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THE DEVELOPMENT OF CRIME IN EARLY ENGLISH SOCIETY

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The purpose of this paper is to trace the development of crime and criminal law in England from 400 A.D. to 1200 A.D. This period of history was selected for two reasons. First, early Saxon laws were recorded, and thus the changes which occurred in the legal structure over a period of years can be traced and analyzed; and second, it was during this period of English history that the tribal law of the Saxons gave way to the common law system which is now basic to Anglo-American law. Whatever social forces produced the common law system had to be present during this period. It is the intent of the writer to analyze these legal changes in terms of changing social conditions.

The method used was that of institutional legal history.[1] A basic assumption of sociological jurisprudence is that law is related to institutional history and change. The social changes that occurred in England during the period studied produced crime and criminal law as we know them today.

PART I

ANGLO-SAXON SOCIAL STRUCTURE

The Iberians and Celts

The earliest settlers of Britain were the Iberians and the Celts. These people were organized along tribal lines, and there is no evidence of a social structure other than the tribal structure. They were bound together by the "legal and sentimental ties of kinship as the moral basis of society."[2] Trevelyan estimates that the Celts and Iberians were in the iron age. Agricultural practices were very crude. Pigs and cattle were kept as a part of their economic life, along with hunting, fishing, herding, weaving, and metal work.[3]

Between 55 B.C. and 400 A.D. the Romans occupied Britain, but for the exception of roads, walls, and town sites the Romans never did Latinize the Celts. Celtic tribalism still survived beyond the city walls.[4]

[1] JEFFERY, RAY, *Crime, Law, and Social Structure.* Jour. Crim. Law, Criminol. and Pol. Sci. 47, 4, (1956).

[2] TREVELYAN, G. M., HISTORY OF ENGLAND, New York: Doubleday and Co., Vol. I, p. 25.

[3] *Ibid.*, pp. 26–28.

[4] *Ibid.*, p. 43.

The Anglo Saxons

Caesar and Tacitus describe the Anglo-Saxons as tribal units occupying the territory of North Germany. They had an iron-age culture: they utilized metals for tools and war weapons; they grew corn; they herded cattle.[5] They had a very crude and extensive type of agricultural system. These tribes possessed a very loose type of military organization and were quite warlike.[6] The consanguine family was the important social unit; the blood-tie was the important social relationship. The primitive fusion of institutional functions in the kinship group is undoubtedly the most important characteristic of this social arrangement.

Each tribe was in theory a group of kinsmen. The tribe performed the economic, political, religious, and familistic functions performed by separate and distinct institutional structures in a modern society. The tribe was the land-owning unit, and the land was cultivated by a group of kinsmen who formed plough-teams and who cultivated the land in an open-field system. Political control was in the hands of the armed warriors who met in the folk-moot or tribal council to elect a king or to pass laws. The king was elected from a given hereditary line, and he was the king of a tribe, never of a territorial unit. "The notion of a territorial influence was never for a moment involved in it."[7] The conjugal family unit was less important than the kinship group. "In general the mores of this period were bound up with the assumption that everyone belonged to a localized kinship group to which he is answerable."[8] "The tie which united these smaller pastoral communities was simply that of kindred."[9]

The Feudal System

Disintegrating Tribalism

The change that was taking place in English social structure has been characterized as "disintegrating tribalism."[10] "But even before the migrations to Britain, tribalism was yielding to individualism, and kinship was being replaced by the personal relation of warrior to his chief, which is the basis of aristocracy and feudalism."[11]

> The whole economic and political structure of society was undergoing a great change. If by any two words we could indicate the nature of this elaborate process we might say that "tribalism" was giving place to "feudalism."[12]

Even before their invasion of Britain these Teutonic tribes had developed the *comitatus*, a military leader and his followers. They were bound to one another by a

[5] Stubbs, William, The Constitutional History of England, Oxford: Clarendon Press, 1891, Vol. I, p. 15 ff.

[6] *Ibid.*, p. 16 ff.

[7] Kemble, John M., The Saxons in England, London: Bernard Quartich, 1879, Vol. I, p. 137. See also Trevelyan, *op. cit.*, p. 50.

[8] Queen, Stuart A. and Adams, John B., The Family in Various Cultures, New York: J. P. Lippincott Co., 1952, p. 175.

[9] Stubbs, *op. cit.*, p. 15.

[10] Gibbs, Marion, Feudal Order, New York: Henry Schuman, Inc., 1953, p. 10 ff.

[11] Trevelyan, *op. cit.*, p. 51.

[12] Maitland, F. W. and Montague, F. C., A Sketch of English Legal History, New York: Putnam and Sons, 1915, p. 10.

code of honor, and the relationship between a military leader and his followers was a personal one. The military leader supplied certain necessities and the warriors shared in the booty whenever a raid was carried out.[13] This military system was replacing the familistic system. The social class system even before the invasions included an *eorl*, a military leader; the *ceorl*, his follower and the *laet*, a slave or conquered man.[14]

The British invasions, between 400 and 600 A.D., accentuated this transition from a tribal state to a feudal state. These invasions were of two different types. First came bands of warriors, the *comitatus*, without women and children; followed by kinship groups, farmers with their families.[15] These "war bands were one of the features of disintegrating tribalism."[16] The warriors settled the land which they were granted as rewards for their military service. Later on the kinship groups settled the land. "They were not so much territories as communities of tribesmen who felt themselves bound together by common customs and blood-ties; sometimes one or two hundred families, sometimes considerably more"[17] Each patriarchal family unit was allotted a share of land, called a *hide*, from which it gained economic subsistence.[18] At the beginning of Saxon history in England we find a distinction between the military man and the agricultural man, a distinction which was to play an important role in the development of feudalism in England.

Feudalism

In his discussion of feudalism Ganshof makes a distinction between two different but related meanings of the term "feudalism." As a *society* feudalism refers to a system of personal dependence, with a military class occupying the higher levels in the social scale, and with a subdivision of rights in real property corresponding to this system of personal dependence. As a *legal* system feudalism means a body of institutions creating obligations of service and duty—a military service on the part of the vassal and an obligation of protection on the part of the lord with regard to the vassal.[19]

Land System

The feudal system began in England with the invasions. The conquering warriors were granted land by their chiefs as a reward for military service. The land settlement pattern was mixed, that is, it included both military and family units. The granting of land to a follower by a chief was called a *beneficium* or benefit. The recipient of the land was able to cultivate it for his own use, to use it as a benefit free from obligations of service and taxation.[20] Land held in *alod*, an original grant of land to a military follower, was held free of service and rent. Land held in *fief* or *feud* was held in return for service and rent. Land grants were originally made for services rendered,

[13] KEMBLE, *op. cit.*, Vol. I, pp. 163–184.

[14] VINOGRADOFF, PAUL, THE GROWTH OF THE MANOR, London: George Allen and Unwin, 1904, pp. 123–124.

[15] TREVELYAN, *op. cit.*, p. 56.

[16] GIBBS, *op. cit.*, p. 17.

[17] *Ibid.*, p. 19.

[18] *Ibid.*, p. 20

[19] GANSHOF, F. L., FEUDALISM, New York: Longmans, Green, and Co., 1952, p. xv.

[20] *Ibid.*, p. 11.

as in the case of the invasions; however, by the ninth century the process was reversed. Service was now rendered in return for a benefice.[21] By the tenth century all land in England was bookland, land held in *fief*. A grant of land by a lord to a vassal came to be known as a *fief* or *feud*, and these terms replaced the term *beneficium*.[22] Land was now under the control of private landlords, and any man who occupied the lord's land owed the lord services. This concept of landownership replaced the system found during the tribal state of Saxon history when the tribe owned the land and each man as a tribesman shared in this ownership.

Vassalage

There was a legal union between vassalage and the benefice since the land relationship created by the grant also created a personal relationship between lord and vassal.[23] *Commendation* was the legal process by which a freeman placed himself under the protection of a lord in return for his services. The act of *commendation* was the way in which the personal tie between men replaced the kinship tie which was disintegrating as a result of the migrations and population growth. An act of *manumission*, usually performed on the altar of a church, freed the serf from his lord. A serf could also be freed by joining the holy orders, being knighted, or by fleeing to a free town and remaining there for a period of a year and a day.[24]

The tenure system, or system of service, developed as an expression of the *fief*. The most common service was knight's service, or military service. In this way military service was connected to the occupation of land. A distinction was made between the man who owed military service and the man who owed other types of services, especially agricultural services.[25] A *thegn* was a man with five hides of land who owned military service to a lord. He was liable for the *trinoda necessitas;* the *fyrd* or military expedition, the repairing of military fortifications, and the repairing of roads and bridges.[26]

The *ceorl* was a freeman with one hide of land. He paid a fee to his lord, but performed no services. The *geneat* was free from week work. The *gebur* was bound to the land and he did week work, work of an uncertain nature required every day of the week. The man who did week work was in a servile position because his services could be demanded every day by the lord. The more specific the demands on a man, the freer he was in this feudal arrangement.[27] As the kinship system disintegrated the *ceorl* sought protection from economic want and from the Danes during the Danish invasions of the ninth and tenth centuries. In return for security he would perform services for his lord.[28] By the time of Aethelstan (925) a law required that

[21] *Ibid.*, p. 47; p. 237.

[22] *Ibid.*, p. 96.

[23] *Ibid.*, p. 37 ff.

[24] POLLOCK, FREDERICK, AND MAITLAND, F. W., THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, Cambridge: University Press, 1932, Vol. I, pp. 427–429.

[25] GIBBS, *op. cit.*, p. 55.

[26] STUBBS, *op. cit.*, p. 208–210.

[27] GIBBS, *op. cit.*, p. 55 ff. See also VINOGRADOFF, THE GROWTH OF THE MANOR, *op. cit.*, pp. 232–233.

[28] STENTON, FRANK, ANGLO-SAXON ENGLAND, Oxford: Clarendon Press, 1950, pp. 463–464.

every man have a lord. ". . . the manorial system arises at the end of the Old-English period mainly in consequence of the subjection of a labouring population of free descent to a military and capitalistic class . . ."[29]

The practice of a man seeking lordship increasingly provided an alternative social discipline. For a good Lord gave his man the material support which a father gave his sons, and the social protection which the kindred gave its members.[30]

Besides military and agricultural services several other types of tenure emerged. Tenure by frankalmoin was held by ecclesiastical groups in return for prayers and saying masses. Tenure by serjeanty was personal service, such as carrying a lord's sword or working in his kitchen. Tenure by socage was a personal tenure involving gifts to the lord on special occasions, such as birthdays and holidays.[31]

Political Unification

The political unification of these militaristic-tribalistic settlements came about as a result of three forces: (1) civil wars among local military leaders, (2) the Danish invasions of the tenth century, and (3) the acceptance of Christianity as the religion of the land.[32] By the tenth century England was united into six or eight large Kingdoms or Earldoms.

The constitutional system of the Saxon tribes was organized around the tribe and the chief. The tribal chief was replaced by a king. The king was a landlord, a military leader. The Saxon invasions plus tribal warfare produced in England a number of such local kings. The concept of kingship changed from a tribal to a territorial concept. The king was elected by the *witan*, usually from a given royal family.[33]

The tribal council was replaced by the *witenagemot*, or the *witan*, a meeting of the large landlords of the community. The *witan* declared law, elected kings, and granted land to lords and churchmen.[34]

Within a kingdom the local subdivisions were known as *shires*, and each *shire* was ruled by an *ealdorman*. The *shire* was a political, military, and fiscal unit of government, and the *shire-moot* was an important feudal court. The *hundred* was a smaller unit than the *shire*, controlling the judicial and agricultural affairs of several agricultural villages.[35]

Village and Manor

With the disintegration of the kinship settlements the local agricultural village came into prominence. These villages were centers for administering agricultural policy, as well as centers of trade and commerce. The manor was the official residence of the lord. It included his house and land. It also represented the agricultural system

[29] VINOGRADOFF, THE GROWTH OF THE MANOR, *op. cit.*, p. 235.

[30] GIBBS, *op. cit.*, p. 21.

[31] POLLOCK AND MAITLAND, *op. cit.*, Vol. I, pp. 282–295.

[32] STUBBS, *op. cit.*, Vol. I, p. 187 ff.

[33] KEMBLE, *op. cit.*, Vol. II, p. 142. See also M. M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND, New York: Harcourt-Brace and Co., 1942, p. 28.

[34] KEMBLE, *op. cit.*, Vol. II, pp. 195–221.

[35] STUBBS, *op. cit.*, Vol. I, pp. 104–108. See also KEMBLE, *op. cit.*, Vol. II, pp. 125–149.

based on tenure. It included the agricultural classes who worked the land. An open-field system of cultivation was used, along with certain areas designated as pasture land, waste land, and forest land. The manor was also a military and political unit. Each unit furnished so many men for the *fyrd*. The manorial court maintained the judicial control of the manor.[36]

CHRISTIANITY

Trevelyan has stated that "the change of religion was the first great step forward of the English people."[37] "Anglo-Saxon Christianity transmuted Anglo-Saxon society."[38] When the Saxons invaded Britain Celtic Druidism still existed in the isolated regions of northern England. However Britain was soon converted to Christianity. By 597 Aethelbert, the king of the Kentians, had married a Christian woman and had accepted Christianity himself. The Pope sent Augustine to England to affect a conversion, and by 735 there were two archbishoprics in England. The Germanic warlords allowed the Church to exist and eventually became its converts because it was useful to them.[39]

Christianity and the State

The Church furnished the Teutonic tribes with their only contact with Roman civilization. The Church furnished a model for the state system that was to come. The political unity of England was in a large part due to the spiritual unity of the people under one God and one Pope.[40] The Church also furnished the people with a new moral and social philosophy. A new philosophy of human nature and society emerged. Man was basically weak and immoral. He was born with original sin as a result of his fall from Eden. The purpose of life on earth was salvation, and the body of the church offered to man the means to this salvation. The State was viewed as an agent of God. ". . . the authority of the secular power in administering justice and punishing crime is derived from God."[41] The purpose of the State was to control these sinful individuals during their stay on earth. The major philosophical issue of this period was the question of the nature of the power of the State, the relation between sacred and secular power. The Church claimed prior control over the prince through the Pope because all power was derived from God. Christianity prepared man for the acceptance of a secular ruler, and the rapid growth of the State is in no small measure a reflection of this Christian notion of society. Christianity taught people to accept their position on earth as God-given. Man should worry about the hereafter, not the here-and-now.[42]

[36] VINOGRADOFF, THE GROWTH OF THE MANOR, *op. cit.*, p. 296 ff. See also FREDERIC SEEBOHM, THE ENGLISH VILLAGE COMMUNITY, and F. W. MAITLAND, DOMESDAY BOOK AND BEYOND.

[37] TREVELYAN, *op. cit.*, p. 74.

[38] *Ibid.*, p. 79.

[39] GIBBS, *op. cit.*, p. 29.

[40] TREVELYAN, *op. cit.*, p. 90. See also STUBBS, *op. cit.*, Vol. I, p. 266.

[41] CARLYLE, R. W., AND CARLYLE, A. J., A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST, London: William Blackstone and Sons, 1915, Vol. III, p. 101.

[42] *Ibid.*, Vol. III, p. 170.

Christianity and Feudalism

The Church was more than a spiritual force; it was a feudal system with its land grants, laws, courts, and secular officials. The bishops were great landlords. The priests and bishops were members of the witan; they sat on the hundred-moot and the shire-moot. It was the Church who first taught the kings to use written charters and wills to alienate land.[43] The Church supported the feudal system which was emerging in England at this time. "The Church, in elaborating the legal and learned aspects of daily life, was thereby promoting the feudal system based on territorialism, the sharp distinction of classes, and the increasingly unequal distribution of wealth and freedom."[44]

> The fundamental social cleavage in England, as on the continent, was formed by exploitation of peasants by landlords. A section of these landlords were soldiers, another section priests; with sword and cross they protected the people, or it was said to justify their privileged position in society.[45]
>
> Catholic discipline, as defined and sanctioned by the law of the Church, the canon law, was created in the feudal period. So we need not be surprised that it was well adapted to the needs of a class divided society. Nothing more sharply differentiates feudalism from tribalism and the society of our own time.[46]
>
> What we have written so far may suggest that the effects of conversion to Christianity, including the psychological effects, worked themselves out at two levels; the economic and political. In England, as in many other parts of Europe, the formation of ecclesiastical estates was part of a wider movement—the extension and improvement of agriculture and the subjection of the peasantry to the power of landlords.[47]

At this time there was no separation of Church and State, The Church was an important part of the feudal system. A new system of social order and control emerged "when Christianity and territorial feudalism were beginning to lay new restraints on the individual. . ."[48]

The Norman Invasion

When William became King of England in 1066, the Saxon era of English history ended and the Norman began. There were few changes in the social structure already described. The land tenure system was accentuated and extended by William. He proclaimed himself to be the "supreme landlord" of all England, and all men who held land held *his* land.[49] The Domesday Survey was a complete survey of the tenure system. This survey attached all men to the soil and reduced all social relationships to a land tenure system. It redistributed the land to Norman nobles who replaced the Saxons as the new upper class. The principle of *nulle terre sans seigneur*, no land without its lord, was now universal in England.[50] The new class system had the Norman noble at its apex with the Saxon population in various agricultural positions.

[43] Knappen, *op. cit.*, p. 42.
[44] Trevelyan, *op. cit.*, p. 94.
[45] Gibbs, *op. cit.*, p. 7.
[46] *Ibid.*, p. 9.
[47] *Ibid.*, p. 42.
[48] Trevelyan, *op. cit.*, p. 97.
[49] Stubbs, *op. cit.*, Vol. I, p. 274 ff.
[50] Trevelyan, *op. cit.*, p. 172.

The thegn became a Norman knight; the ceorl became a villein. Villeins, bordarii, cotters—agricultural classes—were of Saxon descent.[51] The separation of the military and agricultural classes was now complete. "Between the two epochs (tribalism and the state) stands feudalism as an attempt to connect military organization directly with the agricultural husbandry."[52]

> After the breakdown of the tribal and clan organization, and before the rise of the State, feudalism was the only method by which a helpless population could be protected, war efficiently conducted, colonization pushed forward, or Agriculture carried on with increased profits. For it was a process of differentiating the functions of warrior and husbandman.[53]

The split between the Church and State came after the Norman invasion. William attempted to gain control of ecclesiastical affairs whenever he could. The Triple Concordat limited the authority of the Pope. Under William the lay and ecclesiastical courts of law were separated. The controversy and struggle between Church and State continued through the reigns of William Rufus, Henry I, and Stephen. It came to a head during the reign of Henry II with the Becket controversy. [54]

After the death of William the Conqueror the nobles and churchmen gained power at the expense of the crown. It was a period of civil war and peasant uprisings, especially during the reign of Stephen. At this time nobles and bishops reached the height of their power.[55]

PART II

Anglo-Saxon Legal System

Tribal Law

The Anglo-Saxon legal system was originally a system of tribal justice. The old legal codes were recorded from the time of Aethelbert on (570) so that a complete record of the changes which occurred in the legal system is available.[56] Aethelbert followed the Roman practice of recording the laws. These laws are a record of Anglo-Saxon tribal custom, based on the principle of kinship. There is no evidence of borrowing from the Roman legal system. Whenever a migration or invasion occurred the laws were recorded so as to make them familiar to all. The family or kinship group, not the State, was regarded as the injured party.[57]

[51] Vinogradoff, Paul, English Society in the Eleventh Century, Oxford: Clarendon Press, 1908, p. 213.

[52] *Ibid.*, p. 213.

[53] Trevelyan, *op. cit.*, p. 124.

[54] Stenton, *op. cit.*, pp. 650–651.

[55] Poole, A. L., From Domesday Book to Magna Carta: *1087–1216*, Oxford: Clarendon Press, 1951, pp. 178–192.

[56] The following books contain collections of the early laws of the Saxons: B. Thorpe, ed., Ancient Laws and Institutes of England, London: Commission of Public Records, 1840. F. L. Attenborough, The Laws of the Earliest English Kings, Cambridge: University Press, 1922. George Rightmire, The Law of England at the Norman Conquest, Columbus: Herr Printing Co., 1932. A. J. Robertson, The Laws of the Kings of England from Edmund to Henry I, Cambridge, University Press, 1925.

[57] Select Essays in Anglo-American Legal History, Boston: Little, Brown and Co., 1907, Vol. I, pp. 35–37.

All crime was crime against the family: It was the family that was regarded as having committed the crimes of its members; it was the family that had to atone, or carry out the blood-feud. In time, money payments were fixed as commutations for injury; but, even as late as the twelfth century, Welsh blood-feuds were fought . . .[58]

The feud was a kinship matter. If a slaying occured within a family group no feud took place. The offender was either ignored or exiled. Feuds occurred only between kinship groups.[59]

Feudal Law

Wer, Wite, and Bot

As feudalism and Christianity changed the organization of Saxon society, the blood-feud was replaced by a system of compensations: the *wer*, *wite*, and *bot*. The *wer* or *wergild* was a money payment made to a family group if a member of that family were killed or in some other way injured. The *bot* was a general payment of compensation for injuries less than death. The *wite* was a public fine payable to a lord or king. The only other punishment referred to is outlawry, or *friedlos*. A man who was an outlaw could be slain by anyone without fear of reprisal or feud. Anyone offending the folk-peace could be placed outside this peace, or be made peaceless. Imprisonment was a punishment unknown to the Saxons.[60]

Like the blood-feud, the *wergild* contained within it the idea of collective responsibility. The clan as a group was responsible for the offenses of its members, and for the collection and payment of the *wer*.[61] Gradually the *wer* replaced the feud. By Alfred's time (871) the feud could be resorted to only after compensation had been requested and refused.[62] A law of Aethelred's made it a breach of the king's peace to resort to the feud before demanding compensation. (Aethelred IV.4.) The collective responsibility of the kin was gradually destroyed and absorbed by other groups.

If a breach of peace be committed within a "burh" let the inhabitants of the "burh" go get the murderers, or their nearest kin, head for head. If they will not go, let the ealdorman go; if he will not go, let the king go; if he will not go let the ealdordom lie in "peacelessness." (Aethelred 11.6.)

Henceforth, if anyone slay a man, he shall himself bear the vendetta, unless with the help of his friends he pay compensation for it within twelve months to the full amount of the slain man's wergild, according to the inherited rank.

1. If, however, his kindred abandon him and will not pay compensation on his behalf, it is my will that, if afterwards, they give him neither food nor shelter, all the kindred, except the delinquent, shall be free from the vendetta. (Edmund 11.1.)

The authorities must put a stop to the vendettas. First, according to public law, the slayer shall give security to his advocate and the advocate to the kinsmen of the slain man, that he, the slayer, will make reparation to the kindred.

1. After this it is incumbent upon the kin of the slain man to give security to the slayer's advocate that he, the slayer, may approach under safe conduct and pledge himself to pay the wergild. (Edmund 11.2.)

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[58] Traill, H. D., Social England, New York: Putnam and Sons, 1899, Vol. I, p. 5.

[59] Seebohm, Frederic, Tribal Custom in Anglo-Saxon Law, London: Longmans, Green and Co., 1902, pp. 20–31.

[60] Pollock and Maitland, *op. cit.*, Vol. II, pp. 450–451.

[61] Kemble, *op. cit.*, Vol. I, pp. 231–236.

[62] Law of Alfred: 42.

And no monk who belongs to a monastery anywhere may lawfully either demand or pay compensation incurred by vendetta. He leaves the law of the kindred behind when he accepts the monastic rule. (Aethelred VIII.25.)

As feudalism developed in England between 700 and 1066, the lords and bishops replaced the kinship group as the recipients of the *wer* and *wite*. The *wer* was now determined by the amount of land owned by a man, his feudal rank, rather than by his rank in the family.

If anyone grants one of his men freedom on the altar, his freedom shall be publicly recognized, but the emancipator shall have his heritage and wergild. (Wihtred 8.)

If anyone slays a foreigner, the king shall have two-thirds of his wergild, and his relatives one-third. (Ine 23.)

If an Englishman living in penal slavery absconds, he shall be hanged, and nothing shall be paid to his lord. (Ine 24.)

He who begets an illegitimate child and disowns it shall not have the wergild at its death, but its lord and the king shall have it. (Ine 27.)

At this time no distinction is made between intentional and unintentional slayings, or between private and public wrongs.

If one kills another unintentionally by allowing a tree to fall on him the tree shall be given to the dead man's kindred, and they shall remove it within 30 days from the locality. (Alfred 13.)

If a beast injures a man, its owner must hand over the beast to the injured man or come to terms with him. (Alfred 24.)

If a man has a spear over his shoulder, and anyone is transfixed thereon, he shall pay the wergild without the fine. (Alfred 36.)

If a bone is laid bare, 3 shillings shall be paid as compensation. (Aethelbert 34.)

If a bone is damaged, 4 shillings shall be paid as compensation. (Aethelbert 35.)

If a shoulder is disabled, 30 shillings shall be paid as compensation. (Aethelbert 38.)

Today we would view such a schedule of payments as belonging to the law of tort, personal injuries for which compensation may be due at law. An insurance policy provides exactly the type of protection provided above by the early Saxon law. Whether or not we call this law criminal law or tort law depends upon the way we use these terms. This is not criminal law as we know it today. Even in the case where the king or lord inherited a wergild it was in the spirit of being an heir, and is not analogous to a criminal action. A man can fall heir to a suit at civil law, but a man cannot fall heir to a criminal law suit, nor can he collect damages and compensation as a result of a crime.

Some crimes were "botless", that is, no compensation was allowed. In such a case the feud had to be resorted to. Secret murder was a "botless" crime.[63]

We can watch a system of true punishments—corporeal and capital punishments—growing at the expense of the old system of pecuniary mulcts, blood-feud, and outlawry; but on the eve of the Norman Conquest mere homicide can still be atoned for by payment of the dead man's price or "wergild", and if that be not paid, it is rather for the injured family than for the state to slay the slayer.[64]

The Mund and the King's Peace

In the *wite* we see the germ of the idea that a wrong is not simply the affair of the injured party and his kin, but rather it involves a breach of a *mund* of a king, lord,

[63] SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, *op. cit.*, Vol. I, p. 100.

[64] TRAILL, *op. cit.*, Vol. I, p. 172.

or bishop.[65] Early Germanic justice was based an a folkpeace, a peace of the community. This idea gave way to the *mund*. A *mund* was the right a king or lord had to protect a person or area. At first the *mund* was restricted to special persons and areas; gradually it was extended to include the king's court, army, servants, hundred-court, and finally the four main highways in England. It was now referred to as the "king's peace."[66] The kings, lords, and bishops now received the compensation rather than the kinship group. They had a *mund* which had to be protected.

Other Teutonic tribes had a legal system similar to that of the Saxons. The Welsh tribes had a *galanas*, or murder fine, that was allowed in lieu of the bloodfeud. Among the Irish tribes the *eric*, or a death fine for homicide, was shared by the kin. The Frankish law book, *Lex Salica*, described the same system of feuds and compensation for the Frankish tribes in France.[67]

The Administration of Justice

The Teutonic tribes placed the administration of justice in the hands of local tribal councils, popular assemblies known as folk-moots. As feudalism replaced tribalism these folk-moots were replaced by hundred-moots and shire-moots. The hundred-moot, the court of the hundred, was gradually restricted to lords, stewards, priests, reeves, and four men from each township. It also contained a body of twelve men who heard arguments, which committee later emerged as our petit jury.[68] The shire-moot was attended by ealdormen, bishops, lords, and shire-reeves. In these courts precedence was given to the pleas of the Church, or kings, and complaints involving individuals, pleas known as "common pleas".[69]

In later Saxon history an important development in the hundred was the tithing. The tithing represented a local grouping of ten men who stood as surety for one another. If one of them broke the law, the other nine would make good the harm. The tithing was based on the notion that every man ought to have a lord. Only lordless men belonged to a tithing since men with a lord had a surety. "As long as the family remained strong, and the duty of giving up or paying for an offending member and avenging an injured member was acknowledged and carried out, the place of general police was fairly filled; but as population growth, migration, and new ideas loosened family ties, the kings began to substitute local mutual responsibility of freeholders arranged in little groups. . ."[70] "This was the way, apparently, that a substitute was found in the towns for the absent kindreds."[71]

In these courts the responsibility for initiating a trial was placed with the injured party, who in turn summoned the defendant to court. There was no prosecuting official.[72] Proof was by compurgation or ordeal. If compurgation were used, the parties involved secured the aid of oath-helpers who swore to the truthfulness of the

[65] HOLDSWORTH, W. S., A HISTORY OF ENGLISH LAW, Boston: Little, Brown and Co., 1923, Vol. II, p. 47.

[66] POLLOCK AND MAITLAND, *op. cit.*, Vol. I, p. 44; Vol. II, pp. 453–454.

[67] SEEBOHM, TRIBAL CUSTOM IN ANGLO-SAXON LAW, *op. cit.*, pp. 32–145.

[68] RIGHTMIRE, *op. cit.*, pp. 19–26.

[69] *Ibid.*, pp. 16–20.

[70] TRAILL, *op. cit.*, Vol. I, p. 138.

[71] SEEBOHM, TRIBAL CUSTOM IN ANGLO-SAXON LAW, *op. cit.*, p. 413.

[72] ESSAYS IN ANGLO-SAXON LAW, Boston: Little, Brown and Co., 1905, pp. 185–205.

charge. These oath-helpers were originally kinsmen; later on, they were members of the tithing. The number of oath-helpers needed depended upon the rank of the parties and the seriousness of the offense. Trial by ordeal included the hot iron ordeal, the hot and cold water ordeal, and the dry bread or *corsnaed* ordeal.[73] The ordeal was administered with the aid of a priest. Just prior to the Norman invasions a new trial procedure, the jury of presentment, came into existence. It was composed of twelve men who presented facts to the court. It resembled the grand jury of today in many respects.[74]

Sac and Soc

The administration of justice is inseparable from the exercise of jurisdiction. Jurisdiction was now based on a land tenure system, and was related to the feudal system. Those people on the land of a lord or king are in his *mund*, under his protection, and therefore, in his jurisdiction. The right to jurisdiction was given to lords along with a grant of land in grants called *sac* and *soc*. These words, when added to a grant of land, meant that the grantee could hold private court for his subjects and keep the returns therefrom. Such justice was a profitable business for lords and bishops.[75]

By the time of Canute (1016) most of the hundred-moots had passed into the hands of private lords. The manorial court developed as an important aspect of the legal system. Justice was now in the hands of the landlords. "The man who had land judged the man who had not. . ."[76]

The Church and the Law

There was no separation of law and ecclesiastical courts until the time of William, which meant that most of the court business was of an ecclesiastical nature. The church accepted the system of compensation and compurgation, assigning various values to its own ranks. The bishops and priests sat on the various courts, and they held grants of *sac* and *soc*. Excommunication was used as a punishment for secular as well as sacred offenses.[77] A church law provided benefit of clergy, which meant that people within the sanctity of the church could not be subject to the feud. The Church also demanded compensation for itself for many offenses. "The judicial matters of the Church were apparently transacted in the ordinary *gemots* of the hundred and of the shire."[78] The following laws are selected to illustrate the ecclesiastical nature of these Saxon codes.

Men living in illicit union shall turn to a righteous life repenting their sins, or they shall be excluded from the communion of the Church. (Wihtraed 3.)

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[73] ATTENBOROUGH, *op. cit.*, note on Law of Ine, 37.

[74] STUBBS, *op. cit.*, Vol. I, pp. 125–128.

[75] *Ibid.*, pp. 119–121.

[76] *Ibid.*, pp. 207–208.

[77] THOMAS OAKLEY, ENGLISH PENITENTIAL DISCIPLINE AND ANGLO-SAXON LAW IN THEIR JOINT INFLUENCE, New York: Columbia University Studies in History, Economics, and Public Law, 1923, p. 86.

[78] *Ibid.*, p. 139.

If a servant, contrary to his lord's command, does servile work between sunset on Saturday and sunset on Sunday, he shall pay eighty sceattas to his lord. (Wihtraed 9.)

In the first place, we command that the servants of God heed, and duly observe, their proper rule. (Ine 1.)

A child shall be baptized within thirty days. If this is not done, the guardian shall pay forty shillings compensation. (Ine 5.)

If anyone is liable to the death penalty, and he flees to a church, his life shall be spared and he shall pay such compensation as he is directed to pay by legal decision. (Ine 5.)

If anyone withholds Peter's Pence, he shall pay *lahslit* in a Danish district, and a fine in an English district. (Edward and Guthrum, 5.1.)

We enjoin upon every Christian man, in accordance with his Christian profession, to pay tithes, and church dues, and Peter's Pence, and plough-alms. (Edmund 1.)

He who has intercourse with a nun, unless he makes amends, shall not be allowed burial in consecrated ground any more than a homicide. (Edmund 1.)

Priests know full well that they have no right to marry. (Aethelred V.9.)

(Every Christian man shall make amends for) horrible perjuries and devilish deeds, such as murder, homicide, theft, robbery, gluttony, covetousness, greed, and intemperance, fraud, and various breaches of the law, violations of holy orders, and of marriage, and misdeeds of any kind. (Aethelred V.25.)

Norman Law

One of the first acts of William the Conqueror was to claim that he was the guardian of the laws of Edward. The Saxon legal system was accepted in its entirety.[79] A few changes were introduced by the Normans. William separated the lay and ecclesiastical courts, so that from this time on two distinct legal systems existed: state law and canon law.[80]

The differentiation of the functions of law and spiritual courts was a lone step towards a higher legal civilization. Without it neither Church nor State could have freely developed the law and logic of their position.[81]

William required all freemen to swear fealty to him as King of England.[82] The practice of Englishry and the murder-fine were introduced. Any man found dead under suspicious circumstances was deemed to be a Frenchman unless Englishry were proven, and the district in which the body was found had to pay a murder-fine.[83] The frankpledge replaced the tithing in order to enforce the law of Englishry. Trial by battle replaced the trial by ordeal. The lords grew in power through grants of *sac* and *soc;* they controlled the administration of justice. The kings were too weak to centralize the control of judcial functions in their own hands.[84] The law of Henry I was still the law of *wer*, *wite*, and *bot*. The central problem of Henry I's time was: "Who in the myriad of possible cases has *sake* and *soke*, the right to hold court for the offender and to pocket the profits of jurisdiction?"[85]

[79] Maitland and Montague, *op. cit.*, p. 27.

[80] Episcopal Laws of William I.

[81] Trevelyan, *op. cit.*, p. 176.

[82] Ten Articles of William I.

[83] Holdsworth, *op. cit.*, Vol. II, p. 150.

[84] Maitland, F. W., Domesday Book and Beyond, Cambridge: University Press, 1897, pp. 80-96.

[85] Pollock and Maitland, *op. cit.*, Vol. I, p. 106.

PART III

The Emergence of Crime and Criminal Law in England

It was during the reign of Henry II (1154–1189) that the old tribal-feudal system of law disappeared and a new system of common law emerged in England. A comparison of the laws of Henry I and Henry II reveals that a revolution occurred in the legal field. The former described a system of *wer*, *bot*, and *wite;* the latter described a system of writs, procedures, and common law.[86]

> In this period we are at a turning point in the history of English law. We still see traces of old tribal divisions and old tribal rules—divisions and rules which an unmitigated feudal system would have modified but perpetuated. But we can see also that a strong centralized court, in touch with the main currents of the intellectual life of Europe, is beginning to make some general rules for all England.[87]

The sources of this new law were the Constitutions of Clarendon, the Constitutions of Northhampton, and the records of the Curia Regis. These records, known as Pipe Rolls, were kept by Glanvil and Bracton, court officials. Glanvil's work, "*A Treatise on the Laws and Customs of England Composed in the Time of Henry II*," was a record of the proceedings of the Curia Regis, and it revealed a system of writs, which were necessary in order to be admitted to court. The important legal question now is: "What writ do I need to gain admittance to the King's court?" No mention is made here of tribal justice, or wergilds and bot.[88]

The Court System

During the reign of Henry I the Curia Regis was a court of the nobility. Between 1166 and 1178 great changes occurred in the Curia Regis. It came to be a court of common law for the common man. It gave the peasant the right to a court hearing, a right he had been denied by the manorial court. Thus developed a court of common law as a result of the growth of a strong centralized government. As Henry II gained control of the government from the feudal lords, he also gained control of the administration of the justice. The peasant now looked to the king, not his lord, for justice. Henry opened Westminister Hall, where the Court of the King's Bench met, to all who possessed the proper writ. In 1285 the Statute of Westminister II provided that jury cases could be tried in local communities rather that at Westminister.[89]

In time the King's Court came to be several courts. The Court of Common Pleas heard minor pleas without the presence of the king being required. The Court of the Exchequer heard tax and fiscal cases. The Court of the King's Bench was held in the presence of the king to hear difficult and important cases. After 1268 the king did not have to be present in court personally. An official acted in the name of the Crown. The Court of Chancellory issued royal writs. A system of royal justice

[86] *Ibid.*, Vol. II, p. 458.

[87] Holdsworth, *op. cit.*, Vol. II, p. 173.

[88] *Ibid.*, pp. 188–190.

[89] Maitland, F. W., The Constitutional History of England, Cambridge: University Press, 1931, pp. 61–64. See also Maitland and Montague, *op. cit.*, p. 36.

emerged. This is a system of common law, law common to all England and available to all men.[90]

The hundred court and the shire court continued in existence for several centuries; however, as the common law developed these courts declined in importance, and finally disappeared. In 1278 Edward made an attempt to gain jurisdiction over all land through the Quo Warranto Inquest, an inquest into the titles held to jurisdiction by various lords.[91] As the Crown grew in strength it reserved to itself the right to hold court and dispense justice. Feudal justice was absorbed and replaced by royal justice.

The shire-reeve, or sheriff, before the time of Henry II, had been an important judicial official in the county. Henry, through an Inquest of Sheriffs, subordinated this office to the Crown, and after his time the sheriff was a minor official who represented the interests of the Crown in local counties. This was an important step in the extension of royal control and justice into the various counties.[92]

Henry II also made use of itinerant justices, called justices in *eyre*. These men travelled about England, holding court sessions in the various hundreds and shires. They declared law in the name of the king. A jury of twelve men would present the facts to the judge whenever he was in their particular hundred.[93]

Trial by oath and ordeal was replaced by trial by battle and trial by jury. The Fourth Latern Council of 1215 forbad the clergy to participate in trial by ordeal, which meant that alternatives had to be used. During the time of Henry II a defendant was allowed the alternative of a jury trial or trial by battle. Many men refused to accept a jury trial because if they were convicted their property escheated to the king's treasury rather than going to their families. Many were forced to accept a jury trial by means of the *peine forte et dure*, a system of torture whereby heavy stones were placed on a man's chest until he consented to a jury trial or died. It was not until the Abraham Thornton case in 1818, in which the defendant used the ordeal, that Parliament abolished the ordeal.[94]

A new writ, the writ of trespass, came into existence to replace trial by appeal. It allowed a litigant to collect damages. Indictment was now by jury, and charges were brought by the Crown. Private appeals were no longer allowed. The initiation of criminal trials was in the hands of the Crown.[95] "The new procedure, though accusatory, was a true criminal procedure and the king prosecuted, and every indictment alleged that the accused had offended against the peace of our lord, the king, his crown and dignity."[96]

The King's Peace

By the time of Henry II the King's peace extended to all persons and all places in England. The special *munds* of the lords and bishops were devoured by the king's

[90] KNAPPEN, *op. cit.*, pp. 166–168.
[91] TREVELYAN, *op. cit.*, pp. 256–257.
[92] STUBBS, *op. cit.*, Vol. I, pp. 649–652.
[93] KNAPPEN, *op. cit.*, pp. 170–172. See also STUBBS, *op. cit.*, Vol. I, pp. 652–654.
[94] MAITLAND AND MONTAGUE, *op. cit.*, pp. 60–63. See also TRAILL, *op. cit.*, p. 293.
[95] HOLDSWORTH, *op. cit.*, Vol. II, p. 364.
[96] *Ibid.*, Vol. II, p. 621.

peace. The king was now a territorial king and his peace extended throughout the land. The king was now the source of law. He had jurisdiction in every case. The State, and not the family or the lord, now was the proper prosecutor in every case.[97]

Crime and Criminal Law

"Sometime in the twelfth century this ancient system of *writ* and *bot* disappeared, leaving in its place the beginnings of a common law of crime."[98]

On no other part of our law did the twelfth century stamp a more permanent impress of its heavy hand than on that which was to be criminal law of after days. The change that it made will at first sight seem to us immeasurable. At the end of the period we already see the broad outlines which will be visible throughout the coming ages . . . We go back a few years . . . and we are breathing a different air. We are looking at a scheme of *wer*, blood-feud, *bot* and *wite*.[99]

In that most revolutionary of all centuries, under the influence of the East, of the idealism induced by the Crusades, of the reality of the Christian story brought home by nearer knowledge of the Holy Land, of the re-discovery of Roman law, of a world enlarged by contact with a greater civilization, all forms of thought were in process of revision; great minds were questioning accepted beliefs and customs; the Western world suddenly ceased to regard murder, arson, rape, and theft as regrettable torts which should be compensated by payment to the family—such and other offenses came to be regarded not only as sins for which a penance was required by the Church, but as crime against society at large to be prosecuted by the community through its chief; the ever-recurring blood-feud was gradually discredited in men's minds. The transfer of the receipt of payment from the kinsfolk to the king disinclined men to favor violence.[100]

The State takes the Place of the Kinsmen—The very core of the revolutions in law and finance that took place in Henry's reign was the transfer of the initiative in criminal matters from the kindred of the injured man . . . to the king as public prosecutor.[101]

Pleas of the Crown—The king's jurisdiction finally ousted the communal courts and tended to control the courts of the barons, because the king . . . could give a hearing which, if not as speedy, was very likely to be more impartial than the court presided over by local great men.[102]

By 1226 an agreement between the criminal and the relatives of a slain man would not avail to save the murderer from an indictment and a sentence of death. The state no longer allowed a private settlement of a criminal case.[103] During Glanvil's time pleas were for the first time divided into civil and criminal.[104] By adding the words *de pace domini regis infracta* to a plea any offense could be made a plea of the crown.[105]

Blackstone defined a crime as a public offense.

The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist of this: that private wrongs, or civil injuries, are an infringement or

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[97] POLLOCK AND MAITLAND, *op. cit.*, Vol. II, pp. 463–464. See also MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND, *op. cit.*, p. 107.

[98] WALSH, WILLIAM, OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW, New York: New York University Press, 1923, p. 371.

[99] POLLOCK AND MAITLAND, *op. cit.*, Vol. II, p. 448.

[100] JEUDWINE, J. W., TORT, CRIME AND THE POLICE IN MEDIEVAL ENGLAND, London: Williams and Norgate, 1917, p. 84.

[101] *Ibid.*, p. 85.

[102] *Ibid.*, pp. 110–111.

[103] HOLDSWORTH, *op. cit.*, Vol. II, p. 257.

[104] POLLOCK AND MAITLAND, *op. cit.*, Vol. I, p. 165.

[105] REEVES, JOHN, HISTORY OF THE ENGLISH LAW, Philadelphia; M. Murphy Co., 1880, Vol. I, p. 384.

privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity . . . treason, murder, and robbery are properly ranked among crimes; since besides the injury done the individual, they strike at the very being of society; which cannot possibly subsist where actions of this sort are suffered to escape with impunity.[106]

A new doctrine of criminal responsibility was emerging, the doctrine of *mens rea* or intent. Murder was now divided into murder with malice aforethought and murder without malice aforethought. Malice aforethought can be dependent upon other conditions, such as infancy, lunacy, drunkenness, and so forth. The psychiatric view of personality development clashed with this legal view of free will and moral responsibility. A major issue in criminal law today is: "How can a man be guilty of a crime, possess mens rea, if his actions are determined by sociological and psychological conditions?"

The notion of natural crime, a crime against a law of nature rather than against a legal law, was present in the criminal law at its inception. This led to the definition of crimes as *mala in se*, acts bad in themselves, and *mala prohibita*, acts which are crimes because they are prohibited by positive law. This led to the current confusion in criminology between anti-social behavior and anti-legal behavior.[107]

Criminal law is related to acts which, if there were no criminal law at all, would be judged by the public at large much as they are judged at present. If murder, theft, and rape were not punishable by law, the words would still be in use and would be applied to the same or nearly the same actions.[108]

Which has occasioned some to doubt how far a human legislature ought to inflict capital punishment for *positive* offences; offences against the municipal law only, and not against the law of nature. . . . With regard to offences *mala in se*, capital punishments are in some instances inflicted by the immediate *command* of God Himself to all mankind; as, in the case of murder . . .[109]

The English common law is based on the assumption that there is a higher moral order which is a part of the law of nature and from which positive laws are derived.

Throughout the Middle Ages the Law of Nature, identified by Gratian with the law of God, was regarded by the canonists and civilians as the reasonable basis of all law . . . in English law not so much is heard of the law of nature . . . As a matter of fact, the work done elsewhere by the law of nature was done in England by "reasons" . . . Similarly this appeal to reason and expediency has led in later law to talk about the distinction between *malum prohibitum* and *mala in se* . . .[110]

Church and State

Although Church and State had been separated under William, the separation was not complete. The practice of "benefit of clergy" had existed for some time. All clerks of the court had a right to be tried in an ecclesiastical court. Henry II attempted to overcome the abuses of this practice when in the Constitutions of Clarendon he

[106] BLACKSTONE, WILLIAM, COMMENTARIES ON THE LAWS OF ENGLAND, 8th ed., Oxford: Clarendon Press, 1778, Book IV, p. 5.

[107] JEFFERY, *op. cit.*

[108] STEPHEN, J. F., A HISTORY OF THE CRIMINAL LAW OF ENGLAND, London: Metheun and Co., 1883, Vol. II, p. 75.

[109] BLACKSTONE, *op. cit.*, Book IV, p. 9.

[110] HOLDSWORTH, *op. cit.*, Vol. II, pp. 603–604.

provided that criminous clerks were to be sentenced in lay courts. Thomas Becket, the archbishop, opposed the sentencing of clerks in a lay court, and after a bitter struggle Becket was slain. The immediate effect of Becket's death was to postpone the issue until a later date, but gradually the Church lost its right to punish crime through the use of force.[111] The Church could punish offenders of the canon law through excommunication and a system of penances, but this was a spiritual rather than a secular jurisdiction.

This does not mean, however, that State and Church developed separately and independently of one another. They functioned as an interdependent system. The moral code of the Church was made an important part of the common law. The legal system borrowed a great deal from the Church in those areas concerning marriage, sexual practices, morals, wills, property rights, and so forth.

The notion of crime contains within it the notion of sin, for which punishment is required. The concept of *mens rea* was derived from the Christian view of sins of the mind. Sin can be punished individually, not collectively, so that the individual and not the clan or family is responsible. Only individuals have a soul that can be saved; social groups do not possess souls, and for that reason tribal responsibility gave way to the Christian notion of individual responsibility.

The concept of crime thus developed as it did as a result of this interaction of the Church and State. However, it was the State, not the Church, that became the agent for punishing sin.

> Although the religious might preach that it was a sin to kill, the conception of killing as an offense against the community is co-existent only with the conception of the power and the will of the State to enforce penalties for offences against the community. So long as overlords of the tribes, whether the king of Ireland or the king of France, contented himself with collecting customary dues and took no notice of wrongs as between individuals . . . crime as such did not exist.[112]

Kemble has summarized this social change when he stated: "And thus, by slow degrees, as the state itself became Christianized, the moral duty became a legal one."[113] Before a moral offense is a crime it has to become a legal offense.

The transition from tribalism to feudalism to territorialism was complete. The State was not yet complete in all its aspects, but territorialism as we know it was emerging from feudalism. This is especially true in the case of criminal law. The *wer*, *wite*, and *bot* had disappeared, and in their place a new system of common law emerged.

> The State replaced the family as the agent of social control.
>
> The main fact in the development of the State, manifesting itself roughly from the end of the twelfth century, is that the citizens are protected by a central power . . . with its national councils and courts. Between the two epochs stands again the doctrine, and to a certain extent, the practice of feudalism.[114]
>
> In the end the king or the parliament, or both, came to be directly related to all individuals who compose the State, and in their authority the local and personal authorities and jurisdictions of feu-

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[111] POOLE, *op. cit.*, pp. 197–212.

[112] JEUDWINE, *op. cit.*, p. 89.

[113] KEMBLE, *op. cit.*, Vol. II, p. 516.

[114] VINOGRADOFF, ENGLISH SOCIETY IN THE ELEVENTH CENTURY, *op. cit.*, p. 213.

dalism were finally lost . . . The royal justice at last absorbs all feudal justice . . . but it was not feudalism that triumphed, but territorialism.[115]

Conclusions

Social Structure and Social Change in England

The pattern of social change in England from 400 to 1200 was a change from tribalism to feudalism to nationalism. The *land-tie* replaced the *blood-tie* as the basis for social order.

During the tribal period there was a fusion of institutional functions in the kinship unit. This body was the political, economic, family, religious, and ecological unit. By 1200 separate institutions existed in these several areas. Political authority was now in the hands of landlords. By the time of Henry II the king emerged as the supreme landlord in this feudal hierarchy. Economic organization shifted from a hunting, fishing, and pastoral economy, where the kinship group was the economic unit, to an agricultural economy, where the feudal manor was the economic unit. Each man occupied land belonging to his lord, rather than to his kin, and he was attached to this land through a personal-legal relationship known as the tenure system. Status was now based on this tenure system. Feudalism was based on a division of men into two classes: military and agricultural. Religion was now controlled by a professional hierarchy of priests and bishops who acted as both church officials and landlords. Christianity was an important aspect of the feudal system. The conjugal family did not perform the many functions performed by the tribal family. This shift from an institutional family to a companionship family is a familiar theme in sociological literature today.[116]

A new social structure emerged in England, and as a result of these changes a new legal system came into existence. During the tribal period the legal system was in the hands of the tribal group, and justice was based on the blood-feud. As tribalism gave way to feudalism, the feud was replaced by a system of compensations. Justice passed into the hands of landlords. There was no separation of lay and ecclesiastical courts until the time of William. State law and crime came into existence during the time of Henry II as a result of this separation of State and Church, and as a result of the emergence of a central authority in England which replaced the authority of the feudal lords. Henry replaced feudal justice with state justice by means of justices in eyre, the king's peace, a system of royal courts, and a system of royal writs. Common law emerged as the law of the Crown available to all men. The myth that the common law of England is the law of the Anglo-Saxons is without historical foundation.[117] The family was no longer involved in law and justice. The state was the offended social unit, and the State was the proper prosecutor in every case of crime. Justice was now the sole prerogative of the State. "Custom passes into law." This shift occurred historically when a positical community separate from the kinship

[115] Carlyle and Carlyle, *op. cit.*, Vol. III, p. 20.

[116] Burgess, Ernest W., and Locke, Harvey J., The Family, From Institution to Companionship, New York: American Book Co., 1953.

[117] Radin, Max, The Law and You, New York: Mentor Book, 1948, p. 103.

group emerged as a part of the social organization. A comparison of tribal law and state law reveals these basic differences.

Tribal Law	*State Law*
Blood-tie	Territorial-Tie
Collective responsibility	Individual responsibility
Family as unit of justice and order	State as unit of justice
Feud or compensation	Punishment

The basic thesis presented in sociological and anthropological literature concerning law and society is that the development of law has been from tribal law to State law. This idea is developed in one way or another by Maine, Weber, and Hoebel.[118] The growth and development of English law from Saxon tribal law to State law supports Maine's thesis that there has been a transition from kinship authority to territorial authority. It likewise supports Weber's thesis that a change from traditionalistic to rationalistic authority occurred when the State emerged as the unit of social order.

In this paper I have attempted to make the sociology of law the subject of study rather than the criminal. One of the basic difficulties in criminological research is that very little use is made of such basic sociological concepts as institution, history, social change, social organization, and social theory. This orientation is clearly seen in a statement from Sutherland and Cressey that "criminal behavior is not affected directly or significantly by variations in the form of the general social institutions—economics, government, religion, and education. . ."[119] Group behavior is affected by the institutional structure within which it occurs. But more to the point, the system of social control used to judge behavior as legal or illegal is functionally interrelated with the social institutions: political, economic, familial, and educational. As sociologists we should be interested in sociological jurisprudence. A theory of crime depends upon an institutional study of law and society.

[118] JEFFERY, RAY, CRIME, LAW, AND SOCIAL STRUCTURES. Jour. Crim. Law, Criminol. and Pol. Sci. 47, 4, (1956).

[119] SUTHERLAND, EDWIN H., AND CRESSEY, DONALD R., PRINCIPLES OF CRIMINOLOGY, 5th ed., New York: J. P. Lippincott, 1955, p. 217.