

“Let Them Make Him Duke to Rule that People”: The *Law of the Bavarians* and Regime Change in Early Medieval Europe

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The early Middle Ages produced a series of law codes for the new “barbarian” kingdoms of Europe, which succeeded the western Roman Empire. These law codes were often inspired by the precedent and sometimes the content of Roman vulgar law as well as the customs of the respective peoples for whom they were written and the interests of their rulers.¹ The making of law could often play a vital role in the stabilization of kingdoms, especially under new rulers. Early medieval secular lawmaking falls into three broad periods: the early royal laws of the Frankish, Burgundian, and Visigothic peoples in the fifth and sixth centuries; the interrelated composition of Lombard, south German, and perhaps also early Anglo-Saxon law in the seventh and eighth centuries;² and the writing up of the last “ethnic” laws for peoples subject to Charlemagne’s empire, such as Frisians and Saxons, in order to accommodate them into a multiethnic empire com-

1. For an introduction to early medieval legislation, see Patrick Wormald, “The Background and Origin of Early English Legislation,” in *The Making of English Law: King Alfred to the Twelfth Century* (Oxford: Blackwell, 1999), 29–92.

2. Wormald, *Making of English Law*, 97–101, notes some structural similarity between the laws of Aethelbert and the south German laws, and discusses the possibility of some relationship.

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mitted to the principle of personality of the law.³ The subject of this article, the law of the Bavarians (*Lex Baiuvariorum*, hereafter abbreviated “Lb”), belongs to the second of these stages. However, scholars have never reached consensus as to the date of its composition nor where it was created. This has inhibited the use of the Lb for any but the most general discussion of Bavarian society.⁴ This article will review the evidence for the Lb’s date and place of composition, to suggest that we can plausibly identify them more precisely than has been done, and therefore argue that the distinctive features of this text can be tied to specific political needs.

The early medieval Bavarians occupied an area between the Alps and the Danube, with the Lech River as their western border and an open eastern frontier that reached from the Enns River toward the Slavic and Avar peoples of the middle Danube.⁵ On their west, the Bavarians had the Alemanni, living roughly in modern Baden-Württemberg and northern Switzerland. Beyond the Alemanni were the Franks, ruling not only modern France but most of the Low Countries and parts of modern Germany, already the strongest single kingdom in Europe. The continent’s other major kingdom, the Lombards, lay across the Alpine passes in Italy.⁶

3. Rosamond McKitterick, *Charlemagne: The Formation of a European Identity* (Cambridge: Cambridge University Press, 2008), 275–78, and her older *The Carolingians and the Written Word* (Cambridge: Cambridge University Press, 1989), 23–75. Note that McKitterick and Wormald stand on opposite sides of a debate over the practical use of legal manuscripts in actual courts, especially in northern parts of the Frankish Empire; both are agreed, however, on the symbolic importance of lawmaking for early medieval rulers including Charlemagne. How universally the principle of “personality of law” was really applied is controversial. The strongest evidence for it comes only from ninth-century Italy, and it is invoked north of the Alps mainly in Burgundy, together with one well-known case involving St. Denis and Fleury. Nevertheless, it does appear that Charlemagne intended that each of the peoples he ruled should have their own *lex scripta*, and moved to supply it where it did not already exist. Wormald, *Making of English Law*, 30–53.

4. This is sometimes better seen in the gaps of modern scholarship. For example, Carl Hammer’s recent *From Ducatus to Regnum: Ruling Bavaria under the Merovingians and Early Carolingians* (Tournhout: Brepols, 2007), although attentive to title III on the Agilolfings and other Bavarian *genealogiae*, makes little use of the Lb’s title II on the ducal court and its officers.

5. For surveys of the history of Agilolfing Bavaria, see Joachim Jahn, *Ducatus Baiuvariorum: Das bairische Herzogtum der Agilolfinger*, (Stuttgart: Hiersemann, 1991), or in English, Kathy Lynne Roper Pearson, *Conflicting Loyalties in Early Medieval Bavaria: A View of Socio-Political Interaction, 680–900*, (Aldershot, UK: Ashgate, 1999), and most recently Hammer, *From Ducatus to Regnum*.

6. Kurt Reindel, “Grundlegung: Das Zeitalter der Agilolfinger (bis 788),” in *Handbuch der bayerischen Geschichte, I. Band: Das Alte Bayern/Das Stammesherzogtum bis zum Ausgang des 12. Jahrhunderts*, 2nd ed., ed. Max Spindler (Munich, C.H. Beck, 1981), 101–248.

The Bavarians first coalesced as a group in the early sixth century, and were under Frankish influence from an early point, if not the very beginning.⁷ By the end of the seventh century, however, they seem to have become de facto independent. At that time, Duke Theodo invited foreign ecclesiastics to help incorporate his people into Christendom, and visited the pope personally in 715 to advance this process.⁸ When Theodo died soon thereafter, the duchy was divided among his sons. The last of these, Grimoald, was killed in a coup in 725, a conflict that brought renewed Frankish intervention to the duchy under Charles Martel.⁹

When Grimoald's nephew Hucbert died in 735, there were no more heirs of Theodo available. Instead, probably with Frankish influence, a new duke arrived. Odilo was a member of a distant branch of the ruling family, the Agilolfings, from neighboring Alemannia.¹⁰ Odilo led a coalition of Germanic and Slavic peoples to war against the Franks in 743, but was defeated. He ruled until his death in 748, to be succeeded by his 8-year-old son Tassilo III. Tassilo ruled in virtual independence until his cousin, Charlemagne, began to impose his authority on the Bavarians in the 780s, finally deposing Tassilo in 788 and incorporating his lands into the growing Frankish empire.¹¹

7. The Bavarians' ethnogenesis remains a murky subject because of the paucity of sources. Scholars associated with the Institut für Österreichische Geschichtsforschung in Vienna have published several sets of papers pertaining to the question; see *Die Bayern und ihre Nachbarn*, 2 vols., vol. 1 ed. Herwig Wolfram and Andreas Schwarz, vol. 2 ed. Herwig Wolfram and Falko Daim (Vienna: Publisher not given, 1985); *Anerkennung und Integration: Zu den wirtschaftlichen Grundlagen der Völkerwanderungszeit, 400–600*, ed. Herwig Wolfram and Andreas Schwarz (Vienna, Verlag der österreichischen Akademie der Wissenschaften, 1988); *Typen der Ethnogenese*, ed. Herwig Wolfram and Walter Pohl (Vienna, Verlag der österreichischen Akademie der Wissenschaften, 1990); and the articles collected in Walter Pohl and Helmut Reimitz, eds., *Strategies of Distinction: the Construction of Ethnic Communities, 300–800* (Leiden: Brill, 1998). For a critical assessment of the discussion, see Charles Bowlus, "Ethnogenesis: The Tyranny of a Concept," in *On Barbarian Identity*, ed. Andrew Gillett (Turnhout: Brepols, 2002), 250.

8. On Theodo generally, see Jahn, *Ducatus*, 25–76. The papal visit is attested in *Le Liber Pontificalis: Texte, Introduction et Commentaire*, vol. I, 2nd ed., ed. l'Abbé L. Duchesne, (Paris: de Boccard, 1955; repr. Paris, de Boccard, 1981), 398.

9. Jahn, *Ducatus*, 98–116.

10. Jörg Jarnut, "Studien über Herzog Odilo," *Mitteilungen des Instituts für Österreichische Geschichte (MIÖG)* 85 (1977): 273–85.

11. Stuart Airlie, "Narratives of Triumph and Rituals of Submission: Charlemagne's Mastering of Bavaria," in *Transactions of the Royal Historical Society IX* (1999): 93–119; Matthias Becher, *Eid und Herrschaft: Untersuchungen zum Herrscherethos Karls des Grossen* (Sigmaringen: Thorbecke, 1993). On Tassilo, see the important volume of studies edited by Lothar Kolmer and Christian Rohr: *Tassilo III von Bayern: Grossmacht und Ohnmacht im 8. Jahrhundert* (Regensburg: Pustet, 2005). The individual studies in this volume, however, do not pertain to the argument of this article. Charles was still

The Lb was composed at some point in the midst of these political upheavals. It is a complex text that was compiled from numerous sources, but also contains original elements. It is composed of twenty-two titles, each with anywhere from one to thirty-two items, in addition to a prologue.¹² The first eleven titles mainly constitute a wergild code, assigning the composition due for offenses against various classes of society.¹³ Of these, titles I–III specify the rights of leading sectors of society: the church, the ducal household and officers, and a kind of nobility, the “genealogiae.” Therefore, they also sketch out a kind of political constitution. Titles IV–XI complete the wergild code with laws on offenses to freemen, freedmen, and slaves, followed by laws pertaining to marriage, women, theft, arson, and miscellaneous violence. The next section deals with economic relationships: property boundaries, pledges, trusts, and sales.¹⁴ These are followed by two titles dealing with participants in conflict resolutions; first witnesses and then champions in trials-by-combat.¹⁵ The final section, generally agreed to be a Carolingian supplement, contains various laws on animal property, including dogs, falcons, and bees.¹⁶

Two main approaches have been taken to dating the Lb, each combining internal evidence with political and ecclesiastical context.¹⁷ Curiously,

“king” (not “emperor”) at the time of Tassilo’s deposition, but it is certainly correct to describe his realm as an “empire” by that time, as his Italian, German, and Spanish conquests had expanded far beyond the original Frankish “kingdom” (much as Rome had an empire when its own government was still a republic).

12. The standard edition is *Lex Baiuvariorum*, ed. Ernst von Schwind, MGH Leges nationum germanicarum 5.2, (Hannover: Hahn, 1926). An older edition is also available, *Lex Baiuvariorum*, ed. Johann Merkel, MGH Leges (LL) in Folio III (Hannover: Hahn, 1863), 183–496. A translation has been made by Theodore John Rivers: *Laws of the Alamans and Bavarians* (Philadelphia: University of Pennsylvania Press, 1977); Rivers’ version is useful but not always reliable.

13. “Composition” refers to payment made as a peace-price to avert vengeance for offenses (Latin “*componere*”), as opposed to simple compensation to restore economic losses (Latin “*compensare*”). Earlier scholars, such as Floyd Seyward Lear, referred to “compounding” for offenses in these cases.

14. Lb (von Schwind) XII–XVI.

15. Lb XVII–XVIII.

16. Lb XX–XXII. See Bruno Krusch, *Die Lex Bajuvariorum; Textgeschichte, Handschriftenkritik und Entstehung. Mit zwei Anhängen: Lex Alamannorum und Lex Ribuariorum*, (Berlin: Weidmannsche Buchhandlung, 1924) 301–305. It is unclear where title XIX belongs, which is generally on the treatment of cadavers and tombs. Two of its ten chapters are at least loosely based on the *Lex Alamannorum*, whereas the rest appear to be independent.

17. Peter Landau, *Die Lex Baiuvariorum: Entstehungszeit, Entstehungsort und Charakter von Bayerns ältester Rechts- und Geschichtsquelle*. Bayerische Akademie der Wissenschaften: Philosophische–Historische Klasse: Sitzungsberichte, Jahrgang 2004, Heft 3. (Munich: Beck, 2004), xx–36.

both positions follow general lines laid out by Heinrich Brunner in the late nineteenth and early twentieth century. Brunner initially argued for a later dating, between 744 and 748.¹⁸ Subsequently, however, believing that he could discern the text of a lost Merovingian royal decree in the superscription to title I of the Lb, he changed his view and argued for an earlier composition instead.¹⁹ Most adherents of the early dating rely on the prologue of the law. This claims that the original legislation was issued by a Frankish king Theuderic (I, r. 511–533/4), updated by Childebert (I, of Austrasia 575–596) and completed by Chlothar (II, of Austrasia 613–622). Finally, Dagobert I (d. 639) is said to have consulted four noblemen to improve and reissue the whole, not only for the Bavarians but all the peoples under his rule. Originally skeptical of the prologue, Brunner was converted by a superscription to the text, which pronounces that the law was issued for peoples living in the “Kingdom of the Merovingians,” the dynasty to which Theuderic, Childebert, Chlothar and Dagobert belonged.²⁰

This early dating, however, has failed to win a consensus of scholarly opinion. For one thing, the prologue’s description of successive waves of legislation is difficult to reconcile with Bavarian history. During Theuderic I’s reign, the region was not even under Frankish rule, but was governed by the Ostrogoths from Italy. Also, the Merovingians’ authentic documents never refer to their realm as the “Kingdom of the Merovingians,” but simply as the “Kingdom of the Franks.”²¹ Furthermore, there is no manuscript evidence for earlier versions of the Lb than the one known in the eighth century; most other early medieval law codes that were revised and updated in this way, such as the

18. Heinrich Brunner, *Deutsche Rechtsgeschichte*, vol. 1 (Leipzig: Duncker & Humblot, 1887), 313–20.

19. For exponents of the early dating, see Heinrich Brunner, *Über ein verschollenes merowingisches Königsgesetz des 7. Jahrhunderts*. Sitzungsberichte der königlich preussischen Akademie der Wissenschaften zu Berlin XXXIX. Sitzung der philosophisch–historischen Classe vom 17. October. (Berlin: Königlich Akademie der Wissenschaften, 1901), and more recently Wilhelm Störmer, “Zum Prozess sozialer Differenzierung bei den Bayern von der Lex Baiuvariorum bis zur Synode von Dingolfing,” in *Typen der Ethnogenese unter besonderer Berücksichtigung der Bayern*: Teil 1. Berichte des Symposiums der Kommission für Frühmittelalterforschung, 27. bis 30. Oktober 1986, Stift Zwettl, Niederösterreich, ed. Herwig Wolfram und Helmut Pohl (Vienna: Verlag der österreichischen Akademie der Wissenschaften, 1990), 155–171.

20. Brunner, *verschollenes merowingisches Königsgesetz*.

21. Landau, *Lex Baiuvariorum*, 34–35. Brunner’s proposal, that the unique formulation was used because the legislators could not well introduce Bavarian law as a product of the “Kingdom of the Franks,” has not been generally accepted.

Alemannic Law or the Franks' own Salic Law, can still be found in their sixth- or seventh-century versions in some manuscripts.²²

This prologue had a life of its own in the manuscripts and was not inextricably bound to the rest of the Lb. It does not seem to have been composed specifically to introduce Bavarian law; the Bavarians are simply listed with the Franks and Alemanni as people for whom King Theuderic and his successors supposedly produced law, "for each of the peoples under his dominion, according to their own custom."²³ It thus works equally well as a prologue for Alemannic law or for Frankish law, and in fact its manuscript transmission reflects this. For example, the prologue appears in manuscript K21 (first third of the ninth century) of Rosamond McKitterick's handlist of Carolingian legal manuscripts, a codex that includes the *Lex Salica*, *Lex Ripuaria*, and *Lex Alamannorum*—that is, the laws of the other peoples the prologue refers to—but not the Lb. K44 (tenth or eleventh century) includes the prologue with Lombard and Salic law, and K72 (middle of the ninth century) with Salic, Ripuarian, Burgundian, and Alemannic law as well as a few other texts, but, again, not the Lb.²⁴ It is, therefore, possible that the prologue did not originally refer to Bavarian law in particular. Perhaps, prior to the Lb's creation, it was assumed that Frankish or Alemannic law applied to their Bavarian cousins as well.

There have been two recent efforts to defend the older dating for the Lb. When the Lb makes use of Visigothic law, it draws on the *Lex Eurici* from before 507 rather than the *Liber Iudiciorum* of 654, which is far better represented in surviving manuscripts. Hermann Nehlsen has argued that the use of the *Lex Eurici* must mean that the law was compiled prior to the *Liber Iudiciorum*'s promulgation.²⁵ He suggests that copies of the *Lex Eurici* must have passed to the Lombard kingdom and then to the Lb's compilers, who may even have worked in Italy. Taking a different tack,

22. For the Alemannic law, see *Lex Alamannorum*, ed. Karl Lehmann, MGH LL nationum germanicarum 5.1 (Hannover: Hahn, 1888), 35–157; and Clausdieter Schott, *Lex Alamannorum: Das Gesetz der Alamannen. Text-Übersetzung-Kommentar zum Faksimile aus der Wandalgarius-Handschrift, Codex Sangallensis 731* (Augsburg: Schwäbische Forschungsgemeinschaft, 1993). For the many versions of the Salic law, see *Lex Salica*, ed. Karl August Eckhardt, MGH LL nationum germanicarum 4.2 (Hannover: Hahn, 1969).

23. Lb prologue, 202: "Ipso [Theudericus] autem dictante, iussit conscribere legem Francorum et Alamannorum et Baioariorum unicuique genti quae in eius potestate erat, secundum consuetudinem suam..."

24. Rosamond McKitterick, *The Carolingians and the Written Word* (Cambridge: Cambridge University Press, 1989), 48–55.

25. Hermann Nehlsen, "Italien, Bayern und die Langobarden," in *Bayern mitten in Europa: von Frühmittelalter bis ins 20. Jahrhundert*, ed. Alois Schmid and Katharina Weigand (Munich: Beck, 2005), 26–44.

Wilhelm Störmer argued that the Bavarian legislation of the 770s shows a distinct noble class that was unknown to the Lb; in Störmer's view, the single generation from the 740s to the 770s is too brief a time for such a deep-reaching social change.²⁶ By taking these different approaches, both Störmer and Nehlsen argue that the Lb's prologue must be essentially accurate, and that the law or a core of it was composed in the seventh century, probably not later than the reign of Dagobert I (d. 639).

Neither of these arguments is compelling, however. Nehlsen envisions busy scriptoria of Lombard jurists collecting and copying laws from all over Europe. The Lombard laws themselves do show considerable sophistication and we might imagine the Lombard court having a relatively cosmopolitan group of scribes and legal officials, but there is no manuscript evidence to suggest that the *Lex Eurici* was actually transmitted as he suggests. Nehlsen can only point to the well-known royal marriage connections between Lombards and Bavarians to depict the possibility that legal manuscripts might have passed between the two areas already in the early seventh century.²⁷ The *Lex Eurici* is known only from a palimpsest in a late Merovingian (seventh or early eighth century) manuscript, possibly from Corbie; the original was written in uncial letters in the sixth century, apparently in southern Gaul.²⁸ Therefore, the only manuscript evidence we have—which is not much—would point to the Frankish kingdom as the route of transmission, not the Lombard.²⁹ Lombard law never cites the

26. Wilhelm Störmer, "Zum Prozess sozialer Differenzierung bei den Bayern von der Lex Baiuvariorum bis zur Synode von Dingolfing," in *Typen der Ethnogenese unter besonderer Berücksichtigung der Bayern*: Teil 1. Berichte des Symposiums der Kommission für Frühmittelalterforschung, 27. bis 30. Oktober 1986, Stift Zwettl, Niederösterreich, ed. Herwig Wolfram und Helmut Pohl (Vienna: Verlag der österreichischen Akademie der Wissenschaften, 1990), 155–71.

27. Charles Radding, *The Origins of Medieval Jurisprudence: Pavia and Bologna 850–1150* (New Haven, 1988), 44–47, shows that the Lombard palace had a staff of legally conversant notaries but not "legists" in the sense that emerged in the later Carolingian period. I have not yet been able to consult Ugo Gualazzini, "La scuola pavese, con particolare riguardo, all'insegnamento del diritto" in *Atti IV Congresso Studi Alto Medioevo* (Spoleto, Centro italiano di studi sull'alto Medioevo, 1969), 35–73, which Radding cites to the effect that Rothari used up to eight other Germanic codes in creating his edict, and remain doubtful on this point. Nicholas Everett, *Literacy in Lombard Italy, c. 568–774* (Cambridge: Cambridge University Press, 2003), 167, depicts Rothari's court as "fertile ground for the reception of a number of legal influences" but approves Radding's caution.

28. Karl Zeumer, ed., *Lex Eurici*, MGH LL 1 (Hannover, Hahn, 1902), xvi–xviii. The Corbie manuscript is BN Paris Lat. 12161.

29. Brunner, when he held to a later dating for the Lb, suggested that the *Lex Eurici* was known in the parts of southern Gaul—Septimania and Aquitaine—which Clovis conquered from the Visigoths in 507. Therefore, Goths under Frankish rule might have used the older code and never known the later *Liber Iudiciorum*. Brunner, *Rechtsgeschichte*, 318.

Lex Eurici. A further problem with Nehlsen's argument is the assumption that the compiler of the Lb would have availed himself of the most up-to-date Visigothic law available, so that the *Lex Eurici* could not have been used after the appearance of the *Liber Iudiciorum* in 654. However, there is no reason to suppose that the compiler thought in terms of laws' relevance or obsolescence in their homelands when making his collection, nor that he was even aware that different versions of Visigothic law existed. His goal was to create a law for the Bavarians, and he borrowed whatever seemed useful in the law books he had access to. In other words, the compiler presumably did not go looking for up-to-date Visigothic law; he looked for law on particular topics (mostly commercial matters such as pledges and sales, in this case) and found what he needed in a handy copy of the *Lex Eurici*. How or where he found it, we do not know. We do not know how widely available the *Lex Eurici* would have been outside of the Visigothic kingdom in the first century or thereabouts after its publication; the earliest surviving manuscripts of the *Liber Iudiciorum* date to the eighth century, a century or after their original promulgation, or thereabouts, and the bulk of them are products of Carolingian efforts to compile "national" law codes for the peoples of their empire.³⁰ Therefore, Nehlsen's argument that the promulgation of the *Liber Iudiciorum* in 654 means that the Lb's compiler must have worked before that date does not stand; it seems unlikely that scribes elsewhere in Europe would even have had access to it until much later.³¹

Störmer's argument, likewise, rests on the premise that significant social change (the emergence of a defined legal nobility) cannot happen in a single generation. However, one can hardly say that Bavaria in the 740s did not have a class of powerful landholders who dominated the duchy's economic and political life by virtue of their inherited wealth and social connections, even if the Lb did not grant them a distinct legal status or call them "nobles"; we meet them all the time in eighth-century charters, as Störmer's own prosopographical studies have amply shown.³² The

30. Zeumer, *Lex Eurici*, xix–xxv.

31. One may compare the pace of distribution of the *Etymologiae* of Isidore of Seville, undoubtedly an early medieval "bestseller." The earliest signs that Isidore's work was known in a non-Visigothic context come late in the seventh century, and the great spread of his popularity occurred over the course of the eighth. It does not seem probable that legal texts would have been transmitted any more rapidly, especially outside the kingdoms of those who issued them. Bernhard Bischoff, "Die europäische Verbreitung der Werke Isidors von Sevilla," *Isidoriana*, (Leon: Centro de Estudios "San Isidro," 1961), 317–44.

32. Wilhelm Störmer, *Adelsgruppen im Früh- und Hochmittelalterlichen Bayern*, Studien zur bayerischen Verfassungs- und Sozialgeschichte, Band IV (Munich: Kommission für Bayerische Landesgeschichte, 1972), as well as numerous individual studies.

sudden appearance of “nobles” in the legislation of Tassilo’s assemblies of the 770s does not necessarily reflect the appearance of new social realities, but rather the usage of new vocabulary and conceptions for existing social groups, perhaps because of the influence of Frankish terminology.³³

It should be noted that there have also been some efforts to “split the difference” and treat the Lb as the product of gradual evolution or revision, first promulgated in the sixth or seventh centuries but only taking its “final form” as it survives in the manuscripts in the eighth century. Such an approach was taken by Joachim Jahn, for example, who first presented the Lb as a document of the duchy’s sixth-century origins but then also used it to explore the duchy’s social and political structure under Duke Odilo, nearly 200 years later.³⁴ Such an approach has the virtue of compromise, and, since the nineteenth century, the scholarly community has been accustomed to texts that evolve and develop over generations. However, the evidence for such evolution is lacking in the case of the Lb. No scholar has ever been able to excavate an “earlier layer” of the Lb’s text, and the clear exemplar of the law as it exists is the *Lex Alamannorum* (hereafter La) as redacted under Duke Lantfrid, who died in 730. It is far more straightforward to see the text as a single work that took the La as a template and proceeded to revise and supplement it, than to argue that there was an earlier independent version of the Lb that was then somehow overhauled in imitation of Lantfrid’s version of the La. Whether the La itself, particularly the seventh-century *Pactus Alamannorum*, once counted as law for the Bavarians, before they had a law code of their own, is an interesting question, but it is a separate one that need not detain us here.³⁵

Most scholars have therefore followed some variation on Brunner’s earlier approach, which would date the text’s composition between 744 and

33. Chris Wickham argues that some sort of nobility was already in place in northern Francia at the time of Clovis’ consolidation of it in the late fifth century. He cautiously nominates the Agilolfings as representatives of this entrenched aristocracy. I am skeptical of such maximal readings of the evidence on the Agilolfings; see below. Chris Wickham, *Framing the Middle Ages* (Oxford: Oxford University Press, 2005), 183–84.

34. Jahn, *Ducatus*, 1–24 and 221–76.

35. Patrick Wormald, placing early Anglo-Saxon law in its European context, seems to have been the first to observe similarities between the topical organization shared by the Lb, La, and the English law attributed to Aethelberht (d. 616); the organization of the Lombard *Edict of Rothair* may have formed a model for all. That the English laws are really Aethelberht’s can be doubted but not disproved, and the text certainly existed by the 670s. This does not materially affect the argument here; it does suggest that topical organization of laws was a practice introduced in the earlier seventh century, which the Lb, based on the La (itself based on the older *Pactus*) took advantage of. Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century, vol. I: Legislation and its Limits* (Oxford: Oxford University Press, 1999), 96–101.

748.³⁶ Tassilo III succeeded to the ducal office at eight years of age in the latter year, and only came of age in the mid-750s, by which time Bavarian documents already indicate their conformity to Bavarian law.³⁷ This makes composition under his auspices unlikely. Brunner chose 744 as a *terminus post quem*, based on Duke Odilo's unsuccessful war with the Frankish palace mayors, Pippin III and Carloman, in 743. As the Lb often emphasizes the dependence of the Bavarian duke on the Frankish king's authority, it is argued that it could not have been issued prior to Odilo's defeat in 743.

Unfortunately, this argument from ducal politics no longer makes sense in the light of contemporary scholarship on the Agilolfings. Peter Landau, in one of the more recent studies of the Lb, has already suggested that the choice of 743 as a *terminus post quem* exaggerates Odilo's aspirations to independence from the Franks.³⁸ It is not within the scope of this study to trace the political narrative afresh from the primary sources, but it can be summarized as follows: from the fall of Duke Grimoald in 725, the Franks played a leading role in buttressing ducal authority.³⁹ Odilo, even before 743, relied heavily on Frankish support; later sources (albeit

36. Bruno Krusch, after initially arguing for dating the Lb to Hucbert's reign under Charles Martel's influence, later modified his view to support the 744–748 dating, Krusch, "Die Abfassung der Lex Baiuvariorum 788, ihre Entstehung aus einem karolingischen Diplom von 744 und de Enthronung der Merowingerdynastie: eine kritische Studie," *Zeitschrift für bayerische Landesgeschichte* (ZbLG) 11 (1938): 1–8; Konrad Beyerle, *Lex Baiuvariorum: Lichtdruckwiedergabe der ingolstädter Handschrift des bayerischen Volksrechts mit Transkription, Textnoten, Übersetzung, Einführung, Literaturübersicht und Glossar* (Munich: Hueber, 1926), proposed composition at the monastery of Niederaltaich. More recently Landau, *Lex Baiuvariorum*, has argued that an episcopal see such as Regensburg or Freising was a more likely place of composition than Niederaltaich.

37. The bishops assembled at the synod of Ascheim at Tassilo's coming of age in the mid-750s admonished him to uphold canon law, "which the world, spread east and west, maintains and which your predecessors' written law introduced [here]." (. . .quod tot diffusus orbs oriens occidentisque conservat et precessorum vestrorum depicta pactus insinuat.) *Concilium Asheimense*, MGH Legum III: Concilia, II.1, ed. Albert Werminghoff (Hannover and Leipzig: Hahn, 1906), 57. The use of "pactus" here, which can also indicate a treaty or agreement, is consistent with the interpretation of the Lb in this article, although it does not by itself prove that the law was a political arrangement. Early references to the Lb in charters include Freising #5 (July 3, 750), and #7 (June 24, 754), both earlier than or contemporary to the synod, in Theodor Bitterauf, ed., *Die Traditionen des Hochstifts Freising*, 2 vols. Quellen und Erörterungen zur bayerischen und deutschen Geschichte. Neue Folge Band 4. (Munich: Scientia-Verlag, 1905; repr. Munich: Scientia-Verlag, 1967).

38. Landau, *Lex Baiuvariorum*, 34–37.

39. Arbeo of Freising, *Vita Corbiniani*, ed. Bruno Krusch, MGH Scriptorum Rerum Germanicarum in usum scholarum v. 13 (Hannover: Hahn, 1920) pp. 223–4, and *Fredegar Continuationes*, ed. Bruno Krusch, tr. Herbert Haupt in *Quellen zur Geschichte des 7. und 8. Jahrhunderts* (Darmstadt: Wissenschaftliche Buchgesellschaft: 1982) ch. 12,

Frankish ones) claimed that he only obtained the ducal office in the first place through Charles Martel's assistance, and that he took refuge at the Frankish court when a rebellion by his own nobles drove him into exile, probably shortly before Charles' death in 741.⁴⁰ He married one of Charles' daughters, Chiltrud, although apparently without the approval of her half-brothers Pippin and Carloman. The war of 743, in light of these events, was probably not a struggle for Bavarian independence from Frankish control. Rather, Odilo was intervening in the struggle for the succession between Pippin and Carlomann, on one side, and their half-brother (Odilo's brother-in-law) Grifo, on the other.⁴¹ There is therefore no reason to assume that the Lb was compiled after 743.

On the basis of these contextual arguments, Peter Landau has already argued for a composition date between 737 and 743. Internal evidence from the text also makes a dating after 743 unlikely. The first title of the Lb addresses church law. A very unusual and controversial clause in this title, I.10, specifies the procedure for trying a bishop in the duchy. The text is wholly original and not based on any prior legal collection of the early Middle Ages; therefore, it was presumably custom written for the Bavarians.

In some of the earlier manuscripts of the Lb, I.10 carries the superscription "*De solis episcopis et illorum interfectione*," meaning literally, "On bishops *solis* and the killing of them." This raises the question of what the writer meant by "*solis*," and whether it was part of the original text or a later addition. "*Solus*" normally means "single, sole, individual."

284–85. The Annals of St. Amand claim that Charles Martel went to Bavaria a second time in 728 without claiming it was a military campaign. See Jahn, *Ducatus*, 104–7.

40. *Annales Mettenses Priores*, *Scriptores Rerum Germanicarum* (Hannover: Hahn, 1905), 33, for the claim that Charles Martel had given Odilo the duchy; His exile is only mentioned incidentally in the Salzburg property listings, *Breves Notitiae* 8.1, as background to Salzburg's loss of property in the Pongau. Fritz Losek, *Notitia Arnonis und Breves Notitiae: Die Salzburger Güterverzeichnisse aus der Zeit um 800: Sprachliche-historische Einleitung, Text und Übersetzung* (Salzburg: Gesellschaft für Salzburger Landeskunde 1990). Jahn, *Ducatus*, 170–73.

41. Grifo was the son of Charles Martel's second wife, Swanahild (or Sunnichild), herself a daughter of the earlier Bavarian Dukes. Charles had brought her home with him after his 725 campaign. The *Fredegar Continuations* suppress all mention of Grifo until his attempt to take over Bavaria after Odilo's death in 748. The *Prior Annals of Metz*, however, describe Grifo's struggle against his stepbrothers in 741/2 and defer mention of his sister Chiltrud's marriage to Odilo, which must have taken place in 740 or 741 (where *Fredegar Continuations* puts it), until its description of Pippin and Carloman's campaign of 743. It is therefore apparent that Grifo's aspirations, Odilo's marriage, and the conflict of both with Pippin and Carloman were connected, and that the pro-Carolingian chroniclers have tried to control this information in different ways, *Fredegar* by removing Grifo's story from Odilo's and the Metz annalist by delegitimizing Odilo's marriage. See Jahn, *Ducatus*, 186–92.

That it would refer to one bishop out of many being killed (“On individual bishops. . .”) seems unlikely, as there would be no reason to distinguish the killing of one bishop from the killing of several. It might mean that the law envisions times when only a single bishop was present in the duchy (“On unique/sole bishops. . .”), perhaps carrying his authority by association with the ducal court rather than a canonical see. A third meaning would take *solis* adverbially, so that the clause reads, “Concerning bishops only, and the killing of them.”⁴²

The meaning of this heading cannot be settled by grammatical arguments alone. Taking this heading on its own, the adverbial translation makes the most sense. The content of the law, however, is worth consideration. It describes the bishop as chosen by the king or people, without reference to other bishops of the province consecrating him, and calls him “highest pontiff” (*summa* [sic] *pontifex*). This language is found elsewhere in Bavaria, in the hagiographies of Bavarian saints from before Odilo’s time. The *Life of St. Corbinian* (d. ca. 728), written in 770 or thereabouts, describes a miracle in which an eagle delivers a fish to the feet of the “highest pontiff” (*summi pontifici*); In the *Life or Passion of St. Emmeram*, the same author, Bishop Arbeo of Freising, stresses the term by having Duke Theodo ask Emmeram to be his people’s “pontiff” twice in a single sentence.⁴³ In both of these texts, particularly Emmeram’s, the bishop in question is treated as unique in the area; unlike Frankish episcopal saints’ lives from the same period, we never see them interacting with colleagues in the episcopal office. Any medieval Christian writer might refer to a saintly bishop as *pontifex* or even *summus pontifex*; therefore, the term is not unique to these Bavarian hagiographies. We can, however, at least be sure that the usage was consistent with the period of singular, foreign bishops presiding over the duchy from court.⁴⁴

Furthermore, if the bishop was accused of a crime, he was to be judged “according to the canons” by the duke (or king), not by his fellow bishops,

42. This is the choice made by the Lb’s English translator, Theodore John Rivers. It is an unusual formation—one would expect *solum*—but there are precedents in late antique Latin. I owe this observation to the anonymous reader of this article for *Law and History Review*.

43. *Vita Corbiniani*, 207 (the deceased Corbinian is also called “pontiff” at 225); Arbeo of Freising, *Vita vel Passio Haimhrammi*, ed. Bruno Krusch, MGH *Scriptores Rerum Germanicarum in usum scholarum* v. 13 (Hannover: Hahn, 1920), 34.

44. For example, Willibald uses “pontifex” of all bishops but “summus pontifex” only of archbishops and the pope in his *Life of St. Boniface. Vitae Sancti Bonifatii Archiepiscopi Moguntini*, ed. Wilhelm Levison, MGH *Scriptores rerum Germanicarum* (SSRG) in *usum scholarum* 57, 7–47; see index at 208 for examples. There were no archbishops in Bavaria until 798, however, when the pope raised Arn of Salzburg to this rank at Charlemagne’s request.

as canon law would normally have required.⁴⁵ The overall tone of the text, then, carries the impression that the bishop is a unique individual in the dukes' territory, not one in a class of several individuals. Lb I.10 cannot be taken to prove absolutely that there was only one individual in Bavaria at a time with an episcopal consecration (the episcopates of Emmeram and Corbinian may have overlapped with others', such as Rupert's or Erhard's), but it is easy to associate with a kind of "court bishop" operating in the duchy at ducal invitation, of the kind seen in the early Bavarian saints' lives.⁴⁶

Was the problematic "*solis*" part of the original text? The heading does not appear throughout the Lb's manuscript tradition, only in a few manuscripts, and some of those omit "*solis*." It appears in the *index capitulorum* of the law's oldest manuscript, from 800 or thereabouts; some subsequent scribes copied it over as a chapter title to the main text.⁴⁷ Given the ambiguity of the language, it would seem that the *solis* was more likely to have been part of the original text, as the *lectio difficilior*. That is, it seems more likely that the term made sense to an earlier scribe, but came to be dropped in the manuscript tradition by copyists who found it ambiguous, meaningless, or obsolete, than that a later copyist would have thought that *solis* should be added to clarify the meaning. In short, it seems possible that the title with "*solis*" is original to the index of the Lb and that it envisions a duchy with a bishop who was unique, if not exactly "alone," in the province.

I would suggest, therefore, that the Lb does not envision a situation in which multiple bishops are available in the duchy to adjudicate the misdeeds of a fellow bishop; not so much because the heading of Lb I.10 might be translated "on sole bishops," but because the content of the law itself seems to point in this direction. This suggests that the Lb would have been issued at the very beginning of Odilo's reign as duke, between 736 and 738. The year 738 was a *terminus ante quem* because

45. Landau noted the Lb's consciousness of canon law, but surprisingly did not use Lb I.10 for purposes of dating. The council of Antioch (canons XII and XIV) had established that bishops were to be judged by synods of other bishops or their metropolitans, and not to appeal to the emperor. Canons such as these were in circulation in early medieval collections such as that of Dionysius Exiguus. Adolf Strewe, *Die Canonessammlung des Dionysius Exiguus in der ersten Redaktion* (Berlin and Leipzig: de Gruyter, 1931), 47–48.

46. The status of the bishops mentioned for the period before 739 has been much debated, mostly in German scholarship; various scholars have seen them as "Wanderbischöfe," "Klosterbischöfe," or "Landesbischöfe." I have argued elsewhere that the hagiographies seem to anchor these saints in the ducal court; Jonathan Couser, "A Usable Past: Early Bavarian Hagiography in Context," *Studies in Medieval and Renaissance History* 4 (2007): 1–56, here at 32–37.

47. K. Beyerle, *Lex Bajuvariorum*.

in 738/9, St. Boniface, the papal legate, church reformer, and sometime missionary, visited Bavaria at Odilo's invitation and erected four episcopal dioceses.⁴⁸ These new episcopal sees were based on existing religious communities that had, at least occasionally, housed "wandering bishops" since Theodo's time. Boniface's work created four stable, canonical bishoprics instead of the improvised provisions of the prior situation. It is, therefore, unlikely that the Lb was composed after 738, because at no point after that were there ever fewer than four bishops present, and it is hard to imagine Boniface (who had the Dionysiana canon law collection) consenting to its provision for ducal jurisdiction over bishops. Boniface complained often and loudly about the uncanonical behavior of his Frankish colleagues in the episcopate: despite his close relationship with Charles Martel and then later with his sons, he never suggested that these secular rulers should have enforced canon law on them. In fact, as Odilo was apparently in communication with the pope and Boniface about the organization plan in the year 738 itself, he probably would not have made himself the final authority over churchmen in that year either. This pushes the likely date of composition back to 737 at the latest.

If references to the Frankish king indicate that a Merovingian was reigning at the time the Lb was promulgated, this dating would be reinforced. Charles Martel had maintained a puppet monarch, Theuderic IV, in the earlier years of his tenure as mayor of the palace, but from Theuderic's death in 737 he did without the figurehead. His sons, Pippin and Carloman, only had a new king enthroned in 743. At one point Bruno Krusch thought that the attribution of the Lb to a "Theuderic" in the prologue is an allusion to Theuderic IV, in which case it was written no later than 737.⁴⁹ This is not a strong argument, however; no one would have presumed after 737 that the interregnum would be permanent, or even as long as it turned out to be, in which case new laws would still have referred to the king's authority although no actual king was reigning at the time. In any case, Charles Martel regularly issued decrees in his own name without putting the king's name to them. It is unlikely that he would have used the king's

48. See Theodor Schieffer, *Winfried-Bonifatius und die christliche Grundlegung Europas* (Freiburg: Herder, 1954), 181–85; Reinhold Kaiser, "Bistumsgründung und Kirchenorganisation im 8. Jahrhundert," in *Der hl. Willibald – Klosterbischof oder Bistumsgründer?* ed. Harald Dickerhof, Ernst Reiter and Stefan Weinfurter (Regensburg: Pustet, 1990) 29–67; and Stephan Freund, *Von den Agilolfingern zu den Karolingern: Bayerns Bischöfe zwischen Kirchenorganisation, Reichsintegration und karolingischer Reform (700–847)* (Munich: Beck, 2004) 43–76.

49. Bruno Krusch, *Die Lex Baiuvariorum. Textgeschichte. Handschriftenkritik und Entstehung. Mit zwei Anhängen: Lex Alamannorum und Lex Ribuaria* (Berlin: Weidmann, 1924), 255–305.

name here, still less that he would have had a prologue falsified that used the long-dead Theuderic I to allude to his own puppet, Theuderic IV.⁵⁰ Nevertheless, we can at least say that the chronology is suggestive.

On the basis of this reassessment of the eighth-century political context, then, we can say that the old argument for dating the Lb between 744 and 748 is highly unlikely. Assuming that the law was promulgated by Odilo, the Lb was probably compiled between 735/6 (the year of his accession to the duchy) and 737, or at least no later than 738.

The possibility remains that the law was promulgated by Odilo's predecessor, Hucbert.⁵¹ However, attributing the text to Hucbert then raises questions about the place of composition. Bavaria in Hucbert's time had, as mentioned previously, no standing episcopal sees and only a handful of monasteries, which do not seem to have been large or well equipped with libraries and scriptoria. Literacy was not unknown—Duke Theodo had a chancellor near 700—but not on the scale one would have needed to compile a law code like the Lb.⁵² The evidence for Bavarian scriptoria only begins from the mid-eighth century, suggesting that the episcopal foundations of 739 helped encourage regular scribal activity. None of the known manuscripts produced in Agilolfing scriptoria contain secular law. Even in the ninth century, the only secular law to appear in Bavarian manuscripts is the Lb itself, not its sources.⁵³

The size of library that would have been needed can be seen from a review of the sources for the Lb's various titles. To judge by the attributions in von Schwind's edition, the compiler of the Lb drew on several earlier "Germanic" law codes. References to and influences from Visigothic, Lombard, Frankish, Burgundian, and Alemannic law have all been identified or posited, many of them near-verbatim quotations. However, derivations from these older law codes are not distributed evenly through the Lb, and their influence is far from equal. Some of the similarities are only of subject rather than specific language; these are as likely to come from a common heritage of Roman vulgar law as from the use of specific

50. Clausdieter Schott, *Lex Alamannorum: Das Gesetz der Alamannen. Text-Übersetzung-Kommentar zum Faksimile aus der Wandalgarius-Handschrift, Codex Sangallensis 731* (Augsburg: Schwäbische Forschungsgemeinschaft, 1993), 16.

51. Bruno Krusch initially favored this idea, though he eventually changed his view to support the 744–748 dating. Krusch, *Die Lex Baiuvariorum. Textgeschichte. Handschriftenkritik und Entstehung*, and idem, "Die Abfassung der Lex Baiuvariorum 788, ihre Entstehung aus einem karolingischen Diplom von 744 und die Entthronung der Merowingerdynastie: eine kritische Studie," *ZbLG* 11 (1938): 1–8.

52. *Breves Notitiae* 8.14 mentions one "Madalhoch the priest, son of Theodo's chancellor Madalgoz," who testified in a property dispute in 750 or thereabouts.

53. Bernhard Bischoff, *Die südostdeutschen Schreibschulen und Bibliotheken in der Karolingerzeit*, 2 vols., (Wiesbaden: Harrassowitz, 1940–80).

post-Roman codes. Different sources feature differently in the various sections of the Lb. Therefore, the bulk of the wergild code in titles I to XI comes almost verbatim from the *Law of the Alemanni*, Odilo's own people. Within this section, however, the treatment of the ducal court and its officers (title II) makes use of the seventh-century *Edict of Rothair*, from Lombard Italy, in addition to Alemannic law.⁵⁴ Visigothic law, particularly the *Codex Euricianus*, is another important source for the Lb. The titles on pledges, sales, and property boundaries are heavily Visigothic in character.⁵⁵ Other sections, meanwhile, are wholly original, including the titles on witnesses and champions, as well as various individual laws (I.10, mentioned previously, title III, on the noble kin groups called "genealogiae," and title IX, on arson).

Manuscripts that contain substantial compilations of law texts from different areas are quite common in the early Middle Ages. Rosamond McKitterick compiled an impressive list of them in 1989, which might create the impression that the Lb's compilers could easily have had all this material ready to hand, wherever they worked. However, a closer look at McKitterick's list shows that it would not have been so simple. First of all, the earliest of the legal manuscripts McKitterick mentions dates from 770, and the vast bulk of them from the ninth century. This suggests that the practice of legal compilation was a product of the Carolingian Renaissance and the practicalities of governing a multiethnic empire where the personality of law was a recognized principle; factors that were not relevant in Odilo's time. McKitterick argues that such collections flourished precisely because they were needed for practical use under Charlemagne and his heirs. Also, when McKitterick's list is examined for manuscripts that contain Alemannic, Frankish, Lombard, and Visigothic law—the main sources for the Lb—it turns out that not one Carolingian manuscript contains all of them together.⁵⁶ Those that come close, only missing one source (usually either the Visigothic or Lombard elements), are from the ninth century or later and usually include the Lb itself. This makes it clear that the compiler of the Lb would not have

54. See Everett, *Literacy in Lombard Italy*, 163–96, on Rothair. Everett suggests that Rothair's legislative effort may also have had an immediate political aim; he invaded Byzantine holdings in Italy within two weeks of his edict's promulgation.

55. *Codex Euricianus*, in Karl Zeumer, ed. *Leges Visigothorum*, MGH Leges Nationum Germanicarum I (Hannover: Hahn, 1902; repr. Stuttgart, Hahn, 1973), 1–32. Visigothic law codes appear as sole sources to forty-four chapters of the Lb (twenty-eight of them in titles XII–XVI) and as joint sources to eleven chapters (three of them in titles XII–XVI).

56. As the Lb uses the *Lex Eurici*, which only survives in a Corbie palimpsest, none of McKitterick's Carolingian manuscripts can account for the compiler's access to this text; I only intend to illustrate the challenge of collecting "multinational" legal texts.

worked from a single manuscript of collected legal texts, even if anyone before the Carolingians were interested in compiling such; he must have had a library. How common were libraries with all the requisite material in the eighth century?

The Lb would have required a substantial library and a learned scribe or group of scribes to bring together all of these various precedents. The influence from other legal texts was the product of actual books, not simply the familiarity of individuals with those cultures: both the Lombard and Visigothic texts are quoted in versions that were obsolete by the eighth century.⁵⁷ The predominance of the Alemannic Law at the heart of the Lb, however, gives us our best clue to its origins. The composer of the Lb worked from an Alemannic core, supplementing it with material from other law codes and adding original material that presumably reflected the particularity of the Bavarian situation or perhaps even Bavarian custom (the practice of tugging the ears of witnesses, for example, seems unique to the area, mentioned in both the Lb and Bavarian charters). As Odilo himself came from Alemannia—the version of Alemannic law used in the Lb is that produced by his older brother, Duke Lantfrid, between 724 and 730⁵⁸—the obvious conclusion is that he, and not his thoroughly Bavarian predecessor Hucbert, was the moving force behind the Lb's compilation.

The exact location of the Lb's composition cannot be determined with certainty because our evidence for pre-Carolingian book collections and scriptoria is so sketchy. But Carolingian evidence can give us some hints. From the later eighth century onward, Charlemagne's court patronized a greater quantity and quality of text copying and correction; the "Carolingian Renaissance."⁵⁹ As part of this movement, the Alemannic monasteries of St. Gall and Reichenau wrote up catalogs of their libraries early in the ninth century.⁶⁰ The list from Reichenau was written in 820/1,

57. The Lb was used to reconstruct the text of the *Codex Euricianus*, otherwise preserved only in a damaged palimpsest. H.L. Günter Gastroph, *Herrschaft und Gesellschaft in der Lex Baiuvariorum: Ein Beitrag zur Strukturanalyse des Agilolfingischen Stammesherzogtums vom 6. bis 8. Jahrhundert* (Munich: Kommissionsbuchhandlung R. Wölfle, 1974), 52–65. Gastroph rightly recognized that arguments for early dating based on the Lb's resemblance to sixth- or seventh-century legislation can establish a *terminus post quem*, but give little other guidance; allowing time for manuscripts to circulate, the use of this legislation as source material makes the early dating for the Lb most unlikely.

58. Schott, *Lex Alamannorum*, 12–17.

59. Literature on the Carolingian Renaissance is vast. A good introduction and further literature can be found in Rosamond McKitterick, "Eighth-Century Foundations," in *New Cambridge Medieval History*, vol. 2: c. 700–900 (Cambridge: Cambridge University Press, 1995), 681–94, and the other essays in the same volume.

60. Johannes Duft, "Rechtshandschriften in mittelalterlichen Bibliothekskatalogen des Bodenseeraumes," in *Die Abtei St. Gallen, Band I: Beiträge zur Erforschung ihrer*

and includes seven codices of secular law and two of canon law, in a total collection of 415 items. Three of the secular manuscripts were monographs, containing a single legal text each: one of Frankish (Salic) law, one of Alemannic law, and one of Lombard law. The other four manuscripts collected multiple legal texts; of these, the first contained Roman law (from the Theodosiana) in addition to Ripuarian, Salic, and Alemannic laws, and Carolingian capitularies. The three others each combined Alemannic law with other texts: the *Ripuarica* and capitularies, the *Salica*, and capitularies, respectively. Of the sources for the Lb, only Visigothic law is absent from this list. St. Gall's booklist was compiled near 850/60, with items added as late as 880, and lists 294 codices containing 426 texts among them. In this collection, in addition to three volumes of canon law, there were five codices of capitularies and only one book of pre-Carolingian secular law. This contained three Roman texts (the Theodosiana, Ermogeniana, and *Lex Papiant*), Frankish law (the list does not specify if this was the *Salica* or *Ripuarica*) and Alemannic law.

These lists were made generations after Odilo's time, and the books mentioned in them (or their exemplars) might only have come to the Alemannic monasteries in the late eighth or early ninth centuries. However, they do shed some light on the problem. Even in the full swing of the Carolingian renaissance, a center of literary culture as massive as St. Gall did not have a library that could have supported the compilation of a text like the Lb. Only one manuscript there contained any of the needed texts, and was missing any representative of either Visigothic or Lombard law. Reichenau seems more promising, especially if we may imagine its apparently strong interest in secular law going back to the eighth century. The monks of Carolingian Reichenau had several copies of Alemannic law, several copies of both Salic and Ripuarian Frankish law as well, and, perhaps most importantly for the purposes of this suggestion, a copy of Lombard law.

Reichenau had been founded by the *peregrinus* St. Pirmin only in 724.⁶¹ It was a representative of Frankish influence in Alemannia—Charles Martel participated in the foundation—which embroiled it in various regional struggles. Reichenau, however, also may have had ties to Odilo. In 742, he founded a monastery at Niederaltaich with monks from Alemannia.⁶²

Manuskripte, ed. Peter Ochsenein and Ernst Ziegler (Sigmaringen: Thorbecke, 1990), 176–91.

61. See the essays in Arno Borst, ed. *Mönchtum, Episkopat und Adel zur Gründungszeit des Klosters Reichenau* (Sigmaringen: Thorbecke, 1974).

62. *Breviarium Uolfi*, in *Beiträge zur Deutschen Sprach-, Geschichts- und Ortsforschung*, Bd. 3, Heft 11, ed. Karl Roth (Munich: J.A. Finsterlin, 1854), 17–28; and Heinrich

The new house was consecrated not by the bishop of Regensburg, in whose diocese it lay, but by Heddo, Bishop of Strasbourg, a former abbot of Reichenau. It is, therefore, a fair guess that the monks came from Reichenau as well. Odilo also supported other Pirminian monasteries and was ultimately buried in one of them, Gengenbach.⁶³ As a church institution connected both to the Frankish court and to Odilo, Reichenau makes sense as being a place where Odilo might have looked for help compiling the laws to support his reign.

None of these secular law collections from Reichenau was used in the composition of the *Lex Alamannorum* issued by Duke Lantfrid, Odilo's brother, between 724 and 730. This may mean simply that Lantfrid did not turn to Reichenau as Odilo would do; alternatively, it could mean that the composition of the La stimulated Reichenau's interest in secular law, leading to the acquisition of manuscripts, perhaps in the early 730s, which ended up helping Odilo's project. Any attempt to place the Lb's composition is necessarily speculative, and it is unlikely that we will ever determine the location with any certainty. However, given the absence of evidence for active Bavarian scriptoria before the second half of the eighth century, it seems reasonable that we should look abroad; Odilo's origins make it likely that we should look to Alemannia; and the later Carolingian evidence for Alemannian monasteries implies that of the two largest houses to exist in Odilo's generation, Reichenau is more likely to have had the requisite source texts than St. Gall.

The association of the Lb with Reichenau has also been made recently by Clausdieter Schott, as a byproduct of Schott's work on the La.⁶⁴ Schott argues that the final, "Lantfridana" version of the La was in fact an ecclesiastical forgery, principally on the argument that its demands regarding church property were more extreme than anything Lantfrid is likely to have accepted. Judging by similarities between the phrasing of some of the La's clauses and charters from Reichenau, and given that Lantfrid was memorialized favorably there, Schott believes that monastery to be the most likely culprit behind the forgery. In Schott's view, the La would have been forged soon after the duke's death in 730 (not between

Tiefenbach, "Die Namen des Breviarium Uroffi," in *Ortsname und Urkunde. Frühmittelalterliche Ortsnamenüberlieferung*, Münchner Symposion 10. bis 12. Okt 1988, ed. Rudolf Schützeichel (Heidelberg: Carl Winter Universitätsverlag, 1990), 60–96, with an edition on 86–91. See Jahn, *Ducatus*, 193–202.

63. Arnold Angenendt, *Monachi Peregrini: Studien zu Pirmin und den monastischen Vorstellungen des fruehen Mittelalters*. (Munich: Fink, 1972), 108–13.

64. Clausdieter Schott, "Lex und Skriptorium: eine Studie zu den süddeutschen Stammesrechten," in *Leges – Gentes – Regna*, ed. Gerhard Dilcher and Eva-Maria Distler (Berlin: Erich Schmidt, 2006), 257–90.

724 and 730 as generally thought). The consequence Schott draws for the Lb is that Konrad Beyerle's idea was correct, that it was composed at Niederaltaich by monks from Reichenau who brought a copy of the forgery with them, but that it was a private project of the monks there rather than an initiative of the duke's. Schott suggests that the Lb was also "published" after Odilo's death, perhaps at the Synod of Ascheim when the Bavarian bishops tried to dominate the young Duke Tassilo.

However, this argument provokes several doubts. Schott is certainly correct in asserting that the La, and the Lb for that matter, are generous in their protection of church interests and that they bear the marks of composition in an ecclesiastical setting. However, this does not demonstrate that no duke would have approved of them; as many early medieval princes knew, secure church property under a ruler's protection could be an excellent resource to help tame recalcitrant aristocrats. There is also the question of the nobles themselves; one wonders how they were persuaded to yield, with no protest that we can discern, to the sudden presentation of a law code, under the pretext of being "good old law," which they had not heard of 5 years earlier, and which was supposedly so inimical to their interests. Third, if these are ecclesiastical forgeries, they are unique. No church institution managed to forge an entire law code before this, and none did so afterwards either. It seems a very labor-intensive process to generate an entire code for the sake of inserting a handful of clauses protecting church property. Forgers' interests could be served much more simply and credibly by a false charter of donation or immunity. It seems likely, then, that the suspicion of "forgery" in this case is not justified. It is much more probable that the dukes in question—Lantfrid and Odilo—knew and supported what their scribes were working on. Without granting Schott's claims of forgery, however, it appears that his observations are consistent with what has been proposed here: that the La and Lb were composed in close association with each other, by monks who were probably working from Reichenau in the 720s and 730s.

To sum up the argument so far, it appears that the Lb was probably produced 10 years earlier than the conventional view, or thereabouts, between 736 and 738 rather than between 744 and 748, and in Alemannia (perhaps by scribes at or associated with Reichenau) rather than in Bavaria. Is this adjustment merely scholarly pedantry, or does it carry larger implications for our understanding of the role and use of law in early medieval society?

An earlier dating and an origin in Reichenau suggest that the Lb is less a product of Bavarian society itself than a political tool, designed to support the change in ducal dynasty. If the Lb was compiled in 736 or 737, it must have been one of the first projects that Odilo undertook upon becoming duke. I would argue that the text shows Odilo using legislation to gain

control of his new duchy as an outsider, in the absence of military force to assure his authority.

Frankish chroniclers would later claim that Odilo had obtained the duchy through the good graces of Charles Martel, and although these are hardly disinterested sources—they needed to justify Charlemagne's deposition of Odilo's son in 788—there is no reason to discard the claim.⁶⁵ In any case, we have no better information to explain how the younger brother of the duke of Alemannia was chosen to become duke of Bavaria. Charles Martel had led an army to Bavaria in 725, and apparently a second time in 728, interventions which helped assure Hucbert's position as duke.⁶⁶ However, no Frankish campaign in Bavaria is recorded for 735 or 736; the next time Frankish armies ventured into the region was in 743, when Odilo gathered an army in support of Grifo. It would appear that Odilo did not arrive in his new duchy at the head of a column of troops, at least not that any chronicler cared to record. The threat of a renewed Frankish incursion doubtless underlay Charles Martel's role in the process, but that role was presumably one of diplomacy and influence. Charles was in a good position to exercise influence through personal connections. When he returned from his 725 expedition, he brought Swanahild (or Sunnichild) with him, a daughter of the Bavarian Agilolfings.⁶⁷ Thus, Odilo came into the ducal office through the influence of the Frankish court, but any compulsion from his backers was only potential. He had to have a means to gain acceptance as the Bavarians' leader without overawing them with a military demonstration. The Bavarian aristocracy, like most magnates in the early Middle Ages, was not a group whose support a ruler could take for granted; Grimoald was killed in a coup of 725, Odilo was forced into exile in 740/1, and his son Tassilo was handed over to Charlemagne by the testimony of some of his own disgruntled nobles in 788.

The *Law of the Bavarians* was the key to attaining this legitimacy. Through it, Odilo was able to generate support in key sectors of Bavarian society, which could secure his position. There were three groups

65. *Annales Mettenses Priores*, entry for 741, 33; Jahn, *Ducatus*; 125–28; and Becher, *Eid und Herrschaft*, 21–75.

66. J.M. Wallace-Hadrill, ed. and trans., *The Fourth Book of the Chronicle of Fredegar, with its continuations*. (London: Nelson, 1960), 90. The campaign of 728 is only known from a brief mention in the *Annals of St. Amand*, which states that Charles was “in Bavaria again” but does not specify that it was a military campaign. Georg Heinrich Pertz, ed., *Annales S. Amandi*, MGH *Scriptores* 1 (Hannover: Hahn, 1826), 8.

67. Jörg Jamut, “Die Adoption Pippins durch König Liutprand und die Italienpolitik Karl Martells,” in *Karl Martell in seiner Zeit*, ed. Jörg Jamut, Ulrich Nonn, and Michael Richter (Sigmaringen: Thorbecke, 1994), 217–26, points out that this marriage also created a link between Charles Martel and King Liutprand of the Lombards, who had also married a Bavarian princess in 714.

who stand out as the beneficiaries of Odilo's legislation. The first group to benefit was the Christian Church, to whom the Lb gave formal protection, but whose protection was also made dependent upon the duke himself. The second was servants of the ducal household, whom the Lb made a privileged group within Bavarian society; thus, proximity to the duke himself could become the basis for individuals' political and social advancement. The third group was aristocratic kinship networks, which the Lb calls *genealogiae*. Five such kin-groups were named in the text, and the law's provisions for members of these groups lifted them above the run of other free landholding Bavarians, beginning the process of creating a true nobility in the region.⁶⁸

The first title of the Lb consists of laws protecting the church's personnel and property. There are ten original sections to this title, plus three more that are generally believed to be later additions.⁶⁹ Sections 1–6 concern the protection of the church's property, including unfree persons and protection against arson as well as its right to receive and hold real estate and movables. Section 7 guarantees the right of sanctuary in churches, and sections 8–10 set the compensation rates for members of the clergy against personal assaults. The later additions, sections 11–13, cover miscellaneous matters: nuns removed from their convents for marriage, a canonical prohibition of clerical cohabitation with women, and a detailed guide to the disposition of church estates and their revenues.

Section 1 details the procedure to be used in giving property to the church. Its main provisions are as follows. Any free Bavarian can give property to the church so long as he has already divided the property to give his sons their share; no one can prevent his doing so. Such gifts are to be made by charter, with at least six witnesses, on the altar of the church itself. Finally, such gifts are irrevocable; the legal guardian of the church (its *defensor*) can grant the property out in benefice but not give it away, and any disputes must be handled in the presence of the bishop.⁷⁰ The stipulation that a would-be donor must first provide shares for his heirs is an

68. On these titles as the basis of a political constitution, see Gastroph, *Herrschaft und Gesellschaft*, 77–119.

69. Compare Konstantin Hohenlohe, *Das Kirchenrecht der Lex Bajuvariorum*, (Vienna: Mayer, 1932).

70. Rivers' translation renders this last, "let it be defended by the bishop," but there is no precedent for translating "*apud episcopum*" this way; it clearly means "let it be defended in the presence of the bishop." The "*defensor*" who is going to "defend" the property does not seem to be the bishop himself. This may mean that the bishop is actually to judge the case, or it may simply require the presence of an ecclesiastical representative in cases touching on church property. The Synod of Asheim, in the mid 750s, would call on the duke to appoint churchmen to accompany secular officials to guarantee their honesty, so something similar may be intended here.

important amendment to the Alemannic model, and would be the occasion for numerous lawsuits over church property in the coming generations.⁷¹ Sections 2 and 3 indicated the composition owed for seizure of church property; double for “unjust seizure” (presumably the kind of property disputes forbidden in section 1), ninefold for actual theft and twenty-seven-fold for theft of liturgical items. The chalice, paten, and altar cloth are specified as examples of the latter, items that were probably the most valuable of a church’s movable possessions and also sanctified by their role in the Eucharist. Unfree persons are likewise treated as church property to be protected in the subsequent two sections. Persuading an unfree person to flee results in a fine of 15 *solidi*, plus the restoration of the refugee, whereas killing one requires double the compensation normally owed for the unfree.⁷² The penalties against arson set in section 1.6 are consistent with title X, a generally original title which shows a strong concern with this crime.⁷³

These property laws, taken together, indicate a strong commitment on the part of the legislator to secure the position of the church as a legally privileged estate and a major landholder in Bavarian society. Most of them have precedents in Alemannic law, but are not common to other early medieval legal texts. The Salic Law, for example, hardly notices the clergy or the church as a distinct group at all prior to its Carolingian rescensions, which postdate the Lb in any case.⁷⁴

The laws in question also seem to have been anticipatory and prescriptive, rather than descriptive of any customary legal regime for dealing with the church. There were certainly churches and clergy in Bavaria before Odilo’s arrival, and even some bishops. However, whether these earlier bishops exercised rights over church personnel and property as envisioned here is unclear; Theodo is supposed to have granted Rupert a broad swath of territory around Salzburg, but the other pre-Bonifatian bishops do not appear in the sources ordaining or disciplining clergy or consecrating

71. Warren Brown, *Unjust Seizure: Conflict, Interest, and Authority in an Early Medieval Society* (Ithaca, NY: Cornell University Press, 2001), 73–101.

72. There is no agreement in current scholarship as to whether the “*servi*” and “*mancipia*” of early medieval sources such as the Lb should be seen as “slaves” or “serfs.” Not intending to settle this debate here, I have opted for the neutral term of “unfree persons,” but it should be clear that the Lb treats the individuals in question as economic resources owned by the church. The argument for interpretation of these persons as “slaves” has been made by Carl Hammer, *A Large-Scale Slave Society of the Early Middle Ages: Slaves and their Families in Early Medieval Bavaria*, (Aldershot: Ashgate, 2002).

73. Von Schwind’s apparatus associates some of these clauses with title XVI of the Salic Law, but the only real point of contact is the common concern with arson, not any of the specific measures taken.

74. *Lex Salica*, per n. 15.

churches and defending their property. The requirement that donations to churches be made by written charter is another case in point. The oldest surviving charter from the duchy dates from 744, and that not in the original.⁷⁵ Property listings from the bishopric of Salzburg include items going back to Theodo's reign at the beginning of the century, and even mention Theodo's chancellor, showing that written documents were not unheard of.⁷⁶ But these early donations to Salzburg were all made by the dukes themselves. This suggests that only ducal grants were recorded in writing prior to Odilo's time, not "private" grants by free Bavarians as the Lb describes. If so, then Odilo, by issuing the Lb, both extended to private Bavarian freemen a mode of recording grants previously customary only for the ducal household, and also equipped the duchy's churches with a new form of legal protection of their property. More or less monastic communities had already existed at Salzburg, Freising, Regensburg, and possibly Passau; but the years from the 740s on would see an explosion in the founding of new monasteries and churches following the elevation of these older houses to episcopal sees.⁷⁷

The impression that Odilo was trying to reinforce the church's position in society is strengthened by the laws protecting church personnel. Members of minor clerical orders receive double compensation for any injuries that they would have received on the basis of their family status, as do monks, whereas priests and deacons get triple compensation. It is worth noting that these clauses do not make the clergy into an entirely separate social order with its own scale of compensations; rather, their rights are still pegged to their birth status. However, Odilo has distinguished the clergy from the laity more than he would have found in his models: the Alemannic law allowed triple compensation only to priests; deacons received double, and lower clergy the same compensation as other family members. The Alemannic law had set the compositions for outright killings of clergy higher, however: 600 *solidi* for priests and 300 for deacons, to the Lb's 300 and 200, respectively (both laws had set a free man's blood

75. Bitterauf, *Traditionen*, #1.

76. *Breves Notitiae* c. 8. What evidence there is of the survival of Roman documentation traditions is very limited; a fragmentary document in Passau's charter collection could be dated anywhere from the mid-sixth to the mid-eighth century. See Franz-Reiner Erkens, "Actum in vico fonaluae die consule. Das Rottachgau-Fragment und die romanische Kontinuität am Unterlauf des Inns," in *Nomen et Fraternitas: Festschrift für Dieter Geuenich zum 65. Geburtstag*, ed. Uwe Ludwig and Thomas Schilp (Berlin: de Gruyter, 2008), 491–510.

77. Ludwig Holzfurtner, *Gründung und Gründungsüberlieferung. Quellenkritische Studien zur Gründungsgeschichte der bayerischen Klöster der Agilolfingerzeit und ihrer hochmittelalterlichen Überlieferung*, Münchner Hist. Studien. Bayer. Gesch. 11, (Kallmünz: Lassleben, 1984).

price at 160 *solidi*).⁷⁸ The difference in value may reflect economic differences between the two areas, but this is hard to be certain of. The Lb presents the clergy as highly privileged members of their families, standing over and above their relations in the court of law. Seen from another perspective, this law could have given families incentive to place members in the clerical orders in order to gain stronger protections for them.

Law I.10, concerning the killing of a bishop, has been referred to already, particularly that it seems to envision that only one bishop would be present in the duchy rather than the four who were consecrated by Boniface in 739. Two features of this unique law stand out. One is the dramatic way in which compensation for the killing is determined; the offender must pay the weight in gold of a leaden garment fitted to the bishop's body, or the equivalent value in property, or sell himself into slavery if he does not have enough to make up this princely sum. This seems a highly dramatic, rhetorical way to make a point about the inviolability of bishops. It is unlikely that even the wealthiest aristocrats possessed so much gold.⁷⁹ The other striking feature of this law, again already mentioned briefly, is that it calls for the king or duke to try the case if the bishop is accused of a crime. This is clearly to head off private revenge killings in such cases, again stressing that bishops may not be entangled in feuds with secular persons. It also, however, makes the bishop legally dependent on the secular ruler as his judge and protector.

The unusual nature of Lb I.10 has led to much discussion of its relationship to an altogether different text from Agilolfing Bavaria, the *Life or Passion of St. Emmeram*, written between 770 and 772.⁸⁰ According to this hagiography, set in Theodo's reign sometime between 680 and 715, Bishop Emmeram was falsely accused of having impregnated the duke's daughter. He set off for Rome to plead his innocence, but the duke's son Lantfrid overtook him and killed him, after a series of mutilations that the text dwells on at distasteful length. It is possible that Emmeram's story was well known before being written up and that Lb I.10 is a deliberate effort to prevent such things happening again.

78. A chart of the comparisons is in von Schwind's edition, 280.

79. The penalty is reminiscent of the *Volsungssaga*, when the gods must make composition for the killing of Otr by bringing enough treasure to cover his corpse. Any speculation about connections between the eighth-century south German law and thirteenth-century Scandinavian literature is beyond the scope of this article. *The Saga of the Volsungs: The Norse Epic of Sigurd the Dragon-Slayer*, trans. Jesse Byock (Berkeley, CA: University of California Press, 1990), 57–59.

80. *Vita vel Passio sancti Haimhrammi episcopi*, in *Arbeonis Episcopi Frisingensis: Vitae Sanctorum Haimhrammi et Corbiniani*, ed. Bruno Krusch, MGH SSRG in Usum Scholarum 13, (Hannover: Hahn, 1920).

However, the hagiographer's sources for the story are unclear; it is even possible that he embroidered a vague tradition of Emmeram's death with details inspired by Lb I.10.⁸¹ Whatever the case, it is likely that bishops were not exempt from violence prior to Odilo's time; another bishop's hagiography, the *Life of St. Corbinian*, also by Arbeo, depicts its hero narrowly escaping an assassination plot hatched at Duke Grimoald's court in the 720s.⁸²

In issuing the Lb, then, Odilo made a sustained effort, not only to win over ecclesiastical support for his reign, but even to build the church up into a powerful social institution whose support would be politically meaningful. He made significant new concessions to encourage the accumulation of church property, and to protect that property once gained, and he offered strong legal protections to encourage the recruitment of clergy and to enable them to stand above the conflicts of Bavarian society; provided that they also accepted the authority of the duke himself to judge their highest representative, the bishop.

The next sphere to which the Lb turns is the ducal administration itself, in title II. Here also Odilo's legislation builds on Alemannic precedents, and many of title II's clauses also have connections to Lombard law.⁸³ This section deals with three main concerns; the security of ducal personnel and property, the maintenance of order in the army, and the conduct of justice. The latter two categories here largely follow precedents from the La and need not attract close attention here. But the Lb does show innovation on the question of ducal security.⁸⁴

81. This was suggested by Bernhard Bischoff in his edition and German translation of the text, *Vita et Passio Sancti Haimhrammii Martyris*, ed. Bernhard Bischoff (Munich: Ernst Heimeran, 1953).

82. *Vita Corbiniani*, 221–23.

83. It may be significant that Lombard dukes seem, on the whole, to have acted more independently of their kings than Frankish dukes; they did without a king altogether for a decade in the sixth century, and after Charlemagne's conquest of the Lombard Kingdom in 774, the dukes of Spoleto and especially Benevento continued to act as virtual sovereigns in their own right. Chris Wickham, *Early Medieval Italy: Central Power and Local Society 400–1000* (Ann Arbor, MI: University of Michigan Press, 1989), 31–38; and Neil Christie, *The Lombards* (Malden, MA and Oxford: Blackwell, 1995), 204–25.

84. Floyd Seyward Lear argued that the Lb and La show a tendency to draw elements of primitive Germanic "folk law" into the sphere of "public law," influenced by Roman jurisprudence. Few today would accept uncritically Lear's characterization of the "primitive Germanic spirit" of either text, but his observation is sound; Lb titles II and III do create a sense of "public" authority through ducally imposed death sentences for treason rather than reliance on vengeance and wergild alone, which stands in contrast with some other early medieval law. The influence may be Lombard rather than immediately Roman. See Lear, "The Public Law of the Ripuarian, Alemannic and Bavarian Codes," *Medievalia et*

The opening clauses of title II cover attempts on the life of the duke. This is the only offense in the entire Lb for which the death penalty is envisioned; all others are assessed in terms of monetary compensation, although these compositions are intended to avert or settle feuds. Whereas Alemannic law had also specified death for attempts on the duke's life, the Lb changes its Alemannic model significantly. For example, the La had allowed for the accused to clear himself by an oath of innocence with twelve oath-helpers. The Lb, on the other hand, does not allow this. Instead it requires that the accusation be proven by the testimony of three witnesses, or by trial by combat if the witnesses disagree.⁸⁵ This provision prevents high-status offenders, who might have been able to recruit oath-helpers easily, from clearing themselves without personal risk. In addition to attempted assassinations, Lb II.1 also classifies the coups with foreign intervention or the invitation of enemies into the duchy as attacks on the duke. Alemannic law had classified these offenses separately. A purely domestic uprising, however—the *carmulum*—does not warrant the death penalty, but the payment to the fisc of 600 *solidi* for the ringleader, 200 for other aristocratic conspirators, and 40 each for lesser followers.⁸⁶

Another type of insurrection is that of the duke's own son. This can only have been an abstract possibility in Bavaria at the time that Odilo took power, as his son Tassilo was not born until 741. However, internal dissension had played a role in the prior generation of Bavarian dukes and was also an issue in the Alemannic ducal family from which Odilo had come.⁸⁷ A son who rebels against a duke who is still competent to rule is to lose his inheritance and suffer exile. The clause is drawn from Alemannic law, but makes some modifications to the definition of the father's competence. The La had stipulated that the father's competence consisted in serving the king, leading the army, and mounting a horse.

Humanistica 2 (1944): 3–27, repr. in idem, *Treason in Roman and Germanic Law* (Austin, TX: University of Texas Press, 1965), 196–226.

85. On trial by combat, see Robert Bartlett, *Trial by Fire and Water* (Oxford: Oxford University Press, 1986), 113–26.

86. The term “*carmulum*” is only used twice in other sources that I am aware of. In one, the *Conversio Bagoariorum et Carantanorum*, it refers to repeated rebellions against Bavarian rule by the Carantanians, a Slavic people in the eastern Alps. In the ninth century, the rebellion of Bernard in 818 was described by the *Annals of St. Emmeram* as a “*carmulum*.” Fritz Losek, ed. and trans., *Die Conversio Bagoariorum et Carantanorum und der Brief des Erzbischofs Theotmar von Salzburg*. (Hannover: Hahn, 1997), 106 and 108; *Annales s. Emmerammi*, ed. Georg Pertz, MGH *Scriptores in Folio* I (Hannover: Hahn, 1826), 93.

87. Jahn, *Ducatus*, 123–25.

The Lb includes leading the army, mounting a horse, and executing the king's orders; but it adds being able to "contest in a judgment,"⁸⁸ judge the people, use his weapons, and not be deaf or blind. The physical specifics may simply be clarifications of "leading the army," but the decision of the Lb to include judicial activity is telling of Odilo's approach to his new office; the duke's authority depends not only on his military leadership, but on his ability to give justice.⁸⁹

One other aspect of the security of the ducal administration and household is of note here; the Lb adds two clauses that appear to be original, Lb II.7 and 8. II.7 states that if anyone dies honorably in the service of the duke, especially in the army, then his heirs receive ducal protection in the maintenance of their inheritance. This apparently has minors in mind, as the clause specifies that the duke will protect their property "until they can themselves." Lb II.8 specifies that anyone who kills another at the duke's command is exempt from prosecution or vengeance, and entitled to the duke's protection. These two clauses imply that a person might be reluctant to obey dangerous orders, either out of concern about the fate of their heirs should they be killed, or the risk of feud even if they are not. In effect, they obligate the duke to a reciprocal protection of his agents for their service over and above his responsibility to provide justice for the duchy generally.

Other matters relating to the security of the duke and his household are relatively minor modifications or adaptations of clauses from Alemannic law; laws on those who start disputes at the duke's court, steal ducal property, or disregard orders under the ducal seal.⁹⁰

Title II of the Lb, then, gives several indications of Odilo's anxieties at his assumption of the Bavarian duchy and also his image of the ducal role in society, based on the Alemannic background but also anticipating and adapting to Bavarian realities. Requiring witnesses rather than oath-helpers to establish guilt or innocence in cases of treason enabled him to weaken the defenses of powerful magnates who might have attempted a coup. The extension of special legal protection to those who fought or killed on the duke's behalf would tie them more tightly to his service and reward

88. "...iudicio contendere..."

89. The title "duke" itself originates in Roman military titulature, indicating that the Bavarian leaders were originally commanders of local armed forces, presumably on behalf of the Franks. The addition of judicial authority is therefore an important ideological development, and one normally associated with early medieval kings.

90. Lb II.4–6 cover discipline within the army; II.10–13 deal with various offenses at the ducal court or failure to respect the ducal seal or orders; II.14–18 govern judges and law courts, including the scheduling of courts (monthly or biweekly), court fees, and general insistence on fair and objective judgments.

loyalty. Underlying this also, however, is an ideology of the duke that presents him not only as the leader of the people in war but also, king-like, as the provider of law and justice, as seen in the modifications to the Alemannic law against rebellious princes.

The final section of the Lb with clear political implications for the new duke is title III, a section with no precedent in any other early medieval law code. Title III discusses the “*genealogiae*,” a term translated as “families” by Rivers but better understood more loosely as “kin groups,” as the structure and extent of these *genealogiae* are unclear. Lb III.1 names five such groups, the Hosi (or Huosi), Draozza, Fagana, Hahilinga, and Anniona. The ducal kin, the Agilolfings, are named as a sixth *genealogia* but distinguished from these five. These aristocratic kin groups are privileged by the grant of double composition for all injuries suffered, relative to the wergilds that will be specified for ordinary free Bavarians starting in title IV. The Agilolfings received quadruple composition and the duke a further third above that.⁹¹ Therefore, where the base wergild for the life of a free Bavarian is 160 *solidi*, the *genealogiae* are entitled to 320, and Agilolfings to 640. The duke’s own life is assessed at 900 *solidi*.⁹² This last would seem to contradict Lb II.1’s decree of the death penalty for killing the duke, but presumably the number is meant as a benchmark for calculating lesser penalties.⁹³

The Lb tells us little about these other families apart from their higher compensation and the fact that they are “first after the Agilolfings.” No other early medieval law ties legal privilege to membership in specific kin groups; therefore, there is little to compare this clause with. Under the circumstances, we have suggested for the Lb’s compilation, however, the most probable explanation is that these were powerful extended clans with deep roots in Bavaria.⁹⁴ Odilo’s grant of legal privilege to them would have been an effort to win their political support. Therefore, through

91. Rivers’ translation here creates a separate bonus for the “duke’s close family,” implying an inner circle within the Agilolfings. However, the “*parentes*” here are simply the Agilolfings themselves.

92. In the Ingolstadt ms.: von Schwind’s edition has 960.

93. Brunner suggested that the contradiction may be more apparent than real, as the death penalty may not have applied in cases of manslaughter (rather than treasonous murder) or if the duke’s killer sought church sanctuary, in which case wergild assessment would still be needed.

94. Wilhelm Störmer, holding to a sixth-century origin for the Lb, sees these families as the leaders of various ethnic groups out of whom the Bavarians were originally assembled (Thuringians, Alemanni, Rugians). My dating argument would make this impossible, but the basic insight, that such a concession represents an effort to win the loyalty of existing interests, is sound. Wilhelm Störmer *Die Baiuwaren* (Munich: Beck, 2002), 32–37. See Brown, *Unjust Seizure*, 25–29; and Hammer, *Ducatus to Regnum*, 27–29 and 84.

title III, Odilo demonstrated to the most powerful Bavarian magnates that the instruments of written law could be beneficial, not only to the duke himself and to the church institutions he brought under his patronage, but to them as well. The higher compensations these families were now entitled to could have made them virtually immune to vendetta by lesser families, as the compensations owed when the feuds were settled would have favored them heavily and pushed their rivals toward economic disaster.

Unfortunately, we know very little about these *genealogiae* in practical terms. Only two of them are attested in any other sources. The Fagana appear in a Freising charter of 750, the same charter that is the first to mention the “*ius baiovariorum*.”⁹⁵ In that document, Tassilo—who was still a minor at the time—together with members of the Fagana, give property at a place called Erichinga (Oberding, very near Freising) to the cathedral church of St. Mary at Freising. Four specific members of the Fagana are named (Ragino, Anulo, Wetti, and Wurmhart) and it appears that Tassilo himself is regarded as a member of the group. This is the only appearance of the Fagana name in any source outside the Lb.⁹⁶

The Huosi are better attested. They are named specifically in two of Freising’s Carolingian charters, one from 791 and another from 849.⁹⁷ The charter of 791, shortly after the Agilolfings’ fall, deals with a dispute within the kin over an inheritance that had to be arbitrated by Bishop Atto in the presence of the gathered relatives. On the assumption that all the names on the extensive witness list counted as Huosi, the charter has enabled the tracing of relationships through earlier charters in which these individuals appear; prosopographical research soon gives the impression that practically every important person in southwest Bavaria (around Freising and the region of modern Munich) was a Huosi or at least linked to them. Unfortunately, no source indicates what criteria, if any, the Bavarians themselves used to define members of the kin-group. Therefore, we simply cannot tell if all the earlier individuals linked by modern scholars to the witnesses of 791 really thought of themselves as Huosi or could have claimed the protections of Lb III.1.⁹⁸ Nevertheless, we can sense the extent and influence of this kin-group from the

95. Bitterauf, *Traditionen*, #5.

96. Wilhelm Störmer, *Adelsgruppen* (per n. 32), 114–16. Störmer observes that whereas the name Fagana only appears in the one document, signatories to TF 5 appear in all the early Freising charters up to 750, suggesting that they were a very important group under Odilo.

97. Bitterauf, *Traditionen*, #142 and 703a. Brown, *Unjust Seizure*, 68–72.

98. Störmer, *Adelsgruppen*, 90–113.

appellation of a large district in western Bavaria as the “Huosigau” in the ninth century.⁹⁹

The other kin-groups of the Lb, the Draozza, Anniona, and Hahilinga, never appear in any other source. This is probably because of the accidents of documentary survival. Compared with the relatively full texts of over 120 charters from Freising from the Agilolfing era, of which only one names *genealogiae* from Lb III (plus the two appearances of the Huosi in Carolingian-period charters), only seven charters of the era survive from the ducal capital at Regensburg, two dozen more from Passau, and a few dozen others from a handful of monasteries, plus summaries of property donations received by the bishops of Salzburg.¹⁰⁰ It is likely that these other kin groups predominated in the north or east of Bavaria and are hidden among the kinship networks around prominent aristocrats of Tassilo’s reign. Properties held by relatives of a Count Helmuni, for example, crop up at or near places with names suggestive of the “Hahilinga,” such as Hailing, near Straubing on the Danube.¹⁰¹

The conception of a *genealogia* as an important social unit is not limited to the Lb or the groups named in title III; elsewhere in the laws, the term is used for the kin of lesser freemen, and Bavarian charters occasionally mention *genealogiae* that do not appear in the Lb.¹⁰² The same charter that introduced members of the Fagana to us also mentions another *genealogia*, the Feringa, who contributed to the benefaction.¹⁰³ Another document of 806–808 shows a group called the Mohingara (whose name survives at modern Feldmoching in Munich) trying to claim some of Freising’s property.¹⁰⁴ The Salzburg property summaries feature a group of *Romani*, descendants of Roman provincials, known as the “*genealogia de Albina*,”

99. TF 763, 853. Gertrud Diepolder, “Die Orts- und, in Pago’-Nennungen im bayerischen Stammesherzogtum zur Zeit der Agilolfinger,” ZBLG 20 (1957): 364–436.

100. I have not counted Carolingian-period documents from these institutions, which are more numerous in all cases. Doing so would only strengthen the point, as the Lb’s *genealogiae* are not named in the later charters either.

101. Störmer, *Adelsgruppen*, 58–59. Prinz believed that all the *genealogiae* named in the Lb were a group of pro-Frankish nobles from western Bavaria, so that title III represents the empowerment of a group that would limit ducal independence. However, there is no reason to assume that kin other than the Huosi and Fagana were from the west; if anything, their absence from the Freising charters would imply the opposite. Friedrich Prinz, *Frühes Mönchtum im Frankenreich: Kultur und Gesellschaft in Gallien, den Rheinlanden und Bayern am Beispiel der monastischen Entwicklung (4. bis 8. Jahrhundert)*, 2nd ed., (Munich: Oldenbourg, 1988), 317–445.

102. Hammer, *Ducatus to Regnum*, 27; Lb I.8, II.4, VIII.14, and XV.9, as cited by Hammer.

103. See n. 92.

104. Bitterauf, *Traditionen*, #235.

identifying them not with a kin-name but with a place-name (“Albina” being the modern Oberalm in Austria).¹⁰⁵ Presumably, then, the propertied class of Bavarian society was made up of many such *genealogiae*, at least some with sufficiently coherent identities to have group names. The five singled out in Lb III for legal privilege must have been meant as pillars of Odilo’s reign, in order to secure him in his office.

Title III also makes another unique statement: that the ducal office is to remain in the Agilolfing family perpetually, as this family is so pleasing to the Frankish crown. Again, no other early medieval law identifies any office with a specific family; therefore, this clause cries for explanation. It is often invoked in a direct fashion by historians to identify all dukes of Bavaria up to Tassilo III’s fall in 788 as “Agilolfings,” even the shadowy figures of the sixth century found in Gregory of Tours’ and Paul the Deacon’s histories: Garibald I, Tassilo I and Garibald II.¹⁰⁶ Carl Hammer, however, has recently demonstrated that the evidence does not offer certainty on this question.¹⁰⁷ The law takes on a different meaning if we understand it as an innovation made by Odilo (or the anonymous compiler working on his behalf) near 736–738. The intent of the stipulation was to block claims to the ducal office by members of other *genealogiae*, not to give modern historians evidence about the history of the Agilolfings. It is likely that Theodo and his descendants had been Agilolfings, as the clause would carry little conviction if they had not been. But it cannot be invoked to envision a single ducal family stretching back for two and a half centuries. It may be relevant, in this context, that the law does not make the ducal office hereditary, so as to create a dynasty, but only indicates that candidacy for duke must include membership in the broad kin-group: “Whoever of that kin should be wise and faithful to the king, let them make him duke to rule that people.”¹⁰⁸ This clause simultaneously legitimizes the succession of Odilo as a duke not descended from (or even closely related to) his predecessor, while reserving the

105. *Breves Notitiae*, 8.

106. *Pauli Historia Lagobardorum*, MGH SSRG in usum Scholarum 48, ed. G. Waitz (Hannover: Hahn, 1987). Translated in: Edward Peters, ed., William Dudley Foulke, trans., *Paul the Deacon, History of the Lombards* Philadelphia: University of Pennsylvania Press, 1974/2003 (transl. originally published 1907). I.21 (Garibald I), IV.7 (Tassilo I), IV.39 (Garibald II). The presumption that all the Bavarian dukes back to the sixth century were Agilolfings is nearly universal.

107. Hammer, *From Ducatus to Regnum*, 26–51. The state of the evidence is summed up at 49: “Moreover, where we have evidence for the early Bavarian dukes there are no Agilolfings, and where there is evidence for Agilolfings, there are no Bavarian dukes.”

108. “. . . qui de genere illorum fidelis regis erat et prudens, ipsum constituerunt ducem ad regendum populum illum.” Lb III.

possibility that he could in turn be succeeded by another Agilolfing in addition to his own son.

Instead of seeing the Agilolfing element of III.1 as a declaration of venerable Bavarian tradition, then, we should see it as an effort by Odilo to assert his own significance in the jumble of Bavarian *genealogiae*, if not actually to insert his own kin into Bavarian society. If it was important to exclude other *genealogiae* from claims to the ducal office, this can only mean that such claims were being contemplated. As is seen from the appearance of Tassilo as a member of the Feringa, membership in *genealogiae* was not mutually exclusive and the boundaries between kin-groups must have been very loose. No doubt there were members of the Huosi or the other groups who could trace relationships to Theodo and his heirs as well as Odilo could. Lb III, then, represents a compromise, an assertion of Odilo's exclusive legitimacy while buying off the claims of others with exalted legal status. In other words, the unstable political situation near 736 and the need for Odilo to prop up his fragile authority gave birth directly to a Bavarian nobility in the full sense of that word; a class of persons entitled to legal privilege on the basis of descent and kinship. By the 770s, the fluidity of kinship in a cognatic society meant that legislation ceased to speak of *genealogiae* and spoke directly of nobility.¹⁰⁹

In summary, then, we have seen that internal evidence from the Lb itself, set against the political chronology of the duchy of Bavaria, makes it probable that the text was compiled in 736–737, not the sixth century as its prologue claims, nor between 744 and 748 as most historians since Brunner have thought. It was composed in order to support the new duke Odilo, using the laws of his native Alemannia as a framework. The work of composition itself may have been done at a church or monastery with connections to the Alemannic dukes, most likely Reichenau. With this context in mind, the unusual laws from the first three titles of the Lb jump into relief as indicators of a strategy for the outsider to generate authority for himself in his new duchy without the blunt instrument of military force. Through title I, Odilo undergirded church institutions with legal protection of their property and personnel, yet also made the highest church officials, the bishops, answerable to his own judgment for their actions. In title III, Odilo selected several of the most powerful aristocratic kin-groups to

109. *Concilium Dingolfingense*, ed. Albert Werminghoff, MGH Concilia II (Hannover and Leipzig: Hahn, 1906), 93–97. Störmer, again, thought that a single generation from the 740s to the 770s was too soon to generate such a nobility. However, the language of “nobility” in this legislation is probably the application of new vocabulary to long-standing realities in Bavarian society. These concepts were presumably adopted from Frankish or Lombard sources. Compare Störmer, “Zum Prozess sozialer Differenzierung bei den Bayern von der Lex Baiuvariorum bis zur Synode von Dingolfing,” in *Typen der Ethnogenese*, 155–71.

elevate above the rest of Bavarian society as the core of a new nobility, granting them special legal status signified by higher wergilds. In exchange for the privilege, he reserved the office of duke to his own kin, setting the Agilolfings above the rest of the duchy's political and social leadership. Finally, title II set out to protect the ducal household and its officers, protecting conspirators from being able to clear themselves with oath-helpers. It also assured those who risked danger in the duke's service of the direct protection of the duke against attempts on their estates or their lives. In the process, both explicitly and implicitly, Odilo added new elements to the ideology of the ducal office, making the duke not only head of a powerful family and leader of the people in war, but also the source of justice for his subjects, much in the manner of a king.

In the short run, it was not clear that this effort to effect regime change without violence would succeed. In 741, shortly after beginning a reorganization of the Bavarian churches in concert with St. Boniface of Mainz, Odilo was driven into exile by dissent in his duchy.¹¹⁰ This reversal shows just how fragile the new duke's authority could be, and how real the threats envisioned in Lb II actually were. His opponents, unfortunately, remain anonymous in the brief mention of this setback in our sources; therefore, we don't know if the five *genealogiae* stood by the duke who had given them privileges or turned against him. The uprising did not last; Odilo was able to return in a matter of months, again without recorded military intervention. He even recovered enough stature to lead a coalition of Bavarians, Alemanni, Saxons, and Slavs against the Franks in 743.¹¹¹ Charters from Freising indicate that his laws continued in effect during the reign of his son, Tassilo III, and several manuscripts of the Lb include the decisions of Tassilo's assemblies as a kind of supplement to it.¹¹² The success of Odilo's legislation at setting the standard for political legitimacy in Bavaria might best be measured by the use his son's enemies made of it. After Charlemagne moved against Tassilo with questionable legality in 788 and deposed him, a new clause was inserted in title II in manuscripts of the law, the so-called *Lex Tassilonis*.¹¹³ This new clause declared that a duke who was disloyal to the king could be removed by the king and sent to a

110. Jahn, *Ducatus*, 170–76.

111. *Annales Mettenses Priores* for 743, 33–35.

112. Wilfried Hartmann and Heinz Dopsch, "Bistümer, Synoden und Metropolenverfassung," in *Die Bajuwaren: Von Severin bis Tassilo 488–788. Gemeinsame Landesausstellung des Freistaates Bayern und des Landes Salzburg*, ed. Hermann Dannheimer and Heinz Dopsch, Rosenheim/Bayern, Mattsee/Salzburg, 19. Mai bis 6. November 1988. pp. 318–27.

113. Bruno Krusch, *Die Lex Baiuvariorum. Textgeschichte. Handschriftenkritik und Entstehung*. 125–63.

monastery in penance for his sins, precisely what Charlemagne did to Tassilo. The reservation of the ducal office to the Agilolfings in title III maintained enough force that the Carolingians never replaced Tassilo: the region was governed by prefects and counts in the late eighth and early ninth centuries and then became a “sub-kingdom” under Charlemagne’s grandson, Louis the German, avoiding the title “duke” throughout.¹¹⁴ Not until the tenth century would the ducal title be granted to members of another family, and then not as a conscious revival of the Agilolfing duchy.

Some thirty years ago, Patrick Wormald drew attention to the highly ideological character of early medieval law texts in a seminal article.¹¹⁵ He argued that Germanic kings needed to present themselves as lawgivers in order to legitimize their rule to a largely Roman public in the lands they had taken over. To this end, written law – any law – was needed, explaining why so few of the surviving texts seem suited to practical use in court. Wormald thought that the Lb was an exception, belonging to a southern European tradition (along with Visigothic and Lombard law) that still saw law books as authorities for actual cases. This study has sought to explore this connection between lawmaking, practical politics, and ideology in closer detail. Whereas it does not undermine Wormald’s perception that the Lb’s content was of practical use and not arbitrary, it also shows that this act of legislation was more actually at once practical and ideological, and, therefore perhaps more “northern,” and more royal, than Wormald thought. In the political instability of the mid-eighth century, the anonymous monks who wrote the Lb at the behest of Duke Odilo achieved a unique feat. They forged an instrument that enabled the transfer of power, not by fire and sword, but by the legitimation and incentives generated by law. Odilo’s Carolingian cousins took the example to heart; Charlemagne built his own empire across Europe on the basis of law as well as his conquering armies. Even when he overthrew Odilo’s own son, he did so not on the battlefield, but in the law court. In this way, the *Lex baiuvariorum* contributed to the making of Europe.

114. See Hammer, *Ducatus to Regnum*, 201–65.

115. Patrick Wormald, “*Lex Scripta* and *Verbum Regis*: Legislation and Germanic Kingship, from Euric to Cnut,” in *Early Medieval Kingship*, ed. Peter H. Sawyer and Ian N. Wood, (Leeds: the editors, 1979), 105–138.