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# FAULT IN THE LAW: THE INFLUENCE OF THE PENITENTIALS ON THE ANGLO-SAXON LEGAL SYSTEM

ERIKA NAGY LERT\*

## I. INTRODUCTION

Legal historians have traditionally argued that the only form of liability present in the pre-Norman secular laws was one which did not take into account the relative fault of the individual. This "absolute liability" position has been advocated by such renowned jurists as Wigmore and Ames.<sup>1</sup> Others, including O.W. Holmes,<sup>2</sup> have proposed that absolute liability was historically preceded by liability based on fault. A third group, represented by Isaacs,<sup>3</sup> has contended that the two forms of liability alternated cyclically.

This article presents a fourth approach. It suggests that both absolute liability and liability based on fault existed simultaneously in the secular laws of Anglo-Saxon England. Originally, secular laws were based primarily on absolute liability. Following the establishment of the Catholic Church in Britain, and prior to the invasion of William the Conqueror in 1066, the Church and the State gradually became closely intercon-

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<sup>1</sup> Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1909); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315 (1894).

<sup>2</sup> O.W. HOLMES, *THE COMMON LAW* 1-2 (1923).

<sup>3</sup> Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954 (1918).

nected and interdependent. As this interdependence increased, the secular laws incorporated and promoted the Church's penitential teachings and practices. These penitential teachings and practices embodied notions of the fault of the wrongdoer and of his liability for that fault. Consequently, secular laws which promoted penitential teachings and practices also promoted a theory of liability that was based on fault.

Theorists who maintain that absolute liability in the law historically preceded liability based on fault frequently view the early Anglo-Saxon legal system as "formal" and "immoral".<sup>4</sup> The approach that this article suggests is based upon the belief that the pre-Norman laws, and the sociopolitical context out of which they arose, were complex and sophisticated. These laws embodied diverse and evolving needs for order and stability. The presence in the laws of the dual forms of liability represented a coherent and successful integration of a variety of potentially conflicting ecclesiastical and secular teachings and practices. Ultimately, this integration served a primary function of law in society, regulating individual behavior in ways which protected the interests of the majority.

In order to examine and support this position, this article presents a brief history of pre-Norman Anglo-Saxon England and of penance and the Penitentials. It then examines the development of liability based on fault in the secular legal system.

## II. PRE-NORMAN BRITAIN AND THE PENITENTIALS

Prior to the collapse of the Roman Empire, much of the area presently known as Great Britain was occupied by the Romans. When the Romans departed from Britain in the fifth century, the Britons, particularly those in the southwest and western regions of the country,<sup>5</sup> resumed traditional Celtic practices.<sup>6</sup> These practices were influenced by contact with the subsequent invaders of Britain, including the Angles, the Saxons and the Jutes.

From the sixth through the ninth centuries, governmental and religious leaders were concerned with establishing political unity and stability, and with accommodating the increasing influence of the Christian Church. Many of the laws which were enacted by successive kings, and many of the decisions rendered by the various courts resulted directly from these concerns.

One of the first important changes instituted by early political leaders was the suppression of the blood-feud. The blood-feud was a significant obstacle to the achievement of an enduring political unity. Over time

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<sup>4</sup> Ames, *supra* note 1, at 97.

<sup>5</sup> J.E.A. JOLLIFFE, *PRE-FEUDAL ENGLAND, THE JUTES* 1 (1933).

<sup>6</sup> T.F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 7 (4th ed. 1948).

it was replaced by the court system. This replacement was met with severe resistance<sup>7</sup> and was implemented slowly, through a series of steps. Initially, the wrongdoer was encouraged to offer compensation to the victim's kin group or "maegth."<sup>8</sup> Such compensation consisted either of "bot," or of "wer" or "wergild." Bot was compensation which the wrongdoer offered to the injured party himself, while wer or wergild was given to the maegth of the slain person.<sup>9</sup> Acceptance of bot or wer was voluntary and, if the injured parties or maegth refused to accept the compensation, they could choose instead to pursue the blood-feud.<sup>10</sup> Over a period of several hundred years, however, this choice gradually disappeared. A person who defaulted in his payment of bot or wer was outside the law, and could be pursued and slain as if he were a wild beast.<sup>11</sup> Bot and wer were precursors of restitution and civil liability.

When payment of bot or wer was inadequate to atone for the wrong which had been done, the wrongdoer could be required to pay "wite" to one in authority as recompense for breaching the "king's peace."<sup>12</sup> Breaching the king's peace was viewed as a personal act of disobedience against the king. It was a grave offense, and made the wrongdoer the enemy of the king.<sup>13</sup> The modern penal system has its origins in the payment of wite. Although there were clear distinctions during this early period of pre-Norman Anglo-Saxon law between the deeds for which bot or wer was demanded and those for which wite was appropriate, the law did not distinguish between crime and tort or between felony, treason and misdemeanor.<sup>14</sup>

The search for political unity and stability which early Anglo-Saxon kings pursued with such vigor was severely disrupted by Norse and Danish invasions in the ninth and tenth centuries. By the end of the ninth

<sup>7</sup> Holdsworth has discussed the resistance of the replacement of the blood-feud with a court system:

Physical force is the natural method of redressing wrongs, and, when men are grouped in small families or communities, this leads naturally to the blood feud. A step forward is made when recourse to a court appears as an alternative to physical force. But recourse to a court is an innovation disliked and with difficulty followed—regarded, in fact, much as some of us regard the submission of international disputes to arbitration. The court has little coercive authority. Primitive man is like the civilized state. He does not see that the court has any right to exercise authority unless he has agreed to submit to its decisions.

<sup>2</sup> W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 43 (1976) (footnotes omitted).

<sup>8</sup> *Id.* at 44.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 46.

<sup>12</sup> *Id.* at 47.

<sup>13</sup> F. POLLOCK & F. MAITLAND, 1 THE HISTORY OF ENGLISH LAW 22 (1895).

<sup>14</sup> 2 W.S. HOLDSWORTH, *supra* note 7, at 43.

century, the Norse had succeeded in colonizing Iceland, parts of Ireland and Scotland, the Orkneys, Shetlands, Hebrides and Normandy.<sup>15</sup> East Anglia was invaded between 835 and 865 by invaders who threatened the peace of all parts of the island.<sup>16</sup> By 1016, England, Norway and Denmark were ruled by the Danish King Cnut.<sup>17</sup>

Danish occupation of Britain strongly and permanently affected the development of the English sociopolitical and legal systems. The Danes instituted a form of grand jury; English peasantry became less subject to their lords; clubs or guilds flourished; and the borough, rather than manors or hamlets, became predominant centers of social and political life.<sup>18</sup> The strong leadership of King Cnut facilitated the more extensive innovations of William I and his successors, and served as the transition between pre- and post-Norman Anglo-Saxon England.

As the secular political system flourished in England after the fifth century, so too did the Church and its many practices. Britons had first been exposed to Christianity by the occupying Roman forces, but that exposure had not been extensive.<sup>19</sup> In 597, however, St. Augustine journeyed to England to formally establish contact between England and the Church in Rome.<sup>20</sup> In 664, Theodore of Tarsus,<sup>21</sup> the author of the first and possibly the most influential English Penitential, began substantial organization and administration of the Church in England.

The sacrament of penance was an essential practice of the early Church, and served a variety of functions. Penance could be medicinal or punitive. Medicinal penance helped the sinner recover from his wrongdoing, while punitive penance punished him for his actions. Punitive penance was emphasized more than medicinal penance in pre-Norman Anglo-Saxon England.<sup>22</sup>

<sup>15</sup> T.F.T. PLUCKNETT, *supra* note 6, at 9-10. A review of English history indicates that the first Danish raids began to fall on parts of England in 835. F.M. STENTON, *ANGLO-SAXON ENGLAND* 243 (3d ed. 1971).

<sup>16</sup> *Id.* at 243, 246-47.

<sup>17</sup> T.F.T. PLUCKNETT, *supra* note 6, at 10.

<sup>18</sup> *Id.*

<sup>19</sup> One author has argued that:

It is true that the later years of the Roman occupation had seen the first introduction of Christianity into the island, and that an important and vigorous church had been organised, but the English invaders crushed the British Christians and maintained their own ancient mythology. England therefore had to be converted anew . . . .

*Id.* at 8.

<sup>20</sup> *Id.* It is further noted that St. Augustine arrived at the court of Ethelbert, the Saxon king of Kent, and laid the foundations for the cathedral which was built at Canterbury. Fossier, *The Restoration of Stable Empires*, in *LAROUSSE ENCYCLOPEDIA OF ANCIENT AND MEDIEVAL HISTORY* 259 (1963).

<sup>21</sup> 2 W.S. HOLDSWORTH, *supra* note 7, at 21.

<sup>22</sup> T.P. OAKLEY, *ENGLISH PENITENTIAL DISCIPLINE AND ANGLO-SAXON LAW IN THEIR JOINT IN-*

Penance was divided into two forms, public and private. Public penance predated private penance for the laity, but postdated private penance for the clergy. Public penance was required for sins of a particularly heinous nature, many of which were also punishable by law. These included homicide, rape, perjury, robbery, arson, magic, incest, soothsaying and marriage within the prohibited degree.<sup>23</sup> Public penance was used most extensively during the ninth and tenth centuries, a period in which the government was vigorously attempting to teach people to regard a crime as an action committed against an entire community.<sup>24</sup> After the public penance was completed, the penitent was formally welcomed back into the community.

In private penance, the penitent performed the penance alone. As with public penance, the duration of private penance depended upon a variety of factors, including the type of offense, the motive or degree of culpability, the physical condition of the penitent, and occasionally the penitent's wealth.<sup>25</sup> Afterward, the priests informally welcomed the penitent into, or reconciled him with, the community.<sup>26</sup>

In both public and private penitential rites, the penance which was imposed could be performed by someone other than the actual penitent — the "penitential-surrogate." Penance also could be commuted, redeemed by money, substituted or delegated.<sup>27</sup> In money redemptions, the penitent satisfied the requirements of his penance either by paying money directly to the Church, by giving alms to the poor, or by some other generosity such as freeing a slave.<sup>28</sup> The different methods of performing the penance enabled the priest, when imposing the penance, to take into account the age, status, health, condition or occupation of the penitent.<sup>29</sup>

The various penitential practices were collected in a series of writings known as the Penitentials. These were manuals written for confessors. They prescribed the appropriate penance for a particular sin.<sup>30</sup> The Penitentials grew out of ecclesiastical literature which consisted primarily of canonical decrees and synodical letters. Certain writings from Wales appear very similar to the Irish Penitentials, and have been considered by some researchers to be "proto-Penitential." Others have asserted that the Welsh writings are not true Penitentials, but simply collections of pen-

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FLUENCE 43 (1923).

<sup>23</sup> *Id.* at 45.

<sup>24</sup> *Id.* at 45 n.1.

<sup>25</sup> *Id.* at 50 n.2.

<sup>26</sup> *Id.* at 65.

<sup>27</sup> *Id.* at 52.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> L. Bieler, *Penitentials*, in 11 *NEW CATHOLIC ENCYCLOPEDIA* 86 (1967).

ance-related decisions. These decisions differed from true Penitentials in that they were not guides upon which the priest was encouraged to rely when hearing confessions.<sup>31</sup>

The first Penitentials whose identity as such is undisputed were written in Ireland during the sixth century by abbots and bishops. These Penitentials were clearly intended to be used as guides.<sup>32</sup> Because the confessor was admonished to use them with discretion, the list of sins, along with their designated penances, was broad. This allowed the priest considerable flexibility in construing and applying them.<sup>33</sup>

Three major Irish Penitentials were written in the sixth and seventh centuries. They reflected a growing concern for the penitential needs of the laity.<sup>34</sup> They were complex and well-developed, and were taken by Irish missionary monks to England in the sixth century. The first English Penitential was written by Theodore of Tarsus in the eighth century.<sup>35</sup> This Penitential primarily recorded his comments concerning specific penances.<sup>36</sup> Unlike the Irish Penitentials, which contained lists of sins and penances, Theodore's Penitential included administrative information for the confessors. Theodore, or the person or persons writing for him, recognized the tremendous potential of the Penitential for summarizing, enforcing and perpetuating general standards of discipline, and for standardizing the ecclesiastical organization in each independent diocese.<sup>37</sup> It became a rulebook for the clergy of the eighth century.<sup>38</sup> Two

<sup>31</sup> A.J. FRANTZEN, *THE LITERATURE OF PENANCE IN ANGLO-SAXON ENGLAND* 19 (1983).

<sup>32</sup> *Id.* at 7.

<sup>33</sup> A Penitential attributed to Bede states, for example:

Of manslaughter. 1. He who slays a monk or a cleric shall relinquish his weapons and serve God or shall do penance for seven years. 2. He who slays a layman with malice aforethought or for the possession of his inheritance shall do penance for four years. 3. He who slays to avenge a brother shall do penance for one year and in the two following years shall keep the forty-day fasts and other appointed fast days. 4. He who slays through anger and a sudden quarrel shall do penance for three years. 5. He who slays accidentally shall do penance for one year. 6. He who slays in public warfare shall do penance for forty days.

*Id.* (footnote omitted).

<sup>34</sup> *Id.* at 36.

<sup>35</sup> *Id.* at 64. Theodore of Tarsus was sent to England in 669 by Pope Vitalian to centralize the monastic communities of Mercia and Northumbria and to organize the disparate groups of wandering Irish missionary monks. *Id.* at 62.

<sup>36</sup> *Id.* at 62-64.

<sup>37</sup> *Id.* at 65.

<sup>38</sup> It has been stated that:

This [the Penitentials of Theodore] was a significant development: created to serve a wandering, monastic, decentralized church, the handbook soon became a rulebook specifying that penance was properly the duty of the clergy and only a "liberty" or privilege of the monastery. This is a statement with far-reaching implications . . . .  
 . . . Theodore's text unquestionably enlarged the role of penitential practice in

other English Penitentials, attributed to Bede and to Egbert, Bede's student, expanded this English Penitential tradition.

During the ninth century, there were few additional innovations made in the Irish and English Penitentials. Instead, Penitential development shifted to the Continent. Unlike their Irish and English counterparts, continental clergy approached the Penitentials cautiously. Although Theodulf of Orleans proposed a Penitential in 800, he never fully accepted the Penitential tradition. He believed it was "un-Roman," and not sufficiently canonical.<sup>39</sup>

Penitential development revived in England in the tenth century. At that time, the clergy generally believed that the Penitentials in use were handed down from Theodore, Bede and Egbert. In fact, those Penitentials had been derived from the ninth century Continental Penitentials,<sup>40</sup> which in turn had been influenced by the earlier English Penitentials. Aelfric, Abbot of Eynsham, and Wulfstan, Bishop of Worcester and Archbishop of York, with others, synthesized continental source materials and translated these syntheses into the vernacular.<sup>41</sup> The revived Penitential development lost force during the eleventh or twelfth centuries. The reasons for this change are not entirely clear, but may have been partially due to the incorporation of Penitential practices into the secular laws.

### III. THE PENITENTIALS AND THE SECULAR LAW

Following St. Augustine's establishment of the Catholic Church in Britain in the sixth century, and prior to the Norman Conquest in 1066, the Church and the State gradually became mutually influential and interdependent. This mutual influence and interdependence was reflected by both the Church and the State. It was reflected by the Church in penances which required secular compensation, and in penances which punished secular crimes. These and other penances were collected in the Penitentials. The interdependence was reflected by the State in secular laws which differentiated punishments on the basis of the status or condition of the wrongdoer and on his intention in committing the wrong, and in laws which required the performance of penance.

Both secular and ecclesiastical wrongdoing embodied sophisticated notions of law and of liability. Prior to 1066, the secular concept of law was derived from general custom and from enactment. Laws embodied social norms to which individuals were expected to conform, and the be-

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church government and invited closer interaction between the church and secular authority.

*Id.* at 65, 67 (footnote omitted).

<sup>39</sup> *Id.* at 103.

<sup>40</sup> *Id.* at 122.

<sup>41</sup> *Id.* at 123.

liability that persons intrinsically possessed certain duties and rights.<sup>42</sup> One who abrogated the secular law was considered either absolutely liable for his abrogation or liable on the basis of his fault. Absolute liability was liability without consideration for fault or negligence.<sup>43</sup> It imposed punishment on the wrongdoer regardless of his intention in committing the wrong. Liability based on fault was any "intentional" deviation from a reasonable standard of behavior.<sup>44</sup> Intention was the state of mind with which the actor acted. It involved the actor's awareness of the probability that a certain event would occur as a result of his act, whether or not he comprehended the entire consequences of his act, or desired its actual results.<sup>45</sup> Unlike absolute liability, liability based on fault involved an evaluation of the actor's blameworthiness or culpability.

During the pre-Norman period, Church law was based on the Bible, on natural law, on councils and on local church authorities. One who freely abrogated Church law fell into a state of sin. Sin consisted primarily of two elements. The positive element involved the sinner's conversion to some created good. The negative element involved the sinner turning away from God.<sup>46</sup> Guilt was the principal effect of sin. It was "the state or condition of being at fault (*reatus culpae*) . . . ."<sup>47</sup> By being at fault, the sinner was deprived of supernatural life. This deprivation was "the absence of the splendor of which is a stain (*macula peccati*) on the soul . . . ."<sup>48</sup> It also was "the state or condition of being liable to the penalty due in punishment for the fault (*reatus poenae*)."<sup>49</sup>

Teachings on fault and liability were expressed in the Penitentials. The Penitentials were influenced by, and in turn supplemented, the secular laws.<sup>50</sup> They did this in a variety of ways, including imposing penance on persons who had violated secular laws. For example, the Penitentials required penance of those who committed homicide in vengeance on one who had refused to give them justice.<sup>51</sup> They also required restitution for

<sup>42</sup> G.C. LEE, *HISTORICAL JURISPRUDENCE* 2-3 (1981).

<sup>43</sup> BLACK'S LAW DICTIONARY 9 (5th ed. 1979).

<sup>44</sup> *Id.* at 548.

<sup>45</sup> *Id.* at 727.

<sup>46</sup> I. McGuiness, *The Theology of Sin*, in 13 *NEW CATHOLIC ENCYCLOPEDIA* 241, 242 (1967).

<sup>47</sup> *Id.* at 245.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> T.P. OAKLEY, *supra* note 22, at 167.

<sup>51</sup> *Id.* at 168. Oakley has noted that the Penitential system: in penancing homicide in vengeance at all, it was in advance of the secular laws, which left unpunished vengeance taken on one who refused to give justice. . . . [T]here are also interesting penances of excommunication against those who refused to make peace and accept justice from those who had wronged them. Finally, and most important, failure to pay secular compositions [monetary compensations] was, in effect, penalised by the additional penance prescribed when compensation was not

property which was stolen, and for property which was fraudulently obtained and withheld.<sup>52</sup> Perjury was severely punished, as was bearing false witness. The Anglo-Saxon Penitentials and the Continental Penitentials set forth degrees of perjury based on the consecrated objects upon which the oath was sworn or on the motive which prompted the person to commit the perjury, rather than according to the motive for taking the oath.<sup>53</sup>

The Penitentials also advocated ecclesiastical and secular punishment of particularly horrible sins, such as murder, incest, adultery and grand larceny. They sometimes included the payment of wergild as part of the penance. Premeditated murder was punished by the performance of a lengthy penance, varying from seven to fifteen years, and by payment of wergild to the family of the victim. Incest could include penance lasting from twelve to fifteen years, and payment of a heavy secular penalty.<sup>54</sup>

The performance of public penance was particularly effective in supporting the secular law:

To the natural notoriety gained by conviction in a secular court there would thus be added public humiliation before the congregation. Thus the performance of public penance might serve as an important part of a bigger process, of which one purpose was to subject the criminal effectively to adverse public opinion; but it would also serve, by public examples, to educate the community to feel the heinousness of crimes. In both of these results public penance might, therefore, supply a valuable agency through which the penitential discipline might supplement the work of the secular.<sup>55</sup>

The Penitentials sometimes encouraged the extension of the secular law to persons or wrongs not already protected. For instance, the Penitentials punished harshly certain wrongdoing that was punished only lightly by secular law. The Church was often more solicitous of the rights of women and of children than was the secular society. Penances for rape, fornication and abortion were effective in raising the low esteem in which children and women were generally held.<sup>56</sup> The Penitentials also punished

paid.

*Id.* at 168-69.

<sup>52</sup> *Id.* at 172.

<sup>53</sup> *Id.* at 187.

<sup>54</sup> *Id.* at 196.

<sup>55</sup> *Id.* at 44-45. Penances could take a variety of forms and could last up to fifteen years or more, depending on the gravity of the sin and the inclination of the priest deciding the penance. *Id.* Once satisfactorily performed, the penance terminated and the former sinner was welcomed back into, or reconciled with, the community. In "reconciliation," the bishop consulted with his deacons and priests to determine which of the penitents deserved to be readmitted to the community. *Id.* at 62. The determination made, the penitents formally were reconciled or readmitted before Mass on Holy Thursday or on Good Friday. *Id.*

<sup>56</sup> *Id.* at 196.

such sins as brawling and mistreatment of slaves and serfs. Depending on the murderer's motive, they punished differently various degrees of homicide.<sup>87</sup>

The secular laws incorporated and, in turn, promoted teachings and practices expressed in the Penitentials. This incorporation and promotion was primarily evident in the distinction the laws made between the status or condition of the wrongdoer, and his intention in committing the wrong; and in laws which required the performance of penance.

The majority of the pre-Norman Anglo-Saxon laws were based on absolute liability. However, a few laws explicitly considered the status of the wrongdoer and, depending on that status, applied to him an appropriate standard of conduct. For example, certain laws of Ine (690 A.D.) distinguished between the compensation a royal servant owed for wrongdoing, and the compensation owed by a royal servant who owned land.<sup>88</sup> It is likely this difference was based in part on the understanding that the person who was better able to bear the cost of inflicting injury on another should be made to do so. It also reflected the apparently higher standard of care to which a person of higher rank was held.

A law of Alfred (890 A.D.) explicitly incorporated intention into certain secular laws, and then made that intention the basis of different punishments:

If a man have a spear over his shoulder, and any man stake himself upon it, that he pay the wer without the wite . . . if he be accused of wilfulness in the deed let him clear himself according to the wite; and with that let the wite abate. And let this be, if the point be three fingers higher than the hindmost part of the shaft; if they both be on a level, the point and hindmost part of the shaft, be that without danger.<sup>89</sup>

Another law of Alfred distinguished between punishments imposed upon the owner of a dog for the dog's first, second, and third offenses.<sup>90</sup> These differences suggest that the owner was increasingly at fault for failing to control his dog.

The secular laws often required the wrongdoer to perform penance for transgressions in any of three categories of offenses: ecclesiastical, semi-ecclesiastical and purely secular.<sup>91</sup> Other laws directly supported Church practices. Ecclesiastical offenses included working on holidays, breaking fasts, delaying or neglecting to baptize children, unchastity of clerics, marrying within a prohibited degree, incest, adultery of men, fornication, marrying with a nun, abducting a widow, defiling a nun, break-

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<sup>87</sup> *Id.*

<sup>88</sup> 2 W.S. HOLDSWORTH, *supra* note 7, at 38 n.11.

<sup>89</sup> *Id.* at 51 n.8 (quoting Alfred § 36).

<sup>90</sup> Isaacs, *supra* note 3, at 964.

<sup>91</sup> T.P. OAKLEY, *supra* note 22, at 141.

ing vows by a monk, paganism and magic.<sup>62</sup> Semi-ecclesiastical offenses included breaching a pledge, perjury, violating Church-peace, homicide by clerics, theft, perjury of clerics, insubordination of clerics against the bishop, slaying clerics or monks, secret murder and the general crime of homicide.<sup>63</sup>

The laws of Ethelbert, King of Kent (604 A.D.) directly supported many Church practices. They specified a schedule for compensating Church officials. They also protected the "peace of a meeting" and imposed a fine for disrupting a Church service.<sup>64</sup> The laws of Withred, King of Kent (695 A.D.) protected Church property, punished violations of Sunday observance, provided for a system of exculpation based on the relationships of various parties to the Church and required ecclesiastical penance and a heavy fine of those living in illicit unions.<sup>65</sup> The laws of Ine (690 A.D.) required prompt baptisms and Sunday observances. They respected the sanctuary of the Church for condemned persons,<sup>66</sup> and provided special oath privileges to communicants.<sup>67</sup>

The laws of Alfred, King of Wessex (890 A.D.) also supported Church practices. One law stated that "[o]ne who did not fulfill a pledge was required to entrust his arms to his friends, to be imprisoned for forty days on the king's estate, and there to perform 'what penance the bishop prescribes for him.'"<sup>68</sup> Those who breached surety had to pay for the breach by doing what the confessor required.<sup>69</sup> One who was born deaf and dumb and, therefore, could not confess his sins was required by law to have his wrongs compensated by his father.<sup>70</sup>

Alfred's laws did more than just support Church practices. Some laws required that penance be performed for specified crimes.<sup>71</sup> Penance was required in the case of breach of Church-peace, of a feud, and of perjury.<sup>72</sup> Alfred further decreed that "if any man seek a church for any of those offences which had not been before revealed, and shall there confess himself in God's name, be it half-forgiven."<sup>73</sup>

In the tenth century, Edward the Elder (899-925 A.D.), Alfred's successor, enacted a law which decreed that one who refused to submit to

<sup>62</sup> *Id.* at 141-42.

<sup>63</sup> *Id.* at 142.

<sup>64</sup> A.J. FRANTZEN, *supra* note 31, at 79.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> T.P. OAKLEY, *supra* note 22, at 145.

<sup>68</sup> A.J. FRANTZEN, *supra* note 31, at 125.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> T.P. OAKLEY, *supra* note 22, at 145.

<sup>72</sup> *Id.* at 146.

<sup>73</sup> *Id.* at 141 (citing Alfred 5, § 2) (emphasis omitted).

ecclesiastical penance could be punished by the state.<sup>74</sup> He also required penance for the crime of incest, for an ordained person who fought, stole, perjured himself or fornicated, and for anyone who injured a cleric.<sup>75</sup> Athelstan (925-946 A.D.), another of Alfred's successors, ruled that a bishop had to witness that an oathbreaker had performed the penance assigned to him by his confessor.<sup>76</sup>

The increasing mutual influence and interdependence of the Church and the state was reflected in the laws of Ethelred. These laws (approximately 1008 A.D.) encouraged through secular means compliance with general ecclesiastical patterns of behavior. Every Christian was urged to form the habit of frequent confession and to receive the Eucharist on a regular basis. Around Michaelmas, the laity were required to arrive barefoot before the Church and to confess their sins. The reeve in each village was authorized to witness the laity's almsgiving and any other penance they might undertake.<sup>77</sup> Ethelred also required penance for such ecclesiastical and semi-ecclesiastical offenses as homicide by clerics, and abandoning a cloister.<sup>78</sup>

Some purely secular laws of Ethelred also required the performance of penance. One law suggested that: "he who henceforth, in any way, violates genuine laws of God or man, let him expiate it zealously, according as is proper, as well through ecclesiastical penance, as through secular punishment."<sup>79</sup>

By the early part of the eleventh century the intertwining of the secular and ecclesiastical systems had become extensive and pervasive. As the following law of Ethelred demonstrates, this relationship had given rise to a well-defined legal concept of fault; a concept which was manifested in the weight given to the status of the wrongdoer and to the degree to which his action was intentional, and in the requirement that the wrongdoer perform penance to atone for his secular wrong:

And always the greater a man's position in this present life or the higher the privileges of his rank, the more fully shall he make amends for his sins, and the more dearly shall he pay for all misdeeds; for the strong and the weak are not alike nor can they bear a like burden, any more than the sick can be treated like the sound. And therefore, in forming a judgement, careful discrimination must be made between age and youth, wealth and poverty, health and sickness, and the various ranks of life, both in the amends imposed by ecclesiastical authority, and in the penalties inflicted by the secu-

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<sup>74</sup> A.J. FRANTZEN, *supra* note 31, at 125.

<sup>75</sup> T.P. OAKLEY, *supra* note 22, at 145.

<sup>76</sup> A.J. FRANTZEN, *supra* note 31, at 125.

<sup>77</sup> *Id.* at 146.

<sup>78</sup> T.P. OAKLEY, *supra* note 22, at 146.

<sup>79</sup> *Id.* at 144 (citing VI Ethelred 50) (emphasis omitted).

lar law.

And if it happens that a man commits a misdeed involuntarily or unintentionally, the case is different from that of one who offends of his own free will voluntarily and intentionally; and likewise he who is an involuntary agent in his misdeeds should always be entitled to clemency and better terms, owing to the fact that he acted as an involuntary agent.<sup>80</sup>

King Cnut (1027-1034 A.D.) incorporated this law almost verbatim into his own legal code.<sup>81</sup> Other laws of Cnut punished violations of the Lenten fast, required the Church to hear the confession of a condemned person and substituted mutilation for the death penalty.<sup>82</sup>

#### IV. CONCLUSION

This article suggests that following the withdrawal of the Romans from Britain, and prior to the Norman Conquest in 1066, the Church and the State gradually became intertwined and interdependent. This interdependence was reflected in penances which required the payment of fines and other secular punishments and in penances which heavily penalized crimes. It was also reflected in secular laws which distinguished between intentional and unintentional wrongdoing and which required the performance of penance.

As the mutual influence between the ecclesiastical and secular legal systems grew, the degree and frequency with which secular laws incorporated notions of fault also increased. Laws enacted in the early part of the eleventh century demonstrate that contemporary understandings of legal liability were complex and sophisticated. These understandings reflected a commensurate level of sociopolitical sophistication. Prior to the Norman Conquest, law and society were unquestionably "un-primitive."

The true significance of this evolution of law was summarized with clarity by O.W. Holmes. He stated that:

However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is.<sup>83</sup>

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<sup>80</sup> T.F.T. PLUCKNETT, *supra* note 6, at 436 (citing VI Ethelred 52, I (tr. A.J. Robertson)).

<sup>81</sup> *Id.* at 436.

<sup>82</sup> A.J. FRANTZEN, *supra* note 31, at 147.

<sup>83</sup> O.W. HOLMES, *supra* note 2, at 37.