Power: Understanding *Morð*

The clearest prohibition on killing in Anglo-Saxon legislation is that against murder or *morð*, but this is difficult to define. Apart from its occurrence in Æthelstan’s Grately code and the fragment known as *Be Blaserum* (which Wormald associates with that code on linguistic grounds)<sup>2</sup>, it appears only in laws of King Æthelred and King Cnut whose authorship has been attributed to Archbishop Wulfstan. In all but two instances, both in Cnut’s laws, the term occurs as part of

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<sup>2</sup> *Blas*. Wormald (1999a), p. 367.

compounds, thus we hear of *morð*-deeds, *morð*-slayings and *morð*-works.<sup>3</sup> All of the Wulfstian instances of *morð* compounds occur in lists of unrighteous deeds to be avoided or evil people to be shunned, usually alongside such figures as witches, perjurers and magicians. The relevance of these associations to the contemporary legal meaning of *morð* has, however, been dismissed by Bruce O'Brien on the grounds that such lists are simply Anglo-Saxon renderings of biblical models.<sup>4</sup> Because of this, and because they do not mention any legal penalties, these passages can be safely ignored. What remains are the two usages linked with Æthelstan's reign and the two uncompounded instances of *morð* in Cnut's laws. Like the later Wulfstian examples, II Æthelstan treats *morð* alongside witchcraft and sorcery but it does at least offer a penalty: that of death if the charge is undeniable.<sup>5</sup> *Be Blaserum* deals with murderers and arsonists and prescribes the threefold ordeal for those charged.<sup>6</sup> Neither can offer significant enlightenment as to the meaning of the term. The uses in Cnut's code are slightly more helpful. In II Cnut 64 *æbere morð*, flagrant or undeniable murder, is listed alongside a number of other serious offences as being *botleas* – that is, uncompensatable.

The other passage, II Cnut 56, needs to be examined in detail. Robertson's edition and translation is fairly representative of the traditional reading:

*Open morð.*

*Gif open morð weorðe ðæt man amyrrred sy, agyue man magum [ðone banan].*

Murder which is discovered.

If anyone dies by violence and it becomes evident that it is a case of murder, the murderer shall be given up to the kinsmen [of the slain man].<sup>7</sup>

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<sup>3</sup> II As 6; *Blas*; V Atr 25; VI Atr 7, 28,3, 36; EGu 11; Cn 1020, 15; II Cn 4 .

<sup>4</sup> O'Brien (1996), pp. 343-5.

<sup>5</sup> II As 6.

<sup>6</sup> *Blas*.

<sup>7</sup> II Cn 56. Apart from what follows, Robertson's version is problematic for two reasons. Firstly, *amyrrred* means "defiled" not "murdered"; it ought to be corrected to *amyrrðred*. More importantly, *ðone banan* does not refer to "the slain man" but to the killer. The square brackets in the translation should be around "the murderer". See Robertson (1925), pp. 202-3, 357.

The murderer, presumably, was not intended to live long after this meeting with the relatives of his victim, which makes it all the more puzzling that the following clause, dealing with accusations and exculpatory oaths, appears to assume the killer is still alive.<sup>8</sup> Stefan Jurasinski has recently attempted to reintroduce some sense into our understanding of this law. He shows that the idea that the killer is to be handed over to the king is in fact an Anglo-Norman error. If we strip away the twelfth-century emendation *ðone banan* (“the killer”), and follow the Latin of the *Instituta Cnuti* rather than that of the *Quadripartitus* and the *Consiliatio Cnuti*, we come up with a text in which it is not the killer but the body of the victim that is given to the kin.<sup>9</sup> He goes on to interpret this law with reference to some continental parallels and argues that it was precisely the killer’s failure to return the body that made this homicide *morð*:

The term “*morð*” as it is used in II Cnut 56 most likely bears a meaning consistent with its cognates in Frankish and Scandinavian legal literature: not simply “secret or stealthy killing”, a definition that is too vague, but “killing followed by concealment of the victim’s corpse” or “a failure to provide the kin with the victim’s corpse.”<sup>10</sup>

According to Jurasinski, then, the homicide was *morð* because the killer failed to fulfil his obligation to return the body, or even hid it, and it became *open morð* because someone found this body. It was presumably this someone who then had to return the body to the kin and the following clause describes the process of accusation and exculpatory oath that would likely follow.

But how solid is Jurasinski’s definition of *morð*? As he himself notes, this essentially secretive crime hardly seems compatible with the term *æbere morð* used in II Cnut 64 and on this basis alone it seems likely that *morð* requires further definition.<sup>11</sup> Other than this, however, it seems likely that Jurasinski’s interpretation is broadly correct, though it could perhaps be refined a little. Jurasinski in effect offers two explanations: *morð* is either the breach of a prohibition on hiding the bodies of slain men or it is a failure to perform a duty to return such bodies to their families. Both of these, to my mind, seem a little too precise. A requirement to hide the body would rule

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<sup>8</sup> II Cn 56:1.

<sup>9</sup> Jurasinski (2002), pp. 163-72.

<sup>10</sup> Jurasinski (2002), pp. 179-80.

<sup>11</sup> Jurasinski (2002), pp. 161-2n.

out situations where the killer simply left it where it fell and told no-one of its location. On the other hand, the requirement that the killer physically return the body is rather elusive. Nowhere is any evidence of such a requirement cited. There is a passage from the *Leges Henrici Primi*, according to which a lord can demand a body, but the circumstances envisaged are odd: he needs to give security and offer to do full justice for the slain man and, most importantly, failure to return the body requires only extra compensation; it is not *botleas*, as it would have been if it were regarded as *morð*.<sup>12</sup>

What we do have evidence for is a requirement that the killer publicly give notice both of his responsibility for the killing and of the location of the body. Jurasinski quotes the well-known passage from the thirteenth-century Icelandic compilation *Grágás* that details this ritual, known as *víglýsing*,<sup>13</sup> but this roughly equivalent passage in the *Leges Henrici Primi* escaped his attention:

If anyone kills a person in the course of a feud or in self-defence, he shall appropriate nothing at all for himself from the dead man's possessions, neither his horse nor his helmet nor his sword nor indeed any property; but he shall lay out the body itself in the manner customary for the dead, his head turned towards the west, the feet towards the east, resting on his shield, if he has one, and he shall drive his spear into the ground and arrange his arms about it and put a halter on the horse. He shall make this known at the nearest village and to the first person he meets, and also to the lord that has soke, so that it may be possible for a case to be established or denied as against the slain man's relatives or associates.<sup>14</sup>

Given that no source for this passage has been discovered, and that the reference to the lord of the soke is probably indicative of an English origin, it may well be that this passage represents genuine custom. It looks as if, rather than actually returning the body, English killers were expected to lay it out honourably and make both its whereabouts and their own responsibility public. If, then, we are to define *morð* as the failure of a killer to carry out a legal obligation regarding his deed, this seems the best candidate for such an obligation. It has the benefit of being entirely consistent with II Cnut 56: any corpse that is discovered by a third party will, almost

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<sup>12</sup> Hn 74:3; Jurasinski (2002), pp. 172-3.

<sup>13</sup> Jurasinski (2002), p. 176.

<sup>14</sup> Hn 83:6-83:6a.

by definition, constitute a case of *open morð* if *morð* is a killing to which the killer will not publicly own up. It thus seems that if we shift away from Jurasinski's focus on the centrality of the fate of the corpse, and towards a slightly broader definition focused on the concealment of the deed itself and responsibility for it, we are coming closer to the truth. This not only makes sense of the English evidence but also accords perfectly with what is known of the Scandinavian tradition.

Attempts to define *morð* using literary evidence are less than convincing. In a Scandinavian context Klaus von See discovered that *morð* meant very different things in skaldic verse and legal texts – the usage in the former being much looser – and there is every reason to think that a similar situation may have obtained in England.<sup>15</sup> Bruce O'Brien, in his survey of the meaning of *morð* in Old English literature, found that it had two special meanings: a killing for which there could be no compensation, by which he seems to envisage primarily kin-slaying, and treachery to one's lord, the evidence for which is primarily of actual lord-slaying.<sup>16</sup> Legally speaking these two cases are very different. Kin-slayers, *mægslagan*, are mentioned only once in pre-conquest law, alongside *morðslagan* in a passage in Cnut's letter to the English of 1020.<sup>17</sup> As evidence of legal practicalities this is extremely weak. It is more of a homiletic admonition than a law, part of a list of unrighteousnesses to be expelled in the purification of the kingdom. No penalties are specified. Indeed, the general silence of the sources suggests that the killing of immediate kinsmen presented an insoluble dilemma for the kindred in question that the law made little effort to address. In cases where the slayer and the slain were not related on both sides, the *Leges Henrici Primi* states that some compensation can be given to the relatives of the slain with whom the slayer had no blood-ties but, probably sensibly, leaves the details to be worked out by "wise men".<sup>18</sup> The killing of lords, however, was a different matter entirely. Alfred states that though it is permissible to fight alongside one's kin, to do so against one's lord is not allowed.<sup>19</sup> Indeed, he is quite clear (as are both Æthelstan and Cnut) that anyone who even plots to kill his lord is to

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<sup>15</sup> Von See (1964), pp. 20–22.

<sup>16</sup> O'Brien (1996), pp. 345–47.

<sup>17</sup> Cn 1020, 15.

<sup>18</sup> Hn 75:5b.

<sup>19</sup> Af 42:6.

forfeit both life and property.<sup>20</sup> Clearly this sort of treachery against lords was something which kings were closely involved in stamping out. The contrast with kin-slaying is sharp. Both are despicable acts but only the slaying of lords is legislated against. From the way they are treated in the laws there is nothing to indicate either was encompassed by the term *morð*. Indeed, both appear alongside *morð* in these texts, represented as distinct offences.<sup>21</sup> It seems most likely that what O'Brien found in his literary analysis of *morð* and *morðor* was a term that in poetic usage described any despicable homicide, of which kin- and lord-slaying were the most potent examples.

So what can be concluded from this examination of *morð*? We know that it was prohibited, albeit in rather formulaic and biblically influenced terms, in Æthelstan's Grately code with the penalty of death if the charge was undeniable, and that around the same time *Be Blaserum* prescribed, in more convincingly secular terms, the threefold ordeal for dealing with accusations. It thus seems most likely that *morð* was a "crime" punished by the crown by the 930s at the latest. Though we have to work back from later evidence and draw to some extent on foreign parallels, we can come up with a reasonably convincing argument for some ways in which *morð* could be committed. As Jurasinski suggests, hiding the body of the victim seems to have been one method but, on balance, this seems likely in most circumstances to have been subsumed within the slayer's failure to perform the ritual declaration of responsibility, as outlined in the *Leges Henrici Primi*. In essence, we come to a definition of *morð* as "secret killing". This does leave the question of exactly how one committed the *æbere morð* described in II Cnut 64. Conventional definitions of *morð*, such as Wormald's "underhand killing" suggest that the answer may well lie in killing by trickery and betrayal, which could potentially be done flagrantly.<sup>22</sup> There is no real evidence to back this up but in the absence of any better explanation it retains some plausibility.

There can be no doubt that *morð* was a prohibitive power – there is no protected group, the offence being based on the way that the killing is committed rather than the identity of the victim – but the extent of its importance for royal jurisdiction over violence is questionable. The very obscurity of *morð* is probably the most important point here. There is nothing to indicate that it

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<sup>20</sup> Af 4:2; II As 4; II Cn 57, 64.

<sup>21</sup> Cn 1020, 15; II Cn 64.

<sup>22</sup> Wormald (1999a), p. 363.

was a legislative priority of any king and there are no signs (before the conquest) of the concept being extended to encompass a broader range of killings. Though it does not emerge in legal texts until the tenth century, there is no particular reason we should think that it was a novelty under Æthelstan. It seems just as probable, perhaps more so given that the whole concept of dishonourable killing is so closely bound up with feud, that *morð* was a much older idea. If royal jurisdiction over violence did advance in this period, the signs are that it did not do so through *morð*. Indeed, it is possible that the offence was never of any great significance. We do not, at any rate, have any clear evidence of cases of *morð* occurring in practice. Perhaps the closest is the Anglo-Saxon Chronicle's account of Earl Sweyn's treacherous killing of Earl Beorn, for which he was declared a *niðing* and effectively exiled, but there are other factors at play here such as the fact that Beorn was both Sweyn's kinsman and an earl – it is by no means clear that this was either considered *morð* or that the treachery was an important factor in how it was treated.<sup>23</sup> Indeed, it is notable that *morð*, unlike many important royal rights, does not appear at all in *Domesday Book*.<sup>24</sup> There is a distinct possibility, therefore, that *morð* was a very serious but very rare and thus rather obscure offence, whose significance in the grand scheme of royal jurisdiction over violence was minimal.

## Complex Protections: Delegitimising Vengeance.

*Morð*, then, may well not have been of any great significance for royal jurisdiction, nor kin-slaying, but the other offence touched on above – lord-slaying – is a different matter. Alfred's measures quite clearly indicate that those who plot against their lord's life would forfeit both life and property to that lord, but Æthelstan and Cnut are much vaguer about the destination of the property, which may indicate that the destination of forfeitures for lord-betrayal had shifted to the crown.<sup>25</sup> Here, then, we may well be seeing an expansion of royal jurisdiction over violence, but it is important to note that unlike *morð* this is not all about prohibition. We do have a protected group – lords – but we also have a clearly limited group at whom that protection is

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<sup>23</sup> A.S.C. 1049 (C, D, E). The E account, in any case, makes the killing look significantly less treacherous.

<sup>24</sup> The murder fine, or *murdrum*, does appear, but this is quite clearly something different (see below, pp. 171-80). On legal material in *Domesday Book* see Fleming (1998).

<sup>25</sup> Af 4:2; II As 4; II Cn 57, 64.

aimed – those lords' men. This is what I term a "complex protection" and there are several examples of these in Anglo-Saxon law.

A complex protection, then, is one that uses a specific protection but a protection whose effects are limited to a specific group. Unlike a normal protection, in which the protected group receives complete protection such that attack from any quarter is considered a breach, complex protections are rather more sophisticated. Not only does the protected group have to be defined but so too does the group that is constrained by that protection, and there needs to be a clear understanding of what type of act constitutes a breach of that protection. The protection of lords from their men is a good example of how this works. The lord is protected and his men are constrained by that protection, but the protection quite clearly extends beyond violence and into any form of plotting against the lord's life. This, logically, works very well. Treacherous men cannot get around the prohibition on lord-slaying by bringing in an outsider to do the deed itself. We have not only the protected and constrained parties but also a clear definition of the type of act that constitutes a breach. Though the element of protection is undoubtedly the strongest here, it requires much more than just protection to function properly. Complex protections, then, are probably best regarded as being to some extent hybrids with more prohibitive types of power. Their common factor is that they are used to prevent violence between groups with an established relationship, and usually this means that they are specifically aimed at preventing what was regarded as illegitimate vengeance. Indeed, the example of lord-slaying is exceptional in that this is not its main purpose. Thus, though they do offer protection, their main purpose seems to be preventing, in specific situations, the independent assertion of protective power by kindreds and other non-royal parties. By making violence illegitimate in such situations these measures would have removed the one lever by which compensation payments might be extracted.

Perhaps the clearest example of such a complex protection is Edmund's decree allowing the kindred to abandon a member, which has already been looked at in some detail. The key concept here is that of being *unfah*, or exempt from feud, a status that pertained to the kindred after they had disowned their homicidally inclined kinsman. Once this *unfah* status was attained by a kindred, II Edmund states, any vengeance taken upon them by the slain man's kin was punishable by outlawry.<sup>26</sup> What is particularly significant about this is that it is so precise a measure. It is not that nobody may harm the *unfah* kindred, it is only the kin of the slain man who are prohibited

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<sup>26</sup> II Em 1:3.

from doing so. Attacks unrelated to the potential feud (i.e. by people unconnected with the original slaying) were presumably to be dealt with in the normal manner – through wergild, *manbot* and *fihtwite*. This clearly has the main features of a complex protection, a protected and a constrained group, and for it to work it would need the prohibited deeds (homicide undoubtedly, but maybe also other types of violence) to be clearly understood. This, however, is not quite so watertight as the measure against lord-slaying. It is easy to imagine that there could be substantial grey areas which could be manipulated by those eager for vengeance. Is a non-lethal scuffle a breach of this complex protection? Were friends of the slain man who were not strictly kinsmen constrained by the *unfah* status? Were friends of the slayer who were not blood relations protected by it? The precision which characterised the lord-slaying measure is absent here. So can we be sure that this was a workable measure at all? Significant doubts were raised about this in the previous chapter: the dishonourable nature of abandoning one's kin, Edmund's untimely demise and, above all, the absence of any later repetition of the measure or of any evidence for its implementation, all these combine to make the case for the efficacy of *unfah* status rather problematic.<sup>27</sup> Such a complex and controversial measure with such room for evasion would surely have needed both great royal will and extensive aristocratic backing for it to be enforced – it relied, after all, on “the hostility of all the king's friends” as a penalty – and it is unclear that this was available. If it was, we would expect to find some evidence of it in later laws, but this is absent. In short, it is impossible to state with any certainty that *unfah* status gained by formally abandoning homicidal kinsmen ever had any extensive practical application.

There is, however, evidence for something akin to Edmund's *unfah* status in regulations that prohibit feuding on behalf of people who have been slain in accordance with the law. This first appears in the laws of Ine in which it is stated that he who captures a thief is to give him up to the king and receive 10 shillings for his trouble, whilst the kin of the thief (who seems to have faced execution) had to swear “*aðas unfæðha*” – oaths of “un-feud” – towards his captor.<sup>28</sup> Later codes remove the need for an oath. In II Æthelstan those who avenge thieves are placed on the same level as witches, suffering death if they cannot deny the charge with the extra provision that those who attempt to take revenge but fail, wounding nobody, have to pay a 120 shilling *wite*.<sup>29</sup> A

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<sup>27</sup> Above, pp. 39-46.

<sup>28</sup> Ine 28.

<sup>29</sup> II As 6-6:3.

later and slightly contradictory clause of the same code even uses the same formulation as II Edmund in stipulating outlawry for those who try to avenge a thief: “ðonne beo he fah wið ðone cyng 7 wið ealle his freond”.<sup>30</sup> Similar regulations on thieves can be found in VI Æthelstan and also in III Edmund, which uses a Latin version of this same outlawry formula.<sup>31</sup> This formulaic borrowing suggests that Edmund drew on the analogy of those who avenged thieves to deal with inappropriate revenge in feud.

The two cases are in a sense parallel. In both there is a kin-group that, a member having been slain, might understandably desire to pursue a feud which the king wished to prohibit. In the case of thieves it seems that Æthelstan was particularly concerned by the prospect of large, powerful and aggressive kindreds allowing their members to steal with impunity – men who might otherwise have slain them being put off by the certainty of incurring the wrath of such a kindred. Even the threatened “hostility of the king and all his friends” was not, it seems, enough for such groups. A number of Æthelstan’s codes contain provisions for the internal exile of these kindreds. They were to leave their home districts and be prepared to go wherever the king told them, to be slain as thieves should they dare to return.<sup>32</sup> The Exeter code makes it clear that this was both an extraordinary measure and a last resort:

And he who harbours them, or any of their men, or sends anyone to them, is to forfeit his life and all that he owns. That is then because the oaths and the pledges and the sureties which were given there are all disregarded and broken, and we know no other things to trust to, except it be this.<sup>33</sup>

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<sup>30</sup> II As 20:7. II Em 1:3 reads “sy he gefah” for “ðonne beo he fah”, but otherwise the phrase is identical.

<sup>31</sup> III Em 2; VI As 1. There is also a possible parallel in Alfred’s declaring certain people *orwige*, a term generally interpreted as meaning “not liable to feud”. This applies to men who slay when they find another man inappropriately secluded with one of their womenfolk (wife, mother, sister or daughter), who fight on behalf of their lords or men, or even alongside their wrongfully attacked kinsmen (Af 42:5-42:7). However there is no penalty stated for those who do feud with such men and the premise does seem rather improbable – can we really imagine that someone who fights alongside their kinsmen would be exempt from feud? It is tempting to follow the *Quadripartitus*, which reads ‘sine wita’ here (*Gesetze*, i, p. 77). Could it not be that it was, in fact, the *fihtwite* that was not payable in such circumstances? This is not how modern scholars have interpreted the passage but it does make more sense, especially of the absence of penalties (cf. Robertson, p. 198; *Gesetze*, ii, p. 168).

<sup>32</sup> V As Prol. 1; IV As 3; III As 6. Cf. VI As 8:2-8:3.

<sup>33</sup> V As Prol. 3.

If Æthelstan did have some success in his drive against theft – as it seems, from the thanks for this offered in II Edmund, that he eventually did<sup>34</sup> – it was evidently at the cost of much commitment and energy from the king himself, and equally clearly would have required the help and cooperation of powerful noblemen. In this light Edmund's thanks and plea for further aid look a long way from being a simple nicety.

However, Edmund's laws on *unfah* status and Æthelstan's complex protection of the slayers of thieves, though in some senses parallel, were intended for radically different contexts. The sort of grey areas discussed above for Edmund apply just as much to Æthelstan's anti-theft measures – we may imagine creative evasion of the laws – but there is a key difference in the status of the man being avenged. A thief, if the laws are any reflection of social attitudes whatsoever, was held to deserve death and cannot have been thought worthy of vengeance by many people outside his immediate family and friends; whereas the man being avenged in II Edmund has the potential to be an upstanding citizen, an innocent party for whom we might expect a much wider section of society to show some concern.<sup>35</sup> In the one situation it seems likely that prevailing social attitudes might have mitigated against vengeance, in the other they may well have worked for it. We should surely expect this divergence in attitudes – variable, of course, with the particular circumstances of each instance – to be reflected in the willingness of local men to ride against the avengers. As this is what underpins the law in either case it does seem likely that Æthelstan's legislation would prove more workable than Edmund's. In short, it is quite possible that, with stern examples made of a few troublesome kindreds, the laws threatening outlawry against those who avenged thieves were able to draw on hundreds of years of anti-theft sentiment and become reasonably effective. That even this more feasible anti-theft legislation looks to have required a massive investment of Æthelstan's political will is yet another indication that Edmund's attempt to do the same for feud – for which we have no reason to believe there was an effort of similar proportions – was probably a failure.

Our final example of a complex protection has also been touched upon in the previous chapter: the use of the king's *mund* as part of the composition procedure outlined in both II Edmund and

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<sup>34</sup> II Em 5.

<sup>35</sup> For examples of the traditional hostility of West Saxon law towards thieves see Ine 12, 16, 21, and for its most extreme manifestation under Æthelstan, II As 1 and IV As 6-6:7.

*Wergeld*. After surety has been found for the wergild but before any payments are made II Edmund states that “the king’s *mund* is to be established”.<sup>36</sup> *Wergeld* offers more detail:

When that is done, the king’s *mund* is to be established, that is that all from either kin give a common pledge on a single weapon to the arbitrator (*semende*) that the king’s *mund* will stand.<sup>37</sup>

This is clearly intended as a measure to ensure the security of both parties once they have firmly committed (through the production of sureties) to the process of compensation. Any violence between the parties thereafter would constitute *mundbryce* which an earlier clause of II Edmund identifies as an offence that incurs total forfeiture of property and the placing of the offender’s life in the king’s hands.<sup>38</sup> We have the same pattern of a complex protection found in the previous instances, except that the constrained and protected groups are technically the same. In reality, however, it seems most likely that the *mund* was intended to protect the slayer and his kindred and constrain the kinsmen of the slain. As with *unfah* status, it seems that those with no connection to the feud were not affected by the declaration of the king’s *mund* in this context and would not expect any offences they committed to be treated with any unusual severity.

With this measure, as with the others, there may have been grey areas that could have been exploited, but because the levying of the *mund* is something that both kins have to agree on this seems less likely to have been an issue. If the feeling within a kindred was so vengeful that it was unwilling or unable to prevent a member trying to circumvent this complex protection, then it seems rather unlikely such a kindred would have agreed to accept compensation in the first place. Furthermore, unlike the *unfah* measures that open II Edmund, there is at least one solid indication that this measure was used in practice. This comes from the *Domesday* section covering the lands between the Ribble and the Mersey where it is twice stated that land was held quit of all customs except for six, one of which was “a fight after an oath has been made” (*pugnam post sacramentum factum remanentem*).<sup>39</sup> This, to my mind, can only be a reference to the “common pledge on a single weapon” which established the king’s *mund*, otherwise it is difficult to explain

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<sup>36</sup> II Em 7:3.

<sup>37</sup> Wer 4.

<sup>38</sup> II Em 6.

<sup>39</sup> *D.B.* i, 269v, 270r; Fleming (1998), nos. 1295, 1301.

why the king would be involved at all, the offence being simply perjury. Now, there is an issue as to whether this was a traditional element of composition procedure or a novel addition of Edmund's. Certainly it would fit with the context of II Edmund if this was in fact another royal intrusion into feud but, as has been noted, there are some reasons to think that this final section might have been an addition.<sup>40</sup> Clearly we cannot say for sure, but there is at least a possibility that this was an innovation of Edmund's that did have a lasting impact.

Complex protections, then, seem generally to have been reasonably effective. The protection of lords, the prohibition of vengeance for thieves, and the levying of the king's *mund* in the composition of feud can all be traced beyond their first appearances in ways that inspire a degree of faith in their efficacy – unlike Edmund's experiment with *unfah* status in feud. On the other side of the coin, however, it is clear that imposing such a complex protection was not something to be undertaken lightly. The determined effort required by Æthelstan to enforce his will against even so generally despised a character as the thief shows, I think, just how hard it was to interfere with the kindred's protective power. These measures were, in essence, attacks on the universality of the protection that kindreds, and logically also lords and guilds, were able to offer. They should thus be seen as highly provocative and likely to encounter resistance. We can see that Æthelstan succeeded by dogged perseverance and the willingness to throw the full weight of royal power at the problem of theft; we can imagine that the practice of *mund*-levying in composition settlements, being voluntary, would have encountered less resistance; and we may suspect that measures against lord-betrayal would have had the whole-hearted support of the Anglo-Saxon elite; but we should not be surprised that there is no sign of success for a scheme that allowed a unilateral act of one kin to deny another its right to either vengeance and compensation. Though thegns, with considerable royal prompting, may have been willing to risk their lives riding against thieves' kindreds, it would not be surprising if they were much less willing to do so in support of kindreds who had shirked their traditional responsibilities in feud. Complex protections can thus be seen to some extent as extensions of royal protection, but far more crucial is that they constituted deliberate attempts to limit and weaken non-royal protective power. It is this facet that provoked contemporary opposition but, insofar as they were successfully implemented, it is this that gives them their long-term significance. They were measures that struck at the heart of

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<sup>40</sup> Wormald (1999a), pp. 311, 377; Wormald (1999e), p. 338; see above, pp. 40-41.

the system of feud and their various fates show us just how difficult an endeavour this was for Anglo-Saxon kings

## Protections and Royal Jurisdiction

Normal protections, as opposed to the complex protections discussed above, are relatively simple affairs. A protected group is defined by some means and anyone harming one of its members is liable to the protector for breach of protection. There must, of course, be an understanding about what sorts of acts would constitute breaches, but the importance of this issue is not so great here as it is with complex protections because there is not the same scope for creative evasion of the law. Except for the very limited restrictions imposed by the sorts of complex protection detailed above, a normal protection is absolute: you are either protected or you are not and this fact applies to all possible assailants. The question of what acts breach a protection is of some importance here, but it is not primary. There are, broadly speaking, three categories: protections that apply only to homicide (such as the *wergild*, *manbot* and, later, the murder fine), those that cover all violence and those that go beyond violence and cover misdeeds of virtually any type. The distinction between the first two categories, as was discussed in the previous chapter, may be illusory. The *wergild* and personal injury compensations should probably be taken together as representing a general protection from the kindred, whilst there are indications that *manbot* may have had a non-lethal equivalent in the *blodwite*, and – as shall be seen in later chapters – the murder fine can be interpreted as just one aspect of a more general protection of William I's non-English followers.<sup>41</sup> When discussing royal protections, as we are here, it is usual that any act of violence of any seriousness will qualify, from a punch to a decapitation. Though, as we shall see, it can be significant from a jurisdictional perspective if even non-violent offences are included, it is fair to say that generally the definition of what offences breach a protection does not emerge as a major priority. Indeed, the issue is not usually addressed at all.

Instead, the most significant source of variety in protection is the way that the protected group is defined. In some cases this is personal – a single individual may be granted the king's special protection as he goes about his business – but in others it might be spatial, covering all those within a certain area. Protections are also granted *en masse* to particular groups – widows, for example – and more rarely they are limited by time, perhaps providing additional protection on

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<sup>41</sup> The murder fine discussed in detail below, pp. 171-80.

feast days. Given that King Æthelred extended his *mund* to warships, it seems that protections could in principle be applied to virtually anything, but usually we should be thinking in terms of categories of person, space and time.<sup>42</sup> Indeed, combinations of these factors could be used to define protections with considerable subtlety. Perhaps because of this scope for variety, there were numerous royal protections in late Anglo-Saxon England. The main thrust of this chapter's argument is that it was with these protections that English kings successfully extended their jurisdiction over violence. To demonstrate this we need to look closely at how various protections evolved and identify points at which it seems innovation occurred. The aim is not only to show that protections were the core of royal jurisdiction over violence but also to examine the processes by which this came about. This does require considerable detail, so the analysis of protections here is divided up by category as far as is possible. First we will look at the largest category, that of spatial protections, then we will move onto personal protections, before examining the offence of *forsteal*, an important and unusual protection that does not sit well alongside either category. Temporal and group protections, which are a lot simpler, are treated briefly in the conclusion.

## 1. SPATIAL PROTECTIONS

Spatial protections constitute the largest and possibly the most significant category of protections in late Anglo-Saxon law. In certain places, committing a violent deed such as a killing would lead not only to the usual payments of *fihtwite*, *manbot* and *wergild*, but also incur an additional penalty for a breach of protection. Such protection applied to buildings, including royal and noble halls, churches and even the houses of humble ceorls, and might in some cases extend beyond the building itself, although it was building that was the focus of the protection, the degree of protection usually being dependent on the status of the building's owner. A closely linked type of spatial protection is the "presence" of the king or of other high-ranking individuals. Here the focus of the protection is not a building but the immediate environment of the individual in question. The similarities between all these types of spatial protection are so great, both in terms of original concept and the usages we can detect for them, that it makes sense for them to be treated as a group here. There are two main contexts for such protections that are suggested by the laws. The protected zones can appear as being intended simply as places of peaceful conduct in which any violent act, indeed any misbehaviour at all, was conceived as a breach of protection requiring

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<sup>42</sup> VI Atr 34.

compensation. In such passages, the purpose of the protection seems to have been simply to ensure good order within the protected areas, probably as a mark of respect to the protector. Alternatively, spatial protections can be treated specifically as places of refuge to which people in fear of violence might flee. The two contexts do not seem to reflect different concepts. Rather, the use of such zones as sanctuaries looks likely to be based on their being places of non-violence. Nevertheless, this sanctuarial use did spawn additional rules, such as the time-limits, that are limited to that context. The two shall, therefore, be treated separately here.

Whatever the context, these spatial protections constituted a check on killing. Slaying someone whilst in any such protected zone would result in some level of additional penalty. One of the interesting aspects of spatial protections, however, is that not only did the level of the additional penalty vary but so too did the protector to whom it was payable. The king was undoubtedly a great protector but there is ample evidence of payments being due to a host of other parties from abbots to ealdormen, and from churches to *ceorls*. Significantly, though, there is some evidence of a royal takeover of these protections. An examination of spatial protection can, therefore, not only tell us a great deal about how royal jurisdiction over violence expanded but also place that expanding jurisdiction in a wider context within which many other protectors were operating. We thus get a picture not only of royal power but also an insight into how the distribution of protective power within Anglo-Saxon society changed over our period.

***a) Zones of Peaceful Conduct in the Earlier Law-Codes***

It is first to the more general understanding of spatial protection that we turn: protection that ensures the peaceful conduct which was a mark of respect to the protector in question. This is perhaps the root of the protection surrounding houses, halls and churches, as it occurs earlier than the sanctuarial usage. The seventh-century Kentish laws of Hlophere and Eadric are one of the places where these ideas are most explicit:

If a person in another's house calls a person a perjurer or accosts him shamefully with mocking words, let him pay a shilling to him who owns the house, and 6 shillings to whom he spoke that utterance, and let him pay 12 shillings to the king. If a person takes a cup from another where men are drinking without [the man from whom the cup was taken being at] fault, according to the established right let him give a shilling to him who owns that house, and 6 shillings to him from whom the cup was taken, and 12 shillings to the king. If a person should draw a weapon where men are drinking and no harm is done

there, a shilling to him who owns the house, and 12 shillings to the king. If that house becomes bloodied, let him pay the man his *mundbyrd* and 50 shillings to the king.<sup>43</sup>

The principles at work here are interesting. So far as the owner of the house is concerned any bloodshed within his home is a breach of his *mund*, in recompense for which he requires his full *mundbyrd*. From Æthelberht's law-code we know that a ceorl's *mundbyrd* was 6 shillings and that killing in a nobleman's house required a 12 shilling fine, which was undoubtedly his *mundbyrd*.<sup>44</sup> What the passage from Hlophere and Eadric's code adds to this is that cup-stealing, verbal abuse and weapon-brandishing were regarded as infractions for which the householder was entitled to compensation, albeit the lesser one of a single shilling. The focus on these lesser offences makes it clear that the ultimate purpose of the protection was to ensure that the householder and his guests could feast together without fear of violence erupting as a result of such provocations. The concern is for peaceful conduct at a gathering. The same can be said for the West Saxon discussion of house-protection in the context of the destination of *fihtwite*, which was examined in the last chapter.<sup>45</sup> Here again we find a concern not just with fighting and killing but with what happens when men quarrel whilst drinking.<sup>46</sup>

These early house-protection laws, then, seem more concerned with the issue of ensuring peaceful conduct. Sanctuarial uses – that is, the idea that people in fear of violent attack might avail themselves of such protections – do not appear explicitly. The closest we come are ambiguous statements like Æthelberht's that anyone killing in the king's dwelling is to pay 50 shillings,<sup>47</sup> which could refer to sanctuary but equally well might not. Sanctuary in churches is not a large subject. We hear from Æthelberht that church peace (*ciricfrið*) is to be compensated twofold and from Wihtred that the church's *mundbyrd* is 50 shillings, the same as the king's – essentially two different ways of making breaches of church peace more expensive for the perpetrator – but there is nothing specifically on churches being used as sanctuaries by fugitives.<sup>48</sup>

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<sup>43</sup> HI 11-14.

<sup>44</sup> Abt 15, 13.

<sup>45</sup> Above, pp. 26-30.

<sup>46</sup> Ine 6:5. For a discussion of the importance of drinking in this context, see Rollason (2009).

<sup>47</sup> Abt 5.

<sup>48</sup> Abt 1; Wi 2.

This does occur in Ine's laws, according to which those who fled to churches were not to suffer the death penalty or the lash. However, this clause mentions no penalty for attacking someone in sanctuary, we only have the fine for the fighting in a *mynster*, which is discussed alongside penalties for men quarrelling whilst drinking together. It is certainly the idea of ensuring peaceful conduct that emerges most strongly from these early laws. This, however, should not be overplayed, as there is strong evidence for the use of the body of St Cuthbert as a refuge in this period. The saint himself, we are told, warned his brethren not to bury him on Lindisfarne because, his fame as a holy man being widespread, they would be constantly harassed by all sorts of malefactors seeking refuge.<sup>49</sup> And indeed, we know from the Northumbrian annals contained within the *Historia Regum* that in 750 Offa, son of the late King Aldfrith of Northumbria, took refuge there only to be dragged half-starved from the monastery on the orders of King Eadberht.<sup>50</sup>

To an extent, Alfred's laws continue the same pattern: any fighting in the house of a *ceorl* requires 6 shillings in compensation, in the house of a *sixhynde* man 18 shillings and in that of a *twelfhynde* man 36 shillings. Drawing a weapon but not fighting is also an offence but only requires half the compensation.<sup>51</sup> Alfred, however, does not specifically demand anything at all for the king in such circumstances – no longer, it seems, could kings claim compensation for people drawing weapons at gatherings with no connection to the crown. What Alfred does provide is a quite bewildering array of compensations required for such breaches. They can, however, just about be reconciled. We can assume I think, following the model of the laws of Hlophere and Eadric, that the figures above represent the *mundbyrds* of the three classes of freeman defined by their wergilds of 200, 600 and 1200 shillings. To these Alfred adds a list of higher status *mundbyrds* that gives figures of £5 (240 shillings) for the king, £3 (144 shillings) for the archbishop and £2 (96 shillings) for ealdormen and bishops.<sup>52</sup> Additionally, there is a scheme setting payments for fighting or drawing weapons in the presence of the archbishop at 150 shillings, and that of ealdormen and bishops at 100 shillings.<sup>53</sup> These compensations are so close to the sums for these figures' *mundbyrds* that it

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<sup>49</sup> Bede, *Vita Sancti Cuthberti*, ch. 37 in Webb and Farmer (1998), p. 93.

<sup>50</sup> Arnold (1882-85), ii, pp. 39-40.

<sup>51</sup> Af 39-39:2.

<sup>52</sup> Af 3.

<sup>53</sup> Af 15. This is restated in Grið 12.

is reasonable to think that they may be approximations.<sup>54</sup> Certainly, there can be no doubt that the aim of peaceful conduct remains prominent here and that Alfred's code clearly stands in line with the seventh-century tradition in this regard. However, other elements of Alfred's legislation, as shall be seen, have a more sanctuarial flavour, being concerned with the protection of those within certain spaces from attackers outside rather than regulating the behaviour of those legitimately within. In fact, Alfred's code seems to reflect a turning point, as from Alfred onwards the sanctuarial use of the protected space within houses, halls and churches becomes the dominant one. Indeed, between Alfred's code and Archbishop Wulfstan's legislation for Æthelred and Cnut, we have a period of about a century in which protected space seems to be seen only in terms of sanctuarial use. It is to this understanding of spatial protection that we now turn.

**b) Sanctuary and Protected Space from Alfred to Æthelred**

That certain spaces – homes, halls, churches and esteemed presence – could function as places of refuge for those in fear of violence first becomes clearly evident in Alfred's laws. It is also here that the close parallel between the protection expected within the home and that pertaining to churches is made plain. First, Alfred's regulations concerning house-peace:

Moreover we command: that the man who knows his opponent (*gefan*) to be dwelling at home is not to fight before he asks justice for himself. If he has sufficient power to surround his opponent and besiege him there in his house, he is to keep him seven days inside and not fight against him, if he will remain inside; and then after seven days, if he will surrender and give up his weapons, he is to keep him unharmed for thirty days, and send notice to his kinsmen and his friends.<sup>55</sup>

The substance of this, a period of seven days in safety within his own home followed, having surrendered, by thirty days unharmed in the custody of his adversaries, is identical to the provisions given in an earlier passage on sanctuary in churches:

Also we determine this sanctuary (*frið*) for every church which a bishop has consecrated: if a man exposed to vendetta (*fahmon*) reaches it running or riding, no one is to drag him out for seven days, if he can live in spite of hunger, unless he himself fights [his way] out.

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<sup>54</sup> This is also suggested by the fact that, apart from their appearances in this context, West Saxon law has no tradition of payments of 100 or 150 shillings.

<sup>55</sup> Af 42-42:1. Translation is from *E.H.D.* i, No. 33.

If then anyone does so, he is liable to [pay for breach of] the king's protection (*cyninges mundbyrde*) and the church's sanctuary (*þære cirican friðes*) – more, if he seizes more from there ... If he himself will hand out his weapons to his foes, they are to keep him for thirty days, and send notice about him to his kinsmen.<sup>56</sup>

The two passages are alike in all but the crucial aspect of penalties.<sup>57</sup> For a violation of the sanctuary of a church the offender was to pay not only the king's *mundbyrd* – set, as we have seen, at £5 – but also an unspecified amount for church-peace, whereas for that of the home there is no penalty specified. Indeed, the nearest Alfred's laws come to stating a penalty for attacking someone in their own house is in a combination of the scheme of penalties for fighting in someone's house and another related scheme covering the offence of breaking into an enclosure surrounding somebody's house.<sup>58</sup> However, even if these penalties were combined, which we cannot be sure was the case, the total fine incurred by the act of killing someone in their own home would amount to only 5½ percent of their wergild. Such a tiny addition to the total liability for a killing cannot have constituted much of a deterrent.

The context envisaged by these passages is beyond doubt. Those who were expected to be taking refuge in their homes or in churches were evidently those in fear of violence from their enemies in a feud situation. The time periods mentioned, seven days within the building followed by thirty days in the custody of the besiegers, were clearly designed to provide a temporary check on violence in which some sort of deal could be reached between the kindreds concerned – hence the stipulation that kinsmen be notified. The threat of renewed violence at the expiry of these periods remained. What we are dealing with here is unquestionably law aimed at preventing feud violence. There is, however, another passage on sanctuary earlier in Alfred's code where the context of feud is less clear:

If anyone for any guilt (*scylde*) flees to any one of the monastic houses to which the king's food rent belongs, or some privileged community which is worthy of this honour, he is to have respite of three days to protect himself, unless he wishes to be reconciled. If during that respite he is molested with slaying or binding or wounding, each of those [who did it]

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<sup>56</sup> Af 5, 5:3. Translation from *E.H.D.* i, No. 33.

<sup>57</sup> See Riggs (1963), pp. 28-37.

<sup>58</sup> Af 40.

is to make amends according to legal custom, both with wergild and fine (*ge mid were ge mid wite*), and to pay the community 120 shillings as compensation for the breach of sanctuary (*ciricfriðes to bote*) and he himself is to have forfeited his own [claim against the culprit].<sup>59</sup>

It is difficult to know exactly what to make of this as it flatly contradicts the statements made on the same subject very shortly thereafter. Possibly the context envisaged here is one not of feud violence but of something more akin to crime, theft perhaps, with the shorter time limit and lower penalty for breach reflecting the lesser degree of protection that a thief deserved. Another possibility, however, is that this never did make sense and simply reflects two different sources of sanctuary tradition. This passage may be just an echoing of Ine's 120 shilling payment for fighting within a monastery, while it is perhaps plausible that the association of ecclesiastical sanctuary with the king's *mundbyrd* in chapter 5 could reflect earlier Kentish law.<sup>60</sup>

Æthelstan's legislation presents an altogether much clearer picture of the sanctuarial purpose of spatial protections. IV Æthelstan, the harshest of all Anglo-Saxon anti-theft codes, is preserved only in the Latin of the *Quadripartitus* except for a brief fragment in the original Anglo-Saxon. This is from the Latin text:

And if there is a thief who has committed theft since the council was held at Thunderfield, and is still engaged in thieving, he shall in no way be judged worthy of life, neither by claiming the right of protection [*per socnam*] nor by making monetary payment [*per pecuniam*] if the charge is truly substantiated against him ... And if he seeks the king, or the archbishop, or a holy church of God, he shall have respite for nine days; but let him seek [whomsoever or] whatsoever he may, unless he cannot be captured he shall not be allowed to live longer if the truth becomes known about him.<sup>61</sup>

The omitted section of the text details how this applies to people of whatever sex or rank, whether caught in the act or otherwise: so long as their guilt is securely established they are to die unless they manage to escape. The following clause adds that those who seek a bishop, abbot,

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<sup>59</sup> Af 2-2:1. Translation from *E.H.D.* i, No. 33.

<sup>60</sup> Ine 6:1; Wi 2.

<sup>61</sup> IV As 6-6:1.

thegn or ealdorman are to have three days' respite but again emphasises that they are to live no longer. This is confirmed in its essentials by the somewhat terser Anglo-Saxon version which states the same nine and three day periods (though it puts bishops in the nine-day category) and concludes "but let him seek what sanctuary (*socne*) he may, his life shall be spared only as many days as we have declared above".<sup>62</sup>

These remarkable provisions illustrate a number of points very clearly. In their discussion of the fate of thieves who reach some form of sanctuary they make perfectly plain that the sort of temporally limited protection that fitted well with the context of feud made little sense when dealing with theft, which it is quite clearly appropriate to term "crime" in this context. While for feud the limited period of safety provided would constitute a window for negotiation, in cases where royal law demanded the exaction of a non-negotiable penalty this purpose was absent. If Æthelstan's laws had practical effect, sanctuary for criminals in the early tenth century was more of a death row than a safe haven. Indeed, this law would have made the taking of sanctuary either in churches or with prominent individuals a very poor strategy indeed for any criminal fleeing from royal justice.<sup>63</sup> The overwhelming impression is that Æthelstan's aim in this code was to prevent thieves abusing an institution that was meant for feud and feud alone. Logically, in fact, the presence of time-limits ought to have been enough to make this clear. When dealing with a fugitive from royal punishment there cannot have been any need for such a provision. Either, as Ine prescribed, the fugitive would gain some level of reduction in his punishment simply by virtue of his reaching the sanctuary or, following Æthelstan, he would not.<sup>64</sup> In legal terms, at least, no amount of time spent in sanctuary could change the outcome. Temporally limited sanctuary makes sense only in violent disputes in which a non-violent financial solution may be reached by negotiation.

Finally, the Anglo-Saxon fragment of IV Æthelstan is also significant in that it alone states that anyone harming the fugitive in the protected period would have to pay the *mundbyrd* of the protector.<sup>65</sup> There is no hint here of any royal financial interest in sanctuary breaches except, of

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<sup>62</sup> IV As 6:2c.

<sup>63</sup> Bizarrely, Charles Riggs appears to argue that these rules made sanctuary increasingly popular (Riggs (1963), pp. 47-50 and n. 23).

<sup>64</sup> Ine 5-5:1.

<sup>65</sup> IV As 6:2b.

course, when it was the king's protection that was breached. It, however, is not explicit on the point of churches so it may be that Alfred's imposition of the king's *mundbyrd* on top of the payment to the church still stood. Æthelstan's successor, Edmund, certainly seems to have been thinking along these sorts of lines:

If anyone flees to a church or to my *burh*, and he is attacked or molested there, those who do so shall incur the penalty which has already been stated (*ðe hit her beforan cweð*).<sup>66</sup>

The penalty in question, modern editors agree, is that discussed earlier in the code for attacking those who have abandoned a kinsman and thus been rendered *unfah*; that is, to forfeit all property and suffer the hostility of the king and all his friends.<sup>67</sup> What we have here, then, is a significant advance in the royal interest in sanctuary, both in the king's own *burh* and in churches. Rather than being one among many in need of compensation for an act of violence in these protected places, the total forfeiture of the culprit made the king the sole recipient of his worldly possessions. Here, there is no hint at any entitlement of the church to financial compensation – the direct opposite of the situation according to Æthelstan. What this looks like is an attempt at a royal takeover of ecclesiastical sanctuary. Its aims, however, do not look to have been purely acquisitive. Rather, the context of Edmund's code suggests that this was an attempt to make ecclesiastical sanctuary a more powerful check on feud violence, to provide a more secure refuge for feuders and thus encourage composition agreements.

Edmund, however, did not stop there. Not only did he legislate to strengthen the protection available in his own presence and in churches, but also in the home. It is in II Edmund that we first encounter the term *hamsocn*. From Edmund we learn only that *hamsocn* would result in the total forfeiture of both life and property for whoever committed it.<sup>68</sup> For an explanation of what the term means we have to wait for post-conquest glosses. The *Leges Henrici Primi* offers the most detail:

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<sup>66</sup> II Em 2.

<sup>67</sup> *Gesetze*, i, p. 189; Robertson (1925), p. 296; *E.H.D.*, i, p. 392; II Em 1:3.

<sup>68</sup> II Em 6.

*Hamsocn* which in Latin means attack on a house (*quod domus inuasionem Latine sonat*) occurs in several ways as a result of both external and internal circumstances (*extrinsecis et intrinsecis accidentis*). *Hamsocn* occurs if anyone assaults another in his own house or the house of someone else with a band of men (*haraido*) or pursues him so that he hits the door of the house with arrows or stones or produces a perceptible blow from any source. *Hamsocn* or *hamfare* is committed if anyone goes with premeditation to a house where he knows his enemy to be and attacks him there, whether he does this by day or by night.<sup>69</sup>

Some of this detail is rather confusing – the reference to “*extrinsecis et intrinsecis accidentis*” is particularly baffling<sup>70</sup> – but the general meaning of “attacking someone in a house” is clear. Indeed, there is consensus among all the post-conquest glosses that the meaning of the term is something akin to *domus invasione*.<sup>71</sup> This fits very well with the term itself. *Ham* simply means “home” or “house” but *socn* – though its root meaning is “a seeking” or “a search” – is often used specifically to refer to the protection that someone in fear might seek. Thus *socn* is used in the Old English fragment of IV Æthelstan to denote the protection offered by thegns, ealdormen, abbots, bishops, churches and the king: any man who slays a thief under such protection had to pay the *mundbyrd* or swear that he was unaware that the thief had *socn* (*þæt he þa socne nyste*); but after the protected time allotted to a thief was up he could seek whatever *socn* he liked (*7 sece swylce socne swylce he sece*) without any hope of mercy.<sup>72</sup> Likewise, Wulfstan refers to the type of sanctuary that a fugitive might seek as *friðsocn*.<sup>73</sup> *Hamsocn* clearly stands in the same tradition, literally meaning “house-protection” with the connotation that this is the sort of protection that might be actively sought, not just enjoyed passively.

The concept, however, had clearly been extended somewhat by the twelfth century – the next clauses of the *Leges Henrici* state that *hamsocn* applies to mills, sheepfolds and any building with

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<sup>69</sup> Hn 80:10-80:11b.

<sup>70</sup> Downer (1972), p. 400.

<sup>71</sup> In Cn II, 12, 15; Cons Cn II, 12, 15; Quadr II Cn 12, 15. The only variation of note is the *Instituta Cnuti* which defines the term as ‘*inuasionem in domo uel in curia*’.

<sup>72</sup> IV As 6:1-6:2c. Cf. Bosworth and Toller (1898), s.v. “*socn*”.

<sup>73</sup> VIII Atr 1:1; I Cn 2:3. Cf. *DOEonline*, s.v. “*friðsocn*”.

“two roofs” – so it is necessary to tread warily when trying to understand what it meant in Edmund’s day. A sensible approach, to my mind, is to take the most general meaning that comes through in the *Leges Henrici* – an attack by external parties on someone within a house – and search for earlier parallels. The only passage that fits the bill is the Alfredian discussion of house protection analysed earlier, which states that anyone residing at home is to have seven days of sanctuary before surrendering to his enemies, whereupon he is to be held unharmed for a further thirty days and notice sent to his kinsmen.<sup>74</sup> As was noted above, no penalty is given for those who ignored these prohibitions. I would suggest that the best interpretation for the introduction of the offence of *hamsocn* for attacks on people within houses is that, just as with churches, Edmund was using royal power to make the sanctuary previously available more secure. Indeed, in this case it seems the change was a truly drastic one as the penalty of total forfeiture replaced a situation where there was no royal penalty whatsoever.

The importance of this is that in II Edmund we see not only a royal takeover of sanctuary in churches but also one of sanctuary within houses. It appears, from the *Leges Henrici* at any rate, that the house in question does not have to be the victim’s own house. It is, of course, possible that the reverse was true in the time of Edmund, but there is no particular reason to believe this was the case. Nowhere is there any indication that the concept of *hamsocn* was ever so limited. Logically, therefore, this measure also may well have been something of a takeover of the protection available in the houses of prominent men. By adding the royal penalty of total forfeiture, Edmund may well have been reinforcing the protection available within all houses, from those of ceorls to those of ealdormen, but it was not all he was doing. If, following Edmund’s changes, any attack on anyone in any house constituted *hamsocn* and resulted in the culprit’s total forfeiture to the king and to the king alone, then the king had essentially usurped the position of householders as protectors of their own homes. It was the king, not the householders, who received the penalty for attacks taking place in their own houses. The effect, in theory, was dual: attacks in houses were more heavily punished and houses thus more secure for their occupants, but the principle that the householder should receive compensation – in the form of his *mundbyrd* – for such infringements of his protection is removed. This is in direct opposition to the message of IV Æthelstan where, despite the clear concerns about such protections being abused by thieves, the principle that breaches incur the payment of the protector’s *mundbyrd* is

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<sup>74</sup> Af 42-42:1.

upheld. According to this interpretation, then, Edmund's introduction of the offence of *hamsocn* into English law was part of a programme that used royal power to give greater security to those places where feuders could traditionally seek sanctuary. By adding to this security, Edmund was not only trying to make feud violence more difficult to commit legitimately – and thus encourage peaceful settlements – but also extending the reach of royal justice at the expense of householders. It was, therefore, a piece of aggressively royalist legislation that was aimed directly at the restriction of feud.<sup>75</sup>

Tenth-century law contains one more major development regarding *hamsocn*. IV Æthelred – one of the four surviving pieces of that king's legislation now thought not to be authored by Archbishop Wulfstan – states that anyone committing that offence within London would have to pay £5 to the king. Additionally, the Londoners (who seem to have been the authors of this section of the code) asked the king to allow that the city be entitled to an additional 30 shillings.<sup>76</sup> *Hamsocn*, then, is no longer *botleas*. Rather than the culprit forfeiting both his life and all his property to the king leaving other claimants with nothing, he now has a number of people to compensate including both the householder and seemingly also the city of London. The key result is that prominent individuals, under this system, are still entitled to their *mundbyrds* for attacks on those who have taken sanctuary in their houses. The king has a large claim on the culprit's goods, but theoretically this is not to the detriment of other protectors' claims. This, then, represents a step back from the full force of Edmund's legislation, the reason for which seems likely to be that his insistence on forfeiture was harmful to the interests of the very same powerful men whose cooperation was necessary for the enforcement of the law. Even with this accounted for, however, the introduction of *hamsocn* remains significant. The £5 fine was double the 120 shilling *fihtwite*, so it provided a genuine deterrent, but crucially (from the perspective of royal jurisdiction) it was also the fine for breach of the king's protection – his *mundbyrd* – which

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<sup>75</sup> This is not how *hamsocn* was seen by Rebecca Colman, who emphasised "raids perpetrated by violent gangs of armed plunderers" (Colman (1981), p. 108). Much of the evidence used in her study, however, is from the later Middle Ages or from continental Europe, and as a result the conclusions drawn are of questionable validity.

<sup>76</sup> IV Atr 4-4:2.

meant that the payment pertained to the king alone and could not be claimed by any lord who was *wites* or *weres wyrðe*.<sup>77</sup>

In the West Saxon legislative tradition, then, the tenth century saw a definite shift away from an emphasis on spatial protections as measures designed to ensure peaceful conduct within certain zones to a concern with such protections functioning as secure refuges. This shift, I would argue, is indicative of a new tendency to apply royal protections to the violence of feud. In Æthelstan's sanctuary regulations (covering not only churches but noblemen too) we see quite starkly just how feud-centred spatial protection was meant to be in the eyes of tenth-century West Saxon kings: for thieves all the protection they could hope for was a few days' respite before inevitable execution. Time-limits, after all, make sense only in a feud context and they can be found not only in Æthelstan's laws but in Alfred's too, as well as in the sanctuary regulations of a number of Northumbrian churches.<sup>78</sup> Protections were not intended to allow "criminals" to avoid punishment, but were meant to prevent feud violence and facilitate a negotiated settlement. This is how they emerge in the tenth-century sources and it is clearly a step beyond the older trend of spatial protections being used almost exclusively to ensure peaceful conduct. I would not want to deny that the spatial protections outlined in the earlier codes could also fulfil a sanctuarial role; what I think is significant is the way that in tenth-century legislation they are being used actively for this purpose. English kings had begun to manipulate spatial protections so as to restrict and regulate the violence of feud.

That it was King Edmund who was most ambitious in the manipulation of spatial protection for this purpose should, by now, come as no surprise. In mounting a complete royal takeover of both church- and house-protection, he was making truly fundamental changes. We should not be too surprised, either, to learn that later kings did retreat from the full force of Edmund's introduction of *hamsocn*. In spite of this, though, it seems that Edmund made a real impact on these points. Killing in church was from this point onwards regarded as *botleas*, with a full forfeiture of both life

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<sup>77</sup> That the reduction from total forfeiture to the five pound payment was a lasting and widespread measure is evident in II Cn 62. That this five pound payment replaces, rather than adds to, the *fihtwite* is implied in I Cn 2:5 where, in the parallel case of ecclesiastical sanctuary breach, after satisfying the king and the church the culprit is ordered to pay *maegbot* and *manbot* – compensation to kin and lord – with no mention of the *fihtwite*.

<sup>78</sup> Johnson South (2002), ch. 13; *SourcesYorkHist*, p. 223.

and property to the king the prescribed punishment.<sup>79</sup> *Hamsocn*, though it did not retain the same severe penalty, came to be regarded as a crucial element of royal jurisdiction, with Cnut listing it as one of a handful of offences reserved to the crown under both English and Danish law.<sup>80</sup> These were serious advances in the scope of royal jurisdiction. Churches and householders to some extent seem to have lost out as the crown encroached on protections that had previously been held by them, but in a sense they also gained something in that royal enforcement of these increased penalties provided a greater deterrent to violence on their premises. Churches and houses had long been traditional refuges from violence, but in this later period, perhaps beginning with Alfred's own rather contradictory measures on church-protection, we find English kings carving themselves a role as guarantors of these refuges. In taking over and reinforcing these old spatial protections kings were not challenging feud directly, what they were doing – initially at least – was taking measures to ensure that everyone played by the rules. When Archbishop Wulfstan took on the task of drafting England's laws, however, the emphasis changed somewhat, and in sources relating specifically to the Danelaw the picture is different once again. It is to these later sources that we now turn.

**c) Spatial Protection under Wulfstan and in the Danelaw**

It is with the advent of Wulfstan, Archbishop of York, to the position of chief law-maker in Anglo-Saxon England, and with the emergence of some information on Danelaw customs under King Æthelred just beforehand, that the term *grið* emerges fully into the vocabulary of Anglo-Saxon law. Meaning both "peace" and "protection", *grið* would eventually come to displace *mund* as the conventional term for royal protection. It seems probable that it was imported from the Danelaw, and it was in Wulfstan's codes that it first assumed this meaning in southern English law – perhaps in some way reflecting his archiepiscopal connection with the north.<sup>81</sup> Wulfstan's legislation is a particularly rich vein to mine in search of spatial protections. He clearly regarded protection, specifically church protection, as something of a priority as it is often given top-billing in his codes. Indeed, one compilation, now known as *Grið*, is devoted to the subject. As Wulfstan's works, his codes for Cnut in particular, do in large part constitute a recapitulation of previous law, it is not surprising that on some measures he adds little. On *hamsocn*, for example, we hear only

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<sup>79</sup> Cf. I Cn 2:2-2:3.

<sup>80</sup> II Cn 12, 15.

<sup>81</sup> See Whitelock (1965).

of its existence as one of the pleas reserved to the king in both the south and in the Danelaw and it is confirmed that it was now considered amendable through the payment of £5.<sup>82</sup> The only information we have for aristocratic protections are somewhat modified restatements of Alfred's scheme of *mundbyrds* and the regulations in IV Æthelstan on temporally limited sanctuary.<sup>83</sup> His secular code for Cnut does contain a few useful nuggets of information: we learn there was a spatial peace (*grið*) covering the army, a breach of which would result in either loss of life or wergild, and we find out that all those going to and from a *gemot* were to enjoy protection (again, *grið*), unless they were notorious thieves.<sup>84</sup> These details are interesting, and they probably do represent further broadening of royal protective power, but there is not much more that needs to be said about them here than this.

Our information on the Danelaw is similar in this respect, albeit for a different reason: we simply do not have that much information. Most of what we do know comes from King Æthelred's "Wantage Code" (also known as III Æthelred), where we hear of a series of spatial protections covering various legal assemblies, from one presided over by the king all the way down to assemblies at which, it has been suggested, men would meet and form legally binding agreements sealed through ceremonial drinking.<sup>85</sup> Particularly for the higher echelons of this scheme it is not at all clear that the *grið* in question is limited to the meeting, or if it is something that the assembly is entitled to grant to someone personally. What is clear is that the fines for breaches of such protections were vast by comparison to the West Saxon tradition, the highest, the *grið* given by the ealdorman or the king's reeve in the court of the Five Boroughs, amounting to a staggering £96. There are suggestions that these were so large that they had to be paid collectively, primarily because they are expressed in units called "hundreds" worth £8 each and some *Domesday* entries suggest that they were paid *by* individual hundreds (that is subdivisions of shires).<sup>86</sup> This possibility is interesting in that the collective penalty may, in some sense, anticipate the later

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<sup>82</sup> II Cn 12, 15, 62.

<sup>83</sup> II Cn 58; Grið 11.

<sup>84</sup> II Cn 61, 82.

<sup>85</sup> III Atr 1-1:2; Neff (1989).

<sup>86</sup> For a full discussion of this, see Maitland (1911).

murder fine, but of the wider development of spatial protections before the conquest this scheme, standing outside the West Saxon legal tradition, can tell us very little.<sup>87</sup>

The Danelaw and Wulfstan, however, do have some truly significant things to add to our picture of the development of spatial protection. As we have noted, Wulfstan dramatically alters the vocabulary of church protection by adopting the term *grið*, a Scandinavianism previously only seen in Æthelred's Wantage code.<sup>88</sup> Thus church-protection becomes *ciricgrið* whilst, in an almost verbatim borrowing from Wantage, the king's protection becomes his *handgrið*.<sup>89</sup> Wulfstan devotes much space to discussion of these two ideas and the picture that emerges is an interesting one. Firstly, he was quite insistent on the point that *ciricgrið* within walls (*binnan wagum*) and the king's *handgrið* were equally inviolate and that a breach of either would result in the culprit losing both land and life.<sup>90</sup> Breaching *ciricgrið* by committing homicide within church walls was a *botleas* offence and the offender was to be pursued mercilessly by all "friends of God" unless he found so inviolable a sanctuary (*swa deope friðsocne*) that the king chose to grant him the opportunity to pay compensation.<sup>91</sup> If, by this or by some other means, he managed to prevail upon the mercy of the king, he then had to buy his own forfeited life back through payment of his own wergild to the crown before going on to pay for the breach of *ciricgrið* with the king's full *mundbryce* of £5, followed by the usual payments of wergild and *manbot*.<sup>92</sup> Full payment in such a case would have required truly immense resources. It seems rather unlikely that after the payment of the culprit's own wergild there could ever, except in the most exceptional circumstances, have been enough left to satisfy the church's claim to the *mundbryce*, let alone the family and lord of the dead man. Indeed, even if the culprit was rich enough to satisfy all, he still needed to persuade the king not to execute him and seize all his assets for himself. What we have

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<sup>87</sup> This suggestion is made in Maitland (1911), p. 246. However, the murder fine's close links with the West Saxon system of frankpledge, and its absence in many northern counties, tell against these Danelaw arrangements having had any direct influence on its development. The murder fine's origins are analysed in detail below, pp. 171-77.

<sup>88</sup> It is also used in II Em 7:1, but not in the same sense.

<sup>89</sup> Cf. III Atr 1.

<sup>90</sup> I Cn 2:2. Cf. Grið 2; EGu 1; VI Atr 14; VIII Atr 3, 5:1; I Cn 2:5, 3:2.

<sup>91</sup> I Cn 2:3; VIII Atr 1:1.

<sup>92</sup> I Cn 2:3-2:5; VIII Atr 1:1-3.

here, then, is a detailed description of the extent of the royal takeover of church protection: death and forfeiture for the culprit with the spoils going entirely to the king except in extremely special circumstances.

This, however, is not all that comes through in Wulfstan's laws on *ciricgrið*. On careful examination it becomes clear that this royal monopoly is riddled with caveats. *Ciricgrið* must be breached by homicide and it must be breached within church walls. So what happened if *ciricgrið* was breached outside church walls or by an offence short of homicide? Wulfstan answers the latter question directly:

4. And if the sanctuary (*ciricgrið*) is violated without anyone being slain, compensation is eagerly to be paid in proportion to the deed, whether it arises from fighting (*feohtlac*), or from robbery (*reafiac*), or from unlawful sexual intercourse (*unriht hæmed*), or whatever it arises from (*si þurh þæt þæt hit sy*).

4:1. And always first the church is to be compensated for the violation of sanctuary (*griðbryce*), in proportion to the deed and in proportion to the status of the church.

5. All churches are not entitled to the same status in a temporal sense, although they have the same consecration in regard to religion.

5:1. Violation of sanctuary of a chief minster (*heafodmynstres griðbryce*), in case of a crime that admits compensation, is to be atoned for at the rate of the [breach of the] king's protection (*cyninges munde*), namely with £5 in English law; and that of a rather smaller minster (*medamran mynstres*) with 120 shillings, that is, at the rate of the king's fine (*cyninges wite*); and that of one still smaller, where nevertheless there is a burial-place, with 60 shillings; and that of a field-church with 30 shillings.<sup>93</sup>

The answer, then, is that a payment needs to be made to the church reflecting both the church's rank and the nature of the offence. If we take the stipulation about the compensation being paid in proportion to the deed seriously then we should regard the sums given for each rank as

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<sup>93</sup> VIII Atr 4-5:1. Translation from *E.H.D.* i, no. 46. Cf. I Cn 3-3:2. The reference to a burial place is found in only one manuscript but accords with Cnut's version and with distinctions made between churches with regard to the destination of tithes in II Eg 2-2:1. The reference to *unriht hæmed* does not appear in I Cnut, which includes an additional stipulation that in Kent the king's *mund* involved an additional £3 to the archbishop.

maximum penalties, which could be reduced by judicial discretion for less serious offences. The king is notably absent here. The message seems to be that though he had effectively annexed lethal breaches, *ciricgrið* could be breached in other ways and the compensation for those breaches pertained solely to the church. What we have, then, is an approach to spatial protection that has returned to ideas about respectful conduct within a protected area. Kings had effectively taken over the main sanctuarial aspect of church protection – the prohibition on killing – but the church could still assert its protective rights in the context of ensuring peaceful behaviour.

The explanation for one of Wulfstan’s caveats is thus perfectly clear, but what can be made of his unremitting insistence on the phrase within church walls (*binnan ciricwagum*)?<sup>94</sup> This appears with such consistency throughout his legal writings that it is impossible to regard it as a mere stylistic flourish, yet he never explains it.<sup>95</sup> Its implication, however, must surely be that it was possible to breach *ciricgrið* through homicide both inside and outside church walls, with only the former being deemed unforgivable. There is evidence to support this interpretation in Wulfstan’s unofficial compilation on protection known as *Grið*. Firstly, it is stated that in “South English” law if anyone fought within a minster but outside the church (*on mynstre butan cyrcean*), they were to make full compensation to the minster according to its rank.<sup>96</sup> Secondly, we are told that in “North English” law killing *binnan cyricwagum* rendered the killer liable in his life (*he bið feorhscyldig*) whilst wounding in the same area would be paid for by a hand (*se bið handscyldig*).<sup>97</sup> Killing *binnan cyricderum*, however, would cost only 120 shillings whilst, it seems, a non-lethal attack in the same area would come to only 30 shillings.<sup>98</sup> Clearly there was some meaningful distinction between *binnan cyricwagum* and *binnan cyricderum*. Conceivably, *binnan cyricderum* could be a reference to the churchyard—the “doors” in question being the cemetery gates—or it could, as Liebermann suggests, mean *Vorhalle* (“entrance hall”, “porch”).<sup>99</sup> Neither explanation is particularly satisfactory, but regardless of the finer points both these passages do show the

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<sup>94</sup> EGu 1; Grið 2, 13; VI Atr 14; VIII Atr 1:1; I Cn 2:2; Nor. Grið 1.

<sup>95</sup> EGu 1; Grið 2, 13; VI Atr 14; VIII Atr 1:1; I Cn 2:2. Also, perhaps, Nor. Grið 1. See Dammerly (1994), p. 257.

<sup>96</sup> Grið 10.

<sup>97</sup> Grið 13-13:1.

<sup>98</sup> Grið 13:2-14.

<sup>99</sup> *Gesetze*, I, p. 471.

existence of an area outside the main church building covered by *ciricgrið*.<sup>100</sup> Though Wulfstan's main legislative efforts do not say so explicitly, they are careful to imply that all offences, killings included, in these outer zones require compensation to be paid to the church but not to the king.

One possible way of interpreting this is to posit that an orderly scheme of compensations for breach of churches' protections was at some point disrupted by a decision that homicide within any church, regardless of its rank, was a royal, and uniformly heinous, offence. This would suggest that this scheme existed long before Wulfstan tells us of it and that, in it, we are seeing the effects of the royal takeover of ecclesiastical sanctuary. There is probably a degree of truth in this but it cannot be the whole picture. In many ways Wulfstan's scheme completely fails to accord with earlier evidence. Most obviously, this is the first point at which we get any mention of churches having distinct ranks, but the insistence that homicide was the only offence to bring about royal involvement is also new. In Alfred's laws, for example, it is the act of dragging someone out of the church that triggers payment of the king's *mundbyrd* and the payment for the church's *frið*, whilst in II Edmund an assault is sufficient to call down the king's wrath.<sup>101</sup> In this respect it seems that Wulfstan is signalling a major restriction on royal interference in ecclesiastical protected space. He also, as has been noted, introduces completely new vocabulary to the West Saxon legal corpus. Whereas previously we have heard of the church's *frið* (peace) and the king's *mund* (protection) we now hear of both parties' *grið*, a term which essentially combines the meanings of both *frið* and *mund*. This linguistic alteration, making explicit the protective qualities of the peace of the church, does not look insignificant when placed alongside Wulfstan's other innovations. Rather, it seems as though he was deliberately manipulating protective language and ideas to assert ecclesiastical privileges and to limit royal involvement as

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<sup>100</sup> Liebermann's explanation is problematic in that the porch could very easily have been regarded as *binnan cyricwagum*, and even if this is disregarded we would surely expect to find the singular, *cyricdere*, rather than the plural, *cyricderum*, if a porch were being referred to. My suggested alternative explanation, on the other hand, does rely on translating *duru* or *dor* as "gate" rather than "door". Some support for this can be found in the *Dictionary of Old English*, which defines *duru* as "a barrier, door or gate of an entrance" and *dor* as simply "door, gate", though it does, of course, translate *cyric-dor*, *cyric-duru* as "church-door, outer door of a church", with two occurrences where this appears clearly to be the correct translation (*DOEonline*, s.vv. "dor," "duru," "cyric-dor, cyric-duru," (accessed October 2, 2008)). Though linguistically uncertain this interpretation is supported by the reasonable parallel with southern law and the fact that, according to a long tradition of church councils, sanctuary could be claimed in the churchyard. See Zadora-Rio (1989), pp. 11-13; Timbal Duclaux de Martin (1939), pp. 134-5; Ducloux (1994), pp. 207-20, 284-85.

<sup>101</sup> Af 5; II Em 2.

much as possible. A better interpretation, then, is that Wulfstan's orderly scheme was something that he largely created anew, hemming in as much as possible the royal power that had intruded over the preceding century but, ultimately, having to respect its existence.

Wulfstan's uniform scheme of *ciricgrið*, then, seems likely to be something that he was trying to impose on a much messier reality, but it is certainly possible that he was drawing to some degree on existing customs. What seems beyond doubt is that in talking about spatial protection in this way Wulfstan was attempting to secure ecclesiastical privilege and to limit the rights of the king to only the most serious breaches. His concern is different to that of previous tenth-century lawmakers in that he does not treat *ciricgrið* as something primarily intended for the context of feud, or indeed for fugitives at all. (It is worthy of note, in fact, that when he does talk about protection for those seeking refuge he uses different terminology: *friðsocn* rather than *ciricgrið*.)<sup>102</sup> In that his version of spatial protection is clearly aimed at punishing all forms of misconduct within the protected area Wulfstan is more akin to seventh- than tenth-century lawmakers, but his emphasis on defining the boundaries of ecclesiastical and royal spatial protection is something completely new. Here, for the first time, we are seeing protection being discussed primarily for its value to its holder as a legal privilege conveying something very like jurisdiction. This, perhaps, is a context we should be aware of for later Anglo-Saxon texts. Spatial protection that could be interpreted in terms broad enough to cover both fighting and fornication was a significant legal privilege, granting the holder rights to fines for any imaginable offence. This is protected space of precisely the sort that Wendy Davies identified in Wales and posited as a tenth-century trend around the British Isles.<sup>103</sup>

There are, furthermore, some non-Wulfstanian sources that serve to confirm this interpretation of spatial protection. The foremost of these is the law fragment known as *Pax*, which consists of a single sentence that defines the extent of the king's *grið* from his *burhgeate* in all directions as "three miles and three furlongs and three acres breadth and nine feet and nine 'shaftments' and nine barleycorns".<sup>104</sup> What this describes can only be a large circular zone of protected space surrounding the king's *burh*, offences within which would result in an additional penalty for

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<sup>102</sup> I Cn 2:3; VIII Atr 1:1.

<sup>103</sup> Davies (1995), (1996).

<sup>104</sup> Pax.

*griðbryce*. That this only survives in a fragment is unfortunate as it makes it difficult to place with any certainty, but Wormald linked it to III Æthelred (a code intended for the Danelaw) on grounds of its being treated as an extension of that code by the *Quadripartitus* and for its use of the Scandinavianism *grið*.<sup>105</sup> Though this is far from conclusive – the use of *grið* is also a characteristic of Wulfstan’s work, after all – it is still a reasonable guess given that there is good evidence for the existence of similarly sized protective sanctuary zones at Ripon and Beverley in this period. These could, possibly, also be examples of the quasi-jurisdictional sort of spatial protection visible in Wulfstan’s laws, but the evidence for this is problematic. They certainly were large circles of protection, but our sources do not show that this protection conveyed the right to extract fines for any and all offences, at least for the Anglo-Saxon period.<sup>106</sup> However, though these cases are far from certain, Wulfstan’s *ciricgrið* and the king’s *grið* in *Pax* are difficult to read in any other way. These were spaces in which, it seems, all offences would constitute breaches of “protection” or “peace” and require compensation as a result.

**d) The Evolution of Spatial Protection in Anglo-Saxon England**

In terms of spatial protection, then, there is a lot going on in the late Anglo-Saxon period. First of all we can detect a general trend in the tenth century towards the deliberate manipulation of spatial protections as part of the system of feud. Unlike earlier law-codes, in which the focus is very clearly on the idea of ensuring the peaceful conduct of people within a space, in the tenth-century codes the concern is very clearly with protecting those who had taken refuge in such a location from people outside it who intended to harm them. When this shift does seem to reverse itself under Wulfstan, what we find when we look closely is not a return to the seventh-century norms but a new emphasis on the quasi-jurisdictional value of spatial protection. It looks, then, as if we have a development in which kings began to manipulate spatial protections in order to restrict and regulate feuding and in doing so extended their jurisdiction over violence. This process seems, eventually, to have led to a point where it was recognised that possession of spatial protections could constitute a very lucrative form of legal privilege. This general trend is borne out by points of detail in which it is clear that kings effectively took over the protection of both houses and churches. Although the full potential of these measures for exclusive royal

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<sup>105</sup> Wormald (1999a), pp. 371-2.

<sup>106</sup> For a detailed discussion of Ripon and Beverley and the nature of their spatial protections see Lambert (2009b).

jurisdiction, as seen in Edmund's rather ambitious laws, was not achieved and in both cases royal powers seem to have diminished in the second half of the tenth century, what remained in the eleventh was still a considerable step forward. The crown had not only created higher penalties and new royal protections, it had also recognised their value and sought to keep them firmly in royal control.

Spatial protections were not the sole preserve of the king, however. As we have seen, Æthelstan's laws detail protections pertaining to the presence of bishops, ealdormen and thegns, whilst, as we have seen from Wulfstan's treatment of *ciricgrið*, churches retained considerable protective power of their own. Even the humblest of freemen, the ceorl, had some protective power over his home according to Alfred's laws. The important point here is not that kings became exclusive protectors but that they increased their role within a wider system of protections. The effect of this, it seems likely, was that feud became more difficult. The royal takeover of ecclesiastical sanctuary, and the increased likelihood of effective enforcement that this entailed, must have made churches more secure for those in peril than they had been previously. In terms of royal spatial protection, however, the major advance of this period has to be the offence of *hamsocn*. From Alfred's code it is clear that there had been an established idea that houses were places of refuge in feud, but there is no sign of any significant mechanism of enforcement for this idea until the first mention of *hamsocn* in II Edmund. In introducing the new penalty, it seems, the king was adding strict royal enforcement to a much older custom of feud. The significance of this, I believe, has not been sufficiently recognised previously. Indeed, if we were to assume that the king punished all major violent offences in any case, as Wormald and Hurnard did, *hamsocn* does in truth look rather minor. But once we appreciate the very limited involvement of kings in violence before Edmund's reign it becomes apparent what a major step this was. To go from general royal jurisdiction over violence to slightly increased jurisdiction over violence in houses is only a very small step forward; but to go from very little royal jurisdiction over violence, not much beyond that covering the king's presence and his dependents, to jurisdiction over every house – possibly even every building – in the country, is a giant leap. Edmund may not have lived to see the measure through from legislation into reality, and it may have been watered down by his successors, but even with this taken into consideration the achievement is an impressive one. It is even more extraordinary, however, when we consider that this is not all Edmund attempted to do with protection. He was an innovator, too, with the king's personal protection, his *mund*. It is to this that we now turn.

## 2. PERSONAL PROTECTIONS: THE KING'S PEACE

There is a long tradition in the use of the king's personal protection – first his *mund* and later his *grið* – in Anglo-Saxon law. For the most part it is perfectly clear that the king's protection, like that of other high-status figures, applied to his immediate vicinity but could, it seems, also be used to cover those the king had a special wish to protect as they went about their business. This sort of personally applicable protection is probably implied by Alfred's listing the *mundbyrds* of archbishops, bishops and ealdormen in addition to the statements about fighting in such figures' presence discussed above.<sup>107</sup> In general such statements are unproblematic: it is perfectly clear here that the *mundbyrd* is the payment to be made for breaching that figure's protection whether expressed spatially, in the case of a "presence", or granted out on a personal basis. Equally little trouble arises from Æthelstan's use of the term or, indeed, from any other occasion when the words *mundbyrd*, *mundbryce* or *griðbryce* are used to denote the payment due to someone whose protection has been breached.<sup>108</sup> However, there are occasions on which the terms *mundbryce* and *griðbryce* are used differently, to denote an offence rather than the penalty for it, and these can be a little more difficult to interpret. The first such occasion is alongside *hamsocn* in II Edmund:

Further, we have declared concerning *mundbryce* and *hamsocn*, that anyone who commits it after this is to forfeit all that he owns, and it is to be for the king to decide whether he may preserve his life.<sup>109</sup>

This, in fact, is the first occurrence of the term *mundbryce* in the laws, just as it is the first appearance of *hamsocn*. In this context *mundbryce* clearly describes an offence rather than a payment – indeed the logic of the sentence is that a breach of the royal *mund* is so serious that there can no longer be any payment of the *mundbyrd*. What is odd about it is that it is simply *mundbryce*, not *cyninges mundbryce*; it is almost as though Edmund was trying to make the breach of any *mund* whatsoever a *botleas* offence. Though this does seem rather an extreme interpretation, this might, in fact, not be far from what Edmund both intended and achieved.

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<sup>107</sup> Af 3, 15.

<sup>108</sup> IV As 6:2b; VII Atr 4:1; I Cn 3a.

<sup>109</sup> II Em 6. Translation from *E.H.D.* i, p. 392.

To come to grips with *mundbryce* what we need is a clear idea of the sorts of offence that could be covered by it. For this, one very significant passage is II Cnut 12, which again includes *mundbryce* alongside *hamsocn*:

These are the rights which the king possesses over all men in Wessex, namely *mundbryce* and *hamsocn*, *forsteal* and [the fine for] the harbouring of fugitives (*flymena fyrmðe*) and the fine for neglecting military service (*fyrdwite*), unless he wishes to honour anyone further.<sup>110</sup>

The code goes on to state that the king has the same rights in Mercia, whilst in the Danelaw he has *fihtwite* and *fyrdwite*, *griðbryce* and *hamsocn*, again unless he particularly wishes to honour someone by granting these powers to them.<sup>111</sup> Except for *mundbryce* and *griðbryce* – and *forsteal*, which is discussed below – all of these are straightforward enough. But what does *mundbryce* mean in this context? Traditionally the king's *mund* would have applied to his presence, his hall and to men to whom he had given special protection, but can we really countenance the idea that Cnut might wish to grant someone else the right to the compensation payable for offences taking place in his own royal hall? This does not seem likely. A clear definition, as for *hamsocn*, is something only offered by the *Leges Henrici Primi*:

79:3. A person who breaks the king's peace which he confers on anyone with his own hand shall, if he is seized, suffer the loss of his limbs.

79:4. If anyone has the king's peace given by the sheriff or other official (*a uicecomite uel [alio] ministro*) and a breach of it is committed against him, then this is a case of *gri[ð]breche* and compensation of 100 [Norman] shillings [i.e. £5] shall be paid, if settlement can be effected by payment of compensation.<sup>112</sup>

There were available, then, at least by the early twelfth century, two levels of king's peace that applied personally rather than spatially. The peace given by the king's own hand is clearly his *handgrið* and the penalty of mutilation is an example of Norman "mercy" in remitting the death penalty. The second type of peace, still belonging to the king but granted by his agents, seems

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<sup>110</sup> II Cn 12. Translation from *E.H.D.* i, p. 420.

<sup>111</sup> II Cn 14-15.

<sup>112</sup> Hn 79:3-79:4.

likely to be the one under discussion in II Cnut 12. It is, at least, perfectly believable that the king might wish to transfer the revenues drawn from infractions of such a detached form of his personal protection to those he wished to favour.

Indeed, this two-tiered king's peace is to an extent implied by Wulfstan's treatment of *handgrið*. If we take Wulfstan's insistent equation of the king's *handgrið* with *ciricgrið* within church walls as a starting point, we can make some progress. I Cnut states that both *handgrið* and *ciricgrið* were *botleas* unless the king chose to allow compensation.<sup>113</sup> If the two were as closely related as Wulfstan gives us every reason to think they were, then the same pattern should apply to one as to the other. If, therefore, he did choose to pardon a violator of *handgrið*, logic dictates that the culprit would have to redeem his life through payment of his wergild, just as he would in case of *ciricgrið* breached through homicide within walls, before being allowed to compensate through payment of the king's *mundbryce*. *Handgrið*, then, from this perspective, appears as a particularly grievous breach of the king's protection that, with some luck and a substantial sum of money, the culprit could get to be treated as though it were the lesser offence of *mundbryce*. Following this interpretation, which looks to be the correct one, we again have a story whereby under Wulfstan there is a distinct step back from the aggressive royalism of Edmund's laws. Whereas Edmund made any breach of his protection unforgivable, no matter by whom it was established, Wulfstan split the king's protection into two classes. His *handgrið*, the personally granted peace of the king, was to be unemendable whilst the more common peace granted on his behalf by royal agents was compensatable by the old £5 royal *mundbyrd*. Rather than the uniform and compensatable protection that existed before Edmund, or the uniform uncompensatable protection he tried to introduce, there was by the turn of the millennium a compromise solution.

But what about Edmund's role here? We can find a two-tier system with royal officers granting out the king's *grið* or *mund* in the *Leges Henrici Primi* and we can be fairly confident that this is visible in Wulfstan's laws, but can we really trace this development back to Edmund? I think so. We find in II Edmund, after all, a total of three distinct references to royal protection. As well as the passage including *hamsocn* quoted above, there is the second clause which states that anyone attacking someone who had fled to Edmund's *burh* would suffer outlawry, and the reference to the levying of the king's *mund* as part of a composition settlement.<sup>114</sup> What we have here are

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<sup>113</sup> I Cn 2:2.

<sup>114</sup> II Em 2, 7:3.

three different types of royal protection: the protection of the king's *burh* is a straightforward spatial protection; the process of levying the royal *mund* in feud is, as was discussed above, a complex protection established voluntarily by those it affected; and the reference to *mundbryce* was specifically to personal protection. Unless we think Edmund was repeating himself, he was talking here not about the protection available in his vicinity but the type of *mund* that would be carried wherever its grantee happened to wander with it.

Admittedly we cannot be entirely sure that Edmund envisaged this personal protection as being available not from him alone but more widely from royal agents, but there are strong indications that this was the case. A man who allows feuding kindreds to establish his *mund* by taking an oath on a single weapon does not seem likely to have shrunk from allowing his agents from establishing it. An even stronger indication of this is, of course, the absence of the word *cyninges* in the law. This is unlikely to be accidental as all previous laws are scrupulous in defining to whom any given *mundbyrd* belonged, and scribal error seems unlikely because II Cnut likewise makes no reference to the king.<sup>115</sup> The meaning is surely that Edmund wanted breach of personal protection to be *botleas* even when it was not granted personally by him, and this surely implies that he was willing for others to do so on his behalf. The likely candidates for this job are, as the *Leges Henrici* suggest, royal reeves of some sort but it is possible that Edmund also intended to include the *munds* of bishops and ealdormen. Alfred's laws' listing of these figures' *mundbyrds* does suggest that they, and perhaps only they, were able to offer personal protection that was not limited to their presence or halls. It is quite possible that, at least in terms of personal protection, Edmund was attempting both to make his own *mund* more widely available and, in effect, to take over the *munds* of bishops and ealdormen. This could, in short, be quite a close parallel, in terms of aggressively royalist law-making, to the case of *hamsocn*.

Edmund's ambition, it seems, once more exceeded his ability: we have seen that *mundbryce* was no longer *botleas* under Cnut, and this was almost certainly already the case under Æthelred, but in addition to this there are signs in Wulfstan's work that non-royal personal protections remained a reality.<sup>116</sup> But even if ultimately the effects of the introduction of *mundbryce* fell well short of Edmund's intentions, he still deserves much of the credit for creating a situation in which

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<sup>115</sup> Abt 8, 15; HI 14; Wi 2; Af 3, 5; IV As 6:2b. Cf. II Cn 12.

<sup>116</sup> On *mundbryce* under Æthelred see IV Atr 4; Cooper (2002), p. 54; and discussion on *forsteal* below. For personal protections in Wulfstanian texts see II Cn 42; Grið 11.

royal personal protection was available not just from the king's own hand but from a network of royal officers covering the whole kingdom. In the end, just as a man could be granted the king's *handgrið* and go about his business knowing that he had the strongest protection possible, so too would a man who obtained the king's *mund* from the sheriff be able to wander freely in the knowledge that it applied. It would, of course, be extraordinary if sheriffs did not make such men pay heavily to enjoy this protection, but that does not detract significantly from the dramatic increase in availability of royal personal protection that this represents. In multiplying the sources of this protection so that there would, undoubtedly, be at least one for every county, Anglo-Saxon kings – Edmund foremost among them – ensured that far more people would obtain royal protection and that as a result far more acts of violence would be considered breaches of it. This was the expansion of royal protection from being something requiring access to, and a personal favour from, the king, to being a bureaucratic procedure available from local officials. Its effect in expanding royal jurisdiction over violence should not be underestimated.

### 3. FORSTEAL

Alongside *mundbryce* and *hamsocn* in Cnut's list of offences for which jurisdiction is reserved solely to the king (unless he wished to bestow a particular honour on someone) is one other crucially important example of protective power: *forsteal*.<sup>117</sup> As with both *hamsocn* and *mundbryce*, it is necessary to turn to the *Leges Henrici Primi* for an attempt at a definition:

80:2. If an assault is made on anyone on the king's highway (*uia regia*), this is the offence of *forsteal*, and compensation amounting to 100 shillings shall be paid to the king...

80:4. The offence of *forsteal* occurs if someone attacks his enemy (*inimicum*) unexpectedly or lies in wait for him on the road and assaults him.

80:4a. But if he waits until he has passed and calls out to him, so that he returns to meet him, it is not *forsteal* if he (the person waiting) acts in self-defence.<sup>118</sup>

The core definition of the offence – attacking someone on the “king's highway” – is thus clear and the final clauses are suggestive of a context of feud. Here we have a prohibition on lying in wait

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<sup>117</sup> II Cn 12. The other two items in the list, the fines for harbouring fugitives and neglecting military service, are of no interest in this context, neither being applicable to acts of violence.

<sup>118</sup> Hn 80:2, 80:4-80:4a.

for and attacking an enemy – not simply a stranger, although they too were covered by the earlier general definition – which, however, allows that once the enemy has been allowed to pass (i.e. his path not blocked) he can be challenged and can be fought without royal sanction should he choose to accept this challenge rather than continue on his way. Here, then, we have what looks like a very significant example of royal protective power, covering everyone travelling on whatever constituted a royal road.

The context of feud is evident enough here and has been asserted cogently by Alan Cooper.<sup>119</sup> It can very probably also be found in a passage in IV Æthelred that has already been touched upon, the best translation of which is that provided by Cooper:

The man who commits *hamsocn* inside the town without licence, or makes the worst infraction [of the peace] without prior appeal (*de placito ungebendeo*) or who assaults an innocent man on the royal road (*in via regia*), if he is slain, shall lie in an unhonoured grave. If he fights before demanding justice and lives, he will pay £5 for a breach of the king's burghal peace (*regis burhbrece*).<sup>120</sup>

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<sup>119</sup> Cooper (2002), pp. 53-5.

<sup>120</sup> IV Atr 4-4:1. Ibid, p. 54. Cooper's translation differs from that of Robertson in that she combines the commission of *hamsocn* and the breach of the peace into one offence: "the man who, within the town, makes forcible entry into another man's house and commits a breach of the peace of the worst kind..." (*homo qui hamsocnam faciet intra portum sine licentia et summam infracturam aget de placito ungebendeo*). Though it is the word "et" that joins the two ideas, Cooper is closest to the true meaning. *Hamsocn* was by definition already a serious offence, by definition it entailed attacking someone in a house not just breaking into it, it needed no aggravation by an additional breach of the peace. The two were, as Cooper argues, separate concepts and separate offences. Cf. Robertson (1925), p. 75. Another potential problem with using IV Æthelred is a recent suggestion from Derek Keene that its London elements may not have been composed until the twelfth century, there having in fact been no Anglo-Saxon version (Keene (2008), pp. 93-94). There has never been any doubt that IV Æthelred is a composite document which draws on a variety of sources. The "London element" that Keene identifies, however, is in fact several elements and his arguments apply exclusively to the "Billingsgate tolls" (IV Atr 2-2:12), and specifically to the privileges granted to a variety of foreign traders there. On these points it could be that Keene is correct in proposing a twelfth-century interpolation, but for the London material of interest here (IV Atr 4-4:2), which from its sudden shift to the first person looks more than likely to have a different source, there is nothing in his argument to suggest a twelfth-century composition. Indeed, the rather unclear Latin is much more likely to be the result of a poor translation from Old English than the original work of a twelfth-century forger.

This is, for all practical purposes, a Latin version of Cnut’s more laconic statement of his rights, the first point at which the offences of *hamsocn*, *mundbryce* and *forsteal* are linked together.<sup>121</sup> Indeed, this clause is evidently just as much about the proscription of illicit feud as II Edmund. It is only if the offender fights before demanding justice (*si pugnet antequam sibi rectum postulet*) that he is to pay the fine. The context envisaged by the drafters of the law is evidently one in which the offender believes himself to have been wronged and is taking vengeance improperly, without demanding justice of his victim in advance. We may reasonably assume that if the attacker had followed all the requisite procedures and still been unable to obtain justice he may eventually have been entitled to fight and kill his enemy regardless of his location. This, as Cooper very reasonably posits, might be the explanation for the various caveats included in this law – *hamsocn* “sine licentia”, attacking “aliquem innocentem” on the king’s highway, and the hard-to-translate “de placito ungebendeo”. They may be allowing for the possibility that the attacker had jumped through all the necessary legal hoops and was now taking the legitimate vengeance to which he was entitled.<sup>122</sup> In suggesting that such hoops did exist by which royal protections could eventually be bypassed this is a significant text, though its lack of detail makes it difficult to draw any firm conclusions. The language may well suggest that any such acceptable breach would need to have been expressly authorised in legal proceedings condemning the man to be attacked.

Interpreting *forsteal*, however, is not that simple. It appears that it had an original meaning different to that given by the *Leges Henrici*. III Edmund uses the term when prohibiting interference with the pursuit of thieves:

And we have declared with regard to the tracking and pursuit of stolen cattle, that thorough investigation shall be made at the village, and that no obstacle shall be placed in the way thereof or anything to prevent the pursuit and search (*et non sit forsteallum aliquod illi uel aliqua prohibitio itineris uel questionis*).<sup>123</sup>

Liebermann suggests that the final part of this phrase, *uel aliqua prohibitio itineris uel questionis*, is the *Quadripartitus*’s explanatory gloss on *forsteallum*, and if, as seems likely, this is the case it

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<sup>121</sup> II Cn 12.

<sup>122</sup> Cooper (2002), pp. 54-55n.

<sup>123</sup> III Em 6.

gives us a fairly clear definition.<sup>124</sup> The meaning of *forsteal*, therefore, seems to have evolved from one of obstructing investigations of stolen cattle to that of attacking an enemy on a road, each of which draws on the central concept of obstructing free movement. The earlier meaning is still visible in some of Wulfstan's laws composed for Æthelred. Unlike the passage from IV Æthelred quoted above, both V and VI Æthelred use the term in the sense of obstruction.<sup>125</sup> The apparent contradiction here can to some extent be resolved by focusing on the common concern with the obstruction of free movement. As Cooper rather ingeniously points out, "the laws of Wihtrud and of Ine guarantee travellers safety of movement free from being killed as a thief only on the road", enjoining those who are forced to leave the road to announce their presence and honourable intentions by either shouting or blowing a horn.<sup>126</sup> The only circumstance in which anyone had a positive right to travel off the road was in pursuit of thieves or other offenders against whom the hue had been raised. Travelling on a road or in pursuit of a thief are thus, in a sense, the only two types of legitimate progress in Anglo-Saxon law, and seen in this light the two meanings of *forsteal* do form something of a coherent whole as the offence of "obstructing legitimate progress". This, I think, is the root of the *Leges Henrici's* rule that an enemy had to be allowed to pass before a challenge could be shouted to him.<sup>127</sup>

That *forsteal* evolved from such a general concern is interesting, but it is not of any more direct relevance here than the term's later, and even more radical, metamorphosis into an offence relating to markets.<sup>128</sup> What matters is that it had become, quite clearly, a royal protection covering roads by the reign of Æthelred, its protective character being evident not only in the way the offence worked but in its association both with other protections (*hamsocn* and *mundbryce*) and with the sum of £5 – the king's *mundbyrd* since at least the time of Alfred.<sup>129</sup> However, the significance we attribute to *forsteal* is dependent on our view of how widely it applied. What exactly qualified as a *via regia*? A persistent myth, with its origins in the *Leges Edwardi*

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<sup>124</sup> *Gesetze*, iii, p. 130; Robertson (1925), p. 15.

<sup>125</sup> V Atr 31; VI Atr 38.

<sup>126</sup> Cooper (2002), p. 50; Wi 28; Ine 20.

<sup>127</sup> Hn 80:4a.

<sup>128</sup> See Britnell (1987).

<sup>129</sup> Af 3.

*Confessoris*, is that the king had only four roads – Watling Street, Fosse Way, Iknield Way and Ermine Street – and that “other roads from city to cities, from boroughs to boroughs, on which people travel to markets or for their own business affairs, are under the law of the county (*sub lege comitatus sunt*).”<sup>130</sup> This has been comprehensively dismissed by Cooper, who traces the establishment of the myth in literary sources in intricate detail.<sup>131</sup> He, quite reasonably, prefers the evidence of the *Leges Henrici Primi*:

80:3a. That is called a royal highway (*via regia*) which is always open, which no one can close or divert with walls he has erected, which leads into a city or fortress or castle or royal town (*que ducit in ciuitatem uel burgum uel castrum uel portum regium*).

80:3b Every town has as many main streets (*magistras vias*) as it has main gates appointed for the collection of tolls and dues.<sup>132</sup>

This seems like a much more solid basis on which to proceed, with royal roads being seemingly all major routes linking military and urban centres. We can, I think, reasonably look at *forsteal* as a protection covering travellers on all main roads.

In terms of royal jurisdiction, then, it should be plain that *forsteal* was a crucially important addition to the royal arsenal. All violence on major roads – unless both parties consented to it – was within the king’s jurisdiction as a result of this late tenth-century measure, and as far as we can tell from the evidence this was a novelty. Indeed, the only English precedent for the protection of roads by kings comes from Bede’s description of King Edwin as a king who ensured a peace throughout Britain such that that “a woman with a newborn child could walk about the island from sea to sea and take no harm”.<sup>133</sup> There may, then, have been an idea that men and women ought to be able to travel in safety, and that this safety was ultimately the responsibility of the king, but more than this we cannot say before the appearance of *forsteal*. All the indications are that this protection covering roads was yet another tenth-century innovation, and

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<sup>130</sup> ECf 12c, 12:7, 12:9.

<sup>131</sup> Cooper (2000).

<sup>132</sup> Hn 80:3a-80:3b; Cooper (2000), pp. 354-55.

<sup>133</sup> Colgrave and Mynors (1972), ii.16. Possible continental precedents are discussed in Cooper (2002), pp. 39-45.

it is clear that it would have brought a great many more acts of violence within the jurisdiction of English kings.

#### 4. OTHER PROTECTIONS

It is the contention of this chapter that it was primarily through the protections of *ciricgrið*, *hamsocn*, *mundbryce* (later *griðbryce*) and *forsteal* that we can see the expansion of royal jurisdiction over violence in the Anglo-Saxon period. There were, however, a number of other important royal protections that need to be understood if we are to comprehend the system of protections as a whole. Group protections are possibly the most important of these. Certain sections of Anglo-Saxon society, most notably the clergy, foreigners and widows, were formally under the protection of the king. II Cnut demands that those who bind, beat or deeply insult men in holy orders pay the full *mundbryce* of either the king or the priest's lord.<sup>134</sup> When read alongside VIII Æthelred the implication of this is clear:

And if a man in holy orders or a foreigner is for any reason defrauded of property or of life, or is bound or beaten or insulted in any way, the king shall then be for him in the place of a kinsman and protector (*for mæg 7 for mundboran*), unless he has another.<sup>135</sup>

It goes on to state that compensation shall be paid to both the victim and the king as is fitting, or the king shall avenge the deed.<sup>136</sup> Clearly, then, men in orders and strangers or foreigners were regarded as under the protection of the king, unless they had some other protector. II Cnut simply acknowledges that some clergymen had their own *mundboran* in the form of a personal lord and allows them to be protected with a full *mundbryce*. Widows too may have received this sort of special protection on the basis of their status. We do at least find statements that widows of a respectable life are to enjoy "God's *grið* and the king's".<sup>137</sup> Though there are no indications that the king's *mundbryce* was payable for violence against them, it seems probable that Cnut's statement that anyone doing violence to a widow or maiden must compensate with his wergild is

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<sup>134</sup> II Cn 42.

<sup>135</sup> VIII Atr 33. Cf. EGu 12, which also mentions earl and bishop as protectors.

<sup>136</sup> VIII Atr 34.

<sup>137</sup> V Atr 21; VI Atr 26

intended to give force to this same *grið*.<sup>138</sup> The *Leges Henrici*, at any rate, place the same offences (*violentia uirgini uel uidue facta*) next to fighting in the king's dwelling in a list of pleas which place a man at the king's mercy.<sup>139</sup>

Though most protections in Anglo-Saxon law are either personal or spatial, there is also an additional category of protected times, within which any offence would meet with additional punishment. The majority of the evidence for these comes from the *Leges Edwardi Confessoris* where, among other references to the idea, there are peaces specified for eight days at Easter, Pentecost and Christmas, as well as for eight days after the coronation of a king. A breach of any of these would, we are told, incur the same penalty as a violation of the peace given by the king's hand.<sup>140</sup> Though this evidence is late, and clearly influenced by the continental Truce of God movement, there are enough pre-Conquest parallels to give the concept of temporally defined protection some credibility. The earliest is Alfred's statement that during lent or whilst the army was away all compensations were to be doubled.<sup>141</sup> II Cnut calls the former of these *lencgtenbryce*, and explains that it can be committed by fighting (*fihtlac*), intercourse with women (*wiflac*) or robbery (*reaflac*) "or by any great misdeed" and that it also applied on high festivals.<sup>142</sup> These, undoubtedly, reveal a different approach to that in the *Leges Edwardi* – doubling a non-royal compensation is very different to imposing a royal fine – but the principle that at certain times the penalties for violent offences should be increased is clearly present.

We should also, however, be careful not to forget the protective powers exercised by parties other than the king. The rights of churches have been discussed in detail above, but it would be unwise to forget about the nobility. We have, of course, learnt from IV Æthelstan that every thegn was entitled to offer three days' protection to anyone he so chose, with breaches compensatable through payment of the thegn's *mundbyrd*, and though this is not something that is confirmed in later laws there is no particular reason to think it ceased to apply.<sup>143</sup> And we must not, either,

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<sup>138</sup> II Cn 52-52:1.

<sup>139</sup> Hn 13:6.

<sup>140</sup> ECf 12, 27.

<sup>141</sup> Af 40:1,

<sup>142</sup> II Cn 47.

<sup>143</sup> IV As 6:2a-6:2b.

forget that lords had considerable protective power in their right to *manbot* and that throughout this period all free kindreds had the right to extract wergilds. We might even want to see the Londoners' request for an additional 30 shillings for each breach of the main royal protections as an example of a city's offering protection. In terms of scale, we should remember that a thegn's wergild of 1200 shillings was £25 in West Saxon money, five times as much as the king could expect for offences of *mundbryce*, *hamsocn* or *forsteal*. It seems, furthermore, that groups of noblemen could come together in guilds and create their own additional group protections. The one example we have of this is the Cambridge Thegns' Guild, whose regulations, dating from either the eleventh century or the end of the tenth, were discussed in the previous chapter.<sup>144</sup> They are significant enough to be worth quoting once more:

And if anyone kill a guild-brother, nothing other than £8 is to be accepted as compensation. If the slayer scorn to pay the compensation, all the guildship is to avenge the guild-brother and all bear the feud. If then one avenges him, all are to bear the feud alike. And if any guild-brother slays a man and does it as an avenger by necessity and to remedy the insult to him, and the slain man's wergild is 1200 [shillings], each guild brother is to supply half a mark to his aid...<sup>145</sup>

It thus seems that a group with no particular link to royal government was able to impose its own penalties on men who killed its members.<sup>146</sup> This remarkable fact serves as a stark reminder that protection in late Anglo-Saxon England was far from being a royal monopoly. It may have been the means by which kings expressed their power over violence, but it was also the means by which the rest of society did precisely the same thing.

## Conclusions

This chapter has, I hope, shown fairly clearly how royal jurisdiction over violence evolved in the late Anglo-Saxon period. As was seen in the discussion of *morð*, there is no particular reason to think that prohibitive power over violence was an important element in the increase of royal jurisdiction. Complex protections – which are to an extent hybrids with prohibitive power – seem

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<sup>144</sup> For a discussion of dating see *E.H.D.* i, p. 557.

<sup>145</sup> *E.H.D.* i, no. 136; Thorpe (1864), pp. 611-12.

<sup>146</sup> See Althoff (2004), pp. 90-101.

rather more influential as a group. Æthelstan's measures to prevent vengeance against thieves, Alfred's bid to protect lords from the treachery of their men, and the use of the king's *mund* to ensure peace between parties settling a feud all seem likely to have been effective. Edmund's attempt to allow kindreds to disown members and claim *unfah* status seems the exception to this, however, as all the indications are that it failed. In a sense complex protections are rather limited by their specificity: the protections they offer to one group are only valid against an identified group of potential enemies and they cannot, as a result, be seen as a major means by which royal protection was extended in Anglo-Saxon society. Their significance lies in their character as royal measures designed specifically to limit the protective powers of others, notably kindreds. When they worked, as Æthelstan's measures against those who avenged thieves seem to have done, they did so by delegitimising the non-royal violence that had been the foundation of non-royal protective power. The signs are, however, that such aggressive measures were controversial and needed to be targeted very carefully indeed – limited to types of violence that were widely viewed as despicable – if they were to get the aristocratic support necessary to be effective. Their scope was, therefore, rather limited. It is with simple protections that we see major advances in royal jurisdiction over violence. The establishment of royal punishment for all killings (and, in sources before Wulfstan wrote, all violence) within churches was a major expansion of the scope of the king's power over violence, and the establishment of the offence of *hamsocn* – effectively extending the king's protection to all houses – was even more significant. The expansion of the availability of the king's protection on a personal basis so that sheriffs could grant it to those in fear was another major development which surely would have brought many more violent incidents into the jurisdiction of the crown. Likewise, the introduction of *forsteal* as a protection covering all violence on main roads must have had a similar effect, rendering many more violent incidents offences against the king. Taken together these developments, I believe, represent a revolutionary expansion of royal jurisdiction over violence.

These developments do, of course, fall a long way short of the full prohibition of homicide that Naomi Hurnard and Patrick Wormald argued for, but we must not allow that to skew our assessment of the achievement this represents. This may not have been complete prohibitive jurisdiction but it must have been significant. Conducting feud violence without offending the king was rendered very difficult indeed by such measures. Any man who felt threatened could, in theory at least, feel significantly safer once he was in his home, in church, on a major road, or in a court. We should be fairly certain that he would stay close to such protected zones if he felt threatened enough and, if he had the resources to secure it, he might well have sought out the

local sheriff or some other royal officer and claimed the king's *mund* or *grið*. To kill a man such as this without breaching some form of royal protection would probably be just about possible with sufficient planning and some good luck, but it would be a risky undertaking. It would, of course, be significantly easier if the intended victim was unaware of any threat, but in a feud scenario this would surely not have been the case. It is, of course, impossible to do anything but guess at how great a proportion of violent incidents would have involved the king with the cumulative effect of his protections taken into account, but it may well have been high. For less serious acts of violence it might, perhaps, be expected to be smaller but for killings it does not seem unreasonable to me to suggest that at least sizable minority, possibly even a majority, would have been caught in the net of royal protections. Indeed, this may well be rather conservative.

It has, then, been argued here that Anglo-Saxon kings did not establish a royal crime of homicide, but this does not necessarily result in a picture of a weak and ineffectual government. Indeed, the alternative offered here is hardly a minimalist view of the powers of the English monarchy. In recognising that something as deeply engrained as feud cannot simply be done away with by legislative fiat, it emphasises the size of the challenge faced by English crown. In showing how English kings, particularly Edmund, successfully overcame this challenge through the innovative and far-reaching manipulation of protections, the arguments advanced here actually show what many scholars call the “Anglo-Saxon state” in a very positive light.<sup>147</sup> We should not allow modern expectations of what something labelled a “state” ought to do cloud our appreciation of this point. What we are seeing in the tenth century is effective government that, recognising how central feud was to society, sought to restrict and regulate it rather than to ban it. The protections that emerged as important all had some sort of link with older traditions. Houses and churches had long been considered off-limits for violence, kings had always been able to offer their protection to those in need, and there are signs that a general duty of ensuring safe travel had been an expectation of kingship for some time. In establishing protections in the ways that they did, English kings were in a sense just reinforcing existing norms with much stricter penalties. In building on existing foundations in this way, tenth-century kings demonstrated considerable skill. Edmund may have pushed too hard in some respects, but the crucial point is that his successors held on to his more important measures by granting some limited concessions regarding their severity. This is not a weak and ineffectual monarchy, it is one that subtly probed the boundaries

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<sup>147</sup> Campbell (1987), (1994).

of its power, expanding its jurisdiction over violence and restricting the scope of feud, but balancing this against its need to maintain the support of those it governed. This may have led to a slower development than that preferred by Wormald and Hurnard, but recognising the limits beyond which it was unwise to push must surely be regarded as a sign of good government. If for his realm to be considered a state a king needs to possess Weber's "monopoly of legitimate violence", then clearly Anglo-Saxon England was not a state. It was, however, a kingdom in which the crown played an increasingly dominant role in the regulation of violence. This is the important fact and we should not let our choice of terminology obscure it.<sup>148</sup>

A key conclusion here, then, is that English kings advanced their jurisdiction over violence primarily – indeed, almost exclusively – using protective power. This is important, no doubt, but it is secondary in many respects to the conclusions to be drawn about the wider role of protection in the regulation of violence. In the last chapter the core of what I termed the "system of feud" was examined. Here, we have looked at the more peripheral elements, the protections and other powers that could be applied to violent acts in certain specific circumstances. If we put these together, then, what we should get is a reasonably well-rounded impression of the system of feud as a whole. What I want to emphasise here is that when we do this the picture that emerges is overwhelmingly one of protective power. The only examples of prohibitive power are *fihtwite* and *morð*, but as we have seen in the previous chapter there are good reasons to suspect that even *fihtwite* grew from protective roots, whilst we have seen here how relatively insignificant *morð* seems as an example of royal power over violence. Everything else – literally everything – is best interpreted as protective power. The wergild and *manbot*, as we have seen, were unquestionably protective in nature; the complex protections outlined here can, to some extent, be seen as hybrids of protective and prohibitive power but the protective side is clearly dominant; whilst the key royal powers highlighted here – *ciricgrið*, *mundbryce* and *griðbryce*, *hamsocn* and *forsteal* – are all clear examples of protection. They are, as has been noted, all intimately linked with the old £5 royal *mundbyrd*, and all but *forsteal* (which seems to have evolved out of a prohibition on obstruction) have clear protective elements in their terminology. All the other measures covering meetings, vulnerable groups in society, and even the £8 penalties imposed by the Cambridge

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<sup>148</sup> The debate as to whether the term "state" is appropriate for medieval polities turns on far more issues than just this one. For a good discussion see Davies (2003) and Reynolds (2003). Here I am generally avoiding the term, not because I think it is necessarily inappropriate but on the grounds that it is too heavily loaded with implications to be used precisely.

Thegns' Guild, slot neatly into this same wider system of protections. Indeed, it does not seem unreasonable to conclude that the system of feud that regulated violence in Anglo-Saxon England was a system primarily – indeed, almost completely – made up of protections.

The protections that made up this system of feud were diverse, in terms both of who offered them and of their strength. Yet despite this diversity the overall picture is clearly one of universal protection from violence. Everyone is expected to have a kindred able to exact a wergild or take vengeance in the event of a killing. Equally, the expectation is that every man should have a lord to collect *manbot*. For those who did not have this bare minimum of protection it seems that the king was expected to step in and act as a protector (*mundboran*) in its absence. We thus have two universal protections emanating from kindreds and lords, with the king acting as a failsafe in circumstances when these were missing. Though it clearly was the king's job to make sure that everyone was covered by these core protections, it is important to keep the vast number of actors in the system in view: there would have been literally thousands of different kindreds and lords in late Anglo-Saxon England to whom wergilds and *manbots* might pertain. If we add to this core of universal protections the multitude of limited protections that applied not to everyone but only in specific, defined circumstances – those belonging to churches and noblemen throughout the land, and of course the wide variety of specific royal protections – we have a much fuller picture of how violence was regulated in English society. We should, I think, imagine an extensive web of protections emanating from thousands of different sources and offering different people in different circumstances differing degrees of security. This network of protections gave everyone (though probably not outlaws) a degree of protection, but by its very nature it was uneven. The differing strengths of protection covering different places and people served not to prevent all violence – an impossible goal for any system – but to regulate it and, to some extent, to channel it away from the areas that were highly protected and towards those which were less well endowed.

Dealing with violence in late Anglo-Saxon England, then, was a complex matter. Determining the proper penalties in any given case depended, to a large extent, on the protections that applied to the victim. This situation, I think, is what the *Leges Henrici's* author was getting at in the following passage, which considers the various factors bearing on compensation or punishment of homicide:

If anyone, either a freeman or a slave, is slain he shall be compensated for lawfully by the amount of his wergeld, unless a judgement prescribing amends for the physical injuries is

substituted instead; for it will often be the case that a person who slays or wounds another will either put his life in jeopardy or suffer the loss of his limbs. Circumstances produce different consequences in everything: depending on the place, for example whether the offence occurs in a church or the king's dwelling or during military service or in the king's household or in a town or in any permanent abode of this kind enjoying the protection of peace; or depending on the time, for example whether the day is a festival day or whether the king is with his personal troop or in the county itself; or depending on the person concerned, for example whether he is a servant of the king or a reeve or official of some other lord, or in whatever capacity he secures the untroubled calm of peace, whether by writ or some other method.<sup>149</sup>

Here, in one summing up, we have an acknowledgement that the rule for compensating homicide is payment of wergild to the family, but that often in practice the result was a heavier punishment because of a breach of a specific protection. The network of protections, furthermore, is illustrated clearly and concisely, with a wide variety of royal protections interspersed with references to other protectors in the form of lords, towns and churches. There is even an attempt at categorising these protections as spatial, temporal and personal. Certain things here are clearly Norman – the emphasis on mutilation certainly is, and the importance given to temporal protection may reflect the importation of continental ideas from the Truce of God movement – but with allowances made for this the description fits the Anglo-Saxon system as analysed in this chapter very closely indeed.

We should, then, see the protections that formed royal jurisdiction over violence as part of this overarching protective system, not as being in some way set apart from it. Crucially, this means that feuding between kindreds over homicides should be interpreted in a similar way to royal claims to receive payment for incidents of *hamsocn* or *forsteal*. Both, after all, involve protectors trying to extract compensation for violent breaches of their protection. To separate these and call one “feud” and the other “justice” is surely unwarranted. Why should we privilege a king's right to a £5 payment for a breach of his *mund* over a thegn's kindred's right to a £25 wergild payment for a breach of its protection over a kinsman? It may be that in some circumstances the king was able to take first place in the queue when the resources of an offender were being divided, but priority alone does not necessarily make royal claims qualitatively different. It is because of this that I

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<sup>149</sup> Hn 68:1-68:2.

think it is appropriate to think of violence being regulated by the system of feud in this period, even though we do find considerable advances in royal jurisdiction taking place. Perhaps because of the confusion surrounding the concept of feud, however, it would be better to think of this “system of feud” as a “system of protections”. Though this does sideline the role played by prohibitive powers this is, to some extent, fair enough: though *fihtwite* did have an important role it was very much a lone prohibition operating amidst a sea of protections. We may have seen kings taking a larger share of this network of protections in this period but all the evidence suggests that even in 1066 they were still only a part of the network, fitting in alongside many other protectors. Destroying the system altogether by outlawing feud entirely was not on the agenda at all.

## *Chapter Three*

# The Distribution of Legal Power: A Reassessment

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### **Introduction**

The preceding chapters have presented a picture of late Anglo-Saxon society in which violence was regulated, not by the prohibition of all violent deeds by something approximating the role of the modern state, but by a system of protections in which society as a whole participated. This picture, I believe, is an innovative one – it does not, at any rate, agree with modern historiography on a number of points – which has implications for our view of Anglo-Saxon England that reach beyond our understanding of the law on violence. In emphasising not the role of the crown but that of kindreds, lords, churches and guilds, my picture presents a view of the distribution of legal power that does not sit easily with the currently fashionable view of Anglo-Saxon England as a prodigiously centralised “state” with power resting firmly in the hands of the king. It is my belief that, at least in relation to the legal system, much of this edifice of centralisation is based on a misapprehension of the nature and importance of protective power. This chapter is an attempt to make this case in detail. It takes the findings of the previous two chapters and applies them not just to violence but more widely, looking at the legal system as a whole. It aims to produce a more balanced picture of the Anglo-Saxon legal system in which the importance of the roles played, in particular, by nobles and churchmen is emphasised. It argues not that the English monarchy was weak, but that it presided over a system that involved the upper echelons of society, who were well rewarded financially for their troubles. It aims, most of all, to escape from some rather pernicious ideas and assumptions about “immunities” – that is, particular configurations of legal privileges usually held by an ecclesiastical institution through a royal grant – that have shaped the debate on the distribution of legal power in England for many decades.<sup>1</sup>

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<sup>1</sup> For a wide-ranging series of discussions in which immunities are treated as part of the larger question of the relationship between rights over property and power, see Davies and Fouracre (1995). Fouracre (1995), a discussion of immunities’ early Frankish context, is particularly useful.

The conclusions of both the previous chapters, as shall become obvious, are of central importance for the reassessment that takes place in this chapter. Much of what follows here builds on the fact that there was no royal crime of homicide, as was demonstrated in chapter one, and the picture of a system of protections regulating violence that was put forward in chapter two. I hope to show that under the pressure of these two related insights much of the orthodox interpretation of the distribution of legal power in Anglo-Saxon England simply collapses, and that something much less centralised can be put in its place. This chapter, therefore, functions as something of a drawing together of strands running through the entirety of the first half of this thesis. Its aim is to provide a carefully balanced picture of the late Anglo-Saxon legal system, something fundamental to our understanding of pre-Conquest society as a whole. It does make a difference if we envisage this society as one governed by a strong “state” which prohibited crime and enforced its will through a centralised justice system over which local elites had little influence, or if we see instead a society in which local lords held substantial legal powers and participated alongside the crown not only in the regulation of violence but in the wider task of maintaining order. These are not minor tinkering with our understanding of the way Anglo-Saxon England worked; though the legal and historiographical issues involved may at times seem obscure, the questions being addressed are fundamental. We are concerned, after all, with our understanding of the relative strengths of the English monarchy and its subjects. The recent trend has been to take an almost unipolar view of law in this period, seeing the king at the head of a powerful, centralised system of justice standing over nobles and commoners alike.<sup>2</sup> This chapter will argue for a very different picture in which parties that could in no way be considered part of the “state” are afforded a much greater role.

Being, in essence, a reassessment of the current consensus on the late Anglo-Saxon legal system, this chapter is by its nature a historiographical one. It is necessary to look in some detail at the foundations of the orthodox viewpoint. This means that considerable time will be spent looking at the long-running and slow-burning historiographical controversy about immunities in Anglo-Saxon England – a debate that has been continuing in fits and starts for over a century. It is important, however, to avoid automatically accepting the assumptions on which this debate has largely been founded, so at the outset I would like to note a pair of rather obvious but vitally important points.

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<sup>2</sup> This is clearest in the work of Patrick Wormald, particularly Wormald (1999e) and (1999c), but it fits in well with the overtly “maximalist” interpretations of Anglo-Saxon England found in James Campbell’s work, for example Campbell (1989), (1994), (1995).

Firstly, there is no reason to think that all legal privileges necessarily had any connection to the king. The literature on legal privilege concentrates almost exclusively on those rights that kings did or did not give away in their charters, but this is a quirk of the literature: a great many legal powers were exercised as of right, without any royal grant, and they are no less significant because of it. Secondly, there is no particular reason to expect that the types of legal privilege that Anglo-Saxon kings granted should look like those that were common in either early medieval Francia or in post-conquest England. Much of the past century's literature on the subject has been concerned with how closely eleventh-century England's institutions conform to the continental model of the immunity that came to dominate after the coming of the Normans, with heavy emphasis being placed on court-holding rights and the ability to deny access to royal agents – the characteristic features of the continental immunity. This, it seems to me, is something of a distraction. What matters is the practical significance of the legal privileges that were exercised by Anglo-Saxon lords and churchmen; how these privileges compare with those common in later medieval England or with those exercised by continental contemporaries should be seen as an interesting side issue, not the central point of the debate.<sup>3</sup>

This chapter, therefore, takes an approach significantly wider than that of the historiography, and this is reflected in the two part structure adopted here. First, the issue of delegated legal privileges, or immunities, will be addressed directly, the literature reviewed and critiqued and an alternative interpretation offered. Secondly, the much more varied category of non-delegated powers will be examined, including any legal powers for which there is no convincing evidence of a royal grant. The combination of these two aspects will, it is hoped, produce a well-rounded picture. The principle followed here for assessing the importance of the various privileges to be discussed will be broadly based on the common-sense arguments put forward by Helen Cam over half a century ago.

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<sup>3</sup> This shift in emphasis follows the example of Paul Fouracre, who advocates approaching immunities “from an essentially pragmatic point of view, that is, in terms of what they offered contemporaries rather than in terms of what they contributed to the history of the European state over the whole medieval period” (Fouracre (1995), p. 56). Naturally, the results of such an enquiry in Anglo-Saxon England will inevitably have some bearing on the wider debate about the strength or weakness of the Old English “state” with which its historiography is inextricably entwined. These implications will thus be considered in the conclusion of this chapter, but they are secondary to the main goal of providing a clear picture of the importance of legal privileges in Anglo-Saxon society.

The character of a privilege must depend on the system from which exemption is granted, and the Frankish immunity implied a system of comprehensive and centralised control, however decadent, for which there is no parallel in England. To speak of “the state” or of “a national scheme of justice” in Anglo-Saxon England, even to use the term “political”, suggests the existence of categories not yet established there.<sup>4</sup>

We need not accept Cam’s assessment of Anglo-Saxon England to see the validity of the principle she uses to assess “the character of a privilege”. We must, quite plainly, look at any type of privilege in the context of the power structures surrounding it. We need not insist that it takes the form of an “exemption” that is “granted”, but to assess the significance of any legal power we should draw a comparison with those powers possessed by the king. If any collection of powers in “private” (by which I mean “non-royal”) hands can be seen as similar in nature and degree to those possessed by the king, then we can conclude that the holder of those powers had a privilege – perhaps even an immunity – of considerable importance.

## **Delegated Powers**

### ***a) Immunity Historiography***

The historiography of the immunity in Anglo-Saxon England makes a sensible starting point for any consideration of the nature of legal power in non-royal hands, simply because the immunity has been the main way in which the subject has been approached by scholars. The consensus on the issue has shifted drastically over the last century, from F.W. Maitland’s vision of a great proliferation of powerful immunities under Edward the Confessor to the current position that in all probability no immunities whatsoever existed in England before 1066.<sup>5</sup> Nonetheless, despite this shift, the issues on which the debate has hinged have remained constant throughout. There are, in effect, three points of controversy. Firstly, the issue of the significance of the rights that various institutions did receive by charter: essentially the importance of the jurisdiction that certain common legal terms conveyed. Secondly, the issue of court-holding: whether the grantees of legal rights, or “immunists”, could enforce them in their own courts or would have to claim them in royal courts. Finally, the issue of the exclusion of royal officials: the right or absence of a

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<sup>4</sup> Cam (1957), p. 429.

<sup>5</sup> Maitland (1897), pp. 282-83; Wormald (1999c), p. 330; Rosenwein (1999), pp. 195-95.

right to prevent the king's agents from accessing the land of an immunist. The current consensus is a rather minimalist interpretation on all three points: the rights being granted out were relatively insignificant; private courts in all probability did not exist; and our one piece of evidence for the exclusion of royal agents is very likely to be biased. The picture produced is one of strong royal control of a justice system with only the profits of justice from relatively minor offences being delegated by the crown.

Though this chapter is, in large part, intended to challenge this consensus, there are some elements of it that are fairly irresistible. It must be acknowledged, for example, that there is no strong evidence for the existence of private courts. Though a suspicion does remain that in certain cases where a single lord had jurisdictional rights over an entire hundred he would have taken over the hundred court as well, there is no evidence to prove this and it must always remain a matter of opinion. Similarly, it is impossible to deny that the existence of a significant Anglo-Saxon tradition of exclusion clauses (preventing royal agents from entering immunists' lands) seems extremely unlikely. There is only one clear example of such an exclusion in the *Domesday* entry for Oswaldslow, and the reliability of this text was strongly contested by Patrick Wormald.<sup>6</sup> However, accepting these realities does not necessarily mean that the interpretations placed on them are equally valid. It is a key aspect of this critique that they are not; that the emphasis put on these points is in fact symptomatic of the unwarranted historiographical obsession with the continental-style immunity, of which these are defining features. This line of attack, however, will have to be put aside for now. Partly this is because focusing on these aspects affords them a weight that it is doubtful they deserve, but mainly it is because there is a much more profitable and fundamental avenue that demands priority. That is, the conclusion that the jurisdictional rights for which we do have solid evidence were minor and insignificant. On this front there are factual inaccuracies to be exposed as well as what appear, to my eyes, to be clear errors of interpretation.

The historiographical controversy on this point begins with Maitland's seminal work, *Domesday Book and Beyond*.<sup>7</sup> Among many ideas there put forward about Anglo-Saxon immunities, he suggested an interpretation of Cnut's reservation of certain pleas to the crown:

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<sup>6</sup> Wormald (1995).

<sup>7</sup> Maitland (1897).

12. These are the rights which the king possesses over all men in Wessex, namely *mundbryce* and *hamsocn*, *forsteal* and *fyrdwite* [the fine for neglect of military service], unless he wishes to honour anyone further. ...

15. And in the Danelaw he possesses *fihtwite* and *fyrdwite*, *griðbryce* and *hamsocn*, unless he wishes to honour anyone further.<sup>8</sup>

To Maitland's mind this looked like a strong king clawing back losses in royal jurisdiction occurring under his predecessors. But then, to quote Maitland directly:

Cnut himself and the Confessor – the latter with reckless liberality – expressly grant to the churches just those very reserved pleas of the crown. The result is that the well endowed immunist of St Edward's day has jurisdiction as high as that which any palatine earl of after ages enjoyed. No crime, except possibly some direct attack upon the king's person, property or retainers, was too high for him.<sup>9</sup>

As far as Maitland was concerned, then, these reserved pleas were the key to high-level immunities before the conquest. They could scarcely have conveyed greater privilege.

This argument was comprehensively dismantled by Naomi Hurnard in her two part article of 1949, entitled "The Anglo-Norman Franchises". Hurnard, clearly as a result of the reverence in which Maitland was (and indeed still is) held, spent a great deal of time analysing his rather slippery prose from every possible angle so as to rule out the possibility that, interpreted in some special way, the great scholar's words made perfect sense.<sup>10</sup> After much analysis she concludes that Maitland's analysis does indeed, as it first appeared, rest on the interpretation of Cnut's reserved pleas.<sup>11</sup> These pleas, for the purpose of analysis, she reduces to three – *hamsocn*, *griðbryce* and *forsteal* – on the grounds that these are the ones that do tend to appear in charters and in *Domesday Book*. They are, in essence, the West Saxon pleas, with the later more common *griðbryce* standing as a synonym for *mundbryce*, and *fyrdwite* neglected on the grounds that,

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<sup>8</sup> II Cn 12, 15. The Nero version ('G') adds *flymena fyrmðe* – the fine for harbouring fugitives – to the list in c. 12. This seems like a later attempt at clarification as the subject of outlawry is dealt with in detail in c. 13.

<sup>9</sup> Maitland (1897), pp. 282-3.

<sup>10</sup> Hurnard (1949), pp. 289-301

<sup>11</sup> Hurnard (1949), p. 301.

being a fine for failure to give military service, “it was clearly not a major, unemendable [offence], and its grant cannot be taken as evidence of *haute justice*”.<sup>12</sup> Her dissection of Maitland aside, Hurnard’s argument rests on her own interpretation of these three “reserved pleas”. They were not, in her view, reserved by Cnut on the grounds that they were his most important, most valuable, rights but rather because, of all the many pleas that did belong to the king, these ones – being relatively minor, emendable offences that the king could grant out should he wish – were those his lords were most likely to think they could usurp. In Hurnard’s words, “far from being the sole pleas of the Crown, they are merely the borderline ones”.<sup>13</sup>

Her theory expounded, Hurnard then analyses each of the offences in turn to extract their meanings. *Griðbryce*, then, was “the breach of less exalted peaces, such as the lord’s” or more specifically “the humble jurisdiction which the lord has over breach of the peace by medleys and brawls”.<sup>14</sup> *Forsteal* “stands ... for very minor cases of assault and obstruction”, whilst *hamsocn* was simply “assault on a person in a house”.<sup>15</sup> Together, “they denoted aggravated assault and only very slightly amplified the modest jurisdiction conveyed by *sac* and *soc*”.<sup>16</sup> This interpretation swiftly became the new historiographical orthodoxy. Wormald, as has been noted, referred to her paper as “masterly” and stated that she had “show[n] conclusively that the pleas apparently ‘reserved’ by Cnut, yet in fact alienated by his and the Confessor’s writs, were not the major pleas, as Maitland had thought, but on the contrary, amendable offences, hence of relatively minor importance.”<sup>17</sup> Though Hurnard herself argued that great immunities did in fact exist, just not on the basis of *hamsocn*, *griðbryce* and *forsteal*, this “fall-back position” was not accepted by Wormald.<sup>18</sup> His examination of the Bishop of Worcester’s triple hundred of Oswaldslow aimed to cast as much doubt as possible on what had hitherto seemed the most solid case of a powerful immunity before 1066, and the effect of his work has been the establishment of a consensus that

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<sup>12</sup> Hurnard (1949), p. 291n.

<sup>13</sup> Hurnard (1949), pp. 294-5.

<sup>14</sup> Hurnard (1949), p. 304.

<sup>15</sup> Hurnard (1949), pp. 307, 309.

<sup>16</sup> Hurnard (1949), p. 310.

<sup>17</sup> Wormald (1999c), p. 317.

<sup>18</sup> Hurnard (1949), pp. 313-22; Wormald (1999c), pp. 317-18.

there was no tradition of immunities of any significance pre-conquest England.<sup>19</sup> Hurnard's interpretation of *hamsocn*, *griðbryce* and *forsteal* is thus a crucial element of the current consensus against the existence of immunities.

**b) The Alternative View**

The keys to unlocking this consensus, then, are the familiar offences of *hamsocn*, *griðbryce* (or *mundbryce*) and *forsteal*. These, of course, were the central elements of the previous chapter, where they were subjected to a very different interpretation indeed. Rather than being the insignificant offences that Hurnard believed them to be, it was argued that these were crucial powers in the expansion of the English monarchy's jurisdiction over violence. By taking over, reinforcing and extending traditional forms of spatial and personal protection, as well as giving new teeth to older ideas about the king's responsibility for the protection of travellers on roads, English kings gained an interest in feud, and inter-personal violence more generally, that they had previously lacked. *Hamsocn*, introduced by King Edmund, extended full royal protection to all houses, building on pre-existing ideas about freemen protecting their own homes. At the same time the royal offence of *mundbryce* was introduced, signalling a massive expansion in the availability of the king's personal protection, so that it was now something that could be granted by sheriffs and other royal officials. *Forsteal* was in many ways the most far-reaching. Growing, it seems, out of ideas of obstruction of legitimate progress, we find it eventually developing into a royal protection of those travelling on the king's highway.

The result of all this was that from the mid tenth century royal jurisdiction over violent offences was extended to houses, to main roads, to the presence of royal officials and to anyone given personal protection by such an official. The reason this is so significant, I would argue, is not that the powers involved covered particularly "high" or "major" crimes but precisely because of the flexibility involved in such protections. You could commit any of these offences through homicide but you could equally do so through a much less serious act of violence. To Hurnard, these elements made such powers look unimportant – they covered relatively mundane offences – but, I would argue, this is precisely why they were so significant. This was an extension of royal justice into reasonably everyday events, not just rare and infrequently occurring offences like killing through sorcery or *morð*. Those offences, being *botleas*, were classed by Hurnard as "major crimes", far more significant than anything for which financial compensation could be made. But

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<sup>19</sup> Wormald (1999c), pp. 330-32; Rosenwein (1999), pp. 194-95.

their enormity was in all likelihood matched by their rarity and they seem unlikely to have been major sources of revenue. For *morð*, at any rate, we have already seen that the evidence suggests it was a long way from being a priority for royal justice. By contrast, the right to a £5 fine for even a minor infraction taking place in a house or on a road looks exceptionally lucrative.

**c) Hurnard's Case**

Hurnard's argument is based on two major planks. The first is that *hamsocn*, *griðbryce* and *forsteal* were insignificant because they did not, in fact, cover cases involving homicide; and the second is that there was a series of more serious offences – Hurnard uses the term “major crimes”<sup>20</sup> – that the crown would never have dreamt of granting out and which, as a group, are much more significant than those reserved by Cnut. To take the first plank, as can be seen from her definitions of these terms, Hurnard clearly believed that *hamsocn*, *griðbryce* and *forsteal* were ways in which mere assault, not homicide, could be aggravated. The principal argument put forward in support of this position was that there existed a royal plea of homicide (*homicidium*) which would override any case of, for example, *hamsocn* that happened to involve a killing. In such a case the killer would be solely within the jurisdiction of the king because of his *homicidium*, and it would be absurd to think that he would give up his rights over the culprit because a private court had the rights to the lesser crime of *hamsocn* that he had happened to commit as well.<sup>21</sup> This, of course, rests entirely on the idea that a royal crime of homicide existed, and as was shown in chapter one, it seems fairly certain that this was not the case. Hurnard's argument in favour of this royal crime of homicide, which is stated only very briefly within a single footnote, was based on extremely tenuous readings of one passage in the *Leges Henrici Primi* and the *Domesday* entry for Kintbury in Berkshire.<sup>22</sup> Not only this, but Patrick Wormald's attempt to make a similar point by different means was found to be equally flawed. With this established, Hurnard's representation of *hamsocn*, *griðbryce* and *forsteal* as minor offences that “denoted aggravated assault and only very slightly amplified the modest jurisdiction conveyed by *sac* and *soc*” collapses.<sup>23</sup> There is no reason at all to think that they would not have applied to cases of

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<sup>20</sup> Hurnard (1949), pp. 295-97.

<sup>21</sup> Hurnard (1949), pp. 299-300.

<sup>22</sup> Hurnard (1949), p. 300n.

<sup>23</sup> Hurnard (1949), p. 310. See discussion above, pp. 39-54.

homicide and, as a result, there is no impediment to their being viewed – as they are here – as powers of considerable importance.

If this point is removed, Hurnard's whole case is significantly weakened, but the second plank of her argument remains. Her suggestion is that there was a whole host of "major crimes" reserved to the king which were collectively far more important than those listed by Cnut. She refers to these throughout her text, occasionally mentioning a few specifically, as when she lists the unemendable crimes mentioned in II Cnut ("murder, treason, arson, attacks on houses, open theft, persistent robbery, coining"),<sup>24</sup> but the implication is that there are many such crimes and that most if not all can be found in the *Leges Henrici Primi*. On this point, she is correct. Clause 10:1 of the *Leges Henrici* lists thirty-six "rights which the king of England has in his land solely and over all men, reserved through a proper ordering of peace and security".<sup>25</sup> At first sight it is a daunting list but with some categorisation it can be reduced to a more manageable size. Nine can be disregarded as being personal affronts to the king (for example, fighting in his house or troop, contempt of his commands, stealing his land or money). A further fourteen can be reasonably dismissed as regalities, pertaining to the king's unique position as the monarch (for example, danegeld, licensing fortifications, coining, cowardice in battle and neglect of military service, forests, baronial reliefs, unjust judgements, shipwreck). A further five, discounting those already eliminated, are almost certainly Norman innovations lacking, at any rate, any solid pre-Conquest evidence (*murdrum*, *stretbreche*, *premeditatus assultus*, *violentus concubitus*, *raptus*).<sup>26</sup>

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<sup>24</sup> Hurnard (1949), p. 291.

<sup>25</sup> Hn 10:1.

<sup>26</sup> For a full discussion of the origins of *murdrum* see below, pp. 171-177. The presence of *premeditatus assultus*, in particular, in the *Leges Henrici* is rather mysterious; it appears in this list but is never referred to again, let alone explained, by the author. The term, however, does become important in the thirteenth century, an accusation that a killing was committed "wickedly, feloniously, in premeditated assault and against the king's peace" (*nequiter et in felonia, in assultu præmeditato et contra pacem domini regis*) being, according to the text known as *Bracton*, essential for the prosecution of homicide (Thorne *Bracton*, ii, p. 388). Maitland made much of the importance of this phrase later on seeing it as the root of the later common law concept of "malice aforethought", and identifying its origins with *forsteal*, which he defined simply as "way-laying" (Pollock and Maitland (1968), ii, pp. 468-69). However, as L. J. Downer noted, this seems impossible in the *Leges Henrici* as both *premeditatus assultus* and *forsteal* appear in the same list (Hn 10:1; Downer (1972), p. 325). So entirely isolated is the term in the *Leges Henrici* that it is tempting to suggest that it might, in fact, be a later interpolation. From what evidence we have it would certainly have made a great deal more sense in an early thirteenth-century context – the period from which our earliest

Of the eight remaining, two are *hamsocn* and *forsteal*, three concern outlaws (*utlagaria*, *flemenfyrme* and *qui excommunicatum vel utlagam habet et tenet*), two concern thieves (theft punishable by death and *robaria*) and the last is arson. Of this list we can obviously discount *hamsocn* and *forsteal*, but also the two mentions of a penalty for harbouring outlaws, on the grounds that they are present in the list of powers reserved by Cnut.<sup>27</sup> Royal jurisdiction involving excommunicates should perhaps be separated from outlawry, however, as II Cnut stipulates wergild forfeiture to the king for those harbouring them.<sup>28</sup> The only other element of mystery here is *robaria*. This is the *Quadripartitus*'s rendering of II Cnut's *reaflac* (hence, given their common authorship, that of the *Leges Henrici*), which Wormald has suggested "has a quasi-technical sense: not of theft merely, but of unjustified or falsely defended tenure".<sup>29</sup> According, then, to this list Hurnard's "major crimes" consist of harbouring excommunicates, arson, theft punishable by death and something, perhaps, approximating to land theft. To these we can add a few more from Cnut's laws: *æbere morð*, *husbryce*, lord-treachery and homicide within church walls.<sup>30</sup>

Even among this small list of eight potential "major crimes" there is room for various degrees of doubt as to the inalienability of some. Most strongly, as shall be seen below, those that involve wergild forfeitures (harbouring an excommunicate and *reaflac*) were certainly considered part of sake and soke and must, therefore, be disregarded.<sup>31</sup> The royal takeover of sanctuary in churches,

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manuscripts of the *Leges Henrici* originate (Downer (1972), pp. 45-48) – than it does a hundred years earlier.

<sup>27</sup> *Flymena fyrmðe* is mentioned in the Nero version of II Cn 12, but is also dealt with in more detail in II Cn 13-13:2, a continuation of the same list of reserved pleas. Cnut grants it to Christ Church, Canterbury in S. 986 and Edward does the same for Westminster in S. 1126. However, see II Cn 66:1.

<sup>28</sup> II Cn 66. Oddly, this is instantly contradicted by II Cn 66:1 (following VIII Atr 42) which threatens loss of life and property for the same offence.

<sup>29</sup> II Q Cn 63. Wormald (1999e), p. 352.

<sup>30</sup> II Cn 64; I Cn 2:2.

<sup>31</sup> On this point see Goebel (1937), p. 372 and the discussion of sake and soke below. For this to make sense *reaflac* cannot realistically be a technical term regarding land tenure, but this in fact sits rather more easily with the laws. *Reaflac*, at any rate, is listed alongside *fihtlac* and *wiflac* as one of the ways in which *ciricgrið* could be breached without homicide (VIII Atr 4; I Cn 3); land theft is a rather strained interpretation for this, the Latin glosses' suggestions of "robbery", and even "rapine", seem far better suited (Quadr I Cn 3; In Cn I, 3; Cons Cn I, 3). If we think of *reaflac* as simply robbery, and roughly equivalent to the types of theft for

as we saw last chapter, was not a complete one.<sup>32</sup> Homicide within a church was only one part of a wider idea of *ciricgrið* and, as again shall shortly be seen, there is evidence of even this element resting in ecclesiastical hands in some northern English churches. Lord-betrayal may still, as when Alfred introduced the measure, have resulted in forfeiture to the lord rather than the king.<sup>33</sup> Finally, the right to forfeitures from thieves punished by death seems a close approximation of the relatively common jurisdictional right of *infangeneþeof* and can, therefore, hardly be held up as an example of inalienable royal prerogative. What are left are the *botleas* crimes of arson, flagrant murder and *husbryce*. *Husbryce* is troublesome in its obscurity, occurring only in II Cnut 64 and in Latin renderings of the same passage in the *Quadripartitus*, *Consiliatio Cnuti*, *Instituta Cnuti* and *Leges Henrici Primi*. Its literal meaning, “house-breach”, and its unemendable status suggest that it is some more serious form of *hamsocn*. One possible interpretation is supplied by the *Instituta Cnuti* which renders *husbryce 7 bænet* with the Latin *destructio domus et combustio illius*, suggesting that *husbryce* may well represent the offence of destroying someone’s house, albeit without the use of fire.<sup>34</sup> What we can be sure of is that these three were considered unusual and seriously dishonourable crimes for which the usual process of compensation had to be bypassed.

Hurnard’s “major crimes” can thus be reduced to a short list of offences. We can certainly include murder, arson and *husbryce*, and maybe also homicide in church, but little else. What this amounts to is nowhere near so overwhelming as Hurnard represents it. They are “major” offences, without doubt, but they also seem to be more extreme ones, in all probability occurring much less frequently than *hamsocn*, *griðbryce* or *forsteal*. Though these are not insignificant

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which wergild was also forfeited (as it is treated in Hn 12:3), then it should not be surprising that *reaflac* might (like such thefts) be included in sake and soke.

<sup>32</sup> See above, pp. 84-92.

<sup>33</sup> Af 4:2.

<sup>34</sup> In Cn II, 64. The other Latin versions offer transliterations at best: “infractura domus” (Quadr II Cn 64), “domi fractura” (Cons Cn II, 64), “husbreche” (Hn 12:1a). Another possible interpretation is that just as the Oxford section of *Domesday Book* is almost certainly describing *hamsocn* when it states that anyone violently breaking into a house and assaulting, wounding or killing someone there is to pay the king 100 shillings (£5); it is also describing *husbryce* when it states that anyone killing someone within their *own* hall is to forfeit body and property to the king (*D.B.* i, 154v; Fleming (1998), nos. 1267, 1269). *Husbryce*, then, would simply be a more serious breach of royal protection house-protection. Though this is possible it is entirely unprovable.

powers, their scope is not sufficiently great to affect the assessment that the pleas reserved by Cnut were the Anglo-Saxon monarchy's main route to involvement in the violent disputes of its subjects. Unlike arson, murder and *husbryce*, which were unforgivably heinous crimes, *hamsocn*, *griðbryce* and *forsteal* could cover more mundane affairs. They gave the king the right to a £5 fine not only for killings but also for assaults and woundings – for all types of violence – committed against those on roads, in houses or under his officers' protection. They severely limited the arenas in which feud could be pursued without royal involvement, making it much easier for those wishing to avoid violent confrontations to do so. These were far from the insignificant powers that Hurnard made them out to be. They did not go as far as Maitland seems to imply – the comparison with later palatine earls is not a justifiable one – but his picture was in some ways closer to the truth than that portrayed by his critics.

**d) Domesday and Charter Evidence**

The evidence of *Domesday Book* does much to confirm this picture. In no less than sixteen places do we find mention of one of *hamsocn*, *griðbryce* or *forsteal*, or some clear equivalent, mostly confirming the fact that they did indeed belong to the king.<sup>35</sup> Worcester's entry is not atypical. It states that breach of the king's handgiven peace results in outlawry whilst breach of the king's peace given by the sheriff results in a 100 shilling fine, which is likewise incurred by those committing *forstellum* or *heinfaram* (i.e. *hamsocn*).<sup>36</sup> These fines, it states, are due to the king throughout all the county with the sole exception of the lands belonging to Westminster abbey on account of a grant made by King Edward. By contrast, the other offences do not appear much, if at all. There are no references whatsoever to murder and only one to arson. That reference, however, does little to support Hurnard's interpretation of arson as a "major crime" as it is represented as being emendable by the relatively small fine of twenty shillings.<sup>37</sup> Of *husbryce* there is no direct mention, though there is the possibility that it may be being referred to in one

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<sup>35</sup> Fleming (1998), nos. 126, 255, 295, 681, 686, 882, 884, 907, 930, 1267, 1289, 1295, 1301, 1307, 1354, 1640. These are only the more certain examples, where *hamsocn* (or its equivalent *heinfara*), *griðbryce* (or a Latin rendering of 'breach of the peace' punishable by 100 shillings) or *forsteal* are either specifically mentioned or described in detail that allows no doubt. There are other possible references worthy of attention at nos. 79, 252, 257 and 1700.

<sup>36</sup> *D.B.* i, 172r; Fleming (1998), no. 1640. That *heinfaram* or *hamfare* is synonymous with *hamsocn* is established in Hn 80:11a.

<sup>37</sup> *D.B.* i, 179r; Fleming (1998), no. 688.

Oxfordshire passage.<sup>38</sup> There is, in essence, no sign whatsoever of Hurnard’s “major crimes” here, whereas by contrast the offences reserved by Cnut have a strong presence. Indeed, where they do turn up these offences are frequently numbered among the only exceptions to a given place being quit of all custom.<sup>39</sup> The impression given is that either Hurnard’s “major crimes” were not reserved to the king or that if they were they were not seen as significant enough exceptions to record. *Hamsocn*, *griðbryce* and *forsteal*, on the other hand, were recorded frequently, which we must surely take as an indication that they were living, relevant and important law.

The charter evidence bursts another myth. Despite Maitland’s indictment of Edward the Confessor’s excessive alienation of Cnut’s reserved pleas, there are not many reliable examples of this occurring. There are pre-conquest charters that have been judged to be authentic for a grand total of seven distinct recipients: Christ Church, Canterbury; St Augustine’s, Canterbury; Bury St Edmunds; Ely; Winchester; Westminster; and Bromfield.<sup>40</sup> Even if we relax our criteria and include suspicious charters that may be reflecting genuine grants we can only add a further four religious houses: Waltham, Malmesbury, Abingdon and Chertsey.<sup>41</sup> To go further than this we can try looking at confirmations and grants made by William the Conqueror, but this does not substantially alter our picture. Other than the recipients mentioned already we can find only one, supposedly genuine, confirmation of a pre-conquest grant to St Martin-le-Grand, and two seemingly new grants: to Bath and Chertsey jointly and to St Paul’s, London.<sup>42</sup> Indeed, William’s charters serve to confirm the picture painted by the Anglo-Saxon ones: *hamsocn*, *griðbryce* and *forsteal* were granted out, but only very occasionally. Maitland’s charge of “reckless liberality” seems rather excessive; though he was partially justified in according these rights such significance, the fruits of a century of painstaking charter scholarship show that he was not so in his assessment that they were widely granted. However, the fact that these rights were in fact

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<sup>38</sup> See above, n. 34.

<sup>39</sup> See Hyams (1982).

<sup>40</sup> S. 976, 986, 1078, 1084, 1091, 1100, 1125, 1126, 1127, 1141, 1162.

<sup>41</sup> S. 1036, 1038, 1065, 1093, 1094, 1095.

<sup>42</sup> Bates (1998), nos. 12, 181, 185. No 181 (St Martin-le-Grand) has been the subject of debate for over a century. Its authenticity is currently accepted without reserve but I have doubts: the long list of judicial privilege has the flavour of mid twelfth-century forgeries and I am not aware of any other genuinely early grants of the reserved pleas that also include *miskennyng*, *blodwite* or *frithsocne*, to name but a few.

rather closely guarded is not favourable to Hurnard's interpretation either. Rather, it suggests that far from being humble powers applying only to minor brawls and scuffles, these were in fact highly-valued and tightly-controlled royal prerogatives.

**e) More Commonplace Jurisdiction**

Given that we can now see Cnut's "reserved pleas" of *hamsoch*, *griðbryce* or *forsteal* not only as significant powers but also as relatively rarely granted ones, it becomes important to see how this related to less exalted forms of jurisdiction: the privileges that in the eleventh century came to be encompassed by the terms *sake and soke*. This is an issue that can be, and frequently has been, discussed in an immensely complex and rather confusing fashion. This is, in part, the result of the terminology itself. The terms "sake", "soke" and "sake and soke" are usually used interchangeably, but their meaning is not always the same: in *Domesday Book*, it seems, "the term [soke] was used to describe a lord's receipt of 'customs' of any kind"<sup>43</sup> whereas in the *Leges Henrici Primi* the idea is much more precise, demonstrating, according to Julius Goebel, that "a theory of franchise is in full and conscious operation".<sup>44</sup> It also seems clear that the meaning of the terms shifted after the Norman conquest, becoming a grant of the right to hold a court as well as to receive the profits of justice.<sup>45</sup> However, the terms can be approached in a reasonably simple and commonsense way by looking at the law-codes. The key here is to get away, briefly, from the problem of defining the terms *sake and soke* and look instead at the development of the rights they seem to have referred to. *Sake and soke*, after all, are actually rather late terms. As was noted in chapter one, they first appear in two Yorkshire charters of the late 950s, but do not recur in any charters or writs until the reign of Cnut.<sup>46</sup>

Tenth-century laws, however, do repeatedly make reference to fines being paid to lords rather than to the king. Some of this material has been covered in the discussion of *fihthwite* in chapter one, but it is as well to recapitulate briefly. Æthelstan's Grately code is a good starting point for this. Here we find that the penalty for defending a thief is the forfeiture of the thief's *wergild* but

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<sup>43</sup> Wormald (1999c), p. 327.

<sup>44</sup> Goebel (1937), p. 394.

<sup>45</sup> Goebel (1937), p. 397.

<sup>46</sup> Yorkshire charters: S. 659, 681. Next appearance: Harmer (1989), pp. 74-6, no. 28; S. 986).

that this was to be paid either to the king or “to him to whom it is legally due”.<sup>47</sup> We also find, in a later clause, that while it is possible to avoid an ordeal through a monetary payment it certainly is not for a fine (*wite*) “unless he to whom it is due is willing to consent”.<sup>48</sup> Later, in Æthelred’s Woodstock code we find a similar situation. Those found guilty of theft are ordered to repay double the value of the stolen goods to their accuser and forfeit their wergilds not to the king but to their lords.<sup>49</sup> A thief who escapes, however, has to be paid for by his sureties to the same amount, the wergild here being said to go *ðam hlaforde ... ðe his wites wyrðe sy* – literally, “to the lord who is worthy of his fine”.<sup>50</sup> There is no indication whatsoever that the king might receive this wergild payment unless he happened to be the lord in question. We find very similar provisions in II Cnut, where once more the thief’s wergild goes to the lord who is “his wites wyrðe” or “his weres wyrðe”, but also that a man who marries a widow within a year of her husband’s death is to pay his wergild to either the king or “to the lord to whom it has been granted”.<sup>51</sup> The principle here seems clear: payments of *wite* and wergild went to lords frequently enough for it to be treated as a possibility – and in some cases almost a certainty – in the laws. That this right to wergild forfeitures and to *wite* payments was what came to be encompassed by sake and soke seems perfectly clear.

This is not in any way a controversial observation – the disagreement on this issue has centred on whether the right to hold courts accompanied a grant of sake and soke – but it is surely one of some significance. What Hurnard described as the “modest jurisdiction conveyed by *sac* and *soc*” does in fact appear to include the right to receive some very large payments indeed: the wergild of even a ceorl was 200 shillings, not far short of the 240 shillings (£5) payable for the offences reserved by Cnut.<sup>52</sup> No matter what judicial rights were also conveyed, this must surely be recognised as a tremendously valuable fiscal privilege. This, however, is far from being all. The

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<sup>47</sup> II As 1:5.

<sup>48</sup> II As 21.

<sup>49</sup> II Atr 1:5.

<sup>50</sup> II Atr 1:7.

<sup>51</sup> II Cn 30:3b, 30:6, 73a:1.

<sup>52</sup> Hurnard (1949), p. 310.

*Leges Henrici* offers a mass of information on soke but is most succinct in a clause dealing with vavassors:

Vavassors who hold free lands shall have the pleas where the punishment is payment of the *wite* or of the wergild in respect of their own men and on their own land, and in respect of the men of other lords if they are seized in the act of committing the offence and are charged with it.<sup>53</sup>

Though dealing with a special case, this is in essence the basic right of sake and soke according to the *Leges Henrici*.<sup>54</sup> It is an essentially personal, but occasionally territorial, right to all payments of *wite* and wergild.

This is exactly what was argued by Goebel, who saw sake and soke as a non-specific formula conveying non-specific rights, which he explained as follows:

By non-specific rights here is intended the complex of fiscal privileges (exclusive of *geriht* and thief forfeits) collected in the ordinary court, the public hundred—*wites*, wergilds, *overseunessas*, *miskennings*, etc., which slide off modern pens as “judicial profits.” ... It is, then, from the plea-profits, exclusive of theft and the *geriht*, collected in the hundred for the king by the local officer that a *sac* and *soc* grantee is favoured.<sup>55</sup>

Essentially, he is saying, sake and soke covered everything except what he terms the *geriht* (*hamsocn*, *griðbryce* or *forsteal* and the other powers reserved in II Cnut 12-15), the forfeitures of executed thieves and business too serious for the hundred court (those *botleas* offences where the culprit’s life is forfeited to the king). In support of this idea he advances evidence from the 1060 version of II Cnut which makes clear that three of Cnut’s innovations – the payment of *healsfang* for perjury and the wergild forfeitures for both *reaflac* and the over-hasty marrying of a widow – were in fact specifically included in sake and soke.<sup>56</sup> The most dramatic alteration of these is for *reaflac* which goes from requiring a wergild payment specifically to the king, to one

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<sup>53</sup> Hn 27.

<sup>54</sup> Cf. Hn 80:6.

<sup>55</sup> Goebel (1937), p. 371.

<sup>56</sup> Goebel (1937), p. 372. II Cn 37, 63, 73:1 (version G).

ordering the culprit to pay his wergild to the king or “he who has his soke”.<sup>57</sup> This, it seems, is incontrovertible evidence that *reafiac* was hardly the inalienable royal plea described by Hurnard, and it is probable that the same was true for the harbouring of excommunicates, which was also punished by wergild forfeiture.

If both Cnut’s *geriht* and all wergild and *wite* payments were alienable in eleventh-century England, all that remains to the king are the *botleas* offences. That is, murder, arson, *husbryce*, killing within church walls and theft punishable by death. When it is considered that the not uncommon grant of *infangeneþeof* gave the right to the forfeitures of slain thieves to its recipients we are left with a very short list indeed. It surely has to be concluded that Hurnard’s idea of “major crimes” so significant that those covered by Cnut’s *geriht* and sake and soke appear “humble” before them is a fallacy. A grantee like Æthelnoth, Archbishop of Canterbury, who had sake and soke along with *griðbryce*, *hamsocn*, *forsteal*, *infangeneþeof* and *flymena fyrmðe* would have had the right to receive the fines and forfeitures pertaining to almost every type of offence.<sup>58</sup> He would have had rights over his men almost as great as the king had over his own subordinates. It amounted to something approaching full royal jurisdiction over theft and over violence, just without – it seems – the right to hold a court.

#### **f) Private Courts and Exclusion Clauses**

The scope of the rights that were granted by the crown having been examined, we can now turn to the issue that has exercised historians most: that of court holding. As was explained above, the current historiographical consensus is that because there is no solid evidence for the existence of private courts before the conquest, we must assume there were none. The only possible exception to this, and this argued against by Wormald, is that perhaps in situations where a single lord held the right to forfeitures from an entire hundred he would then naturally gain control of the hundred court.<sup>59</sup> The only real evidence for such a situation is in the *Domesday* passage on Oswaldslow that Wormald has cast serious doubt on.<sup>60</sup> Against this absence of direct evidence there are only arguments, chief among which is Maitland’s famously cynical dictum, “no one in

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<sup>57</sup> II Cn 63 (version G).

<sup>58</sup> S. 986.

<sup>59</sup> Wormald (1999c), pp. 327-8, 331. For details of such “private hundreds” see Cam (1962).

<sup>60</sup> Wormald (1999c).

the Middle Ages does justice for nothing”. “Why”, argued Maitland, “should the sheriff hold that court, why should he appoint a bailiff for that hundred, if never thereout he could get one penny for his own or for the king’s use.”<sup>61</sup> Despite the lack of evidence this remains a very good argument. It would be a complete waste of time for a royal official to be sent every month to preside over a court from which no money could be extracted. Moreover, as Maitland also points out, were this to have happened – as Goebel and Wormald envisaged – we really ought to regard the recipient of the profits of justice as immensely lucky. Without the slightest exertion on his part, without any involvement in the process of justice, this lord received what must have been a sizable, if somewhat variable, income. It seems an unlikely picture. Surely we must imagine that the lord needed to go to some effort to secure this money, whether it be presiding over the court or simply turning up and advocating his own interests. The idea that such powerful men would be content to place so much reliance on the incorruptibility of the Anglo-Saxon hundred court is not, in my view, plausible.

Next to this we can place another of Maitland’s observations, this time on the nature of courts in this period:

We must once more remember that even in the days of full grown feudalism the right to hold a court was after all rather a fiscal than a jurisdictional right. We call it jurisdictional, but still, at least normally, the lord was, neither in his own person, nor yet in the person of his steward, the judge of the court. His right was not in strictness a right *ius dicendi*, for the suitors made the judgements. When analysed it was a right to preside over a court and to take its profits. Very easy, therefore, is the transition from a right to “wites” to such “jurisdiction” as the feudal lord enjoys.<sup>62</sup>

The court holder, then, had two main functions: presiding over the proceedings and collecting the profits. In the model of Wormald and Goebel, however, he merely presided, the profits going to the holder of sake and soke. What, then, is the significance of this role? Clearly it is a position from which much influence could be exerted on the business of the court, but can we really be certain that a sheriff’s bailiff in this position would really be able to wield more influence than the

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<sup>61</sup> Maitland (1897), p. 277.

<sup>62</sup> Maitland (1897), pp. 277-8. The shift to judgement by justices seems to have taken place under Henry II; see Brand (1992), pp. 80-86.

agent of the lord who would surely also be attending? Given that the lord in question, in the case of a potential “private hundred”, was not just anyone’s lord but the lord of almost everyone present, this seems unlikely. In cases where a lord had soke over only part of a hundred we might expect the presiding bailiff to have more influence but, even so, the lord (or his agent) would surely be present to pursue his own financial interests.<sup>63</sup> The real difference, then, between this sort of situation and one in which the court is actually presided over by the lord’s man is not great. In both the judgements are made by the suitors, in both the profits go to the same lord, and in both there is a representative of the lord there to ensure he gets what is owed to him. The issue of court holding is, in a lot of ways, a red herring. Because courts became a key element in English immunities, historians have been interested in discovering their origins, despite the fact that the development in itself need not be seen as that significant. It seems to be an issue more of form than of substance.

The issue of the exclusion of sheriffs and other royal agents is, if anything, even more illusory than that of court holding. It has to be asked what, really, does it matter if such agents could be excluded or not so long as the holders of jurisdictional rights were able to claim what was theirs? As Wormald himself points out, the evidence for sheriffs taking a predatory approach to their offices is far greater after the conquest than before, which may be a sign that royal officers, as Maitland suggested, had little interest in operating within other lords’ sokes because of the absence of profit in them.<sup>64</sup> If this was indeed the case the continental entry prohibition clauses that have sapped so much historiographical ink would have been superfluous. Nonetheless, there are some indications that such exclusions did exist. Oswaldslow’s *Domesday* entry is unequivocal, and though Wormald has cast doubt on its reliability the case against it can only ever be a suspicion. It must remain a possibility that the Bishop of Worcester did indeed have “all render from jurisdiction” (*omnes redditiones socharum*) in his “triple hundred” so that no sheriff could have any claim there, and that the entire shire did indeed testify to this, even if the bishop did have ample opportunity to manipulate the evidence put before the inquest.<sup>65</sup>

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<sup>63</sup> We may be able to see something rather like this in the running of the Archbishop of York’s manor of Sherburn; see Van Caenegem (1990-91), no. 172.

<sup>64</sup> Wormald (1999c), p. 331.

<sup>65</sup> *D.B.* i, 172v; Fleming (1998), no. 1643. Cf. Wormald (1999c), p. 313.

And what would such an exclusion mean in practice anyway? Certainly not much more than what we already know to be true of sake and soke: that the bishop would be entitled to all the proceeds of the hundred court and that royal agents would not be able to extract a penny for their own gain. Statements like *Yorkshire Domesday's* “neither the king, the earl nor anyone else has any customs in all the land of the Churches of St Peter, York, St John, St Wilfrid, St Cuthbert and Holy Trinity” are surely close parallels. Without any mention of sheriffs this seems to constitute a comprehensive exclusion of outside interference. If it did not actually exclude the persons of royal officers it certainly prohibited them from claiming any customs, and this, in fact, is all exclusion clauses were ever meant to do. Even the most thoroughly excluded late medieval sheriff could, surely, have paid a social call on an immunist bishop within his lands, and he cannot have been prohibited from venerating in person even the most highly privileged saint. All exclusion clauses ever did was exclude sheriffs in their shrieval capacity; when acting as mere men they could come and go as freely as anyone else. The only meaningful aspect of the exclusion, then, is the royal agent’s inability to make any claims from the land in question, and this is not far from being what was accomplished through the phrase sake and soke alone. The entire issue has, to my mind, been hopelessly overblown. The presence or absence of exclusion clauses in the continental style can tell us something interesting about Anglo-Saxon borrowings of continental ideas, but it does not tell us much that is meaningful about how legal power was distributed in pre-conquest England.<sup>66</sup>

The historiographical fixation with the trappings of Frankish and later medieval immunities – with their courts and exclusion clauses – has distorted our view of the real object of the discussion: the extent of the legal powers of Anglo-Saxon lords. Wormald’s assessment of the state of Anglo-Saxon justice was that “its profits may have been alienated, but the signs are that its servants were intrusive and its arenas monopolised”.<sup>67</sup> It is not an assessment that, in itself, is in any way objectionable: inasmuch as royal agents of one sort or another seem to have presided over most, if not all, of a structure of “public” courts, it is a rational assessment. Though the terms “monopolised” and “intrusive” are perhaps a little strong, insofar as they represent a comparison with the continental state of affairs they seem reasonable enough. The fundamental problem here is not the assessment itself, but the weight given to its constituent parts. To my mind the

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<sup>66</sup> On continental exclusion traditions, see Rosenwein (1999), pp. 27-96.

<sup>67</sup> Wormald (1999c), p. 332.

alienation of so many of the profits of justice deserves far greater emphasis than the relatively insignificant issues of who presided over the courts and whether a specific privilege excluding royal agents existed. On this point, the eleventh-century lords in question would surely have concurred. There is a reason that we know far more about the destination of fines than mechanisms by which they got there. It is because, quite simply, “immunities” in whatever their form were largely fiscal privileges. They were prized not primarily for the prestige of holding courts but for the additional income that they provided. From a royal perspective, at least part of their aim was quite evidently to give powerful landholders a financial interest in local peace-keeping. It is just plain implausible to argue that such landholders did nothing other than pick up their profits from the local sheriff. Both their own (financial) and the king’s (peace-keeping) interests were served by playing an active role of some sort. In this period, landholding and personal lordship were the main sources of power. Whether as court presidents or simply as the prominent local landholders that they were, it would be very surprising if these lords were unable to exercise a high degree of control in courts substantially made up of their own men.

***g) Conclusions***

The picture that emerges from this analysis of delegated legal powers in late Anglo-Saxon England is nothing if it is not controversial. The almost sixty-year-old consensus on the significance of the offences reserved to the king in II Cnut has been turned on its head. Rather than being insignificant aggravations to minor offences like assault, *griðbryce*, *hamsocn* and *forsteal* have been argued to be central to royal jurisdiction over violence. Though the interpretation of sake and soke followed here is nothing new – being essentially that put forward by Goebel – it has been argued that it ought to be afforded more weight than it generally is. This, after all, was a substantial privilege: the lucrative right to all wergild and *wite* payments. The underlying reasons for its consistently being underplayed have also been addressed. The logic seems to have been that because sake and soke only conferred the profits of justice – and the justice of only emendable pleas at that – they were somehow a minor right. Even taken at face value this is a grievously unfair assessment. Whatever ideas may be held about the nature of jurisdiction, the right to wergild forfeitures is clearly of high economic value. However, it seems skewed by a more general historiographical distortion arising from the idea that the right to hold a private court was in some way radically different and obviously superior to the mere right to profits of justice. The argument put forward here is that this difference, though clearly it does exist, is nowhere near so significant as historians have made it appear. Overall, this section has argued, late Anglo-Saxon monarchs delegated a very large proportion of their legal powers to the great lords and great

churches of their kingdom. They were quite liberal with their older prohibitive rights, particularly those covering theft, but much more careful with their newer protective jurisdiction over violence.

## **Non-Delegated Power**

To get a complete picture of the legal powers enjoyed by great lords and great churches before the Norman conquest, we need to look at more than just the rights that were granted out by the crown. Why, after all, should we expect lords and churches of the highest rank to be entirely beholden to the king for their powers? We need to look at the rather diverse group of privileges that do not fit into this category. These range from rights which are fairly clearly autogenous to those for which there are traditions, but no firm evidence, suggesting otherwise. Broadly speaking there are three categories: immemorial customs, as found in the laws; customs for which there is no claim to great antiquity, nor any sign of royal involvement; and privileges later associated with early royal grants for which there is no evidence. This categorisation, however, though helpful in that it illustrates the heterogeneous nature of these powers, is not massively useful as an analytical tool. There is ample scope for overlap not only between these groups but also between these powers and those that we think of as delegated. The best approach, it seems, is to examine them one at a time. As a perfect example of the mobility of these rights between categories, sake and soke makes a good place to start.

### ***a) Lordship and Soke***

The development of the rights referred to by the term “sake and soke” is an instructive example of how delegated power could, it seems, become a right simply associated with lordly status and exercised without any pretence of a royal grant. Sake and soke, or more accurately a lord’s right to receive the *wite* for offences committed by his own men, originally appears to have been the subject of a royal grant. As Maitland first pointed out, there are a series of charters from the eighth and ninth centuries in which general rights are granted with, among the exceptions, the payment of *angild* – the compensation payable to the victim of an offence. He argued persuasively that this meant that though the king claimed no right to the *wite* in this land, this did not mean that the victims could go uncompensated. Indeed, some of the charters are explicit on the point that nothing “is to go out to *wite*” from the land in question, the clear implication being

that the grantee is entitled to it.<sup>68</sup> The exact significance of the *angild* exemption has been the source of controversy – Maitland thought it implied court-holding, Goebel did not – but the basic interpretation of these charters as grants of *wite* is secure.<sup>69</sup>

This right to *wite*, however, seems to have become a fairly standard right of lordship by the early tenth century. As we have seen, the possibility of lords receiving *wite* and wergild payments is well represented in the tenth-century law-codes and there are no indications that this was as the result of royal grant. Indeed, sometimes, as in I Æthelred's treatment of theft, the lord is represented as the only possible recipient of the fines, the king being excluded.<sup>70</sup> To this we may add a series of laws on lord-changing that assume the right of lords to receive penalties for offences committed by their men. The basic element of these laws is that changing lords when not quit of all charges is not allowed, under a penalty of *wite*, usually to be paid by the new lord. These provisions recur in similar, but not identical, forms in laws of Alfred, Edward, Æthelstan and Edmund.<sup>71</sup> Some of the later iterations of these laws make it clear that, as well as paying a *wite* to the king, the new lord is either to ensure that the old lord is paid by the man in question or to pay up himself.<sup>72</sup> What appears to be going on here is a progression of increasingly severe laws trying to ensure that men cannot get away with committing offences by simply switching to a new lord. The assumption underlying all these statements is, of course, that the old lord was meant to extract the *wite* from his men and his interests – as well as those of justice – would be injured by that man's switching lords whilst he still had *wite* to pay. Interestingly, all lords are here represented as possessing similar rights, or at least there is no sign of a differentiation between changes of lords holding soke and of lords that did not.

The advent of the terminology of sake and soke seems to have reasserted royal control over these rights. As we have seen, the first grants occur in the late 950s but it is not until the reigns of Cnut and Edward the Confessor that they start to become common. Cnut's version of the lord-changing

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<sup>68</sup> Maitland (1897), pp. 274-5. The Sawyer numbers of the relevant charters are listed in Wormald (1999c), p. 315.

<sup>69</sup> Cf. Goebel (1937), pp. 348-54.

<sup>70</sup> I Atr 1:3, 1:7.

<sup>71</sup> Af 37; II Ew 7; II As 22; IV As 4-5; V As 1-1:1; III Em 3.

<sup>72</sup> IV As 4-5; V As 1-1:1; III Em 3.

law is perhaps an indication of this shift. No longer is there compensation for the old lord, instead an injunction that he not dismiss his men until they are quit of all charges.<sup>73</sup> Rather than expecting to gain from his men's misdemeanours, a lord is now cautioned against wriggling out of his own obligations of suretyship. The emphasis is precisely the opposite of that in Æthelstan's and Edmund's laws. I would suggest that this be interpreted as a sign that lordship no longer of itself entailed the right to receive fines – that this was coming once more to require a grant – though it did still entail a duty to stand surety for one's men.<sup>74</sup> What we have here, at any rate, is a picture in which the right to *wites* seems to come very close to being accepted simply as right of lordship, before being reclaimed by the monarchy with the introduction of the term *sake and soke*. This, perhaps, is reflected in the nature of the powers encompassed by that phrase. As we have seen, in the *Leges Henrici* they are primarily rights over a lord's men with only a small, extremely practical, territorial element. *Soke* applies to a lord's own men in almost all circumstances; only when caught red-handed on another lord's land will an offender's fine be destined for pockets other than those of his own lord.<sup>75</sup>

What this reveals is that even rights that were originally as clearly royal as *wites* and *wergild* forfeitures could become, in effect, autogenous rights of lordship, possessed simply by virtue of being a lord. It is, however, crucial to remember that these were not the only legal rights that fit this category. As Æthelstan's laws make plain, all lords had the right to offer limited protection to those fleeing to them and to extract the penalty of their *mundbyrd* for any breach.<sup>76</sup> They also, of course, had the right to the payment of *manbot* should any of their men be slain. These protective powers gave them an important role in feuds to place alongside their rights to prohibitive fines for theft and other offences. These were not insignificant rights. It ought to be remembered that in the early tenth century the king's interest in feud was not much greater than the offering of sanctuary and the protection of his own men, and that a large part of the expansion of this interest was accomplished by taking over the protections of others. Lords, moreover, were inherently more accessible than the king. Their relative proximity may have meant that the impact

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<sup>73</sup> II Cn 28.

<sup>74</sup> III As 7; III Em 7; I Atr 1:10; II Cn 31-31:2.

<sup>75</sup> Hn 27. This distinction was a practically useful one as it gave lords an incentive to police their own lands and a disincentive to interfere with other lords property.

<sup>76</sup> IV As 6:2.

of their right to *manbot* or *mundbyrd* was felt much more strongly than seemingly greater royal powers. They were, after all, major landholders and thus would usually have been powerful men in their own districts. It is small wonder that Edmund was keen to gain his lords' support in his attempts to crack down on feud.<sup>77</sup>

**b) Sanctuary**

If lords had certain rights by virtue of their being lords, so too did churches. *Hamsocn*, *griðbryce* and *forsteal* were not the only elements of the English monarchy's radical tenth-century expansion of its role in violence. The other area where a royal takeover of previously private protective power is detectable is in ecclesiastical sanctuary: what became known as *ciricgrið*. As the analysis of Wulfstan's laws in the previous chapter showed, this royal takeover was ultimately not a complete one.<sup>78</sup> It covered homicidal breaches of *ciricgrið* that took place "within church walls". Non-fatal breaches, which Wulfstan makes clear were entirely possible, resulted in no royal involvement; instead a status-dependent fine was to be paid to the church. All breaches in the protected zone outside the church walls again resulted in status-dependent fines. All churches in the south of England, therefore, exercised protective legal powers over their precincts, just as the king did over his court. All that was missing was the most serious element of their jurisdiction covering killings within the church itself; the rest remained and this remainder should not simply be dismissed. It may be that, like *hamsocn*, *griðbryce* and *forsteal*, the more practically useful – indeed, the more lucrative – element of *ciricgrið* was not that which covered the most extreme offences but the more mundane end of the spectrum. Furthermore, even when thinking in terms of serious feud violence we should not dismiss the church's portion of *ciricgrið*. Killings inside the walls may have been out of ecclesiastical hands, but attempted homicides and woundings were not. According to Wulfstan, even with its heart transplanted to the king, the jurisdiction accompanying standard *ciricgrið* was not inconsiderable.

There is some evidence, however, that certain northern churches did rather better than this, possibly because of some royal grant for which we have no evidence, possibly by truly ancient custom. The main reason to think this is a document known as *Customs of York Minster* which,

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<sup>77</sup> II Em 5.

<sup>78</sup> Above, pp. 84-92.

among other privileges, outlines the special sanctuary rights of York, Beverley and Ripon. Beverley's are covered in the most detail.

The church of St John in Beverley has one mile around it free and quit of all claim to any royal custom or to any monetary renders or to any geld which is paid to the king throughout England. From the beginning of the mile up to the cross of King Æthelstan, if anyone breaks the peace, the penalty will be 1 hundred (*hundreth*) [i.e. £8]; from the cross of Æthelstan to the churchyard [*atrium*], 3 hundreds; inside the graveyard 6 hundreds; inside the church, 12 hundreds; inside the choir, whoever breaks the peace will submit his body to peril, without any possibility of rendering satisfaction by nominated sum of money.<sup>79</sup>

This is, clearly, a description of a gradated sanctuary “banleuca” (that is, a large circular zone of privilege).<sup>80</sup> Ripon's privileges are described in very similar terms, the only major difference being the absence of an equivalent to the cross of Æthelstan: all the banleuca outside the graveyard (*atrium*) is covered by the 3 hundred fine. York's are somewhat different, most obviously there is no outer banleuca, the sanctuary extends only as far as the *atrium*. The compensations here and in the church are the same but the choir is covered by a larger fine of 18 hundreds, the uncompensatable area being a stone chair, known as the *friðstol*, by the high altar.<sup>81</sup>

*Customs*, however, is a problematic document. It is a copy of a fourteenth-century letter from the chapter of York Minster to the chapter of Southwell Minster, purporting to contain the record of an 1106 inquest into the privileges of the Archbishopric of York. In spite of its late date, commentators on *Customs* have been positive about the authenticity of its information.<sup>82</sup> Possibly they have been too kind; certainly A. G. Dickens's conclusion that it is an “authentic account” of this inquest cannot be justified.<sup>83</sup> Though the lists of inquisitors and jurors testify strongly that the inquest took place, was recorded, and that this record was used in preparing *Customs*, there is

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<sup>79</sup> *SourcesYorkHist*, pp. 224-25.

<sup>80</sup> See Lobel (1934).

<sup>81</sup> *SourcesYorkHist*, pp. 221-22, 224-25.

<sup>82</sup> *SourcesYorkHist*, pp. 30-31. Van Caenegem (1990-91), i, p. 138n; Dickens (1952-5), p. 139.

<sup>83</sup> Dickens (1952-55), p. 139.

also clear evidence of later interpolation into the text. Shortly after the introductory matter, we find most of the text of a rather suspicious charter of Henry I.<sup>84</sup> Wherever this text originally came from, it was not *Customs*. Its presence disrupts the document's structure, leading to a two-part discussion of sanctuary, and its emphasis on the canons' rights over the archbishop—who is credited with calling the inquest—seems out of place. The text following the charter, however, has few suspicious signs, makes reasonably modest claims, and its information is partially confirmed by less problematic late eleventh-century texts.<sup>85</sup> This section, which contains the material on Ripon and Beverley, may well represent the text of the original inquest. It must, at any rate, have been in existence in the early twelfth century as it was used in Richard of Hexham's description of his own church's privileges.<sup>86</sup>

The Ripon and Beverley sanctuary schemes given in *Customs*, therefore, are at least as old as the early twelfth century, and we do have earlier evidence that supports an Anglo-Saxon origin for them: Ripon's banleuca, for example, appears in *Domesday Book*.<sup>87</sup> Yet, the pre-Conquest evidence is contradictory. An archiepiscopal estate-survey, dated by W. H. Stevenson to about 1030,<sup>88</sup> whose section on Ripon begins "at Ripon first the space of one mile on each side"<sup>89</sup> confirms the early existence of the banleuca, but the similarly early eleventh-century text that Liebermann called *Norðhymbra Ciricgrið* offers a very different sanctuary scheme. It states that York, Ripon, and Beverley had sanctuaries of the highest rank, killings within church walls being *botleas* (unemendable) and breaches short of killing being compensated by three "hundreds". It adds that churches of lesser rank were entitled to lesser sums, and bans women and weapons from churches, but there is no mention of any banleuca.<sup>90</sup>

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<sup>84</sup> Raine (1879-94), iii, pp. 34-36; Johnson and Cronne (1956), no. 1083.

<sup>85</sup> *SourcesYorkHist*, pp. 210-13, 218.

<sup>86</sup> Raine (1864-65), i, pp. 61-2.

<sup>87</sup> *D.B.*, i, 303v. The distance of a league (1½ miles), a common banleuca measurement in Normandy, is given here in error; see Lobel (1934), p. 124.

<sup>88</sup> Stevenson (1912), p. 14.

<sup>89</sup> Stevenson (1912), p. 18.

<sup>90</sup> *Nor Grið* 1-4.

How can these two documents be reconciled? Wormald's view that *Norðhymbra Ciricgrið* was "obviously . . . a local application of Wulfstan principles" suggests a solution.<sup>91</sup> His argument is a solid one: the text gives northern churches a ranking similar to that found in Wulfstan's work and displays identical spatial principles, using exactly the same phrase, *binnan cyricwagum*, to describe where homicide was unforgivable.<sup>92</sup> If, then, we see this as part of an attempt to recast Northumbrian institutions in a Wulfstania n mould, should we not see it as an attempt that failed? There is, after all, no later sign of this Wulfstania n scheme and the official character of *Norðhymbra Ciricgrið* is far from certain.<sup>93</sup> This seems, to my mind, the most sensible view and its implications are interesting: rather than casting doubt on the antiquity of the scheme in *Customs, Norðhymbra Ciricgrið* serves to strengthen the case. To be able to survive this early-eleventh-century assault, the banleuca scheme would probably need to have been regarded as a long-standing custom. If we add that the structure of fines in "hundreds" is extremely close to that in III Æthelred, a late-tenth-century code for the Danelaw, a tenth-century origin for the *Customs* scheme seems most probable.<sup>94</sup> It is, of course, possible that these Scandinavian fines were added to a pre-existing sanctuary scheme. Its similarity to the sanctuary banleuca with concentric subdivisions described in the eighth-century Irish *Collectio Canonum Hibernensis* could be an indication of this, but it would also be consistent with a tenth-century origin as the *Hibernensis* is known to have been circulating in England at that time.<sup>95</sup>

If, then, we follow what seems to be the most reasonable course and accept these sanctuaries as genuine, how do we interpret them? York is not particularly interesting; it merely claims some very high fines for infractions of its peace, which is what we might expect from the Danelaw. It does, however, limit the uncompensatable area far more tightly than Wulfstan did, allowing compensation even within the choir, and there is no indication of any royal involvement in forfeitures resulting from killings at the *friðstol*. Beverley and Ripon, however, are more

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<sup>91</sup> Wormald (1999a), p. 395.

<sup>92</sup> Nor Grið 1.

<sup>93</sup> Dammary (1994), p. 259.

<sup>94</sup> III Atr 1-1:2.

<sup>95</sup> Wasserschleben (1885), xlv.5.8. For discussions of this text see Hughes (1966), p. 148; Doherty (1985), p. 55-7. On early Hiberno-Northumbrian contacts see Hughes (1971). On the *Hibernensis* in England see Wormald (1999f), p. 238n; Bethell (1971), pp. 116-18. Cf. Bateson (1895), pp. 721-22.

significant. We have large sanctuary banleucas within which, it is easy to imagine, any killing would be interpreted as a breach of the church's peace requiring payment of the fine for whichever zone the killing took place. We might, in short, think that it gave these churches what was effectively a zone of jurisdiction over violence. Unfortunately, interpreting this text is not that simple. Another provision in the same passage gives us cause for doubt:

Moreover, at the three feasts and at Pentecost, all coming and going from their homes have peace; fine for breach of the peace, one hundred. Likewise on the feast of St. John the Baptist and John the Confessor, and similarly on the feast of the dedication of the church of Beverley. All those coming to or going from the two feasts of St. Wilfrid shall have peace, and whosoever infringes this peace, within one mile on the inward journey and one mile on the outward journey, shall be liable to a fine of one hundred for peace-breaking.<sup>96</sup>

The clear implication is that on these particular feast-days the protection was broadened from its usual scope into something more general. This could be interpreted to mean that on every other day the protection of the banleuca applied only to those officially in sanctuary; people simply going about their daily business would not be covered. According to this interpretation, what we have here is a much less significant privilege, one that provided protection only to those who claimed it directly and did not give its holders the right to compensation for any and all misdeeds within their banleucas.

I have elsewhere attempted to unravel the different possible interpretations of these rights, and there I came to the conclusion that it seems most likely that this more limited protection did at some point evolve into the more far-reaching one, effectively becoming a large-scale realisation of Wulfstan's concept of *ciricgrið*.<sup>97</sup> It does seem possible, however, that this was a post-conquest, possibly even twelfth-century, development.<sup>98</sup> The important point here, however, is that either way we look at it the churches possessed considerable legal privilege. Even if the banleucas were limited to the protection of those who actively sought it, we must acknowledge that this makes them some of the most powerful examples of protection that we know of. The

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<sup>96</sup> *SourcesYorkHist*, pp. 224-25; Van Caenegem (1990-91), no. 172.

<sup>97</sup> An interesting parallel to this is Cluny's "sacred ban", see Rosenwein (1999), pp. 1-3

<sup>98</sup> See Lambert (2009b), pp. 131-38.

sheer size of the sanctuaries and of the fines that protected them are almost unprecedented. Indeed, the only possible comparisons are the very similar scale of fines for breaches of *grið* in III Æthelred and the statement in the fragment known as *Pax*, discussed briefly in the previous chapter, that the king's *grið* extends for over three miles around his *burhgeat*.<sup>99</sup> Even if we do not allow these churches the level of quasi-jurisdiction that Wulfstan gave to *ciricgrið*, they were still some of the most powerful protections in the country, matched only by the king himself.

This equivalence to royal prerogative in terms of both nature and degree is important. In a sense, it makes them “immunities” in their own right. This effect is enhanced when we consider these positive protective rights alongside the laconic phrases of exemption found in *Customs* – where Beverley is “free and quit of all claim to any royal custom” – and *Domesday Book* where “neither the king nor the earl nor anyone else had any customs in all the land of the Churches of St Peter, York, St John, St Wilfrid, St Cuthbert and Holy Trinity”. Despite the lack of detail, it is clear that the privileges involved are substantial ones indeed. This does seem to imply the right to collect fines for *hamsocn* and *griðbryce* in addition to sake and soke.<sup>100</sup> When these privileges are considered together – and the churches’ rights in their capacities as lords are factored in – the effect is a very impressive collection of powers in non-royal hands. The protection of the banleucas did not, of course, extend over all the lands of Ripon and Beverley, but why should we expect it to, given that the king’s protection was similarly limited? In possessing large central protective zones as well as a constellation of other legal rights covering almost all offences over a much wider area, Ripon and Beverley follow the pattern of royal jurisdiction closely. Maybe they did not have the right to forfeitures for the supposedly inalienable “major crimes” of *husbryce*, *morð* and arson – though, in truth, a literal reading of both *Domesday Book* and *Customs* would suggest that they did – but the significance of these is, in any case, questionable and in all other respects they must have loomed as large to the local population as the king did on his own property.

### c) *Feud Rights*

We have looked, then, at the rights of both the church and of lords. What remains are the rights of kindreds and, in the case of the Cambridge Thegns’ Guild, groups that mimic the structure of kindreds. It needs repeated emphasis, I believe, that the right to extract a wergild was a legal

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<sup>99</sup> III Atr 1-1:2; *Pax*.

<sup>100</sup> *Forsteal*, if we believe II Cn 15, did not exist in the Danelaw.

privilege like any other, and a powerful one at that. A thegn's wergild of 1200 shillings, as has been pointed out, was five times greater than the highest fixed penalty in the West Saxon legal tradition (the £5 or 240 shilling royal *mundbyrd*), and even a ceorl's 200 shillings is not far short of that. Just like the lord's right to *manbot* and probably also the church's right to fines for certain breaches of *ciricgrið*, these are not privileges that are in any way dependent on a royal grant. They are, rather, exercised as of right, simply by virtue of being a member of a free kindred. Because of this, I think, the right to wergild has often been overlooked as a legal privilege – discussed separately to the types of legal privilege that were delegated from the centre. The regulations of the Cambridge Thegns' Guild are in a somewhat similar position.<sup>101</sup> Though clearly not exercised as of right, there are no signs that the £8 addition to guild members' wergilds was reliant on any royal grant. It seems, rather, to have been imposed on the guild's own authority, which was presumably based on the position of its members as dominant figures in the local nobility.

## **Conclusions**

What, I hope, this chapter has shown is that the legal powers of parties other than the king have been significantly underestimated in Anglo-Saxon England. The critique offered here is essentially a twofold one. Firstly, that historiographical traditions with a focus on continental and later medieval English models for immunities have led to a distorted picture of the late Anglo-Saxon period as one free from any significant examples of private legal privilege. Secondly, it has been argued that a lack of understanding of the protective powers analysed in chapter two has led historians to underestimate the crucial role they played in the tenth and eleventh centuries. The first strand is the more general of the two, as the pervasiveness of continental and later medieval models of immunity has influenced historians' expectations in a number of ways. We find its effects in the weight afforded to issues such as exclusion clauses and court holding rights, which are still seen as the crux of the matter, despite Cam's attempt to introduce rather more subtle criteria.<sup>102</sup> We can also see it in the way that delegated power has been studied in isolation, marginalising legal rights not granted by the king and as a result not to be found in charters. It has also contributed to the second element, in that the strongly prohibitive form that characterised

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<sup>101</sup> *E.H.D.* i, no. 136; Thorpe (1864), pp. 610-13.

<sup>102</sup> Cam (1957), pp. 428-433.

the later medieval immunity has encouraged the misunderstanding of protective legal powers. *Griðbryce*, for example, is interpreted by Hurnard as a minor breach of a uniform peace, through an affray or minor assault.<sup>103</sup> It is seen, in other words, as a breach of the peace in the way it would have been understood in the fourteenth century, or indeed today, rather than a breach of a specifically granted protection limited to its recipient. Indeed, the prohibitive mindset seems so strong that both Hurnard and Wormald have tried, in the face of overwhelming evidence and in two completely different ways, to argue for a royal plea of homicide.<sup>104</sup> The idea that something that could be termed a “state” might regulate violence by some method other than outright prohibition seems to have been a rather difficult one.

Historians have long agreed that the immunity, in the continental sense, did not exist in Anglo-Saxon England – that, in fact, is a direct quote from Helen Cam’s 1957 article on the subject<sup>105</sup> – so in this respect the more recent work is not much more than an extra nail in an already tightly sealed coffin. I do not want to challenge this, but I would question the conclusions we should draw from it. The prevailing, Wormaldian, view is that the absence of these immunities implies something very positive about the degree of centralised royal control of the Anglo-Saxon justice system. Wormald’s negative assessment of the privileges held by the Bishop of Worcester in Oswaldslow is followed by a rather telling question “how should all this affect the view we take of the power of central government under the last Anglo-Saxon kings and their successors?”<sup>106</sup> He eventually answers it as follows:

Maitland’s belief that the immunity had taken a firm hold on the framework of royal jurisdiction before the Conquest has had a significant effect on diagnoses of the Anglo-Saxon body politic in general. One should no longer be satisfied with a simple equation of governmental health and lack of immunities. But even if immunities were to be seen as germs of decline in the king’s capacity to fulfil his judicial responsibilities, the Anglo-Saxon

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<sup>103</sup> Hurnard (1949), p. 304.

<sup>104</sup> Hurnard (1949), p. 300; Wormald (1999e), pp. 340-1.

<sup>105</sup> Cam (1957), p. 433.

<sup>106</sup> Wormald (1999e), p. 330.

picture would give us no grounds for finding a further key to the collapse of 1066 in the debilitation of royal justice.<sup>107</sup>

Despite his protestations to the contrary, Wormald is effectively pursuing the line that lack of immunities equates to strong central government. This is precisely the course that his article takes: his concern is to demonstrate conclusively that continental style immunities with private courts and exclusion clauses did not exist, and then to apply this to our picture of Anglo-Saxon royal government. The result is an emphasis on its strength and centralisation. It may be extremely cautiously worded, couched in the idea that though his findings were not a positive indicator of governmental strength they were able to sweep away a previous negative bias on the subject, but there is no question that this context of governmental centralisation was the one in which Wormald wished his arguments to be interpreted. An examination of what *did* exist in the place of the absent “immunity” was simply not on his agenda.

Though in the context of comparisons with France and Germany the continuing “public” nature of the English court structure may well redound to the Anglo-Saxon monarchy’s credit, for understanding the meaning of legal privileges in an English context it is precisely this issue of what *was* present that matters. Absence of the immunity does not imply the absence of legal privileges and, quite obviously, the significance of these legal privileges does not necessarily depend on how well they measure up to Frankish standards. So what is the alternative interpretation offered here? It is one, first of all, in which court-holding rights and exclusion clauses are not as significant as the right to extract fines. Secondly, it asserts that the rights delegated by the king have been unduly underplayed by historians. Specifically, we have a picture in which the protective powers of *hamsocn*, *griðbryce* (or *mundbryce*) and *forsteal* constituted the core of royal jurisdiction over violence; in which *sake and soke* and *infangeneþeof* account for theft in all its forms, as well as a host of other payments of *wergild* and *wite*; and in which Hurnard’s “major crimes” were nowhere near as significant as she believed. But more than this, it is a picture in which the protective rights not delegated by the king were also of serious legal significance. *Manbot*, *wergild*, *ciricgrið* (particularly the highly privileged sanctuary visible in the north) and the compensations demanded by the Cambridge Thegn’s Guild – all these were serious legal rights to rival anything that the king was able to give away or reserve to himself. There were some royal incursions into such protections, as we have seen, but there seems no reason to believe that as a

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<sup>107</sup> Wormald (1999e), pp. 331-2.

result of this all private protections ceased to be of any significance. There is nothing to suggest that even under Edward the Confessor men in fear could not take advantage of the protection offered by an abbot or an earl.

According to this interpretation, prohibitive rights, mainly over theft but covering other aspects too (importantly, *fihtwite*) were widely shared with lords. Eventually this was done through sake and soke in combination with *infangeneþeof* but previously, it seems, these were all simply regarded as autogenous rights of lordship. On the other hand, newer protective rights, such as *hamsocn*, *griðbryce* and *forsteal* were much more closely guarded by the kings. This contrast between prohibitive and protective rights is worth emphasising. We should not get the impression that the protective powers associated with feud were the archaic ones, with the more prohibitive ideas that are familiar from modern law being the major force for the advancement of royal power. In the late Anglo-Saxon period, at least, it was quite the reverse. We have seen the significance of protective powers with regard to violence in the previous chapter, but the main point I want to make here is that they were distinctly royal, as opposed to the prohibitive innovations involving wergild forfeitures that Wormald emphasises. The indications are that most of these, as in the examples of *reaflac* and the over-hasty marrying of a widow discussed above, were regarded as falling automatically to lords with sake and soke. Indeed, it seems like kings had not, by the tenth century, just alienated to lords the rights to specific prohibitive offences but conceded the principle that all payments resulting from present and future prohibitive jurisdiction, short of the few *botleas* offences, were naturally within the sphere of *wites wyrðe*, later to be soke-holding, lords. The trend with protective rights is precisely the opposite. There we find the crown taking over protective duties that had previously been in the hands of others. Householders and churches, at least, seem to alienate their protective rights to the king.

Lords and churchmen, then, could possess extremely high levels of legal privilege and play major peace-keeping roles in the kingdom.<sup>108</sup> In some especially privileged cases they effectively assumed the role of the king with regard to both theft and violence, possibly becoming even more formidable with the addition of their own autogenous rights. This is an important conclusion, no doubt, but even more significant is the more broad approach that produces it. When discussing legal privileges, I believe, we cannot have a full picture unless we go beyond those things delegated by central government. We should think of such delegated powers as merely one type

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<sup>108</sup> For a recent assessment of the powers of eleventh-century earls, see Baxter (2007), pp. 61-124.

of legal privilege alongside which we should place rights of lordship, the powers of kindreds in feud and ecclesiastical sanctuary customs. All of these are, quite clearly, interrelated, and all are capable of change. Looking at one in isolation can, potentially, lead to a distorted picture. To take the example of Ripon and Beverley again, in the thirteenth century there is a radical change in both their delegated legal powers and in their sanctuary rights. Can one be understood without also looking at the other? I am not convinced it can. What I have argued elsewhere is, in essence, that this change marks a reconceptualisation of legal powers that had previously been understood as part of sanctuary and were henceforth to take the form of an immunity. Looking simply at the delegated powers what we see is a sudden increase in privilege, but if we look at all the relevant forms of legal privilege as well as the wider legal context within which they were exercised we see something a lot less revolutionary: privileges being updated and reformulated but not, ultimately, extended in any very radical sense.<sup>109</sup> In the later medieval period, in the age of *Quo Warranto* enquiries, it may be true that legal privilege is mainly a matter of what powers can be demonstrated by royal charter, but this is certainly not the case in the Anglo-Saxon period and if we are to understand how legal privilege evolved this is something we must take into account.

A focus on protection, then, has yielded some interesting results in looking at the Anglo-Saxon justice system. We have a new model for the way that society as a whole regulated violence based on the idea of a network of protections emanating from thousands of different sources from kindreds to lords to churches to the king, and offering different levels of protection. We might imagine these different degrees of protection as contours that served to guide, however imperfectly, the flow of violence in English society. Within this system of protections we find an active English monarchy erecting its own strategically placed protections in the hope, not of stopping feud altogether, but of providing places of relative safety from which peaceful settlements might emerge. In so doing it not only restricted and regulated feud, it established for itself an increasingly dominant role in the wider system of protections and a greatly expanded jurisdiction over violence. This jurisdiction remained tightly within the control of the crown. Though it was shared with some particularly privileged churches, it was not distributed on the same level as the prohibitive jurisdiction that came to be associated with the words “sake and soke”. Though there are only a few institutions to which this applies, our new understanding of the significance of these protective powers allows us to appreciate the powerful nature of their

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<sup>109</sup> See Lambert (2009b) pp. 131-38.

privileges, putting them on a footing nearly equivalent to that of the king in his own lands. More widely, an appreciation of protection enables us to see the protective powers intrinsic to lordship, feud and ecclesiastical sanctuary as the significant legal privileges that they were. Most generally, appreciating protective power encourages us to escape from our modern prohibitive assumptions about the nature of legal power. In accepting that law can be as much about protecting specific people as it is about prohibiting specific actions our sources make more sense to us. Once we accept this, it is no longer a problem that theft is generally dealt with through prohibition and violence generally through protection; and we no longer feel the need to find prohibitions on violence that are inexplicably hidden in the law-codes. Anglo-Saxon society thus looks distinctly different when we fully appreciate the role played in it by protective power.

## Part Two

# *The Destruction of the System of Feud in Twelfth-Century England*

# *Chapter Four*

## Dating the Royal Crime of Homicide

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### **Introduction**

The second half of this thesis is an assessment of the importance of protective power in the development of royal jurisdiction over violence after the Norman conquest. In the preceding chapters it was argued that royal protections played a central role in the expansion of the king's involvement in violent disputes during the Anglo-Saxon period; the question to be asked in the coming chapters is to what extent this process continued. It is well known that by the thirteenth century homicide was being prosecuted as a serious royal crime – a felony<sup>1</sup> – and that by Edward I's day the English viewed the feuding customs of their Welsh, Scottish and Irish neighbours as positively barbarous, plainly contrary to God and reason, but how this situation came about is less certain.<sup>2</sup> What we are seeking to explain here is, in effect, the official destruction of the system of feud. We have seen how Anglo-Saxon measures may have managed to regulate feud so tightly that in practice it became very difficult to take vengeance, or indeed to kill someone in the first place, without incurring the wrath of royal justice. However, all these previous measures worked within the old system. They may have made feud much harder to conduct but they did not outlaw it, and the protection offered by the kin, as represented by wergilds, lay at the heart of the system. What takes place by the end of the twelfth century, however, is something very different. The system is not one based around a network of protections of varying strengths and from different sources, it is one based on royal punishment of what can, by then, reasonably be termed "violent crime". The next two chapters will explore the "how" and, to some extent, the "why" of this dramatic shift – which amounted, in essence, to the assertion of a royal monopoly of legitimate violence – but before this it is crucial to examine the "when".

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<sup>1</sup> On felony: Pollock and Maitland (1968), ii, pp. 466-67; Milsom (1981), pp. 403-6; Plucknett (1956), pp. 447-54.

<sup>2</sup> MacQueen (1990), p. 92; Stones (1965), no. 33; Davies (1966), pp. 143-45, 154; Davies (1969), pp. 338-40; Otway-Ruthven (1949), p. 262.

So when exactly did this development take place? In the previous chapter Naomi Hurnard's and Patrick Wormald's arguments that it had already taken place before 1066 were analysed and dismissed because of a lack of evidence, so at what point can we confidently assert that homicide was regarded as, and punished as, an offence against the Crown? In answering this question it is easiest to work backwards from a point of reasonable certainty to the more ambiguous evidence. Taking this approach, a good starting point is the text entitled *De Legibus et Consuetudinibus Anglie*, apparently written mainly in 1220s and 1230s and probably only added to by Henry of Bratton in the 1250s, but nonetheless universally known as *Bracton*.<sup>3</sup> This is the formula *Bracton* gives for an appeal of homicide:

A. appeals B. for the death of C. his brother, that whereas the said A. and C. his brother were in the peace of God and of the king at such a place, doing such a thing (or "crossing from such a place to such") on such a day in such a year and at such an hour, the said B. came with such persons (to be named) and wickedly, feloniously, in premeditated assault and against the king's peace given to him, dealt the aforesaid C. his brother a mortal wound in the head with a certain sword (or some other kind of sharp-edged weapon, not, according to some, with a club or a stone or other instrument which cannot be termed a sharp-edged weapon) so that he died of the wound within three days. And that he did this wickedly and feloniously and against the king's peace he offers to prove against him by his body, as one who was present and saw, and as the king's court may award.<sup>4</sup>

Here it is plain that homicide is subject to royal justice, and importantly a number of concepts that could potentially be significant in explaining how this came about are highlighted. The victim has to be stated to have been in the "the peace of God and of the king", whilst the accused has to be said to have acted "wickedly and feloniously and against the king's peace" and, though it is not emphasised as strongly, "in premeditated assault". Wounding was treated in precisely the same terms as long as the wound produced was not a trifling one; scratches and bruises did not qualify

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<sup>3</sup> See Brand (1996), pp. 66-79. Cf. Barton (1993).

<sup>4</sup> Thorne*Bracton*, ii, p. 388.

for treatment as felonies and would have to be prosecuted civilly, as “iniuria” rather than felony, but still in breach of the king’s peace.<sup>5</sup>

The picture we get in the text known as *Glanvill*, composed in the 1180s (though again probably not by the man whose name became attached to the work), is rather less sophisticated, suggesting that considerable refinement took place in the fifty years that followed it. It treats homicide as follows:

When anyone is accused of homicide, the trial is ordered and proceeds according to the distinction [between appeal and presentment] set out above. It should be known, however, that in this plea the accused is not allowed his freedom on giving sureties except as a special royal favour. There are two kinds of homicide. The first is called murder: this is done secretly and out of sight and knowledge of all but the killer and his accomplices...[The second] in ordinary speech is called simple homicide.<sup>6</sup>

This passage makes it impossible to mistake the author’s meaning at the start of the work when he includes *homicidium* in a list of “criminal pleas belonging to the crown” that are “punished by death or cutting off of limbs.”<sup>7</sup> This is the earliest point at which it is explicitly stated that simple homicide, as opposed to murder, was a royal offence. The concepts found in *Bracton* do not have the same prominence in *Glanvill* but they do exist in a way that strongly suggests their importance, with one passage explicitly classifying homicide as a felony and another saying the following on lesser acts of violence: “If lords fail to do justice, then sheriffs also have jurisdiction over brawling, beatings and even wounding, unless the accuser states in his claim that there has been a breach of the peace of the lord king.”<sup>8</sup> This clearly indicates that all forms of violence were, at least potentially, breaches of the king’s peace and therefore punishable by the crown. The idea

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<sup>5</sup> Thorne *Bracton*, ii, pp. 406-8 (on wounding), pp. 437-39 (on *injuria*).

<sup>6</sup> *Glanvill*, xiv.3.

<sup>7</sup> *Glanvill*, i.1-2.

<sup>8</sup> *Glanvill*, i.2 and (on felony) xiv.1.

of premeditated assault is not present here, which probably indicates that it had not emerged as a concept of importance during the reign of Henry II.<sup>9</sup>

Earlier than *Glanvill* the situation is more obscure. If we are to push the origin of this situation back to the early days of Henry II's campaign against crime at the Assize of Clarendon in 1166, we have to be prepared to forgive some terminological laxity.<sup>10</sup> Both here and in the Assize of Northampton of 1176 there is a strong emphasis on three types of criminals: the *robator*, the *murdrator* and the *latro*.<sup>11</sup> If we can believe that the term murderer used here in fact applied to all homicides then we can accept that *Glanvill* is reporting the results of Henry's reforms, but this is a very significant leap. If it is indeed the case then it must draw our attention most urgently to the development of the term "murder" to a stage where it could be used so loosely – something unimaginable in any earlier legal text (and, as we have seen, expressly contradicted in *Glanvill*). The case for finding evidence of royal prosecution of homicide in the *Leges Henrici Primi*, as put by Hurnard, has already been addressed and, though there is other pertinent material there that will be addressed in detail in the next chapter, at face value there is nothing in that document to suggest that simple homicide was treated any differently under Henry I than it was before 1066. We can thus be reasonably sure that in the 1110s, the time when the *Leges Henrici* were written, homicide was not a royal offence but that by the time of *Glanvill's* composition in the 1180s, and quite possibly by the Assize of Clarendon in 1166, this had changed.

If we turn now to the rather sparse evidence for actual cases of homicide, the picture that emerges is rather similar. In R. C. Van Caenegem's *English Lawsuits from William I to Richard I* there are sixteen references to homicide, but only five come from before the reign of Henry II and none of these qualifies as simple homicide. There is an accusation that Jews killed a Christian boy, a slaying on a royal road, the killing of a servant of the king, five brothers wishing to take

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<sup>9</sup> The evidence for the concept of premeditated assault being important before the thirteenth century is, in fact, very slight. As was discussed earlier (ch. 3, n. 24) the appearance of *premeditatus assultus* in the *Leges Henrici Primi* appears so isolated that we might suspect it was a later interpolation. Maitland assumed that the later concept was related to *forsteal* (Pollock and Maitland (1968), ii, pp. 468-69) but there is little evidence to support this.

<sup>10</sup> White (2000), pp. 193-94, places the campaign's origins in 1163. See also Warren (1977), pp. 354-360.

<sup>11</sup> *E.H.D.* ii, nos. 24, 25; Stubbs *Charters*, pp. 170-3, 179-81.

vengeance on an accidental killer, and a discussion of homicide in breach of sanctuary.<sup>12</sup> The evidence grows more plentiful as a result of the controversy between Henry II and Archbishop Thomas Becket about jurisdiction over offences committed by the clergy. A cluster of cases from the period 1162-64 follows the pattern of a cleric killing someone, Henry demanding justice in a secular court, and Becket insisting on ecclesiastical punishment instead.<sup>13</sup> In one of these instances it is clear that the king wanted the man to be executed, but it seems that the charge in this case was actually one of insulting behaviour towards a royal officer who had attempted to assert the crown's jurisdiction.<sup>14</sup> The implication of these cases does appear to be that homicide was a royal offence – the king, after all, evidently saw the incidents as his business – but it is not explicitly stated to be so, and the details of the homicides are all left extremely vague, the focus being on the dispute between archbishop and king.

What does seem clear enough, however, is that writers of miracle stories relating to the decade after the Assize of Clarendon saw *homicidium* as something the king would prosecute. This association with the assize is explicitly stated in the account of the case of Robert “the Putrid” of Banham. The effect of the assize, whether it was Clarendon or Northampton is uncertain, is explained as follows:

By royal command, men who had committed homicide (*virī homicidae*), theft and the like were traced in various provinces, arrested and brought before judges and royal ministers at St Edmunds and put in jail, where, to avoid their liberation by some ruse, their names were entered on three lists on the judges' order.<sup>15</sup>

Robert was one of these imprisoned men but, by the miraculous intervention of St Edmund, his name was not on the lists the following morning and he walked free. We also find reference to a layman, languishing in prison in 1171 after an accusation of homicide, being freed by the agency of the (now martyred) Becket; and a woman who having failed the ordeal for homicide in York Minster was condemned to death only to be saved by intercession of St William in 1177.<sup>16</sup> The

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<sup>12</sup> Van Caenegem (1990-91), nos. 134, 139, 172, 321, 330

<sup>13</sup> Van Caenegem (1990-91), nos. 409, 411, 419.

<sup>14</sup> Van Caenegem (1990-91), no. 411.

<sup>15</sup> Van Caenegem (1990-91), no. 501

<sup>16</sup> Van Caenegem (1990-91), nos. 461, 506.

evidence of the treatment of homicide in practice, therefore, offers little that is solid to suggest royal punishment before Henry II's reign, but it does hint that some change may have occurred as a result of the Assize of Clarendon. This, in turn, suggests that in that document the term *murdrator* used there did indeed refer to all killings, not just what would once have been termed murders. This is about as far as a brief survey of the evidence can take us. We can be fairly sure that a significant change took place between the 1110s and 1180s, and we have some grounds for suspecting that the Assize of Clarendon may have been important in this, but the evidence for precise dating is weak. The nature of our records of actual cases – a sparse collection of incidental references in miracle stories and chronicle accounts – makes any certainty on this issue impossible. We do, however, have another source of information in the Pipe Rolls, the records of payments made and debts owed to the Exchequer. It is to these, and the 1130 Pipe Roll in particular, it being the sole surviving roll from before Henry II's reign, that we now turn.

## Homicide, Pardoning and the Pipe Rolls

The Pipe Roll of 1130 is potentially extremely important for understanding how homicide was treated under Henry I. Historiographically, however, its evidence is caught up in the account of the development of the king's pardon for homicide put forward by Hurnard. Because of her belief, as discussed in the first chapter, that homicide was already a royal crime under the Anglo-Saxon kings, Hurnard assumed that this remained the case under Henry I and did not try to use the Pipe Roll evidence in this regard. She did, however, use it to argue that the king was pardoning homicide in 1130, and this has obvious implications that need to be explored here. This is the passage, from the Buckinghamshire section, that Hurnard believed to be crucial:

*Willelmus filius Rogeri de ponte Alerici debet ii marcas auri ut habeat pacem de morte Willelmi del Rotur. Et siquis eum appellauerit defendet se legali lege.*<sup>17</sup>

William FitzRoger of "Pont Aleric" owes 2 marks of gold so that he may have peace regarding the death of William del Rotur. And if anyone appeals him he will defend himself legally through the law.

To Hurnard this was evidently a pardon for the royal crime of homicide:

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<sup>17</sup> PR 31 HI, p. 102.

The novelty here lies in the fact that the homicide is not fully assured of remission or commutation of his crime. He is given peace of it by the king but is still liable to be appealed and has to undertake to answer the appeal in court ... and if the appeal succeeds the appropriate punishment will presumably follow unmitigated by the pardon. Since appeal is not affected, it is evident that prosecution of another kind is remitted here, and this must be prosecution at the suit of the king.<sup>18</sup>

Following Hurnard's logic, then, we have a situation in which the king was prosecuting homicide in such a manner that a pardon of his suit alone was worth the substantial sum of 2 marks of gold (from elsewhere in the same document it is clear that this was equivalent to £12).<sup>19</sup> In Hurnard's reading, this payment was for readmission to a general royal peace that had been forfeited through the killing. FitzRoger is regaining his friendship with the king, having the royal suit against him dropped, but is still liable to be prosecuted by the kinsmen of his victim.

There is, however, another possible interpretation. Might this not have been a grant of protection? In the Anglo-Saxon period we would certainly not be expecting a royal suit for homicide, but we might expect a man frightened of vengeance at the hands of the kinsmen of a man he has killed to flee to the king and attempt to obtain his peace – his *handgrið*. Might this not be what is happening here? The king could be giving FitzRoger his personal protection against the vengeance of del Rotur's kinsmen, but without prejudicing their right to sue him for wergild instead. The same sort of explanation could perhaps be applied to the other two passages that Hurnard took to be pardons for homicide. We hear, in the section on Staffordshire and Gloucestershire, of certain Ernaldus FitzEnisand paying 10 marks of silver so that he might have peace regarding the men he killed; and rather more obscurely, in Devon, of a certain "Roger de Mol." who seems to be offering 200 marks of silver so that he, his brothers and his men can have peace regarding the man they killed.<sup>20</sup> In neither of these cases is there any mention of a right to appeal but it is possible that the peace they are purchasing is protection from vengeance.

The language, I think, is important here. Why should we be discussing peace at all? The notion of a man forfeiting a general peace through crime is not one that is well established for this period

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<sup>18</sup> Hurnard (1969), p. 16.

<sup>19</sup> PR 31 HI, p. 37.

<sup>20</sup> PR 31 HI, pp. 75, 156.

and, as Julius Goebel argued with some vigour, it is not something that we should assume lightly. In his view there is “small room for an antic theory of king’s peace” under Henry I: though the specific protections known as peaces possessed a legal reality in the procedures and penalties designed to enforce them, this is “in contrast with the merely literary or political use of the word peace when the compiler [of the *Leges Henrici*] remarks that the demesne revenue of the crown is for reasons of peace, or that for reasons of peace the big crimes are more severely punished.”<sup>21</sup> This view, however, is in direct opposition to that of Hurnard, who sees the Pipe Roll passage as an early example of something that becomes well known thereafter. On the specific point of peace, however, her case is rather weak. The pardons she quotes from Pipe Rolls of Henry II’s reign do not use the word at all; rather, we find men paying simply for the right to defend themselves if they are appealed, with no explicit mention of a pardon being made, let alone the concept of restoration to the peace.<sup>22</sup> *Glanvill*, however, does refer to outlaws being “restored to the peace”<sup>23</sup> and in *Bracton* the theory is quite explicit: in pardoning an outlaw a king may “admit him to his peace outside of which he had earlier been placed.”<sup>24</sup> Yet these texts are, of course, from a period when the idea of a general king’s peace which any significant act of violence breached had, as we saw above, been established. Reading backwards from them in our interpretation of earlier evidence is, therefore, problematic.

The idea that our text was a royal protection has the merit of according with earlier ideas and not presuming a theory of peace for which there is little evidence at so early a date. It is not, however, without its problems. If it was only a grant of peace, why mention the homicide at all? It would be an unnecessary detail. The specificity as to what prompted the grant of peace could thus be read as evidence that it was a pardon for those particular actions rather than a general grant of protection. There is an alternative interpretation, however. This could be a protection that related only to a specific incident, the king preventing further violence in a particular feud, in a way similar to that envisaged by the declaration of the king’s *mund* in II Edmund.<sup>25</sup> We might, in fact,

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<sup>21</sup> Goebel (1937), p. 434. See also Brunner (1992), pp. 14-36.

<sup>22</sup> Hurnard (1969), p. 18; PR 12 HII, p. 57; PR 23 HII, p. 39.

<sup>23</sup> *Glanvill*, vii.17.

<sup>24</sup> Thorne *Bracton*, ii, p. 369.

<sup>25</sup> See above, pp. 67-70.

want to look at this as a protection parallel to that of the protective writs found in much later Scottish formularies. Harding describes a number of these, the key feature of which was that they took people who had killed in self-defence under full royal protection (*sub firma pace et proteccionem nostra*) directed specifically against the kinsmen of the slain and specifying the highest penalties for breach.<sup>26</sup> These, I think, demonstrate just how close protection and pardon could be. Just as a pardon would remove the threat of afflictive sanctions from royal justice, a protection was meant to remove the threat posed by other parties who felt aggrieved by a killing. Indeed, it is possible to look at these elements as the two halves of a full pardon for a killing. We might think, indeed, that this is precisely what Hurnard's text represents. Given that someone bearing the name William del Rotur would most probably be able to claim some French ancestry, the king may have been pardoning his rights relating to the murder fine (discussed in more detail in the next chapter) and simultaneously protecting FitzRoger from the possibility of violent vengeance whilst allowing the slain man's family the possibility of peaceful redress. We may, then, be able to see in the Pipe Roll evidence both the origins of a pardon for homicide, though not quite as Hurnard thought, and the use of royal protection in a feud.

We can support this interpretation by looking at the "amercement". As is well known, in the period following the conquest, the old fixed sums of *bot* and *wite* cease to be used. Offenders instead theoretically forfeited everything they had to the king, then paid him a flexible sum of money, an amercement, for his mercy. This, argued Maitland, was a major step forward from the old system – an "advance in the theory and practice of punishment" – because it allowed account to be taken of the offender's particular circumstances and did not insist on fines that would be impossible for many to pay.<sup>27</sup> That such a change took place in this period seems undeniable: the example of the 35 marks, just over £23, paid for *heimfara* (i.e. *hamsocn*) in the 1130 Pipe Roll looks a lot more like an arbitrary amercement than a multiple of the £5 penalty specified in the laws.<sup>28</sup> Likewise, the seemingly arbitrary sums paid *pro pace fracta* (as well as the 10 marks noted above, sums of £9 and 6 pence, 13 marks and 20 marks are also listed)<sup>29</sup> are consistent with

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<sup>26</sup> Harding (1966), pp. 122-3.

<sup>27</sup> Pollock and Maitland (1968), ii, p. 514.

<sup>28</sup> Hn 35:2, 80:11a.

<sup>29</sup> PR 31 HI, pp. 11, 45.

amercement, not with either fixed £5 penalties nor the supposed unforgivable nature of the *handgrið*.

Amercements became institutionalised over time, to the point that in the thirteenth century, according to Maitland, they were “being inflicted right and left upon men who had done very little that is wrong” so frequently and for amounts so small that, in his assessment, “most men in England must have expected to be amerced at least once a year.”<sup>30</sup> By this point the idea of being in mercy was a mere fiction – all understood the term amercement simply to mean an arbitrary fine – but this was not necessarily the case in 1130. Indeed, it seems likely that the theory still stood that these were indeed payments for mercy, in which case the amercement effectively constituted a pardon. Why, then, should we believe that the form *ut habeat pacem* indicates only a pardon when pardons were, in effect, frequently conveyed through the far simpler means of the amercement? Far more likely, it seems to me, is that these words about peace meant something specific, something different to the usual amercement, and that “something different” was in all probability a specific royal protection familiar from the Anglo-Saxon period.

What clinches this interpretation, I believe, is the rarity of the formula used. We do not find people in 1130 buying “peace” for anything other than homicide. When they make payments – amercements – for wrongdoings, that is all they do: they do not buy “peace”. For example, in Lincolnshire we find the sheriff rendering account of 35 marks of silver for a certain *heimfara* and 10 marks *pro pace fracta*, as well as “Siwatus de Hoilanda” owing 12½ marks for a false plea.<sup>31</sup> Similarly, in the section on Staffordshire and Gloucestershire, we find Roger son of “Elyon Scutellar” rendering account of 7 marks of silver “for the thief he hid” but being pardoned 5 marks by royal writ on account of his poverty.<sup>32</sup> There is no buying of peace other than for homicide, which is surely suggestive of a context of feud and protection, not one purely of purchased mercy as in these cases. It seems most likely, then, that peace still remained specific – something that could be granted to individuals or to groups, not something that covered the realm as a whole. This certainly seems to be what is implied by the payment of 20 marks by “Hugo de Luuetot” for

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<sup>30</sup> Pollock and Maitland (1968), ii, p. 513.

<sup>31</sup> PR 31 HI, p. 112.

<sup>32</sup> PR 31 HI, p. 73.

breach of the peace *super homines* of Roger de Mowbray.<sup>33</sup> Clearly at some point Roger de Mowbray's men had secured a royal protection, perhaps because Roger's father had only just died in 1129 and he, probably still a boy, was in a vulnerable position.<sup>34</sup>

A grant of peace, then, was not equivalent to a pardon in this period, it was something extra. It did not necessarily of itself mean that any royal penalty was remitted, it meant that the grantee received royal protection. If we are to look for unequivocal pardons for homicide in the Pipe Roll of 1130 we should be looking not for grants of peace but for amercements; that is payments described simply as "for homicide". These do, in fact, exist. Although they are not mentioned by Hurnard, there are four clear examples of precisely this sort of payment in the 1130 Pipe Roll: in the Yorkshire section Nigel of Doncaster accounts for 20 marks for the forfeiture of his sons, who had killed a man; in Carmarthenshire "the men of Catmaur" owed 40 shillings for killing a man of the Bishop of Salisbury; in Devon Stephen son of Erchambald owed 10 marks for the killing of a man of William FitzOdo; and in Cornwall six men are listed as owing a total of 214 shillings and 2 pence for the killing of the "sons of Tochi."<sup>35</sup> From these payments, which seem quite clearly to be amercements, we might indeed suspect that the crown was prosecuting homicide by 1130.

The problem with these entries is their terse nature: we cannot be sure that these are amercements for simple homicide rather than being included here for some other reason that is otherwise unmentioned. For example, we might consider the possibility that, as with the killing of William del Rotur, some of these were instances of *murdrum* where the killers were known but were also wealthy and influential enough to secure pardons rather than face death or mutilation. In the case of the sons of Tochi this seems almost certain as Geoffrey of Monmouth refers to them as "frankigene", and in the Devon case it is hardly unlikely that the man of a lord named William FitzOdo might have had some French blood in him.<sup>36</sup> In Wales and Yorkshire, however, the murder fine was unknown, but there are possible alternative explanations for both of these. Our Yorkshire example might well be concealing something as its concern is solely with the amercement for Nigel of Doncaster's sons' forfeiture; we are told this forfeiture was related to a

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<sup>33</sup> PR 31 HI, p. 11.

<sup>34</sup> *DNBonline*: Hugh M. Thomas, "Mowbray, Sir Roger (I) de (d. 1188)" .

<sup>35</sup> PR 31 HI, pp. 32, 90, 156, 159-60.

<sup>36</sup> Padel (1984), p. 21.

killing but this is just an incidental detail, the killing may only have been the salient point of a more complex story. The Welsh example could be regarded as exceptional; a penalty applied for killing a man of Roger of Salisbury who, because his master was the king's chief administrator, we may reasonably suspect to have been acting as an agent of the crown.

The evidence, then, shows that amercements for homicide were being paid to the treasury by 1130 though we cannot be certain exactly what this means. If we look at Pipe Rolls from Henry II's reign we find that this remained the case, though the number of cases in the 1130 roll does seem unusually high by comparison.<sup>37</sup> If this was, in effect, discovered murderers buying mercy, this again points us towards the murder fine as a potentially important mechanism for the criminalisation of homicide. This will be examined shortly. The other option is that homicide was already a royal offence at this point. This is, of course, a possibility but on this evidence it looks rather a weak one. Indeed, this analysis has tended to suggest the continued relevance of the old Anglo-Saxon system of regulating violence. The *ut habeat pacem* formula discussed above seems clearly to have indicated that protection was at least part of what was being paid for. Furthermore, the context of feud is quite explicit in the case of the sons of Tochi, who we know from other sources to have been slain in revenge for their killing of a certain Osulf, and it is similarly clear in another entry in which the treasury receives 20 shillings for a concord regarding a killing.<sup>38</sup> This latter example, though admittedly from Wales, does at least suggest that not every homicide was subject to a royal penalty. What these considerations appear to indicate is that the system of feud and protection identified for the Anglo-Saxon period remained current in 1130. It is, at any rate, not unreasonable on the basis of the evidence examined here to think that a specific grant of the king's peace remained a valuable commodity, and this would make little sense if killers would, regardless of whether they breached such protections, expect to face execution or mutilation at the hands of royal justice. Whether this continued into Henry II's reign is hard to tell. The Pipe Rolls do not show it to be so, but these are terse sources primarily concerned with shrieval accounting, not the law, so the argument from silence carries little weight. Indeed, though they contain some useful information bearing on the nature of royal justice, the Pipe Rolls – simply because their legal content is incidental to their main purpose and

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<sup>37</sup> PR 5 HII, p. 27; PR 6 HII, p. 28; PR 7 HII, p. 22; PR 8 HII, p. 40; PR 9 HII, p. 30; PR 11 HII, p. 76; PR 20 HII, p. 53; PR 21 HII, p. 43; PR 23 HII, p. 90.

<sup>38</sup> PR 31 HI, p. 89. On the sons of Tochi, see Padel (1984), pp. 20-27.

thus limited to the most exceptional cases – can only ever provide hints, not a comprehensive picture.

## Conclusion

The evidence for the period from the Norman Conquest to the early thirteenth century, then, shows a fundamental change in the legal status of violence and of homicide in particular. By the time *Bracton* was written all homicides and all the more serious cases of violence (involving wounding as opposed to mere bruising) were considered felonies, with the felon's chattels forfeiting to the king and his land escheating to his lord after a year and a day in the hands of the crown. The felon, of course, faced execution if he were caught and outlawry if he managed to escape.<sup>39</sup> What we have is a system in which the crown effectively prohibits all serious violence and, without prejudicing the rights of lords to too great an extent, reserves to itself the right to inflict punishment and profit from doing so. The contrast with the system of protections that operated in 1066 is stark: the old protection of the kindred as expressed in the wergild is now meaningless, the *manbot* and *fihtwite* are obsolete, and all the other protections belonging to the king, the church and the nobility are completely overridden. In theory there was nobody, other than resisting outlaws, whom you could attack and kill without suffering this fate: factors which had been at the core of the regulation of violence – the victim's family and status, the time and location of the killing – were now meant to be utterly irrelevant. Indeed, in the thirteenth century it appears that this was, to a significant degree, true in practice as well as in theory.<sup>40</sup>

The change was a substantial one, but precisely when it came about remains uncertain. Most of the essentials had shifted by the time of *Glanvill* but this was a dynamic process and further shifts can be seen in *Bracton*, just as it seems likely that much of what was to come was already present in the Assize of Clarendon's measures on *murdrators*. Earlier Pipe Roll evidence does not show any conclusive signs of royal jurisdiction over simple homicide. What it does do is show, simultaneously, that in 1130 royal grants of special protection remained a valuable commodity in the context of feud – something that is not compatible with a general prohibition of all homicide – and that some killings resulted in amercements being paid to the king. It has been suggested here

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<sup>39</sup> Thorne *Bracton*, ii, pp. 362-66; Pollock and Maitland (1968), p. 466.

<sup>40</sup> Hyams (2003), p. 265. Though it ought to be noted that private war amongst the upper nobility continued throughout the Middle Ages. See Kaminsky (2002), pp. 74-79.

#### *Chapter Four – Dating the Royal Crime of Homicide*

that an explanation for this might be that the killers, having slain non-English victims, were liable for death or mutilation and were purchasing the king's mercy – yet another indication that the murder fine may have been highly important for the expansion of royal jurisdiction over homicide. The shift from the time of the conquest to that of *Bracton*, then, was a great one indeed, though its timing cannot be tied down very certainly. What hints there are do suggest that the Assize of Clarendon was important, and there are also a few signs that the murder fine may have had a significant role to play. The next chapter takes these hints further and looks in detail at a number of possible ways of understanding this shift, analysing the role that protective power played in it.

## *Chapter Five*

# Murder, Infamy and the King's Peace: The Legal Roots of "Violent Crime"

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### **Introduction**

We know, then, that by the late twelfth century the position of homicide had changed radically: it had gone from being a matter regulated by a system of protections and compensation payments that involved kindreds and lords but not necessarily the king, to something that *Glanvill* could reasonably term a "criminal plea belonging to the crown".<sup>1</sup> As the previous chapter's analysis showed, the evidence suggests that this shift happened during the reign of Henry II, and that it may well have been associated with the 1166 Assize of Clarendon's measures targeting *murdrators*. The questions at issue in this chapter and the one that follows are how and why this happened. Here the focus is on specific legal changes and the impact that these had on the treatment of violence, whilst in the next chapter the focus is broader, looking at the European ideological undercurrents that may have influenced – possibly even driven – these shifts.

Before we can do any of this, however, we need an appreciation of the rather unusual historiographical context within which historians approach the emergence of full royal jurisdiction over serious violence. As shall be seen, the state of research is currently such that even a detailed examination of the literature does not yield a clear answer as to how this came about. This is, I think, to some extent a result of a lack of recent scholarly interest in the subject, which has allowed a number of contrasting interpretations to coexist with very little attention paid to their contradictions. This chapter's first task, then, is to bring a degree of clarity to the confusion here, unravelling the more involved arguments and drawing out their central strands for analysis. Once this is done it will turn to look at the main theories in detail, evaluate their relative merits and, in so doing, assess the role that protective power played in the post-conquest evolution of royal jurisdiction over violence. Was it, as in the Anglo-Saxon period, the crucial concept, central to the

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<sup>1</sup> *Glanvill*, i.1-2.

process of change, or were the dynamics of post-conquest legal development significantly different to what had come before?

## Historiography and the King’s Peace

The key questions here, then, are as follows: was there a continuation after 1066 of the Anglo-Saxon process of expanding royal protections, with English kings increasing the scope of their protections so that they covered a greater and greater proportion of violent incidents? And, if this was so, can we see this process eventually resulting in royal protection covering everyone at all times, thus making all violence the concern of the king? Given the language noted earlier in *Bracton* and to an extent also in *Glanvill*, where it is apparent that homicide and violence could be prosecuted as breaches of the king’s peace, it is an intuitive theory. Indeed, it makes a good starting point for a discussion of the historiography, as it is identical in its essentials to Sir Frederick Pollock’s assessment of the origins of the king’s peace as given in a public lecture in Oxford in 1884. Pollock saw the king’s peace as being “enlarged in the age immediately preceding the conquest, and tending to become the general peace of the kingdom”<sup>2</sup> whilst after 1066:

The various forms in which the king’s special protection had been given disappear, or rather merge in his general protection and authority: for the details that occur in the compilations bearing the names of Henry the First and Edward the Confessor, welcome as they are by way of supplement to earlier documents, are mere echoes of traditions no longer living.<sup>3</sup>

On the question of precisely how such a merger took place, however, answers are much less readily available. Pollock offered no evidence and very little by way of theory; the closest he comes to an explanation of quite how a system of specific protections or peaces could turn into one with a single, general peace is to suggest the following: “We may imagine a transition period in which the judges were ready, on some very slight suggestion, to presume as between the king and the sheriff that the king’s peace had been specially granted to the plaintiff, or to a man unlawfully slain.”<sup>4</sup> In effect, the Pollock model is that shortly, maybe even immediately, after the

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<sup>2</sup> Pollock (1890), p. 83.

<sup>3</sup> Pollock (1890), p. 87.

<sup>4</sup> Pollock (1890), p. 84.

Norman Conquest all the old Anglo-Saxon royal protections were merged and expanded into a general peace through what were essentially administrative means. Rather than requiring stringent proof that the king’s protection had been granted to the victim of a crime, royal justices were happy to accept this was the case on the plaintiff’s word, even when the evidence was overwhelmingly to the contrary. Because of this process, Pollock implies, the fiction swiftly emerged that the entire population was perpetually in the king’s peace.

The weakness of Pollock’s argument is in its lack of detail. His article, as we shall see, has been highly influential but it remains the transcript of a public lecture whose aim was to present a theory to a non-specialist audience rather than to convince sceptical legal historians. What Pollock does is describe the wide variety of royal protections available in Anglo-Saxon England and suggest that they were indeed the root from which the later medieval king’s peace sprang. Aside from the few words quoted above he offers no explanation, and for even these words he offers no supporting evidence. As such, it is not surprising that, half a century later, Julius Goebel thought his assertions were vulnerable to attack. Goebel was perfectly happy to accept that numerous royal protections existed under the Anglo-Saxon kings, his scepticism was directed at the idea that these combined into a single general peace in the Anglo-Norman period. His words are worth quoting at length:

No one of these measures is an expression of a single theory; each has its own rationale: the *murdrum* is a quasi-military defensive; the protection of bishops and monasteries is connected with ecclesiastical prerogative. Royal rights on highways are emphasized for reasons of trade and moving troops. The poor and abject are protected for reasons of Christian charity. Compared with gestures at coronation by the Conqueror, and by his son Henry’s promises in support of general peace, that can be taken as no more than an earnest of their good intentions, these objectives had legal immediacy and fiscal measurability. The protections were one of many devices for attaining general public security but they cannot be taken to be the first extensions of an elastic theory of manifold peace. On the contrary, the king’s *mund* is something that cannot be lightly asserted. In Henry’s time, if allegations of breach are made they have to be proved – and

not to the other party but to the judge. In other words, the sphere of protection at large is governed by conservative considerations.<sup>5</sup>

Goebel is here making three of the main points of his critique of Pollock’s theory. Firstly, that the evidence for this period is one of disparate protections aimed at specific and limited objectives and that, therefore, they cannot be seen as unifying into a single peace. Secondly, that statements such as that in Henry I’s coronation charter – “I establish a firm peace in all my kingdom, and I order that this peace shall henceforth be kept”<sup>6</sup> – cannot be taken, as they were by Pollock, to signify the establishment of a general peace with any legal meaning.<sup>7</sup> A running theme in Goebel’s work is that we need to be able to identify a mechanism of enforcement if we are to view any statement as practicable law; because there is no such mechanism for Henry’s statement it is viewed by Goebel as a mere expression of intent similar in nature to Anglo-Saxon rhetoric about *frið*. Finally, he asserts that judges were conservative in their definition of protection; they demanded that it be proved rigorously rather than, as Pollock suggested, accepting that it applied on even the most flimsy of pretexts.

The main problem with Goebel’s critique is that it is incomplete. When it was published in 1937, *Felony and Misdemeanor* was envisaged as the first in a set of three volumes, but Goebel subsequently abandoned the project. As such, we can never know how Goebel intended to explain the existence of what looks very much like a general king’s peace in *Glanvill* and *Bracton* – he simply does not tell us. In effect all that he offers us on this particular subject is an attempted demolition of Pollock’s theory; we get nothing to put in its place. We can, of course, be reasonably confident that Goebel believed the general king’s peace emerged under the Angevin kings, and we may extrapolate from his arguments on the earlier period that he did not think specific peaces played any significant role. However, these conclusions have only partially penetrated modern historiography. Perhaps because of its misleading title (*Felony and Misdemeanor: A Study in the History of English Criminal Procedure* in fact says little about either felony or misdemeanour, and focuses more on Frankish criminal procedure than on English), the book has not enjoyed the widest of readerships. Those who know it regard it as a true classic –

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<sup>5</sup> Goebel (1937), pp. 431-33.

<sup>6</sup> Hn Cor 12.

<sup>7</sup> Garnett (2007), pp. 115-16, takes a similar line to Pollock on this issue (though approaching it from a very different angle).

according to Patrick Wormald it was “surely the twentieth century’s best book in English on early medieval law”<sup>8</sup> – but it remains obscure to many. A number of more recent scholars who have looked at the king’s peace have followed Pollock’s theory uncritically, ignoring Goebel’s objections. Jack K. Weber in his “The King’s Peace: A Comparative Study” clearly believed that the general peace arrived with the Normans;<sup>9</sup> David Feldman, a legal scholar investigating the roots of modern binding over powers in the medieval king’s peace, thought that by the time of Henry I the king’s peace “extended generally, but was enforced particularly strongly in his vicinity”;<sup>10</sup> indeed, even seasoned historians like David Carpenter are capable of baldly stating that the king’s peace became general with the Norman Conquest.<sup>11</sup> The current historiographical situation is thus rather confused.

Another reason for this confusion is that the king’s peace is hardly a hot topic in modern scholarship. Despite Goebel’s critique, the basic account of specific peaces expanding into a single national peace is regarded, by some at least, as a well-known fact in need of little further illumination. Paul Hyams was content to note that “this phenomenon of the twelfth century is covered in all the modern books”<sup>12</sup> before moving on to a discussion of Alan Harding’s work on charter forms (to which we shall come shortly). For Hyams, this clearly appeared so firm and so well established that he felt no need even to mention which “modern books” he was referring to. John Hudson’s *The Formation of the English Common Law* seems a likely candidate, but in fact the treatment of the issue there is limited to a single paragraph. Hudson states, “the development of a general king’s peace extending throughout the realm is clear in Henry I’s coronation charter, though it may have begun well before 1100 or even 1066.”<sup>13</sup> He then, however, goes on to treat the development as, at least in part, an ideological one related to the continental Peace Movement; his assessment of its practical effects is as follows:

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<sup>8</sup> Wormald (1999a), p. 25.

<sup>9</sup> Weber (1989), pp. 135, 149.

<sup>10</sup> Feldman (1988), p. 106.

<sup>11</sup> Carpenter (1990), p. 106.

<sup>12</sup> Hyams (2003), p. 224.

<sup>13</sup> Hudson (1996), p. 82.

However, the assertion of the strong peace was also practical. The king and his officials were intent on enforcing peace, and peace hence came to be associated with them. One of their methods was to use the death penalty, or at the very least the example of punishment by life or limb. Another was prosecution by royal officials. Offenders, most notably culpable killers and thieves were subjected to a persecuting regime.<sup>14</sup>

This account, in fact, does not agree with Hyams’s assertion that “starting in part from those grants of special peace discussed earlier, the king’s peace grew to cover all the king’s subjects ... and all inhabitants of the realm.”<sup>15</sup> Indeed, what Hudson appears to be saying is that the general king’s peace was, in essence, no different to the Anglo-Saxon concept of *frið*: primarily an ideological notion of good order that prompted kings to adopt practical measures for the enforcement of order, and with no special link to the concept of protection.<sup>16</sup> Furthermore, we get no hint that the king’s peace ever became more than this, that it ever became a practically applicable legal concept rather than an ideological statement of intent. There are different pictures being presented here – Hyams’s corresponding roughly to the perspective of Pollock, and Hudson’s to that of Goebel – but the issue is so marginal to the authors’ main concerns that these differences are either just not remarked upon or, possibly, went entirely unnoticed. The king’s peace, it seems, has long been regarded as a base that a general work has to touch briefly for the sake of completeness, but one which requires no prolonged attention.

There are, then, two major competing interpretations here: that which sees the expansion of protection into a general peace as key, and that which regards peace as an ideological umbrella beneath which a number of essentially unrelated procedural innovations were the effective means of bringing about change. What these interpretations represent are the prevailing historiographical trends, and these trends, as this brief survey has shown, are characterised by never having been fully stated or investigated. They are, in essence, two views of the significance of royal protective power in the development of the royal crime of homicide, with Pollock’s model stressing its central role and Goebel’s largely denying it any importance. This is, of course, precisely the issue with which this chapter is concerned and much of the discussion that follows

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<sup>14</sup> Hudson (1996), p. 83.

<sup>15</sup> Hyams (2003), p. 224.

<sup>16</sup> *Frið* is discussed in more detail below, pp. 202-204. See also Goebel (1937), pp. 423-24, 428-29.

will therefore necessarily involve assessing the relative merits of these two competing interpretations. It is important, however, to note that – as a result of both Goebel and Pollock failing fully to state and support their theories, and indeed the lack thereafter of any coherent scholarly debate on the subject – these interpretations should be thought of only in the broadest of terms. There are several different ways of arguing for the importance or irrelevance of royal protective power. The key here, clearly, is in explanations of the process of change. Pollock made the *prima facie* case for the generalisation of the king’s peace well, but he was vague on the specifics of how it took place. Goebel’s critique of these ideas, likewise, focused on undermining the idea that such a process was likely or possible. What this chapter looks at are theories as to the specific legal developments that brought about the criminalisation of violence .

On Pollock’s side of the debate, where the general king’s peace of the thirteenth century is regarded as the result of an expansion and merger of specific eleventh-century royal protections, there are essentially three different theories for the processes involved. One is that of Pollock himself, in which judges allowed, even encouraged, litigants to allege breaches of the peace in their claims regardless of the actual circumstances of their cases. Another, alluded to earlier, is Alan Harding’s attempt to identify, in a Scottish context, the expansion of royal protection with protection granted to land by charter. The suggestion is that through its grant by charter the king’s peace came to predominate to such a degree that it was, in effect, general, and that trespass in Scotland, and quite possibly also in England, developed out of a single action for breach of this general protection.<sup>17</sup> Finally, there is the idea that the murder fine, in giving royal justice an interest in all cases of homicide unless it was actively proven that the victim was English, paved the way for royal jurisdiction of a more general nature. As Hessel E. Yntema, who first suggested this theory in 1923, expressed it “the murder law supplied a significant means, as well as a source of jurisdiction, by which central authority was enabled to break down the system of private compositions for homicide”.<sup>18</sup> As we have seen in the previous chapter, there are enough hints both in 1130 Pipe Roll and in the Assizes of Clarendon and Northampton to suggest strongly that such an interpretation might be correct.

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<sup>17</sup> Harding (1966).

<sup>18</sup> Yntema (1923), p. 162.

The arguments on Goebel’s side of the debate, on the other hand, are less easy to quantify. The interpretation as a whole is based on a clear assertion of the need for concrete evidence of procedural change and an intense distrust of the sort of vague notions about merging and expanding peaces visible in earlier scholarship. The one theory he does put forward which bears on the emergence of the crime of homicide is based on the introduction of trial by battle into England by the Normans. He argues that with it also came the rule that the landed property of the loser in such a battle escheated to his lord, with the defeated party also liable to afflictive sanctions. Essentially, the theory is that the application of this scheme to homicide cases resulted in convicted killers forfeiting both life and property – basically the situation under the late common law of felony.<sup>19</sup> Other than this there are a great number of other procedural changes – from justices in eyre to juries of presentment – which go towards creating accounts of twelfth-century legal change where the expansion of royal protections into a general peace does not play a role, but they do not have any specific application to homicide or violence. Most such accounts do not look at homicide in any detail. This is quite probably the result of the arguments in favour of a royal crime of homicide under the Anglo-Saxons first put forward by Naomi Hurnard (though Goebel, to an extent, pre-empted her stating bluntly that feud was “non-existent”); if this was the case there was no great twelfth-century shift for historians to explain.<sup>20</sup>

As the preceding chapters have shown, however, there was indeed a major shift in the way that homicide and violence were dealt with and we do need to explain it. There are even, as we have seen here, two competing schools of thought on how we should go about doing so, and a number of different theories as to the specific processes that were at work here. This chapter looks at the four of these theories identified above. First, because of the strong hints in this direction noted in the previous chapter, it looks at the murder fine, cutting through the complex historiographical debate as to its origins to look at Yntema’s largely neglected arguments for its influence on homicide. Secondly, it moves on to examine Pollock’s rather vague idea that judges connived in the application of the king’s peace to cases where this was unjustified by the facts, attempting to find some evidential basis with which to back up the idea. Thirdly, and more briefly, it will look at Harding’s theory that the protection given by charters was important in spreading the royal peace. Finally, shifting to an interpretation in which protection plays no part, Goebel’s own

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<sup>19</sup> Goebel (1937), pp. 409-18.

<sup>20</sup> Goebel (1937), p. 436.

argument about the fate of those who lost judicial duels shall be analysed, and its importance for the development of royal jurisdiction over simple homicide assessed.

## The Murder Fine

The analysis of the preceding chapters has on a number of occasions thrown up the possibility that the murder fine might prove to be, as Yntema argued, of considerable importance in explaining the creation of the royal crime of homicide.<sup>21</sup> The language of the Assizes of Clarendon and Northampton – both of which refer only to “murderers” but seem from the evidence of *Glanvill*, and from case narratives found in miracle stories, to have applied to simple homicide as well – suggests that the concepts of murder and simple homicide were no longer so clearly distinguished as they had been. Similarly, one plausible reading of the 1130 Pipe Roll evidence involves the murder fine as a vehicle for royal jurisdiction over homicide. The murder fine, however, is one of the most controversial aspects of Anglo-Norman law, with the debate as to its origins still unresolved. In order to appreciate its significance we first need a clear understanding as to its likely origins, so it is to this that we shall turn first.

### *a) Origins and Historiography*

Though the murder fine is controversial, there is common ground amongst both scholars and, to an extent, primary sources on its form in the immediate post-conquest period. The *Leges Henrici Primi* describes its operation as follows:

If any Frenchman or Norman or indeed any person from across the sea is slain, and the matter turns out so disastrously that it becomes a case of *murdrum*, and the slayer is unknown or takes to flight, so that he is not surrendered to a royal justice within seven days for the execution of whatever is just, 46 silver marks shall be paid; 40 marks shall belong to the king and 6 to the relatives of the slain man.<sup>22</sup>

On these particulars there is no controversy: all the Anglo-Norman sources agree on the size of the penalty and on the fact that in order to qualify the slain man must be a foreigner.<sup>23</sup> These

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<sup>21</sup> Yntema (1923), pp. 161-66.

<sup>22</sup> Hn 91:1.

<sup>23</sup> ECf 15-16:2; WI art 3-4; Leis WI 22.

sources do disagree on precisely who pays the 46 marks, the debate being between the lord of the location in which the body is found and the hundred as a whole. This need not concern us too much as the disagreement is hardly insurmountable – most of the texts explain that the burden falls first on a lord, vill or manor, and transfers to the wider hundred if those resources were insufficient – and because in the 1130 Pipe Roll it is apparent that it is the hundred that, in practice, paid.<sup>24</sup> The basic outline of the institution after the conquest is clear enough.

The controversy surrounds the roots of the custom. Was it a Norman innovation or was it something they drew from the Anglo-Saxon past? The idea that it was, in fact, a revival of an English custom can be seen in a number of early twelfth-century sources. Henry I’s coronation charter of 1100, for example, contains this statement: “I remit all murder fines which were incurred before the day on which I was crowned king; and such murder fines as shall now be incurred shall be paid justly according to the law of King Edward.”<sup>25</sup> The *Leges Edwardi Confessoris*, which may well be a product of the reign of King Stephen, gives the following account of the murder fine’s origins:

Murder fines were devised in the time of King Cnut, who, after he had acquired the land and pacified it with him, sent his army home at the request of the barons of the land. And those same [barons] were sureties to the king that those whom he retained in the land would have a lasting peace. Thus, if any of the English slew any of those men, justice would be done on him if he could not acquit himself by the ordeal, whether of [hot] iron or water. If, however, he fled, payment would be made as was described above.<sup>26</sup>

This view, moreover, has recently been revived by Bruce O’Brien, who argues that this account was, in essence, correct. However, this remains controversial: it goes against the opinion of Maitland and, more recently, of George Garnett, both of whom believed it to be a Norman innovation,<sup>27</sup> and has since been challenged from a completely different angle by Alan Cooper.

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<sup>24</sup> The differences are outlined in O’Brien (1996), p. 327. Entries for *murdrum* in the 1130 Pipe Roll almost invariably follow the pattern of this one from Dorset: “Et idem vicecomes reddit compotum de .xv. marcas pro .i. murdro in hundredo de Niwetona” (PR 31 HI, p. 15).

<sup>25</sup> EHD, ii, no. 20.

<sup>26</sup> ECf 16-16:2. For a detailed discussion of this text’s origins see O’Brien (1999), pp. 44-61.

<sup>27</sup> Pollock and Maitland (1968), p. 88; Garnett (1985), p. 117.

Cooper’s view is that O’Brien’s arguments for a pre-conquest origin are good but that his attribution of the initiative to Cnut is not; he sees murder as the crime of killing strangers and the murder fine as a mechanism designed to ensure its punishment.<sup>28</sup>

Regardless of its origins, however, there is one particularly pertinent fact about the murder fine. Firstly, after the conquest it was beyond doubt a specific protection for Frenchmen and other foreigners; the text known as the “Ten Articles of William I” reproduces what looks to be the text of a royal writ in which the workings of the murder fine are introduced as follows: “I desire likewise that all the men whom I brought with me or who have come after me shall enjoy the benefit of my protection (*sint in pace mea et quiete*)”.<sup>29</sup> As such we can, to an extent, see it fitting into the Anglo-Saxon pattern of royal protections increasing in scope and importance. Crucially, we can tell that it did not perform this same function of protecting foreigners function before 1066 from this passage in the same text as translated by A. J. Robertson:

But every Frenchman who in the time of King Edward, my kinsman, was admitted to the status of an Englishman (*fuit in Anglia particeps consuetudinum Anglorum*), which they call “in lot and in scot,” shall be paid for according to English law. This decree was enacted at Gloucester.<sup>30</sup>

Though the “Ten Articles” as a whole is clearly not a genuine royal document, it is very probable (given the use of the first person and the mention of a place of issue) that these sections draw on a genuine writ of William I. This provision does, in any case, constitute a highly implausible subject for a twelfth-century forgery. What it shows is that Normans who were resident in England and abiding by English customs before the conquest could expect no protection from this measure (the idea that they had to be “admitted” to the “status of an Englishman” is a stronger reading than the text justifies). This surely must show that they did not enjoy this protection under the law of King Edward, otherwise it would have been customary and hence entirely unobjectionable

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<sup>28</sup> Cooper (2002), pp. 55-8. This recent work has now superseded the discussions of origins in the older specialist works on the murder fine, which tend in any case to be rather cautious in their approach to the subject, see (Yntema (1923), p. 155; Hamil (1937), p. 286. Authors of more general works tended to be in favour of Norman origin, though a substantial minority have argued for Danish influence. The scholars on either side of the debate are listed in O’Brien (1996), pp. 322-3n, 325n.

<sup>29</sup> WI art 3.

<sup>30</sup> WI art 4.

for them to continue. However Henry I imagined that the murder fine worked in Edward’s day, it could not in practice have been applied to the killing of resident Frenchmen.

This observation makes Cooper’s interpretation look less than plausible. If Edward’s Norman favourites could not benefit from a protection extended to strangers, who could? Cooper seems to argue that the fine was not applied on the grounds of identity, but rather on the absence of a pre-existing relationship between killer and victim: he treats stranger as a term which could apply to anyone, English, French or otherwise.<sup>31</sup> Cooper’s Anglo-Saxon murder fine is, in fact, much more far-reaching than the post-conquest version; he sees it as a “pre-emptive measure [which] required hundreds and lords to be responsible for the security of strangers in their territory.”<sup>32</sup> It is a neat theory but its basis is unsound. Why, we might ask, would the incoming Normans limit such an important peace-keeping tool by renouncing their right to payment if the stranger happened to be English? Considering that William’s main policy for his new kingdom was one of legal continuity this seems a most unlikely decision.

The arguments for some pre-conquest root for the murder fine, however, are rather stronger than Cooper’s argument might suggest. O’Brien, perhaps seeing the difficulty of arguing for the murder fine’s existence under Edward the Confessor, argued that Normans revived a custom initially instituted by Cnut in similar circumstances of invasion. The evidence adduced for this view is variable in quality. We can, I think, safely follow Cooper in dismissing O’Brien’s arguments on two points: there is no reason to suppose that Cnut, any more than William, would have introduced the fine only in the south of England rather than throughout the kingdom; and the argument that Archbishop Wulfstan disapproved of Cnut’s measure because it made *morð* an emendable offence (and hence failed to record it in any of Cnut’s law-codes) is pure conjecture.<sup>33</sup> Furthermore, O’Brien’s method of drawing conclusions on the legal meaning of *morð* from literary texts is rather suspect: as was noted in chapter two, there is no reason for us to follow O’Brien in thinking that, legally speaking, murder was in any way peculiarly “a crime against lords.”<sup>34</sup> It must additionally be emphasised that the lack of pre-conquest evidence for the murder fine, especially

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<sup>31</sup> Cooper (2002), pp. 57-58.

<sup>32</sup> Cooper (2002), p. 58.

<sup>33</sup> Cooper (2002), p. 56; O’Brien (1996), pp. 331-37.

<sup>34</sup> O’Brien (1996), p. 356.

in Cnut’s otherwise notably comprehensive code, is important evidence against its existence.<sup>35</sup> The only plausible way around this – if we dismiss the rather odd idea that Wulfstan objected to the measure – is to suggest, as O’Brien briefly does, that it may have been imposed only in the very earliest years of Cnut’s reign and fallen out of use before Wulfstan came to write.<sup>36</sup> Though possible this seems neither probable nor, if it were correct, likely to have left a tradition strong enough for the Normans to revive.

There is, however, some evidence for a pre-conquest context that is not so easy to dismiss. This is the geographical distribution of the murder fine: Pipe Roll evidence from the twelfth century makes it clear that it was not collected in any county north of the Humber nor in the Welsh borders. The arguments about Cnut’s need to protect his men in the south more than the north may be weak, but this is a distribution that requires explanation. Cooper’s suggestion that it indicates a link with the West Saxon kingdom of the tenth century is, in fact, rather more promising. However, the most pertinent fact about the murder fine’s geographical range is that it is coextensive with the institution of frankpledge, a post-conquest institution of suretyship whose early origins have been the subject of some debate.<sup>37</sup> O’Brien’s arguments on this point are powerful: the roots of frankpledge were in a fusion of the Anglo-Saxon institutions of *borh* and tithing that occurred earlier than 1066 – indeed, the two institutions were always so closely linked that “it is unclear how they could have separated in order to have fused again after the Norman Conquest”.<sup>38</sup> This seems reasonable as *borh* and tithing both seem to share the common goal of making communities responsible for the subjection of their members to law: the suretyship of *borh* shifts financial responsibility to sureties should the culprit flee, whilst the chief duty of the tithing seems to have been to apprehend offenders and produce them for trial. The distinction in

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<sup>35</sup> For the comprehensive character of Cnut’s main codes, see Wormald (1999a) pp. 355-66. O’Brien (1996), p. 334, dismisses this “negative evidence” on the grounds that “the survival rate for manuscripts of obsolete secular law in a barbaric tongue could never have been all that good.”

<sup>36</sup> O’Brien (1996), p. 335.

<sup>37</sup> O’Brien (1996), p. 339.

<sup>38</sup> O’Brien (1996), p. 340.

function is not a particularly clear one and, as O’Brien argues, the personnel involved would often have been the same.<sup>39</sup>

This link with frankpledge, and through that to its Anglo-Saxon antecedents, could well be crucial. We could read the murder fine not as something that evolved in parallel with these mechanisms of collective responsibility, but rather as something that emerged out of them. The geographical distribution of *murdrum* could be as it is simply because it required the surety structure of frankpledge to work and could, therefore, only be imposed where those West Saxon institutions existed. We might well imagine that, towards the end of the Anglo-Saxon period, when a clear royal offence had been committed without the local frankpledge tithings producing anyone to answer for it, a financial penalty might have been imposed collectively on those tithings that had failed in their duty. That such a mechanism may have existed does not mean that the murder fine itself existed fully-formed, though we might imagine that an incident of *morð* or the killing of a royal agent might provoke a response that would have looked rather similar. This, indeed, is not far from the description of the frankpledge (or *friborg*) system in the *Leges Edwardi Confessoris*:

[The institution of *friborg*] means that all [the people] in all the vill[s] of the entire kingdom had to be under the suretyship of the tithing, so that if one of the ten should commit an offence, the nine would produce him for trial. But if he should flee, and they say that they were not able to produce him for trial, a term of thirty-one days shall be given to them by the king’s justice. And if they were able to locate him, they would bring him to the justice. ... If however he cannot be found within the above-mentioned term, the chief [of the *friborg*] ... would take two of the better men in his *friborg*, and he shall likewise take from each of his three closest neighbouring *friborgs* the chief and two of the better men, and he shall clear himself and his *friborg* by those twelve, if he can do so, of the crime and flight of the aforementioned evildoer. But if he cannot do it, they shall restore the damage that he had done out of the property of the offender, as much as it can provide, and [then] out of their own. And they shall make amends to the justice according to what shall have been legally adjudged to them.<sup>40</sup>

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<sup>39</sup> O’Brien (1996), p. 339-341; cf. Van Caenegem (1991), pp. 8-9. For a detailed discussion of the evolution of tithing and surety into frankpledge see Morris (1910), pp. 1-41.

<sup>40</sup> ECf 20-20:4.

This, of course, is a description of an incident in which the culprit is known and flees, but we might well imagine that a similar collective liability might have applied if the tithings failed even to provide a suspect. If we can go this far, would it not be reasonable to see the murder fine as a modification of this system to afford protection to the incoming Normans?<sup>41</sup> The mechanism is, in its essentials, already in place; all William needed to do was to define the offence (killing a Frenchman) and the penalty (46 marks). O’Brien argues that it was Cnut who took advantage of this inherited procedure to create the murder fine but, as has been noted, the evidence for the fine’s presence before the conquest is extremely slight. It seems more sensible to attribute the grafting of the murder fine onto frankpledge to a period when there is no doubt of its existence.

**b) Interpretation**

The Normans, then, may have inherited much of the mechanism for collective punishment that underlies the murder fine from the Anglo-Saxons, but it was very probably they who used it to create a new offence of killing Frenchmen. This was important, but so too were the new procedures that accompanied this innovation: namely the assumption that every corpse was foreign unless Englishry could be proven and the strict time-limit within which the slayer had to be produced.<sup>42</sup> This gave the fine a much more serious aspect, particularly because as time passed the distinction between French and English became less clear-cut and, it seems, rather more to do with social status than nationality: fewer and fewer aspiring families whose kinsman had been slain would have felt particularly inclined to swear to his Englishness, particularly if there was the slightest hint of Norman blood. Foreign status did not need to be proven, it could only be disproved and even this required the cooperation of the victim’s family; as such we ought to distinguish it from the more conservatively defined protections of the Anglo-Saxon period. Indeed, we might reasonably expect it to have a better chance of increasing its scope, acting as a vehicle for the extension of royal jurisdiction over simple homicide. That such a development occurred appears to be confirmed by the *Dialogue of the Exchequer*, a text written in the late 1170s taking the form of a dialogue between a master and disciple:

D: Does the secret death of an Englishman, like that of a Norman, give rise to a murder fine?

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<sup>41</sup> Morris (1910), pp. 30-31.

<sup>42</sup> See Hn 92:5-92:6.

*M*: It did not do so originally, as I have told you. But nowadays, when English and Normans live close together and give in marriage to each other, the nations are so mixed that it can scarcely be decided (I mean in the case of the freemen) who is of English birth and who is of Norman; except, of course, the villeins, who cannot alter their condition without the leave of their masters. For that reason whoever is found slain nowadays, the murder fine is exacted, except in cases where there is definite proof of the servile condition of the victim.<sup>43</sup>

As Frederick Hamil long ago noted, this statement is rather odd in that it does not accord well with other evidence – there is little reason to believe that presentment of Englishry was ever as simple a matter as proving servile status – but the general notion that most slayings of freemen came to be treated as *murdrum* seems fairly unobjectionable.<sup>44</sup>

The crucial point, from our perspective, is what happens to the killer when the local population do, in fact, produce him. The *Leges Henrici Primi* seem quite clearly to envisage that he would be liable to afflictive punishment but could possibly ask for mercy from the king: “Even though the offender asks of the king that he be granted his life and limbs, the fine for *murdrum* shall nevertheless be paid in the way we have stated.”<sup>45</sup> Other entries make it clear that this must be a reference to a situation in which the killer is produced after the seven day period of grace in which the hundred can hope to avoid the fine, but there seems little need to doubt that this liability in life and limb applied to all those who killed Frenchmen and was, in effect, the measure that the collective fine was originally intended to enforce.<sup>46</sup> This, as was suggested above, might provide a context for the payments for homicide in the 1130 Pipe Roll, such as Stephen son of Erchembald’s 10 marks for the killing of William FitzOdo’s man.<sup>47</sup>

It is this dual nature that makes the *murdrum* so important. Most historiographical attention has, naturally, been focussed on the most administratively visible element of the communal fine, but

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<sup>43</sup> *DofExchequer*, 1:10.

<sup>44</sup> See Hamil (1937), 294-8.

<sup>45</sup> Hn 92:7.

<sup>46</sup> For a detailed discussion of exactly what the murder fine was trying to achieve see Hurnard (1941), pp. 385-90.

<sup>47</sup> PR 31 HI, p. 156.

the creation and development of the offence which led to it is less well appreciated. Originally, it seems, *murdrum* was like the Anglo-Saxon *morð* – a homicide that was hidden in the sense that the killer did not publicly take responsibility for it. As such the murder fine’s name made sense: it was a fine assessed for a homicide where the killer refused to take responsibility. There is nothing new in this. What few people have asked, however, is what happened in situations where the killer did accept responsibility. In such cases it seems clear that execution or mutilation were in order, yet because the slayer admitted it the offence for which the offenders were being punished could not truthfully be termed *morð* or murder. What it was, in theory, was simple homicide aggravated by the fact that the victim was protected as a Frenchman. By the time Richard FitzNigel was writing, however, it appears that the higher echelons of surviving English society had so merged with that of the Normans that few freemen could be termed English. We find, therefore, that homicide where the victim was not of servile status would normally lead either to a murder fine (if the community was unwilling or unable to name the killer,) or to the punishment of the killer by the crown (should he be handed over within the time-limit) or often both (such as when the killer was named, and thus outlawed, but not produced in time).

What we have, in essence, is a dramatic expansion of the king’s jurisdiction over homicide through a protection for Frenchmen that expanded to cover most of the free population. This, it should be acknowledged, is exactly what Yntema argued for in 1923.<sup>48</sup> Though his conclusions do not seem to have had much impact on modern scholarship – his article being criticised by O’Brien for “rather indiscriminate use of the legal evidence”<sup>49</sup> – it seems from this analysis that Yntema’s argument is both valid and of considerable significance. Yet the murder fine raises as many questions as it answers. It was, at heart, a distinctly odd hybrid of several different concepts, welded together to meet the immediate needs of a conquering aristocracy. It was quite clearly a protection, as William explicitly stated it was to be, but it was both more and less than that: more in that it was combined with the mechanisms of frankpledge to produce a collective penalty whose application was assumed rather than needing to be proved; less in that its association with murder (or *morð*) meant that, unlike all Anglo-Saxon royal protections, it applied only in cases of homicide. There could, clearly, be no payment of a murder fine if the victim survived an attack, no matter how seriously hurt he might be. The *morð* element, of course, also justified the imposition

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<sup>48</sup> Yntema (1923), pp. 161-66.

<sup>49</sup> O’Brien (1996), p. 323n.

of afflictive penalties in a way that a simple protection might not, but even so its inclusion was a serious limitation. Though the murder fine can and should be seen as a key factor in the creation of a royal crime of homicide, and in the expansion of royal protection, it cannot be seen in a similar light for non-lethal violence. The disparity between William’s statement that all his followers were *in pace mea et quiete* and the fact that the murder fine did not protect them from non-lethal violence, however, is worth bearing in mind. It created an ambiguity: was the king’s protection for the non-English limited to the mechanism of the murder fine or was that, in fact, only one aspect of a more comprehensive protection?

### **Expanding Protections: *Hamsocn*, *Griðbryce* and “Tickets”**

In the light of this analysis Pollock’s model of the expansion and merging of royal protections into a single, all-enveloping king’s peace, looks rather underdeveloped. It is based primarily on drawing a connection between the various royal protections of the Anglo-Saxon period, as analysed in chapter two, and the necessary inclusion of accusations of breach of the peace in cases of homicide and violence, which, as we saw in chapter four, is visible in both *Glanvill* and *Bracton*. In particular, the statement in *Glanvill* that “sheriffs also have jurisdiction over brawling, beatings, and even wounding, unless the accuser states in his claim that there has been a breach of the peace of the lord king” makes it seem highly plausible that general royal jurisdiction emerged out of what had once been the more limited offence of violently breaching the peace or protection that the king, usually through an agent, had specially granted to somebody.<sup>50</sup> Bridging the gap between these specific Anglo-Saxon protections and the situation in *Glanvill* is not, however, something Pollock attempted in any great detail; his only pronouncement on the subject, as noted above, was the following: “We may imagine a transition period in which the judges were ready, on some very slight suggestion, to presume as between the king and the sheriff that the king’s peace had been specially granted to the plaintiff, or to a man unlawfully slain.”<sup>51</sup> Other than this speculative theory, Pollock can offer nothing, nor did Maitland add anything of substance in his treatment of the issue.<sup>52</sup> Since Pollock, in fact, only Hessel Yntema

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<sup>50</sup> *Glanvill*, i.2.

<sup>51</sup> Pollock (1890), p. 84.

<sup>52</sup> Pollock and Maitland (1968), ii, pp. 463-64.

and Alan Harding have contributed anything on the mechanisms by which the king's peace might have expanded, and both of these took an entirely different approach to Pollock.

Thus, though there is a good *prima facie* case that an expansion and generalisation of royal protection did occur, the case for the process that Pollock suggested is currently based only on supposition. The best that can be said is that the *Glanvill* passage shows that an allegation of breach of the peace had a practical procedural meaning: by the 1180s, plaintiffs' choices as to whether or not to allege breach of the king's peace may not have been in any way related to the facts of their cases but they did have an immediate jurisdictional effect, bringing a case before royal justices or leaving it in the hands of the sheriff or lord. This is, in effect, what is known to legal scholars as the "ticket" system, in which certain forms of words, such as those referring to breach of the peace and felony, rather than having any factual relevance, function simply as tickets that send cases to higher jurisdictions.<sup>53</sup> The idea that such tickets may have grown out of earlier legal concepts that use similar terminology is clearly reasonable, and it is this inherent plausibility rather than any direct evidence of their growth that has sustained Pollock's rather casually stated model for over 125 years, in spite of Goebel's critique and in the absence of any serious attempts to justify it.

Such an attempt can be made, however, on the basis of the following passage from the *Leges Henrici Primi*:

Concerning *grithbreche* and *hamsocn*. Often through the ignorance of litigants causes are transferred to the jurisdiction of others in a higher court (*transeunt in ius aliorum*): as the result of an overstatement of the case (*exaggeratione rerum*) when, for instance, they specifically undertake to prove *grithbreche* or *hamsocn* or something of that kind which in fact goes beyond the jurisdiction of those holding courts (*quod socam et sacram eorum excedit*), because of an outrageous desire to inflict injury, although a penalty could more suitably be applied by imposing the *wite*; through a denial of justice (*diffortiatione recti*); through an error in making an accusation (*miscrauatione*); through charges improperly made (*presumptis accusationibus*); through delay (*tarditate*), when for instance a person who is established in a judicial office or in some other position of authority frequently puts off claiming from the offender, while he may, what the injured party just as often

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<sup>53</sup> The term originally belonged to Milsom (1958), pp. 195, 223, 435-36, 589.

pursues painfully but without satisfaction; causes also pass to a higher court in the case of a verbal error in pleading (*transeunt etiam in mislocutione*), known as *miskenning*, a practice which has flourished more rankly in London.<sup>54</sup>

Now, the one thing that is clear in this passage is that the author believed there to be a problem with people using at least two of the protections reserved by Cnut (*griðbryce* and *hamsocn*), and others similar to them (*forsteal* is the most likely candidate), to gain access to higher courts and maliciously to expose their adversaries to more serious penalties. These Anglo-Saxon protections were being used under Henry I as “tickets”, exactly as they were later to be used under his grandson. The only significant difference is that here they are not an accepted part of the system but are regarded as an abuse, at least by the author of the *Leges Henrici*.

What is less clear is how this perceived abuse of the offences of *hamsocn* and *griðbryce* relates to the rest of the author’s complaints. The section as a whole is, after all, entitled “De grithbreche et hamsocna”, so it seems reasonable to ask if the point being made here was in fact a more extensive one. It is possible to read this entire paragraph as a tirade against a series of abuses related to the use of *hamsocn* and *griðbryce* as “tickets”. In such a reading the references to cases transferring to other jurisdictions *in mislocutione*, *miskenninge*, *presumptis accusationibus* and *miscrauatione* can all be taken to refer to the central subject of the perceived abuse of *hamsocn* and *griðbryce*. It is easy to imagine that in the use of such offences as “tickets” a conservative author would indeed have detected erroneous accusations of one kind or another and chosen to characterise them as such. If we follow this line of argument, the complaints about denial of right (*diffortiatio recti*) and the brief excursus on delays may be about the ways judges encouraged or even bullied litigants into committing this abuse. We might imagine that a plaintiff wishing to claim damages from his opponent but not wishing to expose him to unjustified royal penalties would be unwilling to make a false allegation of, say, *hamsocn*. He might, indeed, worry that once the king had claimed his share there would be less money available for his own compensation. However, if the court-holder made it clear that such an allegation was required and, in its absence, persistently denied him justice or, to quote directly, “frequently puts off claiming from the offender, while he may, what the injured part just as often pursues painfully but without satisfaction”, then we might well imagine the plaintiff would relent. Indeed, there seems to be little other reason for a court-holder to delay in such a way other than to put pressure on an

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<sup>54</sup> Hn 22-22:1.

accuser. Without some such motive it is hard to understand, as claiming from the defendant would usually be to the court-holder’s own profit.

This paragraph could, in short, tell us not only that *hamsocn* and *griðbryce* were being used as tickets by the 1110s, but also give us some insight into the some of the methods that were used to promote their use in this way. We might even be tempted to go so far as to suggest that the specific complaints about London are evidence for this process being promoted particularly vigorously by royal agents operating there. However, it is advisable to be wary here. The chapter heading may indeed be “De grithbreche et hamsocna” but the text itself is not at all clear that this is the central theme. Indeed, the passage on *hamsocn* and *griðbryce* is only one item in a list whose theme is the transfer of cases to *other* jurisdictions, not necessarily, as Downer’s translation suggests, to *higher* ones. It is the chapter heading alone that justifies interpreting the whole passage as a commentary on the use of *hamsocn* and *griðbryce* as tickets, and we cannot be certain that the heading relates closely enough to the text to warrant this. This interpretation, then, must remain only a possibility. We can be sure from this text that *hamsocn* and *griðbryce* were being used as tickets in the early twelfth century – and this is the most important and pertinent fact here – but we can only suspect that this was brought about by courtholders effectively coercing plaintiffs. We do know that the author of the *Leges Henrici* disapproved of the practice, characterising it as an abuse, and from this we can reasonably extrapolate that its legitimacy was more widely contested, with conservatives insisting on the strict application of Anglo-Saxon standards and others – whether we think of them as modernisers or perpetrators of fraud – advocating a much more generalised interpretation of royal protection.

It seems clear, then, that Pollock’s model of an expanding king’s peace has considerable merit. The evidence of *Glanvill* and *Bracton* indicates that breach of the king’s peace had become what Milsom termed a “ticket” that sent cases away from local courts to the king’s justices, whilst the *Leges Henrici Primi* provides compelling evidence that this process had its roots in the Anglo-Saxon protections of *griðbryce* and *hamsocn*, and probably also *forsteal*. The general king’s peace was not, then, just a vague ideological umbrella beneath which a plethora of unrelated measures took shelter, but something that was intrinsically linked to protective power. The king’s peace of *Bracton’s* day was the direct descendent of the king’s *grið* of Archbishop Wulfstan’s, not just a watery equivalent of tenth-century rhetoric about *frið* that did little more than proclaim a royal

mandate to ensure good order.<sup>55</sup> This is not to say that these older ideas about royal responsibility for a general peace were unimportant; the next chapter looks at these in detail and they were undoubtedly present but they were certainly not alone. It looks, also, at the crucial points of ambiguity. We have seen here that opinion on the extent of the king's peace varied in the time of Henry I, and the conservative viewpoint of the *Leges Henrici* author is clear enough, but what of those who thought differently? What did the men who tried to make *griðbryce* and *hamsocn* function as tickets think about statements like William I's putting all his followers *in pace mea et quiete*, or Henry I's extending *meam firmam pacem* to his whole realm? These are important questions, but for now they must wait as there are two more theories about the creation of royal jurisdiction over violence that remain to be considered.

## Protection and Charters

The one scholar since Goebel who has devoted serious attention to the emergence of the general king's peace is Alan Harding. His approach is a complex one. Focusing on Scotland, his methodology was to dissect the elements within charters and compare them with the forms of *briefes* (the Scottish equivalent of English writs) in the hope of revealing patterns of development. Simplified somewhat, his basic argument on the points at issue here is that we can see the transition from specific protections to a general peace in the proliferation of written grants of protection. He points out that in a number of texts "protection of land and rights shades into protection of persons" and argues that such protection was "an essential part of any charter".<sup>56</sup> The suggestion is that through its grant by charter the king's peace came to predominate to such a degree that it was, in effect, general, and that trespass in Scotland, and quite possibly also in England, developed out of a single action for breach of this general protection. According to Harding, the *briefe De protectione domini regis infricta* could "stand in the place of the whole host of writs of trespass in the English register because in Scotland so many things were regularly placed under the king's protection."<sup>57</sup>

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<sup>55</sup> See discussion below, pp. 200-202, and Goebel (1937), pp. 423-24.

<sup>56</sup> Harding (1966), pp. 116, 127.

<sup>57</sup> Harding (1966), p. 134.

The general thrust of Harding’s case is clear enough, but he never in fact goes quite as far as to say that grants of specific peace actually created a general peace. On the contrary, he specifically states that a truly general peace did not arrive in Scotland until 1357, and then by a royal pronouncement.<sup>58</sup> Hyams quite succinctly sums up the subtlety of Harding’s argument: “The simple number of such grants [of protection by charter] *encouraged* the proliferation of specific grants of peace *to resemble* a general peace over all inhabitants of the realm.”<sup>59</sup> Harding’s case has many more facets than this; his primary concern was to show that much of Scottish law was a law of tort and that this “depended on the one original idea of the contempt of the peace and protection given by the king”.<sup>60</sup> How exactly this came about was relatively peripheral to his main concerns, but for our purposes it is central. What he offers is another model for the transition from a system of specific protections to one of a general peace, a model we can set beside the ideas put forward by Pollock and Yntema examined above.

The key point to examine here, then, is whether we can in fact see the king’s peace spreading in the way Harding suggests. Did the king grant his protection out by charter with sufficient frequency for this model to be plausible? To answer this we need to be clear about what, precisely, we understand by protection. Harding, it seems to me, used a definition that was simply too loose. He dissected what he identified as the archetypal grant of protection – “the mature protection of the fourteenth-century formularies”<sup>61</sup> – into ten distinct parts. The first of these is the grant of protection itself. This is an explicit statement that the grantee has the king’s peace; for example, this phrase taken from a grant to the Priory of Huntingdon (1136 X 1147): *et volo ut habeant meam firmam pacem*.<sup>62</sup> Second is a very general command that the beneficiary be allowed to enjoy his property undisturbed.<sup>63</sup> Thirdly, there is a prohibition on interference with the property, such as this phrase from another mid twelfth-century charter: *et super hoc prohibeo*

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<sup>58</sup> Harding (1966), p. 137.

<sup>59</sup> Hyams (2003), p. 224-25, my emphasis.

<sup>60</sup> Harding (1966), p. 149.

<sup>61</sup> Harding (1966), p. 117.

<sup>62</sup> Harding (1966), pp. 116-17.

<sup>63</sup> Harding (1966), p. 118.

*ne ulles eis inde vim vel contumeliam faciat.*<sup>64</sup> Fourth is a statement of a penalty for any such interference, ranging from full forfeiture to defined sums of money.<sup>65</sup> Fifth is a command that royal agents “do right” to the beneficiary in the event of such interference, and sixth is an injunction to the king’s servants to defend the property as though it were the king’s own.<sup>66</sup> Seventh is an instruction that the grantee not be impleaded except for before the king; eighth makes the grantee immune from poinding (the seizure of assets in lieu of an unpaid debt); ninth is an order that debts owed to the grantee be enforced; and finally the tenth element is an order to the king’s servants to restore any fleeing serfs to the grantee’s manors.<sup>67</sup>

The question that must surely arise is the extent to which all these elements really are intrinsically related to the king’s peace. This is particularly doubtful when it comes to instructions about the return of serfs or poinding, but it also can be questioned for the far more crucial aspect of the measures against interference in property. In the presence of an explicit grant of the king’s protection the relationship seems beyond doubt, but where such explicit phrasing is absent we are faced with a large conceptual leap. If a charter merely prohibits interference in the lands being granted, even with a penalty specified for such acts, are we really justified in regarding this as a grant of the king’s peace? It seems to me that the prohibition of interference by others in land being granted is fundamental to the purpose of all land charters, not something specific to possession of the king’s peace. Indeed, the desire that the grantee enjoy the property conveyed by charter together with a prohibition on interference is a commonplace, occurring even in the very earliest Kentish charters: this is from the oldest English charter for which an original survives, a grant by King Hlophere to Brihtwold, Abbot of Reculver, in 679:

May you hold and possess it, and your successors maintain it forever. May it not be contradicted by anyone. With the consent of Archbishop Theodore and Eadric, my brother’s son, and also of all the leading men, as it has been granted to you, hold it thus, you and your successors. May whoever attempts to contravene this donation be cut off

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<sup>64</sup> Harding (1966), p. 118.

<sup>65</sup> Harding (1966), pp. 118-19

<sup>66</sup> Harding (1966), p. 119.

<sup>67</sup> Harding (1966), pp. 120-21

from all Christendom, and debarred from the body and the blood of our Lord Jesus Christ, this charter of donation remaining nevertheless in its firmness.<sup>68</sup>

The form is different but the intention remains the same. Just as it would be entirely unreasonable to regard this as a grant of the king’s peace – rather than just a grant of land – so, I would argue, it would be unreasonable in the twelfth century. Even if we were inclined to do so, perhaps persuaded by the presence of a threat of forfeiture, it is a leap too far to suggest that such a threat to those interfering with granted lands meant that everyone associated with those lands was believed to be under the king’s peace.

Harding, in identifying all these elements of “the protection”, ends up conflating the specific protection of the king’s peace with the guarantee of safe possession that was the very essence of the royal charter. In a sense this is understandable – charters did protect grantees from interference – but to confuse this protective function with the formal protection afforded by a grant of the king’s peace is not justifiable. The only one of Harding’s ten elements that can be said to convey the king’s peace is the first, where it is explicitly stated.<sup>69</sup> It is such explicit grants that we must look for if we are to assess the extent to which the scope of the king’s peace was extended through charters. When we do this, we find that though there is evidence for such grants, they are a long way from being typical. For example, there is a writ of William I to Abbot Æthelwig of Evesham stating that he is to hold that abbey’s lands in Warwickshire honourably and “cum mea bona pace et protectione”.<sup>70</sup> We can add to these a few other genuine grants from the Conqueror’s reign, including those favouring the Barking, St Paul’s in London, and Selby.<sup>71</sup> There are other cases which are less certain, such as what may be royal protection covering a river flowing through the abbey of St Peter’s, Gloucester, and there are also some forgeries such as grants to Durham and Westminster which may be based on earlier documents, but it is impossible to escape the conclusion that these were the exceptions rather than the rule.<sup>72</sup> The truth of the matter is that the vast majority of land grants did not include explicit grants of the king’s peace in

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<sup>68</sup> S. 8; *E.H.D.* i, no. 56.

<sup>69</sup> A similar point is made in Goebel (1937), p. 430n.

<sup>70</sup> Bates (1998), no. 132.

<sup>71</sup> Bates (1998), nos. 10, 191, 272.

<sup>72</sup> Bates (1998), nos. 155, 114, 305; Van Caenegem (1959), no. 67.

the way that the writ to Abbot Æthelwig did, and as such it is very difficult to accept that such grants were a primary factor in the generalisation of the king’s peace. We can certainly accept that they contributed, but the idea that they hold the key to understanding the process seems to me to be unwarranted.

## **The Appeal and Infamy**

The final stage in this analysis is to look at the alternative to the model of expanding protections that has thus far been favoured here. Can we see major advances taking place in royal jurisdiction over violence by routes completely unrelated to protection? This was, there can be no doubt, a period of considerable procedural innovation. We find, for example, in the reign of Henry I, first the establishment of local royal justices then the beginnings of the system of the “general eyre” in which royal justices would itinerate around a series of counties hearing a range of pleas.<sup>73</sup> We find the introduction of new forms of prosecution in the form first of official prosecutors and then, under Henry II, of collective accusation by “juries of presentment”.<sup>74</sup> We also find a crucial development in the emergence of a new role for justices in the general eyre towards the end of Henry II’s reign: rather than just presiding over county courts where the suitors made the judgements according to local customs as seems to have been the case under Henry I, these justices judged cases themselves according to royal law and in so doing created a degree of legal uniformity for the entire kingdom.<sup>75</sup> All this is well known and it need not detain us here for long. Though undoubtedly all of these were very important in the business of prosecuting a case relating to violence they are all, ultimately, changes to the way that cases were judged, not the principles of what constituted a punishable offence. Royal justice may have been made more effective by these measures but, in themselves, they had no direct effect on royal jurisdiction. There is, however, one example of a procedural change which might well have had an effect on the treatment of violence in law and it is to this that we now turn.

This potentially crucial development is the Norman importation into England of the custom of trial by battle, or the “appeal”. This is a central plank of Goebel’s argument that the Norman kings’

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<sup>73</sup> See Reedy (1966); Stenton (1964), pp. 61-65; Hudson (1996), pp. 31-34; Brand (2007), pp. 216-17.

<sup>74</sup> Van Caenegem (1991); cf. Hurnard (1941).

<sup>75</sup> Brand (1992), pp. 80-86.

control of legal procedure was the foundation for their expansion of royal jurisdiction. His argument is, in essence, that the Normans brought not only the mode of proof with them but also ideas about the appropriate punishment for the infamy incurred by failing at that proof. Goebel states his case with some force:

This is innovation, for the Anglo-Saxons although familiar with infamy did not treat forfeiture as a general consequence of infamy but specified it from time to time as a punishment for this or that offence, and certainly had not pushed the effects of infamy beyond procedural disqualifications. On the continent, however, judicial combat, infamy and exheredation had nested together so long in post-Frankish procedure that once the form of proof was introduced in England, the incidents of conviction followed as of course.<sup>76</sup>

Thus, Goebel argues, regardless of the offence over which the duel was fought, the loser’s property would escheat to his lord simply as a consequence of the infamy that attached to the vanquished party.<sup>77</sup> This, alongside royal control of outlawry, was at the heart of Goebel’s central argument that “the Norman kings cut into the whole problem of public order in England via the control of procedure”.<sup>78</sup>

His argument fits quite well with the views of more modern scholars, though some of their interpretations are a little more extreme. Paul Hyams characterises the appeal as a “dramatic challenge by which a man threw down his gauntlet to commit himself to proof, a genuine commitment of life and members by calling out his enemy to fight within the four benches of the court. ... All concerned knew that the loser faced physical penalties – mutilation or death.”<sup>79</sup> Hyams, however, sees the appeal as one of three options available to any seriously aggrieved man in the age before the common law, the others being direct action (i.e. feud vengeance) or a much less risky strategy of complaining to a powerful figure in the hope of gaining compensation (Hyams terms this “proto-trespass”).<sup>80</sup> According to Hyams, then, someone who was defeated in

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<sup>76</sup> Goebel (1937), p. 414.

<sup>77</sup> Goebel (1937), pp. 409-18.

<sup>78</sup> Goebel (1937), p. 418.

<sup>79</sup> Hyams (2003), p. 146.

<sup>80</sup> Hyams (2003), p. 147.

an appeal would not only have to fear exheredation, the punishment Goebel identifies as traditional on the continent for infamy, but would also be subject to serious afflictive penalties. Logically, then, someone successfully appealed of homicide would potentially face the death penalty, and as historians are convinced that the appeal was, in the words of John Hudson “the main form of procedure concerning homicide, wounding and the like”, there is a clear case for regarding the appeal and the concept of infamy as crucial to the development of royal jurisdiction over homicide.<sup>81</sup>

The evidence itself is not quite so clear-cut. The idea that appeals were the main form of procedure for homicide comes from an early writ of William I that deals with the introduction into England of the continental custom of trial by battle. Its main purpose was to set out the rights of the English to whom this was an unaccustomed novelty, the general gist being that they could choose whether to participate or to opt for a more traditional alternative. Following the greeting, it opens with this statement:

If an Englishman summons a Frenchman to trial by combat for theft or homicide or for anything for which it is fitting that there should be trial by combat or judicial suit (*dom*) between two men, he shall have full permission to do so.<sup>82</sup>

Theft and homicide, then, seem to be treated as two prime examples of things for which it is fitting that there should be trial by battle. Though the term “appeal” is not used in this passage, it is clear that what is being talked about is exactly what later sources would refer to as such. The term, however, is used later in the same document, albeit only in the Latin of the *Quadripartitus* version. Though the original Anglo-Saxon uses the verb *beclipian* to mean challenge or summon throughout the document, the *Quadripartitus* consistently uses *compellare* (complain) until the final section on outlawry where it switches to *appellare* (appeal). Goebel believed that this was no accident and that there was, in fact, a technical distinction being drawn here: “complaint” characterising a set of offences, some of which could potentially be relatively minor, and “appeal” being reserved to the serious offences that could lead to outlawry.<sup>83</sup> Though this is not present in the original, and thus can have no real bearing on the law under William I, it is worth noting as it

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<sup>81</sup> Hudson (1996), p. 71.

<sup>82</sup> WI Lad 1.

<sup>83</sup> WI Lad 1-3:2. Goebel (1937), p. 412.

seems to indicate that – at least in the mind of the man who wrote the *Quadripartitus* and *Leges Henrici Primi* – appeals only took place for the most serious offences. This we shall return to shortly.

Firstly, however, the more pressing issue is whether Hyams’s characterisation of the situation regarding appeals, or trials by battle, is correct: would the defeated party necessarily face mutilation or death? This is certainly not how our source represents things. Indeed, the only reference to what happens after battle is as follows: “[if a Frenchman challenges an Englishman] and if the Frenchman is defeated, he shall give the king £3”.<sup>84</sup> This is a long way from mutilation and death; what it appears to amount to is hefty fine for bringing a false accusation. Goebel, however, interprets this passage differently:

Finally, the rule that the defeated Frenchman pays 60 shillings [i.e. £3 (Goebel uses the Latin text)] is sensible only if taken for the usual Norman penalty for the loss of a land action: it would be absurd as a statement of the economic sanction for conviction of crime, for here the closely contemporary *Domesday* puts the offender in mercy for life, limb or chattels.<sup>85</sup>

On this, I think, we have to take issue with Goebel. Firstly, there is no hint that the Frenchman is paying for being “convicted” of anything, he is the accuser in this scenario and his only offence is to have brought an accusation that was subsequently proven to be false. There is no suggestion in this document that the accused, if defeated and hence convicted, would have to pay this sum. Nor, importantly, is there anything to support Goebel’s contention that this document, for some unspecified reason, neglected to mention a more serious penalty for being vanquished in battle. The *Domesday* passages to which he refers simply do not support his assertion. The first, for Oxfordshire, mentions life and limbs being in the judgement of the king as a penalty for killing someone to whom the king’s personal peace had been given, and forfeiture of body and property for a killing within someone’s own house.<sup>86</sup> The second, for Cheshire, only mentions outlawry and forfeiture of land and goods for killing in a house.<sup>87</sup> All this proves is that the penalty for these

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<sup>84</sup> WI Lad 2:2.

<sup>85</sup> Goebel (1937), p. 411.

<sup>86</sup> *D.B.* i, 154v; Fleming (1998), nos. 1265, 1269.

<sup>87</sup> *D.B.* i, 262v; Fleming (1998), no. 253.

particularly serious breaches of protection through homicide was to put the offender in mercy. In no way does it show that the necessary result of an appeal, regardless of the offence involved, was one of execution or mutilation.

From this evidence, it seems, we would do much better to regard trial by battle as simply a method of proof, used as a direct parallel to the ordeal or proof by compurgation. If the accused failed the proof he faced the penalty set down for his offence. If, on the other hand, he succeeded, his accuser could be liable to a penalty for bringing a malicious accusation. It is in this way that we understand the handful of references to Anglo-Saxon penalties of mutilation for being defeated in an ordeal: one is the penalty for a false accusation (loss of a tongue), the others are a gruesome variety of penalties for notorious criminals who fail the triple ordeal – their crime being that their notoriety was proven to be justified.<sup>88</sup> The situation with regard to trial by battle in the immediate aftermath of the conquest does not look substantially different, and from this evidence it looks rather like historians’ readings of these earlier texts are being influenced by their knowledge of the later common law “appeal of felony”, where the stakes were undoubtedly as high as Hyams and Goebel represent them.

However, we have yet to account for the evidence of the *Leges Henrici Primi*. Though our reading of William’s writ on exculpation seems a reasonable one, it may be that circumstances had changed by the time the *Leges Henrici* were written, perhaps over forty years later. One of the key passages on this point is as follows:

Anyone who commits a theft, who betrays his lord, who deserts him in a hostile encounter or military engagement, who is defeated in trial by battle (*uel uictus erit*) or who commits a breach of the feudal bond (*uel feloniam fecerit*) shall forfeit his land.<sup>89</sup>

However, we should also note this statement – “anyone who wages battle and by judgement loses shall pay sixty shillings in compensation”<sup>90</sup> – which is clearly contradictory, and the following passage:

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<sup>88</sup> III Eg 4; I Atr 1:6; II Cn 16, 30:4-30:5.

<sup>89</sup> Hn 43:7.

<sup>90</sup> Hn 59:15.

Trial by battle shall not take place unless the property in dispute is at least 10 shillings in value, or unless the charge is one of theft or of a misdeed of this kind or concerns a breach of the king’s peace (*de pace regis infracta*) or the dispute is over matters which may involve a penalty of death or mutilation.<sup>91</sup>

From this evidence it not only looks like there was a degree of confusion as to the penalty for defeat in battle but also appears that homicide may not even have been included among the offences for which battle was an appropriate form of proof. It looks rather like a procedure used for land claims or for the more serious offences that were already familiar in Anglo-Saxon England. We might think that this would be the reason for the distinction the same author introduced into William’s writ on the subject, between “appeal” for the most serious offences involving outlawry and “complain” for the rest.

However, this rather confused situation is muddled yet further by another passage from the same document:

Homicide shall be denied by an oath of exculpation equal in value to the value of the wergeld; this suffices for the purpose of clearing the accused or making an answer in the case of charges of this kind; the accusation of the slain man’s relatives shall be by way of offer of battle or by a fore-oath.<sup>92</sup>

Here it seems clear enough that accusations of homicide can be made through an offer of battle. At first sight this may seem conclusive but it should also be noted that the author seems to envisage the offer of battle leading not to a duel, but to an oath of exculpation equal in value to the wergild. Presumably the offer of battle could also be accepted, and in these conditions perhaps the loser would indeed face forfeiture, but our author seems to see the normal mode of proof as the exculpatory oath. Indeed, in the passage analysed in detail in the last chapter he makes it clear that the primary alternative to such an oath was not trial by battle but payment of wergild.<sup>93</sup> It seems, then, that only when the accused wanted to deny the charge of homicide and avoid the liability to wergild would there be any possibility of battle, and even then it would only

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<sup>91</sup> Hn 59:16a.

<sup>92</sup> Hn 92:14.

<sup>93</sup> Hn 12:3.

occur if the accused could not muster the support necessary for the oath or if he so relished the prospect of facing his enemy that he chose to fight.

What is apparent, then, if we believe the *Leges Henrici Primi* on this point, is that battle was not as central to the prosecution of homicide as has been thought. The various statements on this do not sit at all easily together but the impression in all the sources is of a rather hazy distinction between the most serious crimes, for which battle was definitely appropriate, and other offences for which there is evidence pointing in both directions. This accords roughly with the assessment of L. J. Downer, the *Leges Henrici’s* most recent editor, who on the basis of the evidence cited here and a rather more ambiguous passage, argued that trial by battle applied only to capital cases.<sup>94</sup> I would suggest that homicide fits best into the rather murky category of other offences. This fits well with the structure of William I’s writ, which treated the most serious offences as a separate category, and with the *Leges Henrici’s* statements about the offences for which battle was appropriate. It would be going too far to claim that homicide cases could not be the subject of judicial combat, but it does seem fair to suggest that there was something qualitatively different about such battles that separated them from those covering serious offences. It is possible that this did relate to the penalty for defeat; perhaps the rules in William’s writ continued to apply to less serious cases, with men fearing only the 60 shilling penalty even after the punishment of forfeiture for infamy was added to the more serious offences.

Even at the most maximalist reading of the evidence, however, it is still hard to see the appeal as being so crucial as Goebel represented it, particularly for homicide. The *Leges Henrici Primi* represented offer of battle as the proper mode of accusation but gave an oath as the usual method of defence. On this evidence Hyams’s outline of a system in which litigants could choose the procedures that suited them seems to be only partially correct: the accuser did indeed have a choice of options, but even after he had chosen the appeal the defendant could still choose between paying wergild, making an oath of denial or accepting battle. Even if we do see this final option as the riskiest of all, opening both parties to the possibility of forfeiture rather than just a £3 fine for false accusation, we are still a long way from royally punished homicide. The penalty of exheredation meant an escheat of the defeated party’s lands to his lord, which is indeed the same fate as the property of a defeated felon would undergo a century later. However, there is no sign here of the other ingredients in the punishment of felons as described by *Bracton*: the property is

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<sup>94</sup> Downer (1972), pp. 358, 367, 427-30. Cf. Hn 49:6.

not held in the king’s hands for a year and a day, there is no forfeiture of chattels, and most importantly there is no sign whatsoever of afflictive sanctions – no prospect of execution or mutilation.<sup>95</sup> This is very much the maximum view that the available evidence will allow us and we must, surely, conclude that even this is not quite so significant as the literature would suggest. The escheat of property would, no doubt, have been a serious business to a man who – unable to gather the support necessary for an oath of denial and unable to pay a wergild – was defeated in a judicial duel, but it hardly prefigures the punishment of felony in the way that Goebel and Hyams imply. A contributory factor, yes, but not the root cause.

As we have seen, however, the maximalist reading is far from being certain and it may not even be likely. If in punished infamy we are looking at an importation from Normandy, the impression we get is that it is not one that sat easily in English law. Two sets of sources give two different interpretations, but in neither is Goebel’s idea of infamy fully accepted. Indeed, William’s writ accepts the idea of battle but contains no sign of infamy or forfeiture, whilst the *Leges Henrici* is very unclear on the issue as to when trial by battle is appropriate at all, and in both there are hints of a distinction between the most serious offences – which were *botleas* under the Anglo-Saxons anyway – and lesser ones. I am inclined to believe that infamy was indeed introduced into England from Normandy, but that it was done, initially at least, in such a way as to have minimal impact on English procedures, applying only to offences where its addition was of little importance given the seriousness of the punishments for the offences themselves. That it then, through use, gradually extended into something that resembled Norman custom more closely is certainly a possibility – the confusion in the *Leges Henrici* might indicate that such a process of change was underway in the 1110s. But this is conjecture; the evidence does not permit any clear conclusion to be drawn. There is enough, however, to suggest that the idea of exheredation for infamy was present in some form and it is plausible that it may have exerted an influence on Anglo-Norman appeal procedure that carried over into the later “appeal of felony”. We do not, however, given the state of the evidence, have to afford it anything approaching primacy in our consideration of the evolution of comprehensive royal jurisdiction over violence.

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<sup>95</sup> ThorneBracton, ii, pp. 362-66; Pollock and Maitland (1968), p. 466.

## Conclusions

From this analysis, then, the picture that emerges is one in which protections play a major role. The murder fine, insofar as it was a protection covering William's French followers, fits well into a picture of specific protections expanding to a point where they were approximating a general protection of the entire population. Likewise, the process of using older protections such as *hamsocn* and *griðbryce* as "tickets" to take cases to higher courts, regardless of their factual details, is clearly in evidence in the *Leges Henrici Primi*, and the connection of this with the later use of allegations of breach of the king's peace in *Glanvill* is extremely suggestive. The other possible routes for the expansion of royal jurisdiction over violence examined here, the punishment of infamy incurred by defeat in an appeal, and the granting of royal protection in charters, do not seem so promising. These look like more minor contributory factors, at most. It is, as Pollock thought, in the expansion of protections that we find the best explanation for the late twelfth-century appearance of royal punishment of homicide and other violent offences.

The fact that our later sources indicate a clear division between homicide and other forms of violence could well be, at least in part, a result of these processes. The expansion of the murder fine to cover – if we believe the *Dialogue of the Exchequer* – killings of all free men is a vital development, but only for homicide. No matter how serious an assault was, and no matter how foreign the victim, as long as no killing occurred the murder fine could not be applied. This left a gap – perhaps a degree of ambiguity regarding how far the royal protection that lay behind the murder fine also applied to non-lethal violence – that may well have been filled by accusations of breaches of royal protection as seen in the *Leges Henrici*. Who did and who did not have the king's protection when it came to non-lethal violence seems to have been a matter that divided opinion during Henry I's reign. Such accusations of breach of the peace could, no doubt, be applied to homicides as well as assaults, and this may well be reflected in the fact that homicide came to be both a breach of the peace and a felony, whereas we know from *Glanvill* that assault and wounding were, at least in the early stages of the common law, only being breaches of the peace. We might, in other words, want to see the felonious element of thirteenth-century homicide emerging from the murder fine (with its link to the old *botleas* offence of *morð*) and its peace-breaking side coming from royal protections whose roots can be traced back to Edmund's reign and beyond.

What, then, does the Norman conquest mean in terms of the way violence was treated in English society? We can look at this in a number of ways. First and foremost, it is important to note that

not much seems to have changed immediately. We still have the same system of protections regulating violence and feud, and we still find the king occupying much the same place that he had done before. Indeed, the one concrete change accompanying the conquest – the murder fine – does fit in rather well with the general Anglo-Saxon trend of gradually increasing the scope of royal protective power. After the conquest, indeed, we still find the same system of protections outlined in legal texts as well as finding both protection and feud in action in the 1130 Pipe Roll. The picture of English society’s approach to violence in this period, then, is broadly similar. From another perspective, though, we find a lot of change. There is the potential Norman importation of infamy for those defeated in appeals, of course, but also the murder fine, which, though a protection, is not at all like an Anglo-Saxon protection. It is a hybrid of a protection for William’s followers, the *botleas* offence of *morð* and the collective surety mechanisms of frankpledge. It is innovative in a number of ways, not least of which is the presumption in favour of protected status for any corpse, requiring positive proof of Englishry for the fine to be remitted. This in itself is a radical departure from the more conservatively defined protections of the Anglo-Saxon period, something that made it inherently more likely that the fine’s applicability would expand rather than contract. Quite apart from this, the collective element made this an extremely powerful measure, something that any local population would ignore at its peril. In requiring communities to produce killers for punishment, under threat of a massive collective penalty, it went a long way beyond all Anglo-Saxon measures except, perhaps, those of the Danelaw.<sup>96</sup> This was a major procedural innovation, not just the creation of another protection.

This, in fact, is the major theme of the expansion of royal jurisdiction after 1066. Except for the murder fine we do not find new protections of any great significance, but we do see considerable change in the way that old protections were applied. In the *Leges Henrici* we find a snapshot of the situation in the second decade of the twelfth century. It shows a degree of confusion surrounding the rules of trial by battle, quite possibly because they (like the free population of England) were in the midst of a process of gradual Normanisation. Moreover, it gives us a picture of a legal system in which the extent of royal protection was being contested, with some conservatives applying older Anglo-Saxon standards and another group insisting on applying royal protection of some sort to almost every case. However, if we add into this mix the fact that variable amercements had now replaced the old system of fixed *bots* and *wites*, we can

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<sup>96</sup> See above, pp. 85-86, and Maitland (1911).

appreciate that increased royal involvement may not necessarily have led to vast rises in the amounts that those convicted of violence had to pay. We need not imagine, for example, that each time *griðbryce* was invoked an additional £5 fine was added to the defendant’s liability, but we should nonetheless recognise the fact that such an accusation did bring the matter within the king’s jurisdiction.

Possibly this royal involvement was something that litigants actually wanted; royal justice offering a final and binding settlement where the mess of lower jurisdictions was more likely to bring only delay and confusion. We might want to see those who pushed the use of protections as “tickets” not as the unscrupulous abusers of power condemned in the *Leges Henrici*, but as progressive reformers, cutting through the confusion that had been created with the addition of a variety of manorial and feudal courts, as well as private courts for soke-holders, to England’s system of shire and hundred moots. The *Leges Henrici* author, after all, also expressed this opinion:

The vexations of secular legal proceedings are beset by wretched anxieties of such number and magnitude, and are enveloped in so many fraudulences, that these processes and the quite unpredictable hazard of the courts seem rather things to be avoided.<sup>97</sup>

It is, of course, likely that there is some degree of exaggeration here but there is probably some truth in what the author is saying. His solution may have been to research and set down the law in a definitive form so that all confusion ceased, but the signs are that other minds sought to bring order through the expansion of royal jurisdiction by essentially procedural means.

On this point, then, I think we can realistically combine the theories of Pollock and Goebel: royal protections were expanded greatly in the Anglo-Norman period, but this was done primarily through tight control of, and innovation in, procedure. We should not imagine concepts simply merging in an abstract fashion but look instead at how they can be shown to have operated in practice for contemporary litigants. Under the Norman kings, it seems, this was the very field in which serious change was being undertaken, in terms of the expansion of the scope of the murder fine, the use of royal protections as tickets and, indeed, in the introduction of some form of punishment for infamy. These, I believe, were the legal roots of the monopoly of legitimate violence that seems to have emerged under Henry II. It seems from the evidence that the reign of

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<sup>97</sup> Hn 6:6.

Henry I – known even to contemporaries as the Lion of Justice<sup>98</sup> – was a crucial one in which there was significant experimentation with the justice system and the expansion of royal jurisdiction. That Henry II was able to draw on his grandfather’s reign for legal innovations such as justices in eyre is well known; it thus seems perfectly plausible, indeed highly probable, that he did something similar with regard to jurisdiction over violence. We can see here, just as with more well known institutions, a situation in which experimental innovations visible under Henry I emerge under Henry II as fully-fledged institutions. The next chapter looks at how the wider European ideological climate contributed to all of these developments and, eventually, allowed Henry II to complete the destruction of the old system of protections.

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<sup>98</sup> Green (1986), p. 95.

## *Chapter Six*

# Ideology and the Criminalisation of Violence

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### **Introduction**

Whereas the last chapter looked at the process of legal change under the Anglo-Norman kings in the context of specific offences and procedures, this one looks at the way these changes related to wider ideological trends. It looks at the role of ideas and concepts that were not legally forceful, in the sense that they were reflected in concrete legal procedure, but may nevertheless have been considerably influential. Their presence on some level is beyond doubt: the terms “peace” and “felony” are absolutely central to the royal jurisdiction over violence as “crime” in the thirteenth century, and both have long ideological pre-histories. For example, the proposition that the continental Peace Movement (initially just the Peace of God but later also encompassing the Truce of God) had an influence on the establishment of a legally meaningful general peace is not one that can be left uninvestigated. Likewise, the idea central to the concept of felony, the betrayal of a lord, can be linked to Carolingian uses of loyalty oaths and, as we shall see, it has been suggested this was also of fundamental importance in the Anglo-Saxon legal system. This chapter looks at how these ideas developed in the long term and, crucially, how they interacted with the process of legal change under both the Anglo-Norman kings and Henry II. The aim is to gain a deeper understanding of both the processes identified in the previous chapter and of the final step – seemingly taken by Henry II around the time of the Assize of Clarendon in 1166 – by which simple homicide was prohibited outright by the crown. Homicide, as we know, was eventually prosecuted as both a breach of the peace and a felony, and it seems that wounding,

though not a felony in *Glanvill*, had become one in *Bracton*'s day simply by analogy.<sup>1</sup> The origins and influence of these two concepts shall here be examined in turn.<sup>2</sup>

## The Idea of Peace

The previous chapter has stressed the importance of the expansion in scope of specific royal protections in creating a situation in which an allegation of a breach of the king's peace was a crucial part of the prosecution of homicide and – seemingly – an option for the plaintiff in any case of serious violence. This, broadly speaking, conforms to Pollock's view of the origins of the king's peace, telling against the interpretations which view the peace as a mere ideological umbrella beneath which legal change was effected by a series of administrative or procedural measures that had no conceptual connection with the protective understanding of peace.<sup>3</sup> It does seem from the evidence examined in the previous chapter that there may be considerable merit in this: we do see specific peaces expanding in scope and becoming very close to comprehensive. The idea that the general peace we find in *Bracton* and *Glanvill* owed something to these expanded specific peaces does not seem very far-fetched. If this was so, it seems that the later "peace" was more than just an ideological gloss for pragmatic policies of legal change, it was something far more substantial: in theory, a giant protection covering the entirety of society. This, however, raises more questions than it answers. General ideas of peace were very old by the twelfth century and had not, it seems, originally been much more than an inspiration to good government and a justification for firm practical policies enforcing law and order. What was it that made this change? Equally, though we have identified specific legal powers in which we can see

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<sup>1</sup> *Glanvill*, i.2; *ThorneBracton*, ii, pp. 406-8.

<sup>2</sup> Another major ideological trend which may have affected the development of the English common law is the twelfth-century revival of Roman law. As S. F. C. Milsom puts it, "there has been a strong sense that there *ought* to have been an influence, and this has provoked disappointment in some historians and a rummage for examples (of varying plausibility) in others" (Milsom (2003), p. 1, emphasis in original). Whilst conceding that, as Milsom suggests, the shared Latinity of Roman and common law may have led to a rather intangible influence on terminology, I have been happy here to accede to his judgement that overall there "could not be much effect" and to refrain from both disappointment in Roman law's absence and any implausible or fruitless rummaging for it. It seems, at any rate, that any influence was a later thirteenth-century phenomenon, with the appearance of Roman learning in *Bracton* not, in fact, reflecting the realities of contemporary English practice. See Milsom (2003), pp. 1-5. For an interesting appraisal of the English law of sanctuary's relationship to Roman and canon law principles, see Helmholz (2001), pp. 16-81.

<sup>3</sup> Hurnard (1949), pp. 304-5; Goebel (1937), pp. 423-40; Hudson (1996), pp. 82-83.

royal protections expanding under the Norman kings we have yet to explain why they did so. Why was it that some influential figures were pushing for the old offences of *hamsocn* and *griðbryce* to be asserted even in cases where, from the perspective of conservatives like the author of the *Leges Henrici*, there was nothing in the specifics of the case to justify it? The last chapter may, therefore, have told us something of the processes by which specific peaces were generalised, but what drove them is still something of a mystery. An examination of ideological trends regarding “peace” will, I hope, shed some light on the subject.

**a) Frið and Theft**

To understand the importance of the idea of peace for the establishment in England of something that at least approached a royal monopoly of legitimate violence, we need to understand the way the concept developed both over the long term and in a wider European context. A good place to start this is with the Anglo-Saxon concept of *frið*. This term for peace is occasionally used to mean protection, but more usually it is used in a much looser sense, referring to an absence of hostility, a state of friendly relations, or the absence of disorder.<sup>4</sup> It is often used in legal sources in reference to the ideal state of the kingdom, such as when Edward the Elder’s second code explains how in Exeter the king had exhorted his *witan* to consider “hu heora frið betere beon maehte ðonne hit ær ðam wæs” (how their peace might be made better than it had been), or in Æthelstan’s Exeter code’s complaint that “ure frið” had not been kept as well as he would have liked.<sup>5</sup> These references are far from alone; Æthelred’s legislation in particular makes frequent use of the idea that its purpose was “friðes bot”, the “improvement” or “amendment” of peace.<sup>6</sup>

Nobody today would attempt to interpret *frið* as anything so legally concrete as the later medieval king’s peace – as Goebel pointed out, “only a rosy imagination can read into passages where it [*frið*] appears a concept of folk peace, let alone a notion that peace and law are synonymous”<sup>7</sup> – but we can perhaps try to be a little more specific about what the term conveyed. It is most often, when used in this way, associated with theft. Archbishop Wulfstan,

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<sup>4</sup> *DOEonline*, s.v. “*frið*”. On early medieval peace generally, see Renna (1980); Bonnaud Delamare (1939); Kershaw (1998).

<sup>5</sup> II Ew 1; VAs Prol.

<sup>6</sup> I Atr Prol; III Atr Prol; VI As 11, 12:3; V Atr 26:1; VI Atr 32; II Cn 8.

<sup>7</sup> Goebel (1937), p. 424.

writing in both Æthelred's and Cnut's codes, explained that *friðes bot* should be promoted in such a way "as shall be best for the householder and worst for the thief".<sup>8</sup> Similarly, Æthelstan's use of the term was clearly associated with his prolonged campaign against theft, something underlined by the fact that Edmund specifically thanks God and the *witan* for the *frið* they had come to enjoy with regard to theft.<sup>9</sup> Edgar, too, though not quite so explicitly, seems to associate *frið* with theft.<sup>10</sup> However, though the link with theft is the strongest, *frið* also seems to be used with respect to feud by Edmund and to issues surrounding coinage by Wulfstan, so it would be wrong to claim it had any tightly defined specific meaning.<sup>11</sup> We can say, however, that when Anglo-Saxon lawmakers identified threats to *frið* it was most often theft that worried them. The important thing to grasp here is that peace, at this point, was a concept essentially unconnected with the mechanisms that were being used to bring it about, including protective power. Though, as we have seen, Anglo-Saxon law had plenty of specific "peaces" these were all related to violence, whereas the general idea of *frið* seems to have been most associated with theft. Theft, unlike homicide, was the subject of strong royal prohibitions. Whereas violence was something that kings got involved in only in certain aggravated circumstances – most frequently the breach of a protection – it was the act of theft itself that was punished. In the tenth century the idea of peace was purely an ideal. It influenced law only in that it prompted kings to take action to improve the peace of their realms. It did not have procedural reality: thieves were not punished as breachers of *the* peace, or even of *a* peace; they were simply punished as thieves.

The strength of the king's ideological position as a punisher of thieves is well illustrated by the rather extreme position adopted in Æthelstan's Thunderfield code. He says, quite explicitly, that thieves are in no way to be judged worthy of life; whatever their gender or social status, so long as their guilt is established they can only expect death. Even if they claim the protection of a church, a noble, or the king, they can only expect to live for the few days that their protector is entitled to offer. If they flee they are to be pursued to their death by all, with all those daring to

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<sup>8</sup> VI Atr 32; II Cn 8.

<sup>9</sup> II Em 5. Æthelstan's concern seems to have been both with thieves (as is visible in VI As 11-12:3) and with the powerful kindreds that supported them, at which his frustration is evident in V As Prol and throughout IV As.

<sup>10</sup> IV Eg 14:1.

<sup>11</sup> II Em 5; VI Atr 31-32:2; II Cn 8-8:2.

harbour them forfeiting their lives as though they were thieves themselves. If the thief is a free woman she is to be thrown from cliffs or drowned; if a slave, the thief is to be put to death by eighty fellow slaves, men being stoned and women burnt, with these slaves each paying three pennies to their lord under threat of scourging.<sup>12</sup> The ruthless cruelty of this code is quite astounding, surpassing in its barbarity anything that survives from the period,<sup>13</sup> but it does demonstrate well the unwavering self-confidence of the monarchy when dealing with theft. The twenty-seven execution cemeteries from our period recently studied by Andrew Reynolds, with their numerous examples of decapitations and hand amputations (which may be indicative of punishment for theft), are a testament to the reality of this royal power.<sup>14</sup> The contrast with Edmund's inability simply to prohibit homicide in his code is particularly instructive here: whereas thieves were generally accepted to be evil-doers whom it was the king's duty to punish in the name of peace, those engaged in feuds could only be subjected to firm exhortation and tighter regulations; they could not be "criminalised" in the same way as thieves. If we look ahead 250 years, however, we find a different situation: thieves may still expect severe punishment but, according to *Glanvill*, killers are the ones singled out for particular attention. Unlike all other suspected felons, a homicide would not be released if he found sureties but rather, in order to intimidate (*ad terrorem*), he would be imprisoned until trial.<sup>15</sup> We are looking, here, at a major shift. The king gains a much stronger position with regard to homicide, and this move is roughly in parallel with the development of the idea of peace: from something which in the tenth century is a vague ideological notion mainly about theft, to a point where even relatively trivial acts of violence, such as brawls, can be characterised as breaches of the peace in a legally punishable sense.<sup>16</sup>

### ***b) Peace and Violence***

The association of a general notion of peace with theft certainly seems to be dominant in the Anglo-Saxon period, but there are signs that some saw the royal mandate to preserve peace as

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<sup>12</sup> IV As 6-6:7.

<sup>13</sup> Though it is possible that an even more grisly code belonging to Edgar has perished. See Wormald (1999a), p. 125.

<sup>14</sup> Reynolds (2009), pp. 151-79. See Ine 18, 37; Af 6; IV Eg 11; III Atr 4:1; II Cn 30:4.

<sup>15</sup> *Glanvill*, xiv.1.

<sup>16</sup> *Glanvill*, i.2.

applying to violence as well. A precedent for this can be found in Charlemagne's legislation against feud. In the *Admonitio Generalis* of 789, seemingly in connection with the instruction that there be peace, concord and harmony throughout the whole Christian people (*ut pax sit et concordia et unianimitas cum omni populo christiano*),<sup>17</sup> Charlemagne ordered the following:

In accordance with the prohibition in the Lord's law, there are to be no killings within the land, neither by reason of vengeance nor by that of avarice nor by that of brigandage. And wherever they are found they are to be punished by our judges, by virtue of our command, in accordance with the law. And let no man be killed except in accordance with the law.<sup>18</sup>

The ambiguity of this – given that no new penalties are stated we might wonder what was meant by “in accordance with the law” – is worth noting but need not trouble us too much here. It is also a feature of the treatment of homicide in the *Capitulare Missorum Generale* of 802, which initially takes an even more homiletic approach to the subject, admonishing one and all to “abandon and shun homicide, by which a multitude of the Christian people perish” and dwelling on the grave spiritual dangers of killing, declaring that “we would wish to punish with the harshest of penalties the man who dares to perpetrate the evil of homicide”. Then, however, it moves on to slightly more practical measures:

Nevertheless so that sin should not increase, even, and an abundance of feuds come into being among Christians, let the guilty man, whenever, at the devil's instigation, homicides occur, immediately set about making his amends and with all speed pay for the evil he has perpetrated with appropriate composition to the relatives of the deceased. And this we firmly command, that the relatives of the person who has been killed in no way dare to add to the evil which has been committed by resorting to feud or dare to refuse to make peace with him who asks it, but that, after he has given his pledge, they accept the composition provided and in return grant perpetual peace; but the offender is to pay

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<sup>17</sup> Boretius *Capitularia*, no. 22, ch. 62. For translation see King (1987), p. 214.

<sup>18</sup> Item ut homicidia infra patriam, sicut in lege Domini interdictum est, nec causa ultionis nec avaritiae nec latrocinandi non fiant; et ubicumque inventa fuerint, a iudicibus nostris secundum legem ex nostro mandato vindicentur; et non occidatur homo, nisi legi iubente. Boretius *Capitularia*, no. 22, ch. 67. Translation based on King (1987), p. 216.

composition without delay. ... Should anyone scorn to make fitting amends, however, he is to be deprived of his property pending our judgement.<sup>19</sup>

Charlemagne, then, seems quite clearly to have regarded the suppression of homicide as the duty of a Christian ruler, but it is interesting to note that though he declared he would have liked to do so through punishing killers, what he actually tried to do was to enforce composition settlements.<sup>20</sup>

The association of these Carolingian measures against homicide with the king's duty to maintain peace is something that is difficult to demonstrate with full certainty. The 789 capitulary's statements on homicide follow five chapters after an extended discussion of peace, part of which was quoted above, and the logical link does seem clear enough. However, the chapter immediately preceding it is one decrying the evils of hatred and malice, which leads into the prohibition of homicide just as well.<sup>21</sup> In the later document, though peace is mentioned in the relevant chapter (the kin of the victim are to offer perpetual peace in exchange for composition) and nearby (in the context of peace and protection for the poor) it is impossible to read it as an idea explicitly underlying the measures against homicide.<sup>22</sup> Thus, it is important to note that Wormald's theory that Charlemagne prohibited feud outright, because he had seen what Christian "peace and unanimity" implied for vendetta, is not a certainty.<sup>23</sup> It does not, however, seem very unlikely and Wormald's interpretation does fit well with the Anglo-Saxon laws of Edmund, which, after stating that the king and his *witan* had been deliberating on how best to exalt Christianity, introduces its measures on homicide as follows:

First then it seemed to us most necessary that we should most firmly keep between us our peaceableness and harmony (*gesibsumnesse 7 geðwærnesse*) throughout all my

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<sup>19</sup> Boretius *Capitularia*, no. 33, ch. 32. Translation based on King (1987), pp. 240-41.

<sup>20</sup> The efficacy of this legislation is, however, open to doubt. See Fichtenau (1957), pp. 137-38; Ganshof (1968), pp. 95-97.

<sup>21</sup> Boretius *Capitularia*, no. 22, chs. 62, 66, 67.

<sup>22</sup> Boretius *Capitularia*, no. 33, chs. 30, 32.

<sup>23</sup> Wormald (1999a), p. 311.

dominion. I and all of us are greatly distressed by the unlawful and manifold fights (*gefeohht*) that there are between us.<sup>24</sup>

As was discussed in detail in the first two chapters, Edmund then went on to produce a code packed with measures designed to regulate feud more tightly. That he did so because of a concern with peace seems beyond doubt, but it is perhaps interesting to note that the peace in question was not *frið*, the word usually used for the general peace of the realm for which the king had responsibility, but *gesibsumnesse*, a word for peace intimately linked with the concept of kinship but not one with any wider associations with the king or the realm.<sup>25</sup> Later in the code Edmund does thank his *witan* for their support in establishing the *frið* they then enjoyed from thefts and asks them for similar support in respect of his current measures, which may mean that he saw them as an extension of that *frið*, but again this is uncertain.

The relationship, then, between the peace for which the king was ideologically responsible and the suppression of violence was not anywhere near so clear as the relationship between that peace and the suppression of theft in this period. It is impossible to assert that no such tradition existed but the evidence is ambiguous, meagre by comparison to that associating *frið* and theft. This itself may well go some way towards explaining the relative weakness of Edmund's position on feud when compared to Æthelstan's extreme self-confidence in tackling theft: it was accepted that kings were responsible for *frið* and that *frið* entailed the suppression of theft, but it was far more contentious to assert that the royal duty to maintain *frið* applied to the suppression of violence. If we are to explain how kings came to claim such complete jurisdiction over homicide and violence, we need to look at how this understanding of peace shifted.

Part of such a shift is almost certainly visible in the emphasis on the term *grið* in the laws written by Archbishop Wulfstan in the early eleventh century. This term, which meant both "peace" and "protection" was used where we would previously expect the concept of *mund*, which meant "protection" alone. Breaches of protection, which as we have seen were primarily related to violence, can from this point onwards also be regarded as breaches of peace, and indeed by the Norman conquest this concept is completely dominant, with the term *griðbryce* having taken root

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<sup>24</sup> II Em Prol 1.

<sup>25</sup> Bosworth and Toller (1898), s.vv. *ge-sib*, *ge-sibbsum*, *ge-sibbsumnys*, *ge-sibsum*, *ge-sibsumnes*, *sibsum*, *sibsumness*.

and displaced *mundbryce* entirely. To some extent, then, we can see an important shift here towards a more protective understanding of peace, though the distinction between the clearly protective *grið* and the much vaguer *frið* did ensure some separation of the concepts, at least for Old English speakers. What this may reflect is, in fact, some influence from the continent. When Wulfstan wrote *forðam Godes griðe is ealra griða selost to gearnigene 7 geornost to healdenne* (“for the peace of God is of all peaces the most especially to be sought after and the most zealously to be upheld”) it seems unlikely to be coincidence that his language was so very close to the rhetoric of the contemporaneous continental Peace Movement.<sup>26</sup> It is to this that we now turn.

**c) *The Influence of the Peace Movement***

When looking at the Peace Movement there can be little doubt that the idea of “peace” was being directly and specifically associated with violence. The outlines of the movement are well known;<sup>27</sup> although initially the Peace of God was concerned with protecting church property as much as it was with controlling violence, its aims and ambitions expanded as it developed. Emerging from this, the Truce of God, which was first proclaimed at the Council of Elne-Toulouges in 1027, was almost exclusively aimed at violence, its defining characteristic being the prohibition of all violence at certain holy times. As the movement developed these temporal prohibitions on violence expanded to cover more and more time, theoretically, at least, outlawing violence for much of the year. By 1054 and the Council of Narbonne the development of the Peace Movement reached its logical conclusion: “no Christian should kill another Christian, for whoever kills a Christian undoubtedly sheds the blood of Christ.”<sup>28</sup> Without practical enforcement, however, such ideas were no more likely to be efficacious than Charlemagne’s pronouncements over 200 years earlier, probably much less so, but there is a distinction to be drawn. Though we might question how it worked in practice there can be no doubt that the Truce of God measures prohibiting all violence on certain days were something of an innovation. Whereas the Peace of God had drawn to a large extent on Carolingian priorities in terms of the protection of the church and the poor – the early councils’ measures being comparable to later Carolingian legislation – the

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<sup>26</sup> See above pp. 84-91.

<sup>27</sup> On the Peace Movement see Cowdrey (1970); Goetz (1992); Hehl (2004); Hoffmann (1964); Head (2006); Taylor (2009); Bisson (1977); Bonnaud Delamare (1951); Kennelly (1962); Gergen (2002).

<sup>28</sup> Cowdrey (1970), p. 53.

Truce of God represented a departure, a declaration that even the traditionally unprotected fighting classes were illegitimate targets at certain times. The Truce, in establishing the idea of a protective peace that would in effect outlaw feud entirely, albeit only at certain times and even then with doubtful efficacy, set a new precedent: this was something that laws could do. Not even Charlemagne had dared to try to punish simple homicide himself as a breach of his protection – all he did was try to enforce compensation agreements – but in the Truce of God large periods of the year were deemed to be times when any killer was to be punished as a violator of peace, not just coerced into paying compensation. This precedent, and the fact that the internal logic of the movement led inexorably towards the idea of a permanent all-encompassing peace, made the ideology of peace that emerged from the early eleventh century a potent force when it came into the hands of well-organised secular rulers.

There are a number of well-known examples of such secular rulers taking responsibility for, and extending their own jurisdictions through, the Peace Movement. The cooption of the Peace Movement by the French monarchy in the twelfth century has been outlined in some detail by Aryeh Grabois; it was an incremental process in which Abbot Suger of Saint-Denis played a key role by enforcing the Truce of God in his capacity as regent between 1147 and 1149 whilst King Louis VII was on crusade. In this period, Grabois argues, the Truce of God effectively metamorphosed into the peace of the realm. The final step in this process was the institution of peace legislation in the king's own name, so that Louis became not just the enforcer of God's peace but the creator and custodian of the peace of the realm – now the king's peace. This occurred at the council of Soissons in 1155 but the peace in question, it must be noted, was very much in the old style of the Peace of God: it did not cover the entire realm, effectively prohibiting all violence at all times, but was a peace enforced by a series of specific protections, covering churches and their lands, merchants and their men, peasants and their goods. It was an extensive peace, that is clear, but it was not all-encompassing.<sup>29</sup> There is a very similar case in Frederick Barbarossa's great imperial *Landfriede* of 1152, which seems to have been even more ambitious than the French effort, attempting to outlaw homicide entirely, prescribing death to anyone who killed within a peace that was to hold in every part of the Empire.<sup>30</sup> The creation of these two great peaces in the 1150s, at precisely the time when Henry II was coming to the English throne

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<sup>29</sup> Grabois (1966), pp. 591-96.

<sup>30</sup> Harding (2002), pp. 91-92.

and beginning his task of re-establishing the laws of his grandfather, may well have considerable relevance to developments in England during his reign.

Even more directly pertinent to English concerns, however, is the progress of the Peace Movement in Normandy. Goebel argues convincingly that it was the Peace and Truce of God, initially introduced into Normandy in the 1040s, that underlay ducal jurisdiction over violence as it is detailed in the text known as *Consuetudines et Iusticie*, the record of an inquest into ducal rights that took place in Caen on 18 July 1091. The vital step here seems to have been taken at the Council of Lillebon in 1080, where the Truce of God was renewed with the bishop instructed to enforce it. Crucially, however, if his judgements were ignored the bishop was explicitly given recourse to secular authority.<sup>31</sup> Though Goebel sees Robert Curthose's reign as a period of weak government marked by "savage contempt for law", he views the period of Henry I's uncontested rule (beginning in 1106) as one of renewal. By the end of the reign, he argues, and specifically in an ordinance of 1135, it is clear that there are two distinct interests in breaches of the peace by homicide: the specific claims of the church (consisting of the first £9 of the offender's chattels) and the less clearly defined ducal right to exact a penalty through "the application of misericordia by bargain".<sup>32</sup> As Goebel puts it, "secular procedure and the duke's own justice [made] a reality of the Peace of God in Normandy."<sup>33</sup> Its effect, moreover, was specific to homicide, giving the duke jurisdiction – though still very much financial rather than afflictive, and within the context of a settlement with the victim's family – that covered not only certain protected categories of people and places, but also the whole population for about half the week.<sup>34</sup>

From this basis in the Peace Movement, Goebel argues, full ducal jurisdiction, complete with afflictive penalties and excluding ecclesiastical involvement, was to emerge, most probably under Henry II.<sup>35</sup> In Normandy, then, we have jurisdiction over homicide evolving specifically as a breach of a more or less general, albeit time-limited, peace. The implications of this for England are quite obvious. When we later find *Glanvill* and *Bracton* talking about breach of the peace in a general

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<sup>31</sup> Goebel (1937), pp. 305-6; Harding (2002), pp. 82-83. See Haskins (1918), Appendix D.

<sup>32</sup> Goebel (1937), pp. 320-21. See Tardif (1881-1903), i, ch. 71.

<sup>33</sup> Goebel (1937), p. 328.

<sup>34</sup> Goebel (1937), p. 329-30. See Tardif (1881-1903), i, ch. 36.

<sup>35</sup> Goebel (1937), p. 329-35.

sense, we would be foolish to dismiss out of hand the idea that the Norman example had some influence: the similarities are just too great. Indeed, in some respects the Norman evidence can offer much closer parallels with the thirteenth century than the earlier English material can. In terms of specific measures the evidence for direct adoption of Norman custom in England is not, as we have seen, particularly strong. There may be a strong possibility that the notion of infamy as a consequence of failure in an appeal was, eventually, imported in some form, but this is an exceptional case connected with the institution of trial by battle and the evidence, in any case, suggests a degree of resistance to those elements that would most seriously alter English custom. I would suggest that the main significance of the continental developments was ideological: Anglo-Norman kings and Anglo-Norman aristocrats were used to the idea that for a considerable portion of the week, as well as on specific festivals, feuding was limited by a general peace that was increasingly enforced and controlled by the duke. No king of England would be willing to cede so much jurisdiction to the church as to allow it the first £9 of any offender's chattels, but is it not likely that he might see the Norman example of a general peace over homicide, even if it only applied half the time, as a precedent worth following?

The case for Henry I's reign is particularly interesting because of this statement from his coronation charter: "I establish a firm peace in all my kingdom, and I order that this peace shall henceforth be kept".<sup>36</sup> As we have seen, Goebel's argument is that this was "no more than an earnest of [his] good intentions", on the grounds that there is no evidence of any measures by which this was given procedural reality.<sup>37</sup> But can we really accept that all Henry's contemporaries would have seen it this way? Might not some of his ministers, familiar with the workings of the *Treuga Dei* in Normandy, have seen the statement as an unambiguously legal one, just as Pollock did almost 800 years later? Similar, albeit slightly less far-reaching, questions can be asked about William I's statement that all those who followed him to England were *in pace mea et quiete*.<sup>38</sup> Did this, as its context suggests, only apply through the mechanism of the murder fine, and thus leave his men unprotected from violent attacks falling short of homicide, or was there more to William's peace than this? Fundamentally, the point is that these statements can be read in either way, and there are signs in the evidence that there may have been some confusion or even

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<sup>36</sup> Hn Cor 12.

<sup>37</sup> Goebel (1937), p. 432.

<sup>38</sup> WI art 3.

conflict on this issue. Men like the author of the *Leges Henrici Primi* certainly interpreted them as having little legal effect, but it may be that the encouragement of pleas of *hamsocn* and *griðbryce*, in circumstances that such conservatives disapproved of, reflects a school of thought that took these declarations more literally. There are, as we have seen, considerable hints that some influential people in the early twelfth century were trying to expand the scope of royal protection into something like a general peace – might they not have been trying to make a legal reality of Henry’s declaration? Thus, though Goebel is right to assert that we cannot see in the coronation charter alone any procedural measure instituting a general peace, there is evidence to suggest that during the course of Henry’s reign some of his ministers may have tried to provide one. The continental context of the Peace Movement may thus have shaped the way that at least some influential legal minds saw Henry’s “firm peace”, and through this had a significant influence on English legal development.<sup>39</sup>

The developments of the 1150s and their potential influence on Henry II should also be taken into account. Here we have Frederick Barbarossa and Louis VII, the English king’s peers, seizing the initiative in asserting their own legally enforceable peaces, whilst oddly enough Henry – the man who seems to have done most to make a reality of such a peace in his own realm – so far as we know made no equivalent pronouncement. The closest he comes is introducing the Assize of Clarendon as being “pro pace servanda et justitia tenenda”, which is clearly not the same thing, adding up to little more than Anglo-Saxon phrases about *friðes bot*.<sup>40</sup> Why, then, does he fail to declare the peace that seems so evidently to have been the result of his reforms? One possibility is that he believed he did not need to because his grandfather had already done so in his coronation charter. We can be certain Henry II knew this document because he confirms it, in general terms, after his own coronation, in a charter of 19 December 1154.<sup>41</sup> What would he have made of it? Considering the context of the 1150s in France and Germany – and Henry I’s fearsome reputation as the “Lion of Justice” – it does not seem unlikely that Henry II would have read his grandfather’s “firm peace” as something with both the same level of legal ambition as his contemporaries and the same direct connection to the Peace Movement. Henry was, after all,

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<sup>39</sup> For a brief discussion of the influence of Norman *Treuga Dei* customs on aspects of the English king’s peace relating to land tenure, see Garnett (2007), p. 115.

<sup>40</sup> Stubbs *Charters*, p. 170.

<sup>41</sup> Stubbs *Charters*, pp. 157-8; *E.H.D.* ii, no. 23.

essentially French. His youth was mainly spent in Anjou and he was, of course, already Duke of Normandy (from 1151) and Duke of Aquitaine (from 1152) by the time he became King of England: the idea that Peace and Truce of God's influence could have escaped his attention, or that of the counsellors he brought with him, is unthinkable.<sup>42</sup> In Normandy he ruled as an enforcer of a general peace directed against homicide, and although it may only have applied at certain times the ideal of its perpetual application was well understood.<sup>43</sup> When Henry II came to the English throne promising to restore the peace of his grandfather to a realm recovering from a devastating civil war, it seems most likely that he thought of this peace in similar terms to the new royal peaces on the continent, and those were intimately associated with the familiar ideals of the Peace Movement.

The context of the Peace and Truce of God, then, looks as though it could be of considerable importance for the expansion in England of specific royal peaces into one general king's peace. There are good cases for looking at both the expansion of Anglo-Saxon royal protections under Henry I and the establishment of a formal and legally meaningful king's peace under Henry II as being influenced by the ideas of general peace contained within the Truce of God. The ruling elite's exposure to the ideas in Normandy cannot be doubted, and it would be rather odd if they did not carry some form of the concept of a general protective peace back across the channel with them. It cannot, of course, be proven but it is not an unreasonable suggestion that the efforts to expand the scope of *griðbryce* evident in the *Leges Henrici Primi* were inspired by the idea that the king's peace actually did extend to everyone and at all times. Clearly, in that period, such an idea would have been a contested one, but the peculiar context of Henry II's coming to power may have changed that significantly. Henry had a mandate to restore the peace of the kingdom to the state that it had been under his grandfather; he had a thoroughly French background and would have been familiar with the protective idea of peace in the Truce of God not only from his youth but also from enforcing it for several years as Duke of both Normandy and Aquitaine; and, furthermore, he had the example of what his continental contemporaries were doing in establishing their own peaces to guide him. It is, of course, a possibility that these factors are utterly unconnected to the fact that by the time of *Glanvill* violence was being prosecuted as

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<sup>42</sup> See King (2007), pp. 43-46; Warren (1973), pp. 38-39.

<sup>43</sup> On Aquitaine, see Taylor (2009).

“breach of the peace of the lord king”, but it would be an extraordinary coincidence.<sup>44</sup> Far more likely, I would argue, is that the legal developments outlined in the last chapter were to an important degree guided by the notion of a protective general peace inherent in the Truce of God, and by the trend on the continent for secular rulers to claim such general peaces as their own.

## **Felony and Oaths**

The other crucial concept to examine here is that of felony. Thirteenth-century homicide, after all, was not prosecuted simply as a breach of the peace but also, and primarily, as a felony. The origins of the term are obscure but it seems that under Henry I it meant something like “betrayal of one’s lord” (L. J. Downer uses the phrase “breach of the feudal bond”).<sup>45</sup> Quite how this came to denote the most serious crimes in the English legal system is hard to tell; we do not have any hints that it was used as a “ticket” in the same way that breach of the peace was, so it is very difficult to suggest a path by which the common law situation might have evolved. The historiographical background and one possible explanation are summed up nicely by Patrick Wormald:

Like everyone since, Maitland was uncertain how a word whose basic meaning is “broken faith with a lord” became a term for “crime of any considerable gravity”. He hesitantly thought the link lay in “the rule that the felon’s fee should escheat to his lord”. But this fails to explain why larceny should be treated as severely as treason itself. An explanation is to hand in a feature of Old English jurisprudence mentioned above: the twelve-year-old’s “oath and pledge” whereby loyalty entailed disavowal of theft. A “king’s enemy” is thus one who plots conventional offences against his people as well as treason against his person. Crime is indeed a breach of faith, so punished like any other form of infidelity. By Angevin times this theory could well have infiltrated the mind-set and vocabulary of a post-conquest Establishment that had first crossed the Channel with more straightforward notions of disloyalty.<sup>46</sup>

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<sup>44</sup> *Glanvill*, i.2.

<sup>45</sup> Hn 43:7; 46:3; 53:4; 88:14; Downer (1972), p. 355.

<sup>46</sup> Wormald (1999g), p. 62.

To Wormald, then, the key was the idea that any crime was a breach of an oath of loyalty to the king, and was represented as treachery as a result. A potential problem with this view, however, is the degree to which it stretches the available evidence, pushing for an extremely far-reaching interpretation. David Pratt, attempting to summarise Wormald's argument (which appears in a number of locations but has never been stated in full), sees the key concept as that of *hlafordsearu*, treachery towards a lord, as expressed in Alfred's *domboc*.<sup>47</sup> Pratt argues that the punishments outlined by Alfred – death and forfeiture of property for plotting against the king or harbouring the king's enemies, and the same for plotting against one's own lord – were "at the heart of Wormald's view of later English law, postulating a single system of justice behind the more disparate written evidence".<sup>48</sup> The effect of these measures against *hlafordsearu* when combined with the evidence of a general oath of loyalty was, to quote Pratt once more, "to equate crime in general, including theft, with *hlafordsearu* against the king".<sup>49</sup> These are claims of fundamental importance to our view of late Anglo-Saxon justice, and as such it is essential that they are well supported by evidence.

To an extent the case is a powerful one. The Carolingian precedent for the use of oaths of loyalty whose implications extended beyond simply not plotting against the king is strong. This is from Charlemagne's programmatic capitulary of 802:

And that it [the oath of loyalty to be taken by all men over the age of twelve] is to be expounded publicly to all, in such a way that everyone can understand, how important and how many are the matters which that oath comprehends – not only, as many have hitherto thought, fidelity to the lord emperor as regards his life and not bringing an enemy into his realm for hostile purposes and not consenting to, or remaining silent about, another's infidelity towards him, but that all should know that the oath has the following meaning within it:<sup>50</sup>

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<sup>47</sup> Pratt (2007), pp. 232-38. Cf. Wormald (1999g), pp. 55-56; Wormald (1999h), 366-67; Wormald (1999i), p. 307; Wormald (1999a), p. 283.

<sup>48</sup> Pratt (2007), p. 233.

<sup>49</sup> Pratt (2007), p. 234.

<sup>50</sup> Boretius *Capitularia*, no. 33, ch. 2. Translation from King (1987), p. 234.

The text then goes on to stipulate that all should maintain themselves in God's holy service and that that nobody should: steal anything that in any way belongs to the emperor; steal from or in any way harm churches, widows, orphans or pilgrims; allow their benefice from the emperor to go to ruin; disregard military service; thwart the emperor's commands; or contrive to pervert the course of justice in the courts.<sup>51</sup> Pratt also points out capitularies from 853 and 854 which show that the bond of fidelity was deemed to have been broken through theft, and provide the texts of oaths specifically targeted at theft.<sup>52</sup>

This precedent, combined with the English evidence, is certainly suggestive. In England we again get a general oath of loyalty; this is from III Edmund:

In the first place, all shall swear in the name of the lord, before whom that holy thing is holy, that they will be faithful to King Edmund, even as it behoves a man to be faithful to his lord, without any dispute or dissension, openly or in secret, favouring what he favours and discountenancing what he discountenances. And from the day on which this oath shall be rendered, let no-one conceal the breach of it in a brother or relation of his, any more than in a stranger.<sup>53</sup>

The text then goes on to discuss the communal obligation to pursue thieves, the prohibition on changing lords before being quit of all legal charges, a number of measures on theft focusing on cattle, and the necessity of surety. All of these could plausibly be interpreted as being duties implied by the oath, though this is not stated explicitly.<sup>54</sup> In Cnut's code, however, the focus on theft is explicit; it is stated simply that "it is our desire that everyone, over twelve years of age, shall take an oath that he will not be a thief or a thief's accomplice".<sup>55</sup> The English picture is not quite so explicit in the extension of the oath's implications beyond the basic element of loyalty to the king, but otherwise it seems similar to the situation in Carolingian texts.

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<sup>51</sup> Boretius *Capitularia*, no. 33, chs. 3-9; King (1987), pp. 234-35.

<sup>52</sup> Pratt (2007), pp. 234; Boretius *Capitularia*, no. 260, chs. 4-8 and oaths at ii, p. 274.

<sup>53</sup> III Em 1.

<sup>54</sup> III Em 2-7.

<sup>55</sup> II Cn 21.

The problem is the key connection between the oath of loyalty and a general equation of crime with treachery. Even the Carolingian evidence is not very clear on this: Charlemagne's specifications for what was conveyed by the oath of loyalty do go beyond what might have been expected but they do not go so far as to comprehend everything that we would think of as crime. Apart from the duties towards the church and the clearly related protection of widows, orphans and pilgrims, all involve offences that could easily be represented as being against the emperor himself. In England, all that is clear from the texts is that the harbouring of fugitives is considered a betrayal of the king – significant in itself but not obviously indicative of a unified system of justice based on this concept. Furthermore, it must be important that in both countries the extension to include theft involves a new and specific oath. This surely implies that the old general oath had not successfully created an understanding that theft was a betrayal of the king – if it had done so there would have been no need for the specific oath. It strikes me that the interpretation of this evidence is rather more tenuous than Wormald and Pratt suggest. To state that "crime in general, including theft" was equated with lord-treachery seems unreasonable: apart from the harbouring of fugitives, theft is the only case for which there is clear evidence that an oath was important, and even then the oath involved was separate from the oath of loyalty. To claim, as Pratt does, that this equation was explicitly demonstrated by the list of *botleas* offences in II Cnut, on the grounds that lord-treachery was set alongside *husbryce*, arson, open theft and *æbere morð* is also highly questionable: surely we must conclude that it is listed as a separate offence and that, if anything, this implies that the other offences mentioned were not understood as lord-treachery.<sup>56</sup>

My intention here is not to dismiss entirely the work of Wormald and Pratt. Much of their picture of a highly organised system of Anglo-Saxon justice, relying on communal obligations and reinforced by oaths, is convincing. What, I think, ought to be looked at more carefully is the idea of a wider theory of crime. For Wormald this is a central thesis. He pushes for the appreciation of an Anglo-Saxon shift "from a polity where injury is redressed to one with a developed notion of crime and punishment, [and which] performs at least one of the functions of a 'state'".<sup>57</sup> This seems to me to be pushing beyond what the evidence can actually show us, both in general terms and specifically on the issue of violence, the focus of this discussion. Whereas there may be some

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<sup>56</sup> Pratt (2007), p. 234.

<sup>57</sup> Wormald (1999e), p. 342.

merit in seeing theft as a crime that could be regarded as betrayal of the king on the grounds that it breached an oath, and whilst a good case can be made for seeing harbouring of fugitives or the failure to pursue thieves in a similar light, there is no good evidence that any of this applied to royal policy towards violence. There, as we have already seen in great detail, the focus was on protection; and though breach of protection could, I am sure, be seen as infidelity to the king, there is no evidence to suggest that this was a dominant concept for contemporaries. Indeed, by comparison with the Angevin use of the term “felony” to designate serious crimes – which is quite explicit in characterising them as treachery towards the king – the Anglo-Saxon case relies heavily on inferences and generalisations that must always remain possibilities rather than certainties.

The Anglo-Saxon material, then, offers little explanation for how the term felony came to be applied to simple homicide, though it does provide a model for understanding the term’s application to crime in general. This model, it needs to be emphasised, works a great deal better for the late twelfth century than for the pre-conquest period for which it is intended. Here we have a term, *felonia*, whose essential meaning is lord-treachery being combined with what seems to be a continuation of the old loyalty oath. As Wormald notes, the Conqueror is known to have exacted a general oath at Salisbury in 1086, whilst the Assize of Northampton – the very text in which the term “felony” first appears in its later familiar sense – also insists on a general oath from “earls, barons, knights and freeholders, even villeins”.<sup>58</sup> It is no part of my argument that this is unconnected with the use of lord-treachery under the Anglo-Saxons and Carolingians, but I do not think it is fair to see this as something that had been entirely prefigured in West Saxon legislation, as Wormald seems to. The inclusion of simple homicide as a felony in *Glanvill* is a clear departure from the Anglo-Saxon tradition. Before Henry II’s reign there is no evidence for homicide being treated as such. Anglo-Saxon England may well have had a justice system in which some offences – such as theft, harbouring fugitives, and failure to pursue thieves – were regarded as infidelity to the king, maybe even breach of an oath, but these offences were a limited set and violence stood apart, being regulated by royal protection far more than royal prohibition. We might want to look at these offences as crimes in Anglo-Saxon England – there seems little reason not to, given how they were prohibited and punished by the crown – but we should be careful to avoid extending this appellation beyond what the evidence justifies. The key development being

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<sup>58</sup> Wormald (1999h), p. 367; *E.H.D.* ii, no. 25, ch. 6; Stubbs *Charters*, p. 180.

studied here, after all, is the process by which homicide and other violent offences were criminalised.

Probably by the time of the Assize of Northampton (if we overlook its use of the term “murderer”), and certainly by the time of *Glanvill*, homicide had joined the list of offences that can undoubtedly be termed crimes. Theories about lord-treachery and oaths go a long way towards explaining why this category of serious crimes came to be associated with the word “felony” instead of older terms like *botleas*, but they do not offer any help for explaining why homicide joined the category. For this, I think, we do better to look at the murder fine, which seems in time to have rendered most killings of freemen *botleas* so far as the slayers were concerned. It was the murder fine that led to homicide becoming a serious crime, it was the importance of the concept of lord-treachery that led to serious crimes being termed felonies. What remains puzzling is why these two shifts seem to have occurred simultaneously, with the term felony seemingly being introduced at the precise moment when simple homicide was added to the list of serious crimes. Was this coincidence, or was the changed content of the list related to the change in terminology? It is really very hard to say. There seems no clear link between the term felony and homicide, so perhaps the best theory is that Henry II’s reign saw a serious reconceptualisation of the justice system.<sup>59</sup> Much had changed since the Norman conquest – not least the fact that the majority of slayers probably now faced afflictive justice – and the old terminology no longer fitted well with what was probably a rather confusing and incongruously anglophone system. The solution of discarding the old Anglo-Saxon terminology and introducing new concepts and vocabulary seems a likely one, and it may be that felony was introduced primarily for that reason, simply as a new – and, for francophone legal professionals, more comprehensible – term for designating the most serious offences. That these offences were known as felonies may well be linked to Carolingian and Anglo-Saxon ideas of lord-betrayal and the prosecution of theft, but the fact that homicide was included in this category seems more likely to be because of the murder fine and the other developments outlined in the last chapter. There may, in other words, be no direct connection between the developments that led to the emergence of the term felony and the emergence of punished homicide. It is, at any rate, difficult to show any connection between the concepts before they were united under Henry II.

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<sup>59</sup> For a discussion of legal developments early in Henry II’s reign, see White (2000), pp. 161-212.

## **Conclusions**

The twin pillars by which violence was to be prosecuted in later medieval England – felony and breach of the peace – thus emerge rather differently from this analysis of their ideological importance. Peace, in the form of the Peace Movement, emerges as absolutely critical to the expanded ambition of twelfth-century justice regarding violence. The Truce of God, in particular, encouraged the idea that violence be prohibited generally by a single protective peace and, even if this initially only applied at particular times, that the logical climax of the movement was an unbroken general peace against homicide was clear even in the middle of the eleventh century. The ambitious scope of the Peace and Truce of God influenced the secular rulers who were called upon to provide secular sanctions and, in Normandy in particular, clearly shaped expectations of the nature of justice regarding violence. There are signs of these increased expectations of the law under Henry I, and we would be well advised to take them seriously given how men familiar with the Truce of God in Normandy could have viewed Henry's declaration of a firm peace in 1100. Henry II, coming to power at a time when his rival European monarchs were trying to assume full control of the peace within their own realms, and possessing a mandate to restore the order of his grandfather's reign, was almost certainly influenced by expectations of peace formed on the continent. He had not only the administrative ability and the strong legal inheritance necessary to push royal control over violence forward, he had a strong ideological motivation to do so.

Felony, by contrast, emerges rather differently. In emphasising the Anglo-Saxon and ultimately Carolingian roots of what occurred under Henry II, it is worthwhile to note the strong possibility of a degree of continuity between felony and an earlier, albeit more limited and less clear, understanding of crime as lord-treachery. However, the concept itself cannot offer any explanation for the expansion of the most serious offences to include homicide. For that we need to look at ideas of peace, as we have seen, and at technical legal developments such as the murder fine. What the close correlation between the first text in which homicide is clearly a royal offence and the first use of the term felony, in its common-law sense, tells us is that there was a radical renovation of the English legal system under Henry II in which much was rationalised and reinterpreted using concepts and language comprehensible to the contemporary ruling class. Though the case is not entirely clear, felony probably does show how Carolingian ideas adopted by the West Saxon royal house came to underpin the common law's approach to crime. As such, its importance cannot be doubted, but its relationship with the process by which homicide was criminalised is only a tangential one.

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The conclusion that emerges most strongly from this study is the key role played by protective power in regulating violence. Building on the crucial arguments put forward in the opening chapter for the absence of the royal prohibition on homicide that both Naomi Hurnard and Patrick Wormald had argued for, chapter two showed how the system that regulated feud in Anglo-Saxon England was one primarily, indeed almost exclusively, founded on protections. The two exceptions, *fihtwite* and *morð*, do need to be taken into account, but it should be remembered the practical relevance of *morð* remains in doubt, whilst the *fihtwite* may well have grown from protective roots. Other than these offences, all the powers used to regulate violence, royal and otherwise, were protective and as such it is reasonable to think in terms of violence being controlled and channelled by a wide network of protective power. This network included not only the king but all lords, free kindreds and churches, as well as – it seems – some guilds and towns. The prevention of violence was achieved using protective power and protective power was something exercised by free society as a whole, not just the crown. This said, however, the second chapter also showed how the crown came to gain a dominant role within this web of protections. By protecting houses, churches and main roads, and by expanding the sources of the king's personal protection to include royal officers, the king of the English became easily the foremost protector in the land and in so doing he gained considerable jurisdiction over violence. This was, however, protective jurisdiction, not jurisdiction as we would now envisage it. There was no offence of homicide or wounding over which the king had special rights, but rather a series of different royal protections, sitting alongside those of others, which could be breached by violence and would, as a result, lead to situations in which violence was regarded as an offence against the king.

As chapter three showed, this new understanding of the regulation of violence, with the crown as simply the leading player in a much wider network of protective power, can be placed at the heart of a far-reaching reassessment of the distribution of legal power in Anglo-Saxon England. The acknowledgement of the significance of the royal protective powers of *hamsocn*, *griðbryce* or *mundbryce*, and *forsteal* leads inevitably to reassessment of Hurnard's influential demolition of F.

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W. Maitland's view of jurisdictional privilege under the Anglo-Saxon kings.<sup>1</sup> We can no longer agree with her in dismissing these offences as essentially minor, and must acknowledge that some ecclesiastical institutions, in possessing these delegated royal powers, had extensive privileges. There was, in fact, very little royal legal power of significance that would not be exercised by an institution with a grant of *hamsocn*, *griðbryce* and *forsteal* alongside the more commonplace sake and soke, toll and team, and *infangeneþeof*. The few *botleas* offences found in the laws, and for which there is no evidence of delegation, cannot be shown to have been of any significance in practice, which is in marked contrast to the frequent appearances of the royal protective powers in *Domesday Book*. The recognition of these protections' importance thus leads directly to a favourable reassessment of the significance of the legal powers delegated by the king to a handful of privileged institutions. It is only, however, with the application of some common sense to the long-standing historiographical fixation with court-holding rights and exclusion clauses that we get a real appreciation of the nature of delegated power: these things may not have existed in England, but their absence should not detract much from our view of the significance of delegated legal powers. Holding courts in this period meant presiding, not judging, and it is hard to see that role as intrinsically more influential than what could be achieved by a powerful local lord promoting his interests from a less official position. Nor is it clear that the right physically to exclude royal officers is significantly different to the abnegation of their right to exact financial dues. There seems, in short, little reason to think that powers delegated by the king were insignificant. Our focus on protection, however, also highlights the inadequacy of looking at delegated power alone. The protective powers exercised by all lords, kindreds and churches were just as significant as anything the king could grant. For a complete picture of legal privilege we need to take into account sanctuary rights, both ecclesiastical and lay, as well as the protections of wergild and *manbot* that covered every man in feud. In essence these were no different to the core royal powers of *hamsocn*, *griðbryce* and *forsteal*.

The first section as whole, then, offers a new way of understanding the regulation of violence in Anglo-Saxon England, an account of the rise of royal jurisdiction within that system, and a radical reassessment of the distribution of legal power more generally in Anglo-Saxon society. The second half of the thesis is perhaps slightly less controversial, but its scope is similarly broad. Its first concern was to find the point at which we can reasonably believe that homicide was a royal

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<sup>1</sup> Hurnard (1949).

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crime – an offence punishable by the crown wherever, whenever and against whomsoever it was committed. The evidence, both processual and normative, suggests that Henry II's reign was the time, with unequivocal evidence first appearing near the end of his reign in *Glanvill* but with strong indications that when the 1166 Assize of Clarendon spoke of "murderers" it in fact meant all killers.<sup>2</sup> This, however, the subsequent analysis suggests, may well not have been as dramatic a step as it first appears. The murder fine seems quite clearly to have expanded its scope dramatically, and if we believe the *Dialogue of the Exchequer* it encompassed the killing of all free men by the 1170s.<sup>3</sup> It may well be, then, that almost all killers were being punished as "murderers", in the sense that their actions would have resulted in the levying of the murder fine had they escaped, well before the Assize of Clarendon. The murder fine was, of course, in large part a royal protection, and it was not alone in expanding its scope. It can be seen in the *Leges Henrici Primi* how the offences of *hamsocn* and *griðbryce* were being used even in cases where, in the minds of conservatives such as the *Leges Henrici's* author, the circumstances did not justify it.<sup>4</sup> In short, these Anglo-Saxon royal protections were being used as "tickets" to place cases under royal jurisdiction in just the same way as breach of the king's peace was under the later common law. This may not have been of the highest importance for the development of a crime of homicide – the murder fine providing a route to royal jurisdiction that must have been a lot simpler in most cases – but for non-lethal cases of violence this may well have proved highly influential. It provides, at least, a very plausible model for how "brawling, beatings, and even wounding" would come to be regarded by Glanvill as a part of royal jurisdiction if, and only if, the accuser included an allegation of breach of the king's peace in his plea.<sup>5</sup>

In allowing the use of accusations of breach of the king's peace as tickets in all circumstances, courts under Henry II – and it seems some under Henry I – were making an administrative and procedural change. They were not, however, doing so in an ideological vacuum and the implication of this system of tickets must have been clear enough at the time: the king's peace or *grið* now extended everywhere, to everyone and at all times. A general peace was thus created not by legislative decree, but seemingly by some potentially rather dubious administrative means.

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<sup>2</sup> *E.H.D.* ii, no. 24; Stubbs *Charters*, pp. 170-3.

<sup>3</sup> *DofExchequer*, 1:10.

<sup>4</sup> Hn 22-22:1.

<sup>5</sup> *Glanvill*, i.2.

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We might even be tempted to see its emergence as an accidental by-product of some very pragmatic tinkering with procedure. This, however, is only one way of looking at it. The final chapter here showed that there is good reason to think that ideological considerations may have driven this development. The Peace and Truce of God were, after all, at the centre of the regulation of violence on the continent at this time and the idea of a general peace against violence – though not its practical manifestation – was clearly present in the mid eleventh century. The process, too, of the royal takeover of responsibility for peace was well underway in the twelfth century. Emperors, kings, dukes and counts first functioned as the secular arm, giving force to the church's peace, and then went on (in the case of King Louis VII and Emperor Frederick Barbarossa) to seize the initiative and proclaim their own royal and imperial peaces.

The idea that a king should enforce a general peace against violence would thus hardly have seemed outrageous to the Anglo-Norman cross-channel aristocracy, and it is quite possible – probable, even – that in the early evidence for the use of *griðbryce* and *hamsocn* as tickets we are seeing an attempt to give practical legal force to Henry I's coronation declarations about placing the entire realm within his firm peace.<sup>6</sup> The establishment of this as commonly accepted legal doctrine after the disorder of Stephen's reign may well owe something to the example of Henry II's continental contemporaries attempting, rather less successfully, to do something similar. The heightened influence of the Peace Movement may, in short, be what drove post-conquest kings (as opposed to their predecessors) to convert the Anglo-Saxon position of dominance in a wider system of protections into a fully enforceable general peace. Or, to put it another way, post-conquest kings were able to make the full implications of the Peace and Truce of God a reality in England, while their European contemporaries failed, only because of the strong legacy of protective power they inherited from their Anglo-Saxon predecessors. The Peace Movement, then, seems to have worked like a powerful ideological fertiliser on the already rich soil of Anglo-Saxon protective power.

The Norman conquest thus emerges here as heralding something of a step-change in the progress of protective power. The pattern of expansion under the Anglo-Saxon kings was, in some senses, continued after 1066: we find a new protection covering all those who had followed William across the channel and all those who would come after, and we find an expansion of the scope of protections – visible in particular under Henry I – that to some extent has earlier parallels. The

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<sup>6</sup> Hn cor 12.

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expansion of the king's *mund*, probably under Edmund, so that it could be granted not only by the king but also by royal officers is in a sense similar to the later expansion of *griðbryce* into a generally applicable "ticket". There is, however, a qualitative difference in the types of change we see after the conquest, most importantly in their tendency towards generalisation. Anglo-Saxon royal protections may have multiplied and expanded but they remained things to be taken literally, whereas under the Normans we see a move away from this and towards a degree of fictionalisation: *hamsocn*, it seems, no longer needed to take place in a house; *griðbryce* could be committed against someone who had not previously sought out the king's *grið*; the murder fine no longer required the victim to be obviously foreign. After the conquest we do see the same sorts of processes at work as before, but added to them is a drive towards the idea that the king's various protections should be generally applied, protecting everyone, everywhere, all the time. The driving force for this, it has been suggested here, was the presence of this ideal in the continental Peace Movement, the assumptions underlying which the Norman aristocracy, and particularly the clergy, brought with them.

So, what do all these findings amount to when taken together? We are looking at a transition from a broadly based system of protections regulating violence, in which the king was just one of many players, to a system in which the crown effectively prohibits all violence as crime. It may be that initially the establishment of full royal jurisdiction over violence was seen in protective terms – the king's protection now covering everyone evenly – but the result of this change was so close to prohibitive power over violence that it must swiftly have come to be seen as such. Felony, after all, is the dominant concept in dealing with homicide and wounding in *Bracton*, and though that text makes liberal use of accusations of breach of the king's peace it is clear that there it is specific acts that are being prohibited rather than specific people being protected. What we see is a shift from a system in which violence was regulated using the protective power that characterised the system of feud, to one where, in spite of a largely fictional idea of peace, prohibitive power and the idea of crime are dominant. This is, then, in a legal sense, the end of feud and the criminalisation of violence. But it was no cataclysm; the increasing royal dominance of the network of protections that underpinned feud under both Anglo-Saxon and Anglo-Norman kings seems eventually to have produced a situation in which the crown had *de facto* jurisdiction over most serious violence. Only once this state of affairs had been achieved was it rationalised into a *de jure* crime of homicide. It was an important step, it is true, but it should be seen as the last of a series of important steps, the culmination of a much longer process reaching back well before the Norman conquest.

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The irony here is that though the outcome of this process was the effective abolition of the old system of protective power, the process itself was characterised by protection's meteoric rise. Protective power did not gradually fade into obscurity, it increased its importance right up until the moment of its extinction, when it became so general that it was, in effect, no longer a protection. Protective power's demise was thus a bit like that of a supernova, collapsing under its own weight at the very point that it shines its brightest, then swiftly fading from view – an unusual trajectory for a historical phenomenon. However, satisfying though it is to be able to model protection's progress in such cosmic terms, we should nonetheless be alert to the possibility that some less dramatic developments were at work here. It was royal protection, of course, not the practice of feud, that reached critical mass towards the end of our period. From the limited evidence we have, feud itself seems likely to have followed a rather less dramatic – more white-dwarfish – course of gradual decline. We can perhaps identify two separate strands here, the gradual build-up of royal protective power and the erosion of that belonging to other parties, to free kindreds in particular. Much of the time these two strands are so entwined that it is difficult to separate them. For example, as we saw in chapter two, complex protections, though they did serve to expand royal protection to some extent, their main purpose was clearly to limit the use of protective power by kindreds. This, however, seems only to have been effective in rather limited circumstances, removing the threat of violence – the basis of protective power – in cases where composition settlements had been reached, where thieves had been slain, and where men had grievances against their lords.

Perhaps more significantly, in certain instances the expansion of simple royal protections was directly at the expense of private protectors. The introduction of *hamsocn*, for example, seems to have meant that ordinary householders no longer protected their homes, and likewise *ciricgrið* for churches. Even the expansion of the king's *mund* so that it could be offered by royal officers must, in effect, have meant that such men no longer exercised their own protection. In cases where private protections had not been displaced by new royal ones, the emergence of new royal protections must – simply because of the increased demands on the resources of offenders – have had some effect on the ability of other protectors to extract their own penalties. There are indications that such royal penalties would be prioritised in such settlements, which must in some cases have left lords and kindreds with little or nothing by way of wergild and *manbot*. Indeed, even if the division of an offender's resources was in practice more equitable, there must often

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still have been a material diminution in the level of financial compensation that non-royal protectors could hope for.<sup>7</sup> Far more than significant that this, however, were royal claims to exclusivity in certain cases. Edmund's insistence on making his new protections *botleas* also had the effect of negating the rights of kindreds to wergilds, lords to *manbots* – indeed the right of any other protector to what they were due. Though this was retreated from afterwards, presumably because it aroused opposition, the same cannot be said for the similarly unemendable murder fine after the conquest.<sup>8</sup> In some senses the very increase in the scope of royal protection had the effect of limiting the protections belonging as of right to others.

Moreover, it is certainly possible that factors other than the expansion of royal protective powers influenced the decline of feuding. This, indeed, has been the line that recent literature has emphasised. Wormald, as we have seen, makes rather a lot of the idea that Edmund's laws struck a serious blow at kin responsibility, allowing kins to disown killers and avoid liability for their deeds and thus not only making legitimate vengeance next to impossible but also weakening the bonds of kinship that drove men to seek it in the first place.<sup>9</sup> In fact, he makes a more general case for the weakness of English kindreds, relative to Celtic ones, being at least in part the result of an assertive West Saxon monarchy in the seventh century.<sup>10</sup> This relative feebleness of English kindreds is well-known; in the words of W. L. Warren, by comparison to Welsh and Irish examples, "English kindred groups appear half-formed and never achieving the cohesion, identity and status of clans".<sup>11</sup> If we add to this want of proper familial feeling social trends which seem to have been pushing the free peasantry towards serfdom, even before the arrival of the Normans, there is a reasonable case for suspecting that the exercise of protective power by at least the lower rungs of English society was becoming increasingly difficult throughout the period.<sup>12</sup> However, we must

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<sup>7</sup> This, at any rate, is what is suggested by I Cn 2:4-2:5. Wer 4:1-6, on the other hand, may suggest that the immediate family's right to the portion of the wergild known as the *healsfang* and the lord's right to *manbot* would take precedence over payments to authority.

<sup>8</sup> Though some accounts do allow that part of the fine should go to slain man's kin, in practice this is hard to demonstrate. See Garnett (1985), pp. 121-22.

<sup>9</sup> Wormald (1999e), pp. 336-9.

<sup>10</sup> Wormald (1999j), pp. 194-98.

<sup>11</sup> Warren (1987), p. 3.

<sup>12</sup> Stenton (1971), pp. 470-72.

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not take this too far. English kindreds may not appear in our sources in the same developed way that Irish or Welsh ones do, but no-one would seek to deny their existence, and the reduction in the status of the peasantry was hardly a cataclysmic event. We still must account for the existence of some free ceorlish kindreds in the twelfth century, even if their numbers and the strength of the ties that bound them were not as great as they had been in the past.<sup>13</sup> These parallel developments are worth bearing in mind, of course, as they certainly had an influence on the working of the law in practice, but they do not materially affect the picture of developing protective power advanced here.

The final question I want to consider here is that of what the transition from feud to crime meant in practice for violence in English society. Was the great increase in royal protective power leading to the theoretical criminalisation of feud really more a matter of theory than reality? The absence of good evidence for the practical treatment of violence in this period makes this impossible to answer conclusively. We cannot know for sure whether violent feud was common even in the tenth century because we simply do not have the types of sources where we would expect to see it happening. Indeed, in terms of evidence for the reality of feud violence, the best we have for the Anglo-Saxon period is one prolonged Northumbrian feud, undoubtedly with political dimensions to it, that was carried out by opposing kindreds of the very highest status. Feud among ceorls, even among ordinary thegns, cannot be shown to have existed. What we can be sure of, however, is that by the end of the period people, usually of relatively low status, were in practice executed for the felony of homicide.<sup>14</sup> Though we cannot be sure of how things stood before, we do know that in the thirteenth century the royal prohibition on homicide was very real indeed, at least for those of low status. For those of higher status, however, there are questions to be answered. We know from the feud of Uhtred and Thurbrand that, in the eleventh century, there were some men of the highest rank who could kill each other, and breach multiple royal protections in the process, without suffering any consequences as a result of royal justice. Thus from our one clear case, we can tell that at the highest level, and in a relatively far-flung area of the kingdom, the law appears to have been meaningless in the eleventh century.<sup>15</sup>

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<sup>13</sup> Bartlett (2000), pp. 316-25.

<sup>14</sup> Given (1977), pp. 66-105.

<sup>15</sup> Morris (1992); Fletcher (2003); Kapelle (1979), pp. 3-26; and above, pp. 34-35.

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Did this sort of noble independence change significantly as a result of the late twelfth-century royal prohibition on violence? Howard Kaminsky argues not, suggesting that nobles still feuded and killed each other in spite of the supposedly felonious nature of their acts, and that, rather than suffering royal penalties, they tended to end such disputes by negotiation.<sup>16</sup> Kaminsky's evidence of noble feuding, of course, does not affect the fact that the majority of the population could not ignore royal prohibitions with such ease – nor can we here go into the factors that seem to have made the fourteenth and fifteenth centuries more liable to noble law-flouting than the thirteenth<sup>17</sup> – but it does raise an interesting question about the wider effects of the shift in the mechanisms that regulated violence from protective to prohibitive power. If, to begin with, we look at the distribution of legal power in society, as we did in chapter three, it seems likely that we can identify some clear consequences of the relatively sudden irrelevance of protections. The effects can be quite obvious: we find, for example, that the three key protective powers reserved by Cnut – *hamsocn*, *griðbryce* and *forsteal* – cease to be the highly-prized privileges that they once were, with clearly prohibitive rights to inflict punishment, such as the privilege of operating a gallows, emerging as the must-have jurisdictional privilege of the early thirteenth century.<sup>18</sup> Indeed, *hamsocn*, *griðbryce* and *forsteal* ceased to have any real meaning once violence was covered with a blanket prohibition, as the terms' later histories show: *hamsocn* gains an association with burglary but its violent connotations become, it seems, increasingly fictional;<sup>19</sup> the king's special protection that underlay *griðbryce* continued to exist, but its importance became more to do with other privileges that came to be associated with it, such as immunity from certain types of prosecution or distraint;<sup>20</sup> and *forsteal*, undergoing yet another bizarre transformation, became the offence of buying goods outside of markets and evading tax by selling them on at a profit.<sup>21</sup>

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<sup>16</sup> Kaminsky (2002), pp. 74-79.

<sup>17</sup> See Hyams (2003), pp. 263-64.

<sup>18</sup> See Lambert (2009b), pp. 136-38; Fowler (1882), pp. 51-2.

<sup>19</sup> Colman (1981), p. 103.

<sup>20</sup> Lacey (2009), pp. 86-90.

<sup>21</sup> Britnell (1987).

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If we turn to ecclesiastical sanctuary we again seem to have a major shift in customs roughly coinciding with this shift to prohibitive power. Churches do away with time-limited protections and instead claim the right to protect permanently, usually through allowing felons to “abjure the realm” and to go into exile unharrassed by royal justice or, in a handful of more privileged cases, by allowing permanent residence within the confines of the sanctuary.<sup>22</sup> To the extent that such sanctuary rights offered protective jurisdiction on the Wulfstania model of *ciricgrið*, it seems that this too was replaced with more modern rights to hang felons.<sup>23</sup> Finally, as we have just seen, the shift to prohibitive power, looked at in the long term, seems to have had a tangible effect on the abilities of those who would previously have been able to engage in feuding to exercise protective power. Quite simply, the protective rights of kindreds and lords to wergild and *manbot* do seem to have been entirely eliminated by the royal prohibition on homicide, to the extent that in the late thirteenth century Edward I and his ministers were expressing what seems to be unfeigned horror, incomprehension and outrage at the existence of these customs among England’s Celtic neighbours.<sup>24</sup> The continued presence of noble feuding may tell against this interpretation but it remains to be seen whether this is in fact feud of the sort that involves wergilds and other payments for breach of protection, or actually more of a ritualised form of property dispute.<sup>25</sup> Further study is needed here. We should not, in all events, be too surprised that an armed class might violently assert its power in protective terms even within a system that prohibited violence – nor even that such actions might be regarded as legitimate by a substantial section of society – given that this is basically how some sociologists represent the modern mafia.<sup>26</sup> There is, then, much to suggest that for the holders of protective privileges, from kindred groups to sanctuaries to immunities, the shift from protection to prohibitive power was a truly major event.

More widely, we might question the extent to which this legal shift from protective to prohibitive power had a social or cultural impact. The concept of protection had penetrated deeply into early

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<sup>22</sup> See Réville (1892), pp. 17-18; Hunnisett (1961), pp. 37-54; Thornley (1924), (1933); Forster (1905).

<sup>23</sup> Lambert (2009b), pp. 136-38; see above, pp. 84-91, 136-41.

<sup>24</sup> MacQueen (1990), p. 92; Stones (1965), no. 33; Davies (1966), pp. 143-45, 154; Davies (1969), pp. 338-40; Otway-Ruthven (1949), p. 262.

<sup>25</sup> See Kaminsky (2002), p. 76.

<sup>26</sup> Gambetta (1993); Varese (2001). Cf. Kaminsky (2002), pp. 77-78.

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and high medieval society, being intimately linked, as we saw in the introduction, with emotional models concerning the concepts of honour and shame.<sup>27</sup> Indeed, protection, perhaps necessarily in view of its practical importance in feuding, informed the understanding of personal relationships from kinship to lordship to guild membership, and probably even friendship.<sup>28</sup> We even find the concept moulding accounts of how and why long-dead saints exerted their power.<sup>29</sup> Protection thus appears as a major theme in sources as wide-ranging as chronicles, heroic poetry, chivalric *chansons*, and miracle collections.<sup>30</sup> Can a practical shift away from protection in the way that society regulated violence perhaps have had a knock-on effect on the importance of protection in other contexts? Paul Hyams has, in effect, argued that this was unlikely; that in his research the vengeful emotions and calculations of risk that guided people's actions when dealing with violence changed little if at all over our period and that though royal prosecution of homicide was clearly effective in the legal sphere "there is no good reason ... to confuse political and administrative change with cultural change."<sup>31</sup> He may be correct, but it seems to me that this is an issue that could profitably be pursued further. Expectations of the emotional effect that violence would have on people must surely to some extent be conditioned by socially defined notions of honour and shame, and these at least were intimately bound up with protection. Similarly, it is not unreasonable to suggest that people's expectations of the behaviour of powerful figures from lords, to the king, to miracle-working saints, must have been conditioned by their understanding of the sort of power they wielded. A shift from identifying such figures as great protectors to stern prohibitors does not seem too unlikely, given that the earlier protective role of all such figures is well established. Nor does it seem to me to be intrinsically unlikely that conceptions of kinship and lordship – possibly even associated ideas like friendship – might have shifted as the element of practical protection was removed from them. Finding the evidence to demonstrate such a widespread socio-cultural shift might be difficult, but there is surely a question here that needs to be answered.

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<sup>27</sup> Hyams (2003), pp. 34-68; White (2009); Davies (1995), pp. 144-47.

<sup>28</sup> Hyams (2003), pp. 21-32; Althoff (2004), pp. 67-90; Lambert (2009a), pp. 3-8.

<sup>29</sup> Davies (1995), pp. 140-41.

<sup>30</sup> See, generally, Lambert (2009a).

<sup>31</sup> Hyams (2003), pp. 265-66.

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The effects of the shift from protective to prohibitive power, however, will have to wait for further study. The focus of this investigation has been firmly on protective power and its pervasive influence in the tenth, eleventh and twelfth centuries. Violence and its regulation, I would argue, cannot be understood in this period without a firm grasp not only of the king's protective jurisdiction but also the vast web of non-royal protections within which it operated. It is not just that it was largely protective power that regulated violence in the system of feud that had existed in Anglo-Saxon England for centuries, it is that Anglo-Saxon and Anglo-Norman kings built their jurisdiction over violence using the very same sort of power. They were participants in this web of protective power in just the same way that many others were. The Norman conquest did have a crucial influence here – it led to the importation of Truce of God ideology which would leave twelfth-century kings dissatisfied with this less than dominant position, just as it led to the all-important creation of the murder fine – but both of these developments were slow burners whose full effects were not felt for decades. Indeed, the essential continuity across the conquest can be seen in the evidence of the 1130 Pipe Roll that protections from violence were still important even at the very height of Henry I's power. Increasing royal protective power may have challenged the wider scheme of protections but it did not destroy it until at least a century after 1066. The emphasis on protection here is radically different to the traditional concerns of legal historians charting the origins of the common law, and there can, of course, be no doubt that other legal changes and procedural reforms during this period were crucially important for justice as a whole, violence included. What I have offered here is in no sense an attempt to replace such general narratives but, specifically on the shift in the treatment of violence that took place between the late ninth and early thirteenth centuries, there is a great deal that does need revising. The criminalisation of violence was a legal transformation of the most fundamental importance; it deserves considerably more attention than it has been given by historians and, if it is to be properly understood, it requires a full appreciation of the role of protection. Quite simply, if we do not understand protective power in this period, we cannot properly understand violence.

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# List of Primary Sources

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Primary sources in this thesis are cited either through abbreviations (as detailed above, pp. v-viii) or, in the same way as secondary sources, by the use of the editor's name and the year of publication in conjunction with the bibliography. These methods remain the best way to find complete references for citations in the text, but for the reader's convenience a categorised list of the primary sources used is presented here.

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