

## CLASS OUTLINE — LECTURE 3

### **NON-ROMAN LAW IN THE ROMAN EMPIRE**

1. Citizen and non-citizen, mixtures of Roman and non-Roman law.
2. The example of Greco-Roman Egypt
3. The mercantile law of the Eastern Mediterranean, e.g., the giving of *arrha* or earnest money.
4. Celtic elements in the West? The Ligurian inheritance law?
5. Bottom line: the most important non-Roman and non-canonic elements in Western European law that are not the product medieval and modern developments are probably, at least in some sense, Germanic in origin.

# The Germanic Peoples

## The Germanic Invasions

[http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/01\\_Shep045\\_11\\_01\\_24.jpg](http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/01_Shep045_11_01_24.jpg)

The map might be entitled all-hell-breaks-loose, and there are even more inelegant ways to describe it. As we will see, the map probably exaggerates the amount of disruption, but it does show that between the years 150 and 1000, a great many tribes, mostly, but not exclusively, Germanic, made their way into what was, or had formerly been, the Roman empire in the West, and this development had far-reaching consequences for Western European history and particularly for its law.

### Germanic Language Groups:

<i>West</i>	<i>North</i>	<i>East</i>
OHG	ONorse	Gothic
OSax		
ONeth		
OFris		
OEng		

### Germanic Kingdoms in 600:

[http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/02\\_Shep052b\\_11\\_01\\_24\\_ERomanEmp\\_600.jpg](http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/02_Shep052b_11_01_24_ERomanEmp_600.jpg)

<i>West</i>	<i>Center</i>	<i>East</i>
Anglo-Saxon	Saxons	Saxons
Franks	Franks	Thuringians
Visigoths	Lombards	Bavarians

**Germanic Kingdoms in 486:**

[http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/03\\_Shep050\\_11\\_01\\_24\(486\).jpg](http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/03_Shep050_11_01_24(486).jpg)

<i>West</i>	<i>Center</i>	<i>East</i>
Anglo-Saxon	Saxons	Saxons
Franks	Franks	Thuringians
Visigoths	Alemanni	? ? ?
	Burgundians	Ostrogoths
	Odoacer	

**Position of the “Germanic tribes” c. 200 A.D.**

<i>North Sea</i>	<i>Rhine-Weser</i>	<i>Elbe</i>	<i>Oder-Vistula</i>	<i>Scand.</i>
Angles	Franks	Alemanni	Goths	Norse
Saxons		Bavarians	Burgundians	
‘Jutes’		Lombards	Vandals	
Frisians				

## What Were These People Like?

[http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/04\\_VikingHelmets\\_1\\_01\\_24.jpg](http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/04_VikingHelmets_1_01_24.jpg)

Designed to inspire awe, this bronze helmet unearthed at Viksoe in Denmark boasts curved horns and two staring eyes [the Vikings of history did not wear horned helmets]. The four-inch-high kneeling figure in Danish costume (right) wears a similar helmet, suggesting that such a headpiece was an important adjunct to the allure of a Bronze age warrior. [Neither has been dated precisely, but both come from the period before our era and may be as early as 500 BC.] [National Museum, Copenhagen]. Thomas Froncek, *The Northmen, The Emergence of Man* (New York: Time-Life Books, 1974) 111 (Brookline Library 930 F92n). This is clearly from the time before the Germanic peoples had any contact with the Romans.

[http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/05\\_SuttonHooBeltBuckle\\_11\\_01\\_24.jpg](http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/05_SuttonHooBeltBuckle_11_01_24.jpg)

Belt buckle from a ship burial at Sutton Hoo, Suffolk. Seventh century. British Museum, London. Magnus Backes & Regine Dölling, *Art of the Dark Ages*, Francisca Garvie trans. (New York: Harry N. Abrams, 1969c) 45 (Brookline Library 709.4 B12a). The artwork here is Germanic, but we can't be sure that there is not some Roman influence. Even if the Germanic peoples came into an area which the Romans had left, there was plenty of stuff around that showed what they had done.

[http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/08\\_FuneralStele\\_11\\_01\\_24.jpg](http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/08_FuneralStele_11_01_24.jpg)

[Armed and mounted horseman; note the serpent decoration at the bottom.] Funerary stele of horseman. Seventh century. Sandstone, height 30 3/4". From Hornhausen (west of Magdeburg, probably Saxon at this time or Thuringian). Landesmuseum für Vorgeschichte. Halle. Backes, p. 34 (suggests Roman influence). There seems to be considerable disagreement about date and function. It is now being argued that it comes from a church screen. *Origins of Medieval Architecture 600-900*. What is clear is that comes from an area that the Romans never reached.

[http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/09a\\_AgilulfHelmetAl11.jpg](http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/09a_AgilulfHelmetAl11.jpg)

[http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/09b\\_AgilulfHelmetDetail.jpg](http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/09b_AgilulfHelmetDetail.jpg)

Detail of Helmut Plaque of Agilulf, King of the Lombards [first real king, unites the dukes in opposition to the Franks, 591-616], gilt copper, late 6th c. Museo Nazionale del Bargello, Florence. [A king guarded by warriors, Agilulf, ruler of the Lombards, is shown holding court in this hammered relief of gilded copper.] Gerald Simons, *Barbarian Europe*, Great Ages of Man: A history of the world's cultures (New York: Time-Life Books, 1968) 10 (Brookline Library 940.1 S58b). (Also in H&C p. 77, with winged victories on the sides and cities bringing tribute.)

[http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/10\\_OstroGothBirdBrooch\\_11\\_01\\_24.jpg](http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/10_OstroGothBirdBrooch_11_01_24.jpg)

Cesena Bird Brooch, Ostrogothic, gold and precious stones, cloisonné technique with almandines, early 6th c., Germanisches National Museum, Nuremberg, Germany. [The pin combines the stylized bird motif popular among Germanic peoples with a Christian cross; the filigreed metal work, set with garnets, was undoubtedly borrowed from Byzantine art work.] Simons, p. 54.

[http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/11\\_TheodoricTomb\\_11\\_01\\_24.jpg](http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/11_TheodoricTomb_11_01_24.jpg)

Mausoleum of Theodoric the Great. Before 526. Ravenna. Backes, p. 13. Roman elements put together to make something that is not Roman. The inside much more Roman.

[http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/12\\_RecceswinthCrown\\_11\\_01\\_24.jpg](http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/Slides/12_RecceswinthCrown_11_01_24.jpg)

Votive crown of King Recceswinth [653 X 672], Visigothic, gold filigree with pearls and sapphires, 7th c., National Archaeological Museum, Madrid. [The opulent Visigothic crown reveals a barbarian admiration of massive precious stones as well as some refinements of Eastern design; the gold filigree, encrusted with sapphires and pearls, and the dangling pendants of rock crystal are of Byzantine origin. The hanging letters spell the name of King Recceswinth, a ruler in Spain during the Seventh Century. He is believed to have given the crown to the Church that converted him.] Simons, p. 55.

## The ‘Germanic’ Laws

### The Chief Monuments of Roman Law in the Period of the ‘Germanic Kingdoms’:

1. The *lex romana visigothorum (breviarium Alarici)* (Alaric II, 506).
2. The *lex romana burgundionum* (Gundobad before 506).
3. The so-called *edictum Theodorici* (?Theodoric the Ostrogoth, 493–507 [probable date of the laws]).

### Germanic ‘Codifications’ in Areas of Strong Roman-Law influence:

1. The Visigoths (*lex Visigotorum, liber judiciorum, fuero juzgo* (first rec. Euric (466 X 484), others: Leowigild (568 X 586), Rekeswind (653 X 672), Erwig (680 X 687).
2. The Burgundians (*lex Burgundionum* (1st rec. [first recension] before 516).
3. The Lombards (Rothair (643), Liutprand (713 X 735), with various additions).

### Germanic ‘Codifications’ in Areas of Weak Roman-Law Influence:

1. The Salic Law (*pactus legis salicae* (1st rec. c. 500).
2. The Anglo-Saxon Laws (Aethelberht (c. 600), Hlothere & Eadric (c. 680), Wihtried (c. 695), Ine (688 X 694), Alfred (c. 900), etc.)The Anglo-Saxon

Laws (Aethelberht (c. 600), Hlothere & Eadric (c. 680), Wihtred (c. 695), Ine (688 X 694), Alfred (c. 900), etc.).

3. The Alamanian Law (*Pactus* (7th c.); *Leges* (712 X 725).
4. The Bavarian Law (first recension [1st rec.] ? 743 X 744).

#### **Carolingian ‘Codifications’:**

1. The Ripuarian Law (1st rec. 9th c., contents date back to 7th c.).
2. The Chamavian Franks (early 9th c.).
3. The Frisian Law (rec. prob. early 9th c. of very diverse material, some obviously pagan).
4. The Saxon Law (1st rec. early 9th c.).
5. The Thuringian Law (1st rec. early 9th c.)

#### **Later Vernacular Laws**

At various times in the Middle Ages various rulers or groups in what is now Norway, Sweden, Denmark and Iceland issued material (always in the vernacular) that is in the style and form of the early Germanic laws. Perhaps the most interesting is the one called the *Grágás* (Grey Goose), which comes from Iceland in the 12th century. Some scholars believe that some of the material in these laws is very old indeed.

## ÆTHELBERT'S 'CODE'

Æthelbert was king of Kent, today a small county in the very southeast of England. He probably died in 616. The boundaries of his kingdom were probably roughly those of the [modern county](#).



### 1. The circumstances

From Bede, *Ecclesiastical History of the English Nation* (completed around 732) [From Dorothy Whitelock trans. in *English Historical Documents*, 2d ed., vol. 1, pp. 663–64]:

‘In the year of our Lord's incarnation 616, which is the 21st year after Augustine with his companions was sent [by Pope Gregory the Great] to preach to the nation of the English, Ethelbert, king of the people of Kent, after his temporal kingdom which he held most gloriously for 56 years, entered into the eternal joys of the heavenly kingdom. He was indeed the third of the kings in the nation of the English to hold dominion over all their southern provinces, which are divided from the northern by the river Humber and boundaries adjoining it; but the first of them all to ascend to the heavenly kingdom.

‘King Ethelbert died on 24 February . . . and was buried in the chapel of St Martin within the church of the blessed Apostles Peter and Paul, where also Queen Berhta lies buried. Among the other benefits which in his care for his people he conferred on them, he also established for them with the advice of his councillors [*cum consilio sapientium*] judicial decrees [*decreta iudicialia*] after the example of the Romans [*iuxta exempla*

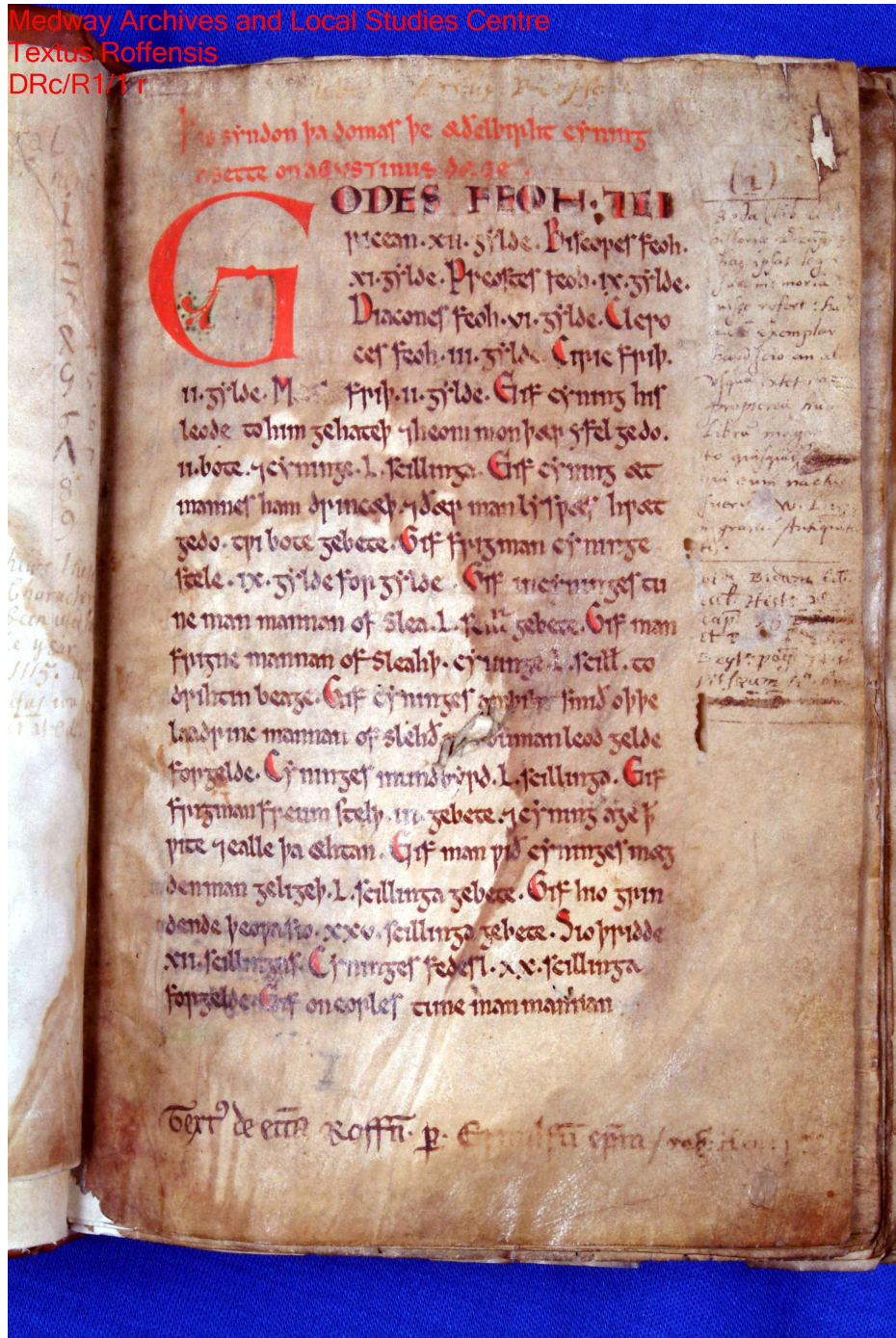
*Romanorum*], which, written in the English language, are preserved to this day and observed by them; in which he first laid down how he who would steal any of the property of the Church, of the bishop, or of other orders, ought to make amends for it, desiring to give protection to those whom, along with their teaching, he had received.’

*Is Bede’s account to be believed?*

1. Did Æthelbert become a Christian?
2. Does the text that Bede had correspond to ours? (We may be missing a prologue. The other two Kentish laws that survive from later in the 7th century both have prologues: Hlothere and Eadric (673 X 686): “Hlothere and Eadric, kings of Kent, extended the laws which their predecessors had made by the decrees which are stated below.” Wihtred (probably 695): “During the sovereignty of Wihtred, the most gracious king of Kent, in the fifth year of his reign, the ninth Indiction, the sixth day of Rugern, in a place called Barham, there was assembled a deliberative council of the notables. There were present there Berhtwald, the chief bishop of Britain, and the above-mentioned king; the bishop of Rohester was called Gefmund; and every order of the Church of the province expressed itself in unanimity with the loyal laity.”
3. Did St. Augustine of Canterbury bring literacy to Kent?
4. The possible role of Liudhard, Berhta’s bishop.



## 2. The Manuscript



The laws of Æthelberht of Kent, the first page of the only manuscript copy, the *Textus Roffensis*, from the collection of the Dean and Chapter of Rochester Cathedral, now housed again in Rochester Cathedral. The photograph was downloaded from the website of the Medway Archives and Local Studies Centre in Strood (near Rochester), Kent, when the manuscript was stored there.

### 3. Notes on the Words in Bede

1. *decreta iudicialia*. The phrase does not have a technical legal meaning, but *decretum* (the singular of *decreta*) does: a decision of the emperor in a specific legal case. *Iudicialia* is derived from *iudex*, which means ‘judge’. The Anglo-Saxon for *decreta iudicialia* is *domas*, which means ‘judgments’. Cf. the Spanish for the Visigothic Code: *fuero juzgo*, literally ‘the forum of the judge’.
2. The A-S word *ae* or *aew* also means law in a more general sense and is cognate with modGer *Ehe*, ‘marriage’. ‘Fundamental agreement’ might be a good translation. The earliest version of the Salic law of the Franks is called in Latin *pactum legis Salicae*, the agreement of the Salic law
3. *iuxta exempla Romanorum*. Literally, “according to the examples of the Romans.” There is no Roman law in Æthelbert’s code, not even a hint. Does this simply mean a written law? or a secular law? or like what the Germanic kings were doing in areas that were thought of as still being parts of the Roman empire?

#### 4. **Æthelbert's Code cc. 1–7, 10 with a Literal Translation**

1. **Godes feoh 7 ciricean XII gylde.** God's property and church's 12 by payment.
2. **Bisces feoh XI gylde.** Bishop's property 11 by payment.
3. **Preostes feoh IX gylde.** Priest's property 9 by payment.
4. **Diacones feoh VI gylde.** Deacon's property 6 by payment.
5. **Cleroces feoh III gylde.** Cleric's property 3 by payment.
6. **Ciricfriþ II gylde.** Church peace 2 by payment.
7. **M[æfthl]friþ II gylde.** Assembly peace 2 by payment.
10. **Gif frigman cyninge stele, IX gylde forgyld.** If a freeman steals from the king, let him pay forth 9 by payment.
15. **Gif frigman freum stelþ, III gebete, 7 cyning age þæt wite 7 ealle þa æhtan.** If a freeman steals from a freeman, let him pay 3[-fold], and the king obtains that fine or all the possessions.

## **5. Method**

1. Elaboration, most notably in cc. 32–71
2. Analogy, implied in many of the provisions to the extent that we doubt that they are all real cases. It seems to be reasonably explicit in cc. 6–7.

## **6. Outline of Æthelbert's Code**

1. The Church cc. 1–7
2. The king cc. 8–17
3. Eorls cc. 18–19
4. Ceorls cc. 20–71
5. c. 20–31 *mundbyrd*, wergeld, property offenses
6. c. 32–71 personal injury, arranged from head to toe
7. Women cc. 72–77
8. Servants, slaves cc. 78–83

## 7. Basic Concepts

1. *wergeld*. *Wer* is cognate with Latin *vir*, a male person; *geld* is our word 'gold' but it's broader: literally 'man-payment' or 'man-price'.
  2. *mundbyrd*. The *mund* part means 'protection'; it is cognate with Latin *manus*, 'hand'. The *byrd* part is harder; but it is probably related to our word 'burden'. *Mundbyrd* seems to mean something like 'area of protection'.
  3. *friþ* pronounced frith, cognate with Modern German *Friede*, 'peace'.
  4. *bot* ('compensation') occurs very frequently particularly in the verbal form *gebete* ('let him make compensation');
  5. *wite* ('fine', 'penalty') occurs only once in c.15, but there are a number of offenses to the king's *mundbyrd*.
  6. This is clearly not criminal law, but it's not quite civil either.
- c. 8: **Gif** cyning his leode to him gehateþ 7 heom mon þær yfel gedo, II bóte, 7 cyninge L scillinga. If the king summons his people to him and a person does any harm to them there, 2[-fold] restitution and 50 shillings to the king.
7. One may doubt if these are absolute liability offenses.
    22. **Gif** man in mannes tún ærest geirneþ, VI scillingum gebete. If a person breaks [as the] first into someone's dwelling, let him pay with 6 shillings.
    - 22.1. **Se** þe æfter irneþ, III scillingas. He who breaks in next, 3 shillings.
    - 22.2. **Siððan** gehwylc scilling. Afterwards, each a shilling.

## 8. Marriage

74. **Mund** þare betstan widuwan eorlcundre, L scillinga gebete.

74.1. **Ðare** oþre, XX scll.

74.2. **Ðare** þridan, XII scll.

74.3. **Þare** feorðan, VI scll.

74. [For violation of] protection of the foremost widow of noble rank, let him pay 50 shillings.

74.1. [For a widow] of the second [rank], 20 shillings.

74.2. [For a widow] of the third [rank], 12 shillings.

74.3. [For a widow] of the fourth [rank], 6 shillings.

75. **Gif** man widuwan unagne genimeþ, II gelde seo mund sy.

75. If a person takes a widow who does not belong to him, the [payment for violation of] protection shall be 2[-fold] as compensation.

76. **Gif** man mægþ gebigeð ceapi, geceapod sy gif hit unfacne is.

76. If a person buys a maiden with a [bride-]price, let the bargain be [valid], if there is no deception.

76.1. **Gif** hit þonne facne is, ef[t] þær æt ham gebrenge, 7 him man his scæt agefe.

76.1 If there is deception, afterwards let him bring [her to her] home, and let him be given his money.

76.2. **Gif** hio cwic bearn gebyreþ, healfne scæt age gif ceorl ær swylteþ.

76.2 If she bears a living child, let her obtain half the goods [belonging to the household] if the husband dies first.

76.3. **Gif** mid bearnum bugan wille, healfne scæt age.

76.3 If she should wish to dwell with the children, let her obtain half the goods [of the household].<sup>1</sup>

[Another translation: If she wishes to depart with her children, she shall have half the goods.]

76.4. **Gif** ceorl agan wile, swa an bearn.

[Another translation: If the husband wishes to keep [the children], she shall have a share of the goods equal to a child's.]

76.4 If she should wish to take a man [i.e., another husband], provision as for one child [i.e., the inheritance is split equally between the mother and each of the children].

76.5. **Gif** hio bearn ne gebyreþ, fæderingmagas fioh agan 7 morgengyfe.

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<sup>1</sup> For translation of this and the following clause, see Carole A. Hough, "The Early Kentish 'divorce laws': a Reconsideration of Æthelberht, chs. 79 and 80," *Anglo-Saxon England* 23 (1994): 19–34.

76.5 If she does not bear a child, her paternal kin should obtain [her] property and the morning-gift.

77. **Gif** man mægþman nede genimeþ, ðam agende L scillinga, 7 eft æt þam agende sinne willan ætgebicge.

77.If a person takes a maiden by force: to the owner [of her protection] 50 shillings, and afterwards let him buy from the owner his consent [to marry her].

77.1. **Gif** hio oþrum mæn in sceat bewyddod sy, XX scillinga gebete.

77.1. If she should be betrothed to another man by goods [i.e., the bride-price has been paid], let him pay 20 shillings [to that man as well].

77.2. **Gif** gængang geweorðeþ, XXXV scill, 7 cyninge XV scillingas.

77.2. If return [of the stolen maiden] occurs, 35 shillings and 15 shillings to the king.

## 9. The sorts and conditions of men: A comparison of Æthelbert's laws and Ine's (West Saxon, roughly 695)

A TABLE OF WERGELDS

<i>Æthelberht</i>			<i>Ine</i>
	<i>mundbyrd</i>	<i>wergeld</i>	<i>wergeld</i>
king	50	?	
eorl	12	300 <sup>a</sup> =6000 <sup>b</sup>	1200=6000 <sup>c</sup>
			600=3000
ceorl	6	100=2000	200=1000
læt		80/60/40	
esne=læt?			
theow			

<sup>a</sup> In Hlothere & Eadric 1.

<sup>b</sup> @ 20 pence to the shilling.

<sup>c</sup> @ 5 pence to the shilling.

Price lists from London in the first half of the 10th century value an ox at 30 pennies, a cow at 20, a pig at 10, a sheep at 5. Probably no ordinary *ceorl* in Athelbert's Kent could command 400 sheep, and precious few kingroups of *ceorlas* could.



## 10. An Insular Comparison

*From an Irish Penitential of c.800 (McNeil and Gamer p. 165):*

Ch.5 *Of anger*. 2. Anyone who kills his son or daughter does penance twenty-one years. Anyone who kills his mother or father does penance fourteen years. Anyone who kills his brother or sister or the sister of his mother or father, or the brother of his father or mother, does penance ten years: and this rule is to be followed to seven degrees both of the mother's and father's kin to the grandson and great-grandson and great-great-grandson, and the sons of the great-great-grandson, as far as the finger-nails. ... Seven years of penance are assigned for all other homicides; excepting persons in orders, such as a bishop or a priest, for the power to fix penance rests with the king who is over the laity, and with the bishop, whether it be exile for life, or penance for life. If the offender can pay fines, his penance is less in proportion.

Ch. 4 *Of envy*. 5. ... There are four cases in which it is right to find fault with the evil that is in a man who will not accept cure by means of entreaty and kindness: either to prevent someone else from abetting him to this evil; or to correct the evil itself; or to confirm the good; or out of compassion for him who does the evil. But anyone who does not do it for one of these four reasons, is a fault-finder, and does penance four days, or recites the hundred and fifty psalms naked.

## 11. The bottom line

- a. An expression of the *Volk*, the people?—the simplest counterargument to this is the virtually no one in Aethelbert's Kent could read, much less write.
- b. Mystification?—this is a harder argument to counter, but the archaisms in the language do suggest that at least for the bodily offenses there's an oral substratum
- c. The missionaries trying to persuade the Kentings to accept compensation payments in lieu of an obligation to take revenge?—the counter-argument to this is that virtually every society that practices blood-feud also has compensation payments, and Tacitus confirms this for the Germanic peoples
- d. An expression of value but not a solvent of controversies?
- e. The beginnings of breaking out law and turning it into a specialized activity in a way in which we can see it?