PART I

Legal Contexts

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English Law before the Conquest

Royal legislation issued in English between the baptism of Æthelberht of Kent (*c.* 600 AD) and the reign of Cnut (r. 1016–35) comprises one of Europe's more remarkable records of early political and legal thought. In it we see the transformation of England from a collection of disputing kingdoms to a nation united under the rule of Wessex in resistance to Viking incursions – all before one such Viking, Cnut (or 'Canute the Great'), overcame Æthelred II ('Ethelred the Unready') and then made full use of the laws maintained by Æthelred and his ancestors, thereby easing the shock of alien rule. No polity of early Western Europe (save Ireland) left such a lengthy record of its reflections on matters of law in its own language. As we will see, this corpus encompasses a range of prose genres beyond those issuing from the royal court; most were read and copied long after the Norman Conquest.

The most immediately striking aspect of Anglo-Saxon law is its having been written in the vernacular even as Latin was preferred for such purposes elsewhere in Europe. Why England favoured its own language for official use defies easy explanation. Poor Latinity does not account for it, as the kingdoms of Northumbria and Kent were pre-eminent centres of Latin learning until the arrival of Viking armies at the close of the eighth century.[1] When seen in a wider context, the advent of vernacular law-making in England may not even be as extraordinary as it now seems. In Einhard's *Vita Karoli Magni*, we learn of Charlemagne's wish to have in writing the most ancient heroic verse (*antiquissima carmina*) of the Franks and of his attempt to prepare a grammar of his own tongue (*grammaticam patrii sermonis*).[2] Poems such as the *Hêliand* and the fragmentary *Hildebrandslied* give some sense of the vigour of Francia's native verse tradition and suggest why its preservation interested the royal palace of Aachen. But not much of the literature to which Einhard referred is now extant, and one wonders if Anglo-Saxon England would occupy so central a place in the history of vernacular writing had more such texts from the continent survived.

King Alfred the Great (r. 871–99), whose book of laws (*domboc*) is the most complex to have been issued in the Anglo-Saxon period, was perhaps inspired to reinvigorate writing in English as much by Charlemagne's example as by the pressure of native tradition. (Ties between the house of Wessex and the Carolingian court had earlier been established when Alfred's father Æthelwulf married the daughter of Charles the Bald.) But Alfred's ambitions for the vernacular surpassed those of Charlemagne and subsequent Frankish monarchs. A number of Old English versions of Latin texts (among them Boethius's *Consolation of Philosophy*, Gregory the Great's *Pastoral Care*, and Augustine's *Soliloquies*) seem indebted to Alfred's initiative and perhaps to his own efforts as translator. Alfred also established schools where young aristocrats learned to read and write in their own language. In the decades after Alfred's death, such efforts allowed the West-Saxon dialect of Old English to serve (until the Norman Conquest) as the standard language for writing new texts and copying older ones.

While use of the vernacular must have advantaged the Anglo-Saxon state in countless ways, post-Conquest ignorance of Old English rendered its legislative achievements effectively mute during the later Middle Ages. The situation was hardly better in the early age of print. Anglo-Saxon law did not attract the enthusiasm of early modern antiquarians nearly as much as continental materials, a contrast evident in the reception of Charlemagne's *Admonitio generalis* (789) and Alfred's *domboc*, both of comparable importance to their respective polities. While no fewer than four editions of the *Admonitio* appeared between 1543 and 1557, Alfred's laws were not printed until 1568 (when they were edited by William Lambarde alongside other known works of Anglo-Saxon legislation), and not again until 1644, when Lambarde's edition was revised by the Cambridge orientalist Abraham Wheelocke.[3]

Another reworking of Lambarde's edition in 1721 by David Wilkins (also an orientalist) formed the basis of all commentary for well over a century. Inevitably, however, editing the Old English legal corpus came to be influenced by comparative philology, a movement then ascendant in some German universities. Its most famous exponent was Jakob Grimm, whose pioneering studies of historical grammar, mythology, folklore and law shaped the field for generations. (More will be said about comparative philology and its uncertain outcomes later in the present chapter.) To the chagrin of Frederic William Maitland, the pre-eminent legal historian of his day, scholarly writing on Anglo-Saxon law became a largely German affair by the end of the nineteenth century.[4] Felix Liebermann's *Die Gesetze der Angelsachsen* (1903–16), a forbidding monument to the methods then dominant in German scholarship, remains the most reliable edition of the

Anglo-Saxon laws, building upon the earlier efforts of Reinhold Schmid (1832; rev. edn 1858) and Benjamin Thorpe (1840). Not until Patrick Wormald's *Making of English Law* (1999) did the work of returning these texts to Anglophone audiences begin in earnest. Due in part to Wormald's achievement, specialists in the literature of pre-Conquest England have come to recognise that Anglo-Saxon law constitutes an important subgenre of Old English prose whose origins and generic conventions demand the sort of attention long lavished on the homily and the chronicle. The present chapter is meant to help readers approach this corpus of legal prose with a minimum of confusion, particularly those aspects that would endure beyond the Norman Conquest.

The Texts of Anglo-Saxon Law

Identifying Anglo-Saxon legal texts is not as straightforward as it might initially seem. Sticking to laws issued in the names of various kings places us on deceptively safe ground, as a fair number of the materials so categorised are mere royal proclamations of national penance prompted by the renewal of Viking activities. Only the laws of Ine, Alfred and Cnut systematically attempt to establish norms governing disputes and transactions. Thus looking beyond texts issued from the royal court may reveal much about Anglo-Saxon England's legal machinery. The English Church, the great purveyor of literacy at this time, produced a regulatory literature outstripping Old English legislation in scope, volubility and sophistication. Because the Church existed to furnish remedies against sin, it engaged with ineffable problems of juristic casuistry in ways secular authorities might not. The medicine it offered guilty consciences was prescribed in Latin and Old English texts that seemingly recognised few boundaries between questions of pastoral care and those of secular law. This literature, with its refined thinking on matters of culpability, anticipated by centuries the doctrine of *mens rea* (the notion that one's state of mind in performing an act, and not the act itself, rendered one culpable); in time, its provisions would find their way into pre-Conquest royal legislation. Though penitentials and secular laws are customarily considered distinct bodies of normative writing, both literatures were composed by elite clergy and consequently manifest overlapping concerns. Extant manuscripts frequently blur these lines as well: both in England and on the Continent, laws and penitentials sometimes appear in the same codex.[5]

However voluminous, the secular and ecclesiastical laws of Anglo-Saxon England still furnish meager evidence for the workings of governance when compared with what is available in later periods. Such scarcity makes even

the briefest statements important. Our knowledge of the law of marriage, for example, would be impoverished without the short tract *Wifmannes beweddung*. Similar texts enumerate the duties of bishops and procedures for administering ordeals and oaths. That clergy seem more concerned to regulate ordeals than marriages is an effect of the period in which these texts appeared. Marriage would not become a sacrament for a century or more, while the support of the Church for ordeals would not be withdrawn until the Fourth Lateran Council (1215).

Establishing the ambit of legal prose is further complicated by the vast, unwieldy and protean corpus known as 'diplomatic' literature: wills, writs and charters. All three legal instruments demonstrate the importance of writing to the practice of law (a matter to be taken up later). Though the debt is not always certain, these three subtypes of diplomatic texts owe something to Roman practice – as did written legislation itself according to Bede.[6] Old English diplomatic texts were of enduring interest in subsequent periods: the fifteenth-century *Liber Abbatiae*, for example, gives Old English wills and charters with translations into Middle English and Latin.

Wills show one way the encroachment of literacy might facilitate legal change. Prior to the widespread use of these written instruments, more rigid strictures encumbered the disposition of land. These new instruments occasioned a new term, *bocland* ('bookland'), to describe parcels not governed by traditional rules of descent; those distributed by older unwritten customs were designated *folcland*. Yet the changes effected by these instruments were less profound than might be imagined, with testamentary disposition (for example) retaining its predominantly oral character through the pre-Conquest era, traces of which are evident in contemporaneous wills.[7] And even *bocland*, as Alfred's laws assert (§41), might fall under the same rules of hereditary descent that governed *folcland* in spite of having been alienated in writing.

Charters – essentially, records of transactions in land – form the bulk of extant Old English writing, and the work of situating them in reliable editions is ongoing. Along with their inherent importance to the history of tenurial law and custom, charters are useful for the incidental light they shed on aspects of procedure left obscure by legislative and other sources. One charter, the 'Fonthill Letter', narrates how a recidivist thief (whose case reached King Alfred) lost all his holdings in land. Another describes a significant council convoked in 824 by the Mercian king Beornwulf. Including 'nearly all the southern English bishops' and a 'papal legate', the council's proceedings were preserved because it considered the descent of 'the minster at Westbury and its endowments'.[8]

Writs – a standard term for sealed letters issued by the royal chancery having a wider range of functions than in later periods – also survive in relative abundance. Their aims were probably more varied than the extant witnesses suggest, which predominately confirm 'grants of lands and liberties to ecclesiastics and religious houses'.[9] Because they were concerned with the descent of property and privileges, both charters and (to a lesser extent) writs were sometimes forged both before and after the Conquest.

Law and Oral Culture

While they are known primarily for establishing the discipline of comparative philology, Jakob Grimm and his followers also emphasised the relationship between law and the spoken word. Influenced by the emergence of modern nation-states and attendant attempts to reclaim indigenous legal practices, Grimm and his generation found oral tradition a more trustworthy vehicle for preserving the law than writing. The former, of course, is accessible only through the latter, and so arose the concomitant assumption that traces of unwritten custom are most conspicuous in aphorisms, often poetic in nature, either embedded in literary and legislative texts or circulating independent of them. However hoary the rhetoric in which these assumptions come down to us, they should not be dismissed outright. One cannot read *Beowulf* without being struck by its admonitory style and legal formulae, some enduring into the present. Hrothgar temporarily transfers ownership of Heorot to Beowulf with an alliterative phrase – *Hafa nu ond geheald husa selest* ('Have now and hold the best of houses') – familiar from the Book of Common Prayer's rite for the solemnisation of matrimony. Other works employ a distinctly legal register pointing back to a shared Germanic past. Wulfstan, for example, admonishes those guilty of grave sins to *þingian* ('negotiate, settle') with God, likening thereby penitential acts to the compensations for wounds and slights characteristic of secular law from England to Iceland (where the proceeding was labelled a 'thing'). Those seeking a full sense of Anglo-Saxon law cannot neglect literary texts, though scholars so engaged are now more cautious than was the norm generations ago.

Another reason not to discount the views of Grimm and his generation is that law-giving kings of the Anglo-Saxon period seem to have been aware of the tensions between their ordinances and oral tradition. One way to negotiate the problems that ensued from issuing laws in writing was assuring audiences that nothing was really changing. We find such efforts in one of the earliest works of royal legislation we possess, the laws of Hloþhere and Eadric (679x686), which survive in one manuscript, the *Textus Roffensis*

(about which more will be said later). It begins with the following proclamation:

> Hloþhære 7 Eadric, Cantwara cyningas, ecton þa æ þa ðe heora aldoras ær geworhton ðyssum domum, þe her efter sægeþ.[10]
>
> (Hloþhere and Eadric, kings of the people of Kent, added to the laws that their ancestors made before with these decrees, which are stated hereafter.)

The prologue's implicit argument, whose language would be repeated in prefaces to the legislation of Wihtred and Ine, is that written laws (*domas*) were suitable means for preserving and expanding upon the customary laws (*æ*) that had earlier existed independent of writing. That it was said at all – not once but three times from the seventh to the ninth century – suggests that some in the Kentish and West-Saxon elite still looked wistfully on the period prior to the arrival of written law, which presumably conferred disproportionate advantages on the literate. The resentments of these slighted magnates may well have required soothing each time new laws were issued.

While the belief of Grimm and his descendants that one might glimpse behind laws and poems of this period a uniform 'Germanic law' now enjoys little support, their sense of traditional law as indifferent to the machinations of the royal court continues to shape present-day commentary. Wormald is the most prominent scholar to claim that works of royal legislation were of more symbolic than practical significance. Yet underestimating the importance of royal law is as much a hindrance to grasping the political life of Anglo-Saxon England as the tendency, prevalent among scholars of earlier generations, to assume complacently that legislation in this period functioned in the same manner as modern statutes. While citations of royal law are virtually absent from Anglo-Saxon records of litigation (in marked contrast to what is found in Francia), one charter issued by Wihtred in 699 appears to back provisions for ecclesiastical immunities earlier set forth in his laws of 695.[11] On top of this, ample evidence suggests the longest of the royal lawbooks – King Alfred the Great's *domboc* – was at least *intended* to be read and applied. The circumstances giving rise to the *domboc* are suggested by a passage in Asser's biography of the king (§106), where we are told that Alfred scolded his judges for their ignorance; they responded by devoting themselves to reading and writing.

Allusions to '*seo domboc*' in the subsequent laws of Edward the Elder and Æthelstan (Alfred's son and grandson, respectively) suggest that Alfred's admonitions were of lasting effect. Moreover, provisions of the *domboc* and the earlier laws of Kent resurface in the legislation authored by Wulfstan for Æthelred II and Cnut. The Anglo-Saxon laws were not merely paper boats floating on a sea of oral tradition. Rather, pre-Conquest England

established a tradition of legal literacy that pervaded most aspects of dispute resolution by the end of Anglo-Saxon period.

How long written law remained in a state of tension with oral tradition is uncertain. The persistence of such a climate into the ninth century is suggested by the fact that *æ* and *domas* are used in the prologue to Alfred's laws much as they were in the seventh century. The terms are not found in later materials, so Alfred's *domboc* may mark one of the last occasions in which an Anglo-Saxon king felt obliged to justify writing laws down. By the later Anglo-Saxon period, both terms would be eclipsed by the ancestor of our Modern English word 'law', Old English *lagu*, a term borrowed from the Danes and related etymologically to the Norse verb *leggja*, 'to lay down'.[12] Once adopted by the English, the term may have designated enactments issuing from the royal court and *witan* (a body of elite counsellors) rather than the informal 'law' of unwritten custom.[13]

Prior to the introduction of *lagu*, Old English was developing its own inventory of terms to designate written law. The words *riht* ('what is in accordance with law, human or divine') and *asetnysse* ('what is set or fixed, a statute, law'), which have some rough correspondence in meaning to *æ* and *dom*, respectively, were favoured in the post-Alfredian period but not unknown before it.[14] Though *æ* (meaning 'customary law') survives into the later period and should not be confused with 'marriage', another sense of the same word, its meaning eventually edges closer to *asetnysse* than *riht*; by the time of Alfred, *æ* is being used to refer to divine law as set forth in Scripture.[15] For its part, *riht* begins its drift towards denoting personal liberties (and thus, perhaps, the space once occupied by *æ*) in the sermons of Wulfstan, leaving the Old English lexicon with no word to designate 'custom' save *þeaw*, a term infrequently used in a legal register.

Law in Practice

Scholarship on Anglo-Saxon legal procedure remains scant: the sole book-length treatment remains an 1876 volume published by Henry Adams and his group of Harvard students.[16] In part, research on this question has been hindered by earlier historians' tendency to view the pre-Conquest legal order as governed by inflexible, arbitrary rules and mindless superstition. Such modern perceptions contributed to the consensus that Anglo-Saxon law relied on self-help and feuding, with an effective state apparatus emerging only during the reign of Henry II (r. 1154–89).[17] (Earlier generations of scholars had mistakenly credited King Alfred with inventing trial by jury and much else besides.) The genuine innovations in Alfred's laws, however, make it difficult to assume a wholly ineffectual Anglo-Saxon state.

Above all, Alfred's *domboc* is an imposing monument to the notion of written law itself. Nearly half the text reproduces Ine's laws, the fullest representation available of royal law in the seventh century. Alfred's contributions begin with an eccentric translation of the Ten Commandments and subsequent legal clauses in Exodus before narrating (in compressed and highly distorted fashion) the Council of Jerusalem recorded in Acts 15. Alfred then claims nameless English 'synods' as the sources of his own laws while also acknowledging debts to those of his predecessors Æthelberht, Ine and Offa.

Alfred's implicit argument for making the written text the basis for legitimate law was perhaps meant to render his magnates and bishops more amenable to legislative reforms. One of these is a reliance upon confession and penance for correcting wrongs not evident in prior laws. Traditionally, scholars have assumed that incorporating these religious practices indicates the state's weakness during Alfred's reign. But whether these new clauses show the church acting as the agent of the state, or the state of the church, is in fact difficult to determine, and perhaps misses the point. Anglo-Saxon kings and bishops were not in the habit of thinking of themselves as occupying distinct spheres of action. Not until the reign of William I would clear lines between secular and ecclesiastical jurisdictions emerge.[18]

In spite of such apparent novelties, Alfred's laws offer a calculated impression of continuity amid change. As in prior legislation, wrongs are principally remedied by self-help, with the king assuming when necessary the role of peacemaker and mediator. Compensations for injuries are carefully tabulated, much as they had been in Æthelberht's laws. Looming over these provisions are the two mainstays of pre-Conquest proof: the oath and (arguably) the ordeal, two legal rituals not as distinct in this period as our nomenclature suggests. Both permitted litigants to invoke divine witness in support of their testimony with the understanding that subsequent misfortunes (illness, infection, falling from a horse, or choking on Eucharistic bread) would show forth their guilt. Alfred emphasises the importance of honouring one's oath and pledge (*wedd*), a legal feature perhaps motivated, as Wormald maintained, by his introduction of oaths of loyalty to the king.[19] Stressing the oath also ensured clerics remained central to the disputing process. Alfred's principal 'innovations' thus rest upon elements of litigation – the oath and the role of clergy as mediators of legal rituals – present in written English law from its inception but newly emphasised in the *domboc*.

The ambitions underlying Alfred's *domboc* had deep roots in the West-Saxon past, as seen in Ine's earlier laws. By beginning his laws with a concern for ecclesiastical disciplines such as abstention from 'servile work' on Sunday as well as the prompt baptism of infants, Ine established himself as

a protector of the church and its interests. Similarly, Ine recognised the royal court's entitlement to be part of negotiations between wrongdoers and the aggrieved. Resolving disputes privately, without involving official justices, is accorded harsh penalties, presumably for the first time. With the help of these precedents, law at the time of Alfred's death was set on a path towards becoming centralised and bureaucratic, a development not fully realised until the late twelfth century.

Manuscripts and Later Witnesses

The surviving manuscripts containing Anglo-Saxon legislation constitute a fraction of what circulated prior to the Conquest. None is earlier than the tenth century, which means that all extant texts reach us somewhat distorted by their manuscript setting. Nevertheless, the manuscripts show these texts were often consulted and thus anything but idle acts of royal self-aggrandisement. Whereas most Old English poems have a single manuscript witness, the major compilations of Old English law – those of Alfred and Cnut – survive in six and three, respectively.

A few manuscripts illustrate how Old English legislative prose was used before and after the Norman Conquest. Cambridge, Corpus Christi College 173 (also known as the 'Parker Manuscript') is the earliest witness to both the *domboc* and the *Anglo-Saxon Chronicle* (a collection of annals initiated during the lifetime of King Alfred). That these texts share space in one manuscript says much about how the *domboc* was viewed during the reign of Æthelstan. Even as Alfred's descendants asserted the lingering authority of his *domboc*, the importance of the document probably resided in its status as a monument to the ambitions of the West-Saxon kingdom, no longer the minor polity which Bede had practically ignored.

In all likelihood, other manuscripts shared the organisation of Corpus 173. This is almost certain to have been the case with British Library, Cotton Otho B.xi, which was largely destroyed in a fire at Ashburnham House in 1731 – the same fire responsible for the extensive *lacunae* towards the end of our sole manuscript copy of *Beowulf*. We know the contents of Cotton Otho B.xi only through transcripts Laurence Nowell made in 1562 and a later eighteenth-century description. Another manuscript prepared in roughly the same period as Cotton Otho B.xi, BL Burney MS 277, was destroyed much earlier. Those who used it for penmanship exercises in the thirteenth century probably had no sense of its importance; nor did those who, not long thereafter, unbound its leaves and used the one leaf that remains to us as 'a wrapper'.[20]