

THE OHIO STATE JOURNAL ON DISPUTE RESOLUTION

VOLUME 11

1996

NUMBER 1

Towards a History of ADR: The Dispute Processing Continuum in Anglo- Saxon England and Today*

VALERIE A. SANCHEZ**

The past is intelligible to us only in light of the present; and we can fully understand the present only in light of the past. To enable [us] to understand the society of the past and to increase [our] mastery over the society of the present is the dual function of history.***

I. INTRODUCTION

The study of dispute processing in English legal history can lend richness and depth to scholarly discussions about modern methods of dispute resolution. Only recently, however, have legal academics and practitioners of “alternative” methods of dispute resolution (“ADR”) become interested in the field.¹ And few historians of English law have

* © Copyright 1995 by Valerie A. Sanchez. A version of this Article was delivered as a paper to the Program on Legal History Speakers Series, Harvard Law School, March, 1994. I am particularly grateful to Charles Donahue, Jr., Daniel G. Donoghue, William W. Fisher III, Robin Fleming, Robert H. Mnookin, Lisi Oliver, and Frank E. A. Sander, for their insightful commentaries and suggestions.

** Lecturer on Law, Harvard Law School. A.B., 1983, Harvard-Radcliffe (History and Literature of Germany and England); J.D., 1986, Harvard University; Graduate Fellow, 1986-1994, Program on Dispute Resolution, Harvard Law School.

*** EDWARD H. CARR, WHAT IS HISTORY? 69 (1961).

¹ I began this study in 1985 when Professor Frank E. A. Sander, of Harvard Law School (and then Chairman of the American Bar Association’s Special Committee on Dispute Resolution), reported to me that the ABA had recently noted the dearth of scholarship on historical aspects of ADR and had expressed a strong interest in promoting research in the

researched or written about historical aspects of dispute processing. As a result, there are large gaps in our knowledge of the history of ADR. This Article concerns one of those gaps, dispute processing in Anglo-Saxon England, at the earliest stages of English legal history. It is based on the results of an extensive study of the surviving historical documents from the period spanning the seventh through eleventh centuries, A.D.² The goal of the study was to reconstruct a contextually accurate portrayal of Anglo-Saxon dispute processing. Many of the conclusions reached break new ground for historians of law and dispute processing. This Article discusses the most salient of these conclusions and aims at making them accessible to non-legal historians and persons unfamiliar with early medieval English history.

The central findings of the study are that the Anglo-Saxons used an array of dispute resolution processes akin to modern-day adjudication, arbitration, mediation, and negotiation, and that these processes were available to litigants during the life of a lawsuit on a "dispute processing continuum." These processes and their inter-relationship on the dispute processing continuum, it is suggested, aimed at fostering respect for law and legal process, effecting the peaceful and enduring resolution of disputes, and promoting the reconciliation of the parties. These aims were the product of a historical context in which violent measures of self-help, so long the cultural norm among the pagan, Anglo-Saxon communities, became less acceptable as Christian teachings about the importance of law, social order, and neighborly love fostered resort to legal process as the

field. Accordingly, when I graduated from Harvard Law School in 1986, Professor Sander appointed me Graduate Fellow at the Program on Dispute Resolution at Harvard Law School so that I could complete the present study. During the course of my research and writing, I was fortunate to have received invaluable methodological guidance from my legal history mentor, the late Professor Emeritus of Legal History, Samuel E. Thorne (1907-1994), also of Harvard Law School. Most recently, I have benefited from the generous support of Professor Robert H. Mnookin and the Harvard Negotiation Research Project.

² See generally VALERIE A. SANCHEZ, *DISPUTE PROCESSING IN ANGLO-SAXON ENGLAND: PART OF A HISTORICAL CONTINUUM* (forthcoming 1996) (setting forth the detailed results of this study). Other historians have recently examined limited aspects of Anglo-Saxon dispute processing. See, e.g., Patrick Wormald, *Charters, Laws and the Settlement of Disputes in Anglo-Saxon England*, in *THE SETTLEMENT OF DISPUTES IN EARLY MEDIEVAL EUROPE 149-168* (Wendy Davies & Paul Fouracre eds., 1986) (a preliminary and partial study of the Anglo-Saxon documents) [hereinafter Wormald, *Charters*]; SUSAN REYNOLDS, *KINGDOMS AND COMMUNITIES IN WESTERN EUROPE 900-1300* (1984) (a survey study making general references to late Anglo-Saxon England); DORIS M. STENTON, *ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER 7-12* (1965) (discussing a small number of late Anglo-Saxon documents).

preferred method of dispute resolution, through which legal judgments and written settlement agreements could be reached.

The study reaches a number of new historical conclusions about the processual and substantive nature of Anglo-Saxon legal judgments. One cluster of conclusions arises from the discovery that Anglo-Saxon lawsuits could be commenced in one of two functionally similar legal processes—adjudication and arbitration—both of which co-existed as beginning points on the dispute processing continuum and both of which produced legal judgments. These processes were controlled by third-party decisionmakers who, contrary to traditional views about legal decisionmaking in Anglo-Saxon England,³ not only made legal judgments on the merits of a claim but did so after a “discovery-like-process” which involved their review of testimonial and documentary evidence. Those legal judgments were in the nature of “winner-take-all” outcomes imposed upon the parties. Contrary to the traditional view of Anglo-Saxon legal process, neither process was rigid nor inequitable in its approach to legal conflict resolution.⁴ Instead, each aspired to be flexible and fair.

The present study also reaches a number of new conclusions about the processual and substantive features of Anglo-Saxon settlement outcomes. This second cluster of conclusions arises from the finding that legal decisionmakers in Anglo-Saxon England—judges and arbitrators—often encouraged parties to reach settlement agreements.⁵ Perhaps the most interesting processual feature of this practice was that it occurred on the dispute processing continuum *after* the decisionmakers had reached a winner-take-all judgment on the merits of the claim *and* had announced it to the parties, *but before* those judgments were procedurally “finalized” in keeping with Anglo-Saxon legal procedure. At this point on the dispute processing continuum, the decisionmakers often changed hats and became third-party facilitators or mediators, helping the parties to negotiate settlement agreements. The advent of written settlement agreements during

³ See, e.g., JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 5–6 (2d ed. 1979) (suggesting that Anglo-Saxon legal process was calculated to avoid rational decisionmaking).

⁴ *Contra* 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD 38–39 (2d ed. 1923) (Pollock characterizing Anglo-Saxon legal process as rigidly formulaic); J. Laurence Laughlin, *The Anglo-Saxon Legal Procedure*, in ESSAYS IN ANGLO-SAXON LAW 183 (1886) (same conclusion reached). These traditional views, most widely read in POLLOCK & MAITLAND, *id.*, have been generally called into question by other historians. See, e.g., Wormald, *supra* note 2, and Reynolds, *supra* note 2, at 25–26.

⁵ Other historians have superficially noted the Anglo-Saxon tendency to compromise. See, e.g., DORIS STENTON, *supra* note 2, at 7; REYNOLDS, *supra* note 2, at 25–26.

this period of English legal history gave settlement outcomes the binding effect of legal judgments.

Figure 1
The Anglo-Saxon Dispute Processing Continuum



It is important to point out to readers who are not familiar with the scholarly study of medieval legal history, that many questions of contemporary relevance cannot be asked of historical contexts that are as vastly different from our own as was that of Anglo-Saxon England. Due to the differences between the modern and medieval contexts it would be implausible to suggest that details about early medieval dispute processing are directly “relevant” to present-day policymaking in the field of dispute resolution. Indeed, given the paucity of documentary evidence from the period, simply understanding how and why people in such a far away day and age coped with conflict, what their disputes were about, and how and why they developed laws and processes to resolve them peacefully, poses the legal historian with a descriptive challenge.

Nevertheless, it is suggested that useful “lessons” can be drawn from the effective ways that the Anglo-Saxons coped with conflict—a persistent human challenge in any historical context. Namely, that by resolving their lawsuits on a dispute processing continuum, the Anglo-Saxons used the authority of the legal process to foster respect for the substantive law; to legitimate the dispute resolution processes used and the outcomes of these processes (legal judgments and settlement agreements); and to foster the peaceful resolution of disputes and the reconciliation of the parties. In all of these regards, it is suggested, the Anglo-Saxon dispute processing continuum was strikingly analogous to one of the more interesting developments in the modern ADR movement—the multidoor courthouse experiment. Like the dispute processing continuum, the multidoor courthouse experiment brings within the authority of a court system an array of dispute resolution processes similar to those practiced in Anglo-Saxon England—arbitration, adjudication, mediation, conciliation, and

negotiation.⁶ By bringing them under the authority of courts, the multidoor courthouse experiment legitimates these processes and the outcomes reached through them. Furthermore, as with the Anglo-Saxon dispute processing continuum, an underlying aim of the multidoor courthouse experiment is to provide litigants in on-going relationships with access to processes such as mediation which, unlike adjudication, are well-suited for effecting their reconciliation.⁷ Therefore, notwithstanding the vast temporal divide between Anglo-Saxon England and the United States of today, the results of this historical study suggest that the modern multidoor courthouse experiment can now be viewed as an idea with a long history.

II. HISTORICAL BACKGROUND

The Anglo-Saxon period of English history spans roughly six centuries—from approximately A.D. 450, when the first Germanic tribes (Angles, Saxons, and Jutes) began to migrate to England, until the Normans wrested England from Anglo-Saxon rule in A.D. 1066.⁸ But the Anglo-

⁶ See generally Larry Ray & Anne L. Clare, *The Multi-Door Courthouse Idea: Building the Courthouse of the Future . . . Today*, 1 OHIO ST. J. DISP. RESOL. 7 (1985). The multidoor courthouse idea was proposed in 1976 by Professor Frank E. A. Sander in a paper he delivered at the Pound Conference on Popular Dissatisfaction with the Administration of Justice in St. Paul, Minnesota. Professor Sander recently summarized the idea and commented on its central purpose: "Instead of just one 'door' leading to the courtroom, such a comprehensive justice center would have many doors through which individuals might pass to get to the most appropriate process. Among the doors one might be labeled 'arbitration,' 'mediation,' and 'minitrial' . . . In my view the basic thrust behind the multidoor approach is to provide more effective and responsive solutions to disputes, not, as is sometimes claimed, to relieve court dockets or to save time and money. The latter consequences may often come about, but they should not be the *raison d'être*. This point is particularly important for disputes involving ongoing relationships since it is frequently so important in those situations to maintain good relationships between the parties." Frank E. A. Sander, *Dispute Resolution Within and Outside the Courts—An Overview of the U.S. Experience*, 1 n.2, 9-10 (April, 1990) (paper available from Professor Sander, Harvard Law School). The Middlesex County Courthouse, located in Cambridge, MA, is one court currently experimenting with Professor Sander's multidoor courthouse idea.

⁷ See *id.*

⁸ The beginning date, A.D. 450, marked the migration of these Northern European peoples to England. See generally ANGLES, SAXONS, AND JUTES: ESSAYS PRESENTED TO JOHN N. L. MYRES (Vera I. Evison ed., 1981). They settled in southern, central, and northern England during the fifth century, and established numerous kingdoms and sub-kingdoms there. See DAVID HILL, AN ATLAS OF ANGLO-SAXON ENGLAND (1981); BARBARA YORKE, KINGS AND KINGDOMS OF EARLY ANGLO-SAXON ENGLAND 157-62 (1990). By the eighth

Saxon period of English *legal* history is usually thought of as beginning in A.D. 601, because documentation of Anglo-Saxon legal practices dates from that year, when King Æthelbert, of Kent, became the first of the co-existing Anglo-Saxon kings to write laws for his kingdom.⁹ Though many historians characterize the Norman Conquest as the end of the Anglo-Saxon period of English political history, there is much evidence to suggest that A.D. 1066 was not a watershed in English *legal* history because many legal practices instituted by the Anglo-Saxons survived well beyond the Norman Conquest.¹⁰

The laws of King Æthelbert, and those of all subsequent Anglo-Saxon kings, before and after England became a monarchy in the late ninth century,¹¹ were fashioned under the influence of the Roman Christian Church ("the Church"). The first Christian mission from Rome to England arrived in A.D. 597, under the leadership of St. Augustine. When King Æthelbert installed that mission at Canterbury, in his Kingdom of Kent, the

century, they were forced to share England with a Scandinavian people—the Danes. See Gillian Fellows Jensen, *The Vikings in England: A Review*, 4 *ANGLO-SAXON ENGLAND* 181-206 (1975); P. H. Sawyer, *Conquest and Colonization: Scandinavians in the Danelaw and Normandy*, *PROCEEDINGS OF THE ENGLISH VIKING CONGRESS* 123-31 (H. Bekker-Nielsen, et al. eds., 1981).

⁹ King Æthelbert, of Kent, became the first Anglo-Saxon king to promulgate a body of written laws. Æthelbert's laws not only memorialized pre-existing customary practices that were Teutonic in origin but also promoted new rules that established the highly-stated position of the Christian Church in Anglo-Saxon society. See *Laws of Æthelbert*, 1, in *LAWS OF THE EARLIEST ENGLISH KINGS* 5 (F. L. Attenborough ed. and trans., 1922) [hereinafter Attenborough]. He did so under the influence of St. Augustine, who led the first Christian mission to England from Rome, in the late sixth century. See, e.g., YORKE, *supra* note 8, at 1. St. Augustine and successive missionaries taught many Anglo-Saxon men and women to read and write, and prevailed upon the Anglo-Saxon kings, whom they converted to Christianity, to begin writing their laws. See Patrick Wormald, *The Uses of Literacy in Anglo-Saxon England*, in *TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY*, 5th, 27 (1977). As a result, many other Anglo-Saxon kings followed King Æthelbert's lead.

¹⁰ DORIS STENTON, *supra* note 2, at 6. See generally HENRY G. RICHARDSON & G. O. SAYLES, *LAW AND LEGISLATION FROM ÆTHELBERT TO MAGNA CARTA* (1966); ROBIN FLEMING, *LORDS AND KINGS IN PRE-CONQUEST ENGLAND* (1991).

¹¹ The late ninth century king Alfred the Great is considered to be the first *English* monarch because he was the only one of the several Anglo-Saxon kings at that time to stop the Danes in their quest to wrest England from Anglo-Saxon rule. As such, he signed the Treaty of Chippenham with the Danes that created two co-existing regions in England—one English and one Danish—both of which were placed under Alfred's rule. See generally FRANK M. STENTON, *ANGLO-SAXON ENGLAND* (3d ed. 1971); JAMES CAMPBELL, ERIC JOHN & PATRICK WORMALD, *THE ANGLO-SAXONS* 242-46 (1982).

conversion to Christianity of the Anglo-Saxon kings and their people began. In the process, the Church secured a political status in Anglo-Saxon society comparable to that of kings.¹² From this vantage point, the clergy transformed England into a literate, as opposed to wholly oral, culture,¹³ and gave their attention to the secular affairs of kings and communities, as well as to Church matters. They were considered to be experts in matters of Anglo-Saxon law and legal process,¹⁴ and routinely served as legal dispute resolvers. Thus, the Church not only helped fashion a nascent legal system in Anglo-Saxon England but also worked to strengthen it by enforcing its laws, and using the legal process to foster the reconciliation of the disputants, in keeping with the Church's teachings about the importance of law and neighborly love.¹⁵

The Anglo-Saxon historical record pertaining to dispute processing consists of some, but not all, of the kings' laws from the period,¹⁶ royal and

¹² See, e.g., *Laws of Æthelbert*, 1, in Attenborough, *supra* note 9, at 5.

¹³ When they migrated to England, the Angles, Saxons and Jutes shared a common pagan, Teutonic culture, descriptions of which have survived in epic poetry and in the writings of the Roman historian, Tacitus, who visited Germanic tribes in Northern Europe in the first century A.D. See C. TACITUS, *THE AGRICOLA AND THE GERMANIA* 54-98 (R. B. Townshend trans., 1894). In England, these tribes lived in a wholly oral culture until their systematic conversion to Christianity began at the turn of the seventh century. See generally CAMPBELL, ET AL., *supra* note 11. See also Wormald, *supra* note 9, at 27.

¹⁴ Even after the Norman Conquest, members of the Anglo-Saxon clergy were considered experts in Anglo-Saxon secular law. In A.D. 1075-76, for example, the former Anglo-Saxon Bishop of Selsey was brought to an Anglo-Norman judicial enquiry to answer questions on the nature of Anglo-Saxon law. And, as late as the reign of William II, there is evidence that the king granted a certain priest a living place because he was learned in the law. See DOROTHY WHITELOCK, *THE BEGINNINGS OF ENGLISH SOCIETY* 135-36 (1952).

¹⁵ As is evident from Pope Gregory's letter to St. Augustine, the Anglo-Saxon Church closely followed the teachings of St. Paul. See BEDE, *ECCLESIASTICAL HISTORY OF THE ENGLISH PEOPLE* 1-3, 38 (8th century, L. Sherley-Price trans., 1955). St. Paul prescribed the working relationship between the Church and State that was used to foster the spread and institutionalization of Christianity in the middle ages and to set forth the complimentary values of obeisance to law and neighborly love. See St. Paul, *The Letter to the Romans*, *THE HOLY BIBLE* (King James Version, 1611, rev. ed. 1962). See also Michael Clanchy, *Law and Love in the Middle Ages*, in *DISPUTES AND SETTLEMENTS: LAW AND HUMAN RELATIONS IN THE WEST* 47, 49 (John Bossey ed., 1983) [hereinafter *DISPUTES AND SETTLEMENTS*]; J. A. Sharpe, 'Such Disagreement betwix Neighbours': *Litigation and Human Relations in Early Modern England*, in *DISPUTES AND SETTLEMENTS*, *id.* at 167, 169.

¹⁶ The surviving Anglo-Saxon laws span the early seventh to the mid-eleventh centuries, with some considerable temporal gaps in between. See generally Attenborough, *supra* note 9; *THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I* (Agnes J. Robertson ed. and trans., 1925) [hereinafter Robertson, *LAWS*]; 1-3 *DIE GESETZE DER ANGELSÄCHSEN* (F.

non-royal charters,¹⁷ royal and non-royal writs,¹⁸ wills,¹⁹ private memoranda that record details of lawsuits,²⁰ and various Church documents

Liebermann ed., 1903-16) [hereinafter Liebermann, GESETZE]. Notwithstanding these temporal gaps, there is considerable evidence that an Anglo-Saxon jurisprudential continuum spanning the seventh through the eleventh centuries, survived beyond the Norman Conquest. That continuum began with King Æthelbert's laws. The seventh century laws of the kings of Kent, Hlothhere and Eadric (673x686), then expressly state that they "extended the laws which their predecessors had made." *Preamble to the Laws of Hlothhere and Eadric*, in Attenborough, *supra* note 9, at 19. And the introduction to the late ninth century laws of King Alfred (871x901), which began a series of contiguous laws from the kingdom of Wessex, expressly traces the jurisprudential continuum back to King Æthelbert:

Now I, King Alfred, have collected these laws, and have given orders for copies to be made of many of those which our predecessors observed and which I myself approved of. . . . [T]hose which were the most just of the laws I found—whether they dated from the time of Ine my kinsman, or of Offa, king of the Mercians, or of Æthelbert, who was the first [king] to be baptized in England—these I have collected while rejecting the others. I . . . have shwn [sic] these to all my councillors, and they have declared that it met with the approval of all, that they should be observed.

Introduction to the Laws of King Alfred, in Attenborough, *supra* note 9, at 63.

Even William the Conqueror, of Normandy, declared that the laws of his Anglo-Saxon predecessor, Edward the Confessor (1042x1066), would rule in Anglo-Norman England. See William I: London Charter, 2, in Robertson, LAWS, *supra* note 16, at 231.

¹⁷ See generally FRANK M. STENTON, LATIN CHARTERS OF THE ANGLO-SAXON PERIOD (1955). See also *infra* note 20.

¹⁸ See generally FLORENCE E. HARMER, ANGLO-SAXON WRITS (2d ed. 1989) [hereinafter HARMER, WRITS].

¹⁹ See generally ANGLO-SAXON WILLS (Dorothy Whitelock ed., 1930).

²⁰ See generally P. H. SAWYER, ANGLO-SAXON CHARTERS, AN ANNOTATED LIST AND BIBLIOGRAPHY (1968) (cataloging and numbering, but not reproducing, numerous of the surviving charters) [hereinafter SAWYER, CHARTERS, generally for purposes of using Sawyer's charter reference number]; ANGLO-SAXON CHARTERS (Anges J. Robertson ed., 1956) [hereinafter Robertson, CHARTERS]; CARTULARIUM SAXONICUM (Walter de Gray Birch ed., 1885-1893); HAND-BOOK TO THE LAND-CHARTERS AND OTHER SAXONIC DOCUMENTS (J. Earle ed., 1888); FACSIMILES OF ANCIENT CHARTERS IN THE BRITISH MUSEUM (A. E. Bond ed., 1873-1878); A. S. NAPIER & W. H. STEVENSON, CRAWFORD COLLECTION OF EARLY CHARTERS AND DOCUMENTS NOW IN THE BODLEIAN LIBRARY (1895); SELECT HISTORICAL DOCUMENTS OF THE NINTH AND TENTH CENTURIES (Florence E. Harmer ed., 1914) [hereinafter Harmer, SELECT HISTORICAL DOCUMENTS]; *Select Cases in Anglo-Saxon Law*, in ESSAYS IN ANGLO-SAXON LAW, *supra* note 4, at 309-83.

pertaining to its role in the legal process.²¹ Many of these documents, written in Old English, medieval Latin, or a combination of both, have been preserved by the English Church because they record the Church's acquisition of vast amounts of land during the Anglo-Saxon period as well as other details of its growth into the highly staturesd and powerful institution that it became in English medieval life.²² Though the royal and non-royal charters were used by the Anglo-Saxons to convey land, many contain details about disputes relating to land grants. Similarly, numerous private memoranda (as well as some writs and wills) contain details about Anglo-Saxon lawsuits, legal rules, or legal practices. The dispute-related charters and memoranda are of central importance to this study (they will be referred to hereinafter as charters).²³

²¹ See generally THOMAS P. OAKLEY, *ENGLISH PENITENTIAL DISCIPLINE AND ANGLO-SAXON LAW IN THEIR JOINT INFLUENCE* (1923).

²² See FRANK M. STENTON, *LATIN CHARTERS OF THE ANGLO-SAXON PERIOD*, *supra* note 17, at 19.

²³ Well over a thousand documents, loosely classified as "charters," have survived from the Anglo-Saxon period. A large number of the medieval Latin and Old English texts are catalogued. See SAWYER, *CHARTERS*, *supra* note 20. Professor Sawyer's catalogue of the charters sub-categorizes them as follows: royal charters (1,163); non-royal charters—consisting of charters by ecclesiastics (185) or lay persons (80); wills and bequests (58); miscellaneous texts (53); property bounds (63); and lost and incomplete texts (273).

The limitations of the Anglo-Saxon charters are manifold from the standpoint of a legal historian. For example, the charter evidence lacks any sort of "*placitum format*" that would have helped legal historians to classify them according to processes for resolving disputes. See Wormald, *Charters*, *supra* note 2, at 151. It is also difficult to discern "whether a given dispute can helpfully be called a legal suit," *id.* at 151, and, due to the prevalence of dispute-related charters concerning the Church, there is a lack of substantial data about the "more mundane" and possibly more "typical" Anglo-Saxon disputes. *Id.* at 152. In addition, many of the charters are considered "spurious," forged for the purposes of fabricating property rights. See generally Patrick Wormald, *Bede and the Conversion of England*, JARROW LECTURE (1984) (list of charters presumed to be authentic). Fortunately, for the purposes of this study, it is unlikely that charters whose goal it was to create convincing evidence of property rights would contain descriptive errors about the dispute resolution processes used to create those rights. If anything, the forgers would have taken pains to insure that their descriptions of legal process were accurate to make the outcomes recorded in the charters seem legitimate.

historians have tended to take a rule-centered approach to the study of legal history.²⁶ That is, they have conceived of law and order—the subjects of legal history—as social constructs imposed from above, through rules and codes promulgated by the powerful authorities in a given society. In the Anglo-Saxon historical context, this methodological bias has led historians to concentrate on the kings' laws to conclude, erroneously, that Anglo-Saxon legal process was procedurally rigid, inflexible, and archaic,²⁷ and to overlook the array of legal dispute resolution processes that are only evident from the charter evidence.²⁸ As a consequence, historians have not envisioned the existence of a sophisticated dispute processing continuum that provided for rule-based and non-rule-based resolution of lawsuits in Anglo-Saxon England.²⁹

Many important aspects of the Anglo-Saxon dispute processing continuum grew from below, out of the customary methods used to resolve disputes arising within and between closely-knit family groups that made up the Anglo-Saxon communities. In the earliest part of the Anglo-Saxon period (*circa* A.D. 450–600), before the Church exerted its influence and the practice of writing laws began, methods of dispute resolution were rooted entirely in the customary practices of the pagan Germanic tribes.³⁰ Judging from the eye-witness testimony of the Roman historian, Tacitus, the Northern European forbears of the Anglo-Saxons engaged in various forms of self-help—ranging from negotiation to pugilism—to resolve their disputes.³¹ However, as populations of Anglo-Saxon England were systematically converted to Christianity,³² and that society moved towards

(1988). See also Nicholas P. Brooks, *Anglo-Saxon Charters: The Work of the Last Twenty Years*, 3 ANGLO-SAXON ENGLAND 211-31 (1974).

²⁶ See Simon Roberts, *The Study of Dispute: Anthropological Perspectives*, in DISPUTES AND SETTLEMENTS, *supra* note 15, at 1–24.

²⁷ See, e.g., I POLLOCK & MAITLAND, *supra* note 4, at 38–39, 40–41, 44, 46; Laughlin, *supra* note 4; Henry Adams, *Anglo-Saxon Courts*, in ESSAYS ON ANGLO-SAXON LAW, *supra* note 4; BAKER, *supra* note 3. But see Wormald, *Charters*, *supra* note 2, and REYNOLDS, *supra* note 2, at 25–26.

²⁸ For example, the index to one of the most widely referenced works of English legal history does not contain such words as arbitration, mediation, negotiation, settlement, or agreement. See, e.g., 2 POLLOCK & MAITLAND, *supra* note 4, at 676, 685, 689.

²⁹ In many societies, important aspects of law are not rule-based. See, e.g., SALLY F. MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* 47–48 (1978).

³⁰ See Catherine Hillis, *The Archaeology of England in the Pagan Period*, 8 ANGLO-SAXON ENGLAND 297–330 (1979).

³¹ See TACITUS, *supra* note 13, at 73.

³² Roman Christianity flowered in England by the eighth century. It was organized in England into a system of dioceses, and monasteries abounded. See generally MARGARET DEANESLY, *THE PRE-CONQUEST CHURCH IN ENGLAND* (2d ed. 1962).

political unification under a Christian kingship, the violent practices of these previously pagan peoples were condemned by king and Church. New, and decidedly Christian, norms shaped dispute resolution practices from above, in the form of kings' laws and Church doctrines. The nascent Anglo-Saxon legal system, however, evolved as a synthesis of the new and the old, of rule-based and non-ruled-based methods for resolving disputes peacefully.

An image of the Anglo-Saxon dispute processing continuum comes into being when the few surviving kings' laws and Church doctrines relating to legal process are connected, as in a mosaic, with the non-rule-based fragments of information elicited from a close textual explication of the surviving dispute-related charters. In legal anthropological terms, this approach tempers the traditional *rule-centered* approach to legal history with the *processual* approach.³³ Like the pioneering work of the American legal realists, which uncovered from an examination of law cases new data about how legal rules worked,³⁴ the approach taken to this work of legal history has led to a revised view of how the Anglo-Saxons processed their legal disputes and why they processed them as they did. These conclusions have not been reached lightly. They were made with Sir Frederic Maitland's admonition in mind: "The task of reconstructing ancient ideas is hazardous and can only be accomplished little by little. . . . Mistakes . . . are easy, and when committed, will be fatal and fundamental mistakes."³⁵ Consistent with Maitland's belief that the historian of law is a historian of ideas who "must represent not merely what people have done and said, but what [they] have thought in bygone ages,"³⁶ this study draws only the most plausible correlations between the documented dispute resolution processes and the philosophical and sociological variables that shaped their evolution and use in the Anglo-Saxon historical context.

III. ANGLO-SAXON LEGAL PROCESS

By the early seventh century, when the Anglo-Saxon kings began to write laws in concert with members of the Church, there is evidence of a

³³ See generally MOORE, *supra* note 29; Roberts, *The Study of Dispute*, *supra* note 26.

³⁴ See KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* viii-ix (1941). See also MOORE, *supra* note 29, at 224.

³⁵ H. A. L. FISHER, *FREDERIC WILLIAM MAITLAND, A BIOGRAPHICAL SKETCH* 92 (1910) (quoting Maitland).

³⁶ *Id.* at 91-92 (quoting Maitland).

nascent legal system which aimed at effecting the peaceful, efficient, and, it was hoped, enduring resolution of disputes. Throughout the period, important aspects of the Anglo-Saxon legal process were supplemented and strengthened by the legal procedures imported to England by the Church and its system of penitential discipline.³⁷ The penitential system, for example, threatened to excommunicate people for refusing to “make peace and accept justice from those who had wronged them.”³⁸ They required individuals to pay the Church monetary sums as compensation for failing to fulfill secular laws,³⁹ and forced litigants to do stiff penance for committing perjury in court⁴⁰ and for failing to resolve disputes peacefully in accordance with the king’s laws. Persons who engaged in brawling, murder, incest, or adultery,⁴¹ as well as those who committed grand larceny, were also punished by penance.⁴² Even the secular laws threatened punishment by penance.⁴³

By exerting such “a powerful influence towards stiffening the penalties for [secular] crimes as well as in temporarily filling important gaps [in the substantive law,]”⁴⁴ the Church influenced and shaped attitudes towards legal process in Anglo-Saxon society.⁴⁵ In addition to strengthening the bite of the secular laws, the Church’s system of penitentials began to correct the “general lack of extensive, powerful machinery for enforcing court-decisions by direct, official coercion . . . [by] severely penanc[ing] those who neglected or resisted the enforcement of secular penalties[,] [insisting] upon respect for the procedure [and jurisdiction] of the secular courts and, in many ways [holding] up to detestation crime and the criminal.”⁴⁶ Although they could be draconian in nature, the penitentials taught “lessons

³⁷ See OAKLEY, *supra* note 21, at 144-46. Penitential discipline included “fasting, vigils, pilgrimages, prayers, [etc., and] also excommunication, deprivation of all Church rites, and the right of a consecrated burial in some cases.” *Id.* at 147.

³⁸ *Id.* at 168-69, 169 n.1.

³⁹ The high incidences of penances for perjury suggests that the Church was bent on establishing the integrity of the legal process. See *id.* at 136, 174.

⁴⁰ See *id.* at 176.

⁴¹ See *id.* at 193-94. These were crimes punishable by heavy secular penalties and severe penances.

⁴² See *id.* at 172-73.

⁴³ King Edmund’s laws (940x946) expressly subjected individuals to penance as well as secular penalties for failing to abide by his laws. See, e.g., I Laws of Edmund, 3, in Robertson, LAWS, *supra* note 16, at 7.

⁴⁴ OAKLEY, *supra* note 21, at 195.

⁴⁵ See generally *id.* at 136-200 (discussing the Anglo-Saxon laws that provided for penance and the penitentials that reinforced or supplemented these laws).

⁴⁶ OAKLEY, *supra* note 21, at 161, 199.

of charity and loving-kindness, [and] of forgiveness of injuries"⁴⁷ which, it was hoped, would foster the Christian ethic of reconciliation.

A. Regulating Acts of Self-Help

The early Anglo-Saxons customarily resolved disputes through acts of self-help. Every member of the community had a right to his or her own peace *via* the *mund*.⁴⁸ The *mund* was effectively a right to be left alone. It belonged solely to the male head of a clan or kin-group (whether he was a common freeman, a nobleman, or a king), but its protection (called *mundbora* and *mundbyrd*)⁴⁹ extended to all members—male and female—of the *mund*-owner's kin-group or clan. The *mund* vested in its owner and members of his kin-group the right to engage in various methods of self-help (*selbsthilfe*), ranging from negotiation to violent acts of vengeance. The latter often escalated a dispute between two individuals into full-scale "vendettas" or blood feuds between kin-groups, disrupting entire communities with a vicious cycle of reciprocated acts of violence. In this way, the Germanic notions of kinship and self-help, which could play a constructive role in the cohesion of communities and the resolution of conflict, could also work to divide it for generations.⁵⁰

It was in an attempt to prevent the long-term ill effects of vendettas and blood-feuds that the Germanic customary law, as observed by Tacitus, provided for the payment of set levels of compensation as reparation for the commission of specific injurious acts.⁵¹ In Anglo-Saxon England, this customary practice was condoned by the Church and memorialized in the first and subsequent sets of kings' laws. Those laws slightly modified the practice, however, by establishing a system of *monetary* compensation for

⁴⁷ OAKLEY, *supra* note 21, at 200.

⁴⁸ The term *mund* translates literally as "protection."

⁴⁹ *Mundbyrd* also means protection, though in the laws of the various Anglo-Saxon kings *mundbyrd* and *mundbryce* signify the amount of compensation to be paid to the *mund*-owner for the violation of his protection. *Mundbora* is similar in meaning to *mund* and *mundbyrd*, except that *mundbora* refers to a *mund*-owner who acts as a guardian or person responsible for another individual (such as a widow or orphaned child). See *infra* note 52.

⁵⁰ See TACITUS, *supra* note 13, at 73 (observing that family friendships and feuds were inherited from generation to generation in the Germanic tribal communities). For a splendid illustration of the importance of kinship to the coherence of Anglo-Saxon society, see generally FLEMING, *supra* note 10.

⁵¹ TACITUS, *supra* note 13, at 73 (observing that feuds could be ended by "the payment of a fixed number of cattle and sheep, and [that] this [plan of] compensation [was] . . . greatly to the public advantage, for feuds where men have so much freedom are exceedingly dangerous.").

specific injurious acts that were violations of an individual's *mund*.⁵² In so doing the laws eliminated a significant zone of potential conflict over acceptable levels of compensation.⁵³ The kings' laws also expressly prohibited violent acts of self-help—vendettas and acts of vengeance—under most circumstances,⁵⁴ and required, instead, that disputants resolve their disputes peacefully, through the legal process.

⁵² Laws of the Anglo-Saxon kings spanning the seventh through eleventh centuries place a monetary value on the breach of an individual's *mund*, depending upon his status within the society. Any violation by one person of another person's *mund*, including the king's (which extended to any agent of the king), was subject to liability under the law. *See, e.g.*, Laws of: Æthelbert, 5, 8, and 10 (setting the king's *mundbyrd* at 50 shillings); Wihtried, 2 (setting the Church's *mundbyrd* at 50 shillings); Æthelbert, 13 and 14 (setting a nobleman's *mundbyrd* at 12 shillings); Æthelbert, 15 (setting a commoner's *mundbryce* at 6 shillings); Æthelbert, 75 §1, and 76 (setting compensation for the violation of a widow's *mund* at 50, 20, 12, and 6 shillings depending upon whether she was the widow of a nobleman or of a second, third or fourth class individual); Hlothhere and Eadric, 14 (entitling the owner of a home to the value of his *mundbryce* when his house is stained with blood); Wihtried, 8 (establishing in the emancipator of a freed man the ownership of the *mund* over the manumitted person's household); Alfred, 3 (setting the king's *mundbyrd* at 5 pounds of pure silver, the archbishop's at 3 pounds, and that of a bishop or ealdorman at 2 pounds), *in* Attenborough, *supra* note 9, at 5, 7, 15, 21, 25, 27, 65. *See also* Laws of: II Edmund, 6, 7 § 3 (discussing penalties for violation of the king's *mund*); VI Æthelred, 34 (extending king's *mund* to national warships), and VIII Æthelred, 3, 5 (providing for payment to principal church value of king's *mund* and for lesser amounts to smaller churches); I Canute, 2 § 5, 3a § 2 (same); II Canute, 12, 42 (providing for compensation for breach of a lord's or king's *mund* arising from assault on a cleric), 40 (extending the king's *mund* to clerics or strangers); (So-called) Laws of William 18 § 1 (providing for compensation for breach of a lord's *mund* arising from assault on a woman), *in* Robertson, LAWS, *supra* note 16, at 11, 101, 119, 157, 181, 197, 263.

⁵³ The laws of King Æthelbert do preserve the customary practice of negotiating over levels of compensation when the victim of an injury to the thigh was left lame by the injury. Under these circumstances, the relatives of the victim and the perpetrator were accorded the right, by written law, to negotiate the amount of compensation to be paid to the victim. *See* Laws of King Æthelbert, 65 § 1, *in* Attenborough, *supra* note 9, at 13.

⁵⁴ *See, e.g.*, II Laws of Æthelstan, 20 § 7 (concerning the institution of an unjustifiable vendetta); Ine, 9 (the exaction of redress prior to pleading for justice); Ine, 28 (prohibiting the vendetta against a person who captures a thief); Ine, 35 (forbidding a vendetta against a person who kills a thief); II Edward, § 2 (prohibiting a person from withholding the rights of another person); VI Æthelstan, 8 § 2 (concerning the wrongful prevention by anyone of another's legal rights), *in* Attenborough, *supra* note 9, at 39, 45, 47, 119, 139, 163. *See also* Laws of: II Edmund, 7 (ordering the authorities to put a stop to vendettas); II Æthelred, 6 § 1 (no-one shall avenge injuries done before a truce); V Æthelred, 32, and 32 § 5 (unjust practices prohibited by the king); V Æthelred, 33 and 33 §1 (on the suppression of injustice);

B. Dispute Resolution Forums

The successful processing of disputes by legal process required the availability of public dispute resolution forums for commencing lawsuits. During the early Anglo-Saxon period, the folk assembly was the community forum (*popularia concilia*) for resolving disputes.⁵⁵ Because the early Anglo-Saxon culture was wholly oral, little is known about its dispute resolving function. But its origins trace back to the Germanic folk assemblies. Tacitus noted that these folk assemblies were gatherings of an entire community presided over by highly respected, male members of a community knowledgeable of the customary law.⁵⁶ Documents from the later part of the Anglo-Saxon period suggest that the early folk assembly evolved into local assemblies of the hundred, shire, and borough (geographic subdivisions within Anglo-Saxon England). These assemblies were presided over by royal representatives (called reeves).⁵⁷ In the later part of the period, kings issued writs to them asking them to perform certain

VI Æthelred 40 and 40 § 1 (same); Canute, Proclamation of A.D. 1020, 3 (same); II Canute, 1, 7 § 1, 9 (same); VI Æthelred, 32 § 2 (an end shall be put to all unjust practices); II Edmund § 1 (concerning manifold illegal deeds of violence); V Æthelred, 23, 24 (zealous casting out of unjust practices from the land); VI Æthelred, 28 § 1 (same); I Canute, 19 § 2 (every injustice shall be zealously cast out), in Robertson, *LAWS*, *supra* note 16, at 9, 11, 59, 87, 89, 99, 101, 103, 141, 171, 175, 179. Some laws, however, continued to regulate the vendetta to limit its scope, in cases of homicide, to the murderer himself and extending it to his friends and family under specific circumstances and also to persons (other than the dead person's kinsmen) who took vengeance on the murderer. See *Laws of II Edmund*, § 1 (1) §§ 1-3, in Robertson, *LAWS*, *supra* note 16, at 9. See also *The Thegn's Guild in Cambridge*, in I ENGLISH HISTORICAL DOCUMENTS 557 (Dorothy Whitelock ed., 1955).

⁵⁵ See FRANK STENTON, *supra* note 11, at 298, citing *CARTULARIUM SAXONICUM*, *supra* note 20, at 201 (containing an eighth century memorandum which is the sole surviving piece of direct evidence confirming existence of popular assemblies in the early part of the Anglo-Saxon period).

⁵⁶ See TACITUS, *supra* note 13, at 63-64.

⁵⁷ For example, a law of King Edward the Elder (A.D. 901-925) required the king's reeves (representatives) to hold public assemblies on a regular and predictable basis so that every person could obtain the benefit of the public law. See *Laws of II Edward*, 8, in Attenborough, *supra* note 9, at 121. Laws from the reign of King Edgar (A.D. 959-975) similarly expressly regulated the administration of the hundred, shire, and borough courts. See *Laws of I Edgar*, 1, 7, 7 § 1, and III Edgar, 5, 5 §§ 1-2, in Robertson, *LAWS*, *supra* note 16, at 17, 19, 27. And after his conquest of England, the Danish king, Canute (A.D. 1016-1042), affirmed this routine for administering justice by repeating it in his body of laws. See *Laws of II Canute*, 18, *id.* at 183.

tasks.⁵⁸ Use of these local assemblies as forums for resolving legal disputes was systematized to the extent that they were required, by law, to meet on a regular basis, and parties to a lawsuit were required to attend them on pain of penalties for disregarding their jurisdiction.⁵⁹

The king's assembly or *witan* was the highest dispute resolution forum throughout the period. Consisting of members of the king's household and high ranking officials of the Church, it resolved disputes between members of the nobility and disputes involving the Church or matters of interest to the king. During the latter part of the period, the king granted members of the nobility and clergy private jurisdiction to resolve, in his name, matters arising between clerics or laypersons who resided on their lands.⁶⁰ Due to the nascent nature of the Anglo-Saxon legal bureaucracy, none of the proceedings of these courts—the local assemblies, *witan*, or courts of private jurisdiction—were systematically recorded in writing. Nevertheless, the parties to numerous lawsuits kept records of the outcomes of proceedings, and those documents, included in the charter evidence, contain significant information about legal proceedings in the local assemblies and *witan*.

⁵⁸ The Anglo-Saxon royal writs were different from the writs used in the post-Conquest period to initiate legal proceedings. In the Anglo-Saxon period, they were not used to commence legal claims but to communicate official messages. See HARMER, WRITS, *supra* note 18, at 1.

⁵⁹ See Laws of II Æthelstan, 20, 20 § 1, in Attenborough, *supra* note 9, at 137; Laws of III Edgar, 7; Laws of II Canute, 17, 17 § 1 (“[e]veryone shall attend his hundred [court] . . . under pain of fine, whenever he is required by law to attend it.”), in Robertson, LAWS, *supra* note 16, at 27, 183. In addition to resolving disputes, these forums served many other public functions. For this reason, calling them “courts” may describe their functions too narrowly. Accord REYNOLDS, *supra* note 2, at 4-5 (“our understanding of law at this time may be enhanced if we recognize how indistinct was the boundary between it and politics or administration in general”). Nevertheless, at points in this Article, these assemblies will be referred to as courts for the purposes of denoting their function as *public* forums of dispute resolution.

⁶⁰ During the century before the Norman Conquest, courts of private jurisdiction became a prevalent institution in England, and the “giving of judgment on the king’s behalf” by noblemen became a significant part of Anglo-Saxon lordship. See FRANK STENTON, *supra* note 11, at 494-99. See also WARREN O. AULT, PRIVATE JURISDICTION IN ENGLAND (1923, rpt. 1981) (discussing post-Conquest forms of private jurisdiction). This exercise of private jurisdiction to resolve disputes between people who lived on their lands was subject to the supervision of the king, and in cases where false judgments were given a nobleman could be deprived of his rank. See e.g., Laws of III Edgar, § 3 and II Canute 15, § 1, in Robertson, LAWS, *supra* note 16, at 25, 181.

C. *The Dispute Processing Continuum*

The charter evidence reveals that both men and women could sue or be sued in Anglo-Saxon England.⁶¹ The pleadings process was wholly oral, and the surviving laws of the various Anglo-Saxon kings make actionable what would today be considered criminal or tortious matters—ranging from theft to assault and murder. By contrast, the majority of the charters deal with disputes over property. Regardless of the subject-matter of a lawsuit, however, all legal actions were brought and enforced by private individuals, not by kings. During this period of English legal history, kings did not assume the task of publicly prosecuting what would today be considered “criminal” matters.⁶² As a result, the victims of any injury or wrongdoing were left responsible for bringing suits against the alleged culprit or wrongdoer whether the alleged wrongdoing involved acts such as murder, assault, theft, robbery, fraud, etc.—or claims considered today to be “civil,” such as those involving allegations of slander⁶³ or challenges to the ownership or possession of land.

1. *Choice of Forum and Legal Decisionmaking: Adjudication or Arbitration*

The earliest surviving rules regarding the initiation of legal actions date from the seventh century. They require litigants to take their lawsuits to an assembly meeting to be adjudicated there by public judges,⁶⁴ or, in the alternative, to find a private arbitrator to decide their suit.⁶⁵ These rules and later charter evidence suggest that these alternative legal processes,

⁶¹ See, e.g., SAWYER, CHARTERS, *supra* note 20, CHARTER nos. 1439, 1462, 1454, 1436.

⁶² For an interesting discussion of the nature of Anglo-Saxon kingship, see YORKE, *supra* note 8, at 15–19, 157–78. See also FLEMING, *supra* note 10.

⁶³ See, e.g., Laws of Alfred, 32, in Attenborough, *supra* note 9, at 77; Laws of III Edgar, 4; Laws of II Canute, 16, in Robertson, LAWS, *supra* note 16, at 25, 183.

⁶⁴ See Laws of Hlothhere and Eadric, § 8 (“If one man brings a charge against another, and if he meets the man [whom he accused] at an assembly or meeting, the latter shall . . . render him such satisfaction as the judges of Kent shall prescribe for them.”), in Attenborough, *supra* note 9, at 21.

⁶⁵ Laws of Hlothhere and Eadric, § 10 (“If one man charges another . . . then three days later they shall attempt to find an arbitrator, unless the accuser prefers a longer delay. Within a week after the suit has been decided by arbitration, the accused shall render justice to the other”), in Attenborough, *supra* note 9, at 21.

adjudication and arbitration,⁶⁶ were *controlled* by third-parties who were empowered to decide the merits of the lawsuit and issue legal judgments. Later charter evidence suggests that kings referred cases of import to arbitration and chose the arbitrators.

Many factors likely influenced the parties' choice of forum. One may have been whether the parties wished to have their dispute aired before the community in the open forum of the assembly or court, or preferred, instead, the privacy of a more closed arbitral forum. For example, legal actions that were of import to an entire community, such as those concerning public or community rights, appear to have been highly political matters most suitable for hearing in a public assembly. Also, some litigants appear to have favored placing their lawsuits before public assemblies because they believed the openness of the process would ensure its fairness, either because they knew and trusted members of the local community who acted as adjudicators or because they were unable to find an arbitrator or arbitral panel to their liking. Some litigants involved in private disputes, however, appear to have preferred arbitration so that their lawsuits could be decided by peers of choice. Another reason for choosing arbitration was expediency; litigants did not have to wait for the sitting of a public assembly. Both the desire for peer decisionmaking and the need for expediency also appear to have motivated kings to refer cases to arbitration. When this occurred, the arbitrations could involve a small or large number of arbitrators, depending upon the nature of the case.

Contrary to traditional views of Anglo-Saxon judges,⁶⁷ the third-party decisionmakers who presided over both the adjudicatory or arbitral processes engaged in a factual investigation or discovery process. They examined proffered testimonial and documentary evidence and also evaluated the reputations of the plaintiff and the defendant.⁶⁸ The main role

⁶⁶ The important role of linguistic analysis to studies of medieval historical documents, such as the present one, is underscored by the significant linguistic pattern evident in the Anglo-Saxon terms used to denote these alternative legal processes: *deman* denotes adjudication and adjudicator, and *sæmend* and *gesemed*, denote arbitrator and arbitration, respectively. See, e.g., Laws of Hlothhere and Eadric, §§ 8, 10 (in the Old English original), in Attenborough, *supra* note 9, at 20.

⁶⁷ See, e.g., I POLLOCK & MAITLAND, *supra* note 4; BAKER, *supra* note 3.

⁶⁸ For the purposes of ensuring that rational proof would be available in lawsuits concerning the ownership of personal property—movables—the laws of several of the Anglo-Saxon kings regulated business transactions involving the purchase and sale of goods and established an elaborate system of witnesses for the purposes of verifying business transactions (vouching to warranty). See Laws of: Hlothhere and Eadric, 7; I Edward, 1; II Æthelstan, 10, in Attenborough, *supra* note 9, at 19, 115, 133. See also Laws of: IV Edgar, 6 & 7; I Æthelred, 3; II Æthelred, 8; II Canute, 24, in Robertson, LAWS, *supra* note 16, at 35, 55, 61, 187. When real property was in dispute, courts looked to documentary and testimonial

of the court counsellors and arbitrators in this "discovery phase" of the legal process was to hear the particulars of the complaint and then, on the basis of a rational examination of the evidence, to determine which party was in the right. A judgment on the merits of a claim was then reached. Sometimes, the legal process ended with this judgment on the documentary evidence (*cum testimonio scripturarum*).⁶⁹ At other times, but much less frequently than was traditionally believed,⁷⁰ a judgment on the merits was finalized through an oath-swearing process.⁷¹

evidence. See, e.g., SAWYER, CHARTERS, *supra* note 20, CHARTER no. 137. In non-transactional contexts, Anglo-Saxon court counsellors also evaluated physical evidence in their search for "guilt" or "innocence." See, e.g., SAWYER, CHARTERS, *supra* note 20, CHARTER no. 1445.

⁶⁹ See, e.g., SAWYER, CHARTERS, *supra* note 20, CHARTER no. 137. See also A. G. Kennedy, *Disputes about Bocland*, 14 ANGLO-SAXON ENGLAND 175-195 (1985); Wormald, *Charters*, *supra* note 2, at 167.

⁷⁰ See generally SANCHEZ, *supra* note 2; Wormald, *Charters*, *supra* note 2, at 167.

⁷¹ The oath-swearing ceremony occurred in two stages. First, the person awarded the oath swore to the truth of his claim or defense. Then his oath was attested to by a specific number of persons who acted as compurgators or oath-helpers. The role of compurgators was simply to swear that what the oath-giver said was true. When this occurred the oath was successfully sworn and the lawsuit came to an end formally. The number of compurgators required in a given case depended upon the nature of the alleged wrongdoing and the status of the accused. See WHITELOCK, *supra* note 14, at 140.

The oath-saying process was sometimes dispensed with when the person to whom the oath had been awarded chose to pay the other party a particular sum of money *in lieu* of swearing the oath. Apparently, the money/oath option enabled the party who had been awarded the oath to avoid giving it. This could be an advantage to the person awarded the oath if he could not muster the required number of oath-helpers to satisfy the type of oath he had been awarded. Thus, it would enable him to end the legal process without having to swear the oath and provide him with a valuable escape hatch from the legal process while ensuring that the other party received some satisfactory level of compensation. See, e.g., Laws of Hlothhere and Eadric § 10, *in Attenborough*, *supra* note 9, at 21; SAWYER, CHARTERS, *supra* note 20, CHARTER no. 1445 (referring to phenomenon). For a detailed analysis of the processual dimensions of the oath-swearing process, see SANCHEZ, *supra* note 2. See also *infra* notes 72-74, 87.

Figure 3

Finalizing Legal Judgments on the Dispute Processing Continuum

1. Choose Forum: Arbitration or Adjudication → 2. Discovery → 3. Judgment on Merits → 4. Finalized Legal Judgment

The oathswearing process seems usually to have been invoked when the legal judgment was based upon testimonial evidence or upon a combination of relevant documentary and testimonial evidence. Court counsellors and arbitrators “awarded” the oath to the party whom they considered to be in the right. While the award of the oath was technically the award of “proof,” it was not an evidentiary burden, in the modern sense, because the award was made *after* the court had reviewed all of the available evidence and had determined that the person to whom the oath was awarded was certainly or probably in the right.⁷² Nevertheless, the oath was a legal procedure of

⁷² However, under certain circumstances the oath appears to have been a *procedural* burden, depending upon the type of oath awarded. There were at least three types of oath used in the Anglo-Saxon legal process: the selected oath, the unselected oath, and the combined oath. A *selected* oath was one in which the suitor was compelled to select oath-helpers from men nominated either by the judge or the defendant. An *unselected* oath was one which left the suitor free to produce his own oath-helpers. In a *combined* oath, the selection of oath-helpers was to be made by lot. See Laws of I Edward, 1 § 3 & Notes to Laws of I Edward, 1 § 3.1, in Attenborough, *supra* note 9, at 115, 204; Laws of: I Æthelred, 1 § 2 and II Canute, 22, in Robertson, LAWS, *supra* note 16, at 53, 185. The facts of each case and the action involved determined the type of oath that would be awarded and to whom.

An underlying purpose of using three types of oaths was to prevent collusive oathswearing. In practice, the oath may have been vulnerable to corruption. For example, when the accused was a member of a dominant clan or tribe, it is imaginable that the members of his kin-group could play a collusive role as the defendant or plaintiff's oath-helpers. But an oath-helper's fidelity to kin would have to override fidelity to the Christian virtue of truth-telling if he or she was to give a spurious oath. A discovered perjury was not penanced lightly. See OAKLEY, *supra* note 21, at 158. See also Laws of: II Canute, 6, 7 and II Canute, 36, in Robertson, LAWS, *supra* note 16, at 179, 195. In addition, as early as the seventh century, kings' laws attempted to safeguard the oath by requiring persons who stood accused of serious crimes either to fulfill a selected oath, or, if the oath was unselected, to produce oath-sayers who were not their kinsman. See FRANK STENTON, *supra* note 11, at 317, citing Laws of: Wihtrud 21 (requiring a commoner to produce three men of own class as oath-helpers); Ine 54 (requiring every accused person to produce one oath-helper of high rank); Treaty of Alfred and Guthrum, 3 (requiring lower rank accused to produce as oath-helpers eleven men of own rank and one of king's noblemen), in Attenborough, *supra* note 9, at 29,

paramount importance because only its successful swearing could bring the lawsuit to a formal end. It was a procedure devised by the Church that invoked the fear of an omniscient and omnipresent Christian God to elicit truth-telling and confessions of guilt.⁷³ As a result, the swearing of the oath

55, 99. But despite these rules, in many cases members of a higher social class or dominant clan could fare better than members of a lower social class because the former had access to greater numbers of powerful, loyal, and socially respected oath-helpers than did the latter. See OAKLEY, *supra* note 21, at 156. This suggests that the oath-swearing procedure may have made it easier for the noble to escape conviction than for the common freeman. See also HENRY C. LEA, *SUPERSTITION AND FORCE* 21 (1866, rpt. 1892).

⁷³ The oath was called a method of "proof" by the Anglo-Saxons because this nomenclature suggested the infallibility of the legal process—as an instrument of God—for determining the truth. The ordeal was the other Anglo-Saxon method of "proof." The ordeal was usually resorted to in cases involving what would today be considered "criminal" matters, such as perjury, theft, assault, murder, etc. Its purpose was ostensibly to establish the guilt or innocence of an individual. But its various procedural dimensions seem to have been designed to elicit and coerce confessions of guilt. It was, therefore, only called into play in cases where an individual had, in effect, been presumed guilty. This could have been, for example, when an accused was awarded the oath but was unable to produce the requisite number of oath-helpers, or when the accused was viewed by members of the public assembly as having a bad character because he had been repeatedly accused of wrongdoing or had been convicted of perjury in the past. Under these circumstances he would have been denied the right to swear an oath and would have been required to undergo the ordeal. See, e.g., *Laws of: I Edward, 3 and VI Æthelstan, in Attenborough, supra* note 9, at 117.

The ordeal was presided over by the Church and involved several procedural stages. The accused was usually first required to fast for three days, after which time a mass would be held where he would be accused of committing the crime and "charged to confess his guilt before receiving the sacrament." WHITELOCK, *supra* note 14, at 142. This stage of the ceremony, performed in English, involved the priest charging the defendant as follows:

I charge you by the Father and the Son and by the Holy Ghost, and by your Christianity which you have received, and by the holy cross on which God suffered, and by the holy gospel and the relics which are in this church, that you should not dare to partake of this sacrament nor to go to the altar if you did this of which you are accused, or know who did it.

Id.

If the defendant received the sacrament, he was then subjected to one of several types of ordeals—an ordeal of cold water, hot water, or iron. *Id.* A law from the reign of King Æthelred accords the *accuser* the right to choose the ordeal to which the *accused* would be subjected. See *Laws of III Æthelred, 6, in Robertson, LAWS, supra* note 16, at 67. If an accused was convicted by ordeal he was subjected to punishment according to the law. The Church preferred mutilation to the death-penalty so that (according to the tenets of

cast a coercive shadow over the entire legal process, the practical aims of which, it is suggested, were to encourage and coerce cooperation from the accused or the accuser during the discovery phase of the legal process, to finalize the outcome of the legal process, and to ensure compliance with that outcome.⁷⁴

a. *Adjudication*

One colorful charter illustrating the resolution of a public dispute through adjudication comes from the early ninth century. It involves a legal dispute between the king's reeves in charge of the royal swineherds ("swinereeves") at Sinton-in-Leigh, in Worcestershire, and the community of Sinton-in-Leigh.⁷⁵ The dispute began when the swinereeves asserted what they believed to be the king's right to harvest "mast"—an arboreal food for the pigs—from a larger share of the community's forest than members of the community believed the king enjoyed under customary law. The community appears to have been outraged by what it perceived to be the king's unjust self-aggrandizement at its expense. It brought suit to defend the parameters of its customary right to take feed for its pigs from its wood-pasture. Because the suit raised a question of law that was of such import to the king and the community, it was decided by a public assemblage of the king's *witan*, whose presiding counsellor was the Archbishop of Canterbury.

The extent of the community's right to mast could only be confirmed by the testimony of persons in the community who had a special knowledge of the unwritten, customary law. One of these persons was a particularly

Christianity) the criminal would have a chance to atone for his sins and thereby save his soul. Sometimes compensation, fines, or forfeiture of property were adequate punishment under the law. When this was the case their amount was fixed by law and the court's role was limited to a pronouncement of the sentence as required by the law books or custom. See WHITELOCK, *supra* note 14, at 145-46.

⁷⁴ Ironically, the processual power of the oath and the ordeal was a remnant of the deeply held pagan beliefs of the Angles, Saxons, and Jutes. These Germanic tribes were greatly influenced by religious taboos—belief in magic, the veneration of ancestors, fear of anthropomorphic deities, and belief in the power of pagan priests over discipline and law. The Church took strategic advantage of these cultural predispositions to bend the Anglo-Saxon psyche into conformity with its own system of beliefs, to secure its own position of power within Anglo-Saxon England, and to foster greater fear and respect for the Anglo-Saxon legal process. Indeed, the formal role of the Church in the legal process became so important that the Anglo-Saxon kings promulgated laws sanctioning it. See OAKLEY, *supra* note 21, at 137-39.

⁷⁵ The charter dates from A.D. 825 and was probably written by a cleric. See SAWYER, CHARTERS, *supra* note 20, CHARTER no. 1437.

credible witness—the Bishop of Worcester. After the court counsellors heard testimony from him and others, they effectively decided the merits of the case in the community's favor and awarded the community the right to swear the oath at an appointed time:

Then the bishop and the advisers of the community said that they would not admit liability for more than had been appointed in Æthelbald's day, namely mast for 300 swine, and that the bishop and the community should have two-thirds of the wood and of the mast. Then Archbishop Wulfred and all the counsellors adjudged (Old English "geræhte") that the bishop and the community might declare on oath that it was so appointed in Æthelbald's time and that they were not trying to obtain more, and the bishop immediately gave security to Earl Eadwulf to furnish the oath before all the counsellors, and it was produced in 30 days at the bishop's see at Worcester. At that time Hama was the reeve in charge of the swineherds at Sinton, and he rode until he reached Worcester, and watched and observed the oath, as Earl Eadwulf bade him, but did not challenge it.⁷⁶

When the community successfully swore the oath in the presence of the king's reeve, the legal judgment was finalized and the lawsuit ended formally with a winner-take-all outcome in favor of the community.

As this case illustrates, the Anglo-Saxon legal process worked admirably to adjudicate important and politically sensitive questions of law. The various procedures employed, in particular the court's consideration of testimonial evidence and its award of the oath to the community, legitimated the adjudicated outcome. This was particularly important from the losing party's perspective—especially when he was a king! The document's reference to the swinereeve's observation of the oath-swearing procedure as per the instruction of the king's nobleman and the swinereeve's failure to challenge it⁷⁷ signified the king's acceptance of the *witan's* legal judgment on the merits of the case.

⁷⁶ See SAWYER, CHARTERS, *supra* note 20, CHARTER no. 1437 (translated above from the original, written in Old English with some medieval Latin phrases, and printed in Robertson, CHARTERS, *supra* note 20, at 8-9).

⁷⁷ In this case, the Earl Eadwulf, as the chief civil authority in the county, was the plaintiffs' representative because it was to him that the swinereeves were answerable. See Robertson, CHARTERS, *supra* note 20, at 267 n.17.

b. *Arbitration*

An interesting account of an Anglo-Saxon arbitration comes from a private, anonymous letter written to King Edward the Elder in the early tenth century about the estate of Fonthill, Wiltshire.⁷⁸ The letter was written to defend the author's rightful ownership of the estate, being challenged by a nobleman called Higa. In recounting how he acquired the estate in the first place, the letter-writer details an earlier dispute over the land which was arbitrated by direction of King Edward's predecessor, King Alfred. The parties to that dispute were Higa and another nobleman, Helmstan. The letter writer was one of the arbitrators:

BELOVED: I make known to you how it was about the land at Fonthill, the five hides that Æthelm Higa lays claim to. When Helmstan committed the crime of stealing Æthelred's belt, Higa at once began to bring charges against him, among other accusers, and wanted to litigate the land from him. Then [Helmstan] sought me and prayed me to be his intercessor, because I had received him formerly from the bishop's hand before he committed the crime. Then I spoke in his behalf, and interceded for him with King Alfred, whose soul may God reward; so he allowed him to be law-worthy at my intercession and plead against [Higa] about the land. Then he [Alfred] ordered an arbitration. I was one of the men who was named for the purpose. . . . Then each of them [Helmstan and Higa] told his tale. Then it was the opinion of us all that Helmstan might go forth with the charters and prove his right to the land. . . . [Helmstan presented an array of witness testimony and] the charter [title to the land] was brought forth and read⁷⁹

As was often the case in the adjudicatory process, the arbitrators judged the merits of the case on the basis of their evaluation of the documentary evidence—the title deeds that Helmstan produced—and testimonial evidence about how he had acquired the deeds. But because Higa was dissatisfied with the arbitrators' decision on the merits—awarding Helmstan (an accused criminal) the oath—he appealed the arbitrators' decision to the king.

The appeal process was straightforward and pragmatic. The arbitrators explained to the king the reasons for their decision, and the king listened while washing his hands:

⁷⁸ See SAWYER, *CHARTERS*, *supra* note 20, CHARTER no. 1445.

⁷⁹ *Id.* (translated above from the original text in Old English and printed in *Select Cases in Anglo-Saxon Law*, in *ESSAYS IN ANGLO-SAXON LAW*, *supra* note 4, at 338–39).

[We] reported [to the king] in full how we judged it, and why we judged it; and [Higa] himself stood there with us, and the king stood, washed his hands within the chamber at Wardour; when we had done this, he asked [Higa] why our judgment seemed to him not right, [the King] said that he could not think any thing more just than that [Helmstan] should give the oath, if he could And we rode then at the appointed day, I, and Wihtbord rode with me, and Byrthelm rode thither with [Higa], and we all heard that [Helmstan] gave the full oath. Then we all said that it was a finished suit, since the . . . decision was complied with. . . .⁸⁰

As this document so colorfully illustrates, notwithstanding Higa's disapproval of the arbitrators' judgment, the king's affirmation of it and Helmstan's successful swearing of the oath ended the lawsuit with a winner-take-all outcome in Helmstan's favor.⁸¹

2. *Settling a Lawsuit: Bargaining in the Clear Light of Legal Certainty*

Often, lawsuits did not end with winner-take-all judgments.⁸² Many ended, instead, with settlement agreements. The present study's processual examination of the charter evidence indicates that after court counsellors reached a winner-take-all legal judgment and announced it to the parties, *but before* those judgments were finalized by oath-swearing, the third-party decisionmakers often persuaded the losing party to come to terms with the winning party, fostering their reconciliation.⁸³ In so doing, the decisionmakers appear to have changed hats, acting not as decisionmakers, but as facilitators of settlement negotiations which left the parties with the ultimate choice of accepting the legal judgment or reaching a better outcome for themselves. I have called this phenomenon "bargaining in the clear light of legal certainty" because the parties negotiated with full knowledge of what the legal outcome would be if they failed to come to terms.⁸⁴

⁸⁰ SAWYER, CHARTERS, *supra* note 20, CHARTER no. 1445 (translated above from the original text in Old English and printed in *Select Cases in Anglo-Saxon Law*, in *ESSAYS IN ANGLO-SAXON LAW*, *supra* note 4, at 338-39).

⁸¹ The letter writer took rightful possession of Fonthill two years after this lawsuit ended (Helmstan having pledged the deeds to him in return for the letter writer's assistance with the oath-swearing process).

⁸² See, e.g., SAWYER, CHARTERS, *supra* note 20, CHARTER no. 137 (winner-take-all judgment on the merits).

⁸³ See, e.g., SAWYER, CHARTERS, *supra* note 20, CHARTER no. 1454.

⁸⁴ Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce Negotiation*, 88 YALE L.J. 950, 966, 969-71 (1979) (the authors identify

Figure 4

Settlement Agreements on the Dispute Processing Continuum

1 • Arbitration or Adjudication --- 2 • Discovery --- 3 • Judgment on Merits --- 4b • Negotiated or Mediated Settlement Agreement

Anglo-Saxon adjudicators and arbitrators frequently promoted settlement agreements in cases where the parties were embroiled in interpersonal conflict. In the bitter dispute between Higa and Helmstan, for example, the letter-writer reveals that after the arbitrators awarded Helmstan the oath, they attempted to reconcile the parties to no avail. Higa, gambling on the uncertainty that the arbitrators' decision would be overturned on appeal to the king, was unpersuaded of the need to settle the case when the arbitrators invited him to do so. He was wrong and ended up the loser when the king affirmed the arbitrators' judgment. However, unlike Higa, most Anglo-Saxon litigants did not doubt the certainty of legal decisions reached by adjudicators or arbitrators. And when "reality-tested" by these third-party decisionmakers about the negative consequences of winner-take-all outcomes, most litigants acceded to the settlement process and came to terms.⁸⁵

One case illustrating the successful facilitation of a settlement outcome by Anglo-Saxon adjudicators involved a woman landowner, named Wynflæd (pronounced "Winfléd"), and Leofwine, the son of a nobleman. Wynflæd brought suit to eject Leofwine from two of her estates, named Hagbourne and Bradfield, alleging that Leofwine had wrongfully taken possession of the estates. Leofwine responded that Wynflæd owed him money belonging to his father and that her failure to relinquish the funds upon request justified his violent act of self-help.

a prevalent modern phenomenon—litigant bargaining to settle a lawsuit before a court reaches an outcome—and point to the litigants' uncertainty about the court's judgment as a central incentive for and shadow under which they agree to settle).

⁸⁵ Cf. Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. DISP. RESOL. 235, 248-49 (1993) (noting the valuable role played by mediators in reality-testing parties to a conflict resolution process in the modern context).

Wynflæd, of course, disagreed. She was so outraged by Leofwine's actions that she instituted a lawsuit against him and took it directly to King Æthelred II. When the King met with her, she presented numerous witnesses who attested to her rightful ownership of the estates. The King then summoned Leofwine, but he refused to appear, insisting, instead, upon his right to present his defense to the local shire court—a right accorded by the laws of King Æthelred. The King acceded to this request and sent a sealed letter to the shire court counsellors commanding them to “settle the case between Wynflæd and Leofwine as justly as they could.”⁸⁶

At the shire court hearing, Wynflæd produced an array of credible witnesses to support her claim. Accordingly, the court counsellors awarded her the right to swear the oath. But before they appointed the date for oath-swearing, they invited the parties to settle the case.⁸⁷ In this settlement process, the court counsellors took pains to promote a settlement agreement as a means of averting continued strife between the parties. First, they “reality-tested” the parties about how the legal judgment would impact upon them. Then, they suggested settlement terms that aimed at satisfying both parties' central interests or, at least, at addressing the losing party's point of dissatisfaction with the legal outcome. They began the “reality-testing” stage by explaining that one consequence of the legal outcome for both parties would be a loss of friendship between them. Then, they detailed for Leofwine how the winner-take-all outcome would cost him, as the loser. He would be required to return the lands he had seized and pay compensation to the king for seizing them illegally. Furthermore, because the seizure violated the king's peace, he would be considered an outlaw unless he paid the king the monetary value of his life as a nobleman. In addition, he would not recover from Wynflæd the money that he had claimed belonged to his father.

⁸⁶ SAWYER, CHARTERS, *supra* note 20, CHARTER no. 1454 (written in Old English during the reign of King Æthelred II [A. D. 978-1016]) (translated above from the original charter printed in Robertson, CHARTERS, *supra* note 20, at 137).

⁸⁷ *See id.* In this case, when the court counsellors asked Leofwine if he would dispense with the oath, they were attempting to discern whether he would agree to negotiate a settlement agreement. The reason that the losing party was consulted in this manner is explained by a processual technicality of the oath-swearing process. Under Anglo-Saxon legal procedure, the oath was not sworn to the court. It was sworn by the winning to the losing party as a form of “satisfaction” given by the winning party to the losing party. Procedurally, it also legitimated the court's outcome. By dispensing with the oath Leofwine was accepting the court's outcome and indicating his preference for a settlement agreement. Notwithstanding Leofwine's choice, if Wynflæd wanted to swear the oath and did so successfully (by producing the requisite number of supportive oath-swearers) she would win a legal victory on the basis of the court's judgment.

The compromise outcome proposed by the court counsellors in this case (and accepted by the parties) required Leofwine to give up Wynflæd's land and Wynflæd to return to Leofwine money that allegedly belonged to his father. The incentives for Leofwine to accept the settlement were clear. It would subject him to fewer burdens than the legal outcome and would also benefit him by satisfying his underlying interest—getting his father's money back. But what incentive was there for Wynflæd to settle? If she finalized the legal judgment by swearing the oath, she would get her land back *and* be able to keep money that Leofwine claimed belonged to his father.⁸⁸ The only possible burden that she would have to endure from going ahead with the oath was the loss of friendship. In the modern context, most litigants would view as inconsequential a judge's admonition that if a dispute were not settled, "thereafter friendship [between the parties] would be at an end."⁸⁹ However, in the Anglo-Saxon context, the loss of "friendship" was taken considerably more seriously because it signalled to the winning party that the losing party was left "in a mind to make trouble."⁹⁰ In what would have been an on-going relationship with Leofwine (as a community member), this was a loss which could be costly to the parties, their families, and the community-at-large, especially if it resulted in future acts of vengeance by Leofwine, or in an all-out blood-feud between them and their respective families. If Wynflæd settled the lawsuit, however, she could still satisfy her central interest—getting her land back—and resolve the matter that might be an ongoing source of costly controversy between the parties—the money. Thus, the initial burden to Wynflæd of reaching a settlement agreement—her concession of the money to Leofwine—might have worked to her benefit in the long run if it preserved the peace between them.

In the final analysis, it was Wynflæd's desire to avert the risks associated with the "loss of friendship" with Leofwine that motivated her to settle. By reaching a settlement agreement, she hoped to bargain for a better outcome than that provided by the legal outcome: the satisfaction of her central interest—getting her lands back—*and* the prevention of future strife between the parties. Only the settlement agreement promised to provide her with the latter because, unlike the legal outcome, it satisfied Leofwine's

⁸⁸ Unless a litigant who was awarded the oath was concerned that she/he might not successfully swear it (by failing to produce the required number of oath-helpers), forgoing the opportunity to swear the oath would not seem advantageous. *See supra* note 71 (discussing the oath/money option for litigants uncertain about successfully swearing the oath). In this case, however, Wynflæd was certain of her ability to swear the oath but, like many other "winning" Anglo-Saxon litigants, still decided to settle.

⁸⁹ *See* SAWYER, CHARTERS, *supra* note 20, CHARTER no. 1454 (translated above from the original charter and printed in Robertson, CHARTERS, *supra* note 20, at 137).

⁹⁰ *See* DORIS STENTON, *supra* note 2, at 7-8.

underlying interest—getting his money back. For Leofwine, it was the certainty that he could do better for himself if he came to terms with Wynflæd that was the primary motivation to settle. Thus, the practice of bargaining in the “clear light of legal certainty” effectively gave the litigants the opportunity to engage in what modern-day dispute resolution theorists might call “post-judgment settlement negotiations.”⁹¹ In comparison to the legal judgment reached, the settlement agreement reached reflected the availability of a broader range of solutions which, to some extent, satisfied both parties’ rights and interests.

3. Resolving Disputes “at Law” and “at Love”: Written Settlement Agreements

By the end of the tenth century, the practice of ending a lawsuit with a settlement agreement, instead of with a winner-take-all, third-party judgment, had made its way into an Anglo-Saxon law: “Where a thegn has two choices, love or law”—that is, composition (amicable agreement) or judgment—“and he chooses love, it shall be as binding as judgment.”⁹²

⁹¹This phenomenon is somewhat analogous to the modern day concept of the post-settlement settlement. See Howard Raiffa, *Post-Settlement Settlements*, 1 NEG. J. 9-12 (1985) (this concept is descriptive of a two-stage practice in which the parties come to an initial settlement agreement and then enlist the assistance of a third party to suggest a better settlement agreement).

⁹²DORIS STENTON, *supra* note 2, at 7 (quoting and translating Laws of III Æthelred, 13, § 3) (citing Old English original in Liebermann, 1 GESETZE, *supra* note 16, at 232). See also Laws of X Æthelred, § 1 (“Frequently and often it has come into my mind that sacred precepts and wise secular decrees promote Christianity and strengthen royal authority, further public interests and are the source of honor, [bringing] about peace and reconciliation, [putting] an end to strife and [improving] the whole character of the nation.”), in Robertson, LAWS, *supra* note 16, at 131. Charter evidence of this reconciliation practice exists from the early and later parts of the Anglo-Saxon period. Furthermore, post-Conquest survival of it is evidenced in two clauses from the laws of King Henry I: “Agreement prevails over law and love over judgment,” (the Latin original reads: *pactum legem vincit et amor iudicium*) and “disputants are ‘brought together by love or separated by judgment’” (the Latin original reads: “*Vel amore congregat vel sequestret iudicio*”), quoted and translated in Clanchy, *supra* note 15, at 47 (citing LEGES HENRICI PRIMI 164, 176 [L. J. Downer ed., 1972]). It also appears in the 12th century treatise by Ranulph de Glanvill, Chief Justiciar of England under King Henry II: “It is generally true that agreement prevails over law,” quoted and translated in Clanchy, *supra* note 15, at 49 (citing THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 129 (G. D. G. Hall ed., 1965) [hereinafter GLANVILL]; DAVID BATES, WILLIAM THE CONQUEROR 98 (1989) (“In property disputes William often preferred a negotiated settlement to an ordeal [reflecting] . . . a conventional

While many settlement agreements may not have effected “sunny compromise[s]”⁹³ between the disputants—or fulfilled the Christian tenet of neighborly “love”—they often seem to have satisfied their central aim, which was to avert continued animosity between parties to a lawsuit.

Although the Anglo-Saxon conceptions of “law” (*lage*) and “love” (*lufe*) appear to have been dichotomous, on the dispute processing continuum they were connected and complimentary.⁹⁴ The outcomes “at law,” reached before outcomes “at love,” created a set of certainties for both parties which could only be altered, to their benefit, if they reached a more favorable settlement agreement and ended the lawsuit “at love.” Thus, the threat of a known outcome “at law” and the opportunity provided by the dispute processing continuum to settle after the legal outcome was reached worked to effect the resolution of disputes “at love.” This phenomenon underscores the sophistication of the dispute processing continuum’s use of third-party controlled processes in the early stages of the legal process as the means of reaching outcomes “at law” that paved the way for the successful implementation of third-party facilitated processes that helped the parties settle and, through outcomes “at love,” reduce the risk of recurring strife between them.

Due to the Church’s influence, the terms of settlement agreements were often recorded in writing, giving outcomes reached “at love” the binding effect of outcomes reached “at law,” well before the late tenth-century memorialization of this principle in the kings’ laws.⁹⁵ These settlement documents were generally made in duplicate or triplicate.⁹⁶ In addition, as illustrated by the following excerpt from a settlement agreement, the agreements were usually witnessed by at least three people (but could be witnessed by many more than three, depending upon the importance of a

eleventh-century preference for a compromise between the two parties, rather than a clear-cut judgment in favor of one of them.”).

⁹³ Wormald, *Charters*, *supra* note 2, at 165.

⁹⁴ The Anglo-Saxon ideas of “law” and “love” originated from the Christian conception of “law” and “love.” They can be traced to *The New Testament*, with which members of the Anglo-Saxon Church were well-versed. See *St. Paul, Letter to the Romans*, *supra* note 15, ¶9 (The commandments, “You shall not kill, You shall not steal, You shall not covet,” and any other commandment, are summed up in this sentence, “You shall love your neighbor as yourself.”); *Id.* at ¶10 (*Love does no wrong to a neighbor; therefore love is the fulfilling of the law*) (emphasis added). See Clanchy, *supra* note 15.

⁹⁵ See *supra* note 92 and accompanying text.

⁹⁶ Though most of the written settlement agreements that have survived from the Anglo-Saxon period come from the later part of that period, a dispute resolution agreement memorializing the reconciliation of parties to a lawsuit has survived from the reign of King Egbert, of Wessex (A.D. 802-837). See A HAND-BOOK TO THE LAND-CHARTERS, AND OTHER SAXONIC DOCUMENTS, *supra* note 20, at 113-18.

settlement agreement to a particular community), and the wrath of God was usually invoked (as in the oath-swearing process) to encourage compliance with the terms of the outcome:

And the negotiators of this settlement were And these are the witnesses who were present at this settlement If anyone attempts to alter this or break this agreement, God shall avert his countenance from him at the great Judgment, so that he shall be cut off from the bliss of the kingdom of heaven and delivered over to all the devils in hell. Amen.⁹⁷

The Anglo-Saxon practice of memorializing settlement agreements is also evident in the post-Conquest period (and, of course, a similar practice exists in modern times). In the early post-Conquest period, written settlement agreements were called final concords (*concordis finalia*). They enabled litigants to settle "a suit in court and by its authority."⁹⁸ In the twelfth century, a lawsuit could still be settled by final concord with the permission of the court. Henry II's Chief Justiciar, Rannulf de Glanvill, referred to this practice: "It oft times hapneth, that disputes moved in the King's court are by final concored terminated; but it, then, is by consent and leave of the King or his Justiciar, upon what occasion soever the difference be; whether it be for Land or any other thing."⁹⁹ Though the term "*finalis concordia*" does not appear in legal documents from England until soon after the Norman Conquest, the Anglo-Saxon settlement agreements served the same purpose as the post-Conquest final concord, as do written settlement agreements today.

⁹⁷ SAWYER, CHARTERS, *supra* note 20, CHARTER no. 1456 (translated above from the original charter and printed in Robertson, CHARTERS, *supra* note 20, at 143).

⁹⁸ FRANK M. STENTON, *Acta Episcoporum*, in PREPARATORY TO ANGLO-SAXON ENGLAND BEING THE COLLECTED PAPERS OF FRANK MERRY STENTON 175 (Doris M. Stenton ed., 1970). Sir Frank Stenton's reference to a small body of final concords which have survived from the eleventh century, shortly after the Norman Conquest, is made with an historical awareness that final concords existed at a much earlier date. According to Stenton, the final concords from the twelfth century merely "mark a stage in the evolution of the final concord." *Id.* Originally, the final concord was an instrument for recording the settlement of a true dispute between the parties. Later, its use altered and it became a vehicle for transferring property. See DORIS STENTON, *supra* note 2, at 51.

⁹⁹ GLANVILL, *supra* note 92, at 94.

IV. HISTORICAL ANALOGUES: SETTLEMENT OUTCOMES, ADR,
AND THE MULTIDOOR COURTHOUSE EXPERIMENT

The social, economic, and legal structure of modern American society is vastly different from its Anglo-Saxon counterpart. As a result, dispute processing in the American legal system is far more complex, structurally and procedurally, than it was in Anglo-Saxon England. Yet there are historical analogies to be drawn between the preference for settlement outcomes in both Anglo-Saxon England and today, as well as the dispute resolution processes used to effect those outcomes. But the central historical analogy came into being after the recent advent of the multidoor courthouse experiment in the United States. It created a modern-day dispute processing continuum akin to the one that existed in Anglo-Saxon England.

A. *Settlement Outcomes*

The pre-eminence of courts in the United States has made that institution the forum to which most Americans bring an ever widening array of legal disputes to be adjudicated.¹⁰⁰ Yet, only a small percentage of lawsuits are actually resolved through legal judgment. Owing to the phenomenon of “bargaining in the shadow of the law,”¹⁰¹ many lawsuits are settled during the course of litigation outside the courts through “alternative” dispute resolution processes, such as arbitration, mediation, and, particularly, through negotiation.¹⁰² As the present study suggests, this

¹⁰⁰ See THE ROLE OF COURTS IN AMERICAN SOCIETY 12 (Jethro K. Lieberman ed., 1984).

¹⁰¹ Mnookin & Kornhauser, *supra* note 84.

¹⁰² See STEPHEN B. GOLDBERG, FRANK E. A. SANDER, & NANCY H. ROGERS, DISPUTE RESOLUTION 4-5 (2d ed. 1991) (providing a list of the distinguishing characteristics of the various primary and hybrid alternative dispute resolution processes, including a reference to when the outcomes, such as mediated agreements, are enforceable at law). See generally JETHRO K. LIEBERMAN, THE LITIGIOUS SOCIETY (1981) (examining the prevalence of lawsuits in the United States and the increasing tendency to resolve these lawsuits through “alternative” dispute resolution processes); Frank E. A. Sander, *Varieties of Dispute Resolution*, 70 F.R.D. 111 (1976) (discussing alternative processes such as arbitration, mediation, negotiation, or various hybrid processes). Through each of these alternative processes, litigants are able to resolve their disputes privately, less formally, more efficiently, and more affordably than they could in courts. In addition, these alternative processes generally enable the parties to articulate and resolve elements of their disputes that could not have been raised in or resolved by the courts, reaching agreements crafted by the parties that are enforceable by the courts.

preference for negotiated outcomes over legal judgments is also found in the Anglo-Saxon historical context, even though Anglo-Saxon litigants “bargained in the clear light of legal certainty.”

It is suggested that the preference for settlement outcomes in both historical contexts is the product of economically rational forms of cost/benefit and risk analysis. For modern plaintiffs and defendants, decisions to settle are often made after they conduct assessments of probable court outcomes and weigh the potential costs and benefits associated with those outcomes. By comparison, Anglo-Saxon litigants made settlement decisions after assessing the costs, benefits, and risks associated with known legal outcomes. Hence, litigants at both ends of the historical spectrum—in Anglo-Saxon England and today—can be seen by us making calculated decisions to settle when they believe that by averting a legal outcome they will be better off.

B. ADR

There are many analogies to be drawn between modern dispute resolution processes and those used on the Anglo-Saxon dispute processing continuum. In the United States today, as in Anglo-Saxon England, adjudication and arbitration are third-party controlled processes that result in legal judgments on the merits of a case. And in both contexts, arbitration is often used as an alternative to adjudication, providing litigants with a more private and expeditious process for getting a third-party decision in a case.¹⁰³ When today’s litigants prefer to fashion their own outcomes, like their Anglo-Saxon counterparts, they do so through processes such as negotiation and mediation.¹⁰⁴ These processes enable them to resolve

The use of the term “alternative” reflects a widespread presumption in the United States that adjudication is the normative method of dispute resolution. In fact, the high settlement rate suggests that negotiation is the normative dispute resolution process and that adjudication is the alternative to that norm. Of course, in the contemporary American context, as in the Anglo-Saxon context, the threat of a formal legal outcome works to coerce parties into dispute resolution processes such as negotiation and mediation.

¹⁰³ The related phenomenon of court annexed arbitration preceded the evolution of the multidoor courthouse idea. See E. ROLPH, *INTRODUCING COURT-ANNEXED ARBITRATION: A POLICYMAKER’S GUIDE* (1984); ABA Committee on Corporate Counsel, Subcommittee on Alternative Dispute Resolution, *COURT-ANNEXED ARBITRATION* (ABA unpublished report, 1984).

¹⁰⁴ See Sander, *Varieties of Dispute Resolution*, *supra* note 102; Sander, *Dispute Resolution Within and Outside the Courts*, *supra* note 6; Frank E. A. Sander & Stephen Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 *NEG. J.* 49 (1994).

elements of their disputes that could not be addressed in legal judgments, but which could be made legally binding if incorporated into written settlement agreements.

A central difference between the use of this array of dispute resolution processes in Anglo-Saxon England and today has been their non-availability, in the modern context, through courts. Adjudication has been the only legal process in the United States uniformly available in courthouses. The acronym "ADR" characterizes the other processes as "alternatives" to it because they are different from adjudication and are usually only accessible outside of the courts. By contrast, in the Anglo-Saxon context, every process used on the dispute processing continuum was viewed as part of the legal process, and the legal process itself evolved as an alternative to the historically normative practice of resolving disputes through violent methods of self-help.

C. *The Multidoor Courthouse Experiment*

The multidoor courthouse experiment, now being instituted in selected courthouses in the United States, has systematically brought an array of ADR processes under the authority of courts. One effect of the multidoor courthouse experiment is to broaden the processual scope of the legal process by bringing inside the courts processes which for so long have been viewed as out-of-court "alternatives" to adjudication.¹⁰⁵ In so doing, it has arguably served motivating aspirations which are closely parallel to those underlying the dispute processing continuum in Anglo-Saxon England.

One such parallel aspiration of the multidoor courthouse experiment is to change the role and image of courts in the United States from wholly adversarial institutions to places where parties can come to be reconciled¹⁰⁶ and/or take a greater role in the legal dispute resolution process and in crafting the outcome. Because courthouses are places where, historically, the only dispute resolution process available has been adjudication, Americans have viewed courts as somewhat ominous institutions, equipped only to resolve sharply focused, rights-based, and highly adversarial legal

¹⁰⁵ Though the term "multidoor courthouse" conjures up an image of a courthouse which has under its roof designated space for each dispute resolution process, a multidoor courthouse can be one with a revolving door where lawsuits are filed in the courthouse and then are screened and referred, if appropriate, out of the courthouse to various non-adjudicatory processes located in various parts of a given city. If the alternative processes should prove to be unsuccessful, the referral of a lawsuit to them for resolution does not bar the parties from resorting to adjudication. See Sander, *Dispute Resolution Within and Outside the Courts*, *supra* note 6.

¹⁰⁶ See Sander, *Dispute Resolution Within and Outside the Courts*, *supra* note 6.

disputes.¹⁰⁷ The elaborate rules of procedure and evidence which govern adjudication (and to a lesser extent arbitration) of civil claims often work to exclude many facets of a dispute from being heard (let alone resolved) by judges in a court of law. And the adversarial philosophy that underlies these proceedings and their winner-take-all outcomes rules out the possibility of reaching outcomes that could satisfy shared interests and otherwise "create value" in ways that mediated and negotiated outcomes often do.¹⁰⁸ Furthermore, as many proponents of ADR have pointed out, adjudication is ill-suited to resolving disputes involving parties who (like most litigants in the Anglo-Saxon context) have ongoing relationships with one another and who might be reconcilable.¹⁰⁹ Therefore, courts in the United States have, historically, not been perceived as forums for resolving important non-justiciable elements of a legal dispute.¹¹⁰

Another motivating aspiration of the multidoor courthouse experiment that parallels a goal of the Anglo-Saxon dispute processing continuum is to legitimate and regulate the quality and appropriateness of ADR services made available to litigants. While many ADR theorists view mediation and negotiation as more appropriate processes than adjudication or arbitration for resolving disputes in the context of ongoing relationships,¹¹¹ many legal theorists have questioned the legitimacy of alternative processes that are unregulated by the legal process and that may place rights at risk. The multidoor courthouse experiment has aimed at lending these processes legitimacy by bringing them under the authority of courts and making them *systematically* available to parties on a dispute processing continuum. Whether the multidoor courthouse can protect the rights of parties who

¹⁰⁷ This view holds that:

[C]ourts are reactive institutions, best suited to hear bipolar disputes pitting one party against another . . . [and] [t]he parties . . . control the proceedings, which should be adversary and sharply focused. . . . The disputes should be such that the courts can resolve them by applying some articulable standards or principles and affording an appropriate and viable remedy. Cases posing routine or repetitive issues, treading on the established decision-making authority of other institutions, or threatening to intrude unnecessarily into ongoing relationships do not belong in the courts.

THE ROLE OF COURTS, *supra* note 100, at 84.

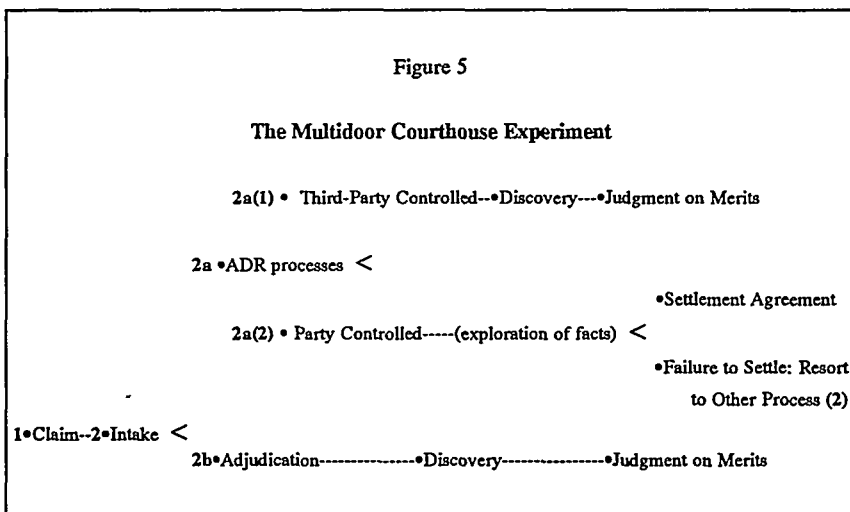
¹⁰⁸ See Mnookin, *Why Negotiations Fail*, *supra* note 85.

¹⁰⁹ See Sander, *Dispute Resolution Within and Outside the Courts*, *supra* note 6.

¹¹⁰ Some forms of mediation can also be rights-based. See *id.* But adjudication is a wholly rights-based process. Non-legal aspects of a dispute cannot be addressed by the court's limited, rights-based lexicon for resolving disputes.

¹¹¹ See Sander & Goldberg, *supra* note 104.

resort to processes other than adjudication is an open question. But, through a detailed “in-take” procedure, the experiment does provide for the careful review of legal complaints before referring them to party-controlled processes such as mediation.¹¹² Similarly, in the Anglo-Saxon context, adjudicators and arbitrators evaluated the appropriateness of cases for settlement processes or for finalization through the oath and gave either processual choice equal legitimacy because both were conducted under the authority of the legal process.¹¹³



One distinction between the Anglo-Saxon dispute processing continuum and the multidoor courthouse experiment is that in the former, the same persons who acted as third-party decisionmakers also acted as third-party facilitators. In the multidoor courthouse experiment, however, only judges adjudicate, leaving other third-parties to act as mediators or arbitrators, for example.¹¹⁴ A further distinction is that in the multidoor

¹¹² Negotiation is also always available to the parties and settlement agreements reached through negotiation can be made enforceable by law. Some settlement agreements—such as those in divorce cases where child custody and support are involved—are also reviewed by judges.

¹¹³ The dispute between the swinereeves and the community of Sinton-in-Leigh, for example, was not appropriate for a settlement outcome because it involved an important principle of law which could only have been established through a legal judgment. By contrast, the conflict between Wynflæd and Leofwine had a deeply personal element to it that was best addressed through a settlement agreement.

¹¹⁴ One newer ADR process, known as “med-arb,” uses the same person as mediator and arbitrator. See Sander, *Dispute Resolution Within and Outside the Courts*, *supra* note 6.

courthouse experiment settlement-type processes, such as mediation and conciliation, are resorted to on a different ascending scale, with adjudication being the last resort.¹¹⁵ By comparison, in the Anglo-Saxon context, adjudication and arbitration were initially employed to decide the merits of a case *before* the settlement process was resorted to. Thus, even in the context of the multidoor courthouse, it can be seen that, unlike Anglo-Saxon litigants who bargained in the "clear light of legal certainty," their counterparts in the multidoor courthouse will continue to bargain in the "shadow of the law."¹¹⁶

V. CONCLUSION

This Article reaches numerous conclusions that revise past perceptions of Anglo-Saxon dispute processing.¹¹⁷ The surviving documentary evidence covering the roughly 460 year period of Anglo-Saxon legal history suggests that Anglo-Saxon lawmakers implemented contextually pragmatic and progressive methods of legal dispute resolution. It is now evident that Anglo-Saxon lawsuits were resolved on a sophisticated dispute processing continuum. That continuum began with the resolution of the legal claims through one of two alternative legal processes: adjudication or arbitration. Both processes were controlled by third-party decisionmakers who issued legal judgments on the merits of a case. Before these judgments were finalized, however, the parties were given the opportunity to reach a compromise settlement agreement. At this point on the dispute processing continuum, the legal decisionmakers often changed hats and became mediators, facilitating settlement negotiations between the parties. If reached, settlement agreements had the binding effect of legal judgments. Thus, the Anglo-Saxon dispute processing continuum provided litigants with alternative dispute resolution processes and alternative outcomes, all of which were legitimated by the authority of the legal process. As a result, the continuum often worked to foster respect for the law and the legal process by resolving disputes in a peaceful and enduring fashion and promoting the reconciliation of the parties.

This Article suggests the existence of significant historical analogies between the Anglo-Saxon dispute processing continuum and the modern

¹¹⁵ See Sander, *Dispute Resolution Within and Outside the Courts*, *supra* note 6. Even in "med-arb," the ascending scale begins with a settlement process and ends with one which imposes a third-party decision on the disputants.

¹¹⁶ See Mnookin & Kornhauser, *supra* note 84.

¹¹⁷ Cf. 1 POLLOCK & MAITLAND, *supra* note 4, at 38-39, 40-41, 44, 46; J. L. Laughlin, *The Anglo-Saxon Legal Procedure*, *supra* note 4. But see Wormald, *Charters*, *supra* note 2, at 167; REYNOLDS, *supra* note 2, at 25-26.

HISTORY OF ADR IN ANGLO-SAXON ENGLAND

multidoor courthouse experiment. Most notable of these analogies is that the multidoor courthouse effectively brings dispute resolution processes, similar to those practiced in the Anglo-Saxon historical context, under the authority of courts. It thus creates a *systematic* dispute processing continuum, like that in Anglo-Saxon England, which includes ADR processes *and* adjudication. If the innovation is institutionalized in courts throughout the United States, it may well succeed in creating a conception of law that is not wholly adversarial by transforming courthouses into institutions that are not rigidly wed to adjudication as the only legitimate form of legal dispute processing. In so doing, it may succeed in fostering an ethic of reconciliation today similar to that promoted by the Anglo-Saxon dispute processing continuum.¹¹⁸

¹¹⁸ Lay and legal practitioners, as well as legal scholars, have articulated the desire to create dispute resolution forums that provide disputants with process options that foster concord between them. *See, e.g.*, NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA ix-xviii (Roman Tomasic & Malcolm M. Feeley eds., 1982). *Accord* Sander, Dispute Resolution Within and Outside the Courts, *supra* note 6. *But see* Sally E. Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057 (1987) (reviewing STEPHEN B. GOLDBERG, ERIC D. GREEN, FRANK E. A. SANDER, DISPUTE RESOLUTION [1987]) (questioning the ability of ADR processes to facilitate reconciliation of the parties in our modern, anomic urban culture).

