

Writing Custom: Juristic Imagination and the Composition of
Customary Law in Thirteenth-Century France

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This project presents a cultural history of legal knowledge. It examines the first move to set a previously oral custom into writing in Northern France during the thirteenth century. This was a revolutionary moment when law moved from small communities literate in Latin and spread amongst lay jurists who thought and wrote in the vernacular, the language in which law was actually lived and performed. Written custom was a creative practice, not formalistic as is commonly assumed. This combination of the new technology of writing with the social choice of the vernacular permitted previously oral and performed law to be theorized and captured in text which, in turn, permitted previously local experiences to be shared and transmitted through the circulation of texts. By imagining a literature devoted to custom the lay jurists who started writing custom created the content and contours of a new intellectual discipline: they separated custom from general community practice and created customary law.

BIBLIOGRAPHICAL SKETCH

Ms. Kuskowski completed this dissertation at Cornell University, where she specialized in medieval history and legal history. She also holds Bachelor of Common Law and Bachelor of Civil Law degrees from McGill University Faculty of Law, and a Bachelor of Arts from McGill University.

*For my parents,
Magdalena and Thaddeus*

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Introduction

This study presents a history of the construction and transmission of knowledge and the resulting changes in thought and culture. The story begins with the idea that a certain type of knowledge has become important and complex enough to commemorate in writing, and with the composition of books devoted to celebrating that idea. The new books in question sought to bring together two cultures that were largely separate previously—the culture of action and practice of everyday life and a culture of conceptual thinking and of written text. These books were the vernacular *coutumiers*, thirteenth-century texts composed in Northern France that sought to give literary form to the previously unwritten and untheorized customs and procedures of the secular courts.¹ The *coutumiers* authors not only capitalized on contemporary social and cultural currents but also sought to be the agents of social change.

This story thus begins with books but also describes a cultural revolution. Modern Western law is so deeply imbedded in textuality that the medieval conceptual revolution that brought together legal practice, written rules and public enforcement can be overlooked. Why is this the case? An important part of the answer is the bifurcated approaches scholars have used to evaluate law and dispute resolution in this period. Scholars have used anthropological theory to examine dispute resolution in the twelfth century and earlier in order to understand how decentralized, informal, unwritten, and performative legal cultures worked. On the other hand, the second half of thirteenth century onward saw a great acceleration in the development of formalized courts, the use of written record, increasing professionalization of personnel and its

¹ Secular or lay courts as opposed to ecclesiastical church courts. The difference between these is described in more detail in the following chapter.

history is approached completely differently. Its study has largely been devoted to formal processes and a hierarchical system of law, and considered narrowly within the field of traditional legal history and largely in isolation from other cultural currents. This cleavage in approaches has led to important parts of the history of customary legal culture to be caricatured or overlooked.

This study is a cultural history of conceptual, technical and cultural transformation that aims to fill this lacuna by looking at why and how change happened. What was custom, why was it written and what happened to it when it was written down? The protagonists and agents of this change were the lay thinkers who composed the *coutumiers*, those who copied and changed these texts, and the lay people that the texts addressed. The *coutumiers* authors constructed a new field of knowledge by choosing what was relevant, right and authoritative and teaching others to think in those terms. And their texts travelled. These wandering texts permitted the development of communities, intellectual and discursive, that spurred the circulation and harmonization of legal ideas and culture as well as the development of political and institutional structures.

Written law had previously been confined to a small group mainly composed of ecclesiastics and scholars who had knowledge of Latin. The *coutumiers*, on the other hand, were written in the French vernacular—the actual language in which law was lived and performed. This combination of the new technology of writing with the social choice of the vernacular was the catalyst that permitted previously oral and enacted customary law to be theorized and for those ideas to spread beyond the local level. It was now potentially accessible to anyone who understood French in writing or read aloud. This meant that lay people acquired an unprecedented access to legal ideas and a new ability to exchange them.

The *coutumiers* allow us to observe an important transformative moment in the relationship between law, culture and society, a moment that saw the construction of the legal ‘realities’ that would continue to give shape to French law until the Revolution. They also allow us to observe the change in the cultural conventions that underpinned the activities that formed practice in the lay courts, and ask important questions about that change: What did it mean to write custom? What is the place of writing in the transition from custom to law? How is legal authority constructed or rejected? How were university ideas adopted, rejected, employed, modified, and repurposed by laymen? How does society move from specific cases or customs to legal norms of general application? How did this group establish a body of knowledge that was accepted by those outside this community? What is the place of lay practitioners in intellectual history and what is their role in the development of legal theory?

There is a tendency to dismiss the group of lay jurists addressed here. Those interested in the intellectual history of law see them as the unsophisticated contemporaries of more eminent Roman or canon-law thinkers. Meanwhile, those interested in the social history of law tend to see them as having failed to record an accurate representation of practice. Because of this, the first *coutumiers* hold an awkward place in the narrative of the transition from custom to law. They are also often relegated as background for the influence of Roman law on other aspects of legal life, for the later official versions of these texts, and for the advent to enforced state law. The aim of this study is to give these lay jurists a place in the great innovations of thirteenth-century legal thought alongside canonists and Romanists and to examine the cultural effervescence that led to the writing and theorizing of custom as an important step in history in its own right.

A CULTURAL HISTORY OF LEGAL KNOWLEDGE

The *coutumiers* were the result of cultural processes that saw the definition of custom change from a type monetary payment to a general sort of rule as well as a dawning perception that these general rules ought to be assembled into some coherent and written form. As Susan Reynolds has noted, however, the transition from diffused and undifferentiated to professional customary law has almost exclusively been studied in relation to the rise and development of Roman law studies and their diffusion.² This study hopes to take one step in establishing the history of the French lay jurist who thought about custom in a new way and in a medium.

Guido van Dievoet, John Gilissen and others have described the *coutumiers* as the culmination of an oral and personal custom that ‘crystallized’ and was ‘transferred’ into writing, a custom that was tied to a specific territory and came to be designated by that territory.³ The texts generally do not have separate titles but indicate the contents at the beginning or the end of the work. This is where we get the titles, such as the *Coutume de Champagne*, the *Coutume d’artois*, *Coutume de Beauvaisis*, and so on.⁴

This study aims to add to earlier conversations about writing and learning and about the development of custom and its relationship to law by examining the *coutumiers* in order to reconstitute a picture of the mental world of its practitioner *qua* thinker-authors, namely, those who generated, wrote, struck down, theorized and immortalized customary practice. Peter Burke

² Reynolds, Susan. “The Emergence of Professional Law in the Long Twelfth Century” *Law and History Review* 21, no.2 (2003) 351.

³ John Gilissen, *La coutume (Typologie des sources du moyen âge occidental)* (Turnhout, 1982) 33, 86; Guido Van Dievoet, *Les coutumiers, les styles, les formulaires et les ‘artes notariae’* (Turnhout, 1986) 13; Esther Cohen, *The Crossroads of Justice: Law and Culture in Late Medieval France* (Leiden, 1993) 28. Parts of this definition are challenged in the current study.

⁴ Gilissen, 33.

has shown how a “social history of knowledge” vastly increases our understanding of the development and transmission of ideas.⁵ It also expands the group of ‘those who thought’ to include a wide range of thinkers from elite intellectuals to everyday ruminators who mulled over ideas in a practical context or ‘popular’ form.

The *coutumiers* authors were educated, though how learned were remains a debated issue.⁶ As Bernard Guenée has shown, the type of practitioner involved in legal practice in the later thirteenth century was increasingly a professional lawyer, advocate, or judge whose role only became more formalized and entrenched in the fourteenth and fifteenth centuries.⁷ Lay practitioners are generally seen as rather unsophisticated compared to Roman legists, perhaps legitimately so. However, it may be more useful to evaluate them for what they were actually trying to do, rather than comparing them to a community of university scholars that was not their main interlocutor. The *coutumiers* authors were part of a class of experts who specialized in and produced a specific form of legal knowledge that framed the lay courts. Thus, the ‘cultural’ aims at the heart of the *coutumiers* were neither an emulation of the university study of Roman law nor a form of popular experience of law, but something both intellectual and practical that lay somewhere in between the high intellectual and experiential.

The *coutumiers* described the dispute-resolution customs of the secular courts and they did so in the vernacular—in this sense they constitute both a cultural development and legal-literary one. The Law and Literature movement has shown, amongst other things, that law cannot be a source of value and meaning outside of its cultural, social and literary context, and that a

⁵ See Burke, Peter. *A Social History of Knowledge: From Gutenberg to Diderot* (Cambridge: Polity Press, 2000).

⁶ Claude Gauvard, Alain Boureau, Robert Jacob and Charles de Miramon. “Les Normes” in *Les tendances actuelles de l’histoire du Moyen Âge en France et en Allemagne (Actes des colloques de Sèvres (1997) et Göttingen)*, ed. by Jean-Claude Schmitt and Otto Gerhard Oexle (Paris: Publications de la Sorbonne, 2002) 470.

⁷ Guenée, Bernard. *Tribunaux et gens de justice dans le bailliage de Senlis à la fin du Moyen Âge (vers 1330-vers 1550)* (Paris: Belles Lettres, 1963).

literary analysis of legal texts sheds light on this larger spectrum of meaning.⁸ This development of a new form of legal literature, such as the *coutumiers*, is necessarily connected to a change in thought and discourse. This study, then, will be largely examining these texts as an act of composition that occurred within a specific historical context, rather than as a form of law, to get more deeply at the type of knowledge that their authors aimed to produce and how this knowledge was then used by others.

LAY JURISTS

The ‘lay jurists’ examined in this study were comprised of a range of actors who were common actors in the lay courts and who had some degree of niche or specialized knowledge associated with those courts. They were active in practice as judges, lawyers, common litigants, agents or representatives of others. Their degree of education varied. Some were more educated and were either asked or decided on their own to address the rules and practices of the secular courts in a more conceptual manner. Some had a knowledge of Roman or canon law, but what distinguished them from Romanists and canonists was that their primary interest was writing about the customs of the lay courts and the use of what education they had in the service of these lay courts.

⁸ There is a vast amount of writing on the Law and Literature movement, *see for instance*: Cardozo, Benjamin N. "Law and Literature" *Yale Law Journal* 14 (1925) 699; White, James Boyd. *The Legal Imagination* (Chicago: University of Chicago Press, 1985); Weisberg, Richard. *Poethics and Other Strategies of Law and Literature* (New York: Columbia University Press, 1992); P. Brooks and P. Gewirtz, eds. *Law's Stories: Narratives and Rhetoric in the Law* (New Haven: Yale University Press, 1996); G. Binder and Robert Weisberg. *Literary Criticisms of Law* (Princeton, NJ: Princeton University Press, 2000); Ost, François. *Lettres et lois: le droit au miroir de la littérature* (Bruxelles: Publications des facultés universitaires Saint-Louis, 2001); and the classic criticism of Posner, Richard A. *Law and Literature: A Misunderstood Relation* (Cambridge: Mass.: Harvard University Press, 1988).

Only two authors of the thirteenth-century vernacular *coutumiers* are known while the others remained anonymous. This means that we do not know anything about the backgrounds, importance, education or activities of the latter outside of what we can glean from the texts themselves. These anonymous authors were also clearly generally involved in the activities of the lay courts. They explicitly associated themselves to the action of these courts and commonly referred to the cases they saw or correct procedures to follow, and must have been implicated in these courts in a significant way, whether as judges, pleaders, jury members and regular attendees.

The secular courts of thirteenth-century France have received some notable scholarly attention. Yvonne Bongert's masterful work on the evolution of the lay courts of the thirteenth century showed the shift from private justice and peace agreements to the restructuring of the judicial function and organization of the courts as legal organs.⁹ Hers remains the most balanced and comprehensive study of the lay courts, including both the judicial and extra judicial in her study. Esther Cohen's work should also be mentioned here, being notably valuable for approaching medieval law from a cultural standpoint and looking subjects such as ritual, animal trials and so on.¹⁰ Bernard Guenée's work on the tribunals of Senlis is in some ways a continuation of Bongert's study, covering the fourteenth till the sixteenth centuries, and provides an illuminating study of the social history of the daily life of the courts and how they were used by litigants and justices, as well the importance of conflicts of jurisdiction in this period.¹¹

⁹ Bongert, Yvonne. *Recherches sur les cours laïques du Xe au XIIIe siècle* (Paris: Éditions A. et J. Picard, 1949). The evolution of the latter by no means pronounced the extinction of the former.

¹⁰ Cohen, Esther. *The Crossroads of Justice: Law and Culture in Late Medieval France* (Leiden: E.J. Brill, 1993).

¹¹ Guenée, Bernard. *Tribunaux et gens de justice dans le baillage de Senlis à la fin du Moyen Age (vers 1380-1550)* (Paris: Publications de la Faculté des Lettres de Strasbourg, 1963).

The personnel of the lay courts has also received scholarly attention. Franklin J. Pegues has discussed the relationship between the monarchy and the lawyers, lawyers during the reigns of the last Capetians, Robert Fawtier has looked at jurists and legal officers during the reign of Philip the Fair, while Quentin Griffiths has notably expanded our knowledge of Pierre de Fontaines' career.¹² Philippe de Beaumanoir is by far the lay jurist who has been studied in the most detail, from his career to his *coutumiers*, to his family background and landholdings.¹³

The current strain of scholarship on the *coutumiers* looks at these texts as political statements to gage how they participated in the rhetorical and legal construction of state infrastructure. The *coutumiers*, then, are part of the background story of the evolution of modern state and its texts and institutions.¹⁴ The *coutumiers* were once thought to be bastions of folksy or aristocratic resistance against monarchy and Roman law. The pendulum has swung in the opposite direction in the last couple of decades and now they are more often seen in the context of the expansion of royal power. Some excellent studies have arisen out of this, notably Jacques Krynen and Albert Rigaudière's studies of state-building and construction of political power.¹⁵

¹² Pegues, Franklin J. *The Lawyers of the Last Capetians* (Princeton, N.J.: Princeton University Press, 1962)

¹³ The one work that brings them together is the recent dictionary of French jurists (Philippe Arabeyre et al, eds. *Dictionnaire historique des juristes français (XIIe - XXe siècle)* (Paris Presses Univ. de France 2008)); the most comprehensive study remains Pegues, Franklin J. *The Lawyers of the Last Capetians*. Princeton, N.J.: Princeton University Press, 1962; Philippe de Beaumanoir was studied extensively under the auspices of a CNRS conference (CNRS. *Actes du Colloque International Philippe de Beaumanoir et les Coutumes de Beauvaisis (1283-1983)* (Beauvais: G.E.M.O.B., 1984)). It was this study that established that there were two people where previous scholarship had seen only one : Philippe de Rémy who wrote vernacular tales and romances who was a *bailli* mid-thirteenth century, and Philippe de Beaumanoir his son who wrote the *Coutumes de Beauvaisis* and who flourished later in the century. There is now a very useful study of the works of both father and son, titled *Essays on the Poetic and Legal Writings of Philippe de Remy and his Son Philippe de Beaumanoir of Thirteenth-Century France*, ed. by Sarah-Grace Heller and Michelle Reichert (Lewiston: Edwin Mellen Press, 2001). Robert Jacob has also written several articles about him.

¹⁴ French legal history has tended to focus on texts and institutions, probably because modern Civil Law culture arose as a revolutionary reaction against the corruption of the individual legal functionaries and replaced them with these. This is unlike historical writing about the Common Law, for instance, which has long romanticized judges and lawyers and sees the people of the law as the glue of the common law.

¹⁵ Krynen, Jacques. *L'empire du roi, idées et croyances politiques en France XIIIe-XVe siècle* (Paris: Gallimard, 1993) ; Rigaudière, Albert. *Penser et construire l'État dans la France du Moyen Âge (XIIIe-XVe siècle)* (Paris: Comité pour l'histoire économique et financière (Ministère de l'Économie, des Finances et de l'Industrie), 2003).

They have more recently been said to be royal officers, in line with the recent monarchical interpretation of the texts.¹⁶ This is not completely accurate. Pierre de Fontaines was a royal justice at the time of composition, but Philippe de Beaumanoir only transitioned from a comital to a royal justice one year after the composition of his *coutumiers*. While the customs within were associated with the royal domain, the *Etablissements de Saint Louis* was first identified with the provostship of Paris and only came to be attributed to Louis IX later in the manuscript tradition. While the Parliament of Paris appears in the customs of Champagne, the royal connection explicitly drawn in the text was not to the King of France but to King Thibault, the Count of Champagne and King of Navarre, even though the county was firmly held by Philip the Fair when the text was composed. The royal sympathies attributed to them could equally have been a realistic description of the realities of jurisdictional relationships, which included the king and his officers. It seems more appropriate to speak of lay jurists who were imbedded in secular courts in the centres of power writing, some of whom became increasingly associated with the development of royal power.

Both known *coutumiers* authors were involved in the secular courts as judges, men of minor nobility who had risen by the pen rather than the sword. Pierre de Fontaines was a king's justice (*bailli/ seneschal* depending on the district) in several regions including Vermandois, member of the Parlement in Paris, and a personal counselor to King Louis IX.¹⁷ Philippe de Beaumanoir was the *bailli* of Beauvaisis (1279-83) for the Count of Clermont when he wrote his book, and the year after he entered the royal judicial service and became the *sénéchal* of Poitou (1284-87), the *sénéchal* of Saintonge (1287-88), the *bailli* of Vermandois (1289-91), the *bailli*

¹⁶ Gilissen, John. *La coutume (Typologie des sources du moyen âge occidental)* (Turnhout, Belgium: Brepols, 1982) 25.

¹⁷ Marnier, M.A.J. "Introduction" in *Le Conseil de Pierre de Fontaines*, ed. by M.A.J. Marnier (Paris: Joubert, 1846) I-X.

of Touraine (1291-2), and the *bailli* of Senlis (1292-6).¹⁸ All of the *coutumiers* authors clearly had some learning, as far as we know, none of the *coutumier* authors possessed the title of *doctor iuris*, but some were clearly familiar with Roman law.¹⁹

Both Philippe and Pierre were clearly at the top of the lay juridical hierarchy and their texts display a rather high degree of education; they were probably as elite as lay jurists could be in the second half of the thirteenth century. We cannot know how representative their careers were of those of the anonymous *coutumiers* authors. The exceptional nature of these two authors comes out in the simple fact that their texts are attributed to them and draw on the *auctoritas* of their authors—perhaps the other authors were less in a position to do so. At the same time, simply having the intellectual capital to conceive of and compose one of these texts would take both some learning and solid knowledge of the workings of the lay courts.

The *coutumiers* authors were a subgroup of the people the above authors have referred to as “lawyers” or “new men.” They were literate and conceptual thinkers, and their knowledge cannot have come purely from court experience but must also have been related to some form of written learning. This learning is widely ascribed to Roman law but, as Alain Boureau and Chris Wickham have shown, an extraordinary increase in advanced legal activity did not necessarily have to be predicated on the influence of Roman law.²⁰ Indeed, some *coutumiers* show no verifiable Roman law influence while others are heavily laden with it.²¹ However, they must

¹⁸ *Actes du Colloque International Philippe de Beaumanoir et les Coutumes de Beauvaisis (1283-1983)*. Beauvais: G.E.M.O.B., 1984) 28-32. One may wonder the extent to which justices like Beaumanoir, who presided over various different customary jurisdictions, acted to spread ideas of customary rules, or create a greater sense of uniformity.

¹⁹ Cohen, Esther. *The Crossroads of Justice: Law and Culture in Late Medieval France* (Leiden: E.J. Brill, 1993) 33. There is one reference to Pierre de Fontanes as “maistre” showing clearly that he was identified by his education as well as his judicial activities.

²⁰ Boureau, citing Wickham (Boureau, Alain. “Droit naturel et abstraction judiciaire: Hypothèse sur la nature du droit medieval” *Annales. Histoire, Sciences Sociales* 57, no.6 (2002) 1463-1488).

²¹ The *Coutumes d’Anjou et de Maine* and the *Coutumes de Champagne* are part of the former, while Pierre’s *Conseil a un ami* and Philippe de Beaumanoir’s *Coutumes de Beauvaisis* are part of the latter (see Chapter 4).

have had known something of sources such as legal documents, legislation, city customs, earlier *leges barbarorum*, Carolingian law or the canon-law texts and procedural manuals to be able to conceive of turning the practice of the secular courts into a body of rules.

The twelfth and thirteenth century explosion in writing, and especially writing in the vernacular permitted previously “local knowledge” to be shared, commented upon, and honed. This meant that lay people acquired an unprecedented access to legal ideas and an ability to exchange these through text, and then formed communities based on these texts that were similar to the heretic textual communities in the same period described by Brian Stock.²² As Marshall McLuhan noted, new media have social consequences and particularly new technologies facilitate “extensions of ourselves.”²³

Lay jurists have been evaluated as lawyers in lay courts, as agents of institutional development, and in virtue of their use of Roman law. There still remains much to discover about the conceptual world they inhabited and created, the cultural developments they built off of and were part of, and the communities they formed. The time is especially ripe for such a discussion now that the lay thinkers more generally are beginning to acquire a historiography of their own thanks to the work of Rosamund McKitterick, Adam Kosto, Warren Brown, Janet Nelson and Susan Reynolds.²⁴ The *coutumiers* offer an additional vantage point onto the development of lay

²² Stock, Brian. *The Implications of Literacy: Written Language and Models of Interpretations in the Eleventh and Twelfth Centuries* (Princeton NJ: Princeton University Press, 1983).

²³ Marshall McLuhan’s famously coined the dictum “the medium is the message.” Though he was writing about contemporary society (of the 1960s), the idea of “extending ourselves” remains a powerful one and helpful to understanding the development of writing and other technologies in the middle ages: “In a culture like ours, long accustomed to splitting and dividing all things as a means of control, it is sometimes a bit of a shock to be reminded that, in operational and practical fact, the medium is the message. This is merely to say that the personal and social consequences of any medium - that is, of any extension of ourselves - result from the new scale that is introduced into our affairs by each extension of ourselves, or by any new technology” (McLuhan, Marshall. *Understanding Media* (New York: Signet, 1964) 7).

²⁴ McKitterick, Rosamund. *The Uses of Literacy in Early Medieval Europe* (Cambridge: 1990); Kosto, Adam. “Laymen, Clerics, and Documentary Practices in the Early Middle Ages: The Example of Catalonia” *Speculum* 80, no.1 (2005) 45.

knowledge. For one, they give us insight on the creation of new lay, vernacular, spheres of knowledge. They also provide an understanding of how that knowledge was disseminated to other more and less sophisticated laymen. They further provide insight on how lay people came into contact with learned university knowledge and how they digested and used it. It is time to move away from the conversation that sees all legal thinking as a refraction of *ius commune* in order to see what forms of lay thinking, though connected, developed a world of their own.

WRITTEN CUSTOM

The place of custom in the legal history of the West has received some notable attention lately.²⁵ Generally, these studies have been preoccupied with questions about how custom fits into the sphere of law—when and how the term ‘custom’ changed from undifferentiated norm to

²⁵ See for instance, Bederman, David J. *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2010); Per Anderson and Mia Münster-Swendsen, eds. *Custom: The Development and Use of a Legal Concept in the Middle Ages* (Copenhagen: DJØF Publishing, 2009); Lemesle, Bruno. *Conflits et justice au Moyen Âge: Normes, loi et résolution des conflits en Anjou aux Xie et XIIIe siècles* (Paris: Presses Universitaires de France, 2008); Amanda Perreau-Saussine and James Bernard Murphy, eds. *The Nature of Customary Law* (Cambridge: Cambridge University Press, 2007); Gilissen, John. *La Coutume* (Turnhout: Brepols, 1982); *La Coutume = Custom*, Vol.II Europe occidentale médiévale et moderne (*Recueils de la Société Jean Bodin pour l'histoire comparative des institutions*) (Brussels: De Boeck, 1992); Van Dievoet, Guido. *Les coutumiers, les styles, les formulaires et les “artes notariae”* (Turnhout: Brepols, 1986); Jacob, Robert. “Les coutumiers du XIIIe siècle ont-ils connu la coutume?” in *La coutume au village dans l'Europe médiévale et moderne*, M. Mousnier and J. Poumarède, eds. (Toulouse: Presses Universitaires du Mirail, 2008); Cheyette, Fredric L. “Custom, Case Law, and Medieval ‘Constitutionalism’: A Re-Examination” *Political Science Quarterly* 78, no.3 (1963) 362-390; Ourliac, Paul “Législation, coutumes et coutumiers au temps de Philippe Auguste” *La France de Philippe Auguste—Le temps des mutations (Colloques Internationaux CNRS n.602)* (Paris: CNRS, 1980) 471-487; Ourliac, Paul “Réflexions sur l'origine de la coutume” *Les Pays de Garonne vers l'an mil* (Toulous: Privat, 1993) Guillot, Olivier. “*Consuetudines, consuetudo*: Quelques remarques sur l'apparition de ces termes dans les sources françaises des premiers Capétiens (à l'exception du Midi)” *Mémoires de la Société pour l'Histoire du Droit et des Institutions des anciens pays bourguignons, comtois et romands* 40 (1983) 21-47.

juridical norm, when it began to be used in a legal sense and become binding, and whether it was something that was pre-law, a “primitive” or “subordinate” source of law.²⁶

This study aims to add to those by examining the culture of custom and how this culture is affected by new ways of thinking and new technologies. What happens to custom when it is written, once it becomes a textual practice and acquires a textual tradition? The relationship between custom and law must be more complex than implied by the narrative of custom as a mirror onto society, or as a pure form of communal dispute-resolution practice that is fixed in writing and eventually becomes law. Rather, the composition of custom was part of a conscious and self-confident juristic project that privileged the rhetoric of custom over other forms of expression of legal rules in the secular courts of the twelfth and thirteenth centuries.

The *coutumiers* lie at the cusp of intense cultural changes that saw the formalization of lay dispute-resolution practices into a body of rules that was framed in written text. Developing literacy and increasing production of written record has received much attention of late, where writing is portrayed as associated with fixity and rigidity: “Without written records, forms of words are unlikely to be fixed, and without some form of publication, definitions and decisions cannot become authoritative. Unwritten, customary law therefore cannot be rigid.”²⁷ This equation of the written with rigidity, formalism or petrification runs through the most important work on the transition from oral to written by Jack Goody, M.T. Clanchy and Walter Ong.²⁸ . Writing seems associated with a sort of self-expulsion from the Garden, emblematic of a

²⁶ See Bederman’s discussion of different ideas about custom, especially the anthropological and the positivist, and how these developed over the last century (Bederman, 3-15). See also H.L.A. Hart’s position on custom to get a general understand of the view of custom from the perspective of legal positivism (Hart, H.L.A. *The Concept of Law* (Oxford: Oxford University Press, 1961).

²⁷ Reynolds, *Kingdoms and Communities*, 14.

²⁸ Notably in Clanchy, *From Memory to Written Record: England 1066-1307* (Cambridge, Mass: Harvard University Press, 1979); Goody, Jack. *The Logic of Writing and the Organisation of Society* (Cambridge, Cambridge University Press, 1986); Ong, Walter J. *Orality and Literacy: The Technologizing of the Word* (London: Routledge, 1988).

beaurocratic modernity that replaced dynamism and creativity with a superstructure of form and paper.

This study will argue for the continued dynamism of customary legal culture just as it was beginning to be textualized. Medieval lay jurists constructed custom and shaped its contours. They did this by imagining and crafting a body of literature devoted to the customs of the secular courts, and by moving custom from the unconscious and reflexive to the reflective, composed and theorized. As we will see in the following chapters, the *coutumiers* were composite works and the writing custom consisted not only in a recording of tradition, but a sort of invented tradition *à la* Eric Hobsbawm and Terrence Ranger, that might in this case be better characterized as a ‘constructed tradition.’²⁹ The creativity involved in the *coutumier* project went beyond the original authors. The manuscript tradition of the *coutumiers* generally shows a significant level of textual variation that involved considerable rearrangement, excising and rewriting of the text. Paul Zumthor and Bernard Cerquiglini have examined this variation as an aspect of vernacular literature and this must be brought to our understanding of vernacular legal literature as well.³⁰ The variation between manuscripts provides important lessons about the construction and transmission of knowledge as well as about the juridical communities that formed around these texts that all evince the continued conscious development of a living customary law which was not, as has been assumed, petrified and fossilized with written text.

²⁹ While there are indeed many similarities, written custom does have a closer relationship with the past than the appearance practically *ex nihilo* of kilts in a national tradition.

³⁰ Zumthor, Paul. *Essai de poétique médiévale* (Paris: Du Seuil, 1972); Cerquiglini, Bernard. *In Praise of the Variant: A Critical History of Philology*, trans. by Betsy Wing (Baltimore: Johns Hopkins University Press, 1999).

LAY LEARNING

An earlier literature had marginalized the study of Roman law, confining it to medieval ivory towers.³¹ The birth of the European Union and the push to unify European law placed Roman and canon law, as the components of the medieval *ius commune*, back to the cutting edge of legal scholarship.³² Since then, legal scholarship placed the Roman law and its scholars at the center of and the impetus for legal development of the medieval period. Ken Pennington has shown that thinking of the *ius commune* as “learned” or “bookish” law, in order to differentiate it from real or practical law, was flawed and that Roman and canon law thinking infiltrated the practical realm.³³ That is absolutely right and uncontested here. Indeed, Roman law influence can be seen in many—though not all—of the *coutumiers* in various ways. What is contested here is a literature that has held that the *coutumiers* are mediocre attempts to emulate the Roman law while some have made an even larger claim that, in writing about custom, the authors of texts like the *coutumiers* were signifying their belonging to the *ius commune* and to a sub-branch of Roman law composed of custom.³⁴

³¹ See generally Giordanengo, Gerard. “Les droit savants au Moyen Âge: Textes et doctrines, la recherche en France depuis 1968” *Bibliothèque de l'école des chartes* 148, no.2 (1990).

³² See the general histories of European law that flourish in the 1990s that sought to bring together previously disparate national legal histories and provide a historical continuum that led to contemporary legal harmonization, such as Bellomo, Manlio. *The Common Legal Past of Europe*, trans. by Lydia G. Cochrane (Washington, D.C.: Catholic University of America Press, 1995); Van Caenegem, R.C. *An Historical Introduction to Private Law*, trans. by D.E.L. Johnston. Cambridge: Cambridge University Press, 1992.

³³ Pennington, Kenneth. “Learned Law, *Droit Savant*, *Gelehrtes Recht*: The Tyranny of a Concept” *Rivista internazionale di diritto commune* 5 (1994) 197ff.

³⁴ Karl Koreschell made this argument in the 1970s (Karl Koreschell in Teuscher, Simon. *Lord's Rights and Peasant Stories: Writing and the Formation of Tradition in the Later Middle Ages*, trans. by Philip Grace (Philadelphia: University of Pennsylvania Press, 2012) 7. Robert Jacob has also made the argument more recently that the use of the term ‘custom’ in the *coutumiers* and the manner in which the category is defined comes out of the popularization of Roman categories (see Jacob, Robert. “Les coutumiers du XIIIe siècle ont-ils connu la coutume?” *La coutume au village dans l'Europe médiévale et moderne. Actes des XXes Journées internationales d'Histoire de l'abbaye de Flaran, septembre 1998*, ed. by Mireille Mousnier and Jacques Poumarede (Toulouse: Presses Universitaires du Mirail, 2001)). See also the work of Jacques Krynen and Gerard Giordanengo.

It must be emphasized, then, that several factors created the conditions for the lay jurists' move to write law in the vernacular in the mid-thirteenth century: a general wave of interest in law that manifested itself as much in secular administration as in university study, the increasing specialization of the lay courts and their growing competition with ecclesiastical courts, the development of vernacular literature that began in earnest in the twelfth century, and a growing notion that the written was an important part of the culture of the secular courts. The idea that the texts arose from a sense of inferiority or competition with Roman law, or an interest in adapting Roman legal forms in the service of royal power, rests on the flawed assumption that the primary gambit of these texts was their relationship with Roman law. Roman law was clearly important but the time has come to also evaluate other factors that propelled the development of secular law in the thirteenth century.

This study examines other cultural factors that propelled the writing of custom in the first two chapters, and then goes into a detailed study of the specific culture of erudition captured in the *coutumiers*. We do not know exactly how the *coutumiers* authors were educated, where or from whom they learned their knowledge of law and of legal writing. However, we can gain at least limited access to their intellectual world by examining the citations they used in their texts and examining the manner in which these were used.

Citations of other works in the *coutumiers* provide a glimpse onto what the authors knew, or, what they wanted to audience to know they know. They tell us a little about the reading these authors did and what categories of knowing and authority they felt were relevant to the secular courts. This will recognize the literary movement associated with the lay courts and return some agency to lay thinkers, who made conscious decisions about how they composed their texts and tagged and used different forms of authority. It will also give us a broader perspective onto what

constituted learning in the secular courts and, within this general spectrum of learning, where Roman law fit and how was it used.

In the interest of examining this lay legal culture more deeply, we will also look at the specific lay practices that developed out of the textualization of custom. In a medieval version of Alan Watson's 'legal transplant,'³⁵ it immediately became common practice amongst the *coutumier* authors to copy entire portions of earlier customary texts, often with other regional labels, in the composition of their own *coutumier*. One of the consequences of this was a community that was joined by text and the greater possibility of exchange of ideas. The implications of the *coutumiers* as vehicles of communication, and the effects of this mobility on the regional boundaries commonly associated with customary law will be examined in the final chapter. This will show the key role of writing in legal development and examine more closely how it affected customary legal culture. Lay jurists combined a little education with a lot of practical experience and constructed a new type of legal literature and a new type of vernacular knowledge, and must be placed in their proper place in the intellectual history of law.

DEFINING THE CORPUS

The *coutumiers* appeared in the twelfth century and flourished in the thirteenth. For centuries, dispute resolution had been local, communal, traditional, and largely unwritten. While kings did promulgate laws, the realm of the 'legal' was occupied by the unwritten and communal where communities resolved their differences in the traditional manner—by negotiation,

³⁵ This was the notion that laws could more from place to place, which Alan Watson was the first to discuss though his analysis has been questioned (Watson, Alan. *Legal Transplants: An Approach to Comparative Law*, 2nd ed (Athens, GA: University of Georgia Press, 1993).

arbitration, community judgment or the decision of the local lord. They may have made some reference to ‘how things had been done in the past’ but did not yet have a conceptualized body of rules.

In the early twelfth century, in addition to being a practice in dispute resolution, law also became an academic pursuit. The first law schools appeared around 1100 in Bologna. It was Irnerius’ method—close analysis of Justinian’s *Corpus Iuris Civilis*—that made the school famous.³⁶ This model provided the prototype for subsequent law schools and came to be used in schools of canon law for the study of the *Decretum*.³⁷ Law schools mushroomed across Europe in the thirteenth century, and students used the travel networks honed by international commerce and pilgrimage routes to travel to far-flung locations to study the intricacies of Justinian’s codification.³⁸

Unlike canon law, however, there was no court that applied just Roman law. Lay courts resolved disputes based on customary practice which, in contrast to its august university rival, was unwritten. This began to change mid-twelfth century, texts describing various sorts of secular law began to appear. The most expansive was the move to write city customs, both in Latin and the French vernacular. Latin texts of laws and customs appeared at a similar time in connection to Norman conquest and settlement: Roger II has *Assises* written around 1140 for

³⁶ The language of instruction was Latin. Law was taught by dialectical methods, with virtually no reference to things external to the text (such as history or philosophy). According to Henry of Susa (ca. 1253), the professor’s lecture on a legal text comprised a summary of the text, a reading out of the text and explaining the difficulties, showing parallels with other legal texts, quoting arguments against it, disposing of those arguments via *distinctiones*, answering questions arising from the text and pointing out noteworthy topics and ideas associated (García y García, Antonio. “The Faculties of Law” in *A History of the University in Europe, Vol. I: Universities in the Middle Ages*, ed. by Hilde de Ridder-Symoens (Cambridge: Cambridge University Press, 1992) 398).

³⁷ Verger, Jacques. “The Universities and Scholasticism” in *The New Cambridge Medieval History, Vol. 5 (c.1198-1300)*, ed. by David Abulafia (Cambridge: Cambridge University Press, 1999) 257.

³⁸ In France, the principal faculties of law were those of Orléans, Montpellier, Toulouse and a little later Avignon. While Paris had a great reputation for canon law, the study of civil law had been discontinued there since pope Honorius III’s prohibition in 1219. A preference for the regional university (or the nearest university) became the general norm only in the late fourteenth century, and markedly in the fifteenth century when various political and ecclesiastical units tried to found a *studium* so that its citizens should study there instead of abroad.

Sicily, and Glanvill's *Tractatus de legibus et consuetudinibus regni Angliae* appeared in post-conquest England in 1180, and the *Très Ancien Coutumier de Normandie* (also in Latin) was written between 1199 and 1204, around the time that Philip Augustus was 'reconquering' Normandy from the Angevins.

When the northern French *coutumiers* flowered in earnest in the mid-thirteenth century onward, they did so in the vernacular and originated in various areas of Northern France.³⁹ Legal thinking was moving away from an audience which read and thought in Latin—this burst of lay legal literature in the vernacular came from new authors, for a new audience, and for a new purpose. While Latin and vernacular coexisted in court record, the vernacular almost immediately came to dominate the writing of custom. The few earlier Latin texts were quickly translated into the vernacular, some even into both prose and verse.⁴⁰ The vernacular had reached maturity by the thirteenth century.⁴¹ It was already the language of romances, plays, stories of saints' miracles, fables, allegories and various genres of song and poetry. Now it was bringing

³⁹ The vernacular first appears in charters in the communal cities in Northern France around 1200, and by the dawn of the fourteenth century it is generally the language of the cities and feudal lords of Northern France (Serge Lusignan, *La langue des rois au Moyen Âge, Le Français en France et en Angleterre* (Paris, 2004), pp. 12, 91). The Parlement in Paris is slower to pass from Latin to vernacular and seems to have vacillated between linguistic choices, but otherwise in the *pays coutumiers* the vernacular mostly supplanted Latin as the juridical language of choice by the 1300s (*Ibid.*, p. 92). Normandy remained "the last bastion of Latin" through till the end of the thirteenth century (*Ibid.*, pp. 47, 92). This perhaps explains why the two earliest *coutumiers*, the *Statuta et Consuetudines Normannie* (between 1199 and 1294) and the *Summa de legibus Normannie* (ca. 1235) both from Normandy, were the only northern French *coutumiers* ever written in Latin and even then they were almost immediately translated into French.

⁴⁰ Namely, *The Treatise on the Laws and Customs of the Realm of England commonly called Glanvill* (c. 1187) the *Très ancien coutumier de Normandie* (c. 1200) and the *Summa de Legibus Normannie* (c. 1235). All of these were fairly swiftly translated into French. For text commonly known as Glanvill as the first of the "French *coutumiers*," see Paul Hyams, 'The Common Law and the French Connection', *Proceedings of the Battle Conference* (1981): 77-86.

⁴¹ While Latin was an international language, it is also important to realize that the vernacular languages were not necessarily linked to political or geographic areas, and it was only after about 1300 that they start bearing connotations of national identity (Smith, Colin C. "The Vernacular" in *The New Cambridge Medieval History*, Vol. 5 (c.1198-1300), ed. by David Abulafia (Cambridge: Cambridge University Press, 1999) 77. Actually, the geographical range of medieval French literature extended throughout modern-day France, England, Flanders, Sicily, Cyprus, the Levant (during the crusading era) and even parts of central Europe ("Introduction" in Simon Gaunt and Sarah Kay, eds. *The Cambridge Companion to Medieval French Literature* (Cambridge: Cambridge University Press, 2008) 3).

together the practical world of dispute resolution and the conceptual world of legal ideas together.

Record-keepers had dabbled in the vernacular before the authors of the vernacular *coutumiers* began writing around the mid-thirteenth century, but they did not embrace the vernacular wholesale as immediately as the *coutumiers* authors did. This is what made the *coutumiers*' authors shift to French so remarkable.⁴² The writing of custom began in earnest in the second half of the thirteenth century, when a long string of *coutumiers* appear in the vernacular: Pierre de Fontaines' *Conseil à un ami* (1253), the *Livre de justice et de plet* (ca. 1260), Philip of Novara's *Livre* (early 1260s), John of Ibelin's *Assizes de Jerusalem* (ca. 1265), the *Établissements de Saint Louis* (1272/3), Philippe de Beaumanoir's *Coutumes de Beauvaisis* (1283), and the *Drois et de costumes de Champegne* and (both at the end of the thirteenth century) to name a few.⁴³ The *coutumiers* thus joined the ranks of types of knowledge that were developed and expressed primarily in the vernacular.

Despite the occasional Latin in a couple of the texts, the *coutumiers* authors' blanket adoption of French from the mid thirteenth-century onward said something about the nature of the ideas they were trafficking. While the range of learning of the authors varied from rather practical to quite learned, the audience was consistently and unambiguously one that thought and functioned in the vernacular. The audience was not the man of learning but the court practitioner and the layman who needed to represent himself in court and the aim of the texts was not only to

⁴² And allied them more closely to the writing of city customs that saw a similar shift than with the systematic study of Roman law of the universities.

⁴³ As far as I have been able to find, the only *coutumiers* in Latin in the North of France was mid-century Norman *Summa de Legibus*, and its kindred on the other side of the channel, Bracton's *De legibus et consuetudinibus Angliae*.

present a body of rules but also to teach the audience how to think in a juridical manner, namely, how to think within a body of coherent rules proper to the particular form they were in.

Most of the rules within relate to matters of jurisdiction and court procedure, and often specifically address barons, vassals, knights and *gentis hom*, gentlemen.⁴⁴ The *coutumiers* seem to be essentially upper-class documents—written and bound up in expensive manuscripts—that addressed rules of general behavior that generally affected the nobility.⁴⁵ This, perhaps, helps to understand the extent to which custom could travel with the nobility, be disseminated in their courts and be imposed onto people with radically different customs and court practices, for instance in England, Sicily and the crusader states in the Levant.

The *coutumiers* are usually defined as private works that set the customs and usages of a region in writing.⁴⁶ The conventional definition of these texts still sees them within a narrative of codes, a term sometimes used to describe these customary texts.⁴⁷ Yet even those who term these text codes concede the texts did not act as codes. Esther Cohen, for instance, indicates that “customal authors considered their work not legal texts, but manuals for laymen. They were to

⁴⁴ Thirteenth century France was a jurisdictional smorgasbord. Kings, barons, lords, cities, and the Church each had their own jurisdictions. In the *coutumiers*, jurisdiction features in place, people and prerogatives—the texts are largely concerned with jurisdiction *over* people or aspects of justice, rather than helping people know which jurisdiction they are *under*. Most rules that deal with ‘commoners’ (*hom costumiers*, from *costumes*, or customary dues, or *vilain*) deal with them in relation to their lords. The exceptions seem to relate to inheritance (*see* Book I.136-9, 141), even though “according to the custom of secular courts, ‘a commoner’s purse is his patrimony’” (Book I.136).

⁴⁵ For instance, Book II opens with the following words: “Here onwards begins: On justice, on law, and on the commandments of law, and on the *order of knighthood*, and on arresting offenders in the execution of the crime, and the Practice of the Châtelet in Orléans in the baron’s court, and on the punishment of offenders” (“Ci emprés commence De joutise, et de droit, et des commandemens de droit, et de l’office de la chevalrie, et de prendre malfeitors en present fait, et de l’Uasge dou Chatelet d’Orliens en cort de baronnie, et de punier malfeitors”) (Book II.1). Book I of the *Établissements* opens with the following words: “Here begin the establishments of the king of France which the provosts of Paris and those of the kingdom uphold in their pleas and use in common accord” (“Ci comancement li establissement le roi de France les kiex li provos de Paris et cil dou roiaume tiegnent à leur plais et usent communement”) (Book I.1) (*See* “comun” in Greimas, Algirdas Julien. *Dictionnaire de l’ancien français* (Paris: Larousse, 2004) 119). Book one closes with “Ci fenist li Usages de Touraine et d’Anjou.”

⁴⁶ Van Dievoet, Guido. *Les coutumiers, les styles, les formulaires et les ‘artes notariae’* (Turnhout, Belgium: Brepols, 1986) 13. *See also* Gilissen and Cohen.

⁴⁷ Cohen, 29.

be of use to readers faced with litigation, unfamiliar with the complexities of courtroom behavior and strategies.”⁴⁸

The content of the customary texts does indeed focus on practice in lay courts and were addressed to laymen but this does not mean they were not legal texts. The traditional definition implies that the main features of the *coutumiers* are that they are unofficial, descriptive works whose significance is regionally delimited. It comes from the vantage point of the intellectual history of law and is tacitly comparative, where the private custom of a region is the lesser precursor to the official or public law of the modern state. Saying the *coutumiers* are not “legal” or calling them “private” texts is a result of the anachronistic application of the positivist idea that authority must be predicated on official promulgation and state enforcement. Authority could be found in many places outside of that in the Middle Ages, an arguably today as well.

The language of “setting in writing” also implies a comprehensive descriptive project that leaves commentators disappointed when the *coutumiers* rules do not necessarily match up to practice, or when rules often used in practice are missing in these texts. As we shall see, the regional language is also partially deceptive. The *coutumiers* should instead be defined as juridical texts constructing the customs and procedures of the lay courts. This definition seems more useful because instead of casting the texts as primitive precursors, it frames the *coutumiers* project in terms of what their authors seemed to aim to do and actually did. It is hoped that the proposed redefinition gives the texts and their authors their rightful place in legal and intellectual history by placing them at the vanguard of the birth of an intellectual lay legal culture— one devoted to the secular courts and more accessible because it thought and wrote in the

⁴⁸ *Ibid.*, 31.

vernacular— in a manner that accounts for the remarkable creativity and intellectual ebullience of their authors.

In the second half of the thirteenth century, the texts that modern scholars group under the term ‘*coutumiers*’ are variously called *livre* (book), *conseil* (counsel), *assize* (sitting in judgment), *établissements* (establishment), *coutumes* (customs), *usages* (usages), or *drois* (laws or rights). It was later that the term *coutumiers* appeared to describe the form of legal literature that described the customs of the lay courts. These texts present the first instantiation of lay legal practitioners attempting to think of the customs of the lay courts as a coherent mass forming a body of rules and to articulate them in the vernacular. These different appellations are one good place to see the range of thinking within which the court process could be thought.

The *coutumiers* did not appear *ab nihilo*. They borrowed elements from various sorts of earlier writing—from charters, to *ordines iudicarii*, to literary narratives of dispute—but there was no one earlier model for *coutumiers* authors to use and no tradition of discussing customs framed as bodies of rules. The *coutumiers* authors, then, were true Levi-Straussian *bricoleurs*.⁴⁹ They brought together some forms of earlier writing with their own court experience and with their own take on practice, and composed texts devoted to the customs and procedures of the lay courts. If they did not “invent tradition,” they chose selectively and gave it a form that was different from earlier ones and foundational for future legal thinking and writing.

It is not surprising that the first texts treating a new category of thought would not yet have the uniformity to properly formally constitute a coherent genre. While they have thematic unity in that they all discuss the customs and procedures of the lay courts and should be discussed as a group because of this, their authors did approach their subject matter in

⁴⁹ Lévi-Strauss, Claude. *The Savage Mind* (Chicago: University of Chicago Press, 1968).

different—though overlapping—ways. These different approaches are usually evaluated as differences in learning, especially in Roman legal learning. Undoubtedly, the use of Roman law in these texts is highly variable and this says something about lay jurists. However, the variation in approach should also be seen more broadly as part of the early stage of the formation of a new body of knowledge.

This variation shows the possible range of thinking and different ways in which this subject matter could be approached. This lack of uniformity was a testament to the ebullience and cultural foment that grew out of the budding professionalization of court practice and the nascent use of French as a legal language. Lay jurists were experimenting with how to write the customs of the lay courts, of course, within certain boundaries. Several *coutumiers* authors were clearly acquainted with earlier *coutumiers*, but none of them used the structure and substance of any one earlier *coutumiers* as a template—even the *Coutumier d'Artois*, a text which copied significant portions from two earlier *coutumiers*, did not simply conform to the presentation of custom in these earlier texts. While the *coutumiers* authors constituted a community that clearly shared and borrowed from each other's texts and approaches, there was remarkable creative and innovative energy behind the conceptualization and writing of each text. It was only later, with the official redactions of the fifteenth and sixteenth centuries, that form and substance combined in a more coherent manner to form a genre.

HISTORIOGRAPHIC APERÇU

It is important to understand the post-medieval life of these texts because it has had a large role in shaping how we understand them and, occasionally, how current contemporary

debates still respond to them. While *coutumiers* begin to be written in the thirteenth century, the legal life of these texts only ended with the French Revolution.⁵⁰

It was only in the mid-fifteenth century, in the aftermath of the Hundred Years War, that centralized authority became interested in taking substantial control of written customary law. In the ordinance of Montils-lès-Tours of April 1453, Charles VII ordered the official redaction of the customs of each region of France in order to “eliminate variation and contradiction,” a goal that recalled the impetus for codification of the late-antique Justinianic corpus.⁵¹ This act carried several messages: the king held the kingdom following the end of the Hundred Years War, he was now turning his attention to the traditional royal duty of delivering justice, and while the regions could keep their local customs, these had proven divisive and were coming under royal control. It took another century and more orders from several kings to get the customs of the various regions in writing.⁵²

The slow movement toward these official redactions precipitated the great sixteenth-century debates between ‘Romanists’ and ‘Germanists’ over the soul of French law that occupied the great jurists, parliamentarians and potentates of the day. The ‘Romanist’ jurists, notably Pierre Lizet, Jean Bouhier, and Jacques Cujas, argued that the provenance and “spirit” of French

⁵⁰ This is true for France itself. In French colonies and former French colonies their life often extended well beyond that.

⁵¹ “voulans abrégier les procez et litiges d'entre nos subjects et les relever de mises et despens et oster toutes matières de variations et contrariétéz” (Art. 125, ordinance of Montils-lès-Tours (1454) in Anette Smedley-Weill and Simone Geoffroy-Poisson. “Les assemblées d'états et la mise en forme du droit: Comparaisons et analyses formelles des coutumes rédigées et réformées d'Auxerre, de Sens et de Touraine” 26 *Les Cahiers du Centre de Recherches Historiques* (2001) 6 (online: <http://ccrh.revues.org/index1592.html>)). As Smedley-Weill and Geoffroy-Poisson noted, the commissioners appointed to draft the customs were Parliamentarians, local officials of the *bailli*, not yeoman farmers (*Ibid.*, 14). For more on this process, see also Dawson, J.P. ‘The Codification of the French Customs,’ 38. *Michigan Law Review* 765-800 (1940); Grinberg, Martine. *Écrire les coutumes: Les droits seigneuriaux en France* (Paris: Presse Universitaires de France, 2006) 63ff.

⁵² For more on the process of redaction of these official *coutumiers*, see Grinberg, Martine. *Écrire le coutumes. Les droits seigneuriaux en France* (Paris: PUF, 2006).

custom was actually Roman and that Roman law was “common law.”⁵³ The ‘Germanist’ jurists, most famously Christophe de Thou and Charles Dumoulin, argued that French custom and law was “our common law.”⁵⁴ Dumoulin saw the *Coutume de Paris* as the dominant one in France and saw the other French *coutumes* as being in “concord and union,” which actually served as the theoretical basis for de Thou’s reform of custom.⁵⁵ These were not purely intellectual legal debates, and as Jean Louis Thireau noted, François Hotman’s *Antitribonian* (1603)—quite the invective against the Roman jurist that the title suggests—shows how anti-Romanism triangulated between the juridical, political and religious.⁵⁶ Later in the seventeenth century, as Donald Kelley has shown, custom came to be designated as “second nature” in contrast to the “reason” of Roman law.⁵⁷ This was especially powerful because the language of reason was gaining primacy as the discourse of authority with the flourishing scientific revolution and custom increasingly became associated with a confused primitive feudal culture, associated with a corrupt judiciary that by the end of the eighteenth century was one of the many contributing factors to Revolution.

These debates continued until the beginning of the nineteenth century, when the French civil code and its appealing mythology of modernity replaced a tangled barbarous medieval

⁵³ Kelley, Donald. ““Second Nature”: The Idea of Custom in European Law, Society and Culture” in *The Transmission of Culture in Early Modern Europe*, ed. by Anthony Grafton and Ann Blair (Philadelphia: University of Pennsylvania Press, 1998) 150. Lizet was president of the Parlement of Paris, and Bouhier was president of the Parlement of Burgundy (*Ibid.*, 150). Jacques Cujas was an eminent scholar and professor of Roman law of an international European reputation, was a member of the Parlement de Grenoble, courted by Pope Gregory XIII to teach at Bologna, he ended his life as a professor at Bourges.

⁵⁴ *Ibid.*, 150-1. Christophe de Thou was a prominent jurist, magistrate, and the president of the Parlement of Paris. Charles Dumoulin was an advocate before the Parlement of Paris, vastly respected, and author of one of the most important commentaries on the *Coutume de Paris*.

⁵⁵ *Ibid.*, 151.

⁵⁶ Thireau, Jean Louis. *Charles Du Moulin (1500-1566)*, Vol.1 (Paris: Droz, 1980) 95. Legal Romanism and Germanism, especially around the time of the Wars of Religion, thus meant something much wider than a preference for a certain set of base norms.

⁵⁷ Kelley, Donald. ““Second Nature”: The Idea of Custom in European Law, Society and Culture” in *The Transmission of Culture in Early Modern Europe*, ed. by Anthony Grafton and Ann Blair (Philadelphia: University of Pennsylvania Press, 1998) 153.

customary legal past with lofty principles of equality, rationality and order.⁵⁸ The reaction against ‘custom’ was so strong that the commission that composed the *Code Civil* entirely avoided the term ‘custom’ and used the term ‘usage’ when the concept was necessary.⁵⁹ At the same time, the nineteenth-century romanticism that followed soon mythologized texts like the *coutumiers* as a form of folklore— a folk-law endowed with the spirit of its people, what Friedrich Carl von Savigny labeled *volksgeist*, composed of autochthonous primordial customs.⁶⁰ It was during this period that most of the critical editions of the French *coutumiers* were put together, at a similar time that Jacob Grimm was collecting German *rechtsbucher* and *weistümer*.⁶¹

This fifteenth to nineteenth century history of the *coutumiers*, as well as the ebbs and flows of modern reactions to it, have shaped modern historiography in some fundamental ways. They have also affected our analytical categories and the questions we ask of these texts. The traditional manner in which medieval French law is described is through the distinction between the North of France as the *pays de droit coutumier* where reigned oral customary law and the South of France as *pays de droit écrit* where law was written and Roman. The occasional opposition between Roman and customary appears in medieval texts, but the categories were porous and bled into each other in all sorts of ways. This distinction only gained substantive and rhetorical currency much later, and there is general agreement that throughout the middle ages

⁵⁸ Of course, despite the Revolutionary rhetoric surrounding it, the French Code was composed by a rather conservative committee of *ancien régime* jurists and in many ways reinforced the preceding legal order (*see, for instance*, Halperin, J.-L. *L'impossible Code Civil*. Paris: Presses Universitaires de France, 1992; Gordley, James. “Myths of the French Civil Code” 42(3) *The American Journal of Comparative Law* (1994) 459-505).

⁵⁹ Hilaire, Jean. *La vie du droit* (Paris: Presses Universitaires de France, 1995).

⁶⁰ For more on this *see* Von Savigny, Friedrich Karl. *The Vocation of Our Age for Legislation and Jurisprudence*, trans. Abraham Hayward (London: Littlewood & Co., 1831).

⁶¹ For more on Grimm and the effect of his legacy for our contemporary understanding of late medieval *weistümer*, *see* Teuscher, Simon. *Lord's Rights and Peasant Stories: Writing and the Formation of Tradition in the Later Middle Ages*, trans. by Philip Grace (Philadelphia: University of Pennsylvania Press, 2012) 3ff.

the Northern French *coutumes* were influenced by Roman law, and that both custom and orality continued to play a major role in dispute resolution in the South all the way into the eighteenth century.⁶²

Our understanding of custom and our definition of the *coutumiers* comes directly from this later history and modern conceptions of legality, for instance the description of the texts as private and local. Scholars have, for instance, looked in detail at what the texts say about custom as a source of law, or have evaluated the extent of each author's erudition based on the quantity and quality of their use of Roman law. The relationship between custom and Roman law is generally seen as antagonistic, where custom is painted as trying to 'resist' learned law which is ever on the track of 'penetration,' 'encroachment' or 'reception.'⁶³ As Emanuele Conte has noted, our habit to think of this relationship as "a confrontation between popular institutions and a superstructure" is perpetuated by many legal historians who see Roman law as foreign, closed and hostile to everyday life.⁶⁴ At the same time, legal historians interested in the dissemination of Roman law tend to overlook other cultural and social currents that were feeding into legal change.

The *coutumiers* themselves have been evaluated in the context of the long history of the development of law from the late Antique codifications, to the "vulgar" Roman law of the *leges*

⁶² Claude Gauvard, Alain Boureau, Robert Jacob and Charles de Miramon. "Les Normes" in *Les tendances actuelles de l'histoire du Moyen Âge en France et en Allemagne (Actes des colloques de Sèvres (1997) et Göttingen)*, ed. by Jean-Claude Schmitt and Otto Gerhard Oexle (Paris: Publications de la Sorbonne, 2002) 470. Doubt about this division was already appearing in the works of André Gouron, Jean Hilaire, Paul Ourliac and others. Despite this twenty-year old consensus, the *pays de coutumes* and the *pays de droit écrit* distinction remains a very strong presence in any writing medieval French law. The current study focuses on the Northern French *coutumiers* because they form a group because they were written in a new legal-literary language, within a short period of time, and the geographic proximity speaks to some influence they had on each other.

⁶³ See Chapter 4.

⁶⁴ Conte, Emanuele. "Roman Law vs Custom in a Changing Society: Italy in the Twelfth and Thirteenth Centuries" in *Custom: The Development and Use of a Legal Concept in the Middle Ages* (Copenhagen: DJØF Publishing, 2009) 37. See also Pennington, Kenneth. "Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept" *Rivista internazionale di diritto commune* 5 (1994) 197-215.

barbarorum, to the *coutumiers*, followed by “official” state-sanctioned *coutumiers*, all of which culminated with the modern *Code Civil* in 1804.⁶⁵ Modern scholars have thus downplayed the authority of the *coutumiers* because they consider them ‘private’ works within the continuum of code-like books and not official redactions, works whose use in practice was neither sanctioned nor enforced and that lacked the authority of officially enacted codes or legislation.⁶⁶ No medieval author used this expression to describe these texts. Contemporary writers use it to differentiate them from officially promulgated law which is formally binding on the populace and on the courts.⁶⁷ While they were not officially enacted, the character of these texts is similar to the American *Restatements of the Law*—the *coutumiers* provided the only presentation of a comprehensive body of rules used in the secular courts and they were pedagogical texts meant to train future practitioners for practice.⁶⁸ As such, they were persuasive and authoritative.⁶⁹ Unofficial and influential were certainly not mutually exclusive during the thirteenth century, as the popularity of Roman law attests.⁷⁰

⁶⁵ See any historical introduction to private law—for instance those by R.C. Van Caenegem or O.F. Robinson.

⁶⁶ Van Dievoet, 13.

⁶⁷ This has to be related to a tendency to think of law as command or coercion rather than authority, which can be as forceful as command or as compelling as persuasion. In English legal theory the command model of law goes back to John Austin (1790-1859), generally considered the founder of legal positivism, where coercion created the legal.

⁶⁸ These treatises are the products of the much more literate and complex society of the twentieth century (they began to be compiled in 1923), they are divided by subject matter and much more intricate, but they were essentially guides on the general principles of common law for American judges and lawyers.

⁶⁹ While the *coutumiers* manuscripts do not contain significant marginal annotation, the variation in text between the different manuscripts attests that copies were made for or by an audience that was thinking critically about the contents of the text and adjusting the text to their own perception of and desire for right practice. Though the *coutumiers* are not overtly cited in court records, these did not have a culture of recurrent textual citation in the manner of modern court records, nor should we expect to find scholastic citation practices in the records of the lay court.

⁷⁰ The difference between lay jurists and those trained in Roman law is that the latter were constantly conscious of and trained in the art of citation, which means that Roman law can be much more easily traced because references would be made to texts, jurists or emperors.

THE COUTUMIERS

This study is concerned with new lay authors who wrote in the vernacular for new lay audiences. Thus it focuses on the vernacular *coutumiers* devoted to the courts of lay lordship, such as baronial and comital courts, in Northern France. It also focuses on the second half of the thirteenth century, the first bloom of the writing of secular law in the vernacular, and finishes during the reign of Philip the Fair which saw a comparative legal hyper-specialization and great influx of university-trained jurists in the administration of secular law. The corpus thus includes: *Coutumes d'Anjou et du Maine* (1246), *Le conseil de Pierre de Fontaines* (1253), *Les Établissements de Saint Louis* (1272 or 1273), *Le livre des constitutions deménées el Chastelet de Paris* (between 1279 and 1282), Philippe de Beaumanoir's *Coutumes de Beauvaisis* (1283), *L'Ancien Coutumier de Champagne* (around 1295), and the *Coutumier d'Artois* (between 1283 and 1302). City customs are thus excluded. For this reason the *Livre Roisin*, which describes the customs of the city of Lille, is not included though many scholars do include it within the *coutumiers* group.⁷¹ The *livre des constitutions deménées el Chastelet de Paris*, while concerned with the Châtelet in Paris, is also the first theorization of the *coutume de France* (ie. the royal domain) and is part of the corpus under this premise. The *Livre de Justice et de Plet* (around 1260) is commonly included in the corpus, my reservations with its inclusion will be outlined below.

This means that the corpus used in this study also excludes the very earliest texts that are normally included in the Northern-French *coutumiers* but that were written in Latin, namely the

⁷¹ This text lies somewhere between written city customs and more juristic text. While it was part of the general foment in thinking about secular legal practice in the vernacular, it might best be viewed as an early theorization of municipal law.

so-called *Très Ancien Coutumier de Normandie* and the *Summa de Legibus Normannie* (also known as the *Grand Coutumier de Normandie*). These texts were written for a restricted audience that could read Latin and understand it when they heard it and so were written for a different audience than were the vernacular *coutumiers*. Normandy generally is slower in developing a vernacular lay legal culture and was one of the slowest Northern French areas to adopt French as a language of legal practice, as evinced by French charters only appearing at the end of the thirteenth century.⁷² Instead of including these texts as part of the corpus, they are used to provide background and comparative value.

Mirror or demiurge, did the *coutumiers* reflect what they saw or were they constructing the world they wanted to see? The answer must certainly be a bit of both. The texts constantly refer to cases they ‘saw in court’ and their authors were people who attended court, probably as judges, lawyers, interested parties. The specific use of these texts in practice can be difficult to gauge because there is no obvious way to identify when the customs referred to in other sources referred to custom that was written in text. When, for instance, a record from the Parlement of Paris in the *Olims* refers to the ‘*coutume de Champagne*,’ does it refer to the customs of region as practiced and known, or to the text that describes these customs? It is difficult to peg these texts to references to the ‘customs of Champagne’ or the ‘Etablissements de Saint Louis’ in other records. Nonetheless, the various manuscript versions of these texts show that the texts were not simply copied by rote, but the variations found within show that copies were made by or for a thinking audience that was changing the text to conform to their idea of what custom was or ought to be.

⁷² Lusignan, Serge, *La langue des rois*, 47. Indeed, the *Summa de Legibus Normannie* has more in common with Bracton’s *Summa de legibus and consuetudinibus angliae* than it does with the continental texts. Though the Capetians changed much of the previous Angevin personnel in the area, enough infrastructure seems to have been left to permit striking similarities in the juridical cultures of England and Normandy throughout the thirteenth century.

Then there is the vexed question of the use of the *coutumiers* in practice. Many of the manuscripts that contained the *coutumiers* contained the *coutumiers* alone, indicating that they contained specialized knowledge that should be easily accessible and transportable. With the exception of Beaumanoir's *Coutumes de Beauvaisis*, which was a long text contained in large tomes, the texts were often contained in manuscripts that were small and portable.⁷³ Tables of contents only began to be used in the later thirteenth century, some of the *coutumiers* manuscripts have them and some do not, but before these the texts were likely to have been read from beginning to end rather than searched for rules. Pierre de Fontaines contemplated two types of people as his audience, those who would see the text in writing (whom he considered more discerning), and those who would hear the text read aloud by another. It is highly unlikely that the *coutumiers* would be specifically cited in court as lawyers do in the modern world, and indeed there is no proof of this practice until the fourteenth century. This was simply not how knowledge and authority were constructed in the realm of customary law in thirteenth-century Northern France. One might read a *coutumiers* to get a general knowledge of procedure and rules, to understand the custom of the lay courts as a whole to better work within them, to learn how to reason properly, but when this person went to court they would have to cite, custom, usage, precedent, and not written text—this is what distinguished “unwritten law” from the written laws of the *ius commune*.

The *coutumiers* do not focus on prohibitions or compensations, but mostly explain the author's view of customs a lay court should follow once a dispute has begun. In other words, while they included some substantive rules, the *coutumiers* are heavily focused on procedure.

⁷³ The second folio of one manuscript of the *Etalissements de Saint Louis*, began with these words: “Brought and present when the provost will ask [for it?]” (Viollet I:399) but the context is unclear, and it cannot be said whether it hints at a provost's use of the text.

These texts do not, in the thirteenth century, constitute a literary genre in the sense of having a specific and defined form because there is some significant variation in the manner in which they present their texts despite the common focus on the customs of the lay courts. This is perhaps best seen in the variation in sources used by the texts: some rely mostly on declaration of custom, some describe custom through precedent formed by earlier cases, others quote selections from Roman law, and often some motley use of several sources is made. Because there is notable variation, brief descriptions of each of these texts will now be provided, in chronological order.

Coutumes d'Anjou et du Maine (1246).⁷⁴

The *Coutumes d'Anjou et du Maine* was composed in 1246 by an unknown author. We have two manuscripts of the text.⁷⁵ The text opens with the title, “These are the customs of Anjou and Maine.”⁷⁶ It does not have a prologue that can tell us anything about the text, and after the title starts right away with the narrative: “A gentleman cannot give his younger children more than a third of his inherited real property...”⁷⁷ The text coached its audience on how to deal with problems of lordship and how to react to certain situations in a range of situations that would today be described as encompassing both private and public law: it began with a spate of rules on

⁷⁴ *Coutumes d'Anjou et du Maine*, in *Coutumes et institutions de l'Anjou et du Maine antérieurs au XVIe siècle*, vol. I, ed. by M. C.-J. Beuitemps-Beaupré (Paris: Durand et Pedone-Lauriel, 1877).

⁷⁵ Touraine and Anjou were united under royal domination in June and July 1246, but were separated in August—Touraine stayed with the king of France with the Loudunois, and Maine and Anjou became the *apanage* of Charles, Louis IX's brother. Thus, Paul Viollet states, the *Coutume d'Anjou* was redacted by a royal officer between May and August 1246 (*supra*, *Les Etablissements de Saint Louis*, I:24). The manuscripts are Bibliothèque de l' Arsenal (jurisprudence) n. 127 and Bibliothèque Nationale, ms.fr. 5359.

⁷⁶ “Ce son le coustumes d'Aniou et dou Miane” (Bibliothèque Nationale, ms.fr. 5359). Ms.fr. 5359 is a rough text, very practical. There is no coloring and the text is all in black ink. The title and chapter titles are differentiated by a larger script and a more formal gothic script, while the text itself is written in a cursive documentary hand. The chapters are not numbered and there is no table of contents. It is written at the end of the fourteenth century, and it is packed in a manuscript with other later legal texts that were composed in the second half of the fourteenth century.

⁷⁷ *Coutumes d'Anjou et du Maine*, I.

inheritance and alliance formation, explained a baron's jurisdiction and how his jurisdiction relates to the king and to his lower vassals, discussed imprisonment and fines for offenses, the buying and selling of goods, and so on. The text cites infrequently and when it does it mentions usage, custom, and Law (*droit*) and does not cite Roman law at all (See Appendix).

There was another very short tract on the customs of Anjou known as the *Compilatio de usibus Andegavie* (to which tradition has given a Latin title though the text was in French).⁷⁸ It appears only in one manuscript, which contained the *Etablissements de Saint Louis* and was written in the early fourteenth century, and was added at the end of this manuscript at an unknown date.⁷⁹ Beautemps-Beaupré does not find a date for the text, but leans towards the later 1270s. The text refers to usage and law (*drois*) of the courts in almost every provision. It never quotes from written law. The author seems to be most interested in baronial and royal courts, their jurisdiction and how they relate to one another.

Le conseil de Pierre de Fontaines (1253).⁸⁰

Pierre de Fontaines wrote his text in 1253. The nineteenth-century editor, Marnier, lists twelve manuscripts of the text though does not document all of these that well.⁸¹ The text

⁷⁸ Also available in Beautemps-Beaupré's edition.

⁷⁹ Bibl. Nat. ms.fr. 13985. See Beautemps-Beaupré, 44.

⁸⁰ Pierre de Fontaines. *Le conseil de Pierre de Fontaines, ou traité de l'ancienne jurisprudence française*, edited by M.A.J. Marnier (Paris: Durand, 1846).

⁸¹ These are the manuscripts: (1) One manuscript from the library in Troyes (probably ms.1712, Marnier is not very clear) provides the complete text but with no title, was written between 1260 and 1280 according to Marnier, and was packaged with several lives of saints. (2) Another was the *manuscript la Roine* BN ms.fr. 9822, which Marnier says was written between 1300 and 1330, which is especially interesting because besides Pierre's text it also contained the French text of the *Grand Coutumier de Normandie* and two texts translated from Roman law. Ms.fr. 9822 was dubbed after a miniature on the first page representing a sitting queen to whom a kneeling man, surrounded by others, was presenting a book. The Norman text in the manuscript also began with a miniature of a lord sitting and delivering justice to his subjects. Some Roman law is added to Pierre's *Conseil* on the nature of law, edicts, ordonances, the distinctions between persons, etc. (3) The next is at Saint-Germain Harlay, Fonds de Thou

presents advice written at the behest of a friend, who asked the author to educate his son in the customs of the land. Scholars thought for a long time that, because Pierre was a royal counselor and justice, this friend must be Louis IX and the friend's son was the future Philip the Fair. There is actually no way of knowing for whom the text was written, if indeed for anyone, as advice of this kind was a common rhetorical advice at the beginning of texts. The text is basically a long conversation between a master and a student written in a scholastic style. Many sections includes large block quotations of the Roman law, especially the Code, but without ever including proper citations for the text that were a hallmark of university training.

Le livre de justice et de plet (around 1260).⁸²

The *Livre de justice et de plet* was written by an anonymous author around 1260. Only one manuscript remains.⁸³ The title comes from the *incipit*, though at the end of the table of contents the author explained that “here begin the titles of the first part of the customs of France.”⁸⁴ This text is an awkward fit in the *coutumiers* corpus for several reasons. The text does not tag itself as usages or customs. It is largely a direct translation of Justinian's *Digest*, but this is never acknowledged in the text, one would have to know the contents of the *Digest* to know that. The author inserted some elements of secular law into the text: it contained a royal

m.s. 7450, possibly written between 1300 and 1330, is titled *Le Livre la Royne Blanche* and includes several texts: Louis IX's ordinance on judicial battles, then the agreement between Philip II and the bishop of Paris on the limits of their respective jurisdictions, then Pierre's *Conseil* (with the same Roman law additions as the previous ms.). (4) The next is Saint-Germain Harlay ms. 7426, possibly written between 1280 and 1310, and is interesting because the copyist paraphrased the large quotations of Roman law to which Pierre was prone instead of copying them out. (5) Another manuscript Saint-Germain Harlay ms. 432. () Another at St Germain de Harlay m.s. 421 seems to be a transcription of Harl. ms. 7450 done at the end of the fourteenth century () A manuscript that DuCange used at the Amiens library, taken by Camus to Paris during the revolution, possibly lost (see Marnier, “Introduction” xxx-xliv)

⁸² *Li livre de justice et de plet*, ed. by Rapetti (Paris: Firmin Didot, 1850).

⁸³ Bibl. Nat. ms. fr 8407-3, Lancelot 70.

⁸⁴ Rapetti, vii.

ordinance on procedure also found at the head of the *Etablissements de Saint Louis*, and provided many cases and anecdotes that mostly derive from Orléans but also from other area, like Saint Quentin, Senlis, and others.

Scholars have posited that it may be associated with the University of Orléans because, as E.M. Meijers noted, the professors at this university made some effort to integrate Roman law and customary law.⁸⁵ The purpose of the text is to present a version of Roman law translated into vernacular and show some ways in which it is connected to practice. The choice of language suggests the target audience is similar to that of the vernacular *coutumiers* but the purpose and general culture of this text is different from the other vernacular *coutumiers*. This text is placed in this list because this deserved to be said separately and because there may be expectations that it ought to be here. Though the text is not included in the corpus, it is used in Chapter IV for comparative purposes.

Les Établissements de Saint Louis (1272 or 1273)⁸⁶

This *coutumiers* was composed by an unknown author sometime between 1272 and 1273. A later tradition developed that Louis IX was the author, or a commission he has selected, and this is where the text acquired its title.⁸⁷ Paul Viollet thought author must have been a royal official, perhaps a *bailli*.⁸⁸ The text is a product of expensive cutting and pasting. It begins with

⁸⁵ Meijers, E.M. “L’Université d’Orléans au XIII siècle” in his *Etudes d’histoire du droit*, vol. 3 (Leiden: Universitaire Pers, 1959) 3ff.

⁸⁶ *Les Établissements de Saint Louis*, edited by Paul Viollet, 4 vols (Paris: Renouard, 1881) [hereinafter “*Etablissements*”]. Citations to this text will be done by volume number and page number separated by a colon, unless the citation is to the edition of the text itself, which will be done by book and section number separated by a period.

⁸⁷ Viollet, *Les Établissements de Saint Louis*, I:3.

⁸⁸ *Ibid.*, I:23.

two promulgations: the first is a regulation by the provost of Paris and the other is a royal ordinance. To this, the compiler added the text of the *Coutumes d'Anjou et du Maine* which he renamed the *Coutume de Touraine et Anjou*. The compiler then added a text of the customs of Orléans.⁸⁹ The compiler then added citations throughout the text—the majority of these referred to texts of Roman law, though citations were also added to custom and practice and to the Decretals of Gregory IX. Modern scholars have mostly seen this text as rather rustic, but it was the most popular Northern French *coutumiers* in the Middle Ages: we preserve over twenty manuscripts and bits of the text were also copied into or paraphrased in other later *coutumiers*.⁹⁰

⁸⁹ Viollet could not find a primitive version of this text, but convincingly states that the citations were inserted in a similar process as in the rest of the text (I:36, I:79, I.34-5).

⁹⁰ The manuscripts are: Vatican, Reine Christine 608 (A) from the end of the thirteenth century; Bibl. Nat. ms.fr. 5278 from the thirteenth century which contains the *Etablissements* text solely and has eight rough miniatures (B); the manuscript of the library of Nantes, also thirteenth century and also contains only the *Etablissements* (C); ms. 395 of the Faculty of Medicine of Montpellier copied in 1273 also contains the *Etablissements* alone (D); Bibl. Nat. ms.fr. 1075 dated 1345 which includes the *Etablissements* and Tancred's *Ordo* and in the margins the text indicates laws, decretals and customs (E); Troyes 1709 dates 1281 which is missing some large parts of the text (F); Royal Library of Stockholm 25, written in the second half of the thirteenth century contains solely the *Etablissements*, has miniatures (G); Vatican, Reine Christine 780, copied in the fourteenth century, contains the *Etablissements* solely (H); Bibl. Nat. ms.fr. 13985, written in the first part of the fourteenth century, this text is glossed by someone from Poitou, and in addition contains a text on wills and testaments and the *Compilatio de usibus Andegavie* (I); Bibl. Nat. ms.fr. 13987 is from the end of the thirteenth century and contains only the *Etablissements*, has some miniatures (J); Bibl. Nat. ms.fr. 5899 written either in the thirteenth or fourteenth century, and also contains the *Etablissements le roi Philippe* (K); Bibl. Nat. ms.fr. 5977, written in the fourteenth century and in addition to the *Etablissements* contains a *Tablula juris canonici*, a moral tract (L); Viollet also mentions a manuscript that was in the hands of the Count of Ségur (Li); Royal library in Munich cod. Gall. 43 has fragments of the *Etablissements*, written in the thirteenth or fourteenth century (M); Municipal archives of Beauvais Reg. AA2 written in the first years of the fourteenth century is part of a manuscript nicknamed the *livre à cinq clous* which contains Pierre de Fontaine's *Conseil* under the title of *Respeus d'ami plain de travail*, the *Etablissements* (but only the royal ordinances that are Book I.1-9 and the customs of Orléans that make up Book II, a moral and philosophical treatise, and a cartulary of the commune of Beauvais whose first charter dates from 1276 and last one from 1303 (N); Viollet notes another Vatican ms. but does not give its number, written in the thirteenth century, and that following the *Etablissements* contains a translations of Justinian's Institutes (O); Viollet notes another ms. owned by the Count of Ségur, end of thirteenth century (this ms. actually had two copies of the *Etabl.*, the other was mentioned earlier as Li, he calls this one Oi); Bibl. Nat. ms.fr. 15352, written at the beginning of the fourteenth century (P); Bibl. Nat. ms.fr. written at the end of the thirteenth century, which begins with the *Etablissements*, and also contained a series of legal maxims, *Coutumier d'Artois*, the customs of Ponthieu, Vimeu, and Amiens (published by Marnier in 1840) (Q); Bibl. Nat. ms.fr. 18096 written at the end of the thirteenth century, there are some marginal notes but there are mostly indicators of chapter contents (R); Bibl. Nat. ms.fr. 13986 from the end of the thirteenth century which contains the *Etablissements* the same text on wills and testaments mentioned earlier, and is annotation in an eighteenth-century hand (S); Vatican ms. Ottoboni 3026, written at the end of the thirteenth century (T); two ms. from the old library at Cheltenham that is no longer (ms. 810 (U) of the XIVth or XVth century and ms. 811 (V) of the XIIIth century); Viollet notes fragments noted by other authors that he could not locate (W); another vanished ms. (X); another

Le livre des constitutions deménées el Chastelet de Paris (between 1279 and 1282)⁹¹

This text was written by an anonymous author, and survives on one manuscript from the beginning of the fourteenth century.⁹² The end of the text indexed the text to the Châtelet of Paris, but the beginning is more general and explains its ambit as a general guide to practice in all cases, and how defendants and plaintiffs should plead in court. The text is firmly about court practice. It only refers to Roman law on one occasion in a section on guarantees during a sale, and to the canon law only once as well on a passage on the contestation of witnesses.⁹³

Philippe de Beaumanoir's *Coutumes de Beauvaisis* (1283)⁹⁴

This text was written by Philippe de Beaumanoir while he was a justice in the County of Clairmont for Count Robert of Clermont, who was Louis IX's son. Four of the manuscripts date from around the beginning of the fourteenth century.⁹⁵ Beaumanoir was the son of Philippe the

mystery manuscript that La Thaumassière referred to as "mon manuscrit" that Viollet could not identify (Y); a table of contents of the *Etablissements* without the text in Bibl. Arsenal 391 from the thirteenth century; he also notes later manuscripts Bibl. Nat. ms.fr. 16198 of the seventeenth century (Ri); Bibl. Nat. ms.fr. 2839 also of the seventeenth century (Rii). (See also Viollet I:422 for relates manuscripts).

⁹¹ *Le livre des constitutions deménées el Chastelet de Paris*, ed. by C. Mortet, in *Mémoires de la Société de l'Histoire de l'Ile-de-Paris* 10 (1883) 1-99.

⁹² Bibl. Nat. ms.fr. 19778. The marginal notes are from the end of the fourteenth or the fifteenth century. Mortet is very unimpressed with the copyist of the manuscript, and notes that there are errors and omissions, but there is no other text to which to compare it.

⁹³ *Le livre des constitutions deménées el Chastelet de Paris*, 51, 22.

⁹⁴ Philippe de Beaumanoir, *Coutumes de Beauvaisis*, edited by A. Salmon. Paris: Picard, 1970.

⁹⁵ Bibl. Nat. ms.fr. 11652, copied at the end of the thirteenth or beginning of fourteenth century and contains the *coutumiers* alone (A); Royal Library in Berlin, Hamilton 193, was also written at the end of the thirteenth or beginning of the fourteenth century, it is singular for its decoration because it is decorated by seventy-four miniatures, other texts were added to the text at the end of the fourteenth and in the fifteenth century (B); Vatican, Reine Christine 1055 was written in 1301 by several copyists one of whom left his name as Durant le Normant, a cleric from Picquigny, the text contains some lacunas but contains the conclusion (E); Vatican, fonds Ottoboni 1155 dates from the beginning of the fourteenth century (F); Bibl. Nat. 18761 was written mid-fourteenth century at the earliest (H); Bibl. Troyes 615 was written at some point in the fourteenth century and the text stops abruptly in the middle of section 1343, and was never finished, it contains a version of the text that was very reworked and excludes

Rémy, who was a poet and romance-writer and also has worked as a justice in secular courts. The two had long been conflated into one person, but it is now well accepted that while both were *bailli*, the father was the poet and the son the jurist. Beaumanoir's is the most sophisticated of all the *coutumiers*, it beautifully organized and the writing is erudite and clear, and it is by far the longest and largest of all the *coutumiers*. Modern scholarship loves him, often calling him the first real French jurist. Beaumanoir was thoughtful and comparatively precise, he clearly had some learning. Unlike some other *coutumiers* authors, he did not cite this learning in the text, which had led to much scholarly controversy, with scholars variously seeing him as not indebted to university law or as completely a product of the *ius commune*.

L'Ancien Coutumier de Champagne (around 1295)⁹⁶

This text was written by an anonymous author around 1295. Eight manuscripts of the text survive, the earliest dating from the fourteenth century, of which there are four.⁹⁷ Like the *Etablissements de Saint Louis*, opens with an ordinance issued by King Thibault IV of Champagne in 1224, where the king with the consent of his barons described the division of

many parts (M). The others are later copies: Bibl. Nat. ms. fr. 4516 seems to be from the fifteenth century (C); Bibl. Nat. ms. fr. 24059 was copied in 1443 (G); Bibl. Of the Tribunal of Beauvais, armoire C-4 was copied in the fifteenth century (J), Bibl. Nat. ms.fr. 24060 was probably from the sixteenth century (K); The library in Orléans, ms. 401 (L), has one from the seventeenth century and one uncertain manuscript in the Library of Carpentras 1838.

⁹⁶ *L'Ancien Coutumier de Champagne (XIIIe siècle)*, edited by Paulette Portejoie. Poitiers: P. Oudin, 1956.

⁹⁷ Bibl. Nat. ms.fr. 25546 is the oldest manuscript of this text we have, written around 1300, which contained fragments of accounts of the hospital in Langres for the year 1373, the text of Tancred's *Ordo* copied in 1329 by Martin de Bordon, then the *Ancien Coutumier de Champagne*, a text about the prophet Ezekiel, a lapidary and bestiary, and then more fragments from the hospital in Langres (A); Municipal Library of Provins ms. 29 copied at the beginning of the fourteenth century which also contained an ordinance by Philip the Fair from 1302 and on by Louis X from 1315 concerning the nobles of Champagne, all written in the same hand (B); Bibl. Nat. ms.fr. 5256 is a manuscript containing different texts from the fourteenth to the seventeenth century that were collated together, but the *coutumier* within dates from the second half of the fourteenth century (C); Bibl. Nat. ms.fr. 5256 also dates from the second half of the fourteenth century, probably a little before 1380. The other manuscripts date from the end of the fifteenth century or after, for a description see Portejoie 102ff.

property in succession between male heirs and a regulation concerning the city of Châteauvillain dated 1284, and then the text describes the customs and usages of the area and opens almost every section of the text by saying so. This text is not related to scholastic or Roman learning, it is all about custom and usage. The text has fifty-nine provisions, thirty-five of which were described as rules, twenty-four which were described casuistically through cases that occurred in lay court, and five of which simply described judgments.⁹⁸ This *coutumiers* described cases in detail not present in others, and used them as a basis of reasoning. Of the cases describes, eighteen were from the Grand Jours de Troyes dating as early as 1270 (so some dated before Philip the Fair), six cases from the court of Barons, four sentences of the Parliament of Paris, another four cases that were judged by masters from the Parliament of Paris while they sat as judges in the Grand Jours, and five that could not be identified.⁹⁹

Coutumier d'Artois (between 1283 and 1302)¹⁰⁰

This text was written by an unknown author sometime in the last part of the thirteenth century or beginning of the fourteenth. It is preserved in two manuscripts.¹⁰¹ The author of this text used part of Pierre de Fontaine's *Conseil* and of the *Etablissements de Saint Louis* without citing them. This author cites from many sources that include the Roman texts, the Decretals, some *ordines iudicarii* (procedural manuals for canon law), the Bible once, and writes heavily from

⁹⁸ Portejoie, 7. These judgments report cases of parties living in the *baillages* of Troyes and Chaumont, it is somewhere in this area that the *coutumiers* must have been written (*Ibid.* 11).

⁹⁹ *Ibid.*, 7-8. As Portejoie notes, none of the jugements of the Parliament of Paris reported here are found in the *Olims*, the records of those courts that began to be kept in 1254 (*Ibid.*, 8 note 20).

¹⁰⁰ *Coutumier d'Artois*, edited by Adolphe Tardif (Paris: Picard, 1883).

¹⁰¹ Bibl. Nat. ms. fr. 5249 from the fourteenth century (A); Bibl. Nat. ms. fr. 5248 which contains three texts: the *Etablissements de Saint Louis*, the *Coutumier d'Artois*, and the *Coutumes notoirement approuvees en la cour de Ponthieu, de Vimeu, de Baillie d'Amiens et en pluseurs autres lieux* (B).

personal court experiences, emphasizing the cases which he himself saw in court in the count;s court in Arras, in the king's court at Doulens, and also in courts at Ancre and Hesdin.

CHAPTER I

Historical Background

The *coutumiers* have generated much scholarship over the centuries. In fact, since the texts were written, writing about them has been almost constant. Early-modern official redactions of regional custom did not put an end to thinking and evaluating the thirteenth-century *coutumiers*. Political and legal theorists kept writing about them, from Dumoulin in the sixteenth century to Montesquieu in his *Spirit of the Laws* in the eighteenth century. An overwhelming number of the medieval *coutumiers* manuscripts are inscribed with the names of owners who were French lawyers, jurists, parliamentarians and potentates between the fifteenth and eighteenth centuries. Indeed, many of the marginal notes on the manuscripts are from these later periods—even though at that point there were official redactions of these texts, the old medieval sources for these official versions still illuminated the nature of norms. The nineteenth-century saw the codification of French law and the passage of old custom into an antiquarian pursuit. Gentlemen scholars compiled critical editions of the medieval texts and formed scholarly historical societies devoted to the detailed study of the texts, now done in a historicized rather than lawyerly way.

Nonetheless, the *coutumiers* were evaluated as texts of law, primitive codifications that formed part of legal history specifically rather than history more generally. Rather than looking at the connections between these texts and general cultural currents, in the twentieth century the texts continued to feature in general histories of private law or more specific histories such as,

for instance, the law of proof. In the last forty years, a new layer of historiography was added by scholars such as Paul Ourliac, Jean Hilaire, Albert Rigaudière, Jacques Krynen, Robert Jacob, and André Gouron who have all added pieces to our knowledge of the *coutumiers*. These legal-history oriented studies generally remain separate from those of historians who write about the life of law, historians of dispute, crime and other forms of “law in action” such as Yvonne Bongert or Claude Gauvard. In other words, books of the law have been treated as a form of law on paper that is part of the intellectual legal history that generally comes out of law schools and while they are used as a source for “law in action” they are not themselves considered to be part of it.

This chapter seeks to do two things. It addresses the cultural context that produced the *coutumiers* and sets the texts within other historical currents of the time. The purpose is to show the texts to be both part of the general intellectual ebullience of the thirteenth century and at the same time reflect how the *coutumiers* reflected the spectrum of the real life of law.¹⁰² It also brings together current historiography on the texts in one place. The *coutumiers* generally appear in discussions of other issues—development of French law, royal sovereignty or the *ius commune*. Guido van Dievoet provides a very useful typology of the *coutumiers* as a type of source and John Gilissen does the same with a study of custom which includes some analysis of the *coutumiers*, but these are both purposefully schematic as dictated by their genres. This chapter thus also seeks to note some of the current features of *coutumiers* historiography.

We will begin by examining the nature of custom before the *coutumiers* and how its meaning was changing from monatery due to general norm in the period before the *coutumiers*

¹⁰² This chapter will specifically touch on the “law in action” reflected in the texts, and specifically how they addressed “dispute resolution” outside of the court process that began with a claim and ended in judgment. The following chapter will consider the relationship between the actual text and practice specifically.

were written. Because the *coutumiers* were part of a more general explosion in the writing of law, we will consider the explosion in thinking and writing about law in the later eleventh and twelfth centuries. We will then move to an examination of a movement in writing law in the vernacular specifically. Next, we will examine the specific milieu the *coutumiers* addressed, namely, the secular courts (or, lay courts) and how their writing was related both to the thirteenth-century expansion of the ecclesiastical courts and of royal power. We will then discuss the continued importance of lordship to the concept of custom as it continues to evolve in the thirteenth century and how the *coutumiers* served to define the contours of lordships and hierarchical relationships that were not as neatly defined as the texts make it seem. Lastly, we will briefly look at men of law involved in the lay courts in order to think about the types of people who produced these texts.

CUSTOM BEFORE THE *COUTUMIERS*

The thirteenth-century vernacular *coutumiers* are united in being texts that discuss the customs and usages of the lay courts. The texts interacted with custom on two levels that often get conflated but that actually ought to be kept distinct for analytical purposes. The first is custom as the manner of functioning of customary legal cultures, a label given by modern scholars to a performative and unwritten form of dispute resolution that is generally associated with the tribal or primitive and draws on memory, tradition and a strong notion of procedure for the substance of its rules and procedures. The second is custom as a term that is actually used in historical sources, which had a range of meaning that was not stable and underwent important changes before and during the time the *coutumiers* were written. By the time the *coutumiers* are

written, customary legal culture was undergoing dramatic changes whereby the written was becoming increasingly part of the process, which was starting to become a professionalized practice. It is with this professionalization that the rules of dispute started to be grouped into the categories of usage (what we usually do but do not necessarily have to do again), custom (a practice established in different ways that generally must be followed), ordinance (a royal proclamation establishing rules or practices), and law (at this stage this term is most often used to describe the “written law” *qua* Roman law, it occasionally but still rarely appears in reference to designate an official type of legislation), each being a conscious choice drawing on different pools of authority.

Paul Ourliac has said that the age from the fall of the Roman empire until the eleventh century fell under the “universal reign of custom.”¹⁰³ One feature of this long period was that custom was undifferentiated, did not have a formal juridical content, and could not clearly be clearly distinguished from law, morality, religion or etiquette. There really was not, in the period formerly known as ‘Dark’, a period completely devoid of some form of ‘law’ or legal writing. Perhaps there was a greater cleavage between legal text and practice, though late antique Rome also saw quite a difference between the two.¹⁰⁴ Indeed, there is some possibility that notable parts the so-called *leges barbarorum* reflected practice that was already current in the provinces before the Empire’s fall.¹⁰⁵ Either way, these texts reflected new legalo-literary modes of

¹⁰³ Paul Ourliac and Jean-Louis Gazzaniga. *Histoire de droit privé français, de l’an mil au Code Civil* (Paris: Albin Michel, 1985) 33.

¹⁰⁴ See for instance Harries, Jill. *Law and Empire in Late Antiquity* (Cambridge: Cambridge University Press, 1998); Matthews, John F. *Laying Down the Law: A Study of the Theodosian Code* (New Haven: Yale University Press, 2000); Caroline Humfress and P.D.A. Garnsey. *The Evolution of the Late Antique World* (Cambridge: Orchard Academic, 2001).

¹⁰⁵ Barnwell, P.S. “Emperors, Jurists and Kings: Law and Custom in the Late-Roman and Early-Medieval West” *Past and Present* 168 (2000) 6-29. Barnwell discusses the marked similarity between the *leges barbarorum* and a text called the *Byzantine Farmers’ Law*.

discussing norms that were not prevalent earlier, whether they were used in practice or not.¹⁰⁶ To the extent that juristic Roman law survived in the West, it was in the Roman law of the *Theodosian Code* and its epitomes. The *leges barbarorum* were copied and expanded, notably the Salian and Visigothic laws. Kings also pronounced upon the law and issued capitularies. Meanwhile, transactions were recorded in documents known as charters. The forms of these charters could be known via formularies, which were form documents somewhat similar to the modern lease agreement or birth certificate, and that have recently been rehabilitated as legal and historical documents both by Warren Brown and by Alice Rio.¹⁰⁷

Eventually, the oral and personal custom of Northern France is said to have ‘crystallized’ into a coherent ‘system’ starting in the eleventh century and become a territorial body of rules. The term “crystallization” is commonly used but not often defined, but it seems to be generally used to designate the coalescing of a coherent body of rules within a particular territorial jurisdiction or lordship.¹⁰⁸ While there were no texts such as the *coutumiers* that discussed bodies of rules yet, there were references to customary practices concerning legal disputes within different regions. Nonetheless, as Susan Reynolds noted, judgments between the tenth and twelfth centuries were not all that different—they were made in “assembly,” a better word than “court” to characterize the proceedings because not only was their business varied but, also, no

¹⁰⁶ Probably not. Patrick Wormald, for instance, doubted very much that they were (see his *The Making of English Law: King Alfred to the Twelfth Century*, Vol. 1: Legislation and Its Limits (Oxford: Blackwell, 1999). Thomas D. Hill (Cornell University) always likened them to broken old fancy cars displayed on rural front lawns—even if it can no longer be driven, it is still a way of showing oneself to be a Corvette or Thunderbird owner.

¹⁰⁷ Brown, Warren. “Conflict, Letters, and Personal Relationships in the Carolingian Formula Collections” *Law and History Review* 25, no.2 (2007) <<http://www.historycooperative.org/journals/lhr/25.2/brown.html>> (19 Jun. 2012); Rio, Alice. *Legal Practice and the Written Word in the Early Middle Ages: Frankish Formulae, c. 500-1000* (Cambridge: Cambridge University Press, 2009).

¹⁰⁸ This language of ‘crystallization’ is a commonplace of French legal historiography. See for instance Gilissen, 32-3; Hudson, 9; Ourliac, 38-9, 68-9; Jean Yver, ‘Les caractères originaux du groupe de coutumes de l’ouest de la France’, *Revue historique de droit français et étranger*, 30 (1952): 18-79.

real distinction was made between law, politics or administration.¹⁰⁹ The practice of secular law in the eleventh and twelfth century was “governed by just that immanence of right, authority of custom, and generally hazy categories that analogies from social anthropology would suggest.”¹¹⁰

While legal historians discussed crystallizing norms, historians talked of revolution. For them, the question of custom was closely connected to what extent one believed in the earlier political and structural changes known as the “feudal revolution”—the notion that the period around the millennium saw some form of anarchy related to the collapse of central government— and whether they subscribe to Marc Bloch’s thesis of continuity between the ninth and eleventh centuries or George Duby’s notion of breakdown of law and public order between those centuries.¹¹¹ The question is debated and will probably continue to be.¹¹² It has, however, implications for the meaning of custom that need to be noted; the most recent word on the subject is Dominique Barthélemy’s arguing for a slow and complex evolution, and more sophisticated post-Carolingian society than previously thought.¹¹³ As Jean-François Lemarignier

¹⁰⁹ Reynolds, Susan. “Law and Communities in Western Christendom, c. 900-1140” *The American Journal of Legal History* 25, no.3 (1981) 214.

¹¹⁰ Reynolds, Susan. “Law and Communities in Western Christendom, c. 900-1140” *The American Journal of Legal History* 25, no.3 (1981) 210.

¹¹¹ See Bloch, Marc. *La société féodale*, vol.2 (*Les classes et le gouvernement des hommes*) (Paris: 1939-40); Duby, George. *La société aux XIe et XIIe siècles dans la région mâcommaise* (Paris 1971).

¹¹² See Bisson, T.N. “The “Feudal Revolution”” *Past and Present* 142 (1994) 6-42; Dominique Berthélemy and Stephen D. White “The “Feudal Revolution”” *Past and Present* 152 (1996) 196-223; Timothy Reuter and Chris Wickham “The “Feudal Revolution”” *Past and Present* 155 (1997) 177-208; Bisson, Thomas N. “The “Feudal Revolution”: Reply” *Past and Present* 155 (1997) 208-225; Barthélemy, Dominique. 1998. “The year 1000 without abrupt or radical transformation” in *Debating the Middle Ages*, ed. by Lester Little and Barbara Rosenheim (Oxford: Blackwell, 1998) 134-147; and more recently, Fouracre, Paul. “Marmourtier and its Serfs in the Eleventh Century” *Transactions of the Royal Historical Society* 15 (2005) 29-49.

¹¹³ Barthélemy, Dominique. *The Serf, The Knight and the Historian*, trans. Graham Robert Edwards (Ithaca, NY: Cornell University Press, 2009) (originally published in French as *La mutation de l’an mil a-t-elle eu lieu?* Though English version has revisions and additions). Barthélemy suggests that the changing nature of the study of history, which had turned from more general to hyperspecialized, and from well-known chronicles to archival ‘finds’ like monastic cartularies, has led to a lack of perspective about societal change over the long run (*Ibid.*, 8ff). Olivier Guyotjeannin has supported Barthélemy’s view, indicating that writing of the “revolutionary” period reflected political change in the field of monastic reform rather than overall societal upheaval (*Ibid.*, 303, see Guiotjeannin,

noted long ago, the term *consuetudines* to denote custom was not all that common until the end of the tenth century and beginning of the eleventh, when it spread in all sorts of documents, notably in those detailing immunities and concessions, and often came to designate seigniorial rights (justice, ‘public power’, dues and exactions).¹¹⁴ At the same time, it was also where the subjects of a lord looked to for protection and in this sense designated their rights.¹¹⁵

With the development of the language of custom (*consuetudo*) came the language of ‘good’ or ‘bad’ custom, and wide scale complaints about “bad customs” which have received much needed scholarly attention lately. It seemed that these complaints showed the unbridled abuses that the seigniorial class inflicted simply because it could in the wake of the breakdown of Carolingian public power, and it was this change that turned ‘seigniorial rights’ into ‘bad customs’.¹¹⁶ However, since Dominique Barthélemy’s important article we can see that these allegations were rhetorical strategies deployed in dispute.¹¹⁷ As Stephen White has recently noted, what made the customs in late tenth and eleventh century charters “bad” was not that they were inherently unjust or unlawful, but that they were exactions that the scribe in question

Olivier. “*Penuria scriptorium*: le mythe de l’anarchie documentaire dans la France du Nord (Xe-première moitié du XIe siècle)” *Bibliothèque de l’École des Chartes* 155 (1997) 11-44.

¹¹⁴ Lemarignier, J.-F. “La dislocation du ‘pagus’ et le problème des consuetudines” in *Mélanges d’histoire du Moyen Âge dédiés à la mémoire de Louis Halphen*, ed. by Charles-Edmond Perrin (Paris: Presses Universitaires de la France, 1951) 403-5. See also Guillot, O. “*Consuetudines, Consuetudo*: Quelques remarques sur l’apparition de ces termes dans les sources française des premiers temps capétiens (à l’exception du Midi)” *Mémoire de la Société pour l’Histoire de Droit et des Institutions des anciens pays bourguignons, comtois et romands* 40 (1983) 21-47.

¹¹⁵ Reynolds, Susan. “Law and Communities in Western Christendom, c. 900-1140” *The American Journal of Legal History* 25, no.3 (1981) 209. According to André Gouron, the urban charters in which the oldest expressions of urban private law are found are those of Saint-Omer and Laon, drawn up in 1128, and indeed many texts into the early twelfth century equate customs (*consuetudines*) with liberties (*libertates*) (Gouron, André. “La coutume en France au Moyen Âge” in *La Coutume/Custom, Transactions of the Jean Bodin Society for Comparative Institutional History*, Part II: Medieval and Modern Western Europe (Brussels: De Boeck, 1989) 199).

¹¹⁶ Lauranson-Rosaz, Christian. “Des “mauvaises coutumes” aux “bonnes coutumes”: Essai de synthèse pour le Midi (Ve-XIIIe siècle)” in *La coutume au village dans l’Europe médiévale et moderne (Actes des XXe Journées Internationales d’Histoire de l’Abbaye de Flaran, Septembre 1998)*, ed. by Mireille Mousnier et Jacques Poumarède (Presses Universitaires du Mirail) 24.

¹¹⁷ See Barthélemy, Dominique. 1998. “The year 1000 without abrupt or radical transformation” in *Debating the Middle Ages*, ed. by Lester Little and Barbara Rosenheim (Oxford: Blackwell, 1998) 134-147.

considered unjust, levied against both the fee and unfree.¹¹⁸ As Tracey Billado has further shown, these were essentially “bad” fees that ranged from taxes, tolls, labor-services, profits of justice and other rights or privileges that could be attached to property (a range that reflected the range of *consuetudeo* itself), and the same group that complained about their imposition would also be imposing those same types of customs on others.¹¹⁹

Overall, the work of these scholars has shown that the language of bad custom was not a feature of the lack of centralized political power but a rhetorical tool developed at this time to cope with and renegotiate various changes in power and politics in a certain place.¹²⁰ Analysis of good and bad custom does not often appear in more legalistic work on the subject, which looks at the coalescence of norms over the long run rather than the politics of rhetorical value of the legal language used at different times. However, the language of bad customs does occasionally appear in the *coutumiers*, as we will see later on, and one should keep it in mind because it is an important reminder of the strong associations between custom, rhetoric and political power.

¹¹⁸ White, Stephen. “Bad Customs (*malae consuetudines*) in Eleventh-Century France” in *Custom: The Development and Usage of a Legal Concept in the Middle Ages* (Proceedings of the Fifth Carlsburg Academy Conference on Medieval Legal History, ed. by Per Andersen and Mia Münster-Swendsen (Copenhagen: DJØF, 2009) 53. This is in contrast to England, where the complaint was that they were new and that they were imposed or collected in a manner that was itself oppressive and unjust (*Ibid.*, 52). White provides a nice history of the historiography on ‘bad customs’ (*Ibid.*, 54ff).

¹¹⁹ Tracey Billado in White, Stephen. “Bad Customs (*malae consuetudines*) in Eleventh-Century France” in *Custom: The Development and Usage of a Legal Concept in the Middle Ages* (Proceedings of the Fifth Carlsburg Academy Conference on Medieval Legal History, ed. by Per Andersen and Mia Münster-Swendsen (Copenhagen: DJØF, 2009) 53. 62.

¹²⁰ White, Stephen. “Bad Customs (*malae consuetudines*) in Eleventh-Century France” 64; *see also* Lauranson-Rosaz. “Des “mauvaises coutumes” aux “bonnes coutumes”” 44ff.

DEVELOPMENT OF LEGAL WRITING

Indeed all kinds of communities began actualizing their rights and responsibilities through the language of custom from the early twelfth century. This was the time when the word also gains other meanings: juridical norm, and the law of a locality or land. The writing of collections of customs spread like a wave amongst different communities that ranged from the monastic, the urban, the seafaring, and the landed. Some of the early charters of immunities actually show pretty sophisticated forms of legal thinking, such as the charter of immunity of the Church of Worms and its people of 1014.¹²¹ It was couched as a defense against the unjust laws of the counts, but thought in terms of rules and prohibitions that were ordinary to legal thinking: “if anyone...” or “if someone...” or “Let this be law” or “This shall be law...” or “We also establish this...”¹²² The text was different from the thirteenth-century *coutumiers* because the latter focused so much on succession and rights of lordship, but the rules described that treat violence, maiming, murder, judicial duels, oaths, fines and rents actually feel markedly similar.¹²³

Thinking and writing about custom was developing in a variety of communities. A monk named Bernard had written up the first version of the customs that regulated life at Cluny in the eleventh century.¹²⁴ Alain Boureau has shown the fundamental importance that the development

¹²¹ Lane, Steve, trans. (text from Lorenz Weinrich, ed., *Quellen zur deutschen verfassungs-, wirtschafts- und sozialgeschichte* [Darmstadt: Wissenschaftliche Buchgesellschaft 1977], document 22, consulted online 6/23/12: <http://www.fordham.edu/halsall/source/lexworms.asp>).

¹²² *Ibid.*

¹²³ While the *Lex familie Wormatiensis* used the language of law, only referred to custom, was written in Latin, and was comparatively brief, its style and description of rules have some similarity to *coutumiers* such as the *Coutumes d'Anjou et Maigne* that are early and betray little *ius-commune* influence. Beaumanoir, of course, looks different from this.

¹²⁴ *Passim*. Jean Umiker-Sebeok and Thomas Sebeok, eds. *Monastic Sign Language* (Berlin: Walter de Gruyter, 1987) 20.

monastic legal thinking could have on our knowledge of the history of the common law.¹²⁵ Greater study of monastic customs in France, which have been studied more for what they say about monasticism than what they say about law, would doubtless also shed much important light on the development of ideas of custom there.¹²⁶ City customs also began to proliferate around this time, beginning in Italy and spreading North. These could be part of a peaceful process but they could also be part of dramatic founding moments for their representative communities. One dramatic account of the founding of a commune and its charter is narrated by Galbert of Bruges in his description of the revolt of the commune of Laon (1112).¹²⁷ While a few Spanish *fueros* had appeared in the eleventh century, such as those of León (1017) and Sepúlveda (1076), these began to proliferate also in the twelfth century. Salamanca, Toledo, Mérida and a host of other localities adopted their own. One famous one was a collection of customs that appeared in Catalonia in the mid-twelfth century called the *Ustages of Barcelona*, which was written up during the rule of Count Ramon Berenguer IV of Barcelona (1131-62).¹²⁸

These redactions were obviously connected to the spread of Romano-canonical legal thought and methods. The birth of the *ius commune* is conventionally heralded by the achievements of two figures—the “great canon lawyer” Ivo of Chartres (1040-1116) and the “great Roman lawyer” Irnerius (ca.1060-1125).¹²⁹ The two ‘founding fathers’ of the *ius commune* must have not been purely *sui generis* and the intellectual stirrings that eventually unfurled into the *ius commune* must have had some antecedents. Charles Radding, for one, has

¹²⁵ Boureau, Alain. *Les moines et la loi*

¹²⁶ The texts of various monastic customs are available in *Corpus Consuetudinum Monasticarum*, ed. by K. Hallinger (Sieburg: Schmitt, 1967).

¹²⁷ See Galbert of Bruges. *The Murder of Charles the Good*, trans. by James Bruce Ross (New York: Columbia University Press, 2005).

¹²⁸ Kagay, Donald J., trans. *The Ustages of Barcelona: The Fundamental Law of Catalonia* (Philadelphia: University of Pennsylvania Press, 1994) 2.

¹²⁹ Berman, Harold. *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983) 120.

convincingly shown that the gradual development of Lombard law and its increasing sophistication gave the early jurists of the *ius commune* the intellectual capital necessary to access and assess the Justinianic texts.¹³⁰ Indeed, this accords with Alain Boureau's findings about English monks who developed sophisticated juridical thinking before any Roman-law influence.¹³¹

There are enormous amounts of work on the *ius commune* which detail its inception in Italy and radiation outward.¹³² This will not be repeated here except to say that Romano-canonical legal thought and methods were also beginning to be made more accessible outside of the most learned circles and were beginning to appear in the writing of secular law. The Assizes of Ariano (also known as the Assizes of Roger II) were composed around 1140 by people who clearly had knowledge of the *ius commune*—indeed, as Kenneth Pennington has shown, this text was unique because no secular prince in the early twelfth century promulgated such a sophisticated body of law, which was not only systematically organized but displayed some

¹³⁰ See Radding, Charles. *The Origins of Medieval Jurisprudence. Pavia and Bologna, 850-1150* (New Haven: Yale University Press, 1988).

¹³¹ Of course, it just makes sense for learning to be born of an interest in and ability to at least try to understand it. What Boureau showed was that new legal consciousness and judicialization did not necessarily have to be predicated on Roman law (Boureau, Alain. "Droit naturel et abstraction judiciaire: Hypothèse sur la nature du droit médiéval" *Annales. Histoire, Sciences Sociales* vol.57, no.6 *Histoire et Droit* (2002) 1464 ; Boureau, Alain. *La loi du royaume : Les moines, le droit et la construction de la nation anglaise (XIe-XIIIe siècles)* (Paris : Belles Lettres, 2004) 198ff; Boureau also points to the demonstration made by Chris Wickham in Wickham, Chris. *Legge, pratiche e conflitti. Tribunali e risoluzione delle dispute nella Toscana del XII secolo*, edited by Antonio Sennis (Rome : Viella, 2000)).

¹³² For basic introductory histories of the *ius commune*, see: Stein, Peter. *Roman Law in European History* (Cambridge: Cambridge University Press, 1999); Kuttner, Bellomo, Manlio. *The Common Legal Past of Europe, 1000-1800*, trans. by Lydia G. Cochrane (Washington, D.C.: The Catholic University of America Press, 1995); or Berman, Harold J. *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983; or, Van Caenegem, *An Historical Introduction to Private Law* (Cambridge: Cambridge University Press, 1994). Many excellent scholars give the subject much more detailed study, to name but a few: John Baldwin, James Brundage, John Cairns, Charles Donahue Jr., Gérard Giordanengo, James Gordley, André Gouron, Charles Homer Haskins, Richard Helmholz, Stephen Kuttner, Peter Landau, Anne Lefebvre-Teillard, Pierre Legendre, Laurent Mayali, Ken Pennington, Gaines Post, Max Radin, Fritz Schultz, Paul Vinogradoff, Franz Wieacker.

strong connections to the study of Roman law developing in Northern Italy.¹³³ Also, the jurists who composed the *Constitutions of Melfi* (or *Liber Augustalis*) for Frederick Barbarossa in 1231 incorporated more than half of this text into theirs.¹³⁴ The author of Glanvill's *Laws and Customs of England*, written probably between 1187 and 1189, was also familiar with Roman legal texts that made law and justice the explicit duties of the prince.¹³⁵

Indeed, just as Romano-canonical legal thinking and texts were incorporated into texts dedicated to lay power and justice, customary law also infiltrated Roman thought and text. The quintessential example of this is the compilation known as the *Libri feudorum*, which came to be incorporated into the Justinianic legal texts and glossed just as those were. The *Libri feudorum* was a compilation of treatises of earlier Lombard origin which was composed layer by layer by various authors in Pavia and Milan, and was used as a sort of manual by communal judges and advocates in those cities.¹³⁶ Pillius of Medicina gave it its first apparatus of civilian glosses around 1208/13, though he died before finishing the work.¹³⁷ It was in the early thirteenth century that the text was appended to the *Corpus Iuris* by Hugolinus and was used in university teaching, and a little in practice as well, and was glossed by Accursius (who used Pillius' gloss, which ended up forming more than half of the Accursian standard gloss).¹³⁸

¹³³ Pennington, Ken. "The Birth of the *Ius commune*: King Roger II's Legislation" *Rivista internazionale di diritto commune* 17 (2006) 24. See the most recent edition: Zecchino, Ortensio. *Le Assise di Ruggerio II* (Naples: Casa Editrice Dott. Eugenio Jovene, 1984.)

¹³⁴ Pennington, Ken. "The Birth of the *Ius commune*: King Roger II's Legislation" *Rivista internazionale di diritto commune* 17 (2006) 24.

¹³⁵ Hall, G.D.G, trans. *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Oxford: University Press, 1983) xi.

¹³⁶ Ryan, Magnus. "Succession to Fiefs: A *Ius Commune Feudorum*" in in *The Creation of the Ius Commune: From Casus to Regula*, edited by John Cairns and Paul du Plessis (Edinburgh: Edinburgh University Press, 2010) 144.

¹³⁷ Ryan, Magnus. "Succession to Fiefs: A *Ius Commune Feudorum*" in in *The Creation of the Ius Commune: From Casus to Regula*, edited by John Cairns and Paul du Plessis (Edinburgh: Edinburgh University Press, 2010) 144.

¹³⁸ *Ibid.*; see also Davis, K. "Sovereign Subjects, Feudal Law, and the Writing of History" *Journal of Medieval and Early Modern Studies* 36, no.2 (2006) 226.

From then on, the *Libri* accompanied the Justinianic texts in a number of different ways and under a number of different names—indeed, they were the second most popular piece of legal literature after Gratian’s *Decretum*.¹³⁹ The story of this text, as Susan Reynolds argued, must be told carefully—though her contention that the text has received a disproportionate amount of attention is controversial, her *Fiefs and Vassals* remains an important wakeup call about the layers of anachronism that have been used to evaluate the *Libri* because of their later history and that we must study the various different layers of evolution and commentary on this text.¹⁴⁰

The development of the language of custom and its slow evolution into a body of rules ran parallel to all the above developments. F. Roumy has shown that the phrases *jus consuetudinarium* and *lex consuetudinaria*, which do not appear in Roman legal texts and had been attributed to the legal renaissance of the twelfth century, had actually appeared in eleventh-century texts in Northern France and Germany before the spread of Justinianic learning to that area.¹⁴¹ These expressions originally designated customs *qua* exactions in the eleventh century, a definition that came under the progressive influence of Roman law in the twelfth century and came to designate a broader “customary law” as opposed to *jus scriptum* and *jus*

¹³⁹ Ryan, 144; Davis, 227. In the words of Magnus Ryan: “The technically accurate title by the end of the Middle Ages was the *Decima collatio de feudis*, the tenth and final section of the Novels in the vulgate form used at the medieval schools known as the *Authenticum*, but for most of the thirteenth and fourteenth centuries the text could appear just about anywhere in the fifth and “short” volume of the *Corpus iuris* (the *Volumen parvum*) alongside the *Authenticum*, *Institutes* and the last three books of the *Code*, and it went under a variety of titles” (Ryan, “Succession to Fiefs: A *Ius Commune Feudorum*” 144).

¹⁴⁰ Reynolds, Susan. *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford: Clarendon Press, 1994) 6. See her explanation of the nature of the problem (*Ibid.*, 1ff). This book, following Elizabeth Brown’s famous article, is mostly devoted to undoing the “construct of feudalism” as an interpretative framework for the middle ages. See reviews of this book: White, Stephen D. “Book Review: Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*” *Law and History Review* 15 (1997) 349; Hyams, Paul. “The End of Feudalism? *Fiefs and Vassals: The Medieval Evidence Reinterpreted* by Susan Reynolds” *The Journal of Interdisciplinary History* 27, no.4 (1997) 655-662.

¹⁴¹ Indeed, the former expression seems to have come from Isidore of Seville while the latter from Cicero (See Roumy, F. “*Lex consuetudinaria, Jus consuetudinarium*. Recherche sur la naissance du concept de droit coutumier aux XI^e et XII^e siècles” *Revue historique de droit français et étranger* 79, no.3 (2001) 257-291). ****

ecclesiasticum.¹⁴² Of course, these three have much overlap, especially as it was common for bishops to hold land and rights in the same way that secular lords did, different subject matter jurisdiction could give them claims in the same issue for different reasons.¹⁴³

So, as mentioned above, custom was ‘crystallizing’ as a normative vector of lordship, it was being valued as ‘good’ or ‘bad,’ and new forms of legal writing were proliferating amongst different communities. In the words of Christian Lauranson-Rosaz, *la cristallisation coutumière* sees the shift from the mores of a people to the usages and customs of a duchy or a county—the example he gives is from *mos Burgundiorum* from around the year one thousand to the *bons us et coutumes* of the lordship of the area.¹⁴⁴ In the middle of the twelfth century, contracts, testaments and marriage agreements begin referring to *consuetudo loci (patriae, civitatis, ect)*.¹⁴⁵ While precocious Normandy saw the latter language used as early as the time of the Conquest, where new land concessions were made *ad usus et consuetudines Normanniae*, it only starts to become common in Northern France in the early thirteenth century: the first mention of a custom of Paris is in the *Statute of Pamiers* (1212), the customs of Champagne are first mentioned in 1224, those of Poitou in 1227, and those of Flanders in 1235.¹⁴⁶ This change in the language of norms was of key significance, it was the conceptual switch from habits to rules.

The writing of custom also began to affect larger geographical areas—the author of Glanvill wrote about the laws and customs of England in 1187/9, Andreas Capellanus was

¹⁴² *Ibid.*

¹⁴³ Uelmen, Amelia J. “A View of the Legal Profession From a Mid-twelfth-century Monastery” *Fordham Law Review* 71, no. 4 (2003) 1520.

¹⁴⁴ Lauranson-Rosaz, Christian. “Des “mauvaises coutumes” aux “bonnes coutumes”: Essai de synthèse pour le Midi (Ve-XIIe siècle)” in *La coutume au village dans l’Europe medieval et modern (Actes des XXe Journées Internationales d’Histoire de l’Abbaye de Flaran, Septembre 1998)*, ed. by Mireille Mousnier at Jacques Poumarède (Presses Universitaires du Mirail) 51. He said this for Burgundy, but it illustrates the general idea well.

¹⁴⁵ Gouron, André . “La coutume en France au Moyen Age” in *La Coutume/Custom, Transactions of the Jean Bodin Society for Comparative Institutional History*, Part II: Medieval and Modern Western Europe (Brussels: De Boeck, 1989) 202.

¹⁴⁶ Paul Ourliac and Jean-Louis Gazzaniga. *Histoire de droit privé français, de l’an mil au Code Civil* (Paris: Albin Michel, 1985) 66.

defining the rules of Love and procedures of the courts of Love in around 1184/6,¹⁴⁷ the *Très Ancien Coutumier de Normandie* appeared soon after the Angevins lost Normandy to the French Crown,¹⁴⁸ the *Sachsenspiegel* was composed by Eike von Repgow in the 1220s at the behest of his lord (Graf Hoyer von Falkenstein), the various authors of Bracton's *Laws and Customs of England* were cobbling the text together in the first half of the thirteenth century, and the *Summa de Legibus Normanniae* was composed between 1230 and 1250.

We cannot know whether the *coutumiers* authors had knowledge of these texts, though it certainly was possible. As previously noted, the texts did not follow a pattern of writing closely enough to be classified as a genre, what united them was their thematic unity in describing the rules of the secular courts. Though some of these titles are later attributions, they nonetheless show that the language used to describe obligatory rules was also not uniform but could be thought in a range of terms.

FRENCH AS A WRITTEN LEGAL LANGUAGE

One feature that distinguished the *coutumiers* from previous as well as contemporaneous sorts of legal writing and was distinctive of them as a group was their authors' immediate adoption of the vernacular as the language of law. By the mid-thirteenth century, the vernacular had not only become the language of history and literature, but had also brought learned knowledge that had been the preserve of Latin-literates to a wider public through translations.

¹⁴⁷ For more on this sort of jurisprudence, see Goodrich, Peter. *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London: Routledge, 1996).

¹⁴⁸ The date of this text is currently being reappraised and it is possible that actually it was written one century later than currently thought, so possibly in the late thirteenth century. This text was originally written in Latin and then translated into French, but for some reason convention sticks to the French title, perhaps this brings the text closer to the other French *coutumiers*.

The shift from Latin to the vernacular has received a lot of attention in the field of diplomatics, the records of legal practice. However, outside of Serge Lusignan's masterful study *La langue des rois*, the *coutumiers* rarely appear as part of the cultural revolution that constituted the spread of writing of the language of speech, and the ability to disseminate knowledge beyond the eminent circles of those who could read Latin or understand it when they heard it.

There must have been something about the type of knowledge contained in the *coutumiers* that seemed best captured and disseminated in the vernacular. There were earlier texts in Latin that were close thematic and geographic relatives to the vernacular *coutumiers*—The Norman *Summa de Legibus Normannie*, and “Glanvill” and “Bracton’s” *De Legibus et Consuetudinibus Angliae*, or from a little further away, Eike von Repgow’s *Sachsenspiegel*. However, once the author of the *Coutumes d’Anjou et du Maine* and Pierre de Fontaines wrote about the practice of the lay courts in the vernacular, it continued to be written in the vernacular. The French vernacular was consistently chosen for texts describing the rules and procedures of the secular courts in the thirteenth century and even the earlier treatises were soon translated into vernacular form. In the fourteenth, furthermore, the *coutumiers* continued to be written in French, while treatises on some more specialized subjects might be in Latin.¹⁴⁹

In a recent article titled “What happened to Latin?” Patrick J. Geary noted that by the end of the Middle Ages only an extreme minority still used Latin as a language of communication.¹⁵⁰ By the end of the thirteenth century, he continued, it was primarily the church that still used Latin while French had displaced it across royal, princely and merchant chanceries of the West

¹⁴⁹ This seems especially the same for procedural tracts, such as Guillaume Dubreuil’s *Stylus Curie parliament Franciae* of 1330 (Aubertin, Charles. *Histoire de la langue et de la littérature au Moyen Âge*, Vol.2 (E. Belin, 1883) 501).

¹⁵⁰ Geary, Patrick J. “What Happened to Latin” *Speculum* 84 (2009) 859, 864.

and also as the language of communication and diplomacy internationally.¹⁵¹ Indeed, the use and fairly swift dominance of the vernacular as a language of law beginning in the second half of the thirteenth-century could also be seen in Spain, the crusader states, Italy, Germany and England (first in French and then in the later fourteenth century in English).

The shift in the language of conceptual ideas adds another layer to this—it occurred at a similar time than the beginning of vernacular record-keeping, and showed that vernacular writing was not just for fixing the memory of facts and events but also to formulate and transmit wider themes and complex ideas. Those localities that had made French a language of law were also all undergoing a concurrent flourishing of other types of writing in the vernacular—from literature to historiography—and these must be seen as associated movements.¹⁵²

The form of French vernacular writing was verse throughout the twelfth century, the Song of Roland being the most famous example, and prose only takes off as a medium of writing in the thirteenth.¹⁵³ The great watershed was Villehardouin's history of the Fourth Crusade (ca. 1210), the first vernacular history in French. It was quickly followed by inspiring tales of knighthood linking holy land to mainland like *Graal* (ca. 1220) and *Lancelot-Graal* (1125-1230), written in a literary style that made itself modestly felt even in the narratives of contemporary charters that were beginning to flirt with the use of the vernacular.¹⁵⁴

The first half of the thirteenth century also saw translations of various subjects originally written in Latin into French as part of the *translatio studii*, the idea that learning was transferred from Greece through Rome to France. These ranged across literature, philosophy, law, medicine, theology, and history and should be seen as a true movement that changed the shape and nature

¹⁵¹ *Ibid.* 864.

¹⁵² Lusignan, *La langue des rois*, 60ff.

¹⁵³ Lusignan, Serge, *La langue des rois*, 23.

¹⁵⁴ Lusignan, Serge, *La langue des rois*, 23.

of knowledge. As Serge Lusignan noted, though not all of the scholarly *auctoritates* were translated, the works that were translated tended to be those used in university teaching and all belonged to the medieval corpus of *auctoritates*.¹⁵⁵ Many of these translations were not direct translations that sought to transmit original meaning, many of them were individual products that reshaped and reinterpreted the source text for a new public.¹⁵⁶ Translation was often an act of creation itself that took on a life of its own afterwards. Moral poetry, for instance, was translated from the Latin and then followed by diverse imitations or innovations.¹⁵⁷ According to Colin Smith, an increasingly discerning and literate aristocratic and bourgeois public, wary of ever more fabulous *chansons de geste*, stimulated an appetite for ‘true’ historical texts in vernacular prose.¹⁵⁸ That may be one of a number of reasons. What we do know is that a range of interests became newly accessible through the vernacular, in different forms and on different themes.

Jan Ziolkowski was undoubtedly right to discuss the move to the vernacular in terms of “cultural exuberance” that developed alongside Latin literary culture and saw both the refinement of and a new confidence in both vernacular culture and language.¹⁵⁹ In the twelfth century great literary works began to be written in French, in the thirteenth it expanded to great chronicles like Primat’s *Grandes Chroniques de France* and juridical works like the *coutumiers*,

¹⁵⁵ Lusignan, Serge. *Parler vulgairement: Les intellectuels et la langue française aux XIIIe et XIVe siècles* (Montreal: Les Presses de Université de Montréal, 1986) 131. Some scholars, however, feel that the translated texts were not ones commonly used in the schools (Verger, J. *Les gens de Savoir en Europe à la fin du Moyen Age* (Paris: PUF, 1997))

¹⁵⁶ Beer, Jeanette. “Medieval Translations: Latin and the Vernacular Languages” in *Medieval Latin: An Introduction and Bibliographical Guide*, ed. by F.A.C. Mantello and A.G. Rigg (Washington: Catholic University of America Press) 729.

¹⁵⁷ Paris, Gaston. *La littérature française au Moyen Age (XI-XIVe siècle)* (Paris: Hachette, 1888) 150. He cites *Les Droits au clerc de Voudai* as an example of these imitations. This poem appears in one manuscript of the Etablissements de Saint Louis, where four stanzas from this *Dit* are selected to open the text of the *Coutumes d’Orelans* that form Book II (Book I, or the *Coutumes de Touraine et Anjou* are completely absent in this manuscript version.

¹⁵⁸ Smith, Colin C. “The Vernacular” in *The New Cambridge Medieval History (c. 1198-1300)* 81.

¹⁵⁹ Ziolkowski, Jan M. “Latin and Vernacular Literature” in *The New Cambridge Medieval History*, vol.4 (c. 1024-1198) (2004) 664.

in the fourteenth century it expanded further to massive political works that theorized royal power, such as Everart de Trémaugon's *Songe du vergier* (1378). Beyond that, various works originally written in the vernacular were then translated from the original vernacular into Latin, such as Marco Polo's travels or the *Coutumes de Beauvaisis*, and even a French Troy romance that the Italian jurist Guido della Colonna (d. after 1287) hoped to make accessible to “*qui grammatican legunt!*”¹⁶⁰

As Guido della Colonna's words made clear, Latin was identified with grammar, with a system of language. Dante made this clear when he wrote the first treatise on the literary use of the vernacular, *De Vulgari Eloquentia*. Vernacular, he explained, was the language that “children learn from those around them,” without any rules, to be distinguished from what the ancient Romans called ‘grammar,’ a secondary language only gained through “the expense of much time and study”—the one is “natural to us, while the latter is more an artificial creation.”¹⁶¹ As he explained, a theory of the correct usage of the vernacular is necessary to everyone (even, he noted, to women and children so far as they could understand it).¹⁶² He was writing for this reason—to be of service to the speech of common people.

There was, already before Dante, the idea that certain genres would tend to be written in one language or another because they were a natural pairing. Raimon Vidal de Besalù (1160-1210), for instance, felt that French should be used for romances and pastourelles, while Limousin should be used for verses, *cansos*, and *sirventes*.¹⁶³ Dante, on the other hand,

¹⁶⁰ Beer, Jeanette. “Medieval Translations: Latin and the Vernacular Languages” in *Medieval Latin: An Introduction and Bibliographical Guide*, ed. by F.A.C. Mantello and A.G. Rigg (Washington: Catholic University of America Press) 730. I have not yet been able to locate this Latin Beaumanoir.

¹⁶¹ Dante, *Literature in the Vernacular (De Vulgari Eloquentia)*, trans. by Sally Purcell (Manchester: Carcanet New Press, 1981) I.1.

¹⁶² *Ibid.*

¹⁶³ Ziolkowski, Jan M. “Latin and Vernacular Literature” in *The New Cambridge Medieval History (c. 1024-1198)*, vol.4 (2004) 668.

explained that the *langue d'oc* was the better language for lyric while the *langue d'oïl* was better for narrative.¹⁶⁴ As for legal writing in texts like the *coutumiers*, as Serge Lusignan noted, Ile-de-France French and Picard were the most popular dialects.¹⁶⁵

By the thirteenth century, the French language was already fulfilling many types of functions that ranged from a medium of communication within the family and civic society, it had become a strong competitor as the language of administration, and was even important to clerics whose grouping into 'nations' at the university level showed the importance of the vernacular as a mode of communication between them.¹⁶⁶ Even at the highest levels of education, then, there was a bilingualism where Latin was a second language, specific to learning certain bodies of knowledge, religious, scientific or otherwise.¹⁶⁷

The first writing in the vernacular was done close to or as part of traditional centers of knowledge—the church and the academy. As is well known, the majority of *litterati* were clerics, so *laicus* acquired the connotation of illiteracy because of the lack of knowledge of Latin—literate meant clerical and illiterate meant everyone else.¹⁶⁸ The relationship between Latin and the vernacular was originally “symbiotic and convivial,” certainly at the very least “dialectical.”¹⁶⁹ Nonetheless, the different languages catered to different audiences and had different practical effect. As Walter Map (c. 1140-1209) told Gerald of Wales (1147-1223):¹⁷⁰

¹⁶⁴ Dante, X; Ziolkowski, “Latin and Vernacular Literature” 668. He says this in the context of saying he does not want to chose a best or favorite French dialect, and then turns to an analysis of Italian vernaculars (Dante, X).

¹⁶⁵ See Chapter V.

¹⁶⁶ Lusignan, *Parler vulgairement* 35.

¹⁶⁷ *Ibid.*

¹⁶⁸ Clanchy, *From Memory to Written Record: England 1066-1307* (Cambridge, Mass: Harvard University Press, 1979); Ziolkowski, “Latin and Vernacular Literature” 660.

¹⁶⁹ Ziolkowski, 658-9; and Gauvard, Claude. “La justice au roi de France et le latin à la fin du Moyen Âge: Transparence ou opacité d’une pratique de la norme?” in *Les historiens et le latin médiéval : colloque tenu à la Sorbonne, les 9, 10 et 11 septembre 1999*, ed. by M. Goullet and M. Parris (Paris: Publications de la Sorbonne, 2001) 31-53).

¹⁷⁰ Ziolkowski, 659.

your writings are far more praiseworthy and lasting than my words; yet because mine are easy to follow and in the vernacular, while yours are in Latin, which is understood by fewer folk, I have carried off a reasonable reward while you and your distinguished writings have not been adequately rewarded; because learned and generous princes have long since vanished from the world.

The implication was that writing in the vernacular could reach many more people and was a desirable skill in princely chanceries or archives. It was a practical skill for which one could be remunerated.

Perhaps it was views such as these that caused the congenial relationship between Latin and vernacular to deteriorate, as Jan Ziolkowski noted, in the thirteenth century.¹⁷¹ As Pat Geary recently emphasized, Latin very rapidly transformed from the universal language of communication to the distrusted language of obfuscation, a thought so well captured by Emperor Rudolf of Hapsburg when he decreed that privileges should be recorded in the vernacular “because the difficulty of laymen was giving birth to errors and great doubts and deceiving laymen.”¹⁷²

Nonetheless, the shift from Latin to vernacular was of course gradual and the shift from the use of Latin to the vernacular in acts of practice was not linear. As Claude Gauvard noted, French as a language of legal record was no doubt in a dialectical relationship with the language of knowledge of the church, namely Latin.¹⁷³ French administrators, especially in conservative royal chanceries, continued to use Latin as their language of record till the beginning of the fourteenth century and even as the use of the vernacular spread it did not replace Latin

¹⁷¹ *Ibid.* 658-9.

¹⁷² Geary, Patrick J. “What Happened to Latin” *Speculum* 84 (2009) 863.

¹⁷³ Gauvard, “La justice au roi de France et le latin à la fin du Moyen Âge: Transparence ou opacité d’une pratique de la norme?” 31-53.

completely.¹⁷⁴ The use of the vernacular was undoubtedly seminal in the dramatic changes in and expansion of legal practice between the beginning of the thirteenth and the end of the fourteenth centuries, as vernacular writing infiltrated all aspects of legal thinking and record. Nonetheless, the wave of writing about legal practice in the secular courts was undoubtedly conceived of and written down mostly in the vernacular.

The oldest ‘legal’ text written in French, of course, was found in the record of the oaths exchanged by Louis V’s sons at Strasbourg in 842. This was an early and precocious appearance of the vernacular in France, though it was not without precedent, as kings in England had already written text after text of Old English law in Old English, a practice squelched with the various conquests of the area, both Danish and Norman.¹⁷⁵ However, it was really from the end of the eleventh century that the literary production in French witnessed an astonishing acceleration, a huge diversification, as well as an impressive geographical expansion.¹⁷⁶

Legal thought found its vernacular voice when sets of rules for communities started to be written down in French. The first charters in French appeared at the end of the twelfth and beginning of the thirteenth century as part of a movement in the North that began in the North East in Tournai, Arras, Saint-Omer and so on.¹⁷⁷ The *Establissemments de Rouen* were composed

¹⁷⁴ Lusignan, Serge. *La langue des rois*, 17. Champagne was the first French principality with French chancery records—with a notable surge in the use of the vernacular after the extinction of the direct line of the Counts of Champagne in 1274, which was followed by a decade of regency until a young Jeanne de Champagne was married to the Philip who would become Philip the Fair (*Ibid.*, 55-6).

¹⁷⁵ For more on the Old English Laws, see Wormald, Patrick.

¹⁷⁶ Kullmann, Dorothea. “Introduction” in *The Church and Vernacular Literature in Medieval France*, Dorothea Kullmann, ed. (Toronto: Pontifical Institute of medieval Studies, 2009) 1. Kullmann notes that the first writing in the vernacular must have been done by clerics as they were the ones who were educated to read and write, and the birth of the written vernacular should not automatically be seen as the birth of lay/profane writing, though by the late eleventh century there is a clear movement in lay vernacular writing (*Ibid.*, 1-4).

¹⁷⁷ Lusignan, Serge, *La langue des rois*, 46-7. For a helpful analysis of the development of early vernacular plays, at a similar time, see Symes, Carol. “The Appearance of Early Vernacular Plays: Forms, Functions and the Future of Medieval Theatre” *Speculum* 77, no.3 (2002) 778-831; for a brief survey on the general rise of European vernaculars, see Brunner, Thomas. “Le passage aux langues vernaculaires dans les actes de la pratique en occident” *Le Moyen Age* 115, no.1 (2009) 29-72.

between 1160-1170, and while they meant to describe the organization and nature of the city's government, the set of rules became the basis for many other collections of city customs. The thirteenth-century *Livre Roisin*, often included in the *coutumiers* corpus, was in fact a hybrid text devoted to the customs of the city of Lille that partially inherited from the tradition of recording city customs and from the new wave of consolidating and theorizing the customs of various sorts of secular courts.

There was also a development, formalization and specialization of diplomatic documents throughout the thirteenth century and after.¹⁷⁸ Before this time, public ritual and witness testimony were the preserve of legal memory—the charters that existed were memory markers for the rituals that had publicly established an agreement or change in status or fact.¹⁷⁹ This increase in charter-writing was related to changes in the law of proof, which provided a decisive impetus for the writing of charters in French, as the fledging fortunes of the judicial duel opened the door to placing an increasing value on written proof.¹⁸⁰ This was not a straight narrative of progression. As Claude Gauvard remarked, Louis IX's prohibition of the judicial duel was purely for the royal domain and the practice continued to be deeply entrenched in dispute resolution long afterwards.¹⁸¹ Nonetheless, it did open the doors for the increasing use of written proof.

The first push to bring academic law outside of the academy also occurred at a similar time. A collection known as *Lo Codi* appeared in the South of France around 1160. It was a

¹⁷⁸ For a nice description of these, see Bautier, Robert-Henri. "Typologie diplomatique des actes royaux français (XIIIe-XVe siècles) in *Actes du colloque diplomatique royale du Moyen-Âge, XIII-XIVe siècles*", *Faculdade de Letras da universidade do Porto, 1996*, consulted online 6/18/2012: <http://ler.letras.up.pt/site/default.aspx?qry=id03id1135&sum=sim>.

¹⁷⁹ Lusignan, *La langue des rois*, 31ff.

¹⁸⁰ *Ibid.*, 28.

¹⁸¹ Gauvard, Claude. "*De grace especial*" *Crime, État et société en France à la fin du Moyen Âge*, 2nd ed. (Paris: Publications de la Sorbonne, 1991) 172ff. She notes that Beaumanoir sees it as a necessary tool for the great criminal cases. However, it was not just a procedure used only by lay folk, but it also appeared in thirteenth-century records of the court of the bishop of Paris in cases of murder and rape/abduction (*Ibid.*, 174).

product of the new university learning, basically a *summa* of Justinian's Code, but was different from other transmissions of the *ius commune* such as Roger II's *Assises* because it was written in the Provençal vernacular (and later translated into French, Castilian and Catalan).¹⁸² As a liberal rehashing of Roman sources, *Lo Codi* already evinced the remix culture that would form the basis of vernacular legal writing and the general approach to description, truth, normativity and authority. The Bible was translated into French in around 1230.¹⁸³

It was also in the 1230s that the vernacular started shifting the language of conceptual law in earnest. This first occurred in the form of translations from Latin into the vernacular of the various texts of the *Corpus Iuris Civilis*, Tancred's *Ordo*,¹⁸⁴ Gratian's *Decretum*,¹⁸⁵ and papal decretals. The *Summa de legibus Normannie* (often referred to as *Grand Coutumier de Normandie*) was also translated. The importance of these for creating and diffusing a French legal language underpinned by the meanings and mechanics of Roman law cannot be overestimated and is strikingly understudied.

The vernacular *coutumiers* followed suit in the next decade, starting with the *Coutumes d'Anjou et du Maine* (1246) and Pierre de Fontaine's *Conseil* (1253). The *Livre de Jostice et de Plet* appeared in around 1260, a text singular for its great use of Roman law and its complete resistance to any acknowledgement of it that awkwardly fits the description of *coutumiers* though it is grouped with these.¹⁸⁶ Around the same time, Louis IX commissioned Etienne Boileau, the provost of Paris at the time, to compile the customs of the merchants and artisans of the city, which he did in a text titled the *Livre des Mestiers*. The *Rolls of Oleron* and other

¹⁸² See for instance Gouron. André. "Du nouveau sur Lo Codi" *Revue d'histoire du droit* (1975) 271-77. Hermann Fitting seems to have published an edition of the text.

¹⁸³ Olivier-Martin, Félix. *Les institutes de Justinien en français* (Paris: Sirey, 1935) xvi note 2.

¹⁸⁴ *Li ordinaire de maistre Tancrez*, Bibliothèque Nationale, Paris, ms.fr. 1073.

¹⁸⁵ Löfstedt, Leena. *Gratiani decretum : la traduction en ancien français du Décret de Gratien. Vol. II, Causae 1-14* (Helsinki : Societas scientiarum fennica, 1993)

¹⁸⁶ See explanation in introduction.

expressions of maritime law were also composed in the French vernacular, which Marianne Kowaleski has argued was the common language of maritime activity.¹⁸⁷ Other *coutumiers* continued to appear in Northern France—the *Etablissements de Saint Louis* (1272/1273) was followed by the *Le livre des constitutions demenees el Chastelet de Paris* (between 1279 and 1282), Philippe de Beaumanoir’s *Coutumes de Beauvaisis* (1283), *L’Ancien Coutumier de Champagne* (around 1295), and the *Coutumier d’Artois* (between 1283 and 1302).

Nor was French as a language of law restricted to France—French was a vernacular *lingua franca legalis* with a wide geographical range. The French vernacular was used from the crusader states to England. As Colin Smith suggested, perhaps it was the internationalism of Latin that fostered a similar spirit in the vernacular, or perhaps the lack of regional frontiers with fixed ‘national’ identities permitted vernaculars to travel far and wide.¹⁸⁸ The extent of the francophone world must also have been a factor. In the second half of the thirteenth century French was still the language of the nobility in England and Anglo-Norman was also used for the vernacular legal treatise, for instance in Britton’s reinvention of Bracton’s vernacular *De legibus*, the anonymous *Fet Assaver*’s introduction to the practice of the lay courts, or the *Court Baron*’s exposition of the practice of baronial courts.¹⁸⁹ The crusader states also saw the multiplication of legal texts written in the French vernacular, written even as the territory was being gradually lost, such as Philip of Novara’s *Livre en forme de plet*, John of Ibelin’s *Assises*

¹⁸⁷ Kowaleski, Marianne. “The French of England: A Maritime lingua franca?” in *Language and Culture in Medieval Britain: The French of England, c. 1100-c. 1500*, ed. by Jocelyn Wogan-Browne (York Medieval Press, 2009).

¹⁸⁸ Smith, Colin C. “The Vernacular” 77-8. National identities would start hardening in the fourteenth century.

¹⁸⁹ For a wonderful study of French as a language of royal law and administration in England, see Serge Lusignan’s *La langue des rois* and essays by George E. Woodbine and Marc Ormrod on the use of English in those courts later in the fourteenth century.

de Jerusalem, the *Assises of Antioch* which we only know from Sempad the Constable's Armenian translation, and the *Assises of Romania*.¹⁹⁰

LAY COURTS

The action in these vernacular *coutumiers* texts was firmly located in the lay courts. There is a strain of historiography, perhaps best exemplified by Joseph Strayer, which saw in the medieval lay *qua* secular *qua* temporal something of the modern separation of powers, where secular also meant non-religious.¹⁹¹ Susan Reynolds came at it slightly differently, but she also saw something secular in the laity.¹⁹² For Strayer, the stakes were about the origins of the modern European sovereign state, how it formed itself into something sovereign, impersonal, representative, specialized, bureaucratized and rational.¹⁹³ Reynolds, however, was trying to recognize that there was a legitimate sphere of thought, activity, and writing that was non-ecclesiastical and non-university. Reynolds was certainly right in pointing out a sphere of lay thinking and writing—indeed, Rosamund McKitterick, Warren Brown and Adam Kosto have show that this existed in the early middle ages and long before the *coutumiers*.¹⁹⁴

¹⁹⁰ See Beugnot, Auguste-Arthur. *Assises de Jérusalem ou Recueil des ouvrages de jurisprudence composés pendant le XIII^e siècle dans les royaumes de Jérusalem et de Chypre (Recueil des Historiens des Croisades, Lois, 2 vols)* (Paris: Imprimerie Royale, 1841-1843).

¹⁹¹ Strayer, Joseph. *On the Medieval Origins of the Modern State*. 1970.

¹⁹² Reynolds, Susan. "Social Mentalities and the Case of Medieval Skepticism" *Transactions of the Royal Historical Society* 6th ser., 1 (1991) 21-41.

¹⁹³ See Strayer, Joshua. *The Medieval Origins of the Modern State* (Princeton, N.J.: Princeton University Press, 1970).

¹⁹⁴ Rosamund McKitterick showed that Carolingian Francia relied on the written word in various fields such as law, administration, learning and religion, and was used by laity in social levels below the aristocratic elite (McKitterick, Rosamund. *The Uses of Literacy in Early Medieval Europe* (Cambridge: 1990)). As Adam Kosto noted, "the documentary practices of laymen—how they created, used, and kept written records of their transactions—approaches the question not from the perspective of diplomatics but rather as part of the history of literary [...] Perhaps the most important result of this scholarship has been the redefinition of literacy as an analytical concept, one that allows for the study of literate practices beyond the simple ability to read and write, and therefore beyond

These older assumptions over the distinctiveness of and acrimony between “those who prayed” and “those who fought,” or “church” and “state” have been disproved by a series of careful and nuanced scholarly works that focused on various forms of interaction between communities.¹⁹⁵ Steve White, for instance, has shown how in the eleventh and twelfth centuries lay donations to monasteries could serve to create communities by creating ties between the donor, all relatives who signed the deed, and the religious institution who received the gift.¹⁹⁶ Indeed, clever kings like Philip IV harnessed the imagery of sacral kingship to buttress their own claims, position and power.¹⁹⁷

The term ‘secular’ was not a description of a lack of religiosity but a certain type of lordship. The secular courts also harnessed the sacred in the service of the secular and were not secular in the modern sense of not religious. One example of this was judicial responsibility, though many others could be provided. As James Q. Whitman discussed in detail, for instance, judges were directly responsible to God, and it was he who would judge them ultimately.¹⁹⁸ The *coutumiers* discussed this as a key aspect of the judicial function. Pierre de Fontaines counseled his audience that “When you are judging, always keep before the eyes of your heart the One who will reward each of us according to his works. For you will be judged according to the very same

the clerical elites most likely to possess those skills to members of the broader society. This the “illiterate” peasant listening to a reading of a biblical text and the “illiterate” landowner who hires a scribe to redact a charter are nonetheless “using literacy” (Kosto, Adam. “Laymen, Clerics, and Documentary Practices in the Early Middle Ages: The Example of Catalonia” *Speculum* 80, no.1 (2005) 45).

¹⁹⁵ See Bouchard, Constance. “Community: Society and the Church in Medieval France” *French Historical Studies* 17, no.4 (1992) 1035-6.

¹⁹⁶ See White, Stephen. *Custom, Kinship and Gifts to Saints: The “Laudatio Parentum” in Western France, 1050-1150* (Chapel Hill, N.C.: University of North Carolina Press, 1988).

¹⁹⁷ Given James. “Power and Fear in Philip IV’s France” *Historiein* 6 (2006) 93. The point for Given is that while Strayer stressed the “rational” state, the state in fact directed and exploited what Strayer might call irrational in its service.

¹⁹⁸ Whitman, James Q. *The origins of reasonable doubt: Theological Roots of the Criminal Trial*. New Haven: Yale University Press. 2008.

yardstick, false or true, that you use to measure others.”¹⁹⁹ That all judges were ultimately responsible to God was echoed in imagery of the Last Judgment that could be found both in church and court.²⁰⁰

As James Brundage noted, during the Middle Ages any one place had multiple and overlapping legal systems that included manorial law, feudal law, municipal law, royal law, merchant law, maritime law, canon law, each with their own courts.²⁰¹ Secular or lay, as opposed to ecclesiastical, in the legal context was generally a jurisdictional designation—it implied a type of court which had competency over specific issues or people, provided specific types of sanctions and followed its own internal logic, rules, authorities. The *coutumiers* were all very clear that they were discussing the customs of the lay, secular courts.²⁰² They were devoting their work to the secular as opposed to the *sacred*— as opposed to their direct adjudicatory counterparts in the ecclesiastical courts.²⁰³ The *coutumiers* provide proof of the keen interest

¹⁹⁹ Pierre de Fontaines, XXI.1. See also Pierre: “you should know that according to God you do not have complete power over your vassal; therefore, if you take any of his property except the lawful dues [*droites redevances*] he owes you, you are taking them against God and to the peril of your soul, like a robber. And when it is said that everything a vassal has belong to his master [*seignior*, 'lord'], it is a truth to be examined: for if they were the master's own, there would be no difference between a slave and a vassal [*entre serf et vassal*], but according to our practice there is no other judge but God between you and your vassal, as long as he is resident on your land, if he has no other law with respect to you than the common law [*s'il n'a autre lois vers toi que la commune*]” (Pierre de Fontaines, XXI.8).

²⁰⁰ See Jacob, Robert. *Images de la justice: Essai sur l'iconographie judiciaire du Moyen Age a l'age classique* (Paris: Le Léopard d'Or, 1994).

²⁰¹ Brundage, James. *Medieval Canon Law* (New York: Longman, 1995) 2.

²⁰² For more on this, see Chapter III.

²⁰³ The writing of procedural manuals (*ordines iudicarii*) for the ecclesiastical courts was likely one of the inspirations for the *coutumiers* authors to write the rules and procedures of the lay courts. The focus on lay courts that runs through the texts must be a contrast to the church courts. Unlike canon law and customary law, Roman law did not have courts in which it was specifically applied. It was the law taught at universities that, when it came into practice, did so through graduates who had learned to think in a Roman-law manner and adopted its scholastic process as well as notions and categories. Some of these graduates went into the royal administration and brought Roman law notions with them. We see these occasionally in the later thirteenth century, for instance, Pierre de Belleperche who studied Roman law under Jacques de Revigny at the University of Orléans and then became an advisor to Philip the Fair (r. 1285-1314). Also, it should be noted that in late thirteenth and the fourteenth centuries, the South of France began identifying itself as the *pays de droit écrit* (the land of written law). It was then that the customary law of the South (shaped by a reception of a summarized Roman law into Visigothic law that had almost no resemblance to the *Corpus Iuris*) was infused with the Roman law of the universities, largely as a post-Albigensian-Crusade reaction of Southern jurists against the king's customary law.

laymen had in developing some sort of identity for their courts. These courts had fairly recently divided the fiscal, administrative and juridical into separate spheres of activity, and were just beginning to have their own personnel whose work was largely devoted to them.

Traditionally, the church could only impose spiritual sanctions such as penance and excommunication that did not involve the spilling of blood.²⁰⁴ As the spiritual sword, the church had claims over several areas of legal activity. The church had authority over certain groups of people that were considered disadvantaged or cleric-like, such as widows, poor people, orphans and crusaders. It also adjudicated any case involving a cleric, even secular ‘crimes’ such as murder or theft. It further had authority over transactions deemed within the spiritual realm, such as alms, testaments or marriage—all which could involve massive transfers of land. The secular courts had competency generally over the other areas of law, which they divided into low and high jurisdiction.²⁰⁵

Just as the *coutumiers* began to be written, other initiatives were taken to make the secular courts a more viable alternative to the church courts, which had started professionalizing earlier and provided services otherwise unavailable. Records of transactions had long been kept by the church, and these increased drastically in the eleventh century onwards. The cartulary of St-Marcel-lès-Chalon, for instance, included six charters from the ninth century (though two were later forgeries), twelve from the tenth, seventy-six from the eleventh, and twenty-six just

²⁰⁴ When the church did need to use some strong-armed persuasion or punishment, they handed over the accused or guilty party to the secular authorities, who did the torturing and executing for them, as in the famous example of the inquisition. For an example of the development of legal rules related to the spilling of blood, and who these rules protected, *see* Whitman, *The Origins of Reasonable Doubt*.

²⁰⁵ Low jurisdiction essentially encompassed what we might call today private law and petty crimes, and the sanctions associated with it were monetary penalties, restitution or minor physical punishment. High jurisdiction was jurisdiction over especially heinous crimes like murder, arson or rape, and the holder of high jurisdiction could punish the guilty with death.

from the first quarter of the twelfth century.²⁰⁶ These episcopal chanceries remain relatively understudied as compared to the royal and papal chanceries, though they were so important for the writing and preserving of documents in the twelfth and thirteenth centuries.²⁰⁷ Before the thirteenth century, when individuals in Northern France wanted to have an act authenticated and recognized officially by public authority, they would have to use the services the local episcopal courts known as the *officilités* to do this.²⁰⁸ However, throughout the thirteenth century, various lower-level lay jurisdictions began offering these services through what was known as the *jurisdiction gracieuse*, and a century later were the predominant source of these.²⁰⁹

The jurisdictional competition between secular and ecclesiastical courts during this period is well known. It was an important factor in compelling the development of written rules. Already in the early thirteenth century lay rulers at local, regional and royal levels were protesting the expansion of ecclesiastical jurisdiction into traditionally secular affairs.²¹⁰ By mid-century, these protests turned into more concerted action, such as one taken in 1246, when many barons swore to punish those who used the church courts for issues relating to lay property with fine or imprisonment, and to ignore the sanction of excommunication that would flow as a

²⁰⁶ Bouchard, Constance Brittain. *The Cartulary of St-Marcel-lès-Chalon, 779-1126* (Cambridge, Mass.: The Medieval Academy of America, 1998). This cartulary ends in 1126.

²⁰⁷ Evergates, Theodore. "Review: *Une chancellerie épiscopale au XII siècles: Le cas d'Arras* by Benoît-Michel Tock" *The American Historical Review* 100, no.1 (1995) 147.

²⁰⁸ Boulet-Sautel, Marguerite. "Le notaire contre le *ius civile* au Moyen Age en région parisienne" in *Excerptiones iuris: Studies in Honor of André Gouron*, ed. by Bernard Durand and Laurent Mayali (Berkeley: Robbins Collection Publications, 2000) 72. Some even had special writing bureaus organized to deliver this service.

²⁰⁹ *Ibid.* In Paris, this lay *jurisdiction gracieuse* had practically eliminated their ecclesiastical competition in the fourteenth century. A royal ordinance of 1301 had established on a permanent basis an office of notaries in charge of such writings in the Châtelet (theoretically they were delegates of the Provost of Paris) (*Ibid.*). France was divided into *tabellionage* or *jurisdiction gracieuse* in the North, and the notariat in the South, a division which was reabsorbed in favor of the notariat starting in the sixteenth century (Lusignan, Serge. *La langue des rois*, 77).

²¹⁰ See Keyser "Peaceable Power: Civil Law and the Limitations of Lordship"; Baldwin, *Philip Augustus*, 318-23; Susan Reynolds, *Kingdoms and Communities in Western Europe 900-1300*, 2nd ed. (New York: Oxford University Press), 284.

consequence.²¹¹ By the end of the thirteenth and beginning of the fourteenth centuries, the Parlement of Paris had taken on the role of intervening in the jurisdictional disputes between church courts, the lay regional courts and the royal courts. It was especially attentive to supervising the limits of ecclesiastical jurisdiction as well as what it considered clerical abuse of excommunication and sanctuary, as these directly affected secular jurisdiction, and even began providing alternative procedures in disputes over marriages and wills.²¹²

KINGS AND CUSTOM

This competition had a lot to do with the rise of increasingly powerful kings who were trying to reclaim supremacy over a political space in which they had been stagnating as figureheads. This began to change in the twelfth century, especially by the end of the century with the reign of Philip Augustus. The kings of the thirteenth century continued to expand their power over both territory and notably over the legal-political processes of conflict and its resolution by affirming that they were reclaiming their traditional responsibility over justice.

Theoretically, the essence of the royal function lay in the dispensation of justice, which was part of the oath the king took during the coronation. His duty was to make laws for the common good, which his *baillis* must uphold.²¹³ Suits had their final end once they reach the

²¹¹ Fournier, Paul. *Les officialités au moyen âge. Étude sur l'organisation, la compétence et la procédure des tribunaux ecclésiastiques ordinaires en France de 1180 à 1328* (Paris: Plon, 1880) 100-104. Fournier how bishops, from the end of twelfth century on, attempted to create some uniformity in direction and authority in areas under their control by creating the *officialités* and delegating authority to them. According to him, one of the pressures that led to the creation of the post was the perceived attempts of potentates to try to take away their rights of jurisdiction. Similar arguments, then, were being deployed on both sides of the issue.

²¹² Harding, Alan. *Medieval Law and the Foundations of the State* (Oxford: Oxford University Press, 2002) 169.

²¹³ “Li establissement que li rois fet pour commun pourfit doivent estre fourment gardé par la porveance des baillis” (Philippe de Beaumanoir, I.51)

king's court, there was no appeal beyond it.²¹⁴ Law and justice were part of the king's duty to provide a peaceful realm for his subjects to inhabit. Jean de Joinville made this clear in his *Life of Saint Louis*. Hugues de Dignes, aiming to educate the king, said in a sermon that he had read the Bible and its books that told stories of infidel princes and concluded that the only way that kingdoms were lost and went from one lordship to another was when they lacked Law (*defaute de droit*).²¹⁵ If the king rendered good and swift justice to his subjects, Hugues continued, the good Lord would permit him to keep his kingdom in peace throughout his life.²¹⁶

According to Jean de Joinville, the king never forgot this lesson, which was then transmitted to the future Louis X (Philip the Fair's son and Louis IX's grandson) to whom Joinville had dedicated the book.²¹⁷ According to Joinville, the king organized things such that after going to mass some members of his entourage, like the Lord of Nesle, the Count of Soissons and Joinville himself, would go to hear the "pleas of the gate (*plez de la porte*) that we now call petitions (*requestes*)."²¹⁸ Joinville had been seneschal of Champagne, his name actually appears in a number of the cases that the *Ancien Coutumier de Champagne* describes, and was sensitive to how legal practice has changed between the events of the 1240s that he was recounting and the time and the first years of the fourteenth century when he was writing the *Life*.²¹⁹

²¹⁴ This idea is already present in the first years of the thirteenth century: "il doit envoyer les parties a l'ostel le roi, si que la cause i soit terminee" (*Très Ancien Coutumier de Normandie*, LXXVII.1).

²¹⁵ Jean de Joinville, *Vie de Saint Louis*, ed. and trans. by Jacques Monfrin (Paris: Garnier, 1995) 55.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*, 57.

²¹⁸ *Ibid.*, 57. The pleas were called *plets de la porte* because pleas were often held at gateways or doorways, in this case, the entrance of the king's home, but the terminology changed to describe more formally what was being done.

²¹⁹ *Ibid.*, 57. The *plets de la porte* must refer to approximately the 1240s, it was in the years before Louis went on crusade in 1248. Jeanne of Navarre had asked him to write Louis IX's life, which was written sometime between her death in 1305 and the text's dedication to Louis IX in 1309. Jean de Joinville lived phenomenally long--almost one hundred years—from 1224 to 1317.

Joinville also famously recounted the most celebrated scene of Louis IX providing justice as he often did after mass, sitting under a great oak tree in the Bois de Vincennes.²²⁰ Anyone could come to him here, without fear of those who guarded his entrance, and he told them that their issues would be resolved one by one. At that point, he called on Pierre de Fontaines and Geoffroy de Villete, and said: “Deliver judgement for me.”²²¹ Joinville also saw Louis IX recreating this scene in the Garden of Paris, the king had a carpet set on the ground where he sat with his counselors, and those who had pleas or petitions would stand around this carpet and be serviced in the same manner as in the Bois de Vincennes—one by one, they would be seen by royal justices like Pierre de Fontaines who would bring their issues to a close. The king presided over the administration of justice, which was delivered by his officers.

Traditionally the king had a special role as the protector of custom: he could confirm or interpret customs, give exemptions to custom in the form of a privilege, or abolish bad customs.²²² It was his duty to make sure that custom was upheld by others.²²³ As Pierre de Fontaines made clear, one of the bases for the appeal of false judgment was that the judgment was rendered contrary to the customs of the region. In such a situation, Pierre said that one should appeal to the king, whose duty it was “to preserve the customs of the regions and have them upheld.”²²⁴ The *Coutumier d’Artois* made this a formal aspect of the king’s justice by listing “judgment made against common custom” as a separate ground for appeal to the crown.²²⁵

²²⁰ *Ibid.*, 59.

²²¹ “Delivrez moy ceste partie” *Ibid.*, 59.

²²² Ourliac, Paul. “Législation, coutumes et coutumiers au temps de Philippe Auguste” in *La France de Philippe Auguste—Le temps des mutations* (Colloques internationaux CNRS) no.602 (Colloques internationaux CNRS, no.602) (Paris: Éditions du CNRS, 1982) 476.

²²³ *See for instance* Philippe de Beaumanoir, XXIV.683.

²²⁴ “Mès je lô que cil contre qui tel jugement sont rendu, qu’il dient: “Je ne reçoif, ne ne m’assent à tel jugement qui est contre la costume commune del païs,” et voist au roi, à qui les costumes del païs sont à garder et à fère tenir, qui la costume li fera tenir...” (Pierre de Fontaines, XXII.32). He repeats the same sentiment soon afterward: “Quant

Kings were confirming small-scale customs, such as city customs, already in the twelfth century. As they were being redacted, the customs were changed and perfected, which resulted in some degree of uniformity. Before confirming new city customs, the king had commissions called to investigate the customs, and to abrogate from or add to them whenever necessary.²²⁶ As Jacques Krynen noted, the more the customs were approved in this manner, the more urban customs were homogenized under the auspices of royal power.²²⁷

A duty to uphold good customs and abrogate bad ones could be a great source of power, as well as a great responsibility. It was one that had to be tended judiciously. In fact, the king did not have a duty to uphold *all* custom. Rather, as Louis IX advised his son, it was the duty of the king to uphold good customs, but to undermine the bad ones. The royal practice of abolishing evil customs was an old one, going back at least to the middle of the eleventh century.²²⁸

From the time of Saint Louis, the king's role expanded from the protector of custom to a veritable "censor of custom" via the abrogation of bad custom.²²⁹ Beaumanoir defended this role of the king when he explained: "for the intention of the law is not to take away others' rights, but to insure that things are done according to reason, and to terminate bad customs and favor the good ones."²³⁰ As Albert Rigaudière has noted, even if considered separately they deal with relatively minor things, the royal acts that abolished bad customs essentially resulted in a

aucuns dit que l'en li a fait jugement contre la costume del païs commune, bien avert au roi, qui les costumes a à garder" (*Ibid.*, XXII.33)

²²⁵ "de defaute de drois, ou de jugement fait contre *commune coutume*, ou de faus jugement" (*Coutumier d'Artois*, XI.1) [emphasis added]. It is impossible to tell whether the common custom in question here was the custom of the area, so Artois, or to those customs that surpassed regional boundaries.

²²⁶ Krynen, Jacques. "Entre science juridique et dirigisme: le glas medieval de la coutume" *Cahier de recherches médiévales* 7 (2000) 21.

²²⁷ *Ibid.* The thirteenth century customs of Agenais and of Toulouse are the two *causes célèbres* of this royal attention, but according to Krynen this was in fact the norm.

²²⁸ Olivier Guillot *et al.*, 130.

²²⁹ Krynen, *L'empire du roi*, 78.

²³⁰ "car l'intencions des establissemens n'est pas pour tolir autrui droit, mes pour ce que les choses soient fetes avec reson, et pour les mauveses coutumes abatre et les bonnes amener avant" Philippe de Beaumanoir, XLVIII.1496.

new order, a new order which affirmed the power of the state and of the king, who was slowly making customary norms conform to those that he himself decreed.²³¹

The power of the French kings continued to be mitigated by the politics of consent. The extent of the king's need for approval for his initiatives, however, lessened gradually during the course of the thirteenth century. The century began with Philip Augustus, who could not legislate outside the royal domain without the consent of each of his vassals, and ended with Philip the Fair, who had some obligation to consult with his personal counsel—no longer all the barons—and to hold its advice in the highest esteem, but was not bound by it. It started with a fledgling royal judicial presence in the regions, when Philip Augustus sent out the royal *baillis* to manage things both economic and judicial related to the crown in the regions, and became a machinery of royal justices with purely judicial functions stationed in the various regions, and rotating to avoid corruption.

Jacques Krynen argued that the impetus for writing the *coutumiers* came from the king and has evaluated the text as royalist, written and deployed to reinforce the power of the crown. As he noted, the monarchy was becoming the locus of power and actively engaged in the task of state-building.²³² This is a tempting thesis, especially because the regions to which the *coutumiers* were tied were all areas had been annexed by or inherited by the crown before the texts were written: Artois came to the French kings in 1190 as Isabelle de Hainault's dowry when she married Philip II (sealed with the Treaty of Melun in 1226), Maine (1203) and Anjou (1204) were gained in King John's losses to Philip Augustus, Vermandois passed to be French kings when Eleanor Countess of Vermandois and Valois died without an heir in 1214, Clermont-

²³¹ Rigaudière, Albert. *Penser et construire l'État dans la France du Moyen Âge (XIIIe-XVe siècle)* (Paris: Comité pour l'histoire économique et financière (Ministère de l'Économie, des Finances et de l'Industrie), 2003) 209-251.

²³² See Krynen, Jacques. *L'empire du roi, idées et croyances politiques en France XIIIe-XVe siècle* (Paris: Gallimard, 1993); Olivier Guillot *et al.*.

en-Beauvaisis was purchased by the French crown in 1218, and Champagne was acquired by the French kings in 1284 through the marriage of Jeanne and Philip the Fair. Also, the texts appear soon after the sweeping measures taken by Louis IX to reorganize law and governance in his kingdom. However, as André Castaldo noted, there is no evidence that the kings were actually behind the writing of the *coutumiers* or even encouraged them to be written.²³³ While that might be true, the connections between jurists, between geographies and between texts do indicate that the royal domain at least provided a fruitful cultural context in which these texts could flourish.

CREATING REGIONAL CUSTOM

Custom was long defined as a form of ‘popular’ law, indeed, a long strain of historiography had allied these texts with resistance to expansion in royal power. More recently, scholars have been arguing the opposite—that the ‘custom’ of thirteenth-century France has little to do with autochthonous rules formed by the consent of a people and a lot to do with the development of regulation and its imposition by the nascent state.²³⁴ Some scholars now tend to align these texts to developing centralization and royal authority and have argued that the *coutumiers* represented rustic attempts to emulate and use the Roman law in the service of these.²³⁵ The real nature of the texts seems to lie somewhere between these two. They were written for principalities that already felt the strong influence of royal authority, as such they

²³³ Castaldo, “À propos de vues nouvelles I” 128.

²³⁴ Claude Gauvard, Alain Boureau, Robert Jacob and Charles de Miramon. “Les Normes” in *Les tendances actuelles de l’histoire du Moyen Âge en France et en Allemagne (Actes des colloques de Sèvres (1997) et Göttingen)*, ed. by Jean-Claude Schmitt and Otto Gerhard Oexle (Paris: Publications de la Sorbonne, 2002) 470.

²³⁵ Jacques Krynen, *La loi des rois*.

reflect the place of the king in law in these areas. At the same time, the texts were also cementing power at other levels that scholars generally overlook.

Multiplicity was the hallmark of both medieval lordship and custom—the two were attached to each other in a multitude of overlapping levels and relationships that were constantly being renegotiated. This is the reason it is so startling that, with the exception of Beaumanoir's *Coutumes de Beauvaisis*, the *coutumiers* completely ignored the existence of a multitude of jurisdictions that lay within comital and baronial jurisdictions. The texts of practice, such as charters that recorded agreements or disputes, were replete with mentions of local particular customs that only had currency in a small village or a small town. The *coutumiers* did discuss issues of jurisdiction and appeals to higher courts, but these local vicinage customs were largely entirely left out of their narratives.

It seems that the *coutumiers* were specifically interested in other types of jurisdictions against whom they might have some competitive interest. The limits and duties of ecclesiastical and royal jurisdictions were an important feature of the texts, as well as the duties of the high-powered lords *vis-à-vis* their own men or how their own courts ought to be run. However, the texts elided the particularities of the customs of subgroups within their territories.

In other words, the *coutumiers* authors tended to smooth over variation within individual regions as well as between them. Just as the king was expanding and cementing his jurisdiction, his counts and barons were also attempting to cement their jurisdiction over the areas they controlled. Glimpses of these lower jurisdictions in these texts are brief and ephemeral. One rare one in the *Etablissements de Saint Louis* showed that while there was a general rule the sons of

the king's free men and women were under royal jurisdiction, but an exception was made for Sainte Croix and Saint Aignien.²³⁶

Of all the *coutumiers* of the second half of the thirteenth century, only Philippe de Beaumanoir acknowledged and commented about variation in local custom within the larger jurisdiction. One way he did this was by pointing out when local customs were exceptions to the more general rules he was discussing. A clear example can be found in Beaumanoir's description of the jurisdiction and care of roads. According to common law (*droit commun*), roads belonged in all ways to the lords who held their land directly from the king.²³⁷ However, there was a different "general custom" in Beauvaisis: if one held the land on both sides of the road and one had jurisdiction and lordship in this land, one had jurisdiction over the part of the road that was on one's land.²³⁸ Even within the small Beauvaisis region there local exceptions to this general custom, and some people has highway jurisdiction on roads who passed through land other than their own.²³⁹

The former was an exception for the practices of certain people, but exceptions could also be regional. For instance, in the county of Clermont, no one could take property from their surety without first making a complaint in court.²⁴⁰ There were, within this county, three exceptions to this rule: in the castellany and town of Creil and localities of Sacy and La Neuville-en-Hez anyone could simply take their surety's property.²⁴¹

Variation between the customs of small localities was often a particular characteristic of numbers and of quantification. Measurement used by tradesmen, for instance, often varied from

²³⁶ "And if he can prove he is the son of the king's free woman or free man, he will remain in the king's jurisdiction, unless he is a man or woman of Sainte Croix or Saint Aignien" (*Etablissements*, 2.31).

²³⁷ Philippe de Beaumanoir, XXV.721.

²³⁸ *Ibid.*

²³⁹ *Ibid.*, XXV.722.

²⁴⁰ *Coutumes de Beauvaisis*, XLIII.1323.

²⁴¹ *Ibid.* Must have been bad for business.

place to place. Beaumanoir felt the need to devote an entire chapter to attempt to reign in the problem of measurement (Chapter XXVI):²⁴²

... because many kinds of merchandise are sold by weight or volume, and especially things which should be delivered by volume, we shall speak in this chapter of volume measurements and of things which cannot be sold except by measurements, and the dangers which lie in buying and selling because the measurements differ from town to town according to the local custom, and we shall speak also of what measurements are used in general according to our custom.

These particular customs of small localities were permitted to persist as long as they did not contradict the customs of the county. On important issues, such as issues relating to land, the policy was uniformity.²⁴³ Just as the kings were attempting to cement their control over their kingdom and introduce some level of commonality, the counts and barons were also attempting to create some uniformity within their own holdings.

There clearly were some efforts at uniformizing the customs within the region commensurate to the efforts to point out similarities between the regions and the lay courts. Nonetheless, variations in local custom within the regions was very much part of the knowledge necessary for the administration of justice on an everyday basis. Only Beaumanoir acknowledged this. Generally, this shows another aspect of creativity of the *coutumiers* authors:

²⁴² *Coutumes de Beauvaisis*, XXVI.743.

²⁴³ Beaumanoir is clear that on important matters, such as the right of redemption on sold land, there must be unity in the county. As he explains: "There are some twenty towns in the county where they want to uphold as a custom that when someone buys property, there is an announcement in the parish that such-and-such a property has been sold [and those who want to redeem it should do so within 15 days...]. But such an announcement and order is not valid, for it is against the general custom of the castellany of Clermont [where you have a whole year to redeem]; and subjects of the count cannot and must not make customs which are contrary to the custom of the castellany which is their chief town. And I have no doubt that if someone in the above-mentioned towns, where such an order was given, tries to redeem a property by the end of the year, he will be able to, if he pursues the suit to a judgment. If there opposite were judged, he would have a good appeal" [*Mes teus cris ne tele maniere de commandement ne vaut riens, car c'est contre la general coustume du chastel de Clermont; ne li sougiet du conte ne pueent ne ne doivent fere coustume contraire a cele du chastel qui est leur chiés*] (*Ibid.*, XLIV.1387).

they were in effect creating the image of a harmonized “regional” jurisdiction as well as linking it to the general customs of the lay courts.

CUSTOM AND LORDSHIP

The general recent emphasis on the *coutumiers* in the development of monarchical and state power has overlooked the story they tell about all levels of power centralizing: consolidation was occurring at the monarchic, ducal, comital, all levels of power and jurisdiction. As this was happening, custom continued to be identified with the privileges of lordship writ large. The *coutumiers* participated in this in various ways, for instance, it creating the image of a unified region as we saw in the previous section.

Le livre des constitutions demenées el Chastelet de Paris was the earliest *coutumier* to provide a working definition of custom. This text showed that the notion of custom, though becoming professionalized and meaning more than exaction by this point, was still very much associated with the idea of lordship. Jean Yver was the first to point this out when he showed that the customs in the *Très ancien coutumier de Normandie* actually reflected ducal legislation in Normandy rather than autochthonous norms.²⁴⁴ The two most common normative words that appeared in the *Demenées* are *droit* and *coutume*. The author mentioned “the custom of the area” but also refers to the “custom of France” of the king’s domain, or the “usage and custom of France.”²⁴⁵ Custom was defined by the text as lord’s command:²⁴⁶

²⁴⁴ Yver, Jean. “Le très ancien coutumier de Normandie. Miroir de la législation ducal? Contribution à l’étude de l’ordre public normand à la fin du XIe siècle” *Tijdschrift voor Rechtsgeschiedenis* 39 (1971) 333-374.

²⁴⁵ “la coutume du païs” (*Demenées*, 17), “as us et aus coutumes de France” (85), “la coutume de France” (*Demenées*, 12, 30, 40, 86)

Custom must be made by the command of the king or count, or bishop, or royal abbot, or by such person who can make it and must do so; and the custom must be brought to the area where it exists by any of the above mentioned lords; and the custom must be kept for precisely the above-said forty years, the custom must not be null nor estimated as null by law (or rightfully); and if custom is made in another manner and against it, it is null and estimated as null, nor must it be kept nor maintained by any good judge.

This passage obviously presents a much less romantic view of custom than the *zeitgeist* of a people or the preservation of ancestral memory and C. Mortet, the editor of the text, was uncomfortable with this definition and said it was “inexact.”²⁴⁷

Seeing custom as an aspect of lordship was actually a reasonable development from seeing custom as a lordly exaction. The idea of custom as a toll or fee did not vanish with the expansion of the concept as a general legal norm, and certainly its legacy is still felt today as we pass through customs to enter a new country. The term also continued to define the relations of lordship: the “customary man” (*home coustumier*) designated men submitted to a lordship and the dues of that lordship, this was another term for villain.²⁴⁸ The author of the text was also knowledgeable about discussion of the parameters of custom of the last decades, and provides the clearest definition of all the *coutumiers*. According to this author, custom was a rule that was

²⁴⁶ “coustume doit estre faite par commandement de roi ou do conte, ou d’evesque, ou d’abbé royal, ou de tel qui puisse faire et doie; et doit la coustume estre aportée el país ou elle estre par aucuns des seigneurs desus dis; et doit la coustume estre gardée par prescripcion de XL ans dessus dis, la coustume ne doit estre de nulle ne de nulle value par droit; et se coustume est fait autrement et contre, est nulle ne de nulle value, ne ne doit estre gardée ne maintenue par nul bon juge” (*Demenées*, 41). There is an echo of this in the *Coutumier d’Artois*, which warned that agreements made against law or custom would not be upheld because “laws and customs were put in the region (*les loys et coutumes mises ou país*) so we can practice according to them and not against them. And for this reason, lords make their commands and *etablissemens*, because they want us to preserve them, and not to breach them.” (*Coutumier d’Artois*, VII.3).

²⁴⁷ Mortet said the definition was inexact because many customs were not ordered by lords (citing Beaumanoir’s mention of popular consensus), and that the author’s views must have been colored by the fact that this author was concerned with the rules followed in lay court where pleaders and practitioners were more likely to apply well-established customs, *coutumes notoires* or *approuvées* (Mortet, *Demenées*, p.55 note 2). One might reply that the rules that were challenged at court were less likely to be these than unsettled ones. Outside of Beaumanoir he cites fourteenth-century texts like Bouteiller’s *Somme rural* and the *Grand Coutumier de France*, but it seems better to come at the question from what we know existed before, than view it from what happened after.

²⁴⁸ Laferrière, Louis-Firmin-Julien. *Histoire du droit civil de Rome et du droit français*, vol.6 (Paris: Joubert, 1858) 23.

commanded and brought into an area. How things were done, according to this author, were part of an active top-down policy. This does not mean that all custom was an imposition, but that custom could legitimately be created through an imposition, and it would still be termed custom rather than law.

LAY JURISTS

The lay jurists who wrote the *coutumiers* worked within this structure of lordship. The lawmen of Carolingian France were called *scabini* or were also known as *boni homines*, *boni viri*, *nobiles viri*, these “good men” were generally local landowners administering local justice.²⁴⁹ Customary dispute-resolution practice, as Bruno Lemesle and Mark Hagger have recently shown, was more developed in the eleventh and twelfth centuries than previously assumed.²⁵⁰ As Susan Reynolds further noted, the period after 1100 saw the appearance of “specialism” and experts and saw the move from non-specialists in courts— which had previously dealt with politics and finance as much as law— to some version of professional expert who specialized in the discrete field of legal knowledge.²⁵¹

Customary law was in essence a form of expert knowledge.²⁵² This expert knowledge could come from three places. The first was regular attendance at the courts combined with some stature in the community, like the *boni homines* of Carolingian France. A new player enters the scene with the expansion of royal power and with royal attempts to cement that power. The post

²⁴⁹ Estey, E.N. “The Scabini and the Local Courts” *Speculum* 26 (1951) 122-3.

²⁵⁰ Lemesle, Bruno. *Conflits et justice au Moyen Âge* (Paris: Presses Universitaires de France, 2008); Hagger, Mark. “Secular Law and Custom in Ducal Normandy c.1000-1144” *Speculum* 85, no.4 (2010) 827-868.

²⁵¹ Reynolds, Susan. “The Emergence of Professional Law in the Long Twelfth Century” 349-350.

²⁵² Teuscher, 39ff. Teuscher is discussing the position of *consuetudinarius*, or a type of customary law expert court consultant, in a later period (15th c.) in the Swiss midlands, but the general idea holds true here.

of the *bailli*, or royal justice, was progressively put in place near the end of Louis VII's reign and continued to expand, notably with Louis IX's reforms of the mid-thirteenth century.²⁵³ The *bailli*'s role was to conduct the exercise of royal justice in the place of the king across Northern France. He had jurisdiction over the king's agents and those directly allied to him as well as over specifically royal matters and, after Louis IX's reforms, he also had jurisdiction over local appeals to the crown. The expertise of this group of legal actors of the lay courts at all levels was drawn from watching, experience and opinion. The *coutumiers* refer to these men but the texts were not written by them, rather they were written for them by legal experts who were also familiar with written culture.

The *coutumiers* show that there must have also been a way of developing an expertise in secular law that scholars of French legal history elide, an expertise developed through what might be called a middling education combined with a knowledge of court documents and practice. A clerk educated in a cathedral school and immediately drawn into a lay chancery would also gain the cultural capital necessary to write a *coutumiers*. Indeed, the authors of the *Couumes d'Anjou et de Maine*, the *Coutumes de Champagne*, and the *Demenées el Chastel de Paris* demonstrate a breadth of knowledge formed through these milieus, rather than ones shaped by the Romanists who taught at universities.

It may pretty safely be said that all the *coutumiers* authors were people who were involved in pleading at court or had judicial functions. The author of the *Coutumier d'Artois*, for instance, was anonymous but constantly referred to cases that he had seen in court, and recounts them in detail, including the issue, the procedural steps taken, the arguments of the parties, the

²⁵³ In the South of France (though lines were blurred) the post was called *sénéchal*, and remained tinged with its military role longer than in the North.

resolution, and the lesson to be learned from it all.²⁵⁴ He writes with full confidence of his knowledge, for instance telling his audience the rule that if those people who are within the king's jurisdiction commit a crime they are tried in the place where they committed the crime: "I tell you [this] with certainty."²⁵⁵

This author, like the author of the *Coutumier de Champagne* either had an excellent and practiced memory that came from being immersed in a specific milieu or, more likely, they had access to written records of the case. It is hard to say for the author of the *Coutumier d'Artois*, but it is likely that the cases were recalled from the author's memory since he recalled cases by at most naming the principal parties and the jurisdiction where the trial took place. The author of the *Coutumier de Champagne*, on the other hand, probably had some access to written record. He described some of the cases in such detail that it would be difficult how to see how he could do so without drawing on written record, and the manner in which he narrated recalled the style of charters and notarial documents. For instance, he illustrated the custom or Champagne about the division of property between older and younger brothers and the guardianship of older brothers over younger ones with a case:²⁵⁶

This was judged in Chateauvillain in the year IIc IIIxx and IX (1289) against Guiot, the brother of Perrin d'Arc, who had asked Simon, the brother of the wife of the aforesaid Guiot, the division of a house. And the aforesaid Simon defended himself and said that he had been (*partis*) by friends and by justice, and had held it for five years after the wife of the said Guiot had become of age, and for this reason he did not want to respond to the request. It was judged (*rappourté*) that he would never have to respond to the request. Present at the judgment were Messire Miles de Saumur, canon of Chalons, Guillaume Alexandre, the bailli of Chalons, Messire Guillaume, Lord of Julli, Messire Hues Chauderons, Messire Guy his brother, Messire Jehanz de Marat, and Guillaume of the Chastelet.

²⁵⁴ For example, cases in Arras (II.3, III.19, III.34), Dorlens (V.3), and Encre (VI.2).

²⁵⁵ *Coutumier d'Artois*, XI.10.

²⁵⁶ *Ancien Coutumier de Champagne*, XVII.

The author of the *Coutumier de Champagne* described the customs of Champagne like this, through cases, or through general expressions of norms (“it is custom in Champagne that...”). The text did not refer to Roman law explicitly or implicitly. The knowledge necessary to compose such a text was a knowledge of court record and practice as well as some experience with writing and composing ideas in writing.

The author of the *Coutumier de Champagne* also provided insight into the lay people involved in court practice in naming the jurors who were involved in judging cases. The case above lists several such people. Miles de Saumur was a canon, an ecclesiastic. Hugues Chauderon came from an important feudal family which held the seigneuries of Briaucourt, and also assisted to the Jours de Troyes.²⁵⁷ Guy Chauderon figured on the list of vassals during the regency of Blanche of Artois (1274-5), he assisted in the Jours of the barons and was in a case himself, pleading with his daughter against her father-in-law.²⁵⁸ Jean de Marat is only known as Lord of Marat. This was a good group of respectable people, or *bonnes gens*, traditionally involved in dispute resolution and the courts, and the sort of people who were the intended audience for the *coutumiers*.

Amongst these men, however, were also two others who had had held several appointments to legal positions. Guillaume Alexandre was a professional justice: he was bailli of Troyes (1240-1246), bailli of Provins (1264), Troyes again (1269), both Troyes and Provins (1271), both Troyes and Provins (1273-1276), and bailli of Chalons (1289).²⁵⁹ Guillaume du Châtelet, on the other hand, had a distinguished career as a man of law: he was bailli of Meaux (1276), of Chaumont (1278), then bailli of Sézanne, again became bailli of Chaumont (1281-

²⁵⁷ *Ibid.*, 170 note 6.

²⁵⁸ *Ibid.*, 170 note 7.

²⁵⁹ Portejoie, *Ancien Coutumier de Champagne*, 169 note 4.

1283), then bailli of Troyes (1283-4), again bailli of Sézanne (1284) where he was still active after.²⁶⁰ He sat on the Grands Jours de Troyes, and in 1285 he even pleaded against Jean de Joinville, who had variously been seneschal of Champagne, crusader in the Holy land, friend and counselor to Louis IX, as well as his biographer.²⁶¹ Though his career was made in Champagne, he did go to plead before Parliament in 1291 and 1295. By the end of the thirteenth century, then, there were men who were making careers of court practice

Expert knowledge in law could, from the twelfth century on, also be gained conceptually and completely outside the realm of the practice of the secular courts through university studies of Roman or canon law. Around the year 1130, a new terminology for new types of legal expertise began to appear—*legisperitus*, *magister*, *notarius*, and *casidicus*—starting in the South in cities such as Montpellier, Carcassonne and Narbonne and slowly, gradually, moved North.²⁶² The first hints that university-trained legal thinkers began to be used by French kings appeared at a similar time. Louis VII used the services of a university-trained professional named Mainier once, a man that Pope Alexander III had named *magister* and an anonymous chronicler had named a *jurisperitus*, and who was the earliest known product of university legal studies in royal circles.²⁶³ Philip Augustus also called on some men of learning, one case mentions two “wise men” (*sapientes homini*) of the king named Master Geoffroy de Poissy and Master Nicolas of Chartres.²⁶⁴ The only professor of civil law that appeared at the royal court before 1270 was Simon of Paris, but students of law such as Eudes de Lorris had appeared as clerks of the

²⁶⁰ Portejoie, *Ancien Coutumier de Champagne*, 10 note 28.

²⁶¹ Portejoie, *Ancien Coutumier de Champagne*, 169 note 4.

²⁶² Boulet-Sautel, Marguerite. “Le droit romain et Philippe August” in *La France de Philippe Auguste—Le temps des mutations, Colloques internationaux CNRS n.602* (Paris: CNRS, 1982) 490.

²⁶³ *Ibid.*

²⁶⁴ Boulet-Sautel, “Le droit romain et Philippe August” 490. Boulet-Sautel feels that the title of *magister* likely made these men jurists.

Parlement and were amongst the colleagues of Pierre de Fontaine, the earliest *coutumiers* author.²⁶⁵

Some *coutumiers* authors fall more closely within this type of legal expertise. How squarely they fall within this has long been a subject of debate and is more closely analyzed in Chapter IV. It is worth noting here, however, that the manner in which they did so had no uniformity. Pierre de Fontaines, the compiler of the *Etablissements de Saint Louis*, Philippe de Beaumanoir, the author of the *Coutumier d'Artois* clearly had some knowledge of Roman and canon law but they had different sorts and amounts of knowledge and they drew on it in different ways. From his *Conseil*, all we can tell about Pierre is that he had a copy of Justinian's Code in translation (though no apparent knowledge of how to cite it properly) and the cultural capital to construct a text in the shape of a scholastic dialogue. The author of the *Etablissements* must have had wider knowledge, as he inserted quotations with proper academic references into earlier texts of customs. Philippe de Beaumanoir is a controversial case, and scholars have argued both that he had no knowledge of university law and that he had so perfectly imbibed it that his text is a perfect product of it though he never cites it at all. He clearly needed to be well educated to compose his impressive *coutumiers*, but there is good reason to doubt that a Roman-law university education was a necessary condition for him to be able to compose it. The author of the *Coutumier d'Artois*, lastly, displayed a very wide education. Roman and canon law are often quoted in this text, but these are very often drawn from other earlier *coutumiers*.

A little more may be said about Pierre and Philippe because, unlike the other *coutumiers* authors, they did not leave their texts anonymous. They were exceptional not only because we know more about them because they named themselves in their texts but also because the reason

²⁶⁵ Griffiths, Quentin. "Les origines et la carrière de Pierre de Fontaines, Jurisconsulte de Saint Louis" *Revue historique de droit français et étranger* 48, no.4 (1970) 551.

why they likely named themselves was that their names would provide added *auctoritas* to their texts. Both authors were exceptional for being close to the centre of political power. Pierre was closer to the center than Philippe, but Philippe was also exceptional for his erudition. What Pierre had claimed to do first, Philippe had done best with a truly original text that was at the same time legal, moral, philosophic. We can also say something about these authors outside of the *coutumiers* they composed.

Quentin Griffiths has shown how accrued traditions have shaped and distorted what we know about Pierre—some people have wanted to make him noble, others bourgeois.²⁶⁶ Pierre de Fontaines was an ordinary member of the knightly class just like the other members of Louis IX's parliament (with the one exception of Simon de Clermont, seigneur de Nesle) and two men of bourgeois origin.²⁶⁷ Pierre seems to have been one of the younger sons in a family that was minor nobility, and in the records he appears as an acquirer of land and rent-collector.²⁶⁸ We do not know with any certainty where Pierre came from, but he began his career in the Vermandois and the lands he bought and rents he collected were in the area around Saint Quentin.²⁶⁹ He was employed at the court of Mahaut de Brabant in Artois, who was the widow of Louis IX's brother Robert of Artois, before he became *bailli* in 1253.²⁷⁰ While in 1252 he was referred to as "sire," by 1257 he had become "chevalier du roi," *dominus Petrus, Mgr Pierre*, and then chevalier again when he stopped being a *bailli*.²⁷¹

²⁶⁶ Griffiths, Quentin. "Les origines et la carrière de Pierre de Fontaines, Jurisconsulte de Saint Louis" *Revue historique de droit français et étranger* 48, no.4 (1970) 544ff.

²⁶⁷ *Ibid.* 545. As far as we can tell, it seems that his entire fortune was built on his professional revenues, fief-rents and royal patronage (*Ibid.*, 556). Pierre must have died before 1267, when his wife remarried (*Ibid.*).

²⁶⁸ *Ibid.* 548.

²⁶⁹ *Ibid.* 549. Saint Quentin entered the royal domain around the beginning of the thirteenth century.

²⁷⁰ *Ibid.* 550. Mahaut d'Artois and her second husband, Guy de Châtillon the count of Saint-Pol, gave Pierre's son Jean a fief-rent of one hundred pounds in 1258, Pierre was already a royal *bailli* by then (*Ibid.*).

²⁷¹ Griffiths 548, 549. He sits in five suits in Parlement between 1255 and 1261, where he is variously referred to as master, counselor and judge (*Ibid.*, 553).

Philippe de Beaumanoir, on the other hand, was the son of a *bailli* and probably had attended court in his childhood. His father Philippe de Rémy, with whom the jurist had been long conflated, was not only a *bailli* but was also a literary man and composed poetry and popular romances such as *La Manekine* or *Jehan et Blonde*.²⁷² Philippe de Rémy had been *bailli* in Artois, where Pierre de Fontaines had been *bailli* before him, and it is possible that Pierre de Fontaines and Philippe de Beaumanoir crossed paths there, and that growing up Philippe had known about Pierre's book describing the rules of the lay courts. He wrote the text while still quite young, if speculation is right about his being born in 1250, then he was thirty-three when he finished the *Coutumes de Beauvaisis* in 1283, which he wrote while he was a justice in Clermont-en-Beauvaisis for Count Robert. His juridical career took off in the royal administration after this, and he was *bailli* in Senlis, Tours, Vermandois, Touraine, seneschal of Poitou.

CONCLUSION

One common interest that linked the *coutumiers* authors was their interest in carving out a specific sphere of lay justice. Lay people had, of course, held court, they had participated in juries and had been judges, there was nothing new about this. However, the idea that there was such a thing as lay courts whose rules should be discussed and should be written, that these should be accessible to those who needed to plead or judge within them, and that some sort of uniformity of spirit of function united them was an innovation. Indeed, the *coutumiers* intimated

²⁷² In the latter romance, Philippe de Rémy displays his solid knowledge of England, its geography and political system. There is no indication that his son had been there as well.

that their authors were interested in delimiting the various lines between the courts, not only to make sure disputes were resolved in the proper forum but also to constitute their own forum and create for it its own practicum and identity.

CHAPTER II

The Life of Written Custom

Anyone commemorating something in writing in the thirteenth century would have had a very good reason to do so. Someone who gave written form to a subject not previously set in writing must have been even more conscious of the task. This person was inventing a new realm for the written and could not completely rely on earlier genres to shape their own composition. They had to decide what form to give the subject, what bits of knowledge they had that they could reuse in its service, and ultimately what sorts of information were relevant and irrelevant to the subject. By this time, the decision had already been made that the subject matter should be transmitted in a new medium, should be imagined in a new form of discourse. Where did the conviction that this subject needed to be expressed in a new and different way, in writing, come from? What did it mean to the lay customary jurist to write customary practice into text? What place did he expect writing to occupy within legal culture more generally? How was the thinking of the lay jurist affected by the use of writing?

There is considerable literature devoted to custom as a community practice where ‘what has always been done’ is constantly negotiated, maintained or transformed.²⁷³ Custom, however, can be something that is written, and once written, it also becomes a textual practice and acquires

²⁷³ Notably in the field of legal anthropology. For some influential texts, see for instance, Falk Moore, S. *Law as Process: an Anthropological Approach* (London: Henley, 1978); J.L. Comaroff and S.A. Roberts. *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago, University of Chicago Press, 1981); Elias, T. O. *The Nature of Customary Law* (Manchester, Manchester University Press, 1956); Harris, O., (ed). *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity* (London and New York: Routledge, 1996).

a textual tradition. This chapter will move away from the more traditional way of discussing legal history as a form of intellectual history and will examine the textualization of custom as part of a cultural history of knowledge. Instead of thinking of custom as a type or source of law, we will examine custom as a way of thinking, as a method or process of thought, in order to come to an understanding of how lay customary jurists thought and how they understood the place of writing within that.

Modern legal history and legal anthropology have rightly put much emphasis on the shift from oral to written legal practice. This has received excellent treatment by M.T. Clanchy in his study of the shift “from memory to written record,” which traces the shift from orality to writing in English chanceries and practices of legal documentation.²⁷⁴ Despite this wealth in thinking about the shift from oral to written legal practice and a remarkable amount of recent publication on thirteenth-century French customary law, lay jurists and the *coutumiers* they authored continue to be evaluated in the traditional manner as a source of law or via their engagement with Roman law. This has led to defining the *coutumiers* project as merely descriptive – take, for instance, Guido Van Dievoet’s claim that “the authors of the *coutumiers* sought to describe local or regional custom”²⁷⁵—or an emphasis on their informal nature in describing them as “private.”²⁷⁶ This definition implies that the *coutumiers* authors are generally seen as scribes who copy customary practice into text—they tie practice down with words but are not yet capable to endow text with the authority of law because these texts were not specifically enforced by a public power.²⁷⁷ This downplays the importance of the fundamental shift in thinking that

²⁷⁴ Clanchy, *From Memory to Written Record: England 1066-1307*. Cambridge, Mass: Harvard University Press, 1979.

²⁷⁵ “Les auteurs des coutumiers ont voulu decrier la coutume locale ou regionale” Van Dievoet, 42 [my trans.]. The issue of the ‘local’ or ‘regional’ nature of these texts is addressed in the next chapter.

²⁷⁶ See Gilissen, Van Dievoet, Cohen.

²⁷⁷ See for instance, Gilissen, *La Coutume*, 25.

permitted the theorization of the practice in the lay courts in writing, as captured in the *coutumiers*.

Scholars have long assumed that the implication of literacy and record was to make the past binding, and that the price of memory is lack of freedom to transform. Benjamin Cardozo noted long ago that the “creative energy” of custom manifests itself in the manner in which old rules are applied.²⁷⁸ This notion was also embraced by Max Gluckman, who noted that custom has a “creative energy” when it is unwritten, which permits the creation of ‘new’ customary rules.²⁷⁹ M.T. Clanchy, following Gluckman, observed that “though they frequently appeal to the past, the *illiterate* judges are not effectively restricted by the decisions of their predecessors because these, *being unrecorded*, are mostly soon forgotten or transformed.”²⁸⁰

The implication of the initiative to write and theorize, and how it fits into customary legal culture, merits more attention, and should move away from clichéd assessments of written culture that align the oral with freedom and highlight the strictures of the written. Modern legal thinking about custom has been conditioned by conclusions decided upon in the late Middle Ages, conclusions that were still in formation throughout the thirteenth century. As we will see, the idea of unwritten custom and of written law was only forming in learned-law circles in the thirteenth century—it was not the framework within which the *coutumiers* authors generally saw their texts. Written custom was not yet a contradiction. Rather, the *coutumiers* authors placed their endeavors in the discursive framework of memory within a society and practice they perceived of as in constant and rapid flux.

²⁷⁸ Cardozo and Gluckman in Bederman, *Custom as a Source of Law*, 10.

²⁷⁹ *Ibid.*

²⁸⁰ Clanchy, “Remembering the Past and the Good Old Law” *History* 55 (1970) 171. [emphasis added] Clanchy discusses oral legal traditions and how within these some people are chosen to ‘remember’ the law, though these memories are adapted to a specific situation or group of hearers by the ‘rememberancers’.

Furthermore, the thirteenth-century French *coutumiers* point to an account of the “legal aesthetics” of written customary law that shows that the textualization of custom could coexist with a creative customary culture that was constantly transforming.²⁸¹ These texts also show that custom was not petrified in the act of writing and that writing could indeed be coupled with “creative energy.” This, in turn, intimates something larger about the relationship between writing and formalism: the *coutumiers* show that legal formalism is not inherent in writing itself, but is the product of a conception of the role of writing as binding.

As such, the discussion of the shift from orality to writing could usefully benefit from the study of the relationship between mode of conduct and text, and the gradual transformation of that relationship in the thirteenth century and onward. This implies the evaluation of custom through the lens of performance in two ways: first through the sphere of oral performance that continues to be envisaged as written culture begins to develop, and second in the manner in which text attempted to give shape to performance and to constitute a new different kind of customary lay jurist.

The *coutumiers* constitute a consistent attempt to observe and describe the practice of the secular courts, to think beyond what is seen and known and to begin the long process (and even incomplete) process of seeking to align practice and legal performance with text. While law is usually associated with enforcement, a state-apparatus that will make the rules real, the content of the law still has to be disseminated and known.²⁸² This takes a high level of organization, of

²⁸¹ As Pierre Schlag has convincingly argued, the “aesthetics of law” within a specific legal culture shape the medium within which the goals and ambitions of law are expressed: “A legal aesthetics is something a legal professional both undergoes and enacts, most often automatically, without thinking” (P. Schlag, “The Aesthetics of American Law” *Harvard Law Review* 115 (2001-2) 1053); *See also* Dedek, Helge. “School of Life: Learned Law and the Scholastic Habitus” in *Law and Private Life in the Middle Ages (Proceedings of the Sixth Carlsberg Academy Conference on medieval Legal History 2009)*, Per Andersen, Mia Münster-Swendsen and Helle Vogt, eds (Copenhagen: DJØF, 2011) 115.

²⁸² *See* HLA Hart.

course, but also a fundamental change in general consciousness, where rules are interpreted and even assumed as fixed. In other words, this change of consciousness is predicated on the shift from practice constituting law, where law is constantly generated in the community setting, to a somewhat known and certain law constituting and shaping practice. This is the story of learning to think of law as text, as immutable text, and in this sense the story of writing as a key step in the transformation of custom into law. The *coutumiers* are far from this transition, but they present a foundational moment in this transition.

TECHOLOGIES OF MEMORY AND CHANGE

The *coutumiers* were written partially because a set of historical factors had come together to create the conditions for this writing, and partially as an attempt to grapple with the intense pace of legal change of the second half of the thirteenth century. The vernacular, initially the language of literature, was rapidly expanding as the language of other spheres of lay activity. As legal practice was professionalizing and becoming more complicated, the use of writing within the field of law was continuously expanding. Also, legal ideas written in Latin had a small audience, and their limitations in reaching a wide variety of people involved in legal activities of the lay courts must have been becoming increasingly clear.²⁸³ All of this amounts to fundamental socio-cultural change and the people of the law associated with the secular courts were intensely aware of it.

In other words, it was the very pace of change that made memory such a preoccupation for the *coutumiers* authors: memory was important because people did not remember. Pierre de

²⁸³ See for instance Geary, Patrick J. "What Happened to Latin" *Speculum* 84 (2009) 859-873.

Fontaines and Philippe de Beaumanoir both said they wrote about custom in order to aid memory, they thus were conscious about using the developing technology of vernacular writing in the service of specific current problems. The writing of the *coutumiers* presents a tension in the idea that the language of memory is often deployed in the service of social traditionalism and resistance to change, because the form in which the argument was made was itself an innovation. The emphasis on aiding memory, then, did not reflect a rigid and fixed society but rather reflected a society that was reacting to the tremendous pace of change that affected almost all aspects of things legal in the thirteenth century.

Three of our eight *coutumier* authors—Pierre de Fontaines, Philippe de Beaumanoir and the author of the *Coutumier d’Artois*—made explicit statements about why they used the increasingly widespread technology of writing to record custom. These authors linked writing with an attempt to help the frailty of human memory, a topos common to medieval sources in connection with the use of writing. This idea went back to Isidore of Seville, who explained that written letters were created “in order to remember things. For lest they fly into oblivion, they are bound by letters. For so great is the variety of things that all cannot be learned by hearing, or contained only in memory.”²⁸⁴ Isidore saw writing and memorizing as essentially the same process—“writing is an activity of remembering, as remembering is writing on the tables of the mind.”²⁸⁵ Remembering, as Mary Carruthers noted, was an activity associated with images.

The concern for preserving memory spanned various intellectual disciplines and genres of writing. As Mary Carruthers noted, students of *ars memorativa* included students of law,

²⁸⁴ “Usus litterarum repertus propter memoria rerum. Nam ne oblivion fugiant, litteris alligantur. In tanta enim rerum varietate nec disci audiendo poterant omnia, nec memoria contineri” (Etymologies, 1.3.2) (Carruthers, 139).

²⁸⁵ Carruthers, Mary. *The Book of Memory: A Study of Memory in Medieval Culture* (Cambridge: Cambridge University Press, 2008) 139.

bureaucratic clerks and notaries.²⁸⁶ Thus the invocation of memory was already a commonplace in charters. The three *coutumiers* that invoke ideas of memory—Pierre de Fontaine’s *Conseil a un ami*, Philippe de Beaumanoir’s *Coutumes de Beauvaisis*, and the *Coutumier d’Artois*—were also the three that exhibited the closest intellectual affiliations with mainstream legal academic culture.²⁸⁷ While the quality of writtenness carries a sense of commemoration with it, the other *coutumiers* do not directly address the role of memory in the body of their text explicitly.

The *coutumiers* authors who invoked memory clearly felt they belonged to this intellectual tradition that saw writing as a therapy for forgetting. They were participating in the wider literary current of the age, which was not only concerned with forgetting things old or past but also with remembering specific pieces of information within the ever-increasing amount of scholarly writing being produced. By tagging their writing as an act of memory, the *coutumiers* authors who invoked this were tapping into an intellectual economy already in place. Their invocation of memory, however, also reflected a genuine anxiety about the lay courts, and this genuine concern that led to a new field of writing dedicated to the practice within them.

Pierre de Fontaines, for instance, asked his future readers (*ceus qui orront par escrit le conseil*) if he write too much of some things and too little of others because “having everything in memory, and to sin in nothing, pertains more to God than to mortal man.”²⁸⁸ Writing, in other words, cannot contain perfect memory. People, however, could make an effort in trying to

²⁸⁶ Carruthers, 153.

²⁸⁷ The compiler of the *Etablissements de Saint Louis* added citations to the text which included citations to Roman and canon law, but it was different from these texts.

²⁸⁸ “tot avoir en mémoire, et en nule rein pecchier, appartient plus à Deu que à home mortel, si come la loi dit” (Pierre de Fonatines, I.3).

preserve old customs, but this effort was not being made and customs being corrupted and forgotten:²⁸⁹

As to the customs of the Vermandois, I am much concerned [*esbahi*]: because **the old customs, which good folk [*preudome*] used to observe and put into practice in the past are much destroyed and almost all have disappeared** in part because of *baillis* and provosts, who are more concerned with doing their will than observing customs: in part by the will of people [*ceus*] who value more their own opinion than the actions of past generations [*des anciens*]: in part again because of all the rich folk, who have permitted the poor folk to be despoiled, and now the rich are despoiled by the poor, so that the area is almost without customs. **So that everything works by the common opinion** of four or three persons, without an exemplar [*exemplaire*] of a customary law.

We do not find the topoi of memory and forgetting in this passage in the traditional manner, where people seem defenseless in the face of the powerful forces of time and oblivion. Rather, Pierre identified the loss of old customs squarely within the field of human agency, it was not a question of memory fading and of people being subject to forces stronger than them. Customs were disappearing because of human actions and human choices, and people's inflated sense of their own opinion.

This had an effect on legal practitioners who, according to Pierre, were valuing their own will and opinion above other sources of authority. According to Pierre, judges and juries (prevalent across Northern France at this time, just as in England) were corrupting custom because they judged by their own opinion rather at the expense of old rules. This anxiety about the use of personal opinion, or discretion, in judgment was a phenomenon also felt by contemporaries in other places. Tom Green has shown that, in cases of homicide in England,

²⁸⁹ “por ce que les ancienes costumes que li preudome çà en arrière soloient [avoir l’habitude de] tenir et user, sont molt anéanties et presque totes failles, partie par bailli et par prévoz, qui plus entendent à lor volonté fère que à user des costumes; partie par la volonté de sens, qui plus s’aert à son avis que a fez des anciens: partie mès presque toz les riches, qui on soufert à despoillier lespovres, et or son par les povres li riches despouitié, et si que li païs est à bien près sanz coutumes” (Pierre de Fontaines, I.3).

juries made “conscientious verdicts” to get a result they desired instead of producing a verdict that closely followed the law.²⁹⁰ In fact, earlier on in the thirteenth century, Bracton had also stated he was writing because people were judging according to their own will and opinion rather than by the “authority of law” or “ancient judgments of just men,” ideas apparently originally in Azo’s *Summa Codicis*.²⁹¹ Richard Fraher has, in fact, shown that judicial discretion was subject to discussion as well as to some divergent and contradictory theories amongst jurists of the *ius commune*.²⁹² Some argued for close adherence to the two witness rule while others argued that more discretion would render punishment more efficient, and the former argument won out in the law schools, but the latter shaped criminal statutes in Italy in the thirteenth and fourteenth centuries.²⁹³ This all may hint at another topos, but a topos with widespread contemporary resonance, as the problem of older rules versus opinion was clearly a preoccupation amongst diverse legal communities.

Philippe de Beaumanoir does not repeat Pierre’s language of opinion and will, but he also has the sense that human choice favored the new instead of the old, and the old was falling into

²⁹⁰ See Green, Thomas Andrew. *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago: University of Chicago Press, 1985).

²⁹¹ “Since these laws and customs are often misapplied by the unwise and unlearned who ascend the judgment seat before they have learned the laws and stand amid doubts and the confusion of opinions, and frequently subverted by the greater who decide cases according to their own will rather than by the authority of the laws, I, Henry de Bracton, to instruct the lesser judges, if no one else, have turned my mind to the ancient judgments of just men [...] by the aid of writing to be preserved to posterity forever” (*Cum autem huiusmodi leges et consuetudines per insipientes et minus doctos, qui cathedram iudicandi ascendunt antequam leges didicerint, sæpius trahantur ad abusum, et qui stant in dubiis et in opinionibus et multotiens pervertuntur a maioribus, qui potius proprio arbitrio quam legum auctoritate causas decidunt, ad instructionem saltem minorum ego, Henricus de Bratone, animum erexi ad vetera iudicia iustorum [...] scripturæ suffragio perpetuæ memoriæ commendanda...*) (Bracton, Introduction, If an unwise and unlearned man ascends the judgment seat, Bracton Online, consulted 5/5/2012: <http://hls15.law.harvard.edu/bracton/Framed/mframe.htm>).

²⁹² See Fraher, Richard M. “Conviction According to Conscience: The Medieval Jurists’ Debate concerning Judicial Discretion and the Law of Proof” *Law and History Review* 7, no.1 (1989) 23-88.

²⁹³ See Fraher, 27.

desuetude. He perceived a similar problem that Pierre had noted some twenty years earlier but described it differently. In his prologue, he stated that:²⁹⁴

because we see people acting according to local customs, and **forsaking old laws** for these customs, it seems to us and also to others that it is good and profitable to **write down and register the customs which are current now, so that they can be observed without change from now on; because owing to memories which fade and people's life which is short, what is not written down is soon forgotten.**

Beaumanoir places his writing more squarely within traditional concepts of the idea of writing. He invokes the language of *memoria* within its conventional framework—memories fade, life is short, and the unwritten is forgotten. He also emphasizes that there is a community of people who are apprehensive about the fate of old rules, a community devoted to the preservation of knowledge trying to stave off forgetting.

Beaumanoir also adds a new idea about the written that had not yet appeared within the *coutumiers* tradition: the idea of indexing practice to the written, such that practice can be fixed and unchanging. The reason Beaumanoir was writing his text, in fact, is that these customs are only “current now” but can change at any moment.²⁹⁵ What might the idea of fixity have meant to Beaumanoir? What were the contours of possibility he imagined when he stated that registered customs ought to be observed without change?

²⁹⁴ “Mes pour ce que nous veons user selonc coustumes des terres et lessier les anciennes lois pour les coustumes, il m'est avis, et as autres aussi, que teus coustumes qui maintenant sont uses sont bonnes et pourfitables a escrire et a enregistrer si qu'eles soient maintenues sans changier does ores en avant, que, par les memoires qui sont escouloujans et par les vies as gens qui sont courtes, ce qui n'est escrit est tost oublie” (Philippe de Beaumanoir, Prologue.7).

²⁹⁵ Pierre de Fontaines also refers to the usage that is current now “par l'usage qui or cort” (Pierre de Fontaines, *Conseil a un ami*, IV.18).

Like Pierre de Fontaines, Beaumanoir was concerned that legal decision-makers disregarded custom in making their decisions. Beaumanoir makes this point strongly in the conclusion of the *Coutumes de Beauvaisis*:²⁹⁶

And since the truth is that **customs come to an end** because of **young jurors** who do **not know the old customs well**, so that in the future the opposite of what we have put into this book will be observed to happen, we pray to all to excuse us, for when we wrote the book, **we wrote as far as we could what was enforced or what should have been done ordinarily** in Beauvais; and the **corruption of the time** to come should not bring us into ill repute, or be blamed on our book.

While Pierre felt that opinion and will were displacing what he felt were more legitimate sources of law in the lay courts, about a quarter-century later, Beaumanoir attributed the same phenomenon to a lack of knowledge. It was more than that too. Beaumanoir intimated that the lack of desire to have and preserve that knowledge because he feels that his book will simply be seen as wrong. While Beaumanoir turned to the idea of writing as registration and a medium of fixity, he did not seem to believe in its ability to actually do these things.

Like Pierre, Beaumanoir betrayed a deep angst about the pace of legal change. Even the fixity of books could not prevent the rapid desuetude of the ideas within them. This may seem a little dramatic and alarmist, but it underscored the extent of legal change that he clearly believed was occurring. This was most plainly revealed in the first words of Beaumanoir's work. He begins his text with the following introductory words: "Here begins the book of the customs and usages of Beauvais as they were current at the time this book was made, that is to say in the year

²⁹⁶ "Et comme la verité soit tele que les coustumes se corrompent par les juenes jugeurs qui ne sevent pas bien les anciennes coustumes, par quoi l'en voie ou tans a venir le contraire d'aucune des choses que nous avons mis en cest livre, nous prions a tous que l'en nous en vueille tenir pour escusé, car ou tans que nous feismes de tout nostre pouoir nous escrismes ce qui tenoit et devoit ester fet communement en Beauvoisins: si ne nous doit pas disfamer ne blasmer nostre livre la corrupcions du tans a venir" (*Ibid.*, Conclusion.1982).

of our Lord's incarnation 1283."²⁹⁷ He does not index custom to communal memory, nor to his own memory, nor to his lifetime, nor to the tenure of the count of Clermont, nor to the reign of a specific king—all legitimate and common contemporary ways of indexing time.

Beaumanoir's awareness of the pace of change led him to peg the timeframe of the customs he described to a specific year—the customs therein were valid in 1283, and Beaumanoir was accountable for an accurate description of custom for that particular year only. Before this year, some customs and usages may have been different, and likewise, after that date they would also change. This presentness of custom also reappeared later in his text, where he clarified that he was discussing “the custom that there is now,” as opposed to the custom that was in force prior to the present moment and that will be in force afterwards.²⁹⁸ His text captured a moment in time. Beaumanoir himself was explicitly *not* writing down age-old custom as handed down through generations, consecrated by old age and communal consensus, namely, the developing definition of custom in the universities. Rather, he was recording new and current ‘custom’ in the form the he sees his contemporaries using it.²⁹⁹

The author of the *Coutumier d'Artois*, on the other hand, was less philosophical about memory and forgetting. He did recognize the problem of fleeting memory and oblivion, as he explained, he put the “laws and customs of the region of the lay court [...in writing] with brevity, because memory is short and things soon gone, and this is not enough to remember many things,

²⁹⁷ “Ci commence li livres des coustumes et des usages de Beauvoisins selonc ce qu'il couroit ou tans que cest livres fu fes, c'est assavoir en l'an de l'Incarnacion Nostre Seigneur .M..CC..IIIIxx et trois” Philippe de Beaumanoir, Incipit.

²⁹⁸ “*mes par la coustume qui maintenant i est*” (Philippe de Beaumanoir, XL.1257), “la coustume qui ore queurt” (*Ibid.*, XXXVIII.1133)

²⁹⁹ Interestingly, he nonetheless defines custom as those “maintained for so long as men can remember without debate” (“maintenue de si long tans comme il puet souvenir a home sans debat”) (Beaumanoir, s.683).

because new things take away the memory of old ones.”³⁰⁰ Memory, in other words, was a finite space. The author thus decided to take a more pragmatic approach in response to the problem by making things easier to remember by shrinking the amount to be remembered. Drawing inspiration from the “good cleric Orasses,” otherwise known as the ancient author Horace, the author concluded this was the best option because “the hearts of people better retain short words than long ones.”³⁰¹ The author’s views on how memory worked were thus shaping how he was presenting his text—the aim was to write the most memorable version of the customs, rather than the most accurate or other goals.

The importance of memory in these texts was clearly a reaction to change and a feeling of loss. While the ideas of memory and forgetting were *topoi* outside the field of law and had a long history before the *coutumiers*, they were clearly perceived as a useful way of verbalizing angst about contemporary transformations in the field of law. It was not that custom had never changed before, it is just that it probably did less perceptibly and less obviously. By the second half of the thirteenth century, the pace of change was so accelerated that it was easily observable and for some felt undesirable. The writing of custom was meant to aid that memory not because the practice of law in the secular courts was fixed and unchanging, but because it was clearly viewed as unfixed and perceptibly changing. However, though the *coutumiers* were the products of legal nostalgia and attempts to grapple with legal change, by theorizing custom in writing, they were also participating in that very change.

³⁰⁰ “Et de ce m’avés requis et requires que je fasse un escrit, selonc les loiys et coustumes dou pais de court laie. Et je les ai mis briement, pour ce que memoire est escoulourgans et chose tost alee, et ce souffist mie a ramenbrer tant de chose, car les nouveies choses tolent la ramenbrance des vies.” (*Coutumier d’Artois*, Prologue s. 4) (note this is not in m.s. A and B).

³⁰¹ “A cette chose s’accorde Orasses, li bons clers, qui dist: “Quanques tu commanderas, di briement”, car li cuer des gens retienent mieus les paroles courtes, que les longhes: ne nuls riens n’est isniele a oir a celui qui est desirrans d’oir, ançois li samble que li isnieletés de le parole est demourance” (*Ibid.*). Note how memory is seen to be located in the heart, rather than other parts of the body.

WRITTEN CUSTOM

Legal activity, as is well known, was largely within the realm of the unwritten before the twelfth and thirteenth centuries.³⁰² While charters, ordinances, and other legal and historical records might offer a glimpses into the normative thinking associated with customary practice, this only gave a piecemeal picture of the sphere of legal activity which was ad hoc in its essence. The professionalization of law and the concomitant juridicalization of normativity of the twelfth and thirteenth centuries, however, fomented conceptual thinking about custom, a type of thinking that spread over various forms of legal writing.

Despite this spread of written customary legal thinking, custom itself remained largely undefined by its practitioners. The *coutumiers* are a testament to this. They often use the term ‘custom’ synonymously with the term ‘usage’ and, with the exception of Beaumanoir, they leave the term undefined. Furthermore, they never precise the form—whether written or unwritten—that custom should take. This is important because it seems to be commonplace amongst modern scholars that the unwritten nature of custom is underscored in medieval definitions.³⁰³ This was not the case and, in fact, medieval definitions mostly underscore that custom can be both written and unwritten. As we will see in this section, while the form of custom became the subject of discussion in the late twelfth and thirteenth centuries amongst some canonists and Romanists, these leaned toward the possibility of the dual form of custom. At this time, these Romanists and canonists had begun to use the term “written law” (*ius scriptum, droit escrit*) as a technical term of art for the Roman and canon law, but custom had not yet become the opposite “unwritten” in

³⁰² Gilissen, 25.

³⁰³ Gilissen, 25.

these main scholarly currents. The *coutumiers*, furthermore, do not give any indication that the categorization of the form of custom was on their authors' minds and did not assume that custom was "unwritten law."

When the classical Roman jurists thought about the forms that normativity took, they did so in connection to thinking about the nature of its authority—what is the magic ingredient that makes something legally binding? The second-century jurist Julian reasoned that since written laws only bind because they have been approved by the will of the people, customary rules also drew their authority from the judgment of the people and were valid whether in writing or not.³⁰⁴ The terms *ius scriptum* and *ius non scriptum* reappear in Isidore of Seville's (d. 636) *Etymologies*, an encyclopedia that condensed the knowledge of antiquity into one volume that was wildly popular both during the Middle Ages and even afterwards.³⁰⁵ In the chapter dedicated to 'Laws and Times,' Isidore brought up the question of the relationship between custom and writing. While he created a genealogy for law that indexed it to writing, he maintained that custom did not have to be packaged in a specific (written or unwritten) form.³⁰⁶

All jurisprudence consists of laws and customs. A law is a written statute. A custom is usage tested by age, or unwritten law, for law (*lex*, gen. *legis*) is named from reading (*legere*), because it is written. But custom (*mos*) is a longstanding usage drawn likewise from 'moral habits' (*mores*). 'Customary law' (*consuetudo*) is a certain type of system of justice established by moral habits, which is taken as law when law is lacking; *nor does it matter whether it exists in writing or reasoning, since reason also validates law.* [...] Customary law is so called because it is in 'common use' (*communis usus*).

³⁰⁴ Stein, Peter. *Roman Law in European History* (Cambridge: Cambridge University Press, 2007) 27. The Emperor Constantine, in 319, also recognized the authority of custom and pronounced that it was valid as long as it did not override reason or written law (C. 8.52(53).2) (*Ibid.*), but this did not mean that he considered custom itself as unwritten.

³⁰⁵ The influence of the *Etymologies* was certainly not restricted to the learned laws. As the collaborators in this translation noted, the influence of this text was immense—it text survives in nearly one thousand manuscripts, a truly huge number, and continued to be copied in the fifteenth century and went into several printings starting also in the latter part of the same century (Barney *et al.*, "The Influence of the *Etymologies*" 24).

³⁰⁶ Isidore of Seville, *The Etymologies of Isidore of Seville*, intro. and trans. by Stephen A. Barney, W.J. Lewis, J.A. Beach and Oliver Berghof (Cambridge: Cambridge University Press, 2008) V.iii. [emphasis added]

Some scholars have claimed that the distinction between law as written and custom as unwritten was “firmly drawn” by Isidore.³⁰⁷ Actually, the conception of this sort of binary only developed much later. Isidore was very clear that writtenness was a quality of law. He was just as clear that the form of custom does not affect its nature as custom: custom, according to him, could be either be in written or unwritten.

The question of the basis of authority of law that had preoccupied the Romans returned to preoccupy the jurists of the Romanist legal revival from the twelfth century onward. This return was deeply imbedded in discussions about political power at the time—especially concerning where lay the ultimate power to pronounce law, whether in the people, the emperor, or the prince (a generic term to describe rulers)—discussions that continued for centuries.³⁰⁸ The *Summa Trecensis*, for instance, took Julian’s definition of law as the people’s will, which could be expressed by vote, habit or custom, no matter whether written or unwritten.³⁰⁹ For the author of the *Summa Trecensis*, no longer thought to be Irnerius, “the law is nothing other than the people’s constitution passed with the approval of prudent men.”³¹⁰ This claim was not simply a commentary on earlier sources, it was also a claim about contemporary political authority.

While “written law” eventually became a term of art for Roman and canon law, it also reinforced the sovereignty claims of emperors, kings and princes. This is why arguments for the

³⁰⁷ Ibbetson, David. “Custom in Medieval Law” in *The Nature of Customary Law*, edited by Amanda Perreau-Saussine and James Bernhard Murphy (Cambridge: Cambridge University Press, 2007) 154. Ibbetson also says that Azo similarly defined *consuetudo* as *ius non scriptum* (*Ibid.*). However, the Azo quote he uses “*Ius non scriptum moribus populi diuturnis introductum*” speaks of the Latin term *mos* (*mors* in Old French, *moeures* in modern French, *mores* in modern English), not of custom *qua consuetudo*.

³⁰⁸ See Pennington, Kenneth. *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993).

³⁰⁹ Lee, Hwa-Yong. *Political Representation in the Later Middle Ages: Marsilius in Context* (New York: Peter Lang, 2008) 65.

³¹⁰ “*et hoc recte, quia lex est consitutio populi cum uirorum prudentium consulto promulgate*” (*Ibid.*, 66).

authority of “written law” developed alongside political commentary that vested the will of the people within the emperor, such that his will reflected the will of the people.³¹¹ Written law was aligned with ordinance—this can clearly be seen even earlier in Frederick Barbarossa’s speech (according to Rahewein of Freising) at the Diet of Roncaglia of 1158 where Frederick said that civil law was established by the emperor and confirmed by the people and, while we should ensure that the law that was chosen to be written was good law, once it was so established it should no longer be judged, but only used to judge.³¹²

Ideas about “written law” could not be divorced from this political context, a political context that absorbed both secular and sacred authorities. The argument aligning the German emperor with written law, based on tradition drawn from the Roman emperors, was not a stretch of the imagination. However, this was not the case in France, where the king would not be deductively made “emperor in his own kingdom” until the jurists of Philip the Fair made him so at the end of the thirteenth century.

Within canon law, the discussion again went back to Isidore, whose work became the foundation for the twelfth-century development of canon law and provided the basic definition and starting point for Gratian’s theorization of custom in his *Concordance of discordant canons* (*Concordia discordantium canonum*).³¹³ The selection of Isidore’s text quoted above was one Gratian found particularly perplexing, namely this idea of confirmation of custom by “writing or reasoning.” Was written custom still custom and what made it different from law?³¹⁴

³¹¹ See Pennington, *The Prince and the Law*, 10ff.

³¹² *Ibid.*

³¹³ This collection of canon law became the first part of the *Corpus iuris canonici*, the body of canon law in force until 1918 when the *Code of Canon Law* came into force.

³¹⁴ Gratian, *The Treatise on Laws (Decretum DD. I-20) with Ordinary Gloss*, Gratian trans. by Augustine Thompson, Ordinary Gloss trans. by James Gordley (Washington, D.C.: Catholic University of America Press, 1993) *dicta Gratiani post D.1 c.5.*

So, when it says, “it does not matter whether custom is confirmed by writing or by reason,” this shows that, in part, custom has been collected in writing, and, in part, it is preserved only in the usages of its followers. What is put in writing is called enactment or law, while what is not collected in writing is called by the general term ‘custom.’

In this passage, Gratian admitted that custom may be preserved in text and in practice, but he also seemed to want to imply that written or unwritten *form* was the distinguishing characteristic between law and custom. Gratian stated that custom could be collected in writing, but this act changed its nature. Once collected in writing, according to him, custom became law. Whether something was confirmed in writing or by reason have quite different implications, for Gratian, and changed nature of the norm in question.

It does not seem, however, that this idea caught on with the various jurists who glossed the texts. The ordinary gloss did not expand on the meaning of this passage, and the gloss summarizing the above quotation simply reiterates the idea without adding anything new.³¹⁵ The idea of custom as unwritten, furthermore, did not seem to be appealing enough to be discussed outside this passage. For instance, the gloss to Gratian’s discussion of what custom is (D.1 c.5) states explicitly that “it says that it does not matter whether custom is in writing or by reason alone, that is, determined without writing.”³¹⁶ Also, when Johannes Teutonicus commented on Gratian’s work in about 1215-18, he stated that ““usage” is used for unwritten law; “custom” is used generally for law whether written or unwritten.”³¹⁷ Later, when Bartholomew Brixiensis added his commentary on Gratian’s text to Johannes’, in around 1245, he did not seem to add to the discussion the written or unwritten nature of custom.

³¹⁵ “He infers from c.5 above, which says that it does not matter whether custom is written or unwritten, that some custom is passed in writing and some is preserved in the usages of those who follow it. What is written is called “enactment” or “law.” What is not written is called “custom.” He says there is another distinction among laws, and at this point, he presents the next capitulum...[which divides law into civil, natural or that of nations]” (D. 1 *Dicta Gratiani post c.5. CASE*).

³¹⁶ D.1 c.5.

³¹⁷ Ioannes Teutonicus, D.1 c.4a.

Custom was also an important source of law in canon law and, as we have seen, canonists felt that custom could be both written and unwritten (as long as it conformed to reason). These discussions amongst the canonists were relevant to the *coutumiers* authors in that this was the other community for whom there were important stakes in figuring out the relationship between and the form of custom and law, and the relationship of these to writing. While Gratian's assessment indicates that at least for some people there was a tension between custom and the written, the question does not seem to have been enough of a preoccupation to establish a community consensus.³¹⁸ The *coutumiers* authors, on the other hand, do not seem to have been troubled by the written or unwritten form of custom, even those who had the strongest affiliations with Romano-canonical ideas.

Either the lay jurists did not know about the murmurs of doubt about the idea of written custom, or they did not feel they were relevant to their own sphere of activity. Beaumanoir, the one thirteenth-century *coutumiers* author who tried to define “what is and what should be held as custom” did not mention whether custom had to appear in written or unwritten form.³¹⁹ While the compiler of the *Etablissements de Saint Louis* used the expression “written law” to denote a term of art for Romano-canonical law—for instance, the text will say “it is written in the Code”, “according to the written law in the Code”, “according to the law written in the Digest,” or “according to written law in the *Decretals*”³²⁰— but he also referred to sections of his own text.³²¹

³¹⁸ This means that there is much yet to be discovered about the time when custom become definitely defined as *ius non scriptum*.

³¹⁹ Beaumanoir, Chapter 24.

³²⁰ “et est escrit ou Code, De edicto divi Adriani tollendo, l. Quamvis quis se filium defunct, etc.” and “selonc droit escrit ou Code” or “selonc droit escrit en la Digeste” (Book II.4) or “selonc droit escrit en Decretales” (Book I.89).)

³²¹ See Dissertation, Chapter IV.

Modern commentators present the shift from enacted custom to written custom as a sort of contradiction. Gilissen, for instance, relies on a play on words in saying that the customs can more accurately be said to have been *décrites* than *écrites*, so *described* rather than *inscribed*.³²² This anxiety about the idea of written custom seems to reflect more recent preoccupations. The *coutumiers* authors were fully participating within the realm of the possible when they undertook to write about custom. Their sphere of activity had not been pigeonholed to a specific form, and they were not participating in some sort of conscious contradiction, just in the cultural and social zeitgeist of their time.

TEXTUAL INTEGRITY

The manner in which writing was viewed amongst those who copied the *coutumiers* took more from vernacular literature than it did from the commentators and glossators who theorized Roman and canon law. Outside of the general interest in writing, the lay jurists had a quite different approach to authority of text and textual interpretation. The work of Gratian or Azo is a great example of the thinking of Romanists and Canonists, who provided detailed textual commentary upon an original text that was preserved at the center of the endeavor. The integrity of the central text was essential to this project. The technology to preserve the integrity of the text had been developed in university circles in the thirteenth century, in order to ensure that every person reading it would be reading the same version of the text.³²³

The customary jurists, however, do not seem to have tried to preserve the textual integrity of the *coutumiers*. Where the one community sought textual certainty and stability, the other saw

³²² Gilissen, 25.

³²³ See later in chapter.

itself as part of a continuous conversation with ever-shifting content. This was yet another facet that emphasized that though the two communities were not isolated from one another and even might share some actors, each community rested on very different forms of discourse and approaches to text, which were aimed at different audiences.

Beginning early in the thirteenth century, steps were taken to ensure uniformity of the Roman law, spurred by the teaching of these texts at universities. This, in turn, gave rise to the *pecia* system that sped up the supply of texts, permitting a number of people to copy the same text and to standardize them.³²⁴ The *pecia* system worked in the following manner: stationers affiliated with the universities would take an official copy of a text and its gloss (called an *exemplar*) and had it copied into the *pecia* format, a pamphlet-type section of the text (four to twelve sheets), the accuracy of which was carefully monitored by the university.³²⁵ Then, professional scribes or students who were copying books for themselves could rent the copied *exemplar, pecia by pecia*, picking up the next after returning the previous.³²⁶ At least eleven universities had this system, and in France, it existed both in the universities of Paris and Toulouse.³²⁷

³²⁴ Pollard, Graham. "The *Pecia* System in Medieval Universities" in *Medieval Scribes, Manuscripts and Libraries: Essays Presented to N.R. Ker*, edited by M.B. Parkes and Andrew G. Watson. London: Scholar Press, 1978) 145-6. The first reference to the system occurred in a contract in 1228, between the commune of Vercelli and some masters of the of the university of Padua, where the community promised to create a system that made copies of text available "complete and correct as much in text as in gloss" (*competentia et correctam tam in textu quam in gloxa*)(Pollard, 146-8).

³²⁵ L'Engle, Susan. "Production and Purchase: Scribes, Illuminators and Customers" in Susan L'Engle and Robert Gibbs. *Illuminating the Law: Legal Manuscripts in Cambridge Collections* (London: Harvey Miller Publishers, 2001) 41.

³²⁶ *Ibid* 43.

³²⁷ Pollard, 148. According to Graham Pollard, no trace of the *pecia* had been found in Montpellier, Orléans, Angers and Avignon, even though the university statutes did provide for *pecia* systems (Pollard, 148). Perhaps traces of the *pecia* system will be found in the future. In any case, those cities were important producers of manuscripts (L'Engle 41).

The *pecia* system was generally restricted to the service of the higher faculties: Theology, Canon law and Civil law.³²⁸ As Graham Pollard has noted, Arts classes and Law classes were depicted differently in artistic representation. In Arts classes only the master was depicted as having a book, and the students sat on benches around him, empty handed.³²⁹ Representations of law classes often depicted the master with an open book before him, surrounded by students who were also sitting at desks with their own books.³³⁰ The civil law, then, was not only study from a text, but a quintessentially textual study.

No such initiatives were made to preserve the integrity of the *coutumiers*. One reason for this could be that there were no university studies in the *coutumiers*, and the *pecia* system was largely tied to universities. Another might be that purportedly “regional” customs had too small an audience but, as we will see in Chap IV, this was not the case. However, the lack of demand seems a more likely reason. Roman law, as noted above, was a textual study—it was the art of the *ius scriptum* and did not exist outside of the text. Custom, on the other hand, was a live practice that was refracted in the *coutumiers*. The writing of custom did not immediately turn custom into a textual practice.

Even Beaumanoir, who invoked the idea of fixity against change, knew the idea was impossible and that customs were constantly subject to negotiation, change or reconfirmation. No lay customary jurist would have expected the text to remain stable because customary practice was not stable. As far as we know from their authors, the *coutumiers* were meant to preserve memory. However, this was not some sort of antiquarian exercise aimed at preserving stale and irrelevant ideas, the past was fully meant to inform the present. The *coutumiers*, in fact,

³²⁸ *Ibid.* 150.

³²⁹ *Ibid.*

³³⁰ *Ibid.* Law students at Oxford were required by statute to own or legitimately borrow law books (*Ibid.*).

were meant to extend the conversation between lay jurists beyond the passage of time, beyond their personal geography, and beyond the grave.

THE AUTHORITY OF THE MULTIPLE

Custom itself is a negotiation of opinion in a community setting, it is approved or disapproved as part of a court performance where different ideas of what a particular custom is confront one another and one must be chosen. It is a conversation between “the way we did things” and “how we do things” and “the manner in which we ought to do things.” The *coutumiers* texts, because they are part of this sort of legal culture, are necessarily subject to organic development. While modern critical editions of the *coutumiers* give the impression that these texts of customary law were uniform, the manuscript tradition generally shows a significant level of textual variation that involved considerable rearrangement, excising and rewriting of the texts.

There is no reason to think that different manuscript versions of the text were perceived as qualitatively different in the medieval period. This means that we have to see each *coutumier* manuscript as an authoritative variant of text, just as Bernard Cerquiglini has show for the different manuscript versions of vernacular literature. These variants, in fact, are proof of the continued conscious development of a living customary law which was not petrified or fossilized with written text. The texts were actually part of the performance that constituted the practice of the lay jurists, a practice that was increasingly encompassing the written word. The texts, in other words, are one strain in the performance, debate and conformation or rejection of custom. This

dynamic process of written custom can be seen in the changes the texts underwent when they were copied, a practice that mirrored the practicum of vernacular literature.

In examining vernacular literature, Paul Zumthor noticed how commonly authorial anonymity was accompanied by textual variation that involved changes that ranged from dialect and word changes to large-scale rewriting, rearrangement and loss. He termed this aspect of vernacular literature *mouvance*, which he saw as a specific characteristic of oral culture, an oral culture that had a continued presence despite the beginning of the development of a culture of writing.³³¹ These features of authorial anonymity and textual change are clear in the *coutumiers*, and emphasize the extent to which these texts were part of a vernacular literary tradition.

Bernard Cerquiglini further developed these ideas by moving away from the interaction between the oral and the written and focusing on *variance*, the relationship between the different written instantiations of a medieval work.³³² For Cerquiglini, the differentiation between author and scribe of medieval text was arbitrary and artificial, as each variant provided an authoritative version of the text.³³³ These ideas must be brought into our understanding of medieval legal texts written in the vernacular and, once we do this, we have to think about what the implications might be. The *coutumiers* are the products of the specific culture of vernacular writing described by Cerquiglini. The common variation between the various manuscripts indicate that the copying of a *coutumier* was very often the product of originality and creativity. There could also be variation within the content specific rules.

Pierre de Fontaine's introduction to his *Conseil a un ami* illustrated this well. Here, Pierre both mentioned the idea of the use of text in practice, but also contemplated textual change.

³³¹ See Zumthor, Paul. *Essai de poésie médiévale* (Paris: Editions du Seuil, 1972).

³³² See Cerquiglini, Bernard. *Éloge de la variante: histoire critique de la philologie* (Paris: Editions du Seuil, 1989).

³³³ *Ibid.*, 57.

Pierre was dissatisfied with current legal practice, where “everything works by the common opinion of four or three persons, without an exemplar [*exemplaire*] of a customary law.”³³⁴ The use of the word *essamplaire* is interesting—Pierre does not refer to an example (*essample*), but to an exemplar, which can range in meaning from a model to a specific text, and there is a good chance that Pierre was referring to a written document. Pierre wanted this document to be understood as some sort of reference for court practitioners (a guide to action, not a modern code), he also saw it as part of an organic process of growth, which is why he invited later lay jurists who would see the text in writing to change it and improve it.³³⁵ The *coutumiers* were not meant simply to be copied and studied, they were part of an on-going exchange between theory and practice, between what was, what is and what ought to be.

The variants between the different manuscript versions of each text could be as restricted as a few words or more wide-ranging. Sometimes, sentences were added, sometimes subtracted, and entire sections could be added or subtracted. Sometimes, only a few words were changed, which occasionally changed the meaning of an earlier version. Take, for instance, a passage concerning dowries in the *Ancien Coutumier de Champagne*. One manuscript described a rule about women receiving their dowries when there were no conditions to the dowry.³³⁶ Another stipulated that the rules expressed applied only to noble women.³³⁷ Another noted that only a specific type of property was involved, namely only movables and debts.³³⁸

³³⁴ “por ce que les ancienes costumes que li preudome çà en arrière soloient [avoir l’habitude de] tenir et user, sont molt anéanties et presque totes failles, partie par bailli et par prévoz, qui plus entendent à lor volonté fère que à user des costumes; partie par la volonté de sens, qui plus s’aert à son avis que a fez des anciens: partie mès presque toz les riches, qui on soufert à despoillier lespovres, et or son par les povres li riches despoutié, et si que li pais est à bien près sanz coutumes” (Pierre de Fontaines, I.3).

³³⁵ See discussion of this passage in Chapter four.

³³⁶ *L’ancien coutumier de Champagne*, IX, see p.154 note a.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

Another example of the implications of *variance* can be seen in the *Etablissements de Saint Louis*, whose different manuscripts describe slightly different rules about what happens to the property of a suicide. One manuscript says that the moveable property of a person who hung themselves or drown themselves or killed themselves in any other way belonged to the baron.³³⁹ Another specified that this sanction is only if the person dies without confession, unshriven.³⁴⁰ Yet another said that the baron obtained both the movables *and* the inheritance (so the immovables, real property).³⁴¹ The legal consequences of the rules described in the different manuscripts are not the same. Textual variants, in law, expressed what were essentially different legal rules.

The textual innovators generally do not explain why they made changes to the text—was this a more accurate description of an old rule, had the rule changed or narrowed down, or was this simply one author's view of how things should be? Nonetheless, textual variations obviously have great implications for our understanding of the nature of custom in the later Middle Ages as well as for the transitions from custom to customary law. The changes were not capricious but, as Pierre noted they should be, they were at least theoretically in the service of improvement.

Improvement is, of course, a highly subjective category. Looking back we may not necessarily agree with what others may have felt were improvements. Perhaps an abbreviation or summary may seem to us as the work of a less enlightened mind, but an improvement did not have to be constituted by more complexity, it could also be greater practicality, or easier to remember and so more likelihood of shaping practice. While some copyists had no idea what they were transcribing and would riddle their texts with what we might call typos, many of the

³³⁹ *Les Etablissements de Saint Louis*, I.XCII, see p.150 note 38.

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

changes in the *coutumiers* seem to have been purposeful. What does that mean for the rules within? Like Cerquiglini, we must accept them as authoritative versions. They meant it when they said it. In law, meaning constantly shifted with changing circumstances.

The creation of a new, more authoritative, better version of a text is well illustrated by an anecdote from Lawman's *Brut*, an English text from the 1190s, that illustrates the *techne* involved though it does not describe a law book but one on Arthurian legend. Nonetheless, it resonates with Pierre de Fonatine's thoughts on original text and subsequent composition. Lawman was a priest who wanted to write his own book, so he traveled far and "procured those noble books which he procured as exemplars."³⁴² He had one book in French, one in Latin and one in English. He then "laid these books out and turned over their leaves. He beheld them lovingly [...]. He took quills in his fingers and applied them to parchment and he set down together truer words and he compressed those three books into one."³⁴³

Clanchy claims this describes Lawman as the stereotype of a scribe-copyist working from an exemplar, and asks why Lawman would not have wanted to be portrayed as a creative writer. But wasn't he portrayed as exactly that? Lawman had sources in three languages, yet he redacted his own work in only one. He significantly modified his sources in order to condense these three books into one volume. Finally, he also wrote a better version—"he set down together truer words"—the manner in which he had chosen the words and put them together created this different, original, and truer version. An almost mystical reverence for the ideas and texts of the past did not stop him from shrinking, adapting, and writing a different version of these.

This has added significance for the field of legal history, because legal scholars have often treated variants between vernacular legal texts as mistakes or problems, scribal flourishes

³⁴² Lawman in Clanchy, *From Memory to Written Record*, 125.

³⁴³ *Ibid*

that had to be reigned in and smoothed over to create the critical edition—the scholarly dream of an authoritative original version. The critical editions have created the illusion that there was a legitimate version of the text. In fact, each version was authoritative. It was authoritative both to its writer and to those who subsequently heard or read that particular version. While these texts were not used in court like codes would be much later, they nonetheless influenced ideas about right and wrong custom and proper practice and procedure in court.

In this sense, the variation between manuscripts is an invaluable source for understanding what was contested practice and what was settled. For instance, while the rule that there were three continuances in secular courts seems to have been well accepted, the rule about who acquired the property of a suicide was still unsettled enough to be the subject of variation and different opinion. So, consensus between manuscripts can show an established custom, while a custom that appears in only one manuscript or is constantly being adjusted or changed within a textual tradition can be understood as in flux, or as representing a particular point of view or agenda that was not shared by a specific juristic community.

Just as variance between literary texts has implications on conceptions of textual authority, variance between texts of customary law has implications for conceptions of normative authority. These variants are proof of the continued conscious development of a living customary law which was not, as has been assumed, petrified and fossilized with written text. The manuscript tradition of each *coutumiers* is a testament of the creative energy that can continue with writing. This is not a fundamental difference between an ‘oral’ and ‘written’ culture. Both of these cultures participated in these texts. What permitted the written to coexist with the dynamism and creativity we see in these texts was the attitude the *coutumiers* authors

had towards the textualization of custom and legal writing, namely, that textualization was dialogical in nature and the locus of ‘creative energy.’

The lay jurists who composed the *coutumiers* obviously did not think in terms of textual formalism. A point should also be made here about verbal formalism, often seen as intimately tied to customary practice. The lesson of the variant and its relationship to the art of good pleading has an important contribution to make to our understanding to the extent or nature of the formalism of verbal argumentation during this period. If the wording of the speech acts is not prone to variation, then we will be able to say something about the oral formalism of customary law.

Legal historians ought to follow Cerquiglini and praise the variant. This is the best framework within which to think about the long interplay between the oral and the written at this early stage when the written bursts into customary practice. If we accept each text as an authoritative version, then we should also accept the variance between the verbal portions of each manuscript tradition as different by legitimate ways of presenting a legal issue, procedure or argument. This is important, if only to take into account a methodological practice of the lay jurists who copied and transformed these texts, but it also shows what changes over time. English legal scholars have already discovered this for Bracton and his *De legibus*, which Samuel Thorne showed to be the work of many hands, but later manuscript versions could also be compared.

The significance of the variations lies beyond understanding juristic method, ascertaining rules and seeing how they change over time. They also say something important about the jurists whose practice revolved around the lay courts. Each variation was the mark of a jurist’s assessment and evaluating the description of customary law offered by the manuscript he held.

The variants, then, show the intensity of legal thinking of some of these lay jurists, their analytical creativity, and their dynamic and discursive nature.

LEARNING TO THINK LIKE A LEGAL PRACTITIONER

Behind the discussions writing lurks the question of the nature of the relationship between the practice of law and the various forms of law that appear in writing. In other words, how and to what extent did the written intended to shape practice? The *coutumiers* authors not only reflected an extended conversation, but they were actually trying to shape that conversation by trying to mold the nature of the practice and thinking of their audience. Legal culture, even when textualized, always has some aspect of performance.³⁴⁴ A convincing or unconvincing performance would basically result in either good or bad law or, in the case of litigation either a victory or a loss. This was no less true of the thirteenth century courtroom or other place of dispute resolution. The various legal actors—whether judges, lawyers, litigants, juries—had to persuade their audience that their presentation of the facts and issues was truthful, that their interpretation was correct, and that the outcome they desire is the right and just one. That is, they are responsible to their audience, which must be persuaded that theirs is the authoritative conception of the law.³⁴⁵

³⁴⁴ To read more about performance in legal culture, see for instance Huizinga, Johan “Play and Law” in his *Homo Ludens: A Study of the Play Element in Culture*, 76-88 (Boston: Beacon Press, 1955); J.M. Balkin and Sanford Levinson “Law as Performance” in *Law and Literature*, ed. by Michael Freeman and Andrew D.E. Lewis, 729-51 (Oxford: Oxford University Press, 1999); Stone Peters, Julie. “Legal Performance Good and Bad” *Law, Culture and the Humanities* 4 (2008) 179-200; Legendre, Pierre. *Le désir politique de Dieu: etude sur les montagnes de l'état et du droit* (Paris: Fayard, 1988); Derrida, “The Force of Law: The ‘Mystical Foundation of Authority’” in *Deconstruction and the Possibility of Justice*, ed. By David G. Carlson, Drucilla Cornell and Michel Rosenfeld, 3-67 (New York: Routledge, 1991); Rogers, Nicole. “The Play of Law: Comparing Performances in Law and Theatre” *Queensland University of Technology Law Journal* 8, no. 2 (2008) 429-443.

³⁴⁵ See Balkin and Levinson, “Law as Performance” 729ff.

The *coutumiers* authors were trying to help their audience with exactly this—they were using text in an attempt to shape authoritative legal actors. There was a running strain throughout the texts that tried to condition speech and practice. The *coutumiers* participated in the making of a “common stage and the shaping of a public sphere,” as described by Carol Symes, where “neither the dramatic articulation of power nor the powerful articulation of drama could depend on firm physical boundaries, but relied instead on performance to delineate those spaces.”³⁴⁶ For the legal sphere, this meant that the performance of customary culture itself—the discussion, contestation, rejection and approval of custom—formed the contours of custom. The *coutumiers* were not texts to be used in practice like codes, they might better be described as sorts of Shakespearean scripts that would be the basis of performance but from which actors could extemporize and innovate. They contained rules, procedures and arguments that their authors felt would aid the enactment of law in court—they were teaching their hearers and readers how to think and act like legal practitioners.

In other words, they contained the medieval secular-court version of what Elizabeth Mertz described for modern society as “learning to think like a lawyer,” a process of intellectual transformation which entailed new attitudes toward spoken and written language.³⁴⁷ The *coutumiers* authors tried to shape legal thinkers in two ways: in trying to shape the legal actor, and also in trying to shape the legal reader. Unlike records of legal transactions meant to serve as proof, these texts were not only meant to contain certain types of information but also to change the habits of mind of the listeners and readers.

³⁴⁶ Symes, Carol. *A Common Stage: Theatre and Public Life in Medieval Arras* (Ithaca: Cornell University Press, 2007) 135.

³⁴⁷ See Mertz, Elizabeth. *The Language of Law: Learning to Think Like a Lawyer* (Oxford: Oxford University Press, 2007). The phrase was originally coined in the 1973 film *The Paper Chase*, where the law professor tells his students: “You teach yourselves the law, but I train your minds. You come in here with a skull full of mush; you leave thinking like a lawyer.”

This can be seen even in the *coutumiers* that do not explicitly state that this is their aim. The earliest vernacular *coutumier*, *Les coutumes d'Anyou et dou Maine* (1246), has no introduction explaining the spirit or goal of the text but simply began by describing rights—things that could or could not be done.³⁴⁸ The text, however, also indicated the types of things that should be said in certain situations. For instance, it gave advice on how to properly navigate an accusation of false judgment against one's lord: "If any gentleman hears that his lord gave him a bad judgment [*mauves jugement*], he may well say: "This judgment is false [*faux*], and I will not plead about this before you anymore.'" ³⁴⁹ If the gentleman did not make this type of protest, he would be seen as implicitly acknowledging the authority of the lord.

The author of the *Coutumes d'Auyou et dou Maigne* was showing the reader that if there was a judgment that seemed wrong or bad, it could be turned into a legal claim for appeal for false judgment to a higher court, if the aggrieved party so chose. This party had to proclaim at the time that the judgment was given that they considered it a false judgment. If this announcement was made, they could then go to the court of his lord's lord to make a complaint against their lord:³⁵⁰

and he can say: "Sire, this man gave me a false judgment [*faux jugement*] and I do not want to hold from him, and I shall hold from you who are the chief lord." And if the other says: "I defend myself of this [accusation]," the other says: "Sire, I do not want for him to be able to defend himself, because he gave me this false judgment [*faux jugement*] in the sight and knowledge of me, who owes faith to him, I am ready to show him if he wants to deny it with his body [i.e. in a trial by battle]."

³⁴⁸ The text begins with: "A gentleman cannot give but a third of his land to his young children. But he can well give his purchases and things he acquired [*conquetes*] to whichever of his children that he wants..." (*Coutumes d'Anyou et dou Maigne*, 1).

³⁴⁹ *Coutumes d'Anyou et dou Maigne*, 90.

³⁵⁰ "*Coutumes d'Anyou et dou Maigne*, 90.

Once the *coutumiers* laid out the proper manner in which to initiate a suit for false judgment, it then indicated to the judges their role in process. The passage continued:

Thus we can adjudge one battle from this. And if the one who appealed against his lord for false judgment wins, he will never again hold from him, but will hold from the overlord. And if he was vanquished, he would lose his fief.

The text was shaping the habits of minds of the various legal actors who might read it, people who might be aggrieved parties or those who would sit in judgment, and was shaping their thought on what a convincing performance and authoritative argument would be.

This form of court pedagogy appeared in all the *coutumiers*. The *Établissements de Saint Louis* obviously did this as well, as the text of the *Coutumes d'Anjou et Maigne* was included as part of the text. While the texts often referred to words that 'must be said' by the litigants or the justices, these are not necessarily the only words that could be said when a dispute did go to trial. A person requesting seisin, for instance, was told the manner in which he was to do so ("he must ask in this way"), but the *coutumiers* also informed its audience that "he should reserve the right to do or say more, if he needs to."³⁵¹ The forms of speech that litigants were to use, then, were not closed. The writing of pleas did not give rise to a Medusa effect that is commonly attributed to it—a swift ossification of court language and performance whereby, in the words of Walter Ong, "the wrong form of plea could lose a case."³⁵²

The *coutumiers* show no sign that their authors, their audience, or the lay courts more generally thought that way at all. Indeed, the *Établissements* show that form could actually be elastic; the text suggested one way in which an argument could be made but the speaker could

³⁵¹ "il doit demander en tele maniere [...] Et si doit faire retenue de plus faire et de plus dire, se mestiers li en est" (II.4)

³⁵² Ong, Walter. "Orality, Literacy, and Medieval Textualization" in *New Literary History* 16, no.1 (1984) 7.

add more. The later *Coutumes de Champagne*, for instance, also explained what various parties should say in different situations. So when an accusing party neglected to appear at court, the defendant defended himself by saying that the accusing party was not present, and he did not have to answer to the accusation nor may he be constrained.³⁵³ The wording of this exchange, however, did not remain stable throughout the manuscript versions, which intimated that meaning may have been valued over exact wording.³⁵⁴ These rights had to be claimed aloud, but the claim was one of substance rather than one of strict form.

The findings of Yvonne Bongert have already put in question the formalism of high medieval procedure. She noted that scholars examining only the *coutumiers* had argued for the formalism inherent to the medieval trial, but the records of practice did not evince this rigid formalism: she showed that the uses (*usages*) were still variable and had not yet acquired the character of ‘obligatory’ custom.³⁵⁵ Indeed, a close look at the *coutumiers* reveals that these texts actually support Bongert’s view. In the examples above, we can see that the *coutumiers* authors were not thinking in terms of a “coercive textuality,” a kind of obtuse formalism that indexed ideas and actions directly to text.³⁵⁶

Rather, ideas and actions were in conversation with text. Just as jurists could converse and negotiate with one another, they were also thinking critical actors to textualized narrations of normativity. These passages, rather than examples of formalism, should be seen as an example of using text to try to shape practice, to show the substantive content of the things that should be said by providing an example of the manner in which things should be said. Formalism, in the

³⁵³ “se li defanderres se deffant et die ensinc: “Sire, il me fait demande qui tuiche a partie ou a persone qui n’est pas presenz” je ne vuil respondre se cil n’est presenz” et n’i doit respondre ne ne l’en doit on contraindre. Ensinc en us’on generalment” (*Coutumes de Champagne*, XXXIV).

³⁵⁴ *Coutumes de Champagne*, p. 189 note p to w.

³⁵⁵ Bongert, 183.

³⁵⁶ Stone Peter, Julie. “Legal Performance Good and Bad” *Law, Culture and the Humanities* 4 (2008) 194.

sense that exact words must be replicated in court, does not seem to have been a concern for the *coutumiers* authors, and the variations between the manuscripts about what ought to be said shows that.³⁵⁷ The point of the passages was to train the audiences of the texts to shape their responses at court into responses that would have a legal meaning, not an emotional response of fairness or unfairness, but a response making a claim that the court could treat, respond to or judge.

Pierre de Fontaines was even more explicit about trying to shape good legal practitioners and explained this in his preface. There, he said that his text was written for the son of his friend, “so that when he inherits, he will know how to do justice to his subjects and keep his land according to the laws and customs of the country, and give advice to his friends when it is needed.”³⁵⁸ What followed in the texts was a very mixed bag of advice, but it was clear that Pierre was trying to mold the hearer or reader into understanding the legal sphere and his role in it.

Indeed, he notably advised his audience on judicial techniques, the right way and wrong way to judge. Medieval legal texts often had exhortations to judge justly and disapproved of those who do not do so. Pierre went further than this and provided very specific advice in a long section on judgment. For one, it seemed that parties tried to sway judges with dramatic displays of tears and sorrows. Pierre, however, counseled that a judge should steel himself against these and not be swayed by emotional appeals.³⁵⁹ Pierre was overtly trying to professionalize those

³⁵⁷ Oaths were probably different, the wording of these obviously mattered more.

³⁵⁸ *Conseil de Pierre de Fontaines*, I.2.

³⁵⁹ “and do not pay any attention to tears nor to wailing that the parties put on before you, but do pay attention to making right judgments [*ne ne pren mie garde as larmes ne as plors que les parties font par devant toi, mès pren-toi garde à fère droit jugement*]” (Pierre de Fontaines, XXI.1).

who judge by teaching them to focus on the words and arguments rather than the smoke and mirrors of emotional appeals.³⁶⁰

Be attentive to all the words that will be said in court where you are going to have to give a judgment, and do not do at all what many people do, who talk two by two while the parties are pleading, and do not hear any of the words that they will then have to give judgment on; and thus it often happens that the party who is not well heard loses when they should have won if they had properly been heard.

Pierre is convinced that the act of judging had to be taken seriously and was hard work that demanded proper listening and attentiveness. It was only through careful listening and making decisions based on the allegations and arguments made by the parties that cases would have their proper conclusions. In other words, judgment must be made on the issue or case, it is not enough to have the form of a judicial scene with judges, but these judges must be making legal decisions.

Judges had to be sure they had the right information and were doing this properly. Indeed, they had to fact-check if they felt they had forgotten important information. As Pierre counseled, “even those who do their best to hear and retain, if they have not remembered things well, should have them repeated [*recorder*, this is an official court recounting done orally] so often as it takes until they have heard them properly; for otherwise they would not be without guilt according to God.”³⁶¹ All of the previous precisions were clearly not enough and Pierre tried to sharpen the judicial act further. It is notable that he still sees this within orality and memory, rather than imprinting on paper.

³⁶⁰ “Soies ententiz à totes les paroles qu’en dira en cort là où il te covendra juger, et ne fai mie si come molt de gens font, qui dui et dui conseillent quanque les parties pleident, ne rien n’entendent des paroles qu’il lor covendra jugier: et ainsi en avient-il sovent que la partie que n’est pas bien entendue pert là où ele deust gaaignier s’ele fust bien entendue” (Pierre de Fontaines, XXI.4).

³⁶¹ “Et cil meismes qui lor pooir font de bien oïr et retenir, s’il ne l’ont bien retenu, facent le tant bien recorder as parties qu’il aient bien entendu; car autrement ne sauroient il mie sanz colpe selon Deu” (Pierre de Fontaines, XXI.5).

The prologue to the *Coutumier d'Artois* was largely copied from Pierre de Fontaine's prologue and contained the same passage discussed above about good rulership and properly delivering justice to one's subjects, keeping the laws and customs of the region and counseling friends properly.³⁶² Within the text, the author of the *Coutumier d'Artois* also displayed his concern for pleaders, noting that "because many causes [*causes*] perish very often because people rashly [*folement*, madly] respond to many accusations that are made in court, I want to show you something very profitable and necessary to avoid (*a eschiever*) the bad causes that may arise."³⁶³ This meant that there were enough people responding in the heat of the moment and seeing anger as part of the process, namely, parties were appearing in court without understanding the proper habits of behavior and failing in their claims. The place of outrage and emotion in law was changing as lay jurists sought to separate the process from these. The author of the *Coutumier d'Artois* was trying to educate lay people about eschewing instinctual emotional responses that may not be to their own advantage. The author taught the audience about exceptions and tried to create new impulses within the reader so they could better perform in the courtroom setting, turning a reflex response to a personal attack into a legal response to an accusation.

The *coutumiers* did not all focus on proper pleading and other *coutumiers* were more interested in the conditioning pleader than with the judge. The author of *Le livre des constitutions demenees el chastel de Paris* said explicitly that he aimed to shape legal practitioners and focused specifically on the parties appearing at court, saying at the beginning of the text: "Here begins the book which teaches how one must propose to speak before all judges

³⁶² *Coutumier d'Artois*, Prologue.2.

³⁶³ "Pour ce que mout de causes sont peries mout souvent par folement respondre a plusieurs demandes qui sont faites en court, te voel je monstren chose pourfitable et necessaire a eschiever les mauvaises choses qui avenir en pueent" (*Coutumier d'Artois*, II.1).

and especially those in lay court: first, how the plaintiff must form his complaint and how he must plead; and after how the defendant should defend himself...”³⁶⁴ This was more than a simple introduction to the lay courts, or a simple description of procedure. Rather, the author was using the text to produce lay ‘jurists’—to sharpen, reinforce and reproduce some forms and patterns of thought that were congealing around the lay courts.

The other equally fundamental manner in which some of the *coutumiers* authors sought to shape legal thinkers was by training their readers to read their *coutumiers* not as a whole, a long text containing some sort of legal wisdom, but as a text that should be combed to find the relevant law. This is most striking when Beaumanoir explains to the reader what a table of contents is and how it ought to be employed:³⁶⁵

Since it would be hard for those who want to consult this book on some matter which is relevant to what they want to do for themselves and for their families to have to search through this book from end to end, in this section we will set out briefly and give a name to all the chapters which will be contained in this book, in the order in which they will appear, and designate them by a number in this division and each chapter when it appears by the same number, so that in this way you can easily find the material you want to study.

In this telling passage, Beaumanoir not only implied that books such as these were consulted, he also showed that he expected his own to be consulted by a reader who would want to search by topic. He indicated that the common way to read law books like the *coutumiers* was from beginning to end, whether one would hear it or read it with their own eyes. He also had a different type of reader in mind, namely, “those who will want to consult this book on some

³⁶⁴ Ci commence li livres qui enseigne comment l’en doit proposer à parler devant tous juges et especiaument en court laie: premierement, comment li demanderres doit former sa demande et comment il doit plaider; et apres, comment li defenderres se doit desfendre...” (*Demenées el chastel de Paris*, Prologue)

³⁶⁵ Philippe de Beaumanoir, Prologue.9.

matter.” In other words, he anticipated an audience who would want to consult the work by topic because they had a specific issue, or legal matter, in mind.

The table of contents was pretty cutting edge—as Richard and Mary Rouse have shown, the last decades of the thirteenth century was the time that tables of content were spreading as reading tools generally.³⁶⁶ Beaumanoir explained how to employ this new tool: a numbered list of the chapters designated by topic was set out at the front of the book and each corresponding chapter was given the same number, so the reader could search for topic and find the corresponding passage. Indeed, Beaumanoir assumed that his readers would think that a text was read from beginning to end, and would not know how to use a table of contents—in other words, the audience was not a learned university audience, but it was an audience who would know how to read in French well enough to peruse a table of contents, flip through the text, locate and read about a topic of interest.

Beaumanoir’s *Coutumes de Beauvaisis* was a long and large text, several times as massive as any other *coutumiers*. The utility of the index, however, was not explained in these terms but in terms of the acquisition of subject-specific knowledge, to help the text be a tool to address specific legal issues. Beaumanoir was trying to shape a legal or juridical turn in the thinking of his audience. This audience would be seeking to understand or resolve something for themselves or their families, they were not trained lawyers, but people who would need to function at court in a more specific manner than they had done in the past.

Beaumanoir, then, was trying to shape the act of reading to condition the legal reader. He was the *coutumiers* author who gave the most detailed description of how to use his text in a specifically legal manner, but he was not the only author to do so. The author of the *Coutumier*

³⁶⁶ Richard Rouse and Mary Rouse, *Manuscripts and Their Makers: Commercial Book Producers in Medieval Paris, 1200-1500*, vol. 1 (Turnhout: Harvey Miller, 2000).

d'Artois wrote in his prologue that “the titles of this book are written out at the beginning, and they were ordered so to better find what is needed, in case that counsel shall be required.”³⁶⁷ This *coutumiers* author perceived the same need as Beaumanoir did: the texts were not just general statements of law in the secular courts, they need to be accessible by subject matter and by specific legal issue. Later manuscripts of the *Coutumier de Champagne* also jumped on this band wagon and though it was not originally outfitted with a table of contents, one was introduced into its manuscript tradition in the fourteenth century.³⁶⁸ The same was also true for later manuscript versions of the *Etablissements de Saint Louis*.

Lay jurists were moving the shape of legal knowledge from one defined by experienced and instinctive knowledge of right and wrong to one that was specific and processual. Pierre de Fontaines, for instance, occasionally pointed out when his interlocutor noticed complicated or tricky legal issues and asked about them. Pierre commends him on a question he asked about the matter of minors who sell land or goods, namely, “You are asking a very good question about whether a minor who had made some transaction clearly to his credit, and then asked for restitution by his own will, would obtain it. And certainly not...”³⁶⁹ Indeed, sometimes Pierre commended his interlocutor with the high marker of praise in the art of speech and argumentation: subtlety. For instance, he complimented him on a question he asked: “You are asking a subtle question, namely whether I understand the same thing concerning a serf who had bought a free fief, and become a free man.”³⁷⁰ The art of seeing these distinctions, of asking good questions or making good arguments—of thinking with finesse was summed up in the old French

³⁶⁷ “Dont le titre de ce livre sont escrit ou commencement, et les ordena ensi pour mieus trouver ce que mestier [besoin] seroit, au cas dont consaus li seroit requis” (*Coutumier d'Artois*, Prologue).

³⁶⁸ *Coutumes de Champagne*, Bibliotheque Nationale ms. fr. 25546.

³⁶⁹ Pierre de Fontaines, XIV.24.

³⁷⁰ Pierre de Fontaines XIII.23.

word *subtilité*. This term was a regular descriptive for good arguments in vernacular literature. In the legal context, *subtilité* marked not only good arguments but also the fine distinctions which signified an advanced stage of legal thinking.

The *coutumiers* authors were trying to help their audience with exactly this—they were trying to shape authoritative legal actors, legal actors who made substantive arguments with legal meaning recognized by the lay courts. This was obviously different from the construction of law in the ecclesiastical courts or in Roman law courses. It nonetheless required various parties involved in the court process to be part of a conversation with an internal logic, one that had legal implications. The *coutumiers* authors wrote their texts, and later lay jurists copied and reshaped them, with the purpose of commenting on and conditioning practice in the lay courts. The *coutumiers* partially reflected an extended conversation while also aiming to shape that conversation by trying to mold how their audience thought about law, text, legal argument and show them how to think like a lay jurists, a legal practitioner specializing in the practice of the lay courts.

CONCLUSION

The texts and manuscript traditions of the *coutumiers* were remarkable repositories of ‘customary thinking’ of the different forms and articulations custom could have and how these represented the fundamentally conversational nature of customary culture—even one which was beginning to textualize. Each *coutumiers* manuscript presented a legitimate version of custom, and was part of the constant conversation and negotiation of authority that defined customary law. The customs we find in the *coutumiers* were those of jurists who attended the secular courts,

who were knowledgeable about the practices of these courts, and who felt that their customs were important enough to set in writing. The authors of the text were conscious of the rapid legal change that was occurring around them: they were reacting to these changes just as they were contributing to them. By writing the *coutumiers*, they had themselves participated in one sort of creative act that was contributing to the changing the nature of custom.

The manuscript traditions around these texts evince the birth of textual and intellectual communities around them.³⁷¹ The majority of the different manuscript versions of these texts were written by people who were thinking about the texts they copied and adjusting them to their own needs.³⁷² The variation between manuscripts was a testament to the juridical communities that formed around these texts as well as the continued conscious development of a living customary law which was not, as has been assumed, petrified and fossilized with written text. Each *coutumier* created and provided an authoritative text.

The variations between manuscripts, even in the suggested words to be spoken at court, showed that text coexisted with a live, critical, engaged customary legal culture. This culture should not be defined, as it has been, by the rigid formalism. There was no indication of the “force of form” (*la force de la forme*, or *vis formae*) that Pierre Bourdieu saw as uniting universal aspiration and official sanction with formality, and an essential component of the codification *habitus*.³⁷³ Instead, the *coutumiers* show that there was no stark or swift transition from the oral to the written. Instead, the texts were replicating the enacted and conversational reality of customary practice—law *in the books* was a type of law *in action*.³⁷⁴ Not only that, law

³⁷¹ See more on this in the last chapter.

³⁷² I am making the argument that this went beyond textual communities to constitute real, though as imagined as any, communities.

³⁷³ Bourdieu, Pierre. “Habitue, code et codification” *Actes de la recherche en sciences sociales* 64 (1986) 43.

³⁷⁴ I would like to thank Marianne Constable for our conversation on this subject.

in the books was constituting and trying to shape various types of law *in action*. While the practice of the lay courts was not rigidly formalized, in the sense of court-enforced rules indexed to and proven by written law, it did have its own customs, usages and forms of practice that were perceived as good or bad, successful or weak, convincing or not. The *coutumiers* authors tried to shape professionalized court performers who would convince judges and members of juries that theirs was the winning argument and that right lay with them.

CHAPTER III

Custom as Conversation

In the eleventh century, the predominant definition of the word *consuetudines* in France was customary dues—the rights and duties owed to a lord, usually translated into monies to be paid for various obligations or privileges.³⁷⁵ For instance, people who owed such money were called ‘customary men’ (*hons coustumier*) because they were men who paid customs. It could also denote services to be rendered.³⁷⁶ Between the late eleventh and the thirteenth centuries, a firm juridical notion of custom was established. This was part of a new wave of legal thinking that brought the rise and development of the discourse of custom as the principal way of conceiving legal rights and rules of secular legal practice. By 1254—a few years after the first vernacular *coutumiers* is written—the first acts and decisions of the *Parlement* in Paris begin to be kept with some regularity in the *Olim*, the allegations of the parties (often made by the legal professionals representing them) make almost exclusive appeal to the notion of ‘custom’ (*consuetudo*), while the term ‘law’ (*jus*) was only very rarely used to indicate a source of law.³⁷⁷

³⁷⁵ Reynolds, Susan. *Kingdoms and Communities in Western Europe 900-1300*, 2nd ed. Oxford: Clarendon Press, 1997) 17 ; Gilissen, 23. Gilissen describes the various meaning the word ‘custom’ could have (*Ibid.*). As Reynolds noted, while the protean character of the word ‘custom’ may show the haziness of legal categories, it was also a strong indicator of its importance (Reynolds, *Kingdoms and Communities*, 17).

³⁷⁶ Mark Hagger recounts an episode in Wace where Duke William was contemplating the conquest of England with his barons. On this occasion, William fitz Osbern said the barons offered to provide twice the amount of men they usually provided, which dismayed the barons because “They feared that the service, which had been doubled, would become an hereditary obligation, be regarded as a custom and be passed on as a custom.” (Wace in Hagger, Mark. “Secular Law and Custom in Ducal Normandy, c. 1000-1144” *Speculum* 85, no.4 (2010) 850)

³⁷⁷ Hilaire, Jean. “Coutume et droit écrit au Parlement de Paris d’après les registres des *Olim* (1254-1318)” *Coutumes, doctrine et droit savant* (Actes du colloque des 20 et 21 octobre 2006), edited by Véronique Gazeau and Jean-Marie Augustin (Poitiers: LGDJ, 2007) 67. Hilaire notes that some 4600 decisions concerning the various cases in the kingdom are preserved in these documents for the period from mid thirteenth-century until the beginning of the following century (*Ibid.*, 65).

The importance of custom, and ascertaining correct custom, could be seen in the development of new methods of proof. During the reign of Louis IX, a new procedure was developed to confirm custom alleged in royal courts, the *enquête par turbe*. When there was controversy, this new procedure allowed judges to ascertain custom by assembling a group of people presumed to have knowledge on the matter and ask them whether the alleged custom was indeed a true custom.³⁷⁸ How exactly this was decided has been disputed, but was probably notoriety rather than popular consensus.³⁷⁹ It was important to know correct custom beyond the local level. Careful attention was paid to custom at all levels of jurisdiction, from small locality to the royal courts, in order to understand the right forum in which to make a complaint, how to make that complaint and also to understand the jurisdiction to which an appeal was made from or made to.

The romanticism of Germanic custom and concomitant ideas about the age-old customs of a people were a strong influence on one of the most influential twentieth-century discussions of the subject, namely, Fritz Kern's discussion of law and kingship.³⁸⁰ Kern felt that the ideal conception of law in the middle ages was that it was "good" and "old," that this good old law was unenacted and unwritten, and that it trumped any legal innovation unless this innovation was itself couched as restoration of the old law—"law itself remains young, always in the belief that it is old."³⁸¹ Recent work has problematized many of these ideas and scholars have seen references to old and good more as rhetorical tools than fact. This meant that there had to be

³⁷⁸ Waelkens, L. "L'origine de l'enquête par turbe" *Tijdschrift voor Rechtsgeschiedenis* 53 (1985) 337. Waelkens disagrees that the decision involved was one based on a popular consensus, but on the notoriety of the custom involved (*Ibid.*, 345).

³⁷⁹ Waelkens disagrees with the traditional opinion that the decision involved was one based on a popular consensus, but on the notoriety of the custom involved (*Ibid.*, 345); for the traditional opinion, see Filhol, René. "La preuve de la coutume dans l'ancien droit français" in *La Preuve, 2ième partie, Moyen Age et Temps Modernes* (Recueils de la Société Jean Bodin) (Brussels: Editions de la Librairie Encyclopédique, 1965) 359.

³⁸⁰ Kern, Fritz. *Kingship and Law in the Middle Ages*, trans. by C.B. Chrimes (Oxford: Blackwell, 1939).

³⁸¹ *Ibid.*, 149ff, 179.

different factors that made custom obligatory that gave it its authoritative power. Fredrik Cheyette, for instance, argued that custom was not obligatory until it was confirmed by the courts while Robert Jacob has looked at *ius commune* factors defining custom such as repeated use, community consensus and old memory.³⁸²

To speak of custom through some final step in its formalization—the point where it starts looking something like what we think of as law, upon court confirmation— is to evaluate by its final stage and to gloss over the fact that it is constituted by a multi-step process. The same is true for using a definition of custom that starts spreading in the thirteenth century and eventually forms the basic components of our own definition of the term. Anthropological work discussing dispute resolution has for these reasons come closer in understanding the nature of customary culture. Notably, the important work of Simon Comaroff and John Roberts that discussed two sorts of legal culture, processual and rule-based, has had an important effect on the field of medieval studies.³⁸³ It has led medievalists such as Fred Cheyette, Steve White, Warren Brown, Piotr Górecki, Paul Hyams, among others, to look at dispute resolution to see what sorts of conflict were addressed outside the law and how these were addressed.³⁸⁴ Claude Gauvard, Yvonne Bongert and Bernard Guenée continue this work for France in the thirteenth and

³⁸² Cheyette, Fredric. “Custom, Case Law and Medieval “Constitutionalism”” *Political Science Quarterly* 78, no.3 (1963) 362ff; “Les coutumiers du XIIIe siècle ont-ils connu la coutume?” in *La coutume au village dans l’Europe médiévale et moderne (Actes des XXe Journées Internationales d’Histoire de l’Abbaye de Flaran, Septembre 1998)*, edited by Mireille Mousnier and Jacques Poumarède (Toulouse: Presses Universitaires du Mirail, 2001) 103ff.

³⁸³ J.L. Comaroff and S.A. Roberts. *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago, University of Chicago Press, 1981).

³⁸⁴ The recent collection of essays edited by Warren Brown and Piotr Górecki where these authors’ articles appear is an excellent example of the fruitful work done in this area (Warren Brown and Piotr Górecki, eds. *Conflict in Medieval Europe: Changing Perspectives on Culture and Society* (Aldershot: Ashgate, 2003)).

fourteenth centuries, looking at both dispute resolution as well as more ‘official’ forms of court-sanctioned arbitration.³⁸⁵

This chapter seeks to complement the work of these scholars by presenting a different way of understanding custom that would include the different stages of its formation. Here, I propose a theory of custom as conversation. After taking a brief look at how custom was understood in the *ius commune* and in the *coutumiers*, we will examine the forms of orality and extra-judicial forms of conflict resolution the *coutumiers* envisage and we will look at a narrative example of the dynamic form that customary thinking took. Then, we will look how the nature of custom as conversation is featured in the *coutumiers*. Lastly, we will look at who could be part of the conversation and how the composition of this group was changing in the second half of the thirteenth century.

THE CUSTOM OF THE *IUS COMMUNE*

Before looking at the language of norm in the *coutumiers*, we must look at Romanist definitions of custom because they have so shaped our modern understanding of the nature of custom and we use this understanding to evaluate the middle ages. As we will see, the exact definition of custom was, in the thirteenth century, something of a moving target even in learned circles. Once we have examined what was being said about it in the *ius commune*, we will better be able to see the extent of their relationship with *coutumiers*’ notions of custom.

³⁸⁵ Gauvard, Claude. “*De grace especial*” *Crime, État et société en France à la fin du Moyen Âge*, 2nd ed. (Paris: Publications de la Sorbonne, 1991); Bongert, Yvonne. *Recherches sur les cours laïques du Xe au XIIIe siècle* (Paris: Éditions A. et J. Picard, 1949); Guinée, Bernard. *Tribunaux et gens de justice dans le baillage de Senlis à la fin du Moyen Age (vers 1380-vers 1550)* (Strasbourg : Faculté des Lettres, 1963).

When late-antique Roman-law texts began to be studied in the high and later Middle Ages, debates over what custom was and how exactly it could be identified became a serious preoccupation for Romanists *doctores*. The reason for this was that, while some parameters were noted, they were not defined specifically enough. Justinian's *Institutes* had explained that "law comes into being without writing when a rule is approved by use (*usus*). Longstanding custom (*mores*) founded on the consent of those who follow it is just like legislation (*legem imitantur*)."³⁸⁶ Custom is clearly considered a source of law in the Justinianic texts.³⁸⁷ Late antique Roman law did not, however, develop a coherent theory of custom, nor did it make strong or consistent distinctions between usage (*usus*), mores (*mores*) and customs (*consuetudines*), though as David Bederman noted, it provided "a rich set of materials."³⁸⁸

The fundamental source for thinking about custom throughout the long medieval period was Isidore of Seville's eminently popular *Etymologies*. Isidore tried to explain the differences and relationships between different sorts of rules captured in the terms custom, law and mores. He explained this in the following manner (I have kept the Latin for *mos* and *consuetudo* for the sake of clarity).³⁸⁹

³⁸⁶ "Ex non scripto ius venit, quod usus comprobavit. Nam diuturni mores consensus utentium comprobati legem imitantur" Justinian, *Institutes*, trans. By Peter Birks and Grant McLeod (Ithaca: Cornell University Press, 1987) 1.2.9.

³⁸⁷ Bederman, 17ff.

³⁸⁸ *Ibid.*, 22.

³⁸⁹ Isidore of Seville. *Etymologies*, trans. by W. M. Lindsay (Oxford: Oxford University Press, Oxford, 1911), accessed online 6/23/2012: <http://penelope.uchicago.edu/thayer/e/roman/texts/isidore/home.html>. For an analysis of the used of 'written' and 'unwritten' in this passage, see Chapter 2.

Law (*Ius*) is a general term, and law (*lex*) is an aspect of Law (*iuris*).³⁹⁰ It is called *ius* because it is just (*iustus*). All jurisprudence (*ius*) consists of laws and customs (*legibus et moribus*). A law (*lex*) is a written statute. *Mos* is *consuetudo* tested by age, or unwritten law, for law (*lex*) is named from reading (*legere*), because it is written. *Mos* is a longstanding *consuetudo* drawn likewise from ‘moral habits’ (*de moribus*). However, *consuetudo* is a certain type of Law (*ius*) established by moral habits (*moribus insitutum*), which is taken as law when law is lacking; nor does it matter whether it exists in writing or in reasoning, since reason (*ratio*) also validates law. Furthermore, if law is based on reason, then law will be everything that is consistent with reason—provided that it agrees with religion, accords with orderly conduct, and is conducive to well-being. *Consuetudo* is so called because it is in common use.³⁹¹

Isidore’s definition was somewhat intricate—he stated that *mos* is a subset of *ius*, and *consuetudo* was a type of *mos*, but that *mos* can make *consuetudo* into a type of *ius*.

What was important about this passage was that, even though Isidore was not exactly clear on the *mos/consuetudo* distinction, it basically established the later criteria used by Romano-canonical jurists to define custom/*consuetudo* as a vector of Law: it is tested by age (*vetustate probata*), it lasts a long time, and it is in common use (*in communi est usu*). Isidore says the first two about *mos* and the latter about *consuetudo*, and this seems to become all assimilated in the work of twelfth and thirteenth century Romanists.³⁹²

Later canonists of the thirteenth-century picked on the problem of Isidore’s definition of *mos* as longstanding *consuetudo* that is derived from *mores*. In the twelfth century, Gratian placed Isidore at the center of the *Decretum*, the foundational text of canon law, and built upon Isidore’s definition. After quoting Isidore’s passage, Gratian explained that “in part, custom has been collected in writing, and, in part, it is preserved only in the usages of its followers” and then

³⁹⁰ The translators of the text use ‘jurisprudence’ for *ius*, but I have chosen to avoid it as it means difference things in the common law and civil law traditions (Stephen A. Barney, W.J. Lewis, J.A. Beach and Oliver Berghof, trans. *The Etymologies of Isidore of Seville* V.iii). Isidore clearly means Law *qua* Droit *qua* Recht.

³⁹¹ Might this explain why “usage and custom” (*us et coutumes*) (*consuetude, usu*) are so often collocated? The only real manner in which custom/*consuetudo* can be determined, from Isidore’s text, is through common use.

³⁹² Note that Isidore also noted reason as a vector of law that became so important in the late Middle Ages. Thomas Aquinas has a discussion in his *Summa Theologica* about whether Isidore’s description of law is a good one (Bigongiari, Dino. *The Political Ideas of St. Thomas Aquinas: Representative Selections* (New York: Hafner Press, 1953) Q95.3 and following).

he added “What is put in writing is called enactment or law, while what is not collected in writing is called by the general term custom.”³⁹³ The problem for Gratian seemed to be that if custom could be written, what would make it different from law? Johannes Teutonicus’ Ordinary Gloss (1211-1215) departed from Gratian, explaining “the term to be defined is used in the definition, and the same term is used for both species and genus, But you may say that the terms [...] are used in different ways. *Mos* is used for unwritten law; *consuetudo* is used generally for law whether written or unwritten.”³⁹⁴

Bartholomew Brixinesis’ commentary on Gratian’s text (ca. 1245) continued to show the dissatisfaction caused by these previous definitions. He commented on Gratian’s description of custom as “long-continued” in a long discussion that combs through the texts of Roman law for an answer.³⁹⁵

What custom would you consider long, or how many repetitions would you say introduce a custom? What is done twice? C.25 q.2 c.25. Or what is done three times? X 1.6.34 (*in fine*). Or what is done more than three times? X. 2.12.3. Or what is done ten times, as prescription is called “long” when it has lasted ten years? Cod. 7.33. Or what has been done from beyond memory? C. 3. Q.6 c.10; Dig. 43.20.3.4 [43.19.3]. You may say that in criminal cases two instances usually introduce a custom, but in other cases three are not enough. Cod. 1.4.4 [1.7.4] (*in fine*). You may take it as certain that, according to canon law, a custom is not valid unless requisite time has passed and it is reasonable. X. I.4.11. Here it would seem that a fourth repetition would introduce a custom. Cod.3.34.14. Bar. Brix.

Bartholomew, in other words, was sure that time was a key factor in the creation of custom but was unsure about exactly how much time it would take for a practice to become a

³⁹³ Gratian, *The Treatise on Laws*, D.1 c.5.

³⁹⁴ Ordinary Gloss in Gratian, *The Treatise on Laws (Decretum DD. 1-20) with Ordinary Gloss*, Gratian trans. by Augustine Thompson, Ordinary Gloss trans. by James Gordley (Washington, D.C.: Catholic University of America Press, 1993) D.1 c.4a.

³⁹⁵ Bartholomew Brixienensis, Ordinary Gloss in *Gratian, the Treatise on Laws with Ordinary Gloss*, trans. by Augustine Thompson and James Gordley (Washington, D.C.: Catholic University of America Press, 1993) D.1 C.4.g.

custom. Time, Bartholomew shows, could be evaluated in two ways: by number of repetitions or by old age, which was evaluated through memory. Yet in another section Bartholomew noted that some people thought that “for a custom to prevail over law, it must be immemorial.”³⁹⁶ Bartholomew also reiterated his predecessors in saying that “usage” denotes unwritten law or actions that are simply frequently performed, while “custom” could be either written or unwritten.

After all of his comments in the gloss, perhaps even a little frustrated, Bartholomew came up with a simpler working definition of custom for canon law: “briefly, you may take it that it suffices according to the canons that custom be reasonable and have gained force through passage of time.”³⁹⁷ Bartholomew was interesting in gaining some control of legal time and in using time to gauge the extent of the validity of custom, but still he could not quite peg it down.³⁹⁸ Custom and its relationship to usage and to law were ambiguous and uncertain even in learned circles. The question was clearly not yet settled.

³⁹⁶ *Ibid.* Incidentally, the “time immemorial” was popularized in England with the Statute of Westminster in 1275 that saw custom as ancient and beyond memory or written record, but fixed its start date—as custom could be no older than July 6, 1189, the date of the accession of Richard I. Incidentally, this is law on the books in Canada, inherited from the English common law. One may note that, despite being in the books, it has not helped native land claims.

³⁹⁷ *Ibid.*, gloss b to “custom” in D.8 c. 7. This was clearly a topic of current interest and discussion. Bartholomew himself attempted to define custom a number of times. He said, in another place, that custom is so called “because it is in common use”, and it obeyed like an ordinance “as long as it is rational, congruent with religion, consistent with discipline, and helpful to salvation (*Ibid.*, case to D.1 c.5). Perhaps these stipulations were a response to “some people [who] put custom before truth, contrary to the sacraments and other things” (*Ibid.*, case to D.8 c.7)—yet another view of custom.

³⁹⁸ I have not found discussions of time and law for medieval France, but for a discussion of how lawyers developed their own ways of dividing and talking about the time of law in England, see Brand, Paul. “Lawyers’ Time in England in the Later Middle Ages” in *Time in the Medieval World*, Chris Humphrey and W.M. Ormrod, eds. (York: York Medieval Press, 2001) 73-103,

LA MANIÈRE QU'IL FAUT USER

The relationship between the custom in the *coutumiers* and the contemporary body of thought of the *ius commune* on the subject of custom has been in the same tug-of-war that characterizes most discussion of the *coutumiers*. Was the understanding of custom the texts rest upon local and organic, or was everything down to the terminology of custom supplied by Roman law and shaped custom from its earliest articulations?

The notion that custom was autochthonous and reflected the spirit of a people goes back to the nineteenth century, and especially to the Friedrich Karl von Savigny's notions that law represented an ethnic-national *zeitgeist*.³⁹⁹ This potent imagery continued into the twentieth century, even with the punishing nationalisms of the World Wars, through a new articulation provided by Fritz Kern as mentioned above. Autochthonous custom that linked people, land and identity has remained especially powerful in the historiography of English Common Law, though new studies by English legal historians are beginning to show the influence of Roman and canon law on the development of the Common Law.⁴⁰⁰

On the Continent, on the other hand, the pendulum has swung the opposite way. Karl Kroeschell claimed that the medieval use of the term *consuetudo* as opposed to other normative terms was already working within the categories of learned law and expressed the desire to be

³⁹⁹ Von Savigny, Friedrich Karl. *Of the vocation of our age for legislation and jurisprudence*, trans. by A. Hayward (London: Littlewood, 1831).

⁴⁰⁰ Helmholz, Richard. *The Ius Commune in England: Four Studies* (Oxford: Oxford University Press, 2001). Maitland demonstrated long ago the vast extent that the Bracton authors had copied from the Romanist Azo, but the influence of the *ius commune* on English law is extremely understudied. English Common Law has been traditionally affirmed as comparatively devoid of Roman law. However, a close look at the Bracton text and the *coutumiers* reveals the former to have made greater recourse to Romanist thinking.

understood as a branch of learned law.⁴⁰¹ On the other hand, Robert Jacob looked at the terms of law actually used in the thirteenth century and noted that the *coutumiers* tended to discuss norms in terms of *droit* (Law/right) or *loi* (law) and that it was only with the influence of the new learned legal studies that a distinction begins to be made between law (in terms of written law) and custom (what had been held as law and was the only law people knew until that point).⁴⁰² The most recent contribution is Simon Teuscher's, whose study of the fifteenth-century Swiss local laws and witness depositions showed that "good old laws" appear with greater frequency at the end of the Middle Ages than earlier, and his conclusions for that area also show age-old custom derived from popular consensus to derive from learned models.⁴⁰³

Robert Jacob has made this argument specifically for the *coutumiers*. He noted that custom *qua consuetudo* as opposed to *usus* or *mores* came from learned law derived from Roman law by medieval jurists, had vaguely three important characteristics that we still use to define custom today: *usus* which was the repeated use of a rule, *diuturnitas* which was the required passage of time of a usage to become a custom, and the *consensus populi* or *opinion necessitatis* which was the will or consensus of the people that elevated the custom to be as binding as a formal rule of law.⁴⁰⁴

Jacob sees this definition reflected in the *coutumiers* but a close study reveals that matters were not so settled in these texts either. First, the term 'custom' (*coutume*) was very often

⁴⁰¹ Kroeschell in Teuscher, 7.

⁴⁰² See Jacob, Robert "Les coutumiers du XIIIe siècle ont-ils connu la coutume" *La coutume au village dans l'Europe médiévale et moderne : actes des XXes Journées internationales d'histoire de l'Abbaye de Flaran, septembre 1998*, ed by M. Mousnier et J. Poumarède (Toulouse, Presses universitaires du Mirail, 2001) 103–119. Jacob's study is very general and includes a wide range of customary texts across Europe to make his point, from Eike von Repgow's *Saxon Mirror* to the crusader laws to the Northern French *coutumiers* but does not study the English texts, which would be a very valuable addition. For a broader take on these ideas within Western legal tradition see Jacob, Robert. "La coutume, les moeurs et le rite. Regards croisés sur les catégories occidentales de la norme non écrite" *Extrême-Orient, Extrême-Occident* 23 (2001) 145-166.

⁴⁰³ Teuscher, Simon. *Lord's Rights and Peasant Stories: Writing and the Formation of Tradition in the Later Middle Ages*, trans. by Philip Grace (Philadelphia: University of Pennsylvania Press, 2012).

⁴⁰⁴ Jacob, "Les coutumiers du XIIIe siècle ont-ils connu la coutume?" 104.

undefined in the very texts that aimed at expounding on it and it was often indistinguishable from ‘usage’ (*usage*), which is often translated into English as “practice.”⁴⁰⁵ Only Philippe de Beaumanoir and the *Coutumier d’Artois* attempted to draw a line between custom and usage. Even so, this line was not at all clear. As we have seen, furthermore, even learned discussions about the constitutive components of custom did form a consensus about how many of the characteristics that Jacob listed were necessary, and the exact ambit of each individual characteristic had not yet been delineated. We have also seen in the previous chapter that the idea of custom (in the sense of rules rather than payments) as a lordly imposition continued into at least the late thirteenth century, and we have also seen references to “new” customs. In other words, Jacob is right that attention to the differences between types of norms—usage, custom, law—came into practice in the secular courts via those who had learned academic law and its careful distinctions. However, the fledgling use of this terminology in the first *coutumiers* was not uniform throughout the texts or even within the texts.⁴⁰⁶

The *Coutumes d’Anjou et de Maine* provide one example. Robert Jacob has said that the author of the *Coutumes d’Anjou et de Maine* did not have the consciousness of treating a customary law.⁴⁰⁷ It is not clear what the author alternately could have thought he was doing in grouping the dispute-resolution rules of the secular courts. This is where the distinction between the modern classification of a legal culture as customary and the use of the term ‘custom’ to describe a type of norm becomes important. The author was clearly had the consciousness of describing the rules and procedures of a customary legal culture. However, he was not using the

⁴⁰⁵ André Gouron also noted that there was no clear line separating custom from usage (Gouron, André. “La coutume en France au Moyen Âge” in *La Coutume/Custom (Transactions of the Jean Bodin Society for Comparative Institutional History)*, Part II: Medieval and Modern Western Europe (Brussels: De Boeck Université, 1989) 197).

⁴⁰⁶ See Appendix.

⁴⁰⁷ Jacob, Robert. “Les coutumiers du XIIIe siècle ont-ils connu la coutume?” 114.

learned terms for it—the customary legal culture of this author was not participating the Roman-canonical framework and he did not refer to these and did not refer to fine distinctions between types of norms.

The majority of the text simply states how things are and what to do in specific situations without attempting to validate the claims by recourse to any sort of authority. Indeed the text had a lot in common with the charter of immunity of the Church of Worms (1014) mentioned in Chapter I, and might better be seen as in a direct line of development from an earlier tradition of discussing rights and responsibilities.⁴⁰⁸ The terms usage and custom appear a few times, but the preferred attribution is “*par droit*” or “by right/law” (see Appendix, Table 1).

This text was originally composed in 1246, it forms the basis of the first book of the *Etablissements* retitled as the customs of Touraine and Anjou, and the manuscript version of the text as the customs of Anjou and Maine that we have today are from the early fourteenth century.⁴⁰⁹ The body of the text conforms to the *Etablissements* version (outside of the compiler’s additions) and the updates seem mainly to have been in the *implicit* and *explicit*, so the text we have at the very least faithfully represents the text as it was in the early 1270s. If we evaluate the text conservatively as a reflection of fourteenth century taste, we see that the term custom shows up in the title and final words but that description (and lack of description) of norm in the text remained the same. That this was enough means that early fourteenth century lay jurists were content with how the rules and procedures of the lay courts were expressed in this text even if it did not distinguish between norms in a meaningful way.

It does seem, however, that the *coutumiers* authors were actually more comfortable with the term “usage” than the term “custom” to describe the norms of the lay courts. This was true

⁴⁰⁸ More on this in Chapter IV.

⁴⁰⁹ See Chapter V for a discussion of the shifting geographic attributions in the *coutumiers*.

for Pierre de Fontaines, this was true for the *Coutumes de Maine et Anjou* if the fourteenth-century date for the implicit and explicit are accepted, this was also true for the other very short tract on the customs of Anjou known as the *Compilatio de usibus Andegavie*, which constantly referred to usage throughout rather than custom.⁴¹⁰ In addition, the references to usage in Book II of the *Etablissements* vastly outnumbered those to custom (see Appendix Table 2).

Beaumanoir, unlike the earlier authors, tried to distinguish the terms usage and custom. He was not, however, terribly consistent about it. Beaumanoir attempted his own definition of custom and indeed devoted a whole chapter to it. Defining custom was not a priority for Beaumanoir—the twenty-fourth out of seventy chapters, nestled into the text about one third of the way in. He began his text with a prologue explaining the contents of the work and why he decided to write it, and afterwards he went deeper into the specific topics such as the duty of judges (Chapter 1), the specifics of summonses (Chapter 2), permissible delays (Chapter 3), the functions of attorneys and advocates (Chapter 4 and 5), how to make complaints (Chapter 6), how to answer a complaint (Chapter 7), and so on. At last— twenty-tree chapters later— he decided to treat custom in his twenty-fourth chapter. He introduced it by saying:⁴¹¹

because all suits are brought according to customs, and this book generally explains things according to the customs of the county of Clermont, in this chapter we will briefly explain what a custom is and what should be held as custom, even though we have spoken of them specially in various chapters as appropriate in the cases we were discussing.

⁴¹⁰ Also available in Beauteemps-Beaupré's edition.

⁴¹¹ “Pour ce que tuit lip let sont demené selonc les coustumes et que cest livres generaument parole selonc les coustumes de la contée de Clermont, nous dirons en cest chapitre briement quele chose est coustume et que l'en doit tenir pour coustume, tout soit ce que nous en aions parlé especiaument en aucuns chapitres selonc ce qu'il esconvenoit esc as de quoi nous parlions” (Philippe de Beaumanoir, *Coutumes de Beauvaisis*, edited by A. Salmon (Paris: Picard, 1970); Philippe de Beaumanoir, *The Coutumes de Beauvaisis of Philippe de Beaumanoir*, trans. by F.R.P. Akehurst (Philadelphia: University of Pennsylvania Press, 1992) XXIV.682).

This text gives the impression that Beaumanoir needed to explain why he would define such a thing as custom. In saying that everything worked by custom he was stating something know and obvious but at the same time he also seemed to be making distinctions in terminology with which he himself was not yet comfortable.

First, he defined it by saying that custom could be approved in two ways. You knew you had a custom when it was “generally observed throughout the county, and has been observed for as long as man can remember, without challenge.”⁴¹² The other manner in which “custom can be acknowledged and held as custom is if there has been a dispute and one of the parties quotes a custom in his argument, and it is approved in the judgment.”⁴¹³ In other words, Beaumanoir saw custom as being generated either by long and uninterrupted common usage or by validation in judgment, where a custom alleged was proven by favorable judgment. Strangely, in a chapter titled “Custom” that begins with the definition of the term, the actual content of the chapter was actually devoted to *usages*.⁴¹⁴ While Beaumanoir made an attempt to distinguish the two, he seems to hijack the definition of usage in the service of custom and he turns usage into a special concession.⁴¹⁵

The same Beaumanoir who introduced his text as “usages and customs” decided to create a distinction between the two half way through his giant tome.⁴¹⁶ What is more, he often did not adhere to his own definition and discussed, for instance, customs that were disputed, or “customs” that were not customs but that he believed ought to be, and also referred to usage in a larger sense than a special privilege. The influence of the Romano-canonical notions were

⁴¹² Philippe de Beaumanoir XXIV.683.

⁴¹³ *Ibid.*

⁴¹⁴ Akehurst translates these as “privileges” here.

⁴¹⁵ F.R.P. Akehurst accounts for this in his translation through the English term “privilege.”

⁴¹⁶ A couple of examples are : “Ci commence li livres des coustumes et des usages de Beauvoisins” (*Ibid.*, Preface) ; “*nostre coustme a l’usage de France*” (XVIII.602).

obvious in Beaumanoir's definition of custom, as observed without challenge over a long period of time or as approved by judgment.

The later *Coutumier de Champagne* (1295) continued this fluid use of the terminology of norms that characterized customary legal culture. The different titles of the different manuscript versions played around with these: one manuscript described itself as containing "the commandments of the customs of Champagne," another "the laws and customs of Champagne," another "the laws and customs of Champagne as established by King Thibaut," and another simply the "customs of Champagne."⁴¹⁷ While the term usage does not appear in the title, it peppers the text and appears to be used synonymously with custom as an expression of how things are habitually done at court. Indeed, each paragraph is introduced with affirmations of custom or usage that do not seem qualitatively different.⁴¹⁸

This fuzziness continued in the *Coutumier d'Artois*. This was remarkable because the text made all sorts of distinctions between types of custom, it referred to custom and its stronger form "agreed" or "confirmed" custom. It also introduced the qualification of reasonableness—the earlier language of 'bad' was beginning to fade as a descriptive disqualifier of a particular rule in favor of unreasonableness (*contre reson*), a language that Isidore had used that was then developed by canonists and Romanists and which then infiltrated customary practice.⁴¹⁹ Nonetheless, the title and introduction of this *coutumiers* which provided the framework for the whole body still bundled custom and usage together. As it explained: "This book speaks of the

⁴¹⁷ "C'est li livre de drois et des costumes de Champegne (ms. B); Ci commance li ordenemanz des coustumes de Champaigne (ms. A); Ci commencent li droit et les coustumes de Champaigne que li roys Thiebaux establi premièrement (ms. C); Ces sont les coustumes de Champagne (ms. D)" *Coutumier de Champagne* (various titles in, respectively, manuscripts A, B, C and D).

⁴¹⁸ For instance, "est coustume en Champane" (II) and "Einsinc en us'on en Champagne" (IV); "Coustume est en Champagne que [...] et ainsins en ont-il usé de toujours..." (XI, p.158-9); "... si comme il est acoustumé au pays" (XIX); "Et ensinc en us'on gerenraulment en Champaigne" (XXV).

⁴¹⁹ The *Coutumier d'Artois* features the category on a number of occasions.

customs and usages of Artois in the manner that we have used them and in the manner that we ought to [use them], according to how we have used them in the past.”⁴²⁰ The language of ‘use’ or ‘usage’ covered the entire contents of the text, it even described what one did and ought to do with custom.

Scholars have paid such close attention to the term ‘custom’ and how it was used but have generally ignored the term ‘usage’ and how it related to it. We might be tempted to describe the above as a lack of solid definition or a failed attempt at it. Another way to see it, however, is to say that the definition was not what was important—it was not what marked different sorts of authoritativeness in this particular customary legal culture.

DISPUTE RESOLUTION

Before we discuss how authoritativeness was created by customary legal culture, it must be noted that, much dispute resolution occurred informally despite the normative language of ‘coutume,’ ‘usage’ or ‘droit’ to refer to the practices of courts in the *coutumiers*. Custom or usage were often played second fiddle to the general concern of creating peace in the community. In the thirteenth century this was not, as we term it today, an “alternative” form of dispute resolution but central to dispute resolution even when a conflict ended up in court.

As mentioned in the Introduction, scholars have generally seen law and conflict in the period before 1250 through dispute resolution and anthropological approaches. Yvonne Bongert has shown the high instance of peace procedures, especially mediation and arbitration, used to

⁴²⁰ “*Cils livres parole des coutumes et des usages d’Artoys en la maniere qu’on en soloit user et que on deveroit, selonc que en soloit user anchiiement*” *Coutumier d’Artois*, First Prologue. Also see throughout the text, statements like “by the usage of the lay courts” (*car par l’usiage de la court laie*) (Artois II.8).

resolve disputes recorded in cartularies.⁴²¹ Common wisdom, such as the proverb “better a bad compromise than a good trial,” said as much.⁴²² The work of Fredric L. Cheyette and Stephen D. White, furthermore, showed that disputes over property until about 1250 were usually settled by arbitration and compromise in Southern France and North Western France.⁴²³

However, the period following this is usually discussed through traditional legal history and its courts, procedures, laws, and lawyers. Even studies that address dispute resolution tend to separate it from the development of law: the *infrajudiciaire* is generally studied separately from the *judiciaire*.⁴²⁴ This produces a skewed version of the legal changes of the thirteenth century, and overlooks how this *infrajudiciaire* was actually included within the realm of the judicial. Ideas of peace, compromise, mediation and arbitration run throughout the *coutumiers*. We see these today as part of “alternative dispute resolution” mechanisms that are designed so that parties can choose to avoid the court process and resolve their disputes more easily if they can agree on how to do so. At the time of the first *coutumiers*, however, these dispute resolution mechanisms were firmly part of the judicial and the juridical.

⁴²¹ Bongert, Yvonne. *Recherches sur les cours laïques du Xe au XIIIe siècle* (Paris: Picard, 1949) 103-111. In twelfth century charters, the word *judicium* does not yet imply ‘judgment’ (Bongert, 196).

⁴²² Cohen, 43.

⁴²³ Cheyette, Frederic L. “*Suum Cuique Tribuere*” *French Historical Studies* 6 (1970) 291, and White, Stephen D. “Pactum... Legem Vincit et Amor Judicium”—The Settlement of Disputes by Compromise in Eleventh-Century Western France” *The American Journal of Legal History* 22, no.4 (1978) 281-308. Compromise was the prevalent mode of settlement even when there was a clear winner, and the clear loser rarely went empty handed (Cheyette, 293). The goal of dispute resolution, and the role of arbiters, was not to ‘do justice’ but to satisfy both parties so that they would both be assuaged and the dispute would end. A judgment was difficult to enforce, could leave one party resentful, and could mean that the peace would not last. Compromise, on the other hand, generally meant reconciliation and an incentive to keep the peace, and the witnesses involved were usually people close to the parties able to pressure them to honor the compromise (White, 300-1). Cheyette argues that this changed from around 1250 onwards, when courts began making “normative judgments” (Cheyette, 296). White does not study the question beyond 1250.

⁴²⁴ See for instance Claude Gauvard, Alain Boureau, Robert Jacob and Charles de Miramon. “Les Normes” in *Les tendances actuelles de l’histoire du Moyen Âge en France et en Allemagne (Actes des colloques de Sèvres (1997) et Göttingen)*, ed. by Jean-Claude Schmitt and Otto Gerhard Oexle (Paris: Publications de la Sorbonne, 2002).

In fact, we have evidence of Pierre de Fontaines participating in peace agreements that is external to his *coutumiers*. Before he was a royal *bailli*, Pierre negotiated a peace between the Church of Saint-Éloi de Noyon and the mayor of the commune of Noyon recorded September 19, 1252.⁴²⁵ The parties disagreed about who owned a certain stream named Goillain.⁴²⁶ The church claimed to have used the stream and had a charter to prove its rights. Meanwhile the mayor, as representative of the commune, claimed that the community had used part of the stream for a long time because of a hole in one of the walls enclosing the stream. As the record noted: “Good people of the country, that is to say Messire Symon de Clermont, Lord of Nesle, Messire Aubers de Angest, Messire Guillaume de Praieurs and Sire Perres de Fontaines intervened to appease the discord between the parties.”⁴²⁷ These good men did not award the whole stream to one party, both walked out with what they generally thought they had: the church was awarded the stream except the part of it went out of that hole in the wall, and a large stone was to be placed between these in order to separate them.

As *bailli*, Pierre de Fontaines also rendered an arbitral sentence in favor of the bishop of Arras and against the countess Mahaut (who was his patroness at one point), and also was one of arbitrators settling a dispute between the community of Orry-la-Ville and the abbey of Chaalis.⁴²⁸ He was also responsible for a peace made in 1257 between the dean and chapter of Saint Quentin on the one hand, and the city of Saint Quentin on the other, because the city wanted to be able to banish from the city those people who belonged to the chapter and went into the city and caused trouble and harm. As the record stated, “by the counsel of Monseigneur Perron de

⁴²⁵ Boutaric, E. *Actes du Parlement de Paris*, Vol. 1 (Hildesheim: Georg Olms Verlag, 1975) cccxx.

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid.*

⁴²⁸ Griffiths, “Les origines et la carrière de Pierre de Fontaines, Jurisconsulte de Saint Louis” 550.

Fontaines, knight of the king, and of other good people, peace was made amicably” and essentially the city was granted the right to banish the unruly religious men.⁴²⁹

In fact, Beaumanoir devoted an entire chapter of his treatise to arbitration (chapter 41), and another to truce and guaranteed peace (Chapter 60).⁴³⁰ So did the *Coutumier d’Artois*, in one of its longest chapters (LIV). The *Établissements* also stated that if he wanted and “if it is a good and honest thing to do” a judge should tell the parties to make “peace [*pais*], for every honest justices [*loial joutise*], and all judges [*juges*], should break up suits [*plaiiz*] and conflicts [*noises*] and bring disputes [*quereles*] to an honest conclusion [*metre à fin loiaument*].”⁴³¹ Making peace, as can be seen, was preferable to judgment if it could be done in a ‘good’ and ‘honest’ manner. To help other judicial officers settle conflicts this way, the author of the *Coutumier d’Artois* provided a formulaic sample of a written peace agreement. Compromise was not just an unofficial practice outside of the courts, it continued to be a fundamental part of dispute resolution even as courts professionalized.

SPEAKING CUSTOM

⁴²⁹ The details of the peace are several pages long. Le Proux, F. “Les chartes françaises du Veermandois de 1218 a 1250” *Bibliothèque de l’école des Chartes* 35 (1874) 477. Consulted online: http://books.google.ca/books?id=j37TrwzTAwoC&pg=PA473&lpg=PA473&dq=%22perron+de+fontaines%22&source=bl&ots=LltUoWNjJ7&sig=S-VSqjMdaAcEo_J9IXeYPdvX4tw&hl=en&sa=X&ei=s0-4T4iSK8HlggfShNTBCg&redir_esc=y#v=onepage&q=%22perron%20de%20fontaines%22&f=false

⁴³⁰ He explains that a truce is temporary, while a guaranteed peace last forever (s.1694).

⁴³¹ *The Établissements de Saint Louis*, trans. by F.R.P. Akehurst, Book II.16. This refer specifically to compromise, which is different from a guaranteed peace (*asseürement*), which is a special types of peace that can be enforced by the courts (Book II.29). The guaranteed peace can be made at court (Book II.29). There is no indication that they *must* be made at court, but a judge can make the parties make a guaranteed peace (Book I.41).

So court business was only partially devoted to judgments. When it did come to judgment, it was not the judges that made the judgments. The judge presided over the court but the jury decided whose claim would prevail. As the *Établissements* stated if the parties were unable to make a peace agreement, “the judge [*joutise*] should call the parties and, in their presence, give and render his judgment as it has been established; for the judge [*juge*] should not make the judgment, according to the practice of the secular courts.”⁴³² The justices, then, “give and render” judgments, they enunciate them *after* they were decided by the jury. Beaumanoir states the same rule for the Beauvaisis.⁴³³ In the mid-thirteenth century, a similar technique was developed as mode of proof in the royal courts.⁴³⁴ Customs were proved not by a written text but by inquest, called the *enquête par turbe*, where ten to twelve men were called in to give information concerning the ruling of local custom.⁴³⁵ These were not people trained in law, but local people who “knew”—spoke, debated, remembered, fudged— custom.⁴³⁶

The *Établissements*, in fact, recorded custom primarily in oral form in the form of pleas to be made in court.⁴³⁷ This writing of pleas did not give rise to a Medusa effect— a swift ossification of court language and performance— whereby “the wrong form of plea could lose a

⁴³² “la joutise si doit apeler les parties et doner et render, les parties presents, son jugement, si come il a esté faiz; car li juges ne doit pas faire le jugement, selonc l’usage de la cort laie” (Book II.16).

⁴³³ Beaumanoir, Philippe de. *The Coutumes de Beauvaisis* of Philippe de Beaumanoir, trans. by F.R.P. Akehurst. Philadelphia: University of Pennsylvania Press, 1992) I.24. The *baillis* do not render judgments, but all judgments are made by the jurors. Beaumanoir specifies that the jurors are the lord’s vassals in the Beauvaisis. The same may be true for the *Établissements*, which states that “no commoner can give judgment, nor prove it false, nor contest it” (“Nus hom costumiers ne puet jugement fere, ne fausser, ne contender”)(Book I.142).

⁴³⁴ Dawson, J.P. *A History of Lay Judges* (Cambridge, Mass.: Harvard University Press, 1960) 46.

⁴³⁵ Cohen, 30. From 1270 onwards the *enquête par turbe* was supposed to only be used to prove ‘custom’ not ‘fact’ in royal court (Gilissen, 66).

⁴³⁶ Cohen, 30. It was only in the fifteenth century that these were commonly lawyers (*Ibid.*).

⁴³⁷ As Esther Cohen noted, “the spoken word was the main vehicle of law” (Cohen, 29). This does not mean that all law was oral. As John Gilissen aptly noted, however, it “is only at the moment when the social group became conscious of the existence of the juridical rule born of continued use that it may happen (though not necessarily) that the rule is verbalized orally” (Gilissen, 26).

case.”⁴³⁸ Bongert already questioned the formalism of high medieval procedure, noting that authors examining only the *coutumiers* had long argued for the formalism inherent to the medieval trial (which, as we have seen, the *coutumiers* did not stand for), but when looking at records from practice, the formalism seemed less accentuated. She showed further that the uses (*usages*) were still variable and had not yet acquired the character of ‘obligatory’ custom.⁴³⁹

The *coutumiers* reflected persuasive arguments and convincing language but not exact words. The *Établissements* often refer to words that ‘must be said’ by the litigants or the justices, these are not necessarily the only words that can be said when a dispute did go to trial. For instance, a person requesting seisin was told the manner in which he was to do so by the author of the *Etablissements* (“he must ask in this way”), but that “he should reserve the right to do or say more, if he needs to.”⁴⁴⁰ The forms of speech that litigants were to use, then, were not closed.

Each *coutumiers* presented one way of speaking and were themselves part of a conversation. To some extent, the *coutumiers* themselves were individual voices. When the poetic introduction to the *Etablissements*’ manuscript N ended, the compiler then says that he now wishes to *speak* of justice because of the reasons enunciated in the poem (“Por ce, veuil de joutise presentement *parler*”).⁴⁴¹ The text that followed, then, was perceived as something spoken rather than written. It may consequently be argued that the writing of the *coutumier* was not meant to make dispute resolution based on custom a textual practice founded on the text of the *coutumiers* themselves.

⁴³⁸ Ong, Walter. “Orality, Literacy, and Medieval Textualization” in *New Literary History* 16, no.1 (1984) 7.

⁴³⁹ Bongert, 183.

⁴⁴⁰ “il doit demander en tele maniere [...] Et si doit faire retenue de plus faire et de plus dire, se mestiers li en est” (II.4)

⁴⁴¹ Book II.I. [emphasis added]

This impression is not only based on manuscript N. It is also substantiated throughout the *Établissements* in phrases that do not differ between manuscripts. Later in Book II, for instance, the text refers to things that were *said* before (“come nos avons *dit* desus”).⁴⁴² In fact, more generally, the phrase “law/right says” (“droiz dit”) which opened every line of the poem the recurred commonly in the *Établissements*.⁴⁴³ The ambit of the text was practice and practice was what was spoken and performed. This came through again in the rule on requesting seisin, which states that “Right/law *says* (“droiz dit”) that the heir should be in possession; and it is written in the Code, *De edicto divi Adriani tollendo*.”⁴⁴⁴ What was right or lawful was pronounced by speech words and the written almost always referred to the texts of Roman and canon law, even in a text which set out to describe custom and practice in writing.

Simon Gaunt noted generally for medieval vernacular literature that “there is no clear-cut line between oral and written literature and [...] there was a long period of interaction between the two, so that the introduction of written literature in the vernacular did not immediately deal a deathblow to oral forms.”⁴⁴⁵ This spokenness was what distinguished custom from Roman and canon law, for which the term “written law” had become a term of art. Custom was not based on ancient texts, resurrected to be studied, analyzed, glossed in a way that was reverential and faithful to the original text as well as secondary to it. Within the customary legal culture the written was one voice among other voices claiming what was customary or what ought to be done.

⁴⁴² Book II.22. [emphasis added] This phrase does not seem to have been contested among manuscripts.

⁴⁴³ See for instance Book II.4, II.6.

⁴⁴⁴ “*Droiz dit que li oirs doit estre en possession; et est escrit ou Code, De edicto divi Adriani tollendo, l. Quamvis quis se filium defunct, etc.*” (Book II.4). [emphasis added]

⁴⁴⁵ Gaunt and Kay.

CUSTOM IN ACTION

The nature of thirteenth-century Northern French customary culture could best be seen in narrative reconstructions of the court process. These provide much more detail than found in nascent court records and fill out the information we have from these. The *Roman de Renart*, an animal fable composed between the end of the twelfth and the mid-thirteenth century, provides us with a telling judicial scene that sheds some light on the world of the lay courts and those active within it.⁴⁴⁶ This realistic animal fable about a scoundrel fox and his unwitting victims was one of the most popular tales of the Middle Ages. In France it became so ingrained that Renart's name displaced *goupil* and became the word for 'fox,' and its popularity across Europe was attested by wide circulation and translations into numerous vernaculars. The tale narrated a long trial where the eponymous fox hero was tried before the *parlement* of the lion king in response to the accusation that he raped the wolf Isangrin's wife.⁴⁴⁷ This episode permits us to see the various steps involved in a customary legal culture, the role of procedure and norm, and the extent to which deliberation and discussion were the formative elements at the heart of that culture. It also provides a glimpse at attitudes toward *ius commune* learning which will be more fully examined in Chapter IV.

Isangrin's heart was heavy and filled with shame because Renart has taken his wife against her will. He decided to assemble his friends and ask their counsel about how he could seek vengeance, and they all agreed that he should make a complaint in king's parliament.⁴⁴⁸ He

⁴⁴⁶ *Le Roman de Renart*, edited by Naoyuki Fukumoto, Noboru Harano, Satoru Suzuki, trans. by Gabriel Bianciotto (Paris: Librairie Générale Française, 2005).

⁴⁴⁷ For more on the earlier versions and variations within the different versions of the tale. Different versions of the tale place the trial at different parts of the narrative, a number even open the text with it.

⁴⁴⁸ *Ibid.*, 9: 15-24. This is an indication of the role of 'legal' procedures in the vengeance economy.

presented the complaint to the king and his court. As the narrator explained, the king would have preferred let the matter go, but he saw Isangrin’s tenacity and so reluctantly replied that he would be dealt with “by judgment and by reason/ according to the purview of my house.”⁴⁴⁹ Seated next to the king was the camel, a man held dear in court—he had come from Lombardy to bring the king the tribute sent from Constantinople, he was a friend of the pope and a papal legate and, in addition, he was very wise and a good legal expert (*bon legistres*).⁴⁵⁰ The king turned to him and asked his opinion on the subject: “Master, said the king, if you have heard of such complaints in your land such as those now heard in my court, we would truly like to know from you what judgment to deliver in such a case.”⁴⁵¹

What followed is difficult to render properly because it was a wonderful parody of the type of *ius commune* legal expert (*legistre*) represented by the camel. The camel spoke in a pidgin legalese that mixed French, Italian, Occitan and Latin that was meant to indicate that, though he may have a wealth of knowledge, he sounded like a fool. The camel responded to the king (here the Latin has been kept while words from other languages have been underlined to try to bring this accross):⁴⁵²

Quare, sire, me audite.
 We find written in a Decretal
Legem expressly published
 On matrimony violated.
 Firstly he must be examined,

Quare, messire, me audite.
 Nos trovons en decrez escrite
Legem express publicate
 De matremoine violate.
 Primes le doiz examinar,

⁴⁴⁹ “Et neporquant s’ert il traitiez/ Par jugement et par raison/ Selonc l’esgart de ma meson” (*Ibid.*, 9: 178-181).

⁴⁵⁰ “Li chameus siet joste le roi,/ Mout fu en la cort cher tenuz./ De Lombardie estoit venuz/ Por aporter monseigneur Noble/ Treü devers Costentinoble./ Le pape l’i avoit tramis./ Ses legas ert et ses amis./ Mout fu sages et bon legistres” (*Ibid.*, 9: 182-189).

⁴⁵¹ “Mestre, fait li rois, s’ainz oïstes/ En vostre terre tex complaintes/ Con a ma cort a l’en fait maintes./ Bien vodrions de vos aprendre/ Quel jugement en en doit rendre” (*Ibid.* 9:190-194). The king had turned to a canon lawyer whose legal expertise came from a different land, and presumably a different sort of court because his expertise seemed to be in canon law. This offers a view onto one way in which legal ideas could be transmitted from centers of learning and texts into the lay courts.

⁴⁵² *Ibid.*, 9:195-203.

And if he cannot justify himself,
You can afflict him as it pleases you,
He who did such a great wrong.
Hec is my sentence...

Et s'il non se puisse *espurgar*,
Grever le puez si con te place,
Que mout grant chose mesface.
Hec est en la moie sentence...

The camel continued to counsel the lion king—always in his mongrel argot—that either Renart should be tried, or if he refuses to submit to judgment his belongings should be confiscated and he should be stoned or burned to death.⁴⁵³ He reminded the king of his duty to dispense justice and make wrongdoers pay for their wrongs, apply justice and the law as did Julius Caesar, and not to be afraid to apply the full force of royal law and protect his kingdom.⁴⁵⁴ The narrator only tells us that the attending barons had mixed feelings about the *bon legistre*'s conclusions and then turned to the central arena of customary law.

Now the attending barons had to make a decision about the case. The king turned to the peers and framed the question for them as a judge was supposed to do for his jury. The question was: if one was overwhelmed with passion, must they be culpable of having cuckolded the other?⁴⁵⁵ The jury-member barons on the council of peers, “the most valiant and greater of the beasts,” left the royal tent and walked away for more than one mile, retreating in typical feudal form to deliberate, express their opinions, and decide how to judge Isangrin's initial complaint.⁴⁵⁶

The jurors were also parodied but for different reasons than the camel. In the pages and pages of deliberations that follow, most jurors are exposed for having nasty motives such as greed, spite, fear and concern for family connections.⁴⁵⁷ Nonetheless, the opinions they

⁴⁵³ *Ibid.*, 9:204-208.

⁴⁵⁴ *Ibid.*, 9: 209-232. The mention of Julius Caesar here is interesting, as is the choice of Caesar as someone who upheld law and justice. At this point one might have expected the go-to Roman to cite for justice and law to be the lawgiver Justinian.

⁴⁵⁵ *Ibid.*, 9: 239-242.

⁴⁵⁶ *Ibid.*, 243-5.

⁴⁵⁷ Gravdal, Katheryn. *Ravishing Maidens: Writing Rape in Medieval French Literature and Law* (Philadelphia: University of Pennsylvania Press, 1991) 74.

expressed were reasoned and sophisticated and provide a view upon legal reasoning in the lay courts of the first half of the thirteenth century. The first animal to speak was Brichemer the deer. Brichemer was very angry on Isangrin's behalf but, nonetheless, he gave an opinion based on the sort of reasoning that was proper to the forum:

Lords, he said, listen now,
You have heard from Ysangrin,
Our friend and neighbor,
How he has accused Renart.
But our usage in court,
When one complains of a wrong
And one seeks to have Justice
It is necessarily to prove it by a third party,
Since anyone could from one day to another
Make a complaint at will
Which could cause harm to another.

Seignors, fait il, ore escoutez,⁴⁵⁸
Vos avez oï d'Ysangrin,
Nostre ami et nostre voisin,
Con il a Renart accusé.
Mes nous avons en cort usé,
Quant l'en se plaint de forfeiture
Et l'en en velt avoir droiture,⁴⁵⁹
Prover l'estuet par tierce main,
Que tiex porroit d'ui a demain
Fere clamor a son vouloir
Dont autre se porroit doloir.

Brichemer opened by noting Isangrin's close ties with the other lords and his strong social standing. Brichemer empathized with Isangrin and was even angry (*s'aïra*) on his behalf. At the same time, he would not fudge the process for him and explained that a man's wife was under his power and he could have her lie for him, so a wife's support of her husband's statement was not a reliable form of proof.⁴⁶⁰ Bichemer first explained court usage and then noted the rationale behind it. This established the usage as reasonable, and his conclusion was that another witness had to be found. Bichemer's reasoning, then, was one based on procedural

⁴⁵⁸ The typical opening for any romance or epic should be recognized here. For more on how the procedures of feudal courts, based on formula, ritual, and communal forms, mirrored those of literary performances, see Bloch, R. Howard. *Medieval French Literature and Law* (Berkeley: University of California Press, 1977).

⁴⁵⁹ I have translated *droiture* as "Justice" because the text is referring to justice in the sense of archetypal ideal justice in the sense of "what is right" or "right, righteousness, equity, due, or what is straight." *Droiture* is what people seek at court, to have their right proclaimed or restored. In the *coutumiers* as well as in vernacular literature *droiture* seems to express this ideal much more often than *justice*, which is more specifically related to the powers of justice, like jurisdiction, holding court, enforcement.

⁴⁶⁰ Actually, the text points to a very interesting shift in public opinion about both expert testimony and explains that this testimony cannot be proved as that of a physician: wives "*ne sont mie fuisiciënt/Itel tesmoing a esprover/ Autre li covendra trouver*" (Roman de Renart, 9: 273-276).

fairness—his feelings of anger took second place to upholding a reasonable customary procedural requirement protects parties from the possible collusion of married couples.

Once customary usage was laid out, other parties brought up other arguments that weighed on the matter. Brun the bear reminded the jurors of Isangrin's position as constable and his excellent reputation.⁴⁶¹ Baucent the boar replied that such arguments could also be made on behalf of Rernart, the only difference being that other people would be making them, and that the ties between husband and wife was such that she would support him in anything, which could be used to defraud people so he supported Brichemer's opinion.⁴⁶² Plateau the fallow deer spoke next, reminded the other jurors that there were other claims in the plaint: Renart took meat from Isangrin's house wrongfully and by force, that Renart urinated on Isangrin's children to denigrate him, he beat them and tore out their hair, and called them bastards.⁴⁶³ This, Plateau noted, called for great compensation because if Renart got away with doing this once, he would do it again.⁴⁶⁴

Brun the bear supported this argument, outraged that a good man could be dishonored and wronged without getting reparation for it and pointed his finger at the king, who he felt should avenge his barons against such injustice.⁴⁶⁵ He then told a story about an outrage Renart had committed towards him, not to make a formal complaint, but to provide an example of what he was capable.⁴⁶⁶ Baucent the boar then reminded everyone about proper procedure: this was merely the first part of the process and the arguments of the adverse party had to be examined before right could be determined.⁴⁶⁷ As Beauent noted, once the accusation was heard, the

⁴⁶¹ *Ibid.*, 9:277-289.

⁴⁶² *Ibid.*, 290-312.

⁴⁶³ *Ibid.* 9: 313-323. For more on the importance of reputation in the middle ages, see T.S. Fensterand D.L. Smail. *Fama: The politics of talk and reputation in medieval Europe* (Ithaca, N.Y: Cornell University Press, 2003).

⁴⁶⁴ *Ibid.* 9: 324-326.

⁴⁶⁵ *Ibid.* 9: 334-343. The king in this narrative is not a strong good king,

⁴⁶⁶ *Ibid.*, 9:489-490.

⁴⁶⁷ *Ibid.*, 9: 507-513.

defense then had to be heard, and afterwards the respective rights of both parties had to be examined before reaching a conclusion—only then can the nature of the penalty be decided, by the judgment of the court.⁴⁶⁸ Only the monkey Cointereau sided with Renart, irritating Brun the bear who declared that Renart should be seized, bound and thrown into jail so an example would be made out of him.⁴⁶⁹ Instead, the assembled peers decided on mediation, on a settlement that would bring peace between the parties. Brichmer the deer, whom the narrator considered wiser than the others, noted that when wrongful actions or words are neither manifest nor confessed, the judicial proceedings that lead to the maiming or death of a man should be avoided, and instead peace must be made.⁴⁷⁰

The *Roman de Renart* presented a dystopian take on medieval society and Isengrin's quest for justice is emblematic tale of the injustices that can result from the legal process—Renart, of course, proceeded to use his knowledge of procedure to create delays and a long protracted process leaving Isengrin frustrated and society imbalanced and disenchanting. As Richard Kaeuper noted, this tale was composed at a time of intense governmental growth of the reigns of Louis VII, Philip Augustus and Henry II and provided a socio-political commentary both about some problems that troubled society, reactions to how those in power addressed those problems, and how effective their response was.⁴⁷¹ Within the realm of law specifically, the tale

⁴⁶⁸ “Mout seroit sages qui savroit/ Jugier d'un droit, et il n'avroit/ l'autre partie encore atainte./ Et un droit après l'autre rendre/ Tant que l'en viengne a la parsonne [...] Comment sera de l'amendise/ Par le jugement de justice.” (*Ibid.*, 9: 511-517, 529-530).

⁴⁶⁹ *Ibid.*, 9: 531-570.

⁴⁷⁰ *Ibid.*, 9: 601-606.

⁴⁷¹ Kaeuper, Richard. “The King and the Fox: Reactions to the Role of Kingship in the Tales of Reynard the Fox” in *Expectations of the Law in the Middle Ages*, ed. by Anthony Musson (Rochester, NY: Boydell & Brewer, 2001) 11. See this article for more on kingship and especially the king's peace in this text.

gives us insight into different ideas of cultural legitimacy and conceptions of justice in the world that directly preceded the lay jurists who wrote the *coutumiers*.⁴⁷²

The narrator had defined views about the forms of authority, legal reasoning and language that were appropriate and inappropriate in a court of law. The camel's learned pedigree was recognizably of the highest level: he came from the traditional home of the new legal studies of Roman and canon law, Lombardy, and was the friend and legate of the pope. The amount of mockery heaped on the camel, incidentally the one exotic and foreign animal amongst domestic ones, demonstrates the narrator's preference for one sort of legal knowledge over another, and presumably the audience would be laughing along and this was their inclination as well. The camel's speech nonetheless provides some idea about zones of contact between forms of knowledge, possible methods of transmission, and perception of this knowledge.

For the camel's cameo to have been funny, the audience had have been familiar with this sort character. Indeed, it is around the last part of the twelfth century that the first university-trained lawyers begin to appear around the king.⁴⁷³ While the scene stressed the ridiculous, there was a sense that this sort of canon lawyer could be present at a trial taking place before the king, a trial outside of ecclesiastical jurisdiction, and that his opinion was considered valuable in virtue of the *auctoritas* supplied by his learning and his position. His absurdity serves to highlight the bad rule of the lion king, who invited the foreign fop to sit at his side and to pronounce his opinion, which seemed so out of place in style and delivery that its contents were made to seem

⁴⁷² The Renart stories appear in the late twelfth century and the first half of the thirteenth, there are approximately twenty-six surviving tales (of course more may have existed), over half of which were already written by 1205. There are two named authors, Pierre de Saint Cloud and Richard de Lison (of whom we know nothing), and as many as twenty anonymous authors that contributed. (*Ibid.*, 10)

⁴⁷³ See especially articles by Marguerite Boulet-Sautel and Paul Ourliac in *La France de Philippe Auguste: Le temps des mutations, Actes du Colloque international organisé par le C.N.R.S., Paris, 29 septembre - 4 octobre 1980*, ed. by Robert-Henri Bautier (Paris, C.N.R.S., 1982).

irrelevant.⁴⁷⁴ Neither the camel nor the ideas in his fine speech reappeared in the jury deliberations.

In other words, authority in secular court can come from elsewhere. The jury's mode of reasoning was quite different from that of the multi-tongued camel, who began his legal opinion by citing the textual authority of the *Decretum*, and explaining how canon law dealt with the violation of matrimony. The peers, on the other hand, were concerned with how rape was dealt with in the secular courts and the first opinion voiced explained what the proper usage of the court was. Their discussion continued with matters of proof and the sorts of precedents that might result depending on the nature of their decision, vacillating between the different options they had and different views of the ultimate goal: some animals were more interested in retributive justice and wanted to see the scoundrel Renart pay for his misdeeds, others highlighted the importance of procedural justice placing the process above what they clearly viewed to be substantive justice, and others focusing on the restorative justice that would compensate Isengrin for the harm done to him, his family and his honor.⁴⁷⁵ One of the basic critiques of the narrator seems to be that these all fail in different ways—the first necessitates a willingness to play beyond the rules, the other is overly rule-bound and lets 'bad guys' off because of problems of proof, and the last puts all the power into the hands of the person who committed the wrong in the first place.

The forms of knowledge and reasoning displayed by the jury-member peers in the *Roman de Renart*—citation of court usage, discussing manner of proof, considering precedent, thinking

⁴⁷⁴ This despite the fact that some parts of the camel's pronouncements echoed in the discussion of the jury—the idea that the case should be tried and that if found guilty he should be severely punished by the king, whose response would be the litmus test for his kingship that would be revealed as good or bad depending on his response.

⁴⁷⁵ Ultimately, they decide on a peace agreement, which later fails, but it would have addressed the needs of the victim without running into the problems of proof that a trial would require.

about the social consequences of the approach they take—were emblematic of the secular courts. Beyond this, it gives a good view onto the legal world as known and lived by the *coutumiers* authors, the practices that they were trying to theorize and for the audience for whom they were doing so. The *coutumiers* authors had some book learning and had some knowledge of the rules and practices of the lay courts, and the texts they wrote drew on both. These authors wrote pedagogical texts for people like the animal peers in the *Roman de Renart*, which means that while the authors had an intended audience for their works, they also wanted to change that audience through their work.⁴⁷⁶ The lay jurists who composed the *coutumiers* were an amalgam of two sorts of men of law that had existed earlier. One type of man of law was interested in the study of law and he was characterized by his university training, while the other was one whose interest in things legal came from attendance of the courts.

CUSTOM AS CONVERSATION

The scene described above changed a little with the advent of the textualization of custom. However, the idea of the shift from orality to writing, or memory to written record, does not fully capture the dynamic and discursive nature that continued to characterize customary legal culture even with the introduction of legal texts like the *coutumiers*. The ideas of the transition from orality and memory to literacy and written record have extraordinarily enriched our understanding of socio-cultural legal transformation in the high and late Middle Ages. Yet it

⁴⁷⁶ Robert Jacob has noted the pedagogical purpose of the *Coutumes de Beauvaisis*, which Philippe de Beaumanoir himself noted in his introduction, and this is certainly true of the other *coutumiers* (Jacob, Robert. "Beaumanoir vs. Revigny: The Two Faces of Customary Law in Philip the Bold's France" in *Essays on the Poetic and Legal Writings of Philippe de Remy and his Son Philippe de Beaumanoir of Thirteenth-Century France*, ed. by Sarah-Grace Heller and Michelle Reichert (Lewiston: Edwin Mellen Press, 2001) 235). The pedagogical mission of the *coutumiers* will be discussed in the chapter on written custom.

also connotes a shift from the primitive to the modern, or from the romantic to the bureaucratic, and suggests that there was such a thing as a full shift from one state to the other. Even today oral arguments or interpretation remain basic components of the legal process both in common-law and in civil-law jurisdictions, and perhaps we should be speaking more of relationships than of transitions.⁴⁷⁷ That is to say, in addition to focusing on instances of speech or written text, we should be asking about the nature of the relationship between practice and text.

Written text, in the thirteenth-century, was an additional voice in the conversations inherent to and constitutive of customary legal culture. This conversation could be seen all over law in practice, in the debates and discussions and consensus-formation that surrounded legal activity. Some matters did not need much conversation, for instance, it was common knowledge that the ‘dead seized the living’—the idea that seisin vested in the heir at the moments of death with no other formality necessary for the transfer of property— or that one had the right to three continuances in lay court. Conversation, however, surrounded the uncertainties, ambiguities and unknowns that led to dispute or litigation, and to arbitration or judgment.

This conversation was not limited to orality and the spoken word. Indeed, conversation was inherent to and constitutive of customary legal culture and marks the approach of thirteenth-century lay jurists both to textuality as well as to law in practice. The previous chapter demonstrated how the variations between manuscripts represented the conversations between jurists over time and space. The *coutumiers* authors also expressed this conversation in their texts, and this conversation was such a fundamental aspect of custom so as to be its essential

⁴⁷⁷ While it seems common to speak of transition, this does not seem quite accurate. Even today, law happens in the argument or in judicial pronouncement, also a form of speech (records are then evidence for these). The debates over the multiple, and occasionally contradictory, interpretations of the American Constitution are the obvious example. Even within modern civil law culture where the written text is at the centre of legal culture, oral and enacted continues to shape the text under the guise of interpretation (see Mitchell Lasser).

cause. Sometimes it was as simple as the author's invocation of conversation with his audience.⁴⁷⁸ At other times, however, we could see the conversational nature of custom in practice—custom being questioned, debated, confirmed, or critiqued.

Not only were the individual manuscripts participants in a discussion about custom but this also featured within the texts, in the adversarial procedure highlighted in cases and exempla as well as in the jurists' comments about their own agreement or disagreement with other opinions about correct custom. It is here that we can see how, in the culture of written customary law, textualization of custom coexisted with a creative, spoken and performed customary culture. While the *coutumiers* explain specific rules, or what should be done in a particular situation, or what various people should say in court, they also show that their authors did not perceive custom as petrified in the act of writing. Set or confirmed custom was as clear in memory or in action as it was in writing, but the problem was when people did not agree or there was no precedent to invoke—this was the moment when custom has to be found or, in other words, generated.⁴⁷⁹ In this sense, custom was imbedded in the medieval culture of claims. In these moments, we can see law featuring as process in the texts, involving various steps and consultations, and negotiations between parties with different ideas.

The format of questioning and reasoned answer was a classic feature of scholasticism and university scholarship and educated laymen then brought it to the lay courts.⁴⁸⁰ Pierre de Fontaine's *Conseil à un ami* clearly saw custom as part of a practice that included rules that were well-known and accepted as well as some rules that were unsettled. The text had a naturally

⁴⁷⁸ Such as when Pierre de Fontaines or the author of the *Coutumier d'Artois* addressed their friends, or Philippe de Beaumanoir addressed the Count of Clermont, or even in the refashioning of the *coutumiers* as a royal proclamation such as in the *Coutumier de Champagne* or the *Etablissements de Saint Louis*.

⁴⁷⁹ There is a deeper philosophical question underlying this statement about whether ideas can be said to exist before they are articulated (or in the case of the Middle Ages, before their first known articulation).

⁴⁸⁰ Where it came from is a different question. However, it cannot be purely learned influence, since this aspect of negotiation is so fundamental to customary practice generally.

conversational tone because the text was framed as advice and was styled as a personal conversation between a teacher and a student.⁴⁸¹ In teaching his student, who was or would be a regular attendee of the lay courts but was not a *légistre*, about custom and customary practice, Pierre also gave us a view onto these practices. This was a view of a man who clearly had some advanced education that included some Roman and canon law in translation but who had a long career in the lay courts, first in comital court then in the highest echelons of the royal courts as a counselor so close to the king.

Practice, for Pierre, was composed of things known and things uncertain and, within the latter, custom became a matter of opinion and discussion. This was the case when a custom has not been firmly established on a certain matter, and Pierre gives his opinions about what he thinks custom might be: “You are asking something I never saw brought to judgment, nor saw a suit on: whether serfs also lose their right to answer one another in court, like gentlemen? And certainly I will give you my opinion...”⁴⁸² Lay jurists supplied opinions in the absence of precedent, but these did not necessarily represent community consensus and would present one authoritative voice in debate.

Indeed, Pierre occasionally pointed out that his interlocutor had been wrongly informed about what was right and wrong in a certain case. Pierre once told him: “You were not rightly informed by whoever told you that Robert had lost his right to an answer in court.”⁴⁸³ This meant that there were different opinions about customs and that these would have to confront each other should the matter become part of a dispute and ended up in the lay courts. It was this

⁴⁸¹ See for instance Pierre de Fontaines, XXII.32. Note this conversation is stylized and conventional, not a representation of regular people in an every-day conversation.

⁴⁸² Pierre de Fontaines XIII.22.

⁴⁸³ “You were not rightly informed by whoever told you that Robert had lost his right to an answer in court, because of a theft he was accused of, but which was never proved, but was put in prison at the will of the judge” (Pierre de Fontaines, XIII.16).

confrontation that established custom. Even absurd or wrong ideas were part of the conversation.⁴⁸⁴

The person who told you that you had begun a proceeding merely because you had asked for a counsel day was not a good law expert [*légistres*] nor was he knowledgeable about the customs of the area. For I believe that all written law that exists, and all the good customs whose practice is followed, are against such a ruling, even the law of La Bassée.

Pierre implied that, in his opinion, there were two types of people who properly understood the rules of procedure in secular court—those who were law experts in virtue of some form of study and those who have knowledge of local custom from practice. However, that did not mean that others did not have an opinion about what custom was or should be, or that they withheld from giving counsel. Claims that were misinformed had to be proved wrong. Claims of misinformation could also be used to try to discredit other versions of custom being asserted. Whether or not they were actually misinformed was less relevant than whether the claim could be proved or disproved.

Even custom that seemed approved, established, and even agreed upon by people with different sources and approaches could be subject to different opinions. Confirmation by the courts certainly provided a custom with greater authority, but even then, jurists thought about them critically. A judgment, then, was not the final word and established custom as Cheyette argued because it only did so for its own case and the possibility of future contestation was always there. For instance, Pierre described one wrong judgement:⁴⁸⁵

⁴⁸⁴Pierre de F: XVII.37. This customary law compilation, also called the *Loi de Vervin*, from which other customs sometimes borrowed, is one of the oldest known in France. It is published in Bourdot de Richebourg, *Coutumier général*, vol. 2 p. 919. See Marnier p. 261 note e.

⁴⁸⁵ Pierre de Fontaines, XVII.54.

It is not my opinion that a right judgment was given by {the judge} who asked the parties if they were ready to hear judgment according to the arguments they had made, and then in his judgment paid attention only the last arguments which had been made, without the parties having renounced in any way what they had said earlier.

Pierre showed that judgments could be subject to disagreement and that even a rule “established” by a court ruling may not stand the test of time. He also intimated that proceedings were not as formal, or *legal*, as he felt they should have been—in this case, the judge was not paying attention to the actual arguments being made throughout the proceeding and judging according to partial information.

This passage was about wrong or arbitrary justice but it also showed that, for Pierre, it was the arguments proposed by the parties that should be judged rather than the right or wrong ‘feel’ of a claim. Judgment should not be about impressions but about allegations made by parties—“judgments according to the arguments that they had made”—this was an argument for an adversarial legal system where arguments in favor of two different takes on the facts and proper law are presented before a judge or jury whose role was to find truth and make a decision. Pierre was writing at the vanguard of the development of a professional legal culture and this passage shows that, though not everyone was participating, there were lay jurists who were trying to construct a professionalized law that at least had some aspiration of thinking and judging according to the facts and arguments of a case.⁴⁸⁶ Procedure ought not be a disguise for opinion but was the method by which truth ought to be revealed.

This negotiated custom, product of allegations and dialogue, also appeared in other guises in Pierre’s text. Neither he nor his interlocutor seem to have had a notion that there was a font of old law that answers all questions and settle all matters as in Ker’s or Clanchy’s formulation—or,

⁴⁸⁶ See more in the following section.

at least, this was not the notion they harkened to when there was doubt. Instead, when some points of practice were notoriously confusing as well as pressing issues they would generate discussion and questioning. For instance, Pierre noted on one occasion that “this question has often been asked about a man who is appealed against for a crime and who settles [*en fait pes*]; namely whether he loses his right to an answer in court. And certainly he does...”⁴⁸⁷ A question often asked if the answer is uncertain, not well known, or not largely accepted.

So, how to know the unknown? Or, where to find what to do when there was no rule nor any memory of a similar resolution in living memory? There is no indication of channeling of ancestral knowledge of the good old law—custom could not be so old that no one had seen or remembered it. What was left, in this case, was the opinions of wise men who were learned in the practices of the lay courts whose opinion carried authoritative weight. Pierre seemed to be one of these, as can be seen in his comment that people often asked his opinion on points of proper customary practice. For instance, on the nature of the tenure of land inherited by a minor, Pierre said that those who are under fifteen years of age must continue to hold their property in the same type of tenancy in which their parents held it.⁴⁸⁸ This point needed further explanation, especially in the face of various different situations, and Pierre noted that “I have been asked many times how I interpret this assertion,” and proceeds to explain how one should understand it in different situations.⁴⁸⁹

⁴⁸⁷ Pierre de Fontaines XIII.24.

⁴⁸⁸ Pierre de Fontaines, XIV.1.

⁴⁸⁹ Pierre de Fontaines, XIV.2.

Occasionally, Pierre responded directly to questions asked by the young man receiving his teaching on law and governance about whether certain types of customary practice were *good* customary practice:⁴⁹⁰

You are telling me there was a gentleman in the Vermandois who had brothers and sisters, and who married under an agreement that his widow would get a half of his land in dower, and from the other half, if he died without heirs of his body, she would get back what she brought to him as a dowry: now you are asking me if such an agreement is valid according to our practice. And certainly it is, as long as maintenance is provided for children existing before the marriage, and {dowry} provided for the sisters, if their father had left these instructions...

Interestingly, the facts are recounted without names and dates, what seems to be important instead is the various facts of the situation, a notably conceptual way of looking at the information pertinent to a conflict or dispute. Passages such as this one provide us with a look at the conversations and information networks were at the heart of customary thinking in the mid-thirteenth century: one young jurist heard of a certain chain of events and asked an experienced jurist about whether what happened should have been what happened. Correct practice was then based on perceptions of the past rather than reflections of it.

Philippe de Beaumanoir, like Pierre de Fontaines, noted a number of occasions where practices contradicted “law or custom.”⁴⁹¹ However, he went one step further than Pierre—he not only noted when he disagreed with a certain common custom but he also explained that these customs were against reason. This was grounds for contesting the rule and, in fact, Beaumanoir encouraged the reader to contest these through the proper channels:⁴⁹²

⁴⁹⁰ Pierre de Fontaines, XV. 8.

⁴⁹¹ “will which was made contrary to law or custom [*qui a fu fes contre droit ou contre coustume*]” (Philippe de Beaumanoir XII.382, *see also* XII.383).

⁴⁹² “et certes tout soit il ainsi que nostre coustume le sueire et la court de Beauvais, nous ne creons pas que ce soit resons et creons que biens et aumosneseroit de contester a teus testamens et de fere les de nule valeur, meismement

and certainly all is such that our custom and the court of Beauvais follows this, we do not believe that this accords with reason and we believe that it would be good and charitable to content such wills and to make them invalid, especially when they exclude heirs without cause; and we believe that whoever would go to the point of definitive sentence, appealing either from the bishop to the pope or from the barons to the king, that such a will would not be upheld.

The role of consensus in making custom is so often emphasized as the generative factor of custom, seemingly at the expense of the fact that lack of consensus also had an essential and formative role. A clash of opinions about certain customs could be seen on a number of occasions in Beaumanoir's text, where Beaumanoir explained that "we say that... [...] And people have sometimes said that [...] but it is not so."⁴⁹³ Disagreement propelled discussion which, in turn, caused custom to be formulated.

Some customs Beaumanoir disliked to the extent that he openly disregarded them. For instance, he explained that he felt that the penalties for commoners striking noblemen were too light. As he notes, "It is an annoying thing that our custom permits a commoner [*petis hons de poosté*, lit. little men subjected to other people's power] to strike a valiant man [*homme vaillant*] and only pay five sous as a penalty; and for this reason I agree that he can be given a long prison term, so that for fear of prison the miscreant will refrain from such mad acts."⁴⁹⁴ Beaumanoir, then, openly made assertions contrary to accepted custom, with strikingly different results for the

quant ele en oste ses oirs sans cause; et creons que qui en iroit a sentence disfnitive, en apelant de l'evesque dusques a l'apostoile, ou des barons dusques au roi, que teus testament ne seroient pas tenu" (Philippe de Beaumanoir, XII.387). Note that a judgment at these highest levels would provide some degree of certainty about how the type of case would be judged again.

⁴⁹³ "Nous disons qu'il convient qu'il soit mis en trois pures defautes, tout sans les jours qu'il puet contremander et essoinier par coustume. Et ont aucune fois dit li aucun qu'il convenoit que teus defautes soient fetes pres a pres, mes non fet" (Philippe de Beaumanoir, II.64).

⁴⁹⁴ "C'est anieuse chose quant nostre coustume suefre qu'un petis hons de poosté puet ferir un homme vaillant et si n'en paiers que .v.s. d'amende, et pour ce je m'acort que longue prisons li musart se chastient de fere teus folies" (Philippe de Beaumanoir, XXX.842).

person involved—a five *sous* fine was turned into a prison sentence. It may have been easier to do so in this particular case, since the people whose traditional rights were circumvented were “little men subjected to other people’s power.” Nonetheless, Beaumanoir indicates that if one disagreed with custom, one would just act in contravention to it presumably until there was some complaint or contestation. This was true even for Beaumanoir a complex thinker working in official capacity as a comital justice whose *Coutumes de Beauvaisis* express a great desire for order.

The *coutumiers*, then, assumed the importance of conversation and its constitutive power in the various stages of the customary legal process. This was significant on one level because it says something about formalism or formalistic practices—there can be no doubt that many *coutumiers* authors and creative copyists envisaged conversation, negotiation and change as fundamental aspects of the practice of custom in the lay courts. They knew that time, opinion, challenge, discussion, allegations of unreasonableness or reasonlessness, and desuetude all contributed to changing rules and that this was the environment within which they operated. Indeed, this accords with studies of other facets of the legal process, such as Susan McDonough’s work on the role of witnesses shaping the discussion and legal framework of court proceedings.⁴⁹⁵ It also shows that the popular *Roman de Renart*’s account of a quintessentially deliberative rather than formalistic customary legal culture remained accurate at the same time as customary practice was professionalizing and was beginning to have a relationship with the written.

⁴⁹⁵ McDonough, Susan. “Poor Widows and Impoverished Mothers: Negotiating Images of Poverty in Marseille’s Courts” *Journal of Medieval History* 34, no.1 (2008) 64-78; McDonough, Susan. “She Said, He Said, They Said: Claims of Abuse and a Community’s Response in Late-Medieval Marseille” *Journal of Women’s History* 19, no.4 (2007) 35-58. For an earlier study of the active role of witnesses in giving shape to the nature of legal discussion within proceedings, see Sally Humphreys, “Social Relations on Stage: Witnesses in Classical Athens,” *History and Anthropology* 1, no. 2 (1985) 313-69.

The *coutumiers* do not showcase a legal practice transitioning from orality to writtenness— from free memory to fixed written record.⁴⁹⁶ Rather, they show that written text was a voice in the various conversations at the basis of the customary legal culture of the day. Written text permitted a Pierre de Fontaines or the compiler of the *Etablissements* to extend this conversation beyond their own person, beyond the region and *post moterm*. To some lay jurists, these texts would be authoritative. Presumably, this is why they were copied as well as adapted by critical thinkers who also sought to be part of the conversation. To others, text was simply not the place of custom and they might not think of written custom at all, neither negatively nor positively, because for them custom was an inherently performative practice. This does not change the fact that the written was part of the general conversation that constituted custom in practice, formed of discussion, negotiation, disagreement, challenge and consensus. The *coutumiers* texts, then, were not fixing oral forms or petrifying them in writing, nor were they participating in a tyranny of textualization.

Seeing the written as part of a continuing conversation was particular to vernacular legal culture. Speech was a common feature of the textualization of custom in the *coutumiers* just as it was generally in vernacular literature. The oldest manuscript of Pierre de Fontaine’s *Conseil à un ami* refers to the text as speech (*paroles*), rather than advice.⁴⁹⁷ When the poetic introduction to manuscript N of the *Etablissements de Saint Louis* ends, the compiler then says that he now wishes to *speak* of justice because of the reasons enunciated in the poem (“Por ce, veuil de joutise presentement *parler*”).⁴⁹⁸ Book II of the *Etablissements* further refers to things that were

⁴⁹⁶ Of course, these texts are different from the various documents of practice such as charters, or records of court practice kept in England.

⁴⁹⁷ “Chi parole mon sires Pieres de Fontaines...” (the description of the auction house Lafon: <http://www.interencheres.tv/?p=972>). Unfortunately this manuscript was sold at auction to a private purchaser.

⁴⁹⁸ Book II.I. [emphasis added]

said earlier on in the text (“come nos avons *dit* desus”).⁴⁹⁹ In fact, textualized law was also generally seen as speaking: the phrase “law/right says” (“droiz dit”) appears fairly commonly throughout the *Établissements*.⁵⁰⁰

Both the writing of a *coutumiers* and the copying of a *coutumiers* was an act of *composition* of custom that participated in these customary discussions, they were one voice that—if it found a chorus—might be part of a prevailing view, and so might constitute proper practice and proper custom. Even established custom could change if the conversation was forced to continue. Written text and spoken word were thus both part of a greater conversation about the proper forms of normativity to be used in the lay courts, about the proper presentation of arguments and ideas, about making the kinds of claims that would have some sort of legal meaning that the court could judge upon—as opposed to opinion, emotion, prejudice and so on.

PARTICIPATING IN THE CONVERSATION:

FROM “GOOD FOLK” TO “FOLK WHO CAN”

⁴⁹⁹ Book II.22. [emphasis added] This phrase does not seem to have been contested among manuscripts.

⁵⁰⁰ See for instance Book II.4, II.6. This comes through again in the rule on requesting seisin, which states that “Right/law says (“droiz dit”) that the heir should be in possession; and it is written in the Code, De edicto divi Adriani tollendo” (“*Droiz dit que li oirs doit estre en possession; et est escrit ou Code, De edicto divi Adriani tollendo, l. Quamvis quis se filium defunct, etc.*” (Book II.4) [emphasis added]).

Most of the vernacular-*coutumiers* authors did not make a point of noting that their text was composed in the vernacular or of explicitly stating why they were writing in French rather than in Latin.⁵⁰¹ Translators who made vernacular versions of Latin texts commonly would include such explanations, but types of literature that developed mainly as vernacular literature—from *chanson de geste* to *coutumiers*—generally did not include such explanations. This meant that customary legal knowledge was aimed at the laity, the dominant participants in secular court and who participated in the customary conversation.⁵⁰² As we will see in this section, subtle changes were also affecting who could participate in this conversation.

The choice of language did indicate that the interlocutors in the customary conversation were not Latin-literate educated clerical-types but the discursive, enacted, political, gruff enactors of custom in secular court. Comments by Philippe de Beaumanoir, the only author who commented on language and law, supported this view. As he explained, what separated the two cultural communities was not only language but also a difference in terminology even when the same language was being used:⁵⁰³

Clerics have a manner of speaking in Latin that is very pretty; but the lay people who have to plead against them in lay court do not even understand the words that they say in French properly, as much as they may be pretty and appropriate to the pleading. And for this reason, we will discuss in this chapter, *in such a manner that lay people can understand it*, about what is most often said in secular court and what is most necessary.

⁵⁰¹ Manuscript H of Pierre de Fontaine's *Conseil* notes in the incipit and explicit that the text is in French. This practice was not common in the *coutumiers*, though in other sorts of vernacular writing it was quite common even when the text was not a translation.

⁵⁰² Churchmen would also be present in secular court, and are commonly found on charters attesting cases or playing the roles of witnesses. Of course, vernacular secular law as found in the *coutumiers* was also accessible to any one of them who could read or understand French, which means that this group could also include those among them who were Latin-literate and interested.

⁵⁰³ "Les clerks on une maniere a parler mou bele selonc le Latin; mes li lai qui ont a pliedier contre aus en court laie n'entendent pas bien les mos meismes qu'il dient en François, tout soit il bel et convenable au plet. Et pour ce, de ce qui plus souvent est dit en la cour laie et don't plus grant mestiers est, nous traiterons en cest chapitre en tele maniere que li lai puissant entendre" (Philippe de Beaumanoir, VI.196). [emphasis added]

The regular pleader in lay court was unable to understand clever cleric even when they were not pleading in Latin because their language was so filled with jargon. Beaumanoir was alluding to the type of character exemplified by the camel in the *Roman de Renart* that we examined earlier.

For all of the aesthetics of refined legal language, Beaumanoir made the decision to prioritize not only French but also the less refined French of lay people so that more people would understand. He thus prioritized the ability to communicate knowledge to his audience, an audience that had been excluded from certain forms of legal knowledge through language. At the same time, his text was teaching that audience to speak more appropriately and to use terminology adopted from the Latin to express legal ideas more specifically.

The *coutumiers* were part of a movement that opened up legal knowledge to a new audience: the judges, practitioners and pleaders in lay court. As Pierre de Fontaines implied earlier on, “those who judge disputes in lay courts are not men of law (*légistres*), so they cannot treat disputes so subtly as the written word (*la lettre*).”⁵⁰⁴ In a different passage, Pierre clarified that legal knowledge could come from two sources. As we saw earlier, he explained to his interlocutor that “the person who told you that you had begun a proceeding merely because you had asked for a counsel day was not a good law expert [*légistres*] nor was he knowledgeable about the customs of the area.”⁵⁰⁵ Though Pierre was at the vanguard on this issue, this does show that at high levels both study of law books and experience of the life of law could be the bases of legal expertise.

⁵⁰⁴ “Cil qui jugent les queeles ès corz laies ne sont mie légistre, dont ne pueent-il mie si soutilment treitier les queeles come la letre: mès certes ci n’eust mie grant soutilleté à entendre celui qui fist tel covent, que on lui du x livres chascun an tant comme il vivroit, à payer à Pasques et à la Saint Jehan” (Pierre de Fontaines, XV.33). Should *la letre* be translated as written law?

⁵⁰⁵ Pierre de F: XVII.37. This customary law compilation, also called the Loi de Vervin, from which other customs sometimes borrowed, is one of the oldest known in France. It is published in Bourdot de Richebourg, *Coutumier général*, vol. 2 p. 919. See Marnier p. 261 note e.

The *Coutumes d'Anjou et Maigne* did not explicitly state its audience, but its contents indicate its nature as a guidebook for lordship and how to handle different legal situations that may arise, clarifications about jurisdiction and the different rules that apply to a person according to their status and gender. The lordship theme also appears in Pierre de Fontaine's discussion of audience, who responds in his prologue to an interlocutor who encouraged him to write his text:⁵⁰⁶

You have made me understand many times that you have a son who is learning good morals and a firm faith very well, and that you hope that he will hold your inheritance after you, and because of this, you want him to study the laws and customs of his country, and the practice [*usage*] of the secular courts, at this time when military operations [*armes*] are suspended, so that when he inherits, he will know how to do justice to his subjects and maintain his land according to the laws and customs of the country, and give advice to his friends when it will be necessary: and you have requested me to do this, and now request that I write him a text according to the practice and the customs of the Vermandois area and of other secular courts (*un escrit selonc les us et les coutumes de Vermandois et d'autres corz laies*).

Pierre, taking up the classic theme that in times of peace good rulers should turn their minds to law, put his *coutumiers* in the framework of landed lordship and set the knowledge within amongst the other lordly virtues. The beginning of the *Coutumier d'Artois*, which copied entire sections of Pierre's text, the author added something to this. He explained that he was giving advice to his son so that first, his son could help his friends should they need his help and, second, so that he could be more clear-sighted and retain things better other forms of knowledge and the words of the wise men of the country.⁵⁰⁷

⁵⁰⁶ Pierre de Fontaines, Prologue.2.

⁵⁰⁷ "Et si son ces coutumes en partie accordees as lois et selonc droit escrit; et en a mis cieus qui ce traita en ce livre, de chascun un pau, quant a enformer un sien fil par qui il peust et seust aidier aucun sien ami, se requis en estoit, et pour ce que il fust plus clerveans et mieus retenans en autre sience et ens es paroles des sages hommes dou pais."

By the 1270s, there was some indication that lines were being drawn between who could and could not participate in the conversation. In the part of Book one of the *Etablissements de Saint Louis* that was originally the *Coutumes d'Anjou et du Maine*, the compiler added an interesting explanatory note. The original text was explaining how to properly request an amendment of judgment, and told the petitioner to say: “Sir, it appears to me that this judgment harms me and is not right; and for this reason I request an amendment and that you set a date for me; and have so many good folk show up that they can know whether the revision is appropriate or not.”⁵⁰⁸ The compiler added the following words: “by folk who can and should do this according to the law and usage in the barony [*par gens qui le puissant faire et doivent selon le droit et l'usage de baronie*].”⁵⁰⁹ The original “many good folk” was narrowed by the compiler to mean a specific group of people. It was no longer enough to be a man of good reputation or importance, lay practitioners were becoming specialized.

CONCLUSION

⁵⁰⁸ (*Etablissements* I.85)

⁵⁰⁹ (*Etablissements* I.85)

In the words of Susan Reynolds, custom formed “the bedrock of all law”, its validity as a source of law was basically unquestioned.⁵¹⁰ Just as the royal courts instituted the *enquête par turbe* to ‘confirm’ custom in court and more coherent records of the Parlement of Paris began to be kept, the *coutumiers* authors were composing custom by writing their texts. The *coutumiers* seen to stand Janus-like at a transition point in history—they are seen as the culmination of a ‘*prise de conscience*’ (a dawning consciousness) that custom ‘existed’, which resulted in the crystallization of oral and personal custom and its ‘transfer’ into writing, which inaugurated territorial and written law.⁵¹¹ Yet, as Mark Hagger amongst others noted, the *coutumiers* cannot be taken as accurately representing the law of the period that preceded them.⁵¹² Part of the problem is the language used to describe the appearance of the texts. The common phrase of ‘setting custom in writing’—*la mise par écrit*—implies a change in medium and faithful transfer from performance to text.⁵¹³ This chapter demonstrated that composition and conversation better describe the culture of speaking, acting and thinking in which the *coutumiers* lived and participated.

The *coutumiers* were born to a world where the lay courts had their own forms of behavior, knowledge and expertise where other forms of conduct or erudition would clash and be out of place. The *coutumiers* authors sought to help lay people become lay practitioners by developing their ability to properly participate in the conversations that constituted the

⁵¹⁰ Reynolds, *Kingdoms and Communities*, 42. She notes that some half-hearted complaints were made by church authorities when custom contradicted the church’s doctrines or needs, and even less protest came from Romanist circles, but these did not have much effect on the omnipresence of custom (*Ibid.*).

⁵¹¹ “Il fallut sans doute quelques années pour que l’on prenne conscience qu’il existait des coutumes. La rédaction des coutumiers allait être le résultat de cette prise de conscience” (Ourliac, Paul. “Législation, coutumes et coutumiers au temps de Philippe Auguste” in *La France de Philippe Auguste—Le temps des mutations* (Colloques internationaux CNRS, no.602) (Paris: Éditions du CNRS, 1982) 482).

⁵¹² Hagger, Mark. “Secular Law and Custom in Ducal Normandy, c. 1000-1144” *Speculum* 85, no.4 (2010) 829.

⁵¹³ “*la mise par écrit... cristallise cet instant...*” Gouron, André . “La coutume en France au Moyen Age” in *La Coutume/Custom, Transactions of the Jean Bodin Society for Comparative Institutional History*, Part II: Medieval and Modern Western Europe (Brussels: De Boeck, 1989) 207.

affirmation, delineation, contestation and reconstitution of custom. They shaped the conversation at the basis of customary legal culture and to placed this conversation within an increasingly professionalized framework based on specific processes of thought. The *coutumiers* were, in that sense, expressions of the past in the service of the present as well as barometers of future legal thinking and performance.

CHAPTER IV

Creative Citation

In an upside-down version of Harold Bloom's anxiety of influence, the *coutumier* authors have been understood as grappling with the anxiety that their texts were *not enough* like their powerful predecessors, namely, the Roman lawyers of late antiquity as packaged in the *Corpus Iuris Civilis* and the various medieval commentators on Roman law.⁵¹⁴ The *coutumiers* have been described as keenly feeling their own inferiority compared to the learned laws, and attempting to use these superior learned laws to shore up authority for their own works. Peter Stein, for instance, has said that Philippe de Beaumanoir "adapted Roman law to quite unroman institutions, to give them greater authority"—Stein seems to think that Beaumanoir felt that it was not only the *coutumier*, but general customary law and practice, that needed to be supported by the greater authority of Roman law.⁵¹⁵ This chapter argues that authority, and the authority of Roman specifically, ought to be discussed in a different manner.

The writing of the *coutumiers* was clearly tied to the renewed interest in Roman law. However, these texts also show that the development of customary law in the lay courts was a movement in its own right, and must be evaluated beyond its relationship to Roman law. They present the voice of the lay practitioner and display his methodology on a scale not seen since the Roman jurists of late antiquity. He did not have an anxiety *vis à vis* Roman law. If anything, he

⁵¹⁴ For Bloom's theory on the 'anxiety of influence', that poets grapple with the anxiety that all their work is influenced by their strong predecessors, see Bloom, Harold. *The Anxiety of Influence: A Theory of Poetry* (Oxford: Oxford University Press, 1973).

⁵¹⁵ Stein, Peter. *Roman Law in European History* (Cambridge: Cambridge University Press, 2007) 66.

needed to be convinced it was relevant to discussions of practice in the lay courts. The Roman law, when it was used, was used as part of a general pool of wisdom. Just like the Theodosian and Justinianic committees that compiled the Roman laws, the thirteenth-century lay jurists who composed the *coutumiers* were not writing to conform to previous juristic models, but took what supported their view of normativity in the secular courts and discarded or ignored what was not useful to them.

Modern notions of the nature of the medieval use of citations have gone some way in shaping our understanding of the relationship between Roman law and the *coutumiers*: the medieval author is understood to be dominated by his or her citations. The difference between modern and medieval citations, in the words of Anthony Grafton, is that:⁵¹⁶

[The modern] historian who cites documents does not cite authorities, as the theologians and lawyers of the Middle Ages and the Renaissance did, but sources. Historical footnotes list not the great writers who sanction a given statement or whose words an author has creatively adapted, but the documents, many or most of them not literary texts at all, which provided its substantive ingredients.

Was medieval scholarship truly confined to authorities or their adaptation, and uninterested in building intellectual monuments of its own?

Citation practices, as Anthony Grafton also noted, are reflections of the culture of erudition to which they belong.⁵¹⁷ The citation practices of the *coutumier* authors and the manner in which they approached Roman law, indicate that change, creativity and innovation were fundamental attributes of the approach that the *coutumier* authors had to the texts they cited.

⁵¹⁶ Grafton, Anthony. *The Footnote: A Curious History* (Cambridge, Mass.: Harvard University Press, 1997) 33.

⁵¹⁷ Anthony Grafton in Suzannah Clark and Elizabeth Eva Leach. "Learning, Citation and Authority in Musical Culture before 1600" in *Citation and Authority in Medieval and Renaissance Musical Culture: Learning from the Learned*, edited by Suzannah Clark and Elizabeth Eva Leach (Woodbridge, UK: Boydell Press, 2005) xxi.

These authors were not citing authorities, in the sense that the weight of the reference's influence conditioned the content of the text. The *coutumiers* do not cater to authorities, and authorities do not condition the normative exposition of individual *coutumier* texts. The sources they use are *authoritative* in the sense that they carry a moral weight and an epistemological nobility that bears a certain persuasive gravitas. They were citing the sources in order to create their own text, and to showcase the erudition of the text.

For Harold Bloom, a poet could only overcome his anxiety towards his strong predecessors and become great by a “strong misreading” of the earlier text that would permit him to create his own text—“weaker talents idealize; figures of capable imagination appropriate from themselves.”⁵¹⁸ The first *coutumiers*, written around the second half of the thirteenth century, were such “figures of capable imagination.” They built up their own texts by collating a variety of sources, sources which they often subjected to a strong misreading that shaped them to their new purpose. This behavior toward sources could not occur if an author was following them slavishly as authorities; it could only occur if the author was a creator, reshaping the sources for a new destiny.

AUTHORITY

Roman law is commonly credited with supplying not only the framework for customary law but also with providing the conceptual apparatus by which it could define and form itself. In the words of Peter Stein, “the thirteenth century saw attempts in several European countries to set down the local law in writing and in every case those responsible turned to the civil law to

⁵¹⁸ Bloom, 5.

provide organizing categories and organizing principles.”⁵¹⁹ The *coutumiers* have largely been judged by the extent to which they successfully fit into this picture—the debate concerning these texts has focused on their relationship to Roman law and the extent to which they ably incorporate it.

The *Établissements de Saint Louis* provide a good example of a text whose reputation has been shaped by modern analysis of its use of the learned laws as authorities. Much of the puzzlement with the *Établissements* is, in fact, rooted in its methods of citation of these texts. The *Établissements de Saint Louis* (1272/3) was transcribed, abridged and adapted—twenty four manuscripts survive just from the end of the thirteenth and beginning of the fourteenth century—as we have seen, it was also drawn upon for the writing of a number of subsequent *coutumiers*.⁵²⁰ A text clearly admired in the thirteenth and fourteenth centuries, the *Etablissements de Saint Louis* has elicited rather different responses in modern day scholars, which range from bewilderment to disdain. Already in the eighteenth century Montesquieu was asking, “What is this obscure, confused, and ambiguous code?”⁵²¹ Montesquieu called into question a text where “French law is continually mixed with the Roman.”⁵²² The rather strong reaction against this mixture can also be gleaned from de Valroger’s assessment of the text as a “*compilation indigeste*”, an indigestible compilation of Roman law, decretals, and French customs.⁵²³

⁵¹⁹ Stein, Peter. *Roman Law in European History* (Cambridge: Cambridge University Press, 1999) 64.

⁵²⁰ “*Établissements de Saint Louis*” in Hasenohr and Zink, 418. Paul Viollet describes these twenty-four manuscripts in detail in his introduction to the critical edition. The manuscripts of the *Établissements* are currently found all over the place: the National Archive in Paris, the faculty of medicine at Montpellier, Troyes, the municipal archive in Beauvais, the Vatican, the Royal Library in Stockholm, Munich, Cheltenham (UK).

⁵²¹ Baron de Montesquieu, Charles Louis Secondat. *The Spirit of the Laws*, trans. by Tomas Nugent (New York: Hafner Publishing, 1949) II.38.

⁵²² Baron de Montesquieu, II.38.

⁵²³ Viollet, “Introduction” in *Les Établissements* vol. I, 3. Decretals are the subsections of the *Decretum*, Gratian’s twelfth-century collection of canon law.

This impression has persisted in more recent evaluations of the text. Giving it the shortest treatment of the *coutumiers* he examined in his article, Jean Gaudemet dismissed the *Établissements de Saint Louis* generally as a work that was ostentatiously doctrinaire and that made an uninteresting use of legal citation. As he explained, instead of making constructive use of Roman law for structuring the customs, nourishing developments, or justifying solutions, Roman law comes up in this text as a “pedantic” inclusion that brings little to the customary law within.⁵²⁴

The main framework for analysis of the *coutumiers* is still provided by J.P. Lévy’s 1957 article in which he evaluates the nature of the penetration of Roman law into the *coutumiers* from superficial, somewhat awkwardly inserted quotations, to substantial, where the Roman law has entered the spirit of the writer and became the unconscious craftsman of the text.⁵²⁵ The language of penetration, sometimes softened by the notion of “influence”, has long conditioned how we interpret the presence of the learned laws in the *coutumiers*.⁵²⁶ It gives the impression of a sophisticated and powerful Roman law steamrolling through an impressionable, inchoate and even naïve customary law. As Emanuele Conte has noted, this is part of a continental historiographical tendency that was inherited from the German Historical School, to “think of the

⁵²⁴ Gaudemet, Jean. “L’influence des droits savants (Romain et canonique) sur les texts de droit coutumier en occident avant le XVIe siècle” *La norma en el derecho canonico, Actas del III congreso internacional de derecho canonico, Pamplona 10-15 de octubre de 1976* (Pamplona: Ediciones Universidad de Navarra, 1979) 175.

⁵²⁵ See Lévy, J. P. “La pénétration du droit savant dans les coutumiers angevins et Bretons au Moyen Âge” *Tijdschrift voor Rechtsgeschiedenis* (1957) 1-53. Lévy uses the language of ‘penetration’ specifically to avoid the language of ‘reception,’ which he does not feel fits this earlier time (*Ibid.*, 3).

⁵²⁶ See for instance, Lefebvre-Teillard, Anne. “Recherches sur la penetration du droit canonique dans le droit coutumier francais (XIIIe-XVIe siecles)” *Mémoires de la Société pour l’histoire du droit et des institutions des anciens pays bourguignons, comtois et romands* 40 (1983) 59-76; J. Gaudemet “L’influence des droit savants (romain et canonique), sur les texts de droit canonique en Occident avant le XIVE s.” in *La Norma en el derecho canonico: Actas del III congreso internacional de derecho canonico (Actes du 3e Congrès International du droit canonique, Pamplona 1976)*, 165-195. Pamplona: Ediciones Universidad de Nava, 1976; Petot, Pierre. “Pierre de Fontaines et le droit romain” *Études d’histoire du droit canonique Gabriel Le Bras*, vol. II, 955-964. Paris: Sirey, 1965; Hubrecht, G. “Le droit canonique dans le coutumier de Beaumanoir” in *Mélanges offerts à Pierre Andrieu-Guitrancourt*, L’Année Canonique vol. 17, 579-88. Paris: Faculté de Droit Canonique de Paris, 1973.

contrast between customs and Roman law as a confrontation between popular institutions and a superstructure imposed by political and economical power.”⁵²⁷

There is a tendency to discuss, perhaps especially in the field of legal history, the devotion to authority, yet the use of authority in law is probably best characterized as a reimagining of the past to shape a desired present. In the thirteenth century, as today, there was a vigorous tradition of making creative use of past narratives and past written texts that can be seen in the works of lawyers, theologians and story-tellers. While analysis of Roman law has come to dominate analysis of the *coutumiers*, it may be best to look at the texts from a different angle and think about what they were trying to build generally, and how they used Roman law to try to do it.

As Jacques Le Goff has noted for the twelfth century, authoritative texts were materials with which to construct an *oeuvre*.⁵²⁸ Probably the most famous medieval remark about authority came from Bernard of Chartres, who flourished in the first quarter of the twelfth century, when he said that he was sitting on the shoulders of giants, in order that he could see further.⁵²⁹ As Le Goff notes, Gilbert of Tournai captures this *élan* of intellectual optimism when he says that the truth will never be found based on what has already been found—“those who wrote before us are not our lords but our guides. The truth is open to all, it has not yet been possessed in its entirety.”⁵³⁰ To add to this, Alan of Lille also said explicitly that figures of authority had wax

⁵²⁷ Conte, Emanuele. “Roman Law vs Custom in a Changing Society: Italy in the Twelfth and Thirteenth Centuries” in *Custom: The Development and Use of a Legal Concept in the Middle Ages*, edited by Per Andersen and Mia Münster-Swendsen (Copenhagen: DJØF Publishing, 2009) 33.

⁵²⁸ Le Goff, Jacques. *Les intellectuels au Moyen Âge* (Paris: Édition du Seuil, 2000) 99.

⁵²⁹ Bernard of Chartres in Le Goff, Jacques. *Les intellectuels au Moyen Âge* (Paris: Édition du Seuil, 2000) 99.

⁵³⁰ “Jamais nous ne trouverons la vérité, si nous nous contentons de ce qui est déjà trouvé... Ceux qui écrivirent avant nous ne sont pas pour nous des seigneurs mais des guides. La vérité est ouverte à tous, elle n’a pas encore été possédée toute entière” Gilbert of Tournai in Le Goff, Jacques. *Les intellectuels au Moyen Âge* (Paris: Édition du Seuil, 2000) 99.

noses (*cereum nasum*) which were remolded by subsequent uses of their authority.⁵³¹ Authority, then, was not meant to be faithfully perpetuated. Rather, that very ‘authority’ was changed in the process of being used. It could be used, created, bent and then superseded. The notion of authority here was flexible.

We also see this in vernacular literary culture. Some tales, of course, draw their claims from antiquity. *La Chanson de Girart de Rousillion*, which draws on the age of the tale in the first few words: “Here is a good old song...”⁵³² Despite the age of a story, however, authors of particular versions still saw themselves as doing something distinct from the others. Bérroul, for instance, criticizes his predecessors for getting the story of *Tristan and Iseut* wrong:⁵³³

The story-tellers say that [Tristan and Gouvenal] had Yvain drowned. They are stupid and do not know the story well at all. Bérroul preserved the story in his memory. Tristan was too valiant and courtly to kill people of such [low] status.

Bérroul’s version of the story is the best one because he remembered it best. Yet Bérroul verges on literary criticism when he implies that the other story-tellers simply did not understand Tristan’s character to tell the story well—they impute actions to Tristan which he himself could not possibly perform. That the others are wrong and he is right may be a pretext for writing the story, or a claim for being preferred to the others. This is precisely the point—‘the story’ was not some static, closed, or stagnant category. Rather, this looks very much like Alain of Lille’s wax nose, a

⁵³¹Rico, Gilles. “‘Auctoritas cereum habet nasum’: Boethius, Aristotle, and the Music of the Spheres in the Thirteenth and Early Fourteenth Centuries” in *Citation and Authority in Medieval and Renaissance Musical Culture: Learning from the Learned*, edited by Suzannah Clark and Elizabeth Eva Leach (Woodbridge, UK: Boydell Press, 2005) 28.

⁵³² *La Chanson de Girart de Rousillion*, I.1.

⁵³³ “Li conteor dient qu’Yvain/ Firent nier, qui sont vilain;/ N’en sevent mie bien l’estoire,/ Berox l’a mex en sen mémoire,/ Trop est Tristan preuz et cortois/ A ocirre gens de tes lois” (Bérroul, *Tristan et Iseut*, in *Tristan et Iseut : Les poèmes français, La saga norroise*, trans. by Daniel Lacroix and Philippe Walter (Paris : Livre de Poche, 1989) ll.1265-1270) [my trans.]. Bérroul also says that he saw the story in a written version (*Ibid.*, ll.1790)

story being shaped and reshaped by different writers. Bérout shows us that there was at the very least a vernacular practice of critique in the twelfth century.

Beyond critique lay claims of novelty. The opening of Jean Renart's *Roman de la rose, ou Guillaume de Dole* makes its entire claim for attention on the basis of the novelty of the narrative, its rupture with its predecessors. Jean Renart says in the opening of this work that he is creating something original—that it is a “new thing, so different from the others, and so well woven with pretty verse in some places, that a boor could not appreciate it. Know this both by faith and by sight: this work surpasses all the others.”⁵³⁴ According to Jean Renart, then, what is new is not only good but, as in this case, it can also be better.

While analysis of medieval legal writing has tended towards discussions of authority, there is also must to be said about play with authority. M. Boulet-Sautel, for instance, has shown that Parisian notaries did not necessarily use Roman law all that faithfully during the thirteenth century.⁵³⁵ Even the archetypal form of medieval reverence for the Ur-text, the gloss, had moments of creative adaptation.⁵³⁶ In his introduction to the *Glossa Ordinaria* to Gratian's *Decretum*, for instance, Bartholomaeus Brixiensis explained that he had “improved as necessary

⁵³⁴ “... *Roman de la rose/ qui est une novele chose/ et s'est des autres si divers/ et brodez, par lieus, de biaux vers/ que vilains nel porroit savoir. Ce sachiez de fi et de voir,/ bien a cist les autres passez.*” (Jean Renart, *Roman de la rose, ou Guillaume de Dole*, trans. by Jean Dufournet (Paris: Champions Classiques, 2008) ll.11-17). Jean Dufournet translates “novele chose” as “œuvre originale” (*Ibid.*, 71)

⁵³⁵ Boulet-Sautel, M. “Le notaire contre le *Jus civile* au Moyen Age en région parisienne” in *Excerptiones iuris: Studies in Honor of André Gouron*, edited by Bernard Durand and Laurent Mayali, 71-81. Berkeley: Robbins Collection Publications, 2000.

⁵³⁶ The gloss foregrounds the textual authority—it emphasizes its centrality in a very visual way by framing it. Later, even glosses had trouble keeping focused on *autoritates*. Robert Connors has noted that the first use of the endnote the he could find actually accompanied glossing, in Rheims New Testament (1582), which used endnote glosses at the end of each chapter of each book of the New Testament (Connors, Robert J. “The Rhetoric of Citation Systems, Part I: The Development of Annotation Structures from the Renaissance to 1900” *Rhetoric Review* 17, no.1 (1998) 21). The endnote, then, was invented “to solve a Catholic rhetorical problem: how do you appear to foreground the scriptural text when you actually have such a massive glossing apparatus to purvey?” (*Ibid.*).

the apparatus of the *Decretum*.⁵³⁷ As James Gordley noted, the liberties that Romanists took with their sources and the creativity this evinced was drawing serious criticism from some in their community by the fourteenth century.⁵³⁸ Richardus Malumbra (d.1334), for instance, complained that while they should be sticking to the original text, its gloss, and the opinions of the most respected *doctors*, Roman jurists were turning “to fables or mak[ing] arguments so logistic and sophistic that they have no truth but only its appearance.”⁵³⁹ This sort of accusation was a tactic to make the work of others seem unreliable and his own good, but it also showed that the art of reasoning would take off from the original source and build something of its own.

CITATION PRACTICES

The enterprise engaged in by the authors of the *coutumiers*, and the universe to which custom belonged, is nowhere better seen as in the forms of experience or learning that are recalled in these texts—in citation practices generally. As Robert Connors has noted, the study of citation systems permits us to ask rhetorical, social and stylistic questions, such as “why these systems evolved and proliferated, what they suggest about authors’ feelings of debt and ownership, how they effect the ways we read and process text and the intentions behind it, and, finally, the effects on reading and writing of social decisions to promote and valorize new

⁵³⁷ Short introduction to the gloss, found before Distinction One (Gratian, *The Treatise on Law with the Ordinary Gloss*, trans. by Augustine Thompson (*Decretum*) and James Gordley (*Glossa Ordinaria*) (Washington, D.C.: Catholic University of America Press, 1993) 3).

⁵³⁸ Gordley, James. “*Ius Quarens Intellectum*: The Method of the Medieval Civilians” in *The Creation of the Ius Commune: From Casus to Regula*, edited by John Cairns and Paul du Plessis (Edinburgh: Edinburgh University Press, 2010) 92.

⁵³⁹ *Ibid.*, 92-3.

citation systems and subsystems.”⁵⁴⁰ This chapter will discuss these issues in the citation practices of the *coutumiers*, and show that these texts are the product of a range of learning and experience that includes, but is not limited to, some knowledge of canon law and Roman law.

Roman law and its propagation by devotees undoubtedly had a great altering effect on legal life and practice in high medieval Europe.⁵⁴¹ However, analysis of the *coutumiers* based on the degree to which they are saturated by Roman law provides an incomplete view of the *coutumiers* and the purpose of the *coutumier* project. To understand the importance of Roman law for the *coutumier* authors, and how they made use of it, it must be evaluated in comparison to the other authorities and sources invoked in these texts. The citations in the *coutumiers* can be as general as a reference to custom or usage, or can be as specific as full scholastic citation to Roman law.

All of these, no matter how vague or specific, are references to something outside the text that can tell us how the authors understood their relationship to other texts and other forms of normativity. The *coutumiers* provide us with a lens through which to look at the relationship between text and authority, court practice and university learning, and lay jurists and *doctores*. This could include some knowledge of canon law and Roman law. However, other sources also appear in these texts, such as previous judgments, common practice in secular court, wisdom from the authors’ personal experience, narrative story-telling, moral poetry, and popular wisdom. Some of these sources are outside of what we might understand as the ambit of law.⁵⁴² The

⁵⁴⁰ Connors, Robert J. “The Rhetoric of Citation Systems, Part I: The Development of Annotation Structures from the Renaissance to 1900” *Rhetoric Review* 17, no.1 (1998) 7.

⁵⁴¹ See for instance Bellomo, Manlio. *The Common Legal Past of Europe ,1000-1800*, trans. by Lydia G. Cochrane (Washington, D.C.: Catholic University of America Press, 1995); Van Caenegem, R.C. *An Historical Introduction to Private Law*, trans. by D.E.L. Johnston (Cambridge: Cambridge University Press, 1992); Stein, Peter. *Roman Law in European History* (Cambridge: Cambridge University Press, 2007).

⁵⁴² For modern discomfort at the use of poetry as a form of judicial expression, see for instance Rains, Robert E. “To Rhyme or Not to Rhyme: An Appraisal” *Law and Literature* 16, no.1 (2004) 1-10.

coutumiers are not uniform in the extent to which they use these sources and the manner in which they do it. We will now take a brief glance at the range of citation in each of the thirteenth-century *coutumiers*. (See Appendix for citation table)

The earliest of these lay vernacular juristic texts, the *Coutumes d'Anjou et du Maine* (1246) does not cite Roman or canon law. The few direct citations in the text refer to “custom in the lay courts,” or to its own text.⁵⁴³ This text actually seems generally uninterested in citation. It explains what is or ought to be done in the lay court in an impersonal tone, making only a handful of references, and giving the impression that the content of the text is source and authority.

Pierre de Fontaine’s *Conseil* (1253), on the other hand, constantly refers to the usage of the courts as well as to the Roman law. While Pierre occasionally cites custom, he prefers to use the language of usage when he describes the sources of rules from practice, such as, “according to the usage of lay courts,” “according to our usage,” and “by reason of our usage.”⁵⁴⁴ He refers to “the philosopher,” probably Aristotle, as well as to the Bible, though infrequently.⁵⁴⁵ He only makes one reference to canon law, but is comfortable discussing procedural issues related to ecclesiastical courts.⁵⁴⁶

Pierre’s *Conseil* refers to Roman law through large block quotations of Roman law. Some chapters make barely any use of Roman law.⁵⁴⁷ Other chapters, on the other hand, are composed

⁵⁴³ “Telle est la coustume de cort laie...” (*Coutumes d'Anjou et de Maine*, §101); “si comme nous avon dit desus” (*Ibid.*, §145).

⁵⁴⁴ “par la coutume” (Pierre de Fontaines, *Conseil*, IV.8, see also XIV.15, XV.8), but these are far outweighed by his constant references to usage: “par usage de cort laie” (*Ibid.*, XI.8), “selonc nostre usage” (*Ibid.*, IX.1) or “par nostre usage” (*Ibid.*, XII.8), and “Il est resons par nostre usage...” (*Ibid.*, XII.2).

⁵⁴⁵ “car li philosophes dit que homs ne puet avoir droiture en soi qui doute mort, périll, essil, ne dolor, ne povreté” (*Ibid.*, XXI. 3); “Cremor de Dieu est li comencement de sapience, si come dit l’Escriture” (*Ibid.*, II.2).

⁵⁴⁶ See for instance, *Ibid.*, IV.15.

⁵⁴⁷ See for instance, *Ibid.*, XXI. In chapter XXI, nineteen of sixty-eight sections are block quotes of Roman law, which works out to about thirteen pages of Marnier’s sixty-five-page chapter (pp. 220-285).

almost entirely of them. On these occasions, the large block quotations can last for pages, with only a couple of paragraphs and a few sentences that explain where custom varied or concurred.⁵⁴⁸ Sometimes a quotation is incorporated into Pierre's work, sometimes Pierre notes that he is quoting from the Roman law, and in the latter case the attribution is made either to 'written law' or to a specific emperor.⁵⁴⁹ Pierre, in other words, does not use the modes of citation of the universities that note the work, book, and chapter so that the reader could locate the reference. Pierre's citations never get more specific, he when he calls on the authority of 'written law' or of the Roman emperors, he does not seem to expect his audience to go and read the original text and it is quite possible that he did not even take them from the original text but from another source that quoted it.

The *Etablissements de Saint Louis* (1272/3) used a wide range of sources. The *Etablissements* refer specifically to the usage of lay courts,⁵⁵⁰ the usage in baronial court,⁵⁵¹ the usage of the Orléans district.⁵⁵² The text also refers more generally to 'how things are done' by citing the "custom of the land," "custom of the region" and "the custom of the region and of the land."⁵⁵³ This text refers to three types of written sources: Roman law, canon law, customary law and royal law. The learned laws are cited by explaining that "it is written in the Code", "according to the written law in the Code", "according to the law written in the Digest," or

⁵⁴⁸ See for instance Pierre de Fontaines, Conseil, Chapter XXIX. In Marnier's critical edition, this chapter goes from page 341 to 359. The size of these block quotes must be emphasized: in these eighteen pages of chapter XXIX, Pierre adds two paragraphs and five sentences about custom.

⁵⁴⁹ For instance, "La loi escrite dist que" (*Ibid.*, XI.7) ; "et ce dit lois" (Pierre de Fontaines, VII.5) ; "Encore dient aucune lois escrites" (*Ibid.*, IX.5) ; "si come la lois escrite dist..." (*Ibid.*, XI.1), ect.

⁵⁵⁰ "selonc l'usage en cort laie" (*Etablissements* II.4)

⁵⁵¹ "selonc l'usage de la cort de baronie" (*Etablissements* II.4)

⁵⁵² "selonc l'usage d'Orlenois" (*Etablissements* II.21, II.26...)

⁵⁵³ "par la costume de la terre" (*Ibid.*, I.7), "par la costume doi païs" (*Ibid.*, I.102), and "par la costume dou païs et de la terre" (*Ibid.*, II.4)

“according to written law in the *Decretals*.”⁵⁵⁴ Also, the *Etablissements* cites other parts of its own text in a formal manner.⁵⁵⁵ Book I is directly copied from royal ordinances, though there is no citation that would identify it as such, but other parts of the text are less coy in referring to royal law, such as the rule that “the king forbids weapons and excursions and novel claims and private wars by his ordinances” or the “king of France forbids trial by battle by his ordinances.”⁵⁵⁶ In some manuscripts, the text refers to itself as a royal ordinance.⁵⁵⁷

In 1303, an unknown compiler put together a version of the *Etablissements* in manuscript N, where we find a new citation pulled from a moralistic poem.⁵⁵⁸ Manuscript N begins by explaining that the text will discuss justice (*joutise*), law (*droit*), laws (*commendemens de droit*), the duties of knights, catching wrongdoers in the act, the customary laws of the baronial courts of Orléans, and punishing wrongdoers. Then, the compiler selected four stanzas of a sixty-four

⁵⁵⁴ “et est escrit ou Code, De edicto divi Adriani tollendo, l. Quamvis quis se filium defunct, etc.” and “selonc droit escrit ou Code” or “selonc droit escrit en la Digeste” (Book II.4) or “selonc droit escrit en Decretales” (Book I.89).)

⁵⁵⁵ While the *Etablissements* use royal ordinances, which are of course written sources, these are not cited. There is one possible exception where the text does refer to the *establissemenz le roi*, but it is unclear whether this refers to some ordinance or whether this is another place in which the text refers to itself as a source.

⁵⁵⁶ “mes sires li roi deffant les armes et les chevauchiées, par ses establissemenz, et les novels avoeries, et les guerres” (*Etablissements* II.38) “selonc les establissemenz le roi” (*Ibid.*, II.4); “car li rois de France deffant les batailles par ses establissemenz” (*Ibid.*, II.11).

⁵⁵⁷ The manuscripts that contain the prologue (Q, R, S), actually turn the entire text into a royal ordinance in the first sentence of the prologue by claiming that “in the year of grace 1270, the good king Louis of France made and ordered these *establissemens* in all the lay courts of the kingdom and under French dominion, before he went to Tunis” (“En l’an de grace mil CCLXX, li bon roi Looy de France fist et ordena ces establissemens, avant ce qu’il allast en Tunes, en toutes les courz layes du reaume et de la poosté de France” (*Etablissements*, II:474, Prologue of Q,R,S)). In this case, the entire *Etablissements* is imputed to the king though he probably had nothing to do with it at all. More commonly amongst the various manuscripts, there are a couple of mentions of the *establissemenz le roi* that also refer to the text of the *Etablissements* itself: “as it was said above, at the beginning of the king’s *establissemens*” (*si com il est dit desus, ou commencement des establissemenz le roi*) (II:12), which refers the reader to *Etablissements* I:1.

⁵⁵⁸ This was not the only example of poetry meeting law. The Bible, for instance, was put into verse in the thirteenth century. More to the point, the important *Grand Coutumier de Normandie*, a translation of the Latin *Summa de legibus Normanniae*, was put into verse near the end of the thirteenth century. The customs of Normandy, first written around 1199/1200, were updated mid-thirteenth century as the *Summa de legibus Normanniae*, which was quickly translated into the vernacular, and was versified around 1280.

stanza moralistic poem, *Des droiz au clerc de Voudoi*, and used these to introduce the *Etablissements*:⁵⁵⁹

*Ore entendés une chosete
Petite qui est nouvelete
Que je veuil de droiture dire.*

[...]

*Droiz dit, et j'en sui emparlier,
Que quiconques est chevaliers
Qu'il ne doit de nelui mesdire.
Droiz dit qu'il soit drois conseillers.
Droiz dit qu'il soit drois joutisiers,
Si qu'en ne le puisse desdire.*

Now hear a little thing
A little thing which is a little new
That I want to say about justice.⁵⁶⁰

[...]

Law says, and I am its advocate,
That whoever is a knight
Must not speak ill of it.
Law says that he be an upright counselor.
Law says that he be an upright judge.
So that no one can speak against him.

When the poem ended, the compiler explained that it is for “these reasons,” the moral propositions about how law should be described in the poem, that he will now speak of justice.⁵⁶¹ The poem’s place, between the title and the rules, affirms its symbolic dimension.⁵⁶² Everything in the text is meant to be read in light of the moral economy expressed in the poem. The poem, then is the dominant authority in the text, it places the rules and procedures within into a wider jurisprudence or theory of law.

Le livre des constitutions deménées el Chastelet de Paris (ca. 1279-82) mostly cites custom. The specific “custom of France” or “custom of France and especially of the court of the Châtelet of Paris” is preferred over the vaguer and rare “the custom of the region.”⁵⁶³ Except for one citation of a Decretal, which Mortet could not identify and claimed was mistaken, the

⁵⁵⁹ There are manuscripts of both Manuscript N and of *Des droiz au clerc de Voudoi* in the Beauvaisis archive.

⁵⁶⁰ ‘Droiture’ has a wide range of meanings, from ‘in a straight line’, or ‘directly’, to ‘uprightness’ to ‘law, justice and rights’, see Greimas, 185.

⁵⁶¹ “Por ce, vueil de joutise presentement parler” (Book II.1).

⁵⁶² Cabrillac, Rémy. *Les Codifications* (Paris: Presses Universitaires de France, 2002) 245. Cabrillac notes this for the preliminary provisions of modern codes.

⁵⁶³ *Le livre des constitutions deménées el Chastelet de Paris*, “par la coustume de France” §12 (see also §30, 40, 44, 49, 63, 85, 86); “selonc la coustume de France et especiaument de la court de Chastelet de Paris” (*Ibid.*, §44); “selonc la coustume du païs” (*Ibid.*, §17).

Demenées do not cite the learned laws at all, nor do they seem to borrow from it in more covert ways.⁵⁶⁴ On two occasions the text uses an example to illustrate rules, but the use of *exempla* was not the exclusive privilege of the schools, and just as much a part of vernacular culture.⁵⁶⁵

Philippe de Beaumanoir's *Coutumes de Beauvaisis* (1283) is easily the most sophisticated and theoretical of all the *coutumiers*. Like his predecessors, Philippe also constantly makes references to "current custom," "our custom," "the custom of Beauvaisis," "our custom in Clermont," "custom of the lay court."⁵⁶⁶ He cites the king's statutes.⁵⁶⁷ He makes use of proverbs and more legal maxims, and even quotes the Bible.⁵⁶⁸ He also proves rules based on decisions made by the consensus of the wise men of the county.⁵⁶⁹ He often uses his own personal opinion about what is right to buttress a rule or procedure, and to disagree with other opinions.⁵⁷⁰

Previous judgments, or precedent, are another important source for Beaumanoir. These appear in a number of different guises. He cited cases over which he presided himself as *bailli* of Beauvaisis, and he explains that he is describing this precedent in order that people be convinced to act in a similar manner in the future.⁵⁷¹ He also used judgments from different areas, some that

⁵⁶⁴ Mortet, 11-12, 44 note 3.

⁵⁶⁵ *Le livre des constitutions demenées el Chastelet de Paris*, § 68, 76.

⁵⁶⁶ "par la coustume qui ore queurt" (*Coutumes de Beauvaisis*, XXXVIII.1133); "par la coustume de Beauvoisins" (*Ibid.*, IV.137); "selonc nostre coustume" (*Ibid.*, IV.160); "selonc nostre coustume de Clermont" (*Ibid.*, LVIII.1653); "coustume de la court laie" (*Ibid.*, VII.246)

⁵⁶⁷ "par l'establisement nostre roi Phelippe" (*Ibid.*, V.176); "car nouvele dessaisine est nouvel establisement; si doit on suir l'establisement en fere sa demande" (*Ibid.*, VI.205); "Et est l'establisement teus que..." (*Ibid.*, XXXII.986, *see also* XXXIX.1165).

⁵⁶⁸ He describes people who lie about the things they sell, and then explains that this is the origin of the expression: "Merchant or thief" [*et pour ce dit on: 'Marcheans ou lerres'*] (*Ibid.*, XXXI.946); and "C" [*pour ce dit on: 'Convenance vaint loi', exceptees les convenances sont fetes pour mauvaises causes'*] (Beaumanoir XXXIV.999). The Biblical quotation: "whoever agrees in a bad judgment is required to pay the damages of a person who loses by a false judgment, if he wants to be pardoned by God for the offense; and for this reason it was said to judges: "Be careful how you judge, for you will be judged"" (*Ibid.*, LXV.1861). This is Matthew 7:2.

⁵⁶⁹ "The council of wise men of the county considered the issue [*Il fu regardé par le conseil des sages hommes de la contreé que*], [...] And by this it can be seen that anyone [*et par ce puet on savoir que chascuns*]..." (*Ibid.*, XV.524)

⁵⁷⁰ "We say yes, provided that ..." (*Ibid.*, V.186); "we say no [*Nous disons que nenil*]" (*Ibid.*, XII.375), "we say that [*Nous disons que se...*]" (*Ibid.*, XII.376).

⁵⁷¹ *Ibid.*, LVI.1619.

were still in the county of Clermont but not in Beauvaisis, and some from outside altogether.⁵⁷² He explained debated issues and explain that there was a judgment on the issue as proof of a rule.⁵⁷³ He even cites cases he was involved in, even when he acted wrongly, and the truth of his claim rests in this admission: “and you will know that this is true because we will recount a case we saw.”⁵⁷⁴

Beaumanoir cites real cases with real names and dates, expressing his knowledge of practice and court expertise.⁵⁷⁵ More commonly, however, he used hypotheticals in scholastic pedagogical manner by saying “let us see...,” “if...,” “such as if...,” “supposing that someone...”⁵⁷⁶ He commonly uses the generic “I” in examples which he introduces by saying “such as when I am...” or “such as if I...”⁵⁷⁷ He often uses generic names for these hypotheticals; he most commonly uses Pierre and Robert, though when he needed a third party he added Guillaume, and when he needed women he used Marie and Jehane.⁵⁷⁸ Sometimes he designates by generic social status, and recounts a case concerning a knight and a lady, or a suit

⁵⁷² “It was judged in Creil, which is part of the county of Clermont, that...” (XIII.442); “For in Normandy there is a custom in some places that ...” (XXXV.1101).

⁵⁷³ “and we have to put his in our book because of doubts we have seen[...] and on this issue they requested judgment” (*Ibid.*, XII.414) “It was judged that... [...] and by this judgment you can see that...” (*Ibid.*, XII.415).

⁵⁷⁴ Beaumanoir, “et que ce soit voir vous savrés par ce que nous dirons un cas que nous en veismes...” (XII.372), and he concludes that in this case “such a gift was permitted by the custom of Beauvais, it was wrongful of us to make a seizure of it for lack of a vassal [*et l'en pouoit tel don fere pare la coustume de Beauvoisins, a tort i metions la main pour defaute d'homme*]” (XII.373). This language of *seeing* is similar to that in the *Coutumier d'Artois* used to recount the facts of specific case, as discussed above.

⁵⁷⁵ See for instance in Beaumanoir: “My lord Pierre de Thiverny sued the town of Les Haies , saying that...” (XXIV.689) or “And we saw a judgment on this matter for the lady of Milly in king’s court” (XIII.454) or “A woman from La Neuville-en-Hez said to a bourgeois” (XXXIX.1159), or “And we saw a judgment on this issue at Creil” (XXXIX.1219). This can be contrast to his narration of a situation in Lombardy (“I will tell you what happened in Lombardy...” (XXX.886)) where again he uses no names but is clearly recalling an issue that has occurred.

⁵⁷⁶ “*or veons*” (Akehurst p.46 note 2); “If...” (VI.220); *si comme se...* (VI.224); “*S’il avient qu’aucuns...*” (XIV.484). See also Akehurst, 46 note 2.

⁵⁷⁷ Philippe de Beaumanoir: “*si comme se l’en me demande*” (VII.238); “*si comme se je...*” (VII.239).

⁵⁷⁸ Pierre and Jehan (II.80), Guillaume (XXIV.1014), and Marie and Jehane (XIV.472). There is good reason to think Beaumanoir would have known of Pierre de Fontaine’s work. And interestingly, when it came to citing examples with generic names, he changed Pierre de Fontaine’s Philippe for Pierre. Perhaps he felt silly using his own name as a generic name in all his examples. So Robert stayed, Guillaume was added as a third party, and Philippe became Pierre (can this be a coincidence?) in his examples.

involving a respectable man, or gentleman.⁵⁷⁹ Beaumanoir, as can be seen, is quite diligent about citing a variety of sources. He cites all the different types of sources that we have seen in the pervious *coutumiers*, except for one— Beaumanoir never overtly cites the learned laws.

L’Ancien Coutumier de Champagne (ca. 1295), like the earlier texts, cites both custom and usage.⁵⁸⁰ The phrase “it is custom in Champagne” appears constantly in the text.⁵⁸¹ Unlike earlier *coutumiers*, however, this text is predominantly devoted to the citation of cases. It cites trials constantly and provides specific reference information on the date of the judgment, where the trial took place, what the issue was, the arguments made, and the names of the people on the jury that made the judgment. These precedents are introduced with the following phrases: “this was reported in,” “this was proved in,” “this was examined for,” “This was how it was used,” or “The following was judged.”⁵⁸² Royal power is only mentioned in virtue of references to cases decided by the Parliament of Paris.⁵⁸³ The learned laws are neither referenced nor does the text seem to have been influenced by them in any revealing way.

The last *coutumier* in our group, the *Coutumier d’Artois* (between 1283 and 1302), is a motley composition of the various sources we have examined. It cites to custom and usage in various ways: “it is the custom of Artois,” “by the custom of Artois and other places,” “by the general custom of the barony,” “by the usage of the lay courts,” “general custom,” and even mentions a usage of the *prevostés* of the king that ought to be applied in Artois.⁵⁸⁴ He also cites

⁵⁷⁹ “uns chevalier” and “une dame” (XII.373), “preudhons” (XXIII.680), “gentius hons” (XLV.1449).

⁵⁸⁰ “il est coustume en Champane” (*L’Ancien Coutumier de Champagne*, II, V, ect); “Einsinc en us’on en Champagne” (*Ibid.*, IV, XXV, ect); “De droit commun et par le coustume de Champagne, li sires sous cui il lieve et couche en aura court, se il la requiert” (*Ibid.*, XXXV).

⁵⁸¹ *Ibid.*, II, V, VI, VII, ect.

⁵⁸² In the *Ancien Coutumier de Champagne*: “Ce fu rapourté a” (XIX), “Ce fuit esprouvé a” (XX), “Ce fu regardé pour” (LX), “Ainsi on a usé” (VI), “Ce fut jugié” (XV)

⁵⁸³ *Ibid.*, XV.

⁵⁸⁴ “par le coustume d’Artoys” (XXI.4); “par la coustume d’Artois et d’autres lieux” (V.1); “par la general coustume de baronie” (*Ibid.*, XI.11); “par l’usage de court laie” (*Ibid.*, III.1); “Car il est generale coustume...” (*Ibid.*, III.18);

reason and right.⁵⁸⁵ Citations to the learned law appear often, either as “written law” generally or via the specific book of Roman or canon law.⁵⁸⁶ This *coutumier* also quotes entire maxims from the learned laws.⁵⁸⁷ Like its kindred from Champagne, this *coutumier* makes frequent use of case references.⁵⁸⁸ A large number of these are cases that the author saw in person in various types of court. The author saw a case in Heding, another in Biaukaisne, another in the castle at Encre, another in the court of the count in Arras, as well as one in the king’s court at Dorlens.⁵⁸⁹ It also uses examples that look very much like descriptions of precedent, but without the actual details of the specifics of the trial.⁵⁹⁰ The good clerk Orasse is quoted.⁵⁹¹ The *Coutumier d’Artois* also includes quotations of lessons contained in poetry, in the form of Latin verse. These are unattributed in the *coutumiers*, but turn out to be drawn from three different *ordines iudicarii* by Marinus de Fano, Dino Mugellanus, and an anonymous Italian jurist.⁵⁹² Lastly, on one occasion it quotes the Bible.⁵⁹³

This brief taxonomy of the types of citations used by the lay jurists who wrote the *coutumiers* shows that these texts were not uniform in their citation practices. The methods of citation of the *coutumier* authors shows that this juristic community was beginning to recognize

“Je te di qu’il est usages, orendroit, tous generaus par les prevostés le roy—et aussi deveroit il estre en Artois...” (*Ibid.*, IV.1).

⁵⁸⁵ “Et c’est de raison, et de droit” (*Ibid.*, XX.18)

⁵⁸⁶ “Et la lois escrite dist bien que...” (*Coutumier d’Artois*, III.16); “selon droit escrit en le digeste: *de procuratoribus*, Lege 3, et en decretales, *de procuratoribus*, C. *None juste*” (*Ibid.*, III.6). The citation to learned law is uneven, some parts of the text make little use of it, while references veritably explode in chapter on lawyers (*procureurs*), for instance.

⁵⁸⁷ “Et si est de droit escrit: *Jure debet causam admittere, qui tanquam contumax negligit in iudicium comparere*” (*Ibid.*, III.33, see also XLVII.10).

⁵⁸⁸ “il fut dit par jugement que” (*Ibid.*, VI.3)

⁵⁸⁹ “.i. plaidiet, que jou en vi a Heding” (*Ibid.*, XVIII.4); “et si vi je a Biaukaisne” (*Ibid.*, II.9); “Si vi je a Encre, ou chastel” (*Ibid.*, VI.2); “Je vi en la cort le conte a Arras” (*Ibid.*, II.3, III.19); “Je vi en la court le roy a Dorlens” (*Ibid.*, V.3). This jurist was clearly travelling to and attending the secular courts of many different places.

⁵⁹⁰ *Ibid.*, XXII.3. Outside of the lack of names, places and dates, the issue at stake, the steps taken, the arguments made are very detailed.

⁵⁹¹ “Orasses, li boins clers, qui dist : “Quantques tu commanderas, di briement”” (*Ibid.*, Prologue.4).

⁵⁹² “si s’ensieut par ces vers: *Conditio, sexus, etas, discretion, forma, / Et fortuna, fides: in testibus ista requires; / Consanguinea partier domestica turba / Et clerus laicos ad se fugiat, et vice vera*” (L.12, see also LI.6).

⁵⁹³ “et il est escrit en l’Evangile : *in ore duorum, vel trium, stet omne verbum*” (L.19).

which sources were fundamental to understanding the lay courts—custom, usage, precedent. However, the *coutumiers* authors did not see custom as a body of knowledge that was closed and autonomous from others. Indeed, some *coutumiers* authors also brought in other types of authority, such as roman and canon law, and occasionally poetry, proverbs, Biblical wisdom.

WRITING CUSTOM AND THE ROMAN LAW

The story of the Roman and canon law in the *coutumiers* is not simply that of authors with a strong sense of *romanitas* and inspiration to record custom. This section will examine one example of how Roman law came to be included in a customary text, via the *Etablissements de Saint Louis*, and it will analyze this in the context of other citations.

Paul Viollet pointed out long ago that the references to Roman and canon law in Book I of the *Etablissements* were *post factum* insertions.⁵⁹⁴ As we saw earlier, Book I was composed of two royal ordinances and an earlier text of the *Coutumes d'Anjou et de Maine* (known as the *Coutumes de Touraine et d'Anjou* in the *Etablissements*). These earlier texts were devoid of references to Roman and canon law. The compiler of the *Etablissements* took these earlier texts and inserted the citations. The earlier *Coutumes d'Anjou et de Maine*, for instance, are used almost entirely. A few words are changed here and there, but essentially almost nothing is excised from the earlier text.⁵⁹⁵

⁵⁹⁴ Viollet, I:80. See also C.-J. Beauteemps-Beaupré, 21.

⁵⁹⁵ On the very few occasions that the text of *Anjou et Maine* is changed, these changes seem to be directly related to political implications. For instance, *Anjou et Maine* claims that “the king cannot impose customs [*ne puet mestre coutumes*] on the baron’s land without his assent” (*Coutumes d'Anjou et de Maine*, §19), while the *Etablissements* changes this language to “the king cannot issue proclamations [*ne puet metre ban*] in the baron’s land without his assent” (*Etablissements* I.27).

The change came in the form of additions to the earlier text. The example chosen by Viollet to illustrate this is telling—the earlier provision in *Anjou et Maine*.⁵⁹⁶

La justice doit mestre jor es II parties et tenir la chose en sa main, jusqu'à tant que le quel que soit ait gueaignié la sesine par droit. *Et si cil qui avra gaingné la sesine par droit* vient au seignor et il li die...

turns into the following one in the *Etablissements*:⁵⁹⁷

La joustise doit metre jor as II parties et tenir la chose en sa main, jusques à tant que li quex que soit ait gueaignié la sesine par droit. *Et est escrit ou Code, De ordine cognitionum, l. Si autem negotium, circa medium legis. Li darreniers* vient au seignor et li die...

The citation to Justinian's Code, complete with directions to locate the actual text, is neatly inserted into a text that, in its previous life, was barren of learned law. The compiler also inserted citations to canon law, or more specifically to the decretals of Gregory IX, in a similar manner. Viollet also suspected that Book II of the *Etablissements*, or *Li Usages d'Orlenois*, was the product of a similar process as well, but he never found the original reference-less text to prove it.⁵⁹⁸

The process of inserting learned-law references into texts that previously contained none had at least one important earlier analogue. Roman law was not originally part of Gratian's *Decretum* either.⁵⁹⁹ As Anders Winroth argued, there were two recensions of Gratian's text, the earlier one being considerably shorter than the one we know today.⁶⁰⁰ The excerpts from the

⁵⁹⁶ Viollet, I :10 ; also, *Coutumes d'Anjou et de Maine*.

⁵⁹⁷ *Etablissements*.

⁵⁹⁸ Viollet I :7. He actually reconstructs this primitive text, it is one of the documents included in his critical edition.

⁵⁹⁹ Winroth, Anders. "The Two Recensions of Gratian's Decretum" *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 114, *Kanonistische Abteilung* 83 (1997) 24.

⁶⁰⁰ *Ibid.*, 23.

Justinianic corpus were added after the original compilation was completed, probably by another author.⁶⁰¹ These additions, Winroth noted, were often awkwardly inserted into the text, breaking up the thrust of an argument by inserting barely relevant canons that cut the flow of the narrative.⁶⁰² This remark echoes Gaudemet's observation that references to Roman and canon law occasionally truncate descriptions or phrases in the *Etablissemments*.⁶⁰³

Both the *Etablissemments* and the text we have of the *Decretum* were the products of a similar process, where an earlier text was changed over time by different authors concerned with adding references to the learned laws into their respective texts. They are part of the same early history of the appearance of Roman law into earlier texts by the work of later authors.

The *Etablissemments* compiler, however, also added other citations. The insertion, or 'penetration' *qua* influence, of Roman and canon law must be placed in context of all of the insertions made by the compiler, which shows that the historiographical focus on 'learned' law has tended to ignore other types of citation that were added to the earlier texts used to write the *Etablissemments*. This context shows that the compiler was not simply attempting to add Roman and canon *auctoritas* to his text.

The compiler, in fact, also added numerous citations to custom and the practice of the lay courts. While the earlier text of *Anjou and Maine* that he used did already contain some citations to custom, the compiler of the *Etablissemments* felt the need to insert more. A very clear example of the various types of citations added by the compiler is provided by a rule that explains what

⁶⁰¹ *Ibid.*, 22.

⁶⁰² Winroth, Anders. "The Two Recensions of Gratian's *Decretum*" *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 114, *Kanonistische Abteilung* 83 (1997) 30.

⁶⁰³ Gaudemet, 175.

happens when a bastard sells his inheritance. The following rule in *Anjou et Maine* that states that⁶⁰⁴

if he died without heir and without kinsmen, it would devolve first to the estate from which it was held, and not to the bastard. For a bastard cannot ask for anything by reason of kinship.

became, in the *Etablissements*,⁶⁰⁵

if he died without heir and without kinsmen, it would devolve **to the holder of justice** before it would to the bastard, or to the estate from which it was held; for a bastard cannot ask for anything by reason of kinship, **or for any other reason, because of his inferior condition. And written law is in agreement in the Code, *On establishing the heir and what persons may be heirs*, in the second law, and in the law *Si pater*, ect., and in the Digest, *On the status of men*, in the law *Vulgo concepti*, etc., and according to the Usage d’Orlenois, in the title *On bastards*. And the custom of the region agrees.** [

On this occasion, the compiler’s additions are not restricted to the learned law alone. He also cites a written text of customary law, the *Usages d’Orlenois* or Book II of the same text, and adds that this accords with unwritten practice, namely, custom of the region. The compiler’s interest in citation, then, was not confined to learned law, but also included the custom of the region as well as references to other parts of the *coutumier* itself. It seems, then, that the compiler of the *Etablissements* did not just have an interest in citing the learned law, but that he had a preoccupation with citation in general.

A close look at the citation of customary and Roman law in this passage reveals that there is no real difference in the quality of citation. The secular law did not have established forms of

⁶⁰⁴ “Et si il mouraient sanz hair et sanz lignage, si escherroient avant à la seignorie de qui il tendroit que il ne feroient au bastart. Quar le bastart ne puest riens demander part lignage” (*Coutumes d’Anjou et de Maine*, 107).

⁶⁰⁵ “Et se il moroient sanz oir et sans lignage, si escherroit il avant à la joutise que au bastart, ou à la seignorie de cui il tendroit ; quar bastarz ne puet riens demander ne par lignage, ne par autre raison, par sa mauvaise condicion. Et drois s’i accorde ou Code, De establir oir et quiex persone puet estre oirs, en la seconde loi, et en la loi *Si pater*, ect., et en la Digeste, De l’estat des homes, en la loi *Vulgo concepti*, etc., et selonc l’Usage d’Orlenois, ou titre Des bastarz. Et coutume dou païs s’i accorde” (*Etablissements*, I.102) bold emphasis added]. It should be noted that the property devolves to different people in these two texts—*Anjou and Maine* have this inheritance rejoining the original estate, while the *Etablissements* see the land as devolving to the holder of justice.

citation used in the Roman law, in the form of Book, chapter and title. Nonetheless, the compiler does refer to customary law in the scholastic manner by the name of the text and the title of the section involved. These texts are not being treated as though they are qualitatively different—no matter whether one thinks the citation is made out to an authority or to a source, the citations to Roman and customary law are made in a similar manner. Texts of customary law proved just as valuable a source, or authority, as Roman law.

The above example also suggests that even Roman law benefitted from the extra support provided by custom and customary law. Every source or authority could be bolstered by others. This approach to citation more accurately describes the compiler's work. This layering of citation upon citation is a hallmark of the compiler's work on the *Etablissements*. Sometimes the *Etablissements* is cited in conjunction with the Roman law, such as citations that refer to a chapter of the *Etablissements* as well as the Code "and its concordances," which presumably refers to glosses.⁶⁰⁶ On other occasions custom and the Decretals are cited together.⁶⁰⁷ Sometimes, Roman law and canon law are cited together.⁶⁰⁸ Again, we see that the learned law was one *coutumier* source amongst others.⁶⁰⁹

This practice of collating citations at the very least shows that the learned law was not being privileged *vis à vis* custom—even by those, like the compiler of the *Etablissements*, who were devoted to making the learned law relevant to a customary context. Adding citations to

⁶⁰⁶ "And if they warrant that the judgment was as he said it was, he should be reimbursed the costs and expenses he spent on the suit, as we said above, in the chapter on Novel Disseisin and according to written law in the Code, *De fructibus et litis expensis*, l. *Non ignoret* and its concordances" ["*si come nos avons dit desus, ou titre De novele dessaisine, et selonc droit escrit ou Code [...] o ses concordances*"] (*Etablissements*, I.96)

⁶⁰⁷ When explaining the rules that the property of convicted heretics goes to the baron, the text cites both the Decretals and custom: "and it is written in the Decretals, at the title "On the meaning of words" in the chapter *Super quibusdam*. And custom is in agreement" ("Et est escrit en Decretales, ou titre *Des significacions de paroles*, ou chapitre *Super quibusdam*. Et costume s'i acorde," *Etablissements*, Book I.90).

⁶⁰⁸ "according to written law in the Code, *De foro competent*, l. *Juris ordinem* and in the Decretals *De dolo et contumacia*, *capitulo Causam quae* where the matter is discussed" (*Etablissements*, I.28).

⁶⁰⁹ The *Coutumier d'Artois* follows the *Etablissements* in this practice, see for instance VIII.1.

customary text and custom was equally as important to the compiler as was adding references to learned law. Just as custom was provided with citation of Roman and canon law, the authority of those was also strengthened with citation to custom and practice.

STRONG MISREADING AND THE BIRTH OF THE LAY JURIST

How were the citations perceived? Were the *coutumier* authors citing authorities, in the sense that the weight of the reference's influence exerted a powerful sway over the content of the text? Or were they citing sources, where the *coutumier* author used the reference to assemble and create their own text? If the references were made to authorities, then presumably the authors would cater to the authorities, and the authorities would condition the textual content of the *coutumiers*. However, not only did the *coutumiers* authors provide 'misinterpreted' citations in the *coutumiers*, but they also noted disagreement between Roman law and custom. In other words, we find Harold Bloom's strong misreading. The *coutumiers* authors were appropriating in order to create, and not idolizing something perceived as greater or more authoritative.

Pierre de Fontaines's *Conseil*, one of the earliest *coutumiers*, used more Roman law quotations than did the other *coutumiers* authors. His attitude to Roman law provides a good starting point. Pierre indicated on a number of occasions that some rules of practice and Roman law were in harmony: he would describe a usage and note that it conformed to written law, or he quoted from Roman law and then remarked that the rule conformed to usage.⁶¹⁰ These are the two main types of references that Pierre makes—his citations to usage or Roman law far

⁶¹⁰ "Bien s'acordenostre usage à la loi escrite, qui dit einsi..." (Pierre de Fontaines, XII.1); "Et certes nostre usage ne se descorde pas de la loi, qui einsi dist..." (*Ibid.*, XIV.13); "Bien s'acorde nostres usages à molt d'aides que les lois escrites font as souz-aagiez" (*Ibid.*, XIV.8); "et à ce s'acorde bien une lois..." (*Ibid.*, XIV.9).

outweigh the others. Indeed, according to him, these are the two sources of sound legal advice, and “advice which does not follow either written law or approved custom is very dangerous.”⁶¹¹

Both ‘written law’—the term of art for Roman law—and custom were good sources of legal advice. The best possible scenario is when they agree with one another and, as Pierre notes, “We must greatly cherish and firmly uphold the usage which agrees to the written laws, for there is no surer way to judge.”⁶¹² A current custom that conformed to Roman legal wisdom was the strongest type of custom.

Or, at least Pierre sought to convince his audience. The dialogical structure of the *Conseil* shows that Pierre’s own commitment to uniting usage and written law was not a universally accepted position. In the text, Pierre both records and responds to the criticisms of the pupil from whom he composed the *Conseil*, doubtless reflecting a wider criticism that could already be seen in the *Roman de Renart*. Pierre was addressing his student, and other practitioners of the lay courts who held similar opinions, who did not accept Pierre’s position on the usefulness of Roman law. Vexed and irritated, Pierre said: “If you knew what the written laws say on many points which do not disagree with our usage, you would not ask me so often the questions that you do!”⁶¹³ Pierre was justifying why he referred to Roman law at all in his discussion of customary rules and procedures.⁶¹⁴ Roman law was perceived as resolving legal issues in a manner different from customary practice, but Pierre was trying to show its utility when it did not disagree with usage.

⁶¹¹ “Car li avis est molt périlleus, qui ne suit ou loi escrite ou coustume aprové” (*Ibid.*, I.3).

⁶¹² “Molt doit-en amer l’usage et fermement tenir, qui s’acorde à lois escrites: car plus seurement ne puet nus juger.” (*Ibid.*, XV.24).

⁶¹³ “Se tu seusses ce que les lois escrites dient en molt de cas qui ne se descordent pas de nostre usage, tu ne me feisses mie si sovent tels demandes come tu me fes” (*Ibid.*, XIV.15).

⁶¹⁴ “Et por ce voil-je que tu saches que une lois dit qui bien termine ta demande...” (*Ibid.*, XV.24).

Despite this appreciation for late antique law, Pierre saw it as a useful pool of knowledge from which to draw ideas and had a critical approach towards it. He noted occasions on which custom and Roman law diverge, and even disagree.⁶¹⁵ On some occasions he points out that the written law has some good ideas, yet he does not argue that these good ideas should influence practice. For instance, the written laws place limits on the length of a trial, which Pierre thinks is a very useful thing [*molt profitable chose*], and then points out that, “nonetheless, our usage does not fix any limits.”⁶¹⁶ On another occasion, he uses a series of block quotes from Roman law to discuss the location of trials. In the middle of this long excerpt from Roman law, Pierre interrupts the narrative to explain that a specific point “is not upheld by our usage.”⁶¹⁷ On other occasions, Pierre comes out strongly against a Roman law rule: “Furthermore, other written laws say that the heir to a pledge must be held to uphold the pledge, however our usage does not consent to this at all.”⁶¹⁸ In other words, the Roman law, though it may have some good ideas, was not authoritative in and of itself. Pierre included citations to the Roman law in his text, discussed where it converged with custom, but when it came to choosing the authority of usage or of Roman law, Pierre dismissed Roman law that did not conform to usage.

The *Coutumier d’Artois*, which used Pierre’s *Conseil* as one of its sources, followed suit. In discussing agreements made in arbitration, this *coutumier* quoted a paragraph from the Code about the role of women in this process specifically in order to disagree with it.⁶¹⁹ In the quote,

⁶¹⁵ “car nostre usages met [...] que ne font les lois, qui le metent.” (*Ibid.*, XV.35).

⁶¹⁶ “Encore metent les lois escrites terme en finer totes manières de plez, qui est molt profitable chose, si come [...] gives examples...]; nequedent nostre usages n’i met point de terme, mès il i met ordre et qui tex est” (*Ibid.*, XXI.7).

⁶¹⁷ With one exception : “Ce ne tient pas nostre usages, fors de la meismes cause dont plez est” (Pierre de Fontaines, XXIX.5)

⁶¹⁸ “Encore dient aucune lois escrites, que li oïr au plége soient tenu à plégerie, nequedant nostre usage ne s’i assent mie...” (Pierre de Fontaines, IX.5).

⁶¹⁹ *Coutumier d’Artois*, LIV.73-74. The text does not cite a reference, but because it is a quotation from an emperor, it must come from the Code.

the emperor Justinian explained that agreements made by women could be broken at will, even if the woman in question was an employer, and even if she was hearing a dispute between people to whom she had granted freedom.⁶²⁰ When he closed the quote, the *coutumiers* author explained:⁶²¹

However, by our usage, women have enough significant [*grigneur*] power to take agreements upon themselves, since they have a voice in judgment alongside the other men of the prince and other nobles, when they are present, and they have landed inheritances for which they give faith and homage to their lord, or when they are [legal] guardians of their children.

The author of the *Coutumier d'Artois* quote the Roman text to acquaint the reader with the Roman rule and to establish its irrelevance to contemporary legal culture. However, the need to make this point indicates that some people were making the argument based on the Roman rule.

Peter Stein noted how medieval learned jurists, such as Bulgarus or Johannes Bassianus, wrestled with the idea of custom if it contradicted Roman law and tried to find solutions for this problem.⁶²² As the above examples show, if custom or usage and learned law contradicted each other in the secular courts, it was not a problem, custom prevailed. These lay jurists—even those convinced of the utility of Roman law—clearly felt it was legitimate, and even ordinary, to disagree with Roman law.

⁶²⁰ *Coutumier d'Artois*, LIV.73. Justinian notes that women should keep in mind their chastity, and the works that nature has granted them, and those from when they should keep themselves separate, one of which is making contracts (*Ibid.*).

⁶²¹ *Coutumier d'Artois*, LIV.74.

⁶²² Stein, Peter. *Roman Law in European History* (Cambridge: Cambridge University Press, 2007) 62. As Stein notes, Bulgarus, distinguished between a general custom and a local custom—while the former always prevailed over an earlier law (customary or written), the latter only did if it was introduced knowingly as an abrogation. Marinus felt a custom could only affect an earlier custom. Johannes Bassianus felt that so long as custom was based on reason (Roman criterion), it is valid, no matter whether it was knowingly introduced as an abrogation. (*Ibid.*)

One may wonder why these authors quoted the Roman law only to disagree with it. Perhaps they felt the rule was known enough that it should be addressed, or perhaps it was simply a rule they knew, or perhaps the Roman rule was being raised in secular courts by some despite contemporary court practice. One thing is clear, they were trying to show how the learned law was often used and how generally it ought to be used—not like the dandy in Roman de Renart who only served to show how disconnected learned law, in that cases canon law, could be— but critically, in the service of custom and practice.

It was precisely the devotion of lay jurists to custom and usage that bothered Jacques de Revigny, professor of law at the university in Orléans. He frequently mentions these people, calling them either rustics (*rustici*) or laymen (*laici*) interchangeably “because they do not know (Roman) law nor do they have access to experts. Thus I would call a cleric or priest not learned in law a rustic...”⁶²³ For Revigny only an education in the learned law could provide the mark of learning, no amount of legal practice or knowledge of the functioning of the courts could do the same. As Kees Bezemer has pointed out, the point of commonality between Revigny’s ‘rustics’ and ‘laymen’ is their common set of legal standards—they keep arguing that they have done things a certain way since time immemorial.⁶²⁴ Revigny is clearly responding to a group of people who feel they are making strong authoritative arguments, but they do not assign normative value in the same manner as Revigny did.

While Revigny showed some contempt for lay jurists, his world was tied to theirs. It was clearly important to Revigny to know their arguments and to respond to them. The practice of the *coutumier* authors of mentioning some Roman law rules only to disagree with them finds a

⁶²³ Bezemer, Kees. *What Jacques Saw: Thirteenth-Century France Through the Eyes of Jacques de Revigny, Professor of Law at Orleans*. Frankfurt am Main: Vittorio Klostermann, 1997) 13.

⁶²⁴ *Ibid.*

parallel practice in Revigny's work. Revigny also occasionally cited certain customs only to disagree with them because the Roman rule was different. For instance, after explaining the French custom that a daughter who lived with her husband is now in his authority, and not her father's, Revigny noted that "This is false... though rustics believe it."⁶²⁵ Revigny also rejected the customary time limit of one year and one day for prescription—"That opinion has lay justice in its favor, yet neither a (Roman) law nor reason."⁶²⁶

Revigny, as can be seen, had some solid knowledge of the customary law of the lay courts. If Roman law was such an ultimate authority, Revigny would never need to know customary law so well, or need to address these differing opinions. Revigny, like Pierre before him, seemed bothered by lay disinterest in the sophistication and reason of the Roman law. In fact, Revigny did note laymen rejecting advice based on Roman law because they did not think it would work in court.⁶²⁷ This indicates that those who knew Roman law wanted to make Roman law relevant to practice, but were having some difficulty in doing so. Lay and learned jurists clearly had contact with each other, and their differing values were in conversation. It is very clear, however, that lay jurists did not have a lack of confidence about their standing in this conversation, just as the *coutumier* authors were not responding to Roman law or its learned practitioners from a position of inferiority.

For Revigny's rustics as for the *coutumier* authors, custom trumped Roman law, and practice trumped the written source. These authors, then, were not simply adding citations to create a concordance, to guide the reader to the supra-authority of the learned law. Actually, the lay jurists who wrote the *coutumiers* do not seem to have felt that they had an obligation to stay

⁶²⁵ *Ibid.*

⁶²⁶ *Ibid.*, 14.

⁶²⁷ *Ibid.* See Bezemer for the story of the townsman who rejects advice based on the *action Publicana* because it would be redundant in court, and other like examples

true to the rules in the Roman law. The learned law does not seem to have been an authority in the sense that its *auctoritas* exerted a powerful sway over the authors of the *coutumiers* and conditioned the manner in which they wrote the texts.

This can further be seen via the extent to which the citations were a road-map to the source referenced. If the purpose of the citation was indeed to create a dialogue between the *coutumiers* and learned-law texts, then one would expect the *coutumiers* to be careful about references and to help the reader find the text cited. This can be seen in the overall used of Roman law in the *coutumiers*. Only the Pierre's *Conseil*, the *Etablissements*, and the *Coutumier d'Artois* use it with any regularity, and they do not do so in any homogeneous manner.

Of the three *coutumiers* that cite the learned laws with any regularity, the *Etablissements* are actually the only one that consistently provides full scholastic citations to the learned law texts. These citations give the title of the text, the title of the chapter, and often the section where the text referred to can be found. The *Etablissements*, then, are the most careful in providing directions to the source text, but further investigation, as noted above, often leads to a passage that has little connection to the rule for which it was cited. The reader would have to look up the citation to know what exactly it referred to—the *Etablissements* are careful in providing citations but they never provide a quotation or a paraphrase that would explain the content of the reference.

Pierre de Fontaines took this latter approach. The learned law sometimes appears in his *coutumier* as a paraphrase, but the great bulk of references to Roman law referred to the 'law' or 'written law,' and were followed by or concluded a large block quotation from Roman law translated into the vernacular.⁶²⁸ The reader was not informed of where in the 'written law' the

⁶²⁸ He only cites canon law on one occasion.

quote could be found. Sometimes Pierre retained the person being quoted, so some inference as to location can be made based on whether it is a jurist (Digest) or an emperor (Code), but this is still not very helpful as a guide to the source text. Pierre, then, conditioned the reader's knowledge of the Roman law, choosing which passages are appropriate to read with his text. He does not seem to expect the reader to look up the passage to read around it.

The *Coutumier d'Artois*, which copied from both Pierre and the *Etablissements*, used both their methods of citation. Sometimes, it gave full scholastic references.⁶²⁹ On other occasions, it cited without giving the reader the information to find the quotation in the original text. On these occasions the author also simply cited the 'law' or 'written law' or 'the decretals', sometimes saying it agrees with a previous discussion, occasionally paraphrasing a principle.⁶³⁰ A few times he used short quotes from one or the other learned law, most of the time these are in the vernacular, but also appear in Latin a couple of times.⁶³¹

The variation in citations in the *Coutumier d'Artois* probably came from the different types of citation used in the author's sources. Rather than being an indicator of authorial preference, the use of the two forms seems to be connected to the use of two sources that included these two different forms of citation. The author did not make an effort to homogenize the citations, to put them all in the scholastic style that would permit them to be a reference tool, or to look up the citations to turn them into quotations or paraphrases that would give the reader instant access to the text cited. He simply used the learned law as it appeared in his sources, but did not make an effort to create any sort of consistent dialogue with the learned laws.

⁶²⁹ For full scholastic references, see *Coutumier d'Artois* III.6, IX.2-8.

⁶³⁰ For general citations, see *Coutumier d'Artois* III.18 and III.34 (general statement that the learned law agrees with a point just laid out, III.16 (paraphrase).

⁶³¹ *Coutumier d'Artois* III.33 (short quote from Roman law in Latin) and XI.8-9 (paragraph quotes of Roman law in the vernacular). All of these varieties of citation can be found in one chapter (ex. Chap.III), and are not a reflection of different parts of the text and different stages of writing. The *Coutumier d'Artois* is actually quite consistent in this polymorphous approach.

To sum up, three of the eight *coutumiers* under study openly make citations to Roman law. One of these gives the reader full scholastic citations, another quotes block text from the Roman law in translation, while the last basically used a combination of these two. In other words, there was no consistent form in which to refer to the learned law in the *coutumiers*. Block quotations were taken out of context and added to the *coutumiers*, and citations were often made to text that had little or no relevance for the rule for which it was cited. This shows us, again, that the virtue of including references to the learned laws was likely not an attempt to conform to learned authority, nor dialogue, nor concordance but a selective use of source material in the service of an original text.

The philosophy that underlay the uses of the Roman law in the *coutumiers* seems rather to have been one of amendment and alteration. Just as Pierre de Fontaines invited future jurists to amend and improve his work, the jurists who wrote, compiled or amended the *coutumiers* approached the learned laws with scissor-hands and used it for their own purposes without feeling obliged to preserve the integrity of the source text. We cannot see this insouciance as to faithfulness to the original text as the mark of an inability to understand the more complex learned law. Rather, we should see it as a mark of the approach that lay jurists had to the learned laws—learned law, to them, was important to them in so far as it could serve custom

LAY JURISTS AND THE ROMAN LAW

Some *coutumiers* linked customary court procedure to the words of Roman jurists, Roman emperors and popes. Others, however, did not and the silence of some has provoked

much debate. Did the *coutumiers* authors have an established practice, a community convention, of citing Roman law? What does their silence indicate?

Philippe de Beaumanoir's *Coutumes de Beauvaisis* is most notorious for leaving scholars debating these questions because, for all the sophistication of his exposition, he never refers to Roman law.⁶³² Philippe, like the author of the *Livre*, has also been accused of affecting an ignorance of the learned law.⁶³³ No one has been able to show conclusively what or how much he drew directly from the learned law. The learned laws are never cited in his text, not once does he refer to the 'written law.' He has a strong knowledge of romano-canonical procedure, but since Louis IX instituted that for royal courts, any good jurists would have to be equipped with that knowledge. According to Paul Ourliac, it is doubtful that he knew Latin at all, and if he acquired his learned law textually, it probably came from a vernacular translation of an abridged version of one of the Justinianic texts.⁶³⁴ As Ourliac has noted, for one of the top medieval French juriconsults, he was much more part of the world of knights than that of the schools.⁶³⁵ Despite the apparent lack of Latin, university education, or demonstrable reliance on learned-law texts, and to the credit of the informal education system of the lower aristocracy, Beaumanoir's *oeuvre* is by far the most erudite of the *coutumiers*.

The question is why he never cited the learned law. Was it, in the words of J.P. Lévy, a case of substantial penetration whereby Beaumanoir had so internalized the Roman law that it had become part of his soul? Or was Beaumanoir trying to make a political statement by not referring to the 'written law'? Was he, as Jacob stated, emphatically denying the learned law a

⁶³² See Stein, 66; Hubrecht, 580-4; Viongradoff, 71, Lefebvre-Teillard, 66; Ourliac, "Beaumanoir et les Coutumes de Beauvaisis," 74-8 ; Jacob, "Beaumanoir and Revigny", to name only a very few.

⁶³³ Ourliac, Paul. "Beaumanoir et les Coutumes de Beauvaisis" in *Actes du Colloque International Philippe de Beaumanoir et les Coutumes de Beauvaisis (1283-1983)* (Beauvais: G.E.M.O.B., 1984) 74.

⁶³⁴ Ourliac, Paul. "Beaumanoir et les Coutumes de Beauvaisis" in *Actes du Colloque International Philippe de Beaumanoir et les Coutumes de Beauvaisis (1283-1983)* (Beauvais: G.E.M.O.B., 1984) 78.

⁶³⁵ *Ibid.*, 79.

position within the legal system, possibly in relation to the king's injunction against the use of Roman law in the places where custom applied?⁶³⁶ Was part of a phenomenon described by Anthony Grafton, namely “a *damnatio memoriae*, which the circle of interested parties will immediately recognize and decode”?⁶³⁷

The idea that the lack of citation was a purposeful snub relies on the assumption that Beaumanoir ought to have cited the learned law. Thinking back to our overview of the range of citation in the *coutumiers*, it is not clear that someone composing a *coutumier* in the 1280s would necessarily have felt this obligation. Of the eight *coutumiers* in our group, only three—Pierre de Fontaine's *Conseil*, the *Etablissements de Saint Louis*, and the *Coutumier d'Artois* (which copied from Pierre's *Conseil* and the *Etablissements*)—make references to the learned law a notable feature of their text. The *Livre de Jostice et de Plet* paraphrases without citing. The rest of the *coutumiers* refer to the learned law on a couple of occasions, if at all.

It has been assumed that those with an interest in custom, who wanted to write about court practice, turned to Roman law for referential authority. This is, as mentioned above, what Stein claims Beaumanoir did.⁶³⁸ In other words, we have assumed that it was important to the *coutumier* writers, to the lay jurists, to draw on Roman law to buttress the authority of their texts. Not citing the learned law, then, was probably not a snub. Rather, Beaumanoir was participating in the lay juristic culture of his time, and this culture did not involve an established practice of citing Roman law.

⁶³⁶ Jacob, Robert. “Beaumanoir vs. Révigny: The Two Faces of Customary Law in Philip the Bold's France” in *Essays on the Poetic and Legal Writings of Philippe de Remy and His Son Philippe de Beaumanoir of Thirteenth-Century France*, edited by Sarah-Grace Heller and Michelle Reichert (Lampeter, Wales: Edwin Mellen Press, 2001) 244.

⁶³⁷ Grafton, Anthony. *The Footnote: A Curious History* (Cambridge, Mass.: Harvard University Press, 1997) 9.

⁶³⁸ Stein, Peter. *Roman Law in European History* (Cambridge: Cambridge University Press, 2007) 66.

Roman law was being inserted into the *coutumier* by those who had some acquaintance with it and who thought it was important, such as Pierre de Fontaines or the *Etablissements* compiler. Its presence in the *coutumiers*, then, was not due to the feelings of inferiority of lay jurists, who used the learned laws in fledgling attempts at legitimacy. Rather, Roman law came into writing about custom because those who were, to whatever extent, learned in it wanted to draw it out of its closed Latin-oriented scholarly circles and give it some relevance in practice, in the everyday practice of secular law.

This group of lay jurists, who were concerned with Roman law and bringing it into the *coutumiers*, was clearly a smaller subset of our group of lay jurists. This subset included Pierre de Fontaines, the compiler of the *Etablissements*, the author of *Artois* (who copied from Pierre and the *Etablissements*), as well as those who copied these texts, or had them copied.

Within this subset of *coutumiers* that overtly cited Roman law, some manuscripts show an even greater concern for Roman law. There are two manuscripts of the *Etablissements* that wrote the learned law citations in the *Etablissements* in red ink—so the titles of the sections are in red, the text is in black, and the learned law citations are in red.⁶³⁹ This means that the learned law in these manuscripts was given the same visual importance as titles under which the text was divided. Two other manuscripts, where the body of the text is in black, use a sign (¶) to point out uses of learned law, however, one of these also used this sign to point out usage.⁶⁴⁰ Another manuscript, one of the few that conjoined the *Etablissements* with other texts (in this case Tancred's *Ordinary* translated into the vernacular), followed the usual method of red titles and black text without using red ink for the learned laws, but proceed to identify the nature of the

⁶³⁹ Bibliothèque Nationale, ms. NAF 10683, ms. fr. 5278.

⁶⁴⁰ Bibliothèque Nationale, ms. fr. 5977 and ms. fr. 18096 ; it is ms. fr. that uses this symbol to point of both learned law and usage.

rules included in the text by writing in the margins either ‘law’, ‘decretal’ or ‘case’ every time one of these appeared in the text.⁶⁴¹ Manuscripts of Pierre’s *Conseil*, as far as I have seen, do not do this.⁶⁴²

Two of these manuscripts gave special demarcation to non-learned sources—usage and cases—so these should be seen as pointing to a more general interest in the citation of sources. A subset of people who copied the *Etablissements*—three of twenty-six—who were interested in emphasizing the learned citations within, interested enough to make it visually easier to spot these references. While it was a small group, it clearly shows that there was a subset of lay jurists who put emphasis on the presence of the learned-law citations in their texts. The smallness of the group that paid tribute to the learned law by differentiating it in the text, however, is also an indication that for most of those who copied the *Etablissements* it was not necessary to find the learned-law citations easily.

More commonly, ideas from Roman law had come into customary thinking in more subtle ways. Graduates from the law schools were beginning to appear in secular and ecclesiastical administrations. Romano-canonical procedure had also made it into the royal domain and the royal courts by royal decree, and could be used in other jurisdictions if elected. As we discussed in Chapter One, from the beginning of the thirteenth century Roman and canon law texts and some of their glosses were translated from Latin into the vernacular, making the ideas more accessible to the educated layman. In fact, they could get their Roman law from vernacular translations of canon law texts—Pierre de Fontaines, for instance, used Vacarius’

⁶⁴¹ Bibliothèque Nationale, ms. fr. 1075.

⁶⁴² I have not yet been able to consult the manuscripts of the *Coutumier d’Artois*.

Liber Pauperum as his source for Roman law sources.⁶⁴³ Personal contact with clerics and ecclesiastical courts allowed for word-of-mouth transmission and experience of learned doctrine.⁶⁴⁴ Personal contact with those who alleged Roman law in the secular courts, whether successfully or unsuccessfully, would also acquaint those who attended with some idea of some of the rules.

We see this subtle infiltration in some of our later *coutumiers*. Beaumanoir, *Demenées*, and *Artois* all include whiffs of *romanitas* in the form of vocabulary and maxims drawn from the learned law. On occasion, for instance, Beaumanoir feels the need to explain some of the technical vocabulary that is starting to be used in the secular courts as they professionalize. For instance, he explains that the arguments made to postpone a complaint “are called dilatory exceptions. To say dilatory exceptions is the same as saying arguments which serve only to delay the suit.”⁶⁴⁵ Technical legal vocabulary drawn from Roman and canon law was clearly making its way into the secular courts, and Beaumanoir has to clarify its meaning for his readers because some may not be acquainted with it yet. There is no indication that this might have been seen as a foreign import from Roman and into customary law, but part of a process of diffusion of language that was matched with professionalization.

A similar process occurred with some maxims drawn from Roman law—they had transubstantiated into custom. Take the Roman maxim that “agreement beat law.” This maxim

⁶⁴³ Petot, Pierre. “Pierre de Fontaines et le droit romain” *Études d’histoire du droit canonique Gabriel Le Bras*, vol. II (Paris: Sirey, 1965) 960. He follows Émile Chénon’s suggestion on this.

⁶⁴⁴ Jacob, Robert. “Beaumanoir vs. Révigny: The Two Faces of Customary Law in Philip the Bold’s France” in *Essays on the Poetic and Legal Writings of Philippe de Remy and His Son Philippe de Beaumanoir of Thirteenth-Century France*, edited by Sarah-Grace Heller and Michelle Reichert (Lampeter, Wales: Edwin Mellen Press, 2001) 245. Jacob notes that, when Beaumanoir used vocabulary that was common to canon law, he indicated that he got it from clerics, or that he is referring to “what the clerics call” or “what they say” (*see s.* 196, 228, 1191, 1908) (*Ibid.*). While this could refer to Jacob textual quotations, Jacob thinks that it refers to orality (245 note 38).

⁶⁴⁵ Philippe de Beaumanoir, VII.236. He mentions this again in the next section : “by many other arguments also, which you can recognize by those which are stated above, which are only to delay suits; and they are all called dilatory exceptions” (*Ibid.*, VII.237).

appears in three of our *coutumiers*, but none of these cite the Justinianic texts as the source. Instead, they make clear that the rule has become a common contemporary proverb. Pierre de Fontaines says that we know “according to our usage that agreement beats law.”⁶⁴⁶ Philippe de Beaumanoir introduces it with the traditional marker of a proverb “for this reason we say: ‘agreement beats law.’”⁶⁴⁷ The *Coutumier d’Artois*, furthermore, refers to this maxim as “a common expression that we say.”⁶⁴⁸ Roman law, then, could be common proverb.

Maxims seem to have also gone through a process of transmission and adaptation to lay juristic understandings of practice. This is what happened with the famous Roman maxim that ‘what pleases the prince has the force of law,’ which appears both in the Digest and in the Institutes.⁶⁴⁹ When Beaumanoir used this well-known Roman law rule, he used it for purposes that the sixth-century jurists would have found befuddling—Beaumanoir explains that the king can postpone the debts of those joining his army, going on crusade, or going on special business for him, because “what he pleases to do must be held as law.”⁶⁵⁰ For Peter Stein, this example is proof that Beaumanoir was well-trained in Roman law and could deploy it to un-Roman institutions to lend them greater authority.⁶⁵¹ Albert Rigaudière, on the other hand, pointed out that while this use of the maxim did not recognize its full ambit, this interpretation actually seems to have been the one current amongst lay jurists at this time.⁶⁵² Lay jurists, then, had

⁶⁴⁶ “selonc nostre usage, que covenance loi veint” (Pierre de Fontaines, XV.6).

⁶⁴⁷ Though Beaumanoir notes an exception—the rule does not apply if the agreement is made for bad purposes : “pour ce dit on: “Convenance vaint loi”, exceptees les convenances sont fetes pour mauvaises causes” (Philippe de Beaumanoir, XXXIV.999)

⁶⁴⁸ “Et se te fais je entendant une coumune parole que on dist: convenence loy vaint” (Artois VII.5).

⁶⁴⁹ ‘*Quod principi placuit legis habet vigorem*’ (Digest I.4.1; Institutes I.2.6).

⁶⁵⁰ “car ce qu’il li plect a fere doit estre tenu pour loi” (*Ibid.*, XXXV.1103).

⁶⁵¹ Stein, Peter. *Roman Law in European History* (Cambridge: Cambridge University Press, 2007) 66.

⁶⁵² Rigaudière, Albert. “*Princeps legibus solutes est* (Dig. 1,3,31) et *Quod principi placuit legis habet vigorem* (Dig. I,4,1 et *Inst.* I,2,6) à travers trois coutumiers du XIIIe siècle” in his *Penser et construire l’État dans la France du Moyen Âge (XIIIe-XVe siècle)* (Paris: Comité pour l’histoire économique et financière (Ministère de l’Économie, des Finances et de l’Industrie), 2003) 46. Rigaudière tentatively argues, pending work on a greater number of sources (he looks at three *coutumiers*—Pierre de Fontaine’s *Conseil*, the *Livre de justice et de plet*, and Beaumanoir’s

developed their own understanding of such maxims that appeared in customary texts, and this understanding was common to their community.

Roman law, then, was part of the laws and customs of the past for lay jurists. It was understood as part of a pool of wisdom that could be drawn on to understand or validate the present. This was an understanding that differed from university *doctores*, who valued the Roman law texts as a coherent whole, a system so well developed that it could even be harmonious when the inconsistencies were ironed out. The *coutumier* authors pulled what they needed from the learned texts, using the Roman law insofar as it fit in their understanding of custom and practice. Conversely, the law professors in the universities, such as Jacques de Revigny, were concerned with staying true to the Roman law, understanding it as a system, and reasoning within that system. Doubtless, these *doctores* would have been dismayed at the way Roman law citations were made in the *coutumiers*.

In essence, lay jurists and learned jurists had very different epistemological views of Roman law. The lay jurists' understanding of the epistemology of Roman law was not a reaction to teaching in the universities. Rather, it should be viewed as part of an older tradition.

There had been a long tradition of citing to the Roman law as a form of normative authority before its 'rediscovery'. Roman law had not disappeared between the fall of the empire and the twelfth century. While the Justinianic texts had never made it to the former Roman West and were barely known between the seventh and eleventh centuries, the Novels known through the *Epitome Juliani* were the one Justinianic book with significant circulation in this period.⁶⁵³

Coutumes de Beauvaisis), that this manner of using this maxim was the common manner in thirteenth century France, when the expression was used in a very formal and restrained manner, which in fact reflected the nature of royal power at the time (*Ibid.*, 66).

⁶⁵³ Radding, Charles M. "Reviving Justinian's *Corpus*: The Case of the Code" in *Law Before Gratian: Law in Western Europe c. 500-1000 (Proceedings of the Carlsburg Academy Conference on Medieval Legal History 2006)*, edited by Per Andersen, Mia Münster-Swendsen and Helle Vogt (Copenhagen: DJØF Publishing, 2007) 36.

Many other texts of Roman law were copied, kept, preserved and used, both in the North and in the South of France, in a similar manner. The most important of these were the *Theodosian Code* and the *Breviary of Alaric* (*Lex romana wisigothorum*), which were also known via the intermediary of various epitomes and abridged versions, and Book V of Isidore of Seville's *Etymologies*, as well as various forgeries that made use of Roman law.⁶⁵⁴ Otherwise, Roman law was also packaged in the form of quotations of learned wisdom. This came in the form of excerpts, *florilegia* (casebooks), and compilations of references.⁶⁵⁵

Roman law, then, was known and even considered a type of living law. While the “venerable Roman laws promulgated by the princes through divine inspiration” were mentioned in a late ninth century letter from pope John VIII to emperor Louis II, as Gérard Giordanengo has noted, prestige and knowledge did not necessarily go hand in hand.⁶⁵⁶ The most sophisticated writers of the day, such as Burchard of Worms and Ivo of Chartres, did not approach Roman law as a coherent system but as a collection of separable parts. They drew upon Roman legal principles and maxims as well as a variety of other sources, such as patristic works, to construct arguments about rights and responsibilities.⁶⁵⁷ In fact, the various collections of Ivo's letters

He also notes that rather than a rediscovery in Bologna, the Code was restored to its full length in various centres in Italy as early as the late eleventh century. Pavia, the stronghold of Lombard legal thinking, was an important part of this story.

⁶⁵⁴ Gaudemet, Jean. “Le droit romain dans la pratique et chez les docteurs aux XIe et XIIe siècles” *Cahiers de Civilization Médiévale (Xe-XIIIe siècles)* 8 (1965) 367. See Gaudemet's list of Roman law sources available before the 'rediscovery' p. 366ff.

⁶⁵⁵ *Ibid.*, 367.

⁶⁵⁶ Giordanengo, G. “Le droit romain au temps de la Réforme: une étincelle? (1050-1130)” *Mélanges de l'école française de Rome* t.113, no.2 (2001) 872-3.

⁶⁵⁷ Giordanengo notes a number of uses of Roman law: that legal principles and formulas such as ‘spoliatus ante omnia restituendus’ (Code 5, 16, 10) were drawn upon and legal maxims were used in letter writing between luminaries. Importantly, Giordanengo also notes that other sources, such as patristic writings, were also used in this same manner, as legal maxims. (*Ibid.*, 876)

show that his correspondence was read for its legal content and, in fact, these letters were arranged into casebooks.⁶⁵⁸

Yvo of Chartres' canonical collection, dated before 1095, is a telling example. This collection is composed of 3760 canons. Of these 424 chapters are excerpts from secular law, 214 are excerpts from Roman law, and 210 are taken from the capitularies of the kings of France.⁶⁵⁹ He relied rather heavily on secular law, more so, in fact, than on Roman law. The Roman law used here was mostly drawn from the *Epitome Juliani* and from the Theodosian texts (*Theodosian Code*, *Sirmondian Constitutions*, *Breviary of Alaric*) though Justinianic texts were also included, and the royal capitularies were not actually drawn from collections of royal capitularies but from the *Decretum* of Burchard of Worms.⁶⁶⁰ Yvo, then, was using citation practices that continue to be used later on. He constructed his canonical collection with a motley group of sources that were authoritative because they contained normative wisdom that could be extracted and adapted.⁶⁶¹

This use of normative sources was why books of quotations and compilations of references, such as the one composed earlier on in 868 by Hincmar of Rheims, had been so popular.⁶⁶² This pre-'rediscovery' scholarly view of Roman law, as a pool of useful quotations and as a repository of rules and ideas that could be excised and reapplied, changed when the Justinianic texts began to be studied as a *corpus*. The scholarly view of the use of Roman law

⁶⁵⁸ Brasington, Bruce C. "Collections of Bishops' Letters as Legal Florilegia" in *Law Before Gratian: Law in Western Europe c. 500-1000 (Proceedings of the Carlsburg Academy Conference on Medieval Legal History 2006)*, edited by Per Andersen, Mia Münster-Swendsen and Helle Vogt (Copenhagen: DJØF Publishing, 2007) 78.

⁶⁵⁹ *Ibid.*, 878.

⁶⁶⁰ *Ibid.* Giordanengo calls the Theodosian Code, the *leges barbarorum* and the various epitomes that were composed pre-rediscovery the 'old Roman law,' and distinguishes it from the 'new Roman law' which was the full Justinianic texts that came to be studied in the twelfth century, and replace eventually the old Roman law.

⁶⁶¹ See *Ibid.* pp. 879-880 for more on Ivo's approach to sources, his bias against custom, and for reason and law.

⁶⁶² *Ibid.*, 367.

post-‘rediscovery’, now expounded from the universities, was one that came to be focused on the internal coherence of the Roman texts.

The *coutumiers* authors who felt it was important to cite Roman law—Pierre de Fontaines, the *Etablissements de Saint Louis* and the *Coutumier d’Artois*—did use Roman law in this manner. They continued the earlier pre-‘rediscovery’ tradition of how to use the Roman sources. They saw it as a body of knowledge composed of a multiplicity of parts that could be pulled out and used in the service of the present; their goal was not to faithfully reproduce the original meaning or context. The earlier popularity of books of quotations and abridgments of Roman law also show that these Roman quotations were not viewed as laws to be followed, but as words of wisdom to be passed on. Pierre, the *Etablissements* and *Artois* seem to follow this tradition. Pierre, for instance, explains that “the emperor Antoine [originally, Antoninus] said the following to one woman..” that she is disgraced if she is convicted of theft, but the harsh sentence shall not defame her name if she does not know how she came into possession of the stolen goods, or he quotes emperors Gratian and Valerian explaining that one cannot be a judge in one’s own suit, or that “we must keep our agreements, because written law says: “there is nothing more proper to human faith than to keep that that which you agreed to do.”⁶⁶³ When they refer to quotations of the emperors drawn from the Code, all seem to refer to the emperors as wise men from the past who are part of the same culture and tradition whose words they were passing on, and not as a foreign import.

In Southern France, of course, Roman law had continued to be living law. This, however, was the “old Roman law” of the Theodosian Code, the *leges barbarorum*, especially the *leges*

⁶⁶³ “Li empereres Antoinnes dist à une feme ainsi en une loi...” (Pierre de Fontaines, XIII.17); “En une loi dient li empereor Gratiens et Valerians ainsi...” (*Ibid.*, XXIII.3); “Bien doit-on garder ce qu’en convenance, car la lois escrite dist qu’il n’est nule riens tant soit covenable a humaine fois, for de garder ce où en convenance” (*Ibid.*, XV.1).

wisigothorum, and various epitomes. This Roman law, however, did not survive in any better shape in the South—the future *pays de droit écrit*— than it did in the North.⁶⁶⁴ As Paul Ourliac pointed out, this Roman law was more a communal memory than it was the stuff of rules, and it was only around the 1250s the Roman law in the form of specific rules (dowry, prescription ect.) begin to be inserted into the custom of the region.⁶⁶⁵ As P. Tisset noted long ago, this new diffusion of Roman law in the south was part of the political fall-out that followed the Albigenian crusade, whereby the patriciate attached itself to the myth that they had followed Roman law since antiquity to try to counter rapidly increasing French influence in the area.⁶⁶⁶ H. Gilles, furthermore, has shown that the importance of Roman law for the customs of Toulouse (1296) has also been quite exaggerated.⁶⁶⁷

Even around the end of the thirteenth and beginning of the fourteenth century, Roman law as it was used in the south was still largely in the older customary form and indeed referred to as a form of custom—this is why, in a case in the *Olims* from 1312, the Parlement supports the succession claims of a younger daughter against her older sister, because her father had the right to make her heir, “following the customs of the land of Rodez which are ruled according to

⁶⁶⁴ Gaudemet, Jean. “Le droit romain dans la pratique et chez les docteurs aux XIe et XIIe siècles” *Cahiers de Civilization Médiévale (Xe-XIIe siècles)* 8 (1965) 368.

⁶⁶⁵ Ourliac, Paul. “Législation, coutumes et coutumiers au temps de Philippe Auguste” in *La France de Philippe Auguste—Le temps des mutations* (Colloques internationaux CNRS, no.602) (Paris: Éditions du CNRS, 1982) 484-5. Gaudemet sees the insertion of Roman law into the customs of the South beginning even later, in the early fourteenth century (J. Gaudemet “L’influence des droit savants (romain et canonique), sur les textes de droit canonique en Occident avant le XIVe s.” in *La Norma en el derecho canonico: Actas del III congress internacional de derecho canonico (Actes du 3e Congrès International du droit canonique, Pamplona 1976)* (Pamplona: Ediciones Universidad de Nava, 1976) 183).

⁶⁶⁶ Tisset, P. “Mythes et réalités du droit écrit” in *Etudes d’histoire du droit privé offertes à Pierre Petot*.

⁶⁶⁷ J. Gaudemet “L’influence des droit savants (romain et canonique), sur les textes de droit canonique en Occident avant le XIVe s.” in *La Norma en el derecho canonico: Actas del III congress internacional de derecho canonico (Actes du 3e Congrès International du droit canonique, Pamplona 1976)* (Pamplona: Ediciones Universidad de Nava, 1976) 184.

Roman law.”⁶⁶⁸ In fact, as Albert Rigaudière has shown, much fourteenth-century litigation that came from the South to the Parlement in Paris concerned certain regions and whether they were part of the *pays de coutumes* or the *pays de droit écrit*.⁶⁶⁹ If there was such uncertainty, the substantive content of these *coutumes* and *droit écrit* must have been close enough to cause the confusion.

LAY JURISTIC SCHOLARLY PRACTICE

This mining of sources in a creative endeavor was not only the approach that the *coutumiers* had *vis à vis* the learned laws, but it marked their approach to citation in general. When one looks at the span of sources used in the *coutumier* and the very individual ways in which they were used by their authors, it becomes clear that the *coutumier* authors did not follow their predecessors blindly, be they learned law or customary texts, even when they copied from them. While these texts have a common goal—writing the customs and usages of a region—the manner in which they execute it remains individual, and no two *coutumiers* follow the exact same form.

An example from the *Etablissements* shows us that the compiler was cobbling together various sources under specific headings, as seemed fitting. In Book II.4, a section that explains

⁶⁶⁸ “*facere potuerat, secundum consuetudinem terre Ruthenensis que regitur jure scripto*” (see Rigaudière, Albert. “La royauté, le Parlement et le droit écrit aux alentours des années 1300” *Académie des inscriptions et belles lettres*, 140th year, no.3 (1996) 892).

⁶⁶⁹ *Ibid.*, 885-908.

how to request seisin as the nearest relative or as heir, the compiler uses eight different citations.⁶⁷⁰

And that his reservation is valid is written in **the title “On appealing against a man for murder and treachery.”** The law says that the heir should be in possession; and it is **written in the Code, De edicto divi Adriani tollendo, l. Quamvis quis se filium defuncti, ect.** And the **practice of the Orléans district is that** the dead man gives seisin to the living [...]. And the lord before whom he is requesting the aforesaid things must give him a ruling, in his court, in a judgment, by his liege men, by those who owe him faith, by knights, for the things that are done in the presence of noble persons and the court of the prince are enforceable, according to **written law in the Code, “On wills and how a will is executed,” in *lege omnium testamentorum solempnitatem*, at the beginning, ect.** [... and if there is no agreement on the judgment] the lord can give his own judgment, after taking honest counsel, according to **written law in the Digest, *De re judicata*, l. Inter pares** [...]. And if the lord did not do this and was in default, and the default was proved against him, the case would go to the sovereign, and the lord would lose what jurisdiction he had, according to the **custom of the area and the district**; which is to say the obedience **according to king’s statutes as contained in the chapter “On appealing against your lord for default of judgment”** according to the **practice of the Orléans district, in the secular courts.**

This selection shows the extent of *collage*, or *bricolage*, that could be marshaled in the composition of a *coutumiers*. The compiler patched together a plethora of citations as part of the narrative for one rule. The source, each step of the way, is plucked from a different text—the *Etablissements* II:21, the *Code* 6.33.2, the practice of the Orléans district, the *Code* 6.23.19, the *Digest* 42.1.38, the custom of the area or district, the king’s *établissements* (the royal ordinance that constitutes *Etablissements* I.8), and the practice of the Orléans district in secular court. Taking them out of their previous context, the compiler creates a new narrative based on a *collage* of sources. He reused and recycled to create something new.

⁶⁷⁰ “Et que retenue li vaille il est escrit ou titre D’apeler home de murtre et de traïson [...] et est escrot ou Code, De edicto divi Adriani tollendo, l. Quamvis se filium defuncti, ect. Et li usages d’Orlenois si est que [...] selonc droit escrit ou Code, Des Testamens et coment testamens est ordonez, in lege Omnium testamentorum solempnitatem, ou comancement ect [...] selonc droit escrit en la Digeste, De re judicata, l. Inter pares [...] par la costume dou païs et de la terre; c’est à savoir l’obeïssance selonc les establissemenz le roi, si com il est contenuz ou titre D’apeler son seignor de defaute de droit, selonc l’usage d’Orlenois, en cort laie” (*Etablissements*, II.4) [bold emphasis added].

This small portion of text is indicative of the composition of the *coutumiers* on a larger scale. The *Coutumier d'Artois*, composed between 1283 and 1302 and possibly our latest text, almost seems to be a symphony dedicated to this approach to sources and the wider concern with citation. As we have seen, this coutumier cites custom, usage, reason, right, case references, cases the author saw with his own eyes, Roman law, canon law, legal maxims, examples, the words of a clerk, Latin verse that is extracted from three *ordines iudicarii* and lastly, the Bible. Each of these sources constitutes authority in some form. The act of bringing them together, however, constitutes the creation of an *oeuvre*—a creative act that makes use of sources to create something new, and not a show of devotion to authorities.

The *Ancien Coutumier de Champagne*, finished around 1295, is perhaps the most interesting showcase of the new interest in citation. The *Ancien Coutumier de Champagne* is fully engaged in the culture of citation in *coutumier* writing. It opened with an ordinance by Thibault IV of Champagne (unlike in the *Etablissements*, quoted in full and openly attributed to the count).⁶⁷¹ Either custom or usage is cited in almost all sections of the text, no matter how awkwardly they may fit the tag of local Champenois custom or usage (such as decisions of the Parlement of Paris).⁶⁷²

The *Demenées el Chastel de Paris* uses little citation compared to the other texts described. This text right away explains its narrow focus and very practical purpose as a guide to

⁶⁷¹ “il est coustume en Champane” (*Ancien Coutumier de Champagne*, II) ; “Einsinc en us'on en Champagne” (*Ibid.*, IV). See any section of the text for this sort of attribution, except for the ordonnance by Thibault IV of Champagne that opens the text. Actually, these expressions seem to be fairly interchangeable and for the author of this coutumier, to mean the same thing.

⁶⁷² Some of these cases are reports from the Parliament of Paris, that involved litigation between parties that had little to do with Champagne. See for instance, *Ancien Coutumier de Champagne* XL. This section implies that there is a specific, customary way in Champagne in which one appeals a decision of seisin to the king. This specifically Champenois mode of appeal is proven by an example of a case between the duke of Burgundy and some lords of Artois, a case that was judged in Paris. This is a case of royal law, so it is perhaps not surprising that it would be done in a uniform manner and that the word of the Parlement of Paris would be followed. The text, however, opens with “It is custom in Champagne that...” and then explains the rule and then buttresses the rule with the case.

pleading before judges in the Châtelet in Paris and other lay courts, and is close to a *style*. Most of the text is devoted to the words exchanged in court or procedures that ought to be followed. When it does cite, this text also drew upon the custom of the area, one decretal, and numerous times to the custom of France.

The lesson that the *coutumier* authors learned from the law schools and from the scholastic method was that the mark of erudition was the general use of citation. This is why we see a general preoccupation with citation, reason, and justification.

CANON LAW

The *coutumiers* authors used both “learned laws” canon law and Roman law, in the composition of their texts.⁶⁷³ Roman law, however, was treated differently from canon law. In fact, many *coutumiers* authors evinced knowledge of the texts of canon law, or a good knowledge of the actual functioning of the ecclesiastical courts, or both. Not only that, they often used the canon law differently from Roman law.

Pierre de Fontaines, who both referred to practice in the lay courts and copied block quotations of from the Justinianic Code, only refers to canon law once. Probably. In his section on judgments, Pierre explains that no judgment ought to be made on a dispute where both the complaint and a reply have been heard, unless the lack of reply results in a party holding seisin for a year and a day, and that “law and *décrè* (decree/decretal?), are in accord with this, I

⁶⁷³ As Ken Pennington has argued, the term ‘learned law’ is unsatisfactory, as it implies that canon law and Roman law was contained to the universities, while many ideas acquired currency in practice (Pennington, Kenneth. “Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept” *Rivista internazionale di diritto commune* 5 (1994) 197-209. Also, the concept lumps together the canon and Roman law when these had enough differences that made them distinct.

believe.”⁶⁷⁴ This might be a reference to the Decretals of Pope Gregory IX (1234), and if so it is the only one in the text.⁶⁷⁵ Pierre did make use of canon law in more significant ways, but without citing it. For instance, he quotes from a French translation of Tancred’s *Ordo*, verbatim at times.⁶⁷⁶

Nonetheless, Pierre knows when he can use canon law sources because they are similar to or complement the practice of the secular courts, and he also knows when he should not cross the line in the sand between the practices of the two jurisdictions. For instance, in describing how to structure a complaint, Pierre notes that “We do not require or make in forming our complaints such great subtleties as the clerks do; but nevertheless we follow this form [*tel manière*].”⁶⁷⁷ He also notes the occasional similarity, the secular and ecclesiastical courts will occasionally have a common practice but call it by a different name.⁶⁷⁸

Pierre is knowledgeable about the practices of the church courts, but he delimits those practices that are particular to it. Pierre presents a fact pattern where he makes this overtly clear.⁶⁷⁹

A clerk is trying to redeem because of his kinship some land which one of his relatives has sold, and he prosecutes the suit for a long time in the ecclesiastical court, and without obtaining a judgment he goes to the secular court and sues there. The other party says he does not want to {have to} give an answer, because he has held the land without challenge for a year and a day. The clerk says he has not, for he has sued him in the ecclesiastical court. Now you are asking if the time of possession will be in the buyer's favor. And certainly it will; *for a person who is not suing in the proper forum for something is not suing properly.*

⁶⁷⁴ Pierre de Fontaines, *Conseil à un ami*, 21.12.

⁶⁷⁵ References to ‘laws and decretals’ are made the compiler of the *Etablissements*, and perhaps this is a similar reference.

⁶⁷⁶ Compare Pierre de Fontaine’s *Conseil*, chap. 25, sections on *litiscontestation*, with Tancred’s *Ordo* 1.3 (*De litis contestations*). See next section of this chapter.

⁶⁷⁷ Pierre de Fontaines, XXIV.1. Beaumanoir makes a similar comparison, with more detail, 196.

⁶⁷⁸ “And what we have said for us {the secular court} is the same as what clerks do “under protest” except that according to them, the principal party in the case can make a protest; but according to our practice, principal parties have no right to amendment when they themselves do the pleading” (Pierre de Fontaines, XII.8).

⁶⁷⁹ Pierre de Fontaines, XVII.9 [emphasis added].

There is clearly an idea of proper forum, of distinct jurisdiction that separated lay and ecclesiastical courts. Nonetheless, we can see that there was clearly some interaction between the two types of courts, and that practitioners were knowledgeable about what was happening in the other courts. Indeed, these practitioners probably had a lot in common and much they could compare. Elizabeth Brown has proposed that “similarities among the activities, interests and assumptions of lay people and ecclesiastics at different levels of society were far more striking and significant than the differences stemming from the fact of ordination.”⁶⁸⁰ Pierre shows us that there was at least knowledge and understanding, if not actual bonding, within the legal subgroup of the two groups.

In any case, Pierre was also aware of specific ecclesiastical rules and how they affect the secular courts. For instance, he devoted an entire chapter to the problem of the crusader who has been away for an extended period of time and what happens to the property he left behind.⁶⁸¹ In this chapter he noted what he considers exaggerated protections that the church provided crusaders, and does not seem to feel bound to respect these rules as part of a traditional ecclesiastical jurisdiction. In his own words: “And certainly, even though, in my opinion, their privileges do not extend so far as is sometimes said, namely that all their affairs are in the protection of Holy Church, and remain the same and unchallenged from then until their return or their death is known with certainty.”⁶⁸² Nonetheless, Pierre explains, the practice of the lay courts has often been to return to them the property that was transferred away from them, though a good judge would carefully weigh all evidence connected to sale or transfer and be sensitive to

⁶⁸⁰ Brown, Elizabeth A.R. “Laity, laicization and Philip the Fair of France” in *Law, Laity and Solidarities: Essays in Honor of Susan Reynolds* (Manchester: Manchester University Press, 2001) 209.

⁶⁸¹ Pierre de Fontaines, *Conseil à un ami*, 17.14.

⁶⁸² Pierre de Fontaines, *Conseil à un ami*, 17.14.

how difficult it could be for relatives to have a piece of property frozen for years while its lord was off on crusade.⁶⁸³

The compiler of the *Etablissements de Saint Louis* included citations to canon law alongside those to Roman law in the additions he made to the earlier texts from which he worked. The entirety of these citations to canon law refer to the Decretals of Gregory IX, which appear in the text when a particular point in a decretal agrees with the point the author is making.⁶⁸⁴ The later copyists of manuscripts Q, R and S added a prologue to this *coutumiers* that attributed the text to the king, and transformed it into a royal ordinance promulgated by the king before going off on crusade. Beyond this, these manuscripts also made the *Etablissements* the result of a powerful, if imaginary, process of redaction and agreement between different types of people involved in different types of laws: “and these laws were made after great consultation of wise men and good clerks, through the concordance of laws and canons and decretals, to confirm the good practices and ancient customs, which are adhered to in the kingdom of France.”⁶⁸⁵ These copyists were clearly advocating a close relationship between people of the church and the secular courts. This relationship was at its most tense exactly when they were copying their texts, around the first years of the fourteenth century, when the conflicts between Pope Boniface VIII and King Philip IV of France was raging, and authors such as John of Paris were writing⁶⁸⁶

The author of the *Coutumier d’Artois* copied from both Pierre de Fontaine’s *Conseil* and from the *Etablissements*, and takes a number of references directly from these sources. However, this authors does add some references of his own. Short snippets of Latin verse are found

⁶⁸³ *Ibid.*

⁶⁸⁴ “for the law is in agreement in the *Decretals*, On the homage of a serf, in the chapter *Dilectus filius*” (*Etablissements*, II.31). This is the scholastic form of citation, which the *Etablissements* compiler also follows in his citations of Roman law that he adds to the original text.

⁶⁸⁵ *Etablissements*, Prologue added in manuscripts Q, R and S.

⁶⁸⁶ John of Paris, *On Royal and Papal Power (De potestate regia et papali)*, trans by. J.A. Watt.

interspersed in this *coutumiers* on three occasions and, unlike the other *coutumiers* authors, this author likely did have some knowledge of Latin.⁶⁸⁷ The author does not tell the reader the source of this verse, which turned out to be drawn from three different *ordines iudicarii* by Marinus de Fano, Dino Mugellanus, and an anonymous Italian jurist.⁶⁸⁸ On one occasion, this *coutumiers* even quotes a text that has been remarkably absent in the other *coutumiers*, namely, the Bible.⁶⁸⁹

The jurisdictional contests witnessed by Philippe de Beaumanoir have been studied recently and in detail by Robert Jacob, who has argued for moving the debate about the *coutumiers* away from alleged relationship with the Roman law and *ius commune* more generally and for scholars to instead look at the tensions between local church and lay courts.⁶⁹⁰ His arguments will not be repeated here, except to say that when Beaumanoir mentions lay courts, he was differentiating their customs from those of the church courts.⁶⁹¹ In fact, he devoted an entire chapter to the jurisdiction of the lay court and another to the jurisdiction of the ecclesiastical court, and described these in detail to avoid jurisdictional confusion.⁶⁹² He is emphatically clear about the cases where “the secular courts should be in control, and Holy Church should not get involved.”⁶⁹³ As Jacob noted men of law in such small towns as Clermont-en-Beauvaisis must have known each other, talked ideas and compared the way their procedures and norms, and attended each other’s sessions, whether they tolerated each other’s work and jurisdiction or fought over it. Perhaps because of this proximity, it seems that justices on both sides were also

⁶⁸⁷ The compiler of the *Etablissements* may have as well, see next section of this Chapter.

⁶⁸⁸ “si s’ensieut par ces vers: Conditio, sexus, etas, discretio, forma, / Et fortuna, fides: in testibus ista requires; / Consanguinea partier domestica turba / Et clerus laicos ad se fugiat, et vice vera” (L.12, see also LI.6).

⁶⁸⁹ “et il est escrit en l’Evangile: in ore duorum, vel trium, stet omne verbum” (L.19).

⁶⁹⁰ Robert Jacob, “Philippe de Beaumanoir et les clercs. Pour sortir de la controverse du Ius Commune” *Droits: Revue française de théorie juridique, de philosophie et de culture juridiques* 50, no.2 (2009) 163ff.

⁶⁹¹ For instance, *Ibid.* II.91-92, VI.221, VII.248, XI.357.

⁶⁹² *Ibid.*, Chapter XI.

⁶⁹³ *Ibid.* II.340.

confusing which rules and procedures belonged to which court, and so confusing which ones they should apply—another reason to write out a chapter about jurisdiction in detail.

Beaumanoir was so knowledgeable about ecclesiastical jurisdiction yet so set on avoiding discussing it that, at one moment when he loses track of his topic and begins to address practices specific to the ecclesiastical courts that did not at all relate to the secular courts, he interrupts himself and puts an end to the discussion: “But when they plead against each other in an ecclesiastical court—we should not speak of that since we intend to speak only of the customs of secular courts.”⁶⁹⁴ This is a rare moment where we can glimpse how hard it was to confine discussion to just one jurisdiction or the other, even for sophisticated thinkers like Beaumanoir, who had a particular talent for compartmentalization.⁶⁹⁵

The most interesting source for thinking about the relationship between lay and church courts, and the relationship between lay custom, canon law and Roman law is undoubtedly the *Livre de Jostice et de Plet*, written by an unknown author in the 1260s or 1270s. In this text, the Roman law was disguised and repackaged as customary practice and common knowledge, while the canon law was cited overtly.⁶⁹⁶ The different treatment of these two in this text contains important lessons about how differently Roman law and canon law were perceived and used.⁶⁹⁷

The *Livre de Jostice et de Plet* is for the most part a long paraphrase of Justinian’s *Digest*. This *coutumier* may have been somehow related to the university of Orléans, which was known

⁶⁹⁴ “Mes quant il pledent li uns a l’autre en court de crestienté, il ne convient ja que nous en parlons pour ce que nous n’entendons a parler fors que des coustumes de la court laie” (*Ibid.*, XXIX.1211).

⁶⁹⁵ As we will see in the next section, Beaumanoir introduced the table of contents to his readers as a new and useful tool—another moment that shows the extent to which legal thinking was rapidly changing.

⁶⁹⁶ According to Rapetti the text dates from after 1260, but Gaudement notes that it may have been composed even after 1273 if it did indeed use the *Etablissements* as a source, as has been claimed (Rapetti, xiv, Gaudement, 176).

⁶⁹⁷ This text’s treatment of Roman law also carried an important lesson about how some Roman law ideas entered the stream of customary law incognito.

for teaching Roman law in the vulgar tongue and for its liberal commentary it.⁶⁹⁸ As Jean Gaudemet noted, of the 342 titles (organized in twenty books), 195 are liberal translations of the Digest, 31 are borrowed from Gregory's Decretals, 95 refer to customary rules (most of these are very brief, which makes customary law the least well represented), and 20 do not have an identifiable source.⁶⁹⁹ We only have one manuscript of this text, but it provides a key addition to how learned law was used by jurists in the latter half of the thirteenth century.

What matter about this text is not *that* the author used Roman and canon law, but *how* the author went about doing so. It has often been noted that that author of the *Livre* sought to hide his debt to the 'learned law'.⁷⁰⁰ The author seamlessly incorporates it and paraphrases it in the vernacular, without including citations to notify the reader that a certain passage may come from the Digest, and sometimes omits citation of Gregory IX's *Decretals* as well. Section after section and chapter after chapter of this long text use both Roman and canon law without cite or attribution to the original text, and only Rapetti's faithful footnotes show the reader the great extent to which the author relied on the learned laws.

There is one exception to this general lack of citation to the learned laws. Chapter ten, a chapter devoted to the topic of betrothal and marriage, is the one chapter of twenty that includes citations. In this one chapter, the author of the *Livre* provides a succession of brief quotations from *Decretals*, occasionally providing a brief additional comment providing additional information, explaining the rule, or noting an exception. Unlike all the other chapters, also, the author provides informative and faithful citations as to where he found the quotations he used, always giving the title of the decretal and the name of the pope who issued it. This means that the

⁶⁹⁸ Rapetti, xxxi. Gaudemet, 175-6.

⁶⁹⁹ Gaudemet, 176.

⁷⁰⁰ Rapetti, xx; Gaudemet, 177. In some places of the text there is some citation to decretals, though not most of the time.

author knew how to cite properly, in the traditional scholastic method, and could have provided reference information in other parts of his text, had he wanted to.

Chapter ten was then one chapter in the *Livre* that discusses matter that was specifically within the jurisdiction of canon law—betrothal and marriage—and this must be why this markedly different approach was taken. What is noteworthy is that the author felt that canon law, or the rules of the church courts, had to be addressed via quotations of papal decretals and reference information as to whence this information when he was discussing a topic specifically within ecclesiastical jurisdiction. On other occasions, in other chapters that were not concerned with issues within ecclesiastical jurisdiction, the author simply translated from the decretals alongside Roman law without any attribution whatsoever. The author seems to assume that he did not need to cite Roman and canon law if these were being used to describe the customs or procedures of the lay courts (in this case, not terribly faithfully since the description was based on Roman texts), but that he did need to cite the canon law sources he used to describe matters that pertained to the ecclesiastical jurisdiction. The author, then, implicitly acknowledged and respected the fact that church courts had different norms, a different jurisdiction, and a different approach to sources than that of customary law.

Not only did the author of the *Livre* choose not to provide reference information for his discussion of the secular courts but, as noted above, he completely elided any indebtedness to Roman and canon law in all the other chapters. Instead of the *romanitas* of the late-antique world, we find the Roman law in the *Livre* firmly entrenched in thirteenth-century France. Pierre de Fontaines and the *Etablissements* referred to *li empereurs*, various emperors of Rome whose names appear in the *Code* and who are quoted in these medieval texts, as though space and time were of little concern.

The author of the *Livre*, on the other hand, modernized the Roman-law terminology from the passages he borrowed. He made *praetor* into *bailli*, *praeses* into *prévôt*, *senator* into *seigneur*, *provincia* into *pays* or *terre*, *imperator* into *roi* or *reine*, and so on.⁷⁰¹ He also changed the names of the Roman jurists. Ulpian, Pomponius and Florentinus become Jean de Beaumont, Geoffroy de la Chapelle (*bailli* of Caux between 1227 and 1234), Renaut de Tricot/Tricort (*bailli* of Gisort in 1236), and Jehan Le Manoïere (*bailli* of Orléans in 1249).⁷⁰² Also, the long paraphrases of Roman law are broken up with modern-day tid-bits, be they real or fictional, that involve regular people such as a butcher in Orléans, a bourgeois from Crépi, a draper from Paris, a pastry chef of some town, and the mayor of Arras.⁷⁰³ Without a training in Roman law, there would be no way to know what or how much of this text was drawn from learned law. As for the canon law, it was acknowledged in the areas where it belonged, and was not shown to contribute to or influence the secular law.

CONCLUSION

Analysis of the *coutumiers* has focused on their relationship with the Roman law, be it via comparison, penetration or reception. Indeed, the relationship between Roman law and the *coutumiers* has even been compared to a colonial process, where Roman law ‘colonized’ the customary law and became its ultimate authority.⁷⁰⁴ While modern scholarship sets up an

⁷⁰¹ Rapetti, xx ; Gaudemet, 177.

⁷⁰² Rapetti, xx ; Gaudemet, 177. The choice of names, all from a previous generation of judges, is rather interesting.

⁷⁰³ Gaudemet, 178 ; “li bochier d’Orliens” (I, 2, 6), the “borjois de Crépi” (I, 6, 20), “li draper de Paris” (I, 3, 5), “li thalemlier d’une vile” (I.3.6) ; “li meres d’Arraz”.

⁷⁰⁴ Jacob makes the colonial comparison in passing, see Jacob, Robert. “Les coutumiers du XIIIe siècle ont-ils connu la coutume” in *La coutume au village dans l’Europe medieval et modern (Actes des XXes Journées Internationales*

antagonism between customary and Roman law, this is not the picture presented in the early *coutumiers* composed in the thirteenth and at the beginning of the fourteenth century.

The difference between the citation of authorities and of sources is significant. If we think that the *coutumier* authors were citing authorities, it means we think that the weight of the reference's influence exerted a powerful sway over the content of the text, and that these authors submitted to the ideas of their authorities and shaped their own text to conform to their authorities. In this case, we are discussing a culture of textual and conceptual deference that does not seem to accurately describe the thought world of the *coutumiers* authors. On the other hand, if we think they were citing sources, we think that they possessed the agency to assemble and create their own texts, and used other texts in the service of their own.

The *coutumiers* were using sources in a conscious and self-confident juristic project devoted to theorizing, describing and creating the dispute resolution customs of the secular courts. They were not servile followers of authority, but Harold Bloom's "figures of capable imagination" who appropriated for themselves to create something new.⁷⁰⁵ They took what the emperors has said, and what the jurists opined, and built up their own texts by selecting and collating sources as they saw fit, subjecting these sources to a strong misreading in order to reshape them for a new purpose.

d'Histoire de l'Abbaye de Flaran, Septembre 1998), edited by Mireille Moussier and Jacques Poumarède (Toulouse: Presses Universitaires du Mirail, 2001).

⁷⁰⁵ Bloom, 5.

CHAPTER V

Crafting Common Law in the Middle Ages

The language of geography and images of maps have long dominated our general understanding of French law in the high Middle Ages. While medieval English law is typically characterized by a nascent ‘common law’, medieval French law is typically characterized by a mosaic of different legal identities. Henri Klimrath established the first cartography of French medieval custom already in 1837.⁷⁰⁶ The most important feature of this map was the famed fault-line that ran more or less from La Rochelle to Lake Geneva and divided the *pays de coutumes*, the areas of Northern France governed by custom, from the *pays de droit écrit*, the areas of Southern France with a Roman-influenced law.⁷⁰⁷

An essential source for these cartographers of medieval custom was found in the *coutumiers*. These *coutumiers*, as noted previously, are commonly defined as private works that set the customs and usages of a specified region in writing and this area, ruled by a specific *coutume*, could be as small as a particular castellany or as large as a whole duchy.⁷⁰⁸ These texts

⁷⁰⁶ Henri Klimrath, *Études sur les coutumes* (Paris, 1837).

⁷⁰⁷ Jean Hilaire, *La vie du droit* (Paris, 1995) p. 157. For a good introduction to the “two zones” of France’s juridical map at their relationship to Roman law and to custom, see Guillot *et al* (Olivier Guillot, Albert Rigaudière and Yves Sassier, *Pouvoirs et institutions dans la France médiévale: Des temps féodaux aux temps de l’état* (Paris, 1994), pp. 139 ff.). This line between the two zones is now understood to have been rather blurry and pock-marked in the thirteenth century and into the fourteenth, with enclaves of the other ‘system’ on either side (*Ibid.*, p. 140). Jean Hilaire has also critiqued this map for being essentially judicial. He notes that the ambit of custom may better be seen by looking at notarial practice which, at least in the South, is an awkward match for Klimrath’s map (see Hilaire, p. 159). The disjunction between judicial and notarial maps should, in itself, lead us to question a unified customary law indexed to specific territory.

⁷⁰⁸ John Gilissen, *La coutume (Typologie des sources du moyen âge occidental)* (Turnhout, 1982), p. 86; Guido Van Dievoet, *Les coutumiers, les styles, les formulaires et les ‘artes notariae’* (Turnhout, 1986), p. 13; Esther Cohen, *The Crossroads of Justice: Law and Culture in Late Medieval France* (Leiden, 1993), p. 28.

are seen as artifacts of the shift to territoriality of law, the culmination of the story of an oral and personal custom that ‘crystallized,’ was tied to a specific territory and came to be designated by that territory.⁷⁰⁹

Klimrath had worked by deduction from the geographic indicates in the *coutumiers* and from the limits of the regional Parlements in pre-revolutionary France. The problematic nature of this method is quite clear — custom, legal practice and geographic boundaries had undergone some notable changes between the thirteenth and the eighteenth centuries.⁷¹⁰ In the 1960s, Jean Yver adjusted this customary map for Northern France in his *Géographie Coutumière*, where he amended the territorial delimitation of the customs and gathered them into affiliated groups.⁷¹¹

As John Hudson has noted, much of the scholarly attention paid to medieval secular law in France has focused on these geographical aspects because of the later importance of regional custom in the development of French law.⁷¹² Notions of what ‘common law’ means and has meant has also been a contributing factor. It is still commonly thought that, if there was a ‘common law’ in France in the middle ages, it was the pan-European *ius commune* composed of Roman and canon law. While this has been challenged, and the existence of a ‘common customary law’ acknowledged by many scholars, scholarship has focused on the particular

⁷⁰⁹ Gilissen, 33. Also see generally Guterman, Simeon L. *From Personal to Territorial Law: Aspects of the History and Structure of the Western Legal-Constitutional Tradition* (Metuchen, New Jersey: The Scarecrow Press, 1972).

⁷¹⁰ An excellent case study of these geographic changes may be found in Daniel Power’s analysis of Normandy, see Daniel Power, *The Norman Frontier in the Twelfth and Thirteenth Centuries* (Cambridge, 2004), pp. 148-151.

⁷¹¹ Jean Yver, *Égalité entre héritiers et exclusion des enfants dotes, Essai de géographie coutumière* (Paris, 1966). Yver’s method was to follow a specific rule of inheritance—the equality of heirs in inheritance, and the exception that dowered children were excluded from inheritance—and then to see to what extent it made a mark on the various regions of the *pays de coutumes*. Yver has also argued that instead of discussing individual customs, we need to see them instead as part of customary groupings. See also Jean Yver, ‘Les caractères originaux du groupe de coutumes de l’ouest de la France’, *Revue historique de droit français et étranger*, 30 (1952): 18-79. Paul Ourliac and Jean-Louis Gazzaniga offer a useful updated summary in their discussion of the ‘juridical map’ of these customary grouping (“Essai de géographie juridique” in Paul Ourliac and Jean-Louis Gazzaniga, *Histoire de droit privé français, de l’an mil au Code Civil* (Paris, 1985), pp. 81-120).

⁷¹² John G.H. Hudson, ‘Customs, Laws and the Interpretation of Medieval Law’, in Per Andersen and Mia Münster-Swendsen (eds.), *Custom: The Development and Use of a Legal Concept in the Middle Ages* (Copenhagen: DJØF Publishing, 2009), p. 9.

instance of the term ‘common law’ (*droit commun/ ius commune*) in legal treatises and court records.⁷¹³ H. Patrick Glenn, in a broad study of the concept of common law, also recently made the point that the notion of ‘common law’ historically extended beyond the *ius commune* and the English common law.⁷¹⁴ However, the implications of a French common law for other orthodoxies of French legal history have not yet received considerable attention. For instance, where did this ‘common law’ come from? What does it mean for the narrative of regional custom?

This chapter will discuss the movement of legal ideas amongst the lay jurists who wrote about the laws and customs of the secular courts of thirteenth-century France and how, in writing ‘regional’ customs, they participated in the creation of a French common law. While at first glance the *coutumiers* may seem like the quintessential representatives of an inward-looking local legal identity, the textual practices of the lay jurists who composed these texts reveal that the *coutumiers*, as a group, were seen and used as a common pool of legal knowledge that transcended regional boundaries. Together, these texts formed a pool of knowledge from which to draw upon in the composition of subsequent *coutumiers* and, one might say, a sort of *ius commune* for the lay courts.

⁷¹³ See below, section titled ‘The *Droit commun* Debate.’

⁷¹⁴ Glenn, H. P. *On Common Laws* (Oxford: Oxford University Press, 2005) p. vii.

THE LANGUAGE OF CUSTOM

The *coutumiers* were different from the legal writing that preceded them because they were written in the vernacular.⁷¹⁵ Earlier legal writing was only accessible to the Latin-literate. The *coutumiers* presented, for the first time, the voice of the lay practitioner describing and even theorizing the practice of the customary law of the secular courts in the vernacular, and one of the clues that they did, in fact, exercise these new abilities can be found in the language of the texts.

Not everyone spoke the same French in the thirteenth century. The various dialects included Picard, Champenois, Orléanais, Tourangeau, Poitevin, Normand, Francien, to name a few. Even before the expansion of the French crown in the thirteenth century, however, the French from the royal domain and especially from the Paris region (Francien) was understood by many to be superior to other dialects.⁷¹⁶ As spelling was not standardized, we can say something about the origin of each *coutumier* manuscript by looking at the dialect in which it was copied.

The affinity between law, language and geography popularized in the nationalisms of the late-eighteenth and nineteenth centuries does not map onto these medieval texts. Though they are supposed to be regional customary texts, many *coutumiers* manuscripts were written in the

⁷¹⁵ There were some cases of texts being written in Latin and then translated into the vernacular, such as the *Sachsenspiegel* (1235) or the *Très Ancien Coutumier de Normandie* (1199?/1204?).

⁷¹⁶ For more on dialects, see *Ibid.*, 62ff. Interestingly, until the twelfth century, the vernacular is referred to as “romana lingua” or “roman,” but during the twelfth century “franceis,” and later “françois” begin to overtake it (*Ibid.*, pp. 221-2). Lusignan recounts an episode from the miracles of Saint Louis collected by Guillaume de Chartres soon after 1290, where a deaf and dumb man from Bourgogne went to pray at Saint Louis’ grave in Saint Denis to recover these senses. Then a miracle occurred. He recovered the ability to speak, and Saint Louis added the perk of speaking it properly—instead of recovering the Bourguignon dialect, he recovered good Parisian French! (*Ibid.*, p. 21). Other than Francien, Picard was the most widespread rival dialect (*Ibid.*, p. 225).

Francien dialect.⁷¹⁷ Francien is actually the most common dialect between the different *coutumiers*. The thirteenth-century *coutumiers* all have at least one manuscript in Francien. The use of this dialect can mean two things. Either the authors or copyists in the regions wanted to ennoble their texts by using “superior” Ile-de-France French, or the copyist was a native Francien speaker. Both situations prove that the extra-regional appeal of the *coutumiers* — the first, because using an outside dialect implies an audience outside the region, and the second, because the text had clearly already passed into an outsider’s hands.

Francien is not the only extra-regional dialect in which the *coutumiers* appear. Most *coutumier* have manuscripts in dialects that are unrelated to their affiliated region, and even include some southern dialects.⁷¹⁸ This mixture of languages would not be possible if these texts were of purely local interest. It goes beyond an isolated instance and indicates a community practice—texts, jurists and copyists all must have been mobile, and the different dialects used in the copying of the *coutumiers* must attest to the extra-regional appeal of these texts.

SHIFTING TERRITORIALITY

Lay jurists were, in fact, treating these texts of customary law as a creative commons from which they could draw if they wanted or needed. The practice of copying from one

⁷¹⁷ The oldest translation of the *Statua et Consuetudines Normannie* into French that we have was written in the Ile-de-France dialect, and not written in the Norman dialect (‘Introduction’, in *Coutumiers de Normandie, Textes Critiques*, ed. Ernest-Joseph Tardif, (2 vols, Paris, 1903), vol. 1, part II, pp. xl, l). The earliest extant version of Pierre de Fontaine’s text, copied between 1260-1280, is also in the language of the Ile-de-France (‘Introduction’, Pierre de Fontaines, *Le conseil de Pierre de Fontaines, ou traité de l’ancienne jurisprudence française*, ed. M.A.J. Marnier (Paris, 1846), p. xxxi). Philippe de Beaumanoir’s text is written in both the Ile-de-France dialect and in Picard.

⁷¹⁸ Manuscript M of Pierre de Fontaine’s work is written in a southern dialect (Pierre de Fontaines, p. xxxvii). The *Coutumier d’Artois* is the only one written in dialects not connected to the Ile de France, but in the Artois and Picard dialects (‘Introduction’, *Coutumier d’Artois*, ed. Adolphe Tardif (Paris, 1883), p. xvi). The difference is visually significant—gages and waiges, manaces and manaiches, suer becomes sereurs, ect.

coutumier to another begins soon after the first few *coutumiers* are written mid-13th century, and continues with vigor well beyond. While each *coutumiers* is conventionally indexed to a specific territorial unit, the manuscript tradition indicates that the texts were subject to a shifting territoriality, in other words, legal transplanting or *métissage*. It was common practice amongst the *coutumier* authors to copy entire portions of earlier customary texts, often with other regional labels, in the composition of their own *coutumier*. This suggests that the *coutumiers*, and the customs within, were subject to transplant and cross-pollination, and further suggests they were part of an organic process of the movement of ideas, ideas that were understood to have a more general application.

Alan Watson has noted that even customary law may be the subject of legal transplant.⁷¹⁹ H. P. Glenn has noted the movement of the *Sachsenspiegel* and the laws of some cities, such as Magdeburg, beyond their original geographic ambit.⁷²⁰ Nonetheless, modern commentators have reacted to this practice largely with feelings of disdain. Unlike the citation of Roman and Canon law, which is regarded as a reverent citation of authority—whether or not it is attributed—the practice of copying portions of one *coutumier* into another has largely been evaluated through vague notions of intellectual hypocrisy and cultural plagiarism. After all, how can you take the customs of one region and say they are another’s?

According to Peter Edwards, Philip of Novara’s work was “plagiarized” by later authors.⁷²¹ Guido Van Dievoet, in turn, claimed that the *Livre des droiz et des commendemens d’office de justice* of Poitou “shamelessly pillages” the *Établissements de Saint Louis* to compose its text, and Jean Boutillier’s *Somme Rurale* and the *Coutumier d’Artois* both also take selections

⁷¹⁹ In the Appendix to the second edition (Watson, Alan. *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens, Georgia: University of Georgia Press, 1993) 114).

⁷²⁰ Glenn, H. P. *On Common Laws* (Oxford: Oxford University Press, 2005) 38.

⁷²¹ Philip of Novara. *Le livre de forme de plait*, trans. by Peter Edbury (Nicosia : Theopress Ltd., 2009) 6.

from the *Établissements* and copy them into their own text.⁷²² The *Demenées el Chastelet de Paris* was also used by the redactor of the *Grand Coutumier de France*.⁷²³ As Van Dievoet notes, all of these texts use the work of their predecessors without citing them.⁷²⁴ The “harm” (*mal*) would not be so great, he notes, if these *coutumiers* had contented themselves with using the customs from their own regions—but they did not.⁷²⁵

Thus, while the author who copied from texts of Roman and canon law is seen as making an appeal to an authority and aspiring to something better, the author copying from a *coutumier* is seen at best as uninventive and at worst disingenuous, a thief of custom and identity. The cognitive disconnect in understanding the medieval lay jurist’s approach to custom seems to be related to modern almost instinctual feelings about customary law as *volksgeist* and a sense of a type of authenticity it should have. As this section will demonstrate, the medieval lay jurist did not share this anxiety.

It must be noted that the *coutumiers* do to some extent give the impression of fixity of place. The texts do not have titles in the modern sense, but generally open by defining the nature of the text. For example, the text that describes the customs of Champagne opens by explaining “This is the book of rights and customs of Champagne,” and throughout the text the author attributes rules to that region by saying that “it is custom in Champagne,” one of the manuscripts ends by saying “Here end the customs of Champagne.”⁷²⁶ Generally, a *coutumier* will include this form of regional attribution either at the beginning of the text, in its discussion of specific

⁷²² Van Dievoet, 43. See Van Dievoet for more examples of the practice outside of France (*Ibid.*, 44).

⁷²³ Mortet, C. “Seconde Partie: Étude du texte” in *Le livre des constitutions demenées el Chastelet de Paris*, ed. by C. Mortet, in *Mémoires de la Société de l’Histoire de l’Ile-de-Paris* 10 (1883) 19. [hereinafter “*Demenées el Chastelet de Paris*” or “*Demenées*”]

⁷²⁴ Van Dievoet, 43.

⁷²⁵ “S’ils s’étaient limités aux coutumiers ou aux styles de leur region, le mal ne serait pas grand” (*Ibid.*).

⁷²⁶ “C’est li livre de drois et des costumes de Champegne” (*L’ancien coutumier de Champagne (XIIIe siècle)*, ed. Paulette Portejoie (Poitiers, 1956), p. 131); “il est coustume en Champane” (*Ibid.*, II, V, ect); this explicit occurs only in Portejoie’s manuscript A where it says “ci faillent les coustumes de Champaigne” (*Ibid.*, p. 230).

rules, or within the last few sentences. Based on such geographic clues, each *coutumier* is understood to map onto a specific regional delimitation: Pierre de Fontaine's *coutumier* concerns the Vermandois, Philippe de Beaumanoir's *Coutumes de Beauvaisis* discusses the custom of the Beauvaisis, the *Établissements de Saint Louis* contain the customs of Touraine and Anjou in Book I and the customs of Orléans in Book II, and the various anonymous texts are specific to Artois, Normandy, Champagne and Touraine and Maine.

The manuscript tradition of these texts tells a different story. In fact, the different manuscripts do not always agree about the identity of the region to which a specific set of customs attached. This can be seen clearly by looking at the manuscript tradition of the *Établissements de Saint Louis*. Paul Viollet's critical edition of the *Établissements* is divided into two parts. Part I contains the customs of Touraine and Anjou (*Usages de Touraine et d'Anjou*), while Part II contains the customs of the Orléans region (*Li Usages d'Orlenois*).⁷²⁷ However, not all manuscripts present the same picture. Instead, they tie the same text to different territory.

Book I of the *Établissements* is commonly known as the *Usages de Touraine et d'Anjou*.⁷²⁸ Some manuscripts, however, do not designate them as the customs of Touraine-Anjou at all and, instead, they present Book I as the first part of the king's *établissements* according to the usage of Paris and Orléans.⁷²⁹ This means that the regional customs of Touraine

⁷²⁷ Viollet does not break up the two parts of book one, while F.R.P. Akehurst separates the royal ordinances from the Customas of Touraine and Anjou in his translation (*Les Établissements de Saint Louis*, ed. Paul Viollet (4 vols, Paris, 1881); *The Etablissements de Saint Louis: Thirteenth-Century Law Texts from Tours, Orléans, and Paris*, trans. F.R.P. Akehurst (Philadelphia, 1996) [hereinafter "*Etablissements*"]).

⁷²⁸ Book II is pretty uncontroversial—the customs of Orléans are sometimes attributed to Orléans alone, sometimes to both Orléans and Paris: "*L'usage dou Chatelet d'Orliens en cort de baronnie*", "*L'usage d'Orlenois et de Paris*", and "*L'usage dou chatelet de Paris et d'Orliens*" (*Etablissements*, p. 327 note 7). That the same customs might be attributed sometimes to Orléans, and sometimes to Orléans and Paris is not very startling as both of these cities had long been part of the royal domain.

⁷²⁹ The title of the customs of Touraine-Anjou are drawn from the explicit. The text that Viollet chose is from the manuscripts that end with: "The usages of Touraine and Anjou finish here (*Ci fenist li Usages de Touraine et d'Anjou*)" (*Etablissements*, I.175). Other manuscripts, however, close Book I with "The first books of the Establishments of the king of France according to the usage of Paris and Orléans and baronial court end here (*Ci*

and Anjou, a cultural and geographic space distinctly separate from the royal domain, were being passed off as the customs of the royal domain. If the customs of the various regions are indeed so distinct, this would be jarring to any contemporary. Would such a book not be useless to litigants, lawyers, and judges? If we conceive of custom, as recorded in the *coutumiers*, as deeply imbedded in territorial identity, it is notable that the same rules could be attributed to such culturally different areas as Touraine and Anjou were from Paris and Orleans.

The shifting territoriality of these texts goes beyond this one instance. The first nine provisions of Book I were actually royal ordinances.⁷³⁰ We know this from unrelated works, not from the *Etablissements*. The *Etablissements* incorporate the royal ordinances into the customs of Book I without ever mentioning that they were royal ordinances.⁷³¹ Here, royal decree was being presented as regional custom.

Viollet's investigations led him to see yet another extraterritorial connection. He found that the contents of the customs of Touraine-Anjou in the *Établissements* largely correspond to the Customs of Anjou and Maine (*Coutume d'Anjou et Maine*), about thirty years its junior.⁷³² Actually, the *Coutume d'Anjou et Maine* basically became Book I of the *Établissements* (or the customs of Touraine-Anjou, depending on the manuscript). There is so little variation between the two texts — twenty-four insertions are made in approximately one hundred and fifty chapters — that Beautemps-Beaupré's statement that the *Usages de Touraine et d'Anjou* in the

fenist li premiers livres des Establissemenz le roi de France selon l'Usage de Paris et d'Orliens et de cort de baronie)" (*Établissements*, pp. 325, 325 note 7).

⁷³⁰ See Viollet, vol.1, pp. 5-8.

⁷³¹ Viollet points this out in his introduction (*Ibid.*), but does not separate the first nine provisions from the text that follows and kept the text united, as presented in the manuscripts (see Viollet, vol. 2, p.19). Akehurst opens Book I with the first nine provisions under the title "The Rules of Procedures in the Châtelet", and provision ten onwards are separated and placed under the title "The Customs of Touraine and Anjou" (Akehurst, pp. 7, 15)

⁷³² Viollet, vol. I, pp. 8-33. See *Coutumes d'Anjou et du Maine*, in *Coutumes et institutions de l'Anjou et du Maine antérieurs au XVIe siècle*, ed. C.-J. Beautemps-Beaupré (Paris, 1877), vol. 1, pp. 64-176. The *Coutumes d'Anjou et Maine* correspond to provision ten onwards of Book I, and pre-date the royal ordinances mentioned above.

Établissements is in fact the glossed version of *Coutume d'Anjou et Maine* is not a rhetorical flourish.⁷³³ In this process, the identity of the text changed. While the attribution to Anjou remained, the earlier customs of Maine and were transposed to Touraine.

Viollet explained this away by saying that the juridical nuances that separated Touraine and Maine were probably not important enough for this fuzzy territoriality to be a problem.⁷³⁴ This may be true, but it does not explain why so many authors of subsequent *coutumiers* used the *Établissements* — the customs of Touraine, Anjou and Orléans — in writing their own work.

Historians have often dismissed the *Établissements* for its crudeness and lack of sophistication, giving the text little attention in comparison to Beaumanoir's refined work. In the Middle Ages, however, it was the former that captured the interest of contemporaries. As the copying practices attest, the *Établissements* was possibly the most popular French *coutumier* of the thirteenth century. We can see the influence of this text on the customs of Brittany, Champagne, Artois, Picardy, even in Beaumanoir's erudite *Coutumes de Beauvaisis*.⁷³⁵ Tellingly, an abridged version of the *Établissements* pops up in Champagne, and this new abridged version of the customs of Touraine-Anjou-Orléans holds itself out to be the customs of both France (in the sense of the royal domain) and of Champagne.⁷³⁶ In the first years of the fourteenth century, the *Établissements* even makes its mark on the South, in Poitou, where a jurist glosses the text.⁷³⁷

The text we call the *Etablissements de Saint Louis*, then, was a composite work composed by collating two royal ordinances with larger works on custom written by earlier

⁷³³ Beautemps-Beaupré, 'Observations sur les textes A, B et C', vol. I, p. 15.

⁷³⁴ *Ibid.*, 23. Viollet has convincing arguments for seeing the *Coutume d'Anjou et de Maine* as the work of a royal officer as well.

⁷³⁵ Viollet, vol., pp. 280-394.

⁷³⁶ See *Abrégé Champenois* in *Établissements*, vol. 4, pp. 141-187.

⁷³⁷ Geneviève Hasenhor and Michel Zink (eds.), *Dictionnaire des lettres françaises, Le Moyen Âge* (Paris: Fayard, 1992), p. 418.

jurists, and partially reassigning the customs of one location to a new one. Not only did the lay jurist who compiled the *Etablissements* reorient the customs of Anjou and Maine as those of Anjou and Touraine, afterwards, other lay jurists then spread his text far beyond its original ambit of Anjou, Touraine and Orléans.

JURISTIC DIALOGUE

While the compiler of the *Etablissements* used the entire texts of earlier *coutumiers* wholesale, the more common practice amongst lay jurists composing a customary treatise was to use selections from the *coutumiers* from which they copied. This was the case of the *Coutumier of Artois*, composed sometime between 1283 and 1302.⁷³⁸ The two major sources for this text are Pierre de Fontaine's *Conseil a un ami*, a *coutumier* based on the Vermandois written in 1253, and the *Etablissements de Saint Louis*, discussed above. The majority of the text is of the author's own composition, with sections of Pierre's *Conseil* or of the *Etablissements* appearing intermittently.

The prologue of the *Coutumier d'Artois* is the most indebted part of the text. In fact, with the exception of one paragraph, the entire longish prologue is pulled directly from Pierre de Fontaine's *coutumier*, ostensibly based on the region of Vermandois. It is not quoted or cited, the text is incorporated as though it had originally been written for this text.

If one has read Pierre de Fontaine's *Conseil*, the copying is easy to spot. In his Prologue, Pierre de Fontaines explains that he is writing down the laws and customs of the *pays*, or the region, at the request of a friend. He then exhorts those who will see the written text of the

⁷³⁸ Tardif, Adolphe, ed. *Coutumier d'Artois* (Paris: Picard, 1883).

Conseil (qui orront par escrit le conseil) not to judge him too severely if he included too much of some things and too little of others.⁷³⁹ One of the reasons he should not be judged too harshly for these shortcomings, Pierre explains, is that no one before him has undertaken such a task, he is the first and has no example to work from.⁷⁴⁰

Pierre then goes on to encourage the future readers of his work to amend the text as they see fit. Specifically, Pierre said:⁷⁴¹

And it would be very pleasing to me that they make their amendments, if they see that it will be useful. And let them well know that where they make amendments, they will make something *more* worthy of praise than I did. For, as the law says, he who skillfully amends a previous work does something more praiseworthy than the one who created it.

Pierre, then, encouraged future readers to change the text that he wrote— as long as the change constituted an improvement— and praised skillful amending above the actual original writing of the text. The notion of using a customary text and changing it was actually present in one of the sources which the author of the *Coutumier d’Artois* used to construct his own text.

In fact, the author of the *Coutumier d’Artois* seemed to respond directly to Pierre’s invitation to amend and improve. The one section of the Prologue that the author wrote himself is a defense of brevity—he explains that he put the laws and customs of the lay courts of the region in writing, but that he did so with brevity because “memory is fleeting and things soon forgotten, and it is not enough to try to remember many things, because new things take away the

⁷³⁹ Pierre de Fontaines. *Le conseil de Pierre de Fontaines, ou traité de l’ancienne jurisprudence française*, edited by M.A.J. Marnier (Paris: Durand, 1846) Prologue.

⁷⁴⁰ *Ibid.* Pierre here is implying that the common practice of contemporary jurists would be to work from example. And what is this thing that no one has done before (in Pierre’s knowledge)? It seems that he is saying that he is the first to write a text devoted to the laws and customs of the lay courts. His is not the earliest text in the vernacular, the *Coutumes d’Anjou et Maine* were written before. The treatise attributed to Glanvill and the two earlier treatises devoted to the customs of Normandy also precede his, but these were written in Latin which he probably did not read. He either did not know about these texts, or thought he was doing something fundamentally different.

⁷⁴¹ *Ibid.*

memory of old ones.”⁷⁴² People remember better what is short than what is long so, he explained, it “profits my book to speak briefly instead of at length.”⁷⁴³ The author of the *Coutumier d’Artois* must have been replying directly to Pierre de Fontaine’s words here. This one-paragraph addition to the prologue is an argument for why he made the changes he did, and how they constitute an improvement.

The technique used by the author of the *Coutumier d’Artois* echoes those employed by the compiler of the *Etablissements de Saint Louis*—both of these lay jurists adopted portions of other *coutumier* and adapted them into their own text. The author of the *coutumier d’Artois*, however, did not simply use the text of another lay jurist. He was clearly in conversation with Pierre de Fontaines, and his use of Pierre’s text formed part of a living exchange of ideas. He was consciously building upon Pierre’s work, a reusing and recycling in a common endeavor, a common practice, and continuing dialogue.

By spreading individual *coutumiers* beyond the ambit of one region, these jurists were creating dialogue between the local laws and customs. In doing so, they were creating juristic communities based on common textual practices and, one might even say, on a coherent methodological approach. In effect, they were treating the *coutumiers* as though they formed a common pool of legal knowledge from which to compose texts of customary law.

⁷⁴² *Coutumier d’Artois*, Prologue 4.

⁷⁴³ *Ibid.*

JUDICIAL ABSTRACTION AND A ROYAL CONNECTION

This use of texts of customary law as a pool of common customary legal knowledge is closely connected to a movement towards judicial abstraction that was occurring during this period. ‘Judicial abstraction’ is a term coined by Alain Boureau to describe the dynamic process whereby the complex and diverse situations that give rise to conflicts are generalized and formalized.⁷⁴⁴

There seem to have been two main factors that contributed to the movement to judicial abstraction reflected in the *coutumiers*. On the one hand, the answer must at least partially lie in the expansion of royal power and of the territorial state. On the other, the intense secular legal activity of the thirteenth century seems to contribute to the development of the generalizable norm.

The writing of the first *coutumiers* in the second half of the thirteenth century occurs simultaneously with the cementing of the links between royal power and the territory with which it is identified—the king shifts from *rex Francorum* to *rex Franciae*, and ‘France’ is constituted as a space.⁷⁴⁵ The swift establishment of royal sovereignty no doubt went hand in hand with the expansion of jurists entering the royal service and of juridical study generally.⁷⁴⁶ As Jacques

⁷⁴⁴ Boureau, Alain. *La loi du royaume. Les moines, le droit et la construction de la nation anglaise (XIe-XIIIe siècles)* (Paris : Belles Lettres, 2004) p.18-19.

⁷⁴⁵ Daniel Nordman and Jacques Revel, « La formation de l'espace français », dans *Histoire de la France*. 1. L'espace français, 2000 (Paris, 1989), p. 71, 72. By 1254 the king has shifted from *rex Francorum* to *rex Franciae* in the acts of the royal chancellery, and this evolution seems to be complete by 1300 (*Ibid.*, p.71).

⁷⁴⁶ Krynen, Jacques. *L'empire du roi. Idées et croyances politiques en France XIIIe-XVe siècle* (Paris : Gallimard, 1993) p. 69ff.

Krynen has noted, the royal power cemented its grasp on the kingdom primarily through justice, by insisting upon the judicial sovereignty of the king.⁷⁴⁷

The *Établissements* are the only thirteenth-century French *coutumier* specifically attributed to a king. There is good reason to think that this royal attribution might be linked to the shifting regional affiliations in the different manuscripts. Louis IX (1226-70) was not just any king. His concern for justice was legendary. Canonized soon after his death, he became Saint Louis, whose words and deeds were to be revered and emulated as a sort of informal constitution.⁷⁴⁸ This *coutumier*, it is true, was the work of a redactor who copied and pasted previous texts to create the patchwork known as the *Établissements*. It was probably a later copyist who attributed the text to the king. Only three manuscripts contain this attribution, but it was the one that had captured popular imagination, even inspiring a poem.⁷⁴⁹ It was only in the nineteenth century that scholars began doubting the royal authorship of this text.⁷⁵⁰ Previously, as far as we know, it was generally considered as a representation of Saint Louis' will, if not authorship.

The *Établissements* seems to have been the best travelled *coutumier*, as demonstrated in its geographic spread outlined above. The remarkable shifting territoriality of this text must largely be due to its royal connection. In the manuscripts attributing the text to Louis IX, the personal charisma of this unique king as well as the powerful *post mortem* mythology that enveloped his character undoubtedly played a part. In those that did not share this royal

⁷⁴⁷ *Ibid.*, p.252.

⁷⁴⁸ William Chester Jordan has noted that Saint Louis' life in fact became the unwritten constitution of medieval France in his concluding words to the *Law, Justice and Governance: New Views on Medieval Constitutionalism*, organized by Prof. Richard Kaeuper at the University of Rochester, Rochester, New York, April 2-4, 2009.

⁷⁴⁹ "Chanson sur les Établissements du roi Saint Louis" in Antoine Leroux De Lincy, 'Chansons historiques des XIIIe, XIVE et XVe siècles', *Bibliothèque de l'école des chartes*, 1/1 (1840): 359-388. This poem was a lament about the legal changes brought in by Louis IX.

⁷⁵⁰ Viollet, I:1.

attribution, the traditional bastions of royal power—Paris and Orléans—were mentioned often enough to give the text the support of royal authority.

This can also be seen in other texts. Manuscript M of Pierre de Fontaines' *Conseil à un ami*, copied between 1280 and 1300, is one example.⁷⁵¹ It states that the text records “the customs of France and of Champagne and of Vermandois and of other lay courts.”⁷⁵² This attribution generalizes the customs from Vermandois to other lay courts and, beyond that, it also makes the particular customs of Vermandois those of the royal domain and of Champagne.

It is tempting to see a direct correlation between the expansion of royal power and the shifting territoriality of these texts. However, some *coutumiers* show that shifting territoriality could also occur when there was no discernable royal connection. Thus, while expanding royal power and the territorialization of the French kingdom could explain the movement of custom and customary text, movement when there was no royal connection seems to have been due to the increasingly abstract thinking of jurists who participated in, wrote about, and theorized the activity of the lay courts.

Pierre de Fontaine's *Conseil à un ami* was also subject to this sort of judicial gerrymandering of legal ideas, though in this case the movement did not seem to show a royal connection. Philip of Novara seems to have used it for his lawbook written for the crusader kingdoms in Cyprus and Jerusalem, *Livre à un sien ami en forme de plais* (c. 1264), which he also styled as advice to a friend. The *Coutumier d'Artois*, furthermore, copies extensively from Pierre's *Conseil*. The *Coutumier d'Artois* copies entire passages verbatim, including the part in Pierre's Prologue where Pierre claims to be doing something new that no one before has done.

⁷⁵¹ For more on manuscript M, see Marnier, 'Introduction', p. xxxvii.

⁷⁵² “les costumes de France et de Champaingne et de Vermandois et d'autres corz laies” (Pierre de Fontaines, p. 4 note 1)

The *Conseil* continues to be used for other works in the fourteenth century — passages are quoted in the *Somme rurale* and in the *Coutumier de Charles VI*.⁷⁵³ Another version of the *Conseil*, probably a little later, appears translated into Dutch.⁷⁵⁴

This shifting territoriality also appears in the manuscript tradition of the *Coutumes de Beauvaisis*. Robert Jacob has noted in passing that the prologue and the conclusion to Beaumanoir’s work announce slightly different goals—customs of the Beauvais region, and customs of the county of Clermont.⁷⁵⁵ Beaumanoir states that he is writing his book, on the customs of Beauvaisis, so that Robert the count of Clermont can know how he should keep the customs of the county of Clermont, and Jacob is certainly correct that the text seems to vacillate between the two.⁷⁵⁶ This may indicate the difficulty of writing a purely regional custom without drawing on those of other regions. This difficulty is evident from the beginning of Beaumanoir’s work, where he explains in his prologue that in order to write his *Coutumes de Beauvaisis* he will draw from the judgments of neighboring castellanies as well as the law common to the kingdom of France.⁷⁵⁷ This, in turn, indicates the composite nature of written custom and the generative role of the *coutumiers* authors.

⁷⁵³ Marnier, ‘Introduction’, p. xliii.

⁷⁵⁴ Paul Collinet, ‘Une traduction néerlandaise inédite du Conseil de Pierre de Fontaines’, *Compte rendu des séances de la commission royale d’histoire*, 70 (1901): 408-419. The manuscript (Bibliothèque royale de Bruxelles m.s. 16775) is from the fifteenth century, and it contains various texts relating to the political history of Flemish cities in the thirteenth and fourteenth centuries (*Ibid.*, pp. 409-10). Collinet does not give a potential date for the translation itself, though he says the manuscript is undoubtedly a copy of an earlier one (*Ibid.*, p. 413).

⁷⁵⁵ Robert Jacob, ‘Beaumanoir versus Révigny: The Two Faces of Customary Law in Philip the Bold’s France’ in *Essays on the Poetic and Legal Writings of Philippe de Remy and his Son Philippe de Beaumanoir of Thirteenth-Century France* (Lewiston, 2001), p. 271.

⁷⁵⁶ “par cest livre pourra il estre enseignié comment il devra garder et fere garder les coustumes de sa terre de la conteé de Clermont” (Philippe de Beaumanoir, Prologue, 3).

⁷⁵⁷ Philippe de Beaumanoir, Prologue, 6.

A more interesting case of shifting territory concerning Beaumanoir shows up in a fourteenth-century abridged version of his text.⁷⁵⁸ This abridged version slices off the Prologue, excises Beaumanoir's name from the text, removes passages that refer to the Beauvaisis, changes references to the count of Clermont to "the sovereign," and in so doing removes any information that would permit the identification of the original text, its author and its geographical ambit.⁷⁵⁹ Only one geographic indicator remained in the text, in the chapter on inheritance, where the redactor inserts two paragraphs mid-text that refer to the region of Champagne.⁷⁶⁰ Champagne, as a region, does not seem to be the special focus of the text. This abridged version takes the customs of Beauvais/Clermont outlined by Beaumanoir and makes them virtually placeless. This also demonstrates the generative role of the *coutumiers* authors, but beyond that, it also shows the changing conception of custom from territorialized rule to abstract norms of general application. In fact, this movement toward spatial transcendence and judicial abstraction evinced in the *coutumiers* can be linked to a nascent concept of *droit commun* developing contemporaneously in France.

THE *DROIT COMMUN* DEBATE

Restricting these texts to regional delimitations effaces the important part they played in creating something common and, in fact, participated in the formation of a common law, *à la française*, comparable to parallel to initiatives of crown and jurists on the other side of the

⁷⁵⁸ This is manuscript ms.fr. 5332 of the Bibliothèque Nationale (André Giffard, 'Un troisième abrégé de Beaumanoir', *Nouvelle revue historique de droit français et étranger*, 30 (1906): 626). Giffard says it is a fourteenth century text.

⁷⁵⁹ *Ibid.*, p. 627.

⁷⁶⁰ *Ibid.*

Channel. This term today may seem to describe a quintessentially Anglo-American form of legal culture, inimical both to the narrative of regional custom of the *Ancien régime* and the codal culture that then replaced it.⁷⁶¹ However, the term ‘common law’ flowers in thirteenth-century legal sources both in England and in France.

Indeed, references to the term ‘common law’ in the *coutumiers* are not a rare occurrence. What was meant by this term has elicited much debate and, in fact, monopolized analysis of the subject. Scholarly treatment of this ‘common law’ has been caught in a tug-of-war between those who believe that it refers to the learned laws of the *ius commune* and those who consider it to refer in some sense to a customary law. The debate initially focused on Philippe de Beaumanoir’s use of the term ‘*droit commun*’ in his *Coutumes de Beauvaisis*. In 1908, P. Van Wetter argued that the ‘common law’ in Beaumanoir’s work was primarily the Roman law as it had been incorporated into custom, canon law in a more accessory manner, and also included the ordinances of the kings of France, feudal law and custom that had no connection to learned law.⁷⁶² This view was challenged in 1960, when Pierre Petot argued that the term *droit commun* in Philippe de Beaumanoir’s work referred to a notion, albeit blurry, of general rules that were common to the various customary regions of France and upheld by judgments of the Parlement in Paris.⁷⁶³

⁷⁶¹ Modern sensitivity about this term, and worries about the spread of Anglo-American legal dominance, can be seen, for instance, in the preliminary provision of the Quebec Civil Code. This bilingual text states, in the French language version that the code constitutes “le droit commun” of Quebec. However, in order to avoid saying in the English language that the text is ‘common law’, and the baggage of Anglo-American legal culture it carries, the drafters chose instead to use the Latin term ‘*ius commune*.’

⁷⁶² Van Wetter, P. “Le droit romain et Beaumanoir” in *Mélanges Fitting*, vol.2 (Paris: Flammarion, 1908) 538-539.

⁷⁶³ See Petot, 412-429.

Various scholars weighed in on the debate.⁷⁶⁴ Most recently, the two exponents of the learned-law view were Gérard Giordanengo and Jacques Krynen. Giordanengo argued that only in a few cases can references to ‘common law’ be shown to designate a general custom, and then, in texts that were not very learned and where terminological fluctuations are normal.⁷⁶⁵ Krynen has argued the ‘common law’ was Roman law, and that the French kings had allied with Roman law because of its imperial nature in their attempt to bolster the state.⁷⁶⁶

Many scholars also came out in favor of a customary common law.⁷⁶⁷ Recently, André Castaldo has, in this author’s opinion, put the debate to rest in a long article that challenges the arguments presented for Roman law undoes them one by one.⁷⁶⁸ He notes that the mentions of

⁷⁶⁴ J.P. Lévy said that the ‘common law’ was the learned law, and custom was only its application, its complement (Lévy, J. P. “La pénétration du droit savant dans les coutumiers angevins et Bretons au Moyen Âge” *Tijdschrift voor Rechtsgeschiedenis* (1957) 17). J. Gaudemet also felt that Roman law was more “realistic” because he felt that the notion of a common customary law was scarcely outlined by the end of the thirteenth century and legislation via royal ordinances was still very modest (J. Gaudemet “L’influence des droit savants (romain et canonique), sur les textes de droit canonique en Occident avant le XIVE s.” in *La Norma en el derecho canonico: Actas del III congress internacional de derecho canonico (Actes du 3e Congrès International du droit canonique, Pamplona 1976)* (Pamplona: Ediciones Universidad de Nava, 1976) 181). As Castaldo has noted, Van Wetter’s view seems to have been remembered as a claim only for Roman law, instead of a claim *primarily* for Roman law (Castaldo, “II. Le droit romain est-il droit commun?” 187).

⁷⁶⁵ Giordanengo, Gérard. “*Jus commune* et ‘droit commun’ en France du XIIIe au XVe siècle” in *Droit romain, jus civile, et droit français*, edited by Jacques Krynen (Toulouse: Presses de l’Université des sciences sociales de Toulouse, 1999) 220-247, *see especially* 232. Giordanengo gives a cursory glance to a few of the thirteenth-century *coutmiers*, but focuses his analysis on Beaumanoir and the fourteenth century *coutumiers*, which seems to say more about the later development of ‘common law’ (if one accepts his arguments) than about the ‘common law’ in the *coutumiers* of the thirteenth century.

⁷⁶⁶ See Krynen, Jacques. “Le droit romain, droit commun de France” *Droits: Revue Française de Théorie, de Philosophie et de Culture Juridiques* 38 (2003) 21-35, and his “*Voluntas domini regis in suo regno facit ius*” 59-89.

⁷⁶⁷ Paul Ourliac supported Petot’s argument, adding that the ‘common law’ was an imprecise notion that was composed of the adages that circulated in the *pays de coutumes* amongst people involved in the law and were most often taken up in the judgments of the Parliament in Paris (Ourliac, Paul. “Beaumanoir et les Coutumes de Beauvaisis” in *Actes du Colloque International Philippe de Beaumanoir et les Coutumes de Beauvaisis (1283-1983)*, 75-79 (Beauvais: G.E.M.O.B., 1984) 77). André Gouron goes a little further than Ourliac, noting that references to *comun droit* in the *coutumiers* refer to the whole of customary and jurisprudential rules (Gouron, 290). Gouron also notes that during the thirteenth century royal ordinances are devoid of any reference to the *ius commune* as learned law, rather interesting since *jura scripta* are mentioned (though with distrust), and actually it is difficult to find the term *jus commune* refer to Roman law even in the consciously Romanizing South (*Ibid.*). Robert Jacob has also said Beaumanoir’s *droit commun* is customary law and not the *ius commune* of scholars (Jacob, “Beaumanoir versus Révigny” 243).

⁷⁶⁸ Castaldo, “II. Le droit romain est-il droit commun?” 173-247. Castaldo focuses on rebutting Krynen and Giordanengo’s arguments. He ends up writing a mini-treatise on ‘common law’, though in this form of a response,

‘common law’ in the thirteenth century *coutumiers* can all be linked to general customs.⁷⁶⁹ He examines Beaumanoir’s work in detail, noting that though this author was clearly inspired by learned law in his writing, each reference to the expression ‘*droit commun*’ concern issues of customary law, such as roads.⁷⁷⁰ He also examines the records of Parliament (mostly in Latin for this period) that refer to *ius commune*, and argues that they do not refer to Roman law, neither explicitly nor implicitly.⁷⁷¹ *Droit commun* in the *coutumiers* is, as Castaldo has proven, customary in nature.

The study of the terminology of French common law has been quite exhaustive. Nonetheless, a couple of contextual notes can be added. Scholars agree that the origin of the term lay in Roman law—references to the *ius commune* are sprinkled across the *Corpus iuris civilis*.⁷⁷² However, as André Gouron has noted, the term ‘*ius commune*’ in the works of Romanists was opposed to privileges or exceptions until the middle of the thirteenth century, and it was only then that it begins to be opposed to custom and to territorial law.⁷⁷³ It is really in the later thirteenth and fourteenth centuries that the concept of the learned laws as *ius commune* in its modern instantiation was formed.⁷⁷⁴

The references to ‘common law’ that indicate overarching laws and customs of the secular courts seem to appear in earnest at a similar time in both French and English texts. One surprising find in looking into this subject matter is that, for all the volumes upon volumes of

because he is so meticulous in examining the question from every possible angle. This article must now be taken as the definitive word on the issue.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ *Ibid.*, 190-204.

⁷⁷¹ *Ibid.*, 221.

⁷⁷² Petot, P. “Le droit commun en France selon les coutumiers” *Revue Historique de droit français et étranger* 38 (1960) 414 ; Gouron, André. “Le droit commun a-t-il été l’héritier du droit romain?” *Comptes-rendus des séances de l’Académie des Inscriptions et Belles-Lettres* 142, no.1 (1998) 284; Rigaudière, 83.

⁷⁷³ Gouron, 286-8. The only earlier instance of the use of *ius commune* in the latter sense, according to F. Calasso, was made by a Lombard jurist at the end of the twelfth century—Gouron doubts this interpretation while Glenn accepts it (Gouron 287, Glenn 11).

⁷⁷⁴ Glenn, 11.

work devoted to the origins of the common law, extremely little work seems to have been done on the development of the use of ‘common law’ terms—the opposite situation to French historiography. As Pollock and Maitland noted, the term ‘common law’ is not often used in the early thirteenth century.⁷⁷⁵ When the term appears in the Dialogue of the Exchequer and in Bracton it is in reference to a privilege, a special contract or donation.⁷⁷⁶ John Hudson points to a writ of 1246 that referred to common law “to indicate the normal law of England, enforced by the king’s court, above local custom.”⁷⁷⁷ Charles McIlwain found several later instances of the term in connection to the confirmation of Magna Carta by Edward I in 1297, for instance the reference to the “great charter of liberties as common law” (*la grande charte des franchises cume lay commune*).⁷⁷⁸

This subject would greatly benefit from a comprehensive study, not just for England but also on a wider scale. Hector MacQueen has identified the use of the term in Scotland, in a royal brief of 1264 that referred to “the usage throughout the kingdom of Scotland according to ancient approved custom and by common law [*ius commune*].”⁷⁷⁹ This begs the question of how widespread a practice thinking of the laws of a realm as ‘common law’ was throughout Europe.

In any case, these few dates do indicate that the terminological allusions to ‘common law’ in England were fairly contemporaneous to those in France. In the French *coutumiers*, *droit commun* appears in Pierre de Fontaine’s *Conseil à un ami*, finished in 1253, in two ways: it is

⁷⁷⁵ Pollock and Maitland, *The History of English Law*, 2nd ed. (Cambridge: Cambridge University Press, 1952) 176-7.

⁷⁷⁶ *Ibid.*, 177. In the Dialogue of the Exchequer it is used to contrast the writer’s disapproval of the king’s bad forest laws with the common law of the realm. Glenn, however, sees more in this and feels this is a first instance of “the common law tradition to identify a distinct and overarching source of common law” (Glenn, 11).

⁷⁷⁷ Hudson, John. *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (London: Longman, 1996) 18. Hudson focuses on institutional factors that contributed to the development of common law, and only looks at this term briefly, in a little over half a page (*Ibid.*, 18-9).

⁷⁷⁸ McIlwain, Charles. “Magna Carta and Common Law” *Magna Carta Commemoration Essays* (London: Longman, 1917) 123.

⁷⁷⁹ MacQueen, Hector L. *Common Law and Feudal Society in Medieval Scotland* (Edinburgh: Edinburgh University Press, 1993) 2.

part of the Roman law quotations in the text, and refers to the corpus of rules that were valid in Vermandois.⁷⁸⁰ Beaumanoir's use of *droit commun* in his *Coutumes de Beauvaisis* of 1283 includes the "common law according to the custom of the county," "the law that is common to all in the kingdom of France," "general custom," "common custom," and "common law" (*commune loy*).⁷⁸¹ A truly exhaustive analysis of these terms may be found in Castaldo's article, and will not be repeated here.

However, the 'common law' debate largely passed over the *Établissements de Saint Louis*, and a note should be made on the insight it provides on the subject. That it was passed over is not altogether surprising as 'common law' is mentioned only once, and then only in one manuscript. After explaining that those who are judged guilty of disavowing their lord lose their land, manuscript N (copied in the first years of fourteenth century) explains that "practice and the general, tested, and ancient custom, and the common law, are in agreement; for by his laws our lord the king forbids arms and excursions, and claiming to hold your land from a new lord, and [private] wars."⁷⁸² A reference to common law is also present in slightly different guise in other manuscripts of the *Établissements* that were also copied between the end of the thirteenth and fourteenth century: manuscript T states "custom generally," manuscript U has "approved and

⁷⁸⁰ Gouron, 290. We do not know the source Pierre used for his lengthy Roman law quotations, but it is likely that he used a vernacular translation. It should also be noted that the *jura publica* of Roman law gets translated as "droit commun" (*Ibid.*, XVII.16 and p.174 note e), and *publicum iudicium* is translated as 'commun jugement' (*Ibid.*, XIX.53 and p. 202 note p), which means that both *commune* and *publicum* were translated into French as 'commun.'

⁷⁸¹ "par droit commun selonc la coustume de la contree" (Philippe de Beaumanoir, XVII.571); "le droit qui est communs a tous ou royaume de France" (*Ibid.*, Prologue 6); "coustume general" (*Ibid.* VI.214, XIII.430, XXIV.697); 'commune costume' (Pierre de Fontaines XXII.24; Philippe de Beaumanoir, XXVII.773); for "commune loy" (Pierre de Fontaines XXII.24 and p.315 note 10; *Coutumier d'Artois* XXVII.12, XXVII.14). See also Castaldo, "II. Le droit romain est-il droit commun?" 198. The common law of the kingdom of France, is as geographically large as the *coutumiers* go in their allegations of commonality. As the variety of uses of '*droit commun*' show, there were layers upon layers of common law—there were laws common to a county, a region, a kingdom. As Robert Jacob notes for the *Coutumes de Beauvaisis*, "customs are not all equal; they rise in tiers of decreasing order of generality, forming a kind of pyramid" (Jacob, "Beaumanoir versus Révigny" 243).

⁷⁸² "Et usage et costume generaus esprovéee et ancienne, et drois communs s'i acorde; car mes sires li roi deffant les armes et les chevauchiées, par ses establissemenz, et les novels avoeries, et les guerres" (*Établissements de Saint Louis*, II.38, II:470 note 23).

general custom,” and K had “proven and general custom.”⁷⁸³ This indicates that ‘common law’ was becoming a concept that was important enough and widespread enough for copyists to insert ‘common law’ and ‘general custom’ into a text whose manuscript tradition had not contained any mention of it previously.

THE *COUTUMIER* AUTHORS AND THE COMMON LAW

France, then, was not split into a multitude of independent regions with their own legal customs but, like England during the same period, was developing legal commonality based on custom.⁷⁸⁴ Of course, this development was not exactly the same on both sides of the Channel, and building understanding of the nature of the French common law can eventually serve as a vehicle for comparison with English developments.

There are still many questions about the nature of the French *droit commun* and what exactly its legal implications were. This section will examine one small aspect of this vast subject—the extra-regional juristic practices of the *coutumiers* authors and how these connect to the contemporary development of the notion of common law in France. The movement towards abstraction in the thinking of the lay jurists of Northern France, and the concomitant thinking of rules and procedures in generalizable terms, created the conceptual space for thinking of legal commonality within the largest jurisdictional set, namely the kingdom. This conception of custom, normativity, and legal territoriality offer the best explanation for why customs could be

⁷⁸³ Viollet II:468 note 21.

⁷⁸⁴ This makes the English Common Law an interesting parallel for comparison, rather than an exception to continental legal developments.

transferred from one region to another unproblematically by simply changing the name of the region in a different manuscript.

It also explains why the *coutumier* constantly refer to areas beyond their region. This can already be seen in the earliest text in our group. While Pierre de Fontaine's text is taken to represent the customs of Vermandois, Pierre is clear in his prologue that he has been asked "to write a text according to the usages and customs of Vermandois *and other lay courts*."⁷⁸⁵ There is some variation on the wording in different manuscripts, but they do agree about the extra-regional scope of the text. According to Manuscript A, Pierre de Fontaines writes about "the customs of the region and *all lay courts*."⁷⁸⁶ Manuscript P elides the region and simply states that the text concerns the "customs of *all lay courts*."⁷⁸⁷

The important point of emphasis here is the lay court. This is a jurisdictional claim, and means that the text is describing the customs of the lay, secular, courts as opposed to the church courts which had their own jurisdiction, procedure and rules. The different manuscripts do not seem to be concerned with opposing the Vermandois to other regions. If anything, the similarities between different regions are assumed.

Manuscript M emphasizes this point. As M. Marnier notes, all references to rules normally made "according to our usage" (*selon notre usage*) are instead made "according to right usage" (*selonc droit usage*) in manuscript M.⁷⁸⁸ In one case, "our usage" (*nostres usages*) becomes "usages that exist generally everywhere" (*usages qui s'estent généralement partout*).⁷⁸⁹ In effect, manuscript M has written out specific geographic attribution in the text in order to

⁷⁸⁵ [emphasis added] "que je li face un escrit selonc les us et les costumes de Vermandois et d'autres corz laies" (Pierre de Fontaines, I.2).

⁷⁸⁶ [emphasis added] "les coustumes du païs et de toutes cours laies" (*Ibid.*, p.4 note 2)

⁷⁸⁷ [emphasis added] "les costumes de toutes cors laies" (*Ibid.*)

⁷⁸⁸ Marnier, p. xxxvii.

⁷⁸⁹ Pierre de Fontaines, p. 103 note 10.

emphasize the general application of the rules to lay courts. It is clear, then, that Pierre de Fontaines, and those who copied his text even more so, believed that the *Conseil à un ami* was not simply a regional text but described rules that were generally relevant to lay courts.

This belief is echoed in the *coutumiers* that followed. The *Établissements de Saint Louis* also has rules that were upheld both by regional custom and by the usage of lay courts.⁷⁹⁰ For instance, there is a rule that after the death of a spouse, the live spouse may not give an unequal inheritance to their children unless all the children agree to it.⁷⁹¹ The main text of the critical edition attributes this to the practice of the Orléans district.⁷⁹² Manuscript E attributes it to both Paris and Orléans, while manuscript J goes beyond this and attributes the rule to the practice of lay courts.⁷⁹³ Eleven other manuscripts, about half of those we have, attribute the rule to the practice of many regions, *l'usage de divers païs*.⁷⁹⁴

The authors of the critical editions of some *coutumiers* did flirt with the idea that rules repeated in the *coutumiers* may express general principles. Tardif noted in passing that many of the rules that the author of the *Coutumier d'Artois* borrowed from Pierre de Fontaines and from the *Établissements* were general principles.⁷⁹⁵ Mortet similarly noted that the rules in the *Demenées el Chastelet de Paris* could not be seen as special to the jurisprudence of the Chatelet in Paris.⁷⁹⁶ This led him to wonder whether this could mean that the rules discussed could be of general application and suited the *pays de droit coutumier* generally. Ultimately, Mortet talked

⁷⁹⁰ “And the tested custom of the area and the practice of the secular court are in agreement” [*Et coutume de païs esprouvée et usages de cort laie s'i acorde*]— I think that it is quite clear that the *coutume de païs esprouvée* and the *usages de cort laie* do not constitute a repetition for emphasis but refer to different things, otherwise, there would be no need to state whether they are in agreement (*Etablissements*, II.34).

⁷⁹¹ *Etablissements*, II.26.

⁷⁹² “established according to the usage of the Orléanais” [*estable selonc l'usage d'Orlenois*] (*Ibid.*) [my trans].

⁷⁹³ “l'usage de Paris et d'Olliens” (*Ibid.*, II:419, note 42); “l'usage de la curt laie” (*Ibid.*).

⁷⁹⁴ These are manuscripts A, B, C, D, O, P, Q, R, S, T, V (*Ibid.*).

⁷⁹⁵ Tardif, “Introduction” in *Coutumier d'Artois*, xiii.

⁷⁹⁶ Mortet, C. “Seconde Partie: Étude du texte” 9.

himself out of the idea—this was impossible because of the well-known “essentially local character” of the *coutumiers*.⁷⁹⁷ For this reason, he decided that the locality that the text described the local practice of the royal domain.⁷⁹⁸

The authors of the critical editions, then, seem to have privileged the manuscripts that gave a regional or local provenance to a rule, as opposed to a more general attribution. This can also be seen in Paul Viollet’s work on the *Établissements*.⁷⁹⁹ This voluntary blindness can be seen more clearly in his choice of attribution for a rule that those accused of murder, treachery or rape must respond to the accusation immediately, without any delay provided for counsel.⁸⁰⁰ He chooses to attribute this to practice in Orléans in the main text of the critical edition, but this attribution only appears in four manuscripts.⁸⁰¹ Two manuscripts give no geographic attribution, manuscript J is the only one to specifically designate the lay courts, but all the other manuscripts — the majority — explain that this rule accords with the practice of *divers païs*, many regions.⁸⁰² Again, Viollet makes a similar choice to privilege the manuscripts with the regional attribution of a rule concerning the proper summons of a baron to court.⁸⁰³

The rules in the *Établissements* are not all attributed to a geographic space, however small or large, but they are very often simply attributed to the practice of lay courts. The text occasionally specifies that it is referring to the practice of the lay court of Orléans, but the

⁷⁹⁷ *Ibid.* 9-10.

⁷⁹⁸ The examples he cites focus on the few local references in the text (*see Ibid.*).

⁷⁹⁹ I would just like to note that this analysis would barely be possible if Paul Viollet had not produced such a masterful critical edition with the most detailed and helpful of notes, explaining the minutia of variation between the manuscripts in detail. Modern historians owe his great thanks.

⁸⁰⁰ *Etablissements*, II.21.

⁸⁰¹ These are manuscripts N, G, F, I (Viollet, vol. 2, p. 408 note 33).

⁸⁰² Manuscripts T and V give no geographic attribution, J states it is “selon l’usage de cort laie”, and all the others have “selonc l’usage de divers païs” (*Ibid.*).

⁸⁰³ The main text of his critical edition makes it a regional custom from Orléans [selonc l’usage d’Orlenois] (*Etablissements*, II.33), which it true for some manuscripts. But many other manuscripts (C D E P Q R S T J V) clearly indicate that this rule is used in diverse regions [selonc l’usage de divers païs] (Viollet, vol. 2, p. 450 note 46).

majority of references to lay court are made to lay court alone.⁸⁰⁴ The same is true for Philippe de Beaumanoir who mentions the customs of the lay courts many times throughout his *Coutumes de Beauvaisis*.⁸⁰⁵ The question is whether the *Établissements* and the *Coutumes de Beauvaisis* refer to regional lay courts, or whether they refer to lay courts more generally.

Some clue may be obtained from the meticulous Beaumanoir. When Beaumanoir refers to lay courts, he refers to the general practice in lay courts and not just to the lay courts in Beauvaisis. He mentions lay courts when he is trying to differentiate their customs from those of the church courts.⁸⁰⁶ He makes clear that he is only interested in discussing the lay courts, and not the ecclesiastical courts.⁸⁰⁷ He does devote an entire chapter to the jurisdiction of the lay court and that of the ecclesiastical court, to avoid jurisdictional confusion.⁸⁰⁸ He is quite clear about the cases where “the secular courts should be in control, and Holy Church should not get involved.”⁸⁰⁹ There is no such discussion of the respective jurisdictions of different regions, or choice of law rules in case of disagreement about ‘regional’ jurisdiction.

Beaumanoir’s references to lay courts, then, do not designate how these courts function in his specific region, but designate the general practice of the secular courts as opposed to ecclesiastical courts. That is why he can tag them to general popular wisdom, for instance “it is

⁸⁰⁴ “selonc l’usage d’Orlenois, en cort laie” (*Etablissements*, II.4). On the other hand, there are many references to lay court. A few examples are: “accostumé en cort laie” (*Ibid.* I.3), “l’usage de la cort laie” (*Ibid.*, I.85); “Tele est la costume en cort laie que” (*Ibid.*, I.96), “selonc l’usage de la cort laie” (*Ibid.*, I.136, II.5, II.7, II.28 ect).

⁸⁰⁵ See for instance, Philippe de Beaumanoir, II.92, VII.246, VII.248, VII.257, XI.357, XXXI.946, XXXIX.1211.

⁸⁰⁶ For instance, *Ibid.* II.91-92, VI.221, VII.248, XI.357.

⁸⁰⁷ “But when they plead against each other in an ecclesiastical court—we should not speak of that since we intend to speak only of the customs of secular courts” [*Mes quant il pledent li uns a l’autre en court de crestienté, il ne convient ja que nous en parlons pour ce que nous n’entendons a parler fors que des coustumes de la court laie*] (*Ibid.*, XXIX.1211)

⁸⁰⁸ *Ibid.*, Chapter XI.

⁸⁰⁹ *Ibid.*, II.340.

said that in the secular courts you only argue once.”⁸¹⁰ A little earlier, the *Établissements* similarly quote some proverbial wisdom from the lay courts: “for according to the custom in secular courts, “a commoner’s purse is his patrimony.””⁸¹¹

Our other texts confirm the tendency to reach beyond the region. The *Ancien coutumier de Champagne* implies that there is little difference in the practice of the regional courts of the lord or Prince, and the royal court of the king.⁸¹² The *Demenées el Chastelet de Paris* claims to describe the “custom of France and especially of the Chatelet in Paris.”⁸¹³ This reference to ‘France’ may be to the king’s domain rather than the kingdom (which by the time this text was being written was coming significantly close to the kingdom), but it nonetheless shows that a text can claim a specific place and general application at the same time. In any case, the text opens with a clear and overt statement of its *general* application: “Here begins the book which teaches how we ought to undertake to speak before all judges, especially in lay courts.”⁸¹⁴ The *Coutumier d’Artois*, as other texts before it, also refers to the general practice of lay court as well as “the customs of Artois and other places.”⁸¹⁵ For instance, “by the general custom of lay courts”

⁸¹⁰ “dit on que l’en ne barroie qu’une fois en court laie” (*Ibid.*, VII.248). This is said because while in church courts you can make your arguments and then reserve the right to make more arguments, but in secular court you cannot make such a reservation and so cannot make additional arguments at a later time (*Ibid.*).

⁸¹¹ “car borse à vilain si est partimoines, selonc l’usage de la cort laie” (*Etablissements*, I.136)

⁸¹² “Encor use on en Champaigne que se uns hons aseure un autre *en cort de Roy ou Prince ou d’autre signour...*” [*emphasis added*] (*Ancien coutumier de Champagne*, XXX) . This clause explains a rule on warranty that applies in the any court—be it that of the king, prince, or another lord.

⁸¹³ “selonc la coustume de France et especiaument de la court de Chastelet de Paris” (*Demenées el Chastelet de Paris*, 44).

⁸¹⁴ “Ci commence li livres, qui enseigne comment l’en doit proposer à parler devant tous juges, et especiaument en cort laie” (*Demenées el Chastelet de Paris*, Prologue). Also the text later refers rules applicable “before all the judges in the lay courts” [*par devant tous les juges de la court laie*] (*Ibid.*, 50).

⁸¹⁵ “par l’usaige de court laie” (*Coutumier d’Artois*, II.9); “Je te di generaument que par l’usage de court laie” (*Ibid.*, III.1). And, “par la coustume d’Artois et d’autres lieux” (*Ibid.*, V.1); “si conme il est de coustume en Artois et ailleurs” (*Ibid.*, LIII.12).

people caught red-handed committing a crime are judged by the *lex loci*.⁸¹⁶ Such a rule would be useless if it were not generally applied.

In fact, some rules are repeated across several *coutumiers*. For instance, the rule that the parties each may ask for up to three continuances (*contremans*) during the course of a particular case appears in several texts.⁸¹⁷ Pierre de Fontaine explains that “according to current practice parties can make three continuances” in Vermandois, the *Demenées el Chastelet de Paris* claim that three continuances can be made according to the custom of the royal domain, Philippe de Beaumanoir also notes the possibility of three continuances in Beauvaisis, and the *Coutumier d’Artois* also states generally that “by the usage of the lay courts, parties can makes three continuances.”⁸¹⁸ Though only the author of the *Coutumier d’Artois* explicitly claimed this rule for the lay courts generally, its spread across many texts clearly demarcates a general custom.

More examples can be found. Several *coutumiers* refer to a rule that minors may request seisin when they come of age, and until then the case awaits for them to reach the age of majority.⁸¹⁹ The same is also true for rule that agreements trump law (*convenance loi veint*) also appears in a number of *coutumiers*.⁸²⁰ This last rule was of Roman origin—the *Digest* instructs that *conventio vincit legem* (Dig. 16, 3, 1, 6). This origin, however, was unacknowledged even by Pierre de Fontaines who was not at all shy in attributing ideas and quotations to the Roman law,

⁸¹⁶ “La ou li criesme sont fait, doivent li malfaiteur iestre jugiet par general coustume de court laie, s’il est pris en present meffait” (*Ibid.*, XI.10)

⁸¹⁷ This is a type of delay given for a specific period of time, for instance, fifteen days. The other type of delay is an *essoine*, which is a delay given for an indefinite amount of time, and would be used in cases of illness and the such.

⁸¹⁸ “Par l’usage qui cort, puet l’en fère III contremaz” (Pierre de Fontaines, VI.18); “il puet faire trios contremans par la coustume de France” (*Demenées el Chastelet de Paris*, 49, *see also* 86); “puet li hons .III. fois contremander” (Philippe de Beaumanoir, II.59); “Je te di generaument que par l’usage de court laie, puet on faire .iiij. contremans” (*Coutumier d’Artois*, edited by Adolphe Tardif (Paris: Picard, 1883) III.1).

⁸¹⁹ *See* Pierre de Fontaines XIV.5, Philippe de Beaumanoir III.118, *Établissements de Saint Louis* I.71, *L’Ancien Coutumier de Champagne (XIIIe siècle)*, edited by Paulette Portejoie (Poitiers: P. Oudin, 1956) V. [hereinafter “*Ancien Coutumier de Champagne*”].

⁸²⁰ “une parole que on seult dire selonc nostre usage, que convenance loi veint” (Pierre de Fontaines, XV.6); *see also* *Coutumier d’Artois* VII.5, Philippe de Beaumanoir 34.2.

and it seems the *coutumiers* authors saw it as part of secular custom. The authors of these texts, attributed to regions, clearly felt that many of the customs they described were general to the lay courts.

Indeed, Robert Jacob has noted that Beaumanoir saw his work as a pedagogical tool—the reader would be prepared to learn other bodies of rules more easily after learning how a trial worked in the Beauvaisis.⁸²¹ Indeed, Beaumanoir states in his Prologue that:⁸²²

... the customs of France are so varied that you could not find in the kingdom of France two castellanies which used the same customs in all cases. But you should not for this reason fail to learn and remember customs of the district where you are resident, for from there you more easily learn and remember the others, and in any case in several instances they are identical in several castellanies.

When Beaumanoir noted that there is endless variation in custom in the kingdom of France, he was referring to the fact that no two castellanies have the exact same *set of customs*. Though exact sets of customs may not have matched perfectly, there were many similarities between them. There was enough commonality that knowing the customs of one place is a springboard for learning those of other places.

Beaumanoir also implied that his audience would want to learn the customs outside their own locality. He was, in this quotation, making an argument for the value of learning local custom. One incentive he noted for this was that learning one set of customs made it easier to learn others. This means that learning extra-regional customs was something to which to aspire,

⁸²¹ Jacob, “Beaumanoir versus Révigny” 235.

⁸²² “Et bien i pert a ce que les coustumes sont si diverses que l’en ne pourroit pas trouver ou roiaume de France dues chasteleries qui de tous cas usassent d’une meisme coustume. Mes pour ce ne doit on pas lessier a aprendre et a retenir les coustumes de païs ou l’en est estans et demourans, car plus legierement en aprent on et reticent on les autres, et meismement de pluseurs cas eles s’entresievent en pluseurs chasteleries” (Philippe de Beaumanoir, Prologue 7). This is cited by Jacob (*Ibid.*).

something his intended audience would want to do. Knowledge of custom starts with one's own customs but the goal was to use it as a vehicle for the knowledge of the customs of other places.

LAY JURISTS AND A CUSTOMARY CREATIVE COMMONS

This study has concentrated on the texts of customary law written in Northern France. However, comparison shows that the lay juristic attitudes and practices discussed were not localized and particular to that area, but a widespread lay juristic practice. The crusader laws, arguably the first European colonial law, provide a useful counterpoint because there is no national legal tradition explicitly attached to these texts, they largely offer a historiographical *tabula rasa*.

The dialogical relationship that we have seen between customary juristic texts in the thirteenth-century Northern *coutumiers* comes out in even greater contrast in the crusader texts. These texts offers added insight into the textual communities of lay jurists, as the following tangled textual relationships attest. Philip of Novara styled his *Livre en forme de plait* (1250s) as advice to a friend, possibly following Pierre de Fontaine. According to Edward Peters, he wrote this text for his friend, John of Ibelin, who was another great Levantine jurist who finished a text called the *Assises de Jerusalem* in 1265.⁸²³ Later jurists who copied John of Ibelin's text found it profitable to add to it with sections taken from the text of Philip of Novara. Later in the thirteenth century, selections from John of Ibelin's *Assises of Jerusalem* appear in the *Assises of Romania*, a text written by an unknown author for the kingdom of Morea, the Greek part of the crusader kingdom formed after the conquest of Constantinople in 1204.

⁸²³ Peters, Edward, "Introduction" Philip of Novara, *Livre de forme de plait* 19ff.

The author of the *Assises of Romania* gives a rather detailed explanation of the textual link between his own text and that of the *Assises of Jerusalem*. As he explained, out of a desire for justice, right and reason, and because of the various types of peoples within this new state, “and since [the emperor and the barons] could not rule the empire well except with the usages and assises which exist in the land of the West, it was agreed to send to Jerusalem to the king and the patriarch, asking them to send their usages and assises, for they wished to be ruled by them since they were usages of conquest.”⁸²⁴ When the *Assises of Jerusalem* arrived, the author explained, it was read before all the barons, the most necessary articles for the new kingdom Romania were retained in the *Assises of Romania*, and an oath was sworn by the magnates to follow these laws.

This was probably more of a literary device than a faithful account, and author only took two largish sections from John of Ibelin’s text and seems to have composed the remainder of the text himself. This likely mythical account of origins nonetheless indicates the importance placed on written custom, as well as the assumption that these written customs can be adopted from one place to another and indeed, that they should be. The author emphasized that he was creating a textual link to the *Assises of Jerusalem*—this was not a reception of custom from practice, imported through habit or habitus, it was specifically a textual import. The author clearly thought that the textual import added to the authority of his own text. While he justifies why the customs of Jerusalem were the ones selected as the source for this text, his lack of justification of the practice of textual borrowing intimates that it was common and did not need justification.

⁸²⁴ *Les Assises de Roumanie*, edited by Georges Recoura. Paris: 1930 (Bibliothèque de l’Ecole des hautes études., IVE section, Sciences historiques et philologiques; 258) ; Topping, Peter W. *Feudal institutions as revealed in the "Assises of Romania", the law code of Frankish Greece* (Translations and reprints from the original sources of European history, vol. 3) (Philadelphia: University of Pennsylvania Press; Oxford: Oxford University Press, 1949) Prologue.

We can see the dialogic relationship between juristic works in another crusader text, Sempad the Constable's translation of the *Assises of Antioch* for the Kingdom of Armenia. At the beginning of this text, Sempad explained that he requested the text of the Assises of the Barony of Antioch from his kinsman Lord Simon, Constable of Antioch, who had received them from his father, Lord Mancel, who had been Constable of Antioch before him.⁸²⁵ As Sempad explained,⁸²⁶

Simon then gave it to me, out of love and upon my request, and I took the trouble to translate it into Armenian. [...] Once the translation was finished, I sent the original and the translation to the Court in Antioch, so that they could be compared. And they affirmed by their signatures and attestations that the translation is just, and corresponds word for word. So, for those who want to conduct themselves according to this Assises and law, it is the true Assise of Antioch.

Sempad's text is different from the ones discussed above because it is a translation, but it provides us with a clear snapshot of one way in which the *coutumiers* circulated. The *Assises of Antioch* took the following path: Lord Mancel, constable of Antioch, gave the text to his son Simon who became constable of Antioch after him, and Simon then sent the text to kinsman Sempad, who was Constable of Armenia.⁸²⁷ Here, the circulating texts as passing through the hands of the members of a juristic family. Again, Sempad offers no explanation of why someone in Armenia would find a set of Antiochene customs useful, the legitimacy is assumed.

⁸²⁵ *Assises d'Antioche : Reproduites en francais et publiees au sixieme centenaire de la mort de Sempad le connetable, leur ancien traducteur armenien dediees à l'Academie des inscriptions et belles-lettres de France par la Societe mekhithariste de Saint-Lazare* (Venice: Imprimerie armenienne medaillée, 1876) Prologue.

⁸²⁶ *Ibid.*

⁸²⁷ Simon was not Sempad's only juristic family connection. In fact, his sister had married John of Ibelin, author of the *Assises of Jerusalem* mentioned earlier on. Sempad himself later also became author of his own *coutumier* for Armenia. Sempad, then, was also operating within juristic circles that were connected through family networks and textual communities, and in this case, the textual communities were also mapped onto family connections.

The crusader texts demonstrate that the lay jurists of the thirteenth century clearly had some common attitudes and practices, based on sharing legal ideas through mobile texts. Notably, the customary texts of both Northern France and of the crusader kingdoms display the remarkable mobility of legal ideas amongst the lay jurists who wrote about the laws and customs of the secular courts. In both cases, texts of purportedly regional custom participated in a ‘commoning’ of legal ideas. These texts were not representatives of an inward-looking local legal identity, but a common pool of legal knowledge that transcended regional boundaries.

CONCLUSION

This study does not attempt to do away with regional custom. There were undoubtedly differences between the customs of various areas in thirteenth-century France. Rather, this study argues that the picture of thirteenth-century customary law in France is more than a map of regional custom. The lay jurists who composed the *coutumiers* not only recognized commonalities but also created them as the *coutumiers* were read and even adopted outside the region of their original affiliation. These jurists, in fact, participated in the formation a French ‘common law’ in the thirteenth century.

Common law and customary law, and the *ius commune* and the *iura propria*, have long been understood as antagonists and their traditional enmities have played out over pages of historical, legal and political work. H. Patrick Glenn has recently emphasized that ‘common law’ is a fundamentally relational concept born of a plural context— it exists in relation to particular

law and is in constant conversation with it.⁸²⁸ On top of that, as we have seen, the development of written custom is not necessarily a representative of fractured regionalism, and can also be part of the consolidation of central power and a vehicle toward legal harmonization.

Thirteenth-century lay jurists were forming communities based on common textual practices and methods of thinking, and in so doing, they were developing a common pool of customary legal knowledge. The *coutumier* have long been seen as discrete texts that almost emanated from the land whose customs they purported to describe. Where Roman law was a product of the intellect, they were the rustic products of the soil. Rustici, in fact, was how Jacques de Revigny, professor of law at the University of Orleans, called the same people referring to here as lay jurists.⁸²⁹ Yet, as André Gouron has noted, even in the *coutumiers* which owe no discernable debt to the Roman law, the level of sophistication is high.⁸³⁰

The *coutumiers* show us that though the culture of erudition of the lay jurists may have been quite different from that of those learned in the Roman law, it was nonetheless one that was *learned*, and which involved quite a high degree of specialization, professionalization, and textual knowledge. The ambit of any one text may have been limited. However, the practice of copying, excising, and reusing formed part of a common juristic endeavor that went some way to create a common pool of legal knowledge—a creative commons—that could be drawn upon to build other *coutumiers*, and constituted a sort of lay vernacular *ius commune* for the lay courts and the jurists connected to them.

⁸²⁸ Glenn, H. P. *On Common Laws* (Oxford: Oxford University Press, 2005) vii. This book argues that the concept of ‘common law’ can reconcile national and transnational laws.

⁸²⁹ Bezemer, Kees. *What Jacques Saw: Thirteenth-Century France Through the Eyes of Jacques de Revigny, Professor of Law at Orleans*. Frankfurt am Main: Vittorio Klostermann, 1997) 13.

⁸³⁰ Gouron, André. “Le droit commun a-t-il été l’héritier du droit romain?” *Comptes-rendus des séances de l’Académie des Inscriptions et Belles-Lettres* 142, no.1 (1998) 292.

CONCLUSION

Whoever wants to hear this narrative,
Can listen to it as they can
To the works of God and clerks
Since I compose for lay people
Who are skillful and have good sense,
Of which many can be found in my time,
Who, if they had learned Latin,
Would have learned many good things,
And for such people I set myself
To setting in the vernacular what was in Latin
Something good from the understanding of clerks
About which many people know nothing
That they could understand in the vernacular
What they could not learn in Latin.

*Qui velt entendre a cest romans,
Si puet entendre a cest commans
Des oeuvres Diu e de clergie
Car por laie gent romancie
Qui soutiu sunt et de bon sens
Dont plusiors trova a mon tens,
Qui se latin apris eussent,
Maint grant bien apprendre peussent
Por itex gens m'entremis
Que de latin en romans mis
Des sens de clergie aucuns biens
Dont maintes gens ne se vent riens
Qu'en romans puissent ce entendre
Que en latin ne puissent aprendre.*

Pierre de Corbiac, *Trésor* (c.1225)⁸³¹

Pierre de Corbiac explicitly stated that his encyclopedia was written in French to make that knowledge available for those for whom it would be otherwise inaccessible. John of Antioch likewise gave the same explanation for his translations but, because he considered his new readership to be less sophisticated, he omitted “subtleties” to make the text understandable for his new audience.⁸³² In this sense, *subtilité* underlay the differences between clerical and learned

⁸³¹ Pierre de Corbiac. *Le Tresor de Pierre de Corbiac en vers provençaux: publie en entier avec une introduction et des extraits du Bréviaire d'amour de Matfre Ermengau de Beziers, de l'Image du monde De Gautier de Metz et du Trésor de Brunetto Latini*, ed. by Karl Ernest August Sachs (Brandenburg: J.J. Wiesike, 1859) ll. 1-14. This predates Vincent de Beauvais' *Speculum Maius* by twenty years.

⁸³² “Ici parole de l'argumentacion de logique, por faire la conoistre a ceaus qui cele science ne peuvent savoir” and “trop seroit sutil chose et longue a dire coment, et top ennuieuse a home qui ne seit logique” in Boucher, Caroline. “De la *subtilité* en français: Vulgarisation et savoir dans les traductions d'*auctoritates* des XIIIe-XIVe siècles” in *The Medieval Translator/Traduire au Moyen Age*, ed. by R. Voaden, R. Tixier, T. Sanchez Roura, and J.R. Rytting (Turnhout: Brepols, 2003) 92. Boucher on the history of representation of lay and cleric, the former sometimes described as “dialectical idiots” while the latter are sometimes praised and sometimes decried for their *subtilité* (*Ibid.*, 261). She cites Gilles de Rome who said that “lay and vulgar men [...] who do not argue in an elaborate and dialectical manner are called *idiotae dialectici*” (*Ibid.*, note 37). In looking at some fourteenth and fifteenth century texts, Boucher noted that the emphasis turned to keeping the *subtilités* from the *vulgus*, for instance Raoul de Presles

and lay and uneducated. It was also a particular characteristic of legal argumentation. As James Brundage noted, John of Salisbury had remarked on his discontent about the “vigorous use of legal subtleties” by canon lawyers who, he complained, were harassing his master Theobald of Canterbury (r. 1138-61) with lawsuits.⁸³³ *Subtilité*—skillfulness, a sharp mind, cunning—ranged from a mark of high intellectual caliber to the pejorative sense of using words for nefarious ends as in Renart the fox, who had enough *subtilité* to deceive all the animals from the village to the king’s court. Whether used for good or evil, it captured the ability to think and speak with intellectual complexity.

Pierre de Corbiac appreciated that in the first half of the thirteenth century there were already many lay people who, though they had no knowledge of Latin, were capable of exactly this sort of sophisticated thinking (*qui soutiu sunt*). They formed a new market for previously exclusive learning, for whom texts such as Pierre de Corbiac’s or Brunetto Latini’s French-language compendia of all knowledge were written.⁸³⁴ They asked scholars to write books, in the vernacular, either providing a topic or providing the sources to be used.⁸³⁵ They also formed a

noted in the late fourteenth century that some ideas were *trop soutilles et trop dangeureuses* and that he would skip over them (*Ibid.*, 94, 95). Of course, Pierre de Corbiac presents the other side of that coin.

⁸³³ Brundage, James. *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008) 215.

⁸³⁴ Brunetto Latini. *Li livre dou tresor*, ed. by P. Chabaille (Paris: Imprimerie Impériale, 1863). Brunetto Latini was a notary in Italy, and after the defeat of the Guelphs in France, before returning to Florence in 1270s and 1280s and holding high political offices there. He was Dante’s guardian after his father’s death. In the *Divine Comedy*, Dante placed Latini in the *Inferno*, with the sodomites though portrayed him with sympathy. Brunetto Latini wrote his encyclopedia in French, “And if anyone asks why this book is written in the vernacular (*romans*), according to the language of the French, since we are Italian, I shall say it is for two reasons: the one, because we are in France, and the other, because that language (*parleure*) is more delightful (*delitable*) and more common to all people (*plus commune à toutes gens*)” (Brunetto Latini, I.1.1). Also, incidentally, a couple of paragraphs from his *Trésor* appeared in the *Assises de Jérusalem* published by Thaumassière (*Ibid.*, vi).

⁸³⁵ See generally, Holznecht, Karl. *Literary Patronage in the Middle Ages* (London: Frank Cass & Co., 1923). I have not had a chance to consult Batu, Cristian. “*Clerc, Chevalier, Aucteur: The Authorial Personae of French Medieval Historians from the 12th to the 15th centuries*” in *Authority and Gender in Medieval and Renaissance Chronicles*, Juliana Dresvina and Nicholas Sparks, eds. (Newcastle upon Tyne: Cambridge Scholars Publishing, forthcoming in 2012). For an examination of how the author’s role changed with printing, and how even anonymous authors tried to assert their authorship through subtle means, see Brown, Cynthia Jane. *Poets, Patrons and Printers: Crisis of Authority in Late Medieval France* (Ithaca, NY: Cornell University Press, 1995).

new market that spurred the growth of new forms of erudition, and the lay jurists who wrote the *coutumiers* and their target audience— sophisticated enough to be reading or listening to fairly detailed and complex legal information— were one group of lay thinkers who rose out of this thirteenth-century context.

The lay jurists who wrote the *coutumiers* formulated comprehensive bodies of rules, which they based on a combination of learned and practical knowledge, to buttress the lay courts. They wrote these in the vernacular. They were not seeking a scholastic or Civilian audience, their audience was composed of lay practitioners with sharp minds who needed to be able to argue, judge and advise others well. In the generation of Pierre de Fontaines and Philippe de Remi, Philippe de Beaumanoir's father, these included great lords who were very active in court especially as judges and petty nobles who made their careers in the administration of justice, but by Beaumanoir's generation at the end of the thirteenth century and turn of the fourteenth, the balance had started to tip to the latter and began to significantly include university-trained men of law steeped in the *ius commune*.⁸³⁶

The question of the extent of the role of the Roman law in all this has been a vexed one for historians. As we have seen, different *coutumiers* authors had different approaches to it, from quoting it extensively to not mentioning it at all. Of those who did overtly draw on the Roman law, their methods and sources can be gleaned from their citations. Pierre de Fontaines and the compiler of the *Etablissements de Saint Louis* were overtly keen about introducing lay practitioners to Roman law and making it relevant to legal practice in secular court. However, while the author of the *Coutumier d'Artois* copied heavily from these two texts and kept their citations, the ones he introduced himself tended to come more from canon law or practical court

⁸³⁶ See Griffiths, "New Men" 241, 243.

experience than elsewhere. The author of *Li livre de Jostice et de Plet*, on the other hand, relied heavily on the Roman law but did not cite it and so did not rely on its authority, rather he made it a background for current legal practice. Roman law, then, still did not have a set or obvious place in legal thinking in the second half of the thirteenth century. This would begin to change as the reign of Philip the Fair (r. 1285-1314) progressed, especially in the rapidly professionalizing Parliament of Paris.

Philippe de Beaumanoir presented the largest puzzle of all the texts or, at least, has been the subject of intense scholarly debate. How did he come to think the way he thought, in order to be able to write such an erudite work? He may, actually, be the best example of law being influenced by the general new culture of learning of the Middle Ages that began with the twelfth-century renaissance. He clearly had a strong familiarity with the procedure of both ecclesiastical and secular courts, had some knowledge of rhetoric, was well acquainted with elements of a scholastic prologue, was generally educated and part of a literary family, and the strong echoes show he must have read both Pierre de Fontaine's *Conseil* and Trancred's *Ordo* (possibly the *Etablissements*). We don't know whether he studied Roman law, he certainly never mentioned it overtly, only debatably covertly, and his *Coutume* could have been composed without it based on the other sources of knowledge listed here. It is impossible to tell from his work whether he knew any Latin, the knowledge he definitely had could have come from translations—there was already over a century of vernacular writing and translations of Latin works, and this was over fifty years after Pierre de Corbiac acknowledged the sharp minds and good sense of some lay people.⁸³⁷

⁸³⁷ Pierre de Fontaines quotes heavily from the Code, but never used one word of Latin. Was this because of his audience, or did he take his materials from translations?

This is why we should be approaching the *coutumiers* as compositions and thinking about the balance of creativity and authority within that. Instead of asking how well or how much Roman law the lay jurists knew, we should be looking at all the sources of knowledge they used to construct their texts. This will give a better vantage point on customary legal practice and its professionalization, the transmission of knowledge between university jurists and secular ones, and the relationship between ecclesiastical and lay jurists.

In connection to this, one conduit for the dissemination of legal ideas written in Latin has been severely understudied, namely, translation. The translations of Roman Latin legal texts into the vernacular do not seem to have been systematically catalogued or studied, and only a little work has been done on the vernacular versions of Justinian's *Institutes* and the Norman *Summa* (both of which were translated into vernacular prose as well as into vernacular verse) and Azo's *Summa*.⁸³⁸ It is in these initiatives that we can see the drive to make sophisticated legal learning accessible on a wider scale.⁸³⁹ As H  l  ne Biu noted for the Azo's *Summa*, the translator was a person who knew both Latin and the Roman civil law well but used simple language in order to reach potential law students, practitioners with no Latin, or students preparing to study the texts in Latin.⁸⁴⁰ The translator of Justinian's *Institutes* into French verse made explicit that the latter

⁸³⁸ Olivier-Martin, F  lix. *Les institutes de Justinien en fran  ais* (Paris: Sirey, 1935); Lavigne, Claire-H  l  ne. "La traduction en vers des *Institutes* de Justinien 1er: mythes, r  alit  s et enterprise de versification" *Meta: Translator's Journal* 49, no.3 (2004) 511-525; Biu, H  l  ne. "La *Somme Ac  *: prol  gom  nes    une   tude de la traduction fran  aise de la *Summa Azonis* d'apr  s le manuscrit Bibl. Vat., Reg. lat. 1063" *Biblioth  que de l'  cole des chartes* 167 (2009) 417-464.

⁸³⁹ Gerard Giordanengo noted that "learned doctrine aims above all at having an influence on contemporary social life" (Giordanengo, Gerard. "Les droit savants au Moyen   ge: Textes et doctrines, la recherche en France depuis 1968" *Biblioth  que de l'  cole des chartes* 148, no.2 (1990) 446).

⁸⁴⁰ See generally Biu, 417ff.

was why he was translating.⁸⁴¹ Once written, of course, these translations became interesting to anyone with an interest in law and an ability to read or hear French in the vernacular.

The translations also aid our understanding of the acquisition of legal knowledge generally. Guillaume Chapu, for instance, in his verse translation of the *Grand Coutumier de Normandie* explained that versified French was easier to learn than prose.⁸⁴² One manuscript of this verse translation even noted that “the Norman *coutumiers* that/Is common to all lawyers/Of the lay courts when it comes/To addressing their quarrels/They must have and hold dear.”⁸⁴³ This directly connected the text with practice, and indeed, external evidence corroborates this: a case from the Norman exchequer from 1296 noted that the judges consulted a book of the customs of Normandy, some fourteenth century cases of the Norman Exchequer cite precise chapters of the Norman *Grand Coutumier*, Philip the Fair cited and confirmed one article of the text in 1302.⁸⁴⁴

As the Norman example shows, by the end of the century and into the next, legal practice had changed enough and the culture of citation had become entrenched enough that textualized custom might be mentioned in court. The written text of the *Très ancienne coutume de Bretagne*

⁸⁴¹ A commencer ceste besoigne/ Ne met ung enfant de gascoigne/ Qui m'est baillie a introduyre/ Et a ensaigner et a duyre/ Et a tenir lay bien soubz pie./ Se il veult garder suvent/ Il y pourra asses aprendre/ Et plus legierement entendre/ Le Latin quant il le verra/ Et trouver ce qu'il querra. (ll. 21-32, Lavigne 515). This hints that even university-bound students did not have the best knowledge of Latin, and had to know the text before going off to university, preferably learning it by heart, as facilitated by this verse translation.

⁸⁴² Guillaume Chapu gives three reasons for why he translated the text into verse, which he seems to have done from the Latin text and not the French-verse version. The first is “so that current lawyers (*avocats*) and those in the future (*avocats qui sont et seront*), who wish to know the text and its contents by heart faster; since we hold that rhymed French is easier to internalize (*conchevoir*) than prose,” the second is because rhymed language is more beautiful than prose, and the third is the topos of getting readers to pray for his soul (*see text at Lavigne, 519*). The authorship of the verse version is debated—some scholars said the translator was also Richard Annebaut because the translated *Institutes* and *Grand Coutumier de Normandie* were often coupled together, however apparently one manuscript carried the name Bertrand Chalphepie which led Tardif to believe the translator was the student for whom Richard d'Annebaut translated Justinian's *Institutes*, while Viollet thought it was a certain Guillaume Caulph/Chapu because the epilogue of one manuscript hinted at this name in an anagram. The anagram passage was as follows: “Qui mon nom vault appercevoir/ Par aiguille, & pour me voir/ Le sçaura, & le sournom sache/ Cil y met C.A.U.P.H.” (Lavigne, 513). Lavigne settles on saying that the text is attributed to Guillaume Chapu.

⁸⁴³ Harl. 4477.1 (folio 4), the prologue states that: “Si veul le français mestre en rime/ Du latin li livre qui me/ Semble bon, est que l'on appelle/ Le Coutumier normant, que le/ Commun de tous les advocas/ De la cour loye, quant au cas/ De leurs querelles adrechier/ Doyvent avoir et prendre chier” (Lavigne 522 note 10).

⁸⁴⁴ Van Dievoet, 56-7.

(possibly written between 1312-1325, definitely by 1341) was cited in a case between Charles of Blois and John of Montfort in 1341.⁸⁴⁵ It is, otherwise, difficult to find other citations of textualized custom. There are many references to this or that area but, if the source of the custom is explained, it will usually point to a previous case, to precedent, either from experience or hearsay—and whether the latter came by word of mouth or from a book is impossible to tell.

The *coutumiers* were written, in the thirteenth century, as guides to legal thinking, as a first theorization of customary legal practice as a set of comprehensive rules, and as a guide to proper action should one or one's friend be embroiled in a dispute. They were not cited in court because it simply had never been customary practice to cite text, as customary practice was based on allegations of custom that were discussed based on precedent and reasonableness, as can be seen in the discussions between the animal-peers of the *Roman de Renart*. Citation was a learned practice that developed out of scholasticism. The *coutumiers* were not code, they were not intended to be codes, they were not even intended as completely accurate representations of practice because they intended to shape and improve practice. As much as Pierre de Fontaines addressed his *Conseil*'s interlocutor, he never mentioned an expectation that the text would be used in court. He did expect the text to be read both aloud and by private readers. Indeed, we not only have different manuscripts of the text, but also sections of the text being used in the writing of other *coutumiers*. In this sense, the text was relevant to legal thinking and to legal practice.

The *coutumiers* also point to extra-regional networks and communities amongst lay jurists. One future avenue of inquiry that would prove interesting would be identifying some lay legal centers. For instance, there is reason to believe Artois was such a center. It was a county very close to the heart of the Capetian monarchy: the future Louis IX was count of Artois

⁸⁴⁵ *La très ancienne coutume de Bretagne*, ed. by Marcel Planiol (Rennes: Plihon et Hervé, 1896).

between 1226 and 1237, when it became an appendage for his brother Robert. Philippe de Remy was *bailli* for Robert d'Artois probably from 1239 till 1250, and when Robert died in 1250 Philippe continued to work for his widow Mahaut throughout the 1250s.⁸⁴⁶ Pierre de Fontaines was in Mahaut's service until 1253, it is likely that the two knew each other, and that Pierre had met a very young Philippe de Beaumanoir, who actually was *bailli* of Pierre's Vermandois some years after he wrote his book, from 1289 to 1291.⁸⁴⁷ Later, the author of the *Coutumier d'Artois* composed a *coutumier* for this area that was already linked to two earlier great lay juristic compositions of the era. We only know the identities of two *coutumiers* authors, but we can see them circulating in similar regions and conducting their judicial business for a closely related aristocracy.

They were also building a new type of legal thinker who was part of a new professional community with its own characteristics and practices. Fourteenth-century jurists continued to build upon the text and communities developed by the lay jurists of the second half of the thirteenth century. As the author of the *Coutumier d'Artois* noted this in his prologue, he “put those who treated this subject in his book, a little bit from all of them.”⁸⁴⁸ Jacques d'Albeiges, the author of the *Grand Coutumier de France*, said a similar thing: he assembled his work “over a long period of time and from many other books and opinions of wise patricians, and from many other things concerning and regarding the actual nature of practice (*le faict de ladict*

⁸⁴⁶ Carrolus-Barré, Louis. “Origines, milieu familial et carrière de Philippe de Beaumanoir” in *Actes du Colloque International “Philippe de Beaumanoir et les coutumes du Beauvaisis (1283-1983)”*, by the Groupe d'Etude des Monuments et Oeuvres d'Art de Beauvaisis (Beauvais: G.E.M.O.B., 1984) 23-5.

⁸⁴⁷ Griffiths, “Les origines et la carrière de Pierre de Fontaines, Jurisconsulte de Saint Louis” 553. Griffiths did not know of the earlier cases that places Philippe de Remy in Artois long before 1257. Pierre died in 1267, at this point he had become a counselor to Louis IX and a member of his Parlement, but it is possible that Philippe met him as a young man. As Griffiths noted, it was not improbable that Philippe had some direct juridical formation from Pierre, or was influenced by Pierre via his father Philippe de Rémy.

⁸⁴⁸ “et en a mis cieus qui ce trata en ce livre, de chascun un pau” (*Coutumier d'Artois*, prologue).

praticque).”⁸⁴⁹ These authors made explicit that instead of the alleged “plagiarism” and copying, there was actually a community practice related to text and authority. Indeed, just as the *Coutumier d’Artois* kept Pierre de Fontaine’s claim of being the first to undertake the task, Jean Boutillier copied several cases from the *Coutumier d’Artois* into his text, even repeating the claims to having seen them himself: “I saw a daughter of Madame de Seles” in the *Coutumier d’Artois* is “Je visez une fille a Madame de Seelles.”⁸⁵⁰ These fourteenth-century authors were building on earlier developments, intellectual and professional community mores that defined how lay jurists assessed practice and sources as part of their *techne*.

Coutumiers continued to be written in the North of France as time progressed, for instance, the *Coutume de Picardie* (early 14th c),⁸⁵¹ the *Très ancienne coutume de Bretagne* (possibly 1312-1325, definitely by 1341),⁸⁵² and *Le vieux coutumier de Poitou*.⁸⁵³ Royal custom also began to be written in a more serious manner. Jean Bouthillier wrote the *Somme rural*, Jacques d’Albeiges wrote the *Grand Coutumier de France*,⁸⁵⁴ the Macreux brothers combined their efforts to write the *Ordonnances de plaidoyer de bouche et par escript*, and Guillaume de Breuil, *Style du Parlement de Paris*.⁸⁵⁵ Many of the manuscripts that we preserve today of the thirteenth-century *coutumiers* are, in fact, copies written in the fourteenth century. Lay jurists continued to study those texts and to add to them and to fiddle with the text. Not only that, the texts became the subject of Civilian study methods, and comments and glosses added to some

⁸⁴⁹ “Lequel traictié j’ay prins et assemblé dès longtems sur plusieurs aultres livres et opinions des saiges praticiens, et sur plusieurs aultres choses concernans et regardans le faict de ladicté praticque, selon ma possibilité, faculté et puissance, laquelle j’ay réputé estre petite et foible” (Jacques D’Albeiges. *Grand Coutumier de France*, ed. E. Laboulaye (Paris: Durand, 1868) Prologue).

⁸⁵⁰ Van Dievoet, 45. He also copied cases from Guillaume du Breuil’s *Stylus*, but he describes tens of cases he saw himself as *bailli*.

⁸⁵¹ *Ancien Coutumier inédit de Picardie*, ed. by M.A.J. Marnier (Paris: Techner, 1840).

⁸⁵² *La très ancienne coutume de Bretagne*, ed. by Marcel Planiol (Rennes: Plihon et Hervé, 1896).

⁸⁵³ *Le vieux coutumier de Poitou*, ed. by René Filhol (Bourges: Tardy, 1956).

⁸⁵⁴ Jacques d’Albeiges, *Grand Coutumier de France*, ed. by E. Leboulaye and R. Dareste (Paris: Durand, 1868).

⁸⁵⁵ In a brand new edition, Guillaume du Breuil, *Style de Parlement de Paris*, intro. Gerard Giordanengo (Paris: Dalloz, 2011). This one was originally composed in Latin.

coutumiers manuscripts, and these displayed an increasing Roman-law influence on the writing and intellectual assessment of custom.⁸⁵⁶

Nonetheless, the thinking about and study of the practice of secular courts remained a fundamentally vernacular one. The thirteenth century *coutumiers* were often packaged alone. On occasion they were coupled with moralistic tracts—for instance one text of Pierre’s *Conseil* is packaged within a manuscript that also includes the lives of several saints, Brendan, Hispan, Hervei and Alcuin.⁸⁵⁷ Sometimes they were coupled with other legal texts and in this case, they were coupled with texts written in the vernacular, even if we know the original to have been in Latin. At the end of the thirteenth century or beginning of the fourteenth, one manuscript containing the *Etablissements* contained a compendium of customary knowledge, also including a series of legal maxims, the *Coutumier d’Artois*, and the customs of Ponthieu, Vimeux and Amiens.⁸⁵⁸ One manuscript of Pierre’s *Conseil* from the first decades of the fourteenth century, for instance, also contained the French translation of the *Grand Coutumier de Normandie* as well as a selection of translated Roman-law texts.⁸⁵⁹ A mid-fourteenth century manuscript contained both the *Etablissements* and Tancred’s *Ordo* in French translation.⁸⁶⁰ The authors of the vernacular *coutmiers* had invented and shaped the form and discourse that framed the practices of the lay jurists into the fourteenth and even the fifteenth centuries.

It is hoped that this study makes a contribution to medieval history by giving lay jurists their place in the great innovations in law and dispute resolution of the twelfth and thirteenth centuries, alongside canonists and Roman lawyers. These lay jurists revolutionized law by

⁸⁵⁶ Van Dievoet, 39.

⁸⁵⁷ Manier, “Introduction” xxxi. Bibl. Nat. ms.fr.9822.

⁸⁵⁸ Manuscript P.

⁸⁵⁹ Bibl. Nat. ms.fr. 9822.

⁸⁶⁰ Manuscript E.

inventing a literature devoted to custom in the vernacular. They packaged and theorized custom and, in this manner, they created what we know as “customary law.” Hopefully, also, it will be of use to medieval historians more generally because the *coutumiers* are often consulted as statements of high medieval French ‘law’ on various aspects of medieval culture, ranging from the status of women to road maintenance, and this study clarifies how information presented in these texts. Lastly, this evaluation of written custom can offer fruitful comparison to the development of customary law in other times and places, from autochthonous textualizations of customary law by various peoples to the treatment of custom in colonial law, and even to the contemporary recognition of norms in developing legal fields.

This study has examined these lay jurists by approaching them from the vantage point of a cultural history of knowledge. This approach is clearly concerned with *mentalités*, but not quite the same sort of “historical archaeology” as articulated by the Annales school. As Michael Gismondi argued, the latter approach has overemphasized the uniformity within a particular society and had downplayed the active role of culture in social formation.⁸⁶¹ This study emphasizes active social creation inspired by the type of social history of knowledge inaugurated by Peter Burke, on how thought-worlds constitute a certain culture while also trying to shape other cultural spheres: the social context of *coutumiers* writers, their interest in shaping their audience and teaching them to “think like a lawyer,” their shaping of a lay common law.

The story of “law” is not often told from this perspective. It has rather been studied as a form of intellectual history interested in the development of norms or specific legal fields, as part of the history of state-formation, or as a social history of the experience of law. This has conditioned how lay jurists were perceived: they were the less sophisticated counterparts to the

⁸⁶¹ Gismondi, Michael A. ““The Gift of Theory”: A Critique of the *histoire des mentalités*” *Social History*, 10 no.2 (1985) 212.

university Roman-law or canon-law scholars, they were functional tools of an expanding monarchy, or they were unimportant because they were not directly cited at court and thus irrelevant to the social experience of law.

Taking the texts on their own intellectual terms permits us to evaluate their role in the professional taking control of knowledge, as well as in the production and dissemination of knowledge. In this sense, it permits us to see professionalization in its socio-cultural context, not purely as a development internal to the courts or to law. Beyond this, it permits us to think about the social and cultural development of cognition: how did the authors acquire the intellectual capital to be able to compose these texts, and what sort of intellectual capital did they aim to transfer to their audience? Why and how does a new field of expertise and a new culture of experts form? More specifically, within legal anthropology and law, how does abstract knowledge develop, and how does it affect later thinkers?

This analysis of the *coutumiers*, as part of a new legal movement associated with the vernacularization of law, the rise of the lay jurist and the professionalization of the lay courts, has wider implications for our understanding of custom and how custom is transformed into law. Notably, it shows how cultural changes can affect practitioners' approaches to normativity, which in turn make rules into either usages, customs or laws. Also, it shows custom and law to be a cultural construction rather than a fact, one that was deeply related to changes in technology such as writing, changing methods of reasoning that started relying on citation to prove authority, and developing communities that crafted new spheres of knowledge.

Medieval lay jurists constructed custom, they invented how it was packaged and articulated when they wrote the *coutumiers*, they decided what was included and what was excluded within that category, and they developed its ambit as a category of rule in the spectrum

of obligatory norm. The thirteenth-century *coutumiers* capture a moment of intellectual ebullience. They were part of the formative moments of the lay courts and the theorization of “law in practice” and in this sense were the lynchpin of French legal thinking until the Revolution and in some French colonies, beyond. They created something powerful in the French legal imagination, so powerful that their use only increased with time, and eventually that form of text became official law when the kings demanded *coutumiers* to be written for all the regions of France in the fifteenth and sixteenth centuries. This was all due to the ingenuity and intellectual creativity of the thirteenth-century lay jurists who borrowed and constructed, and effectively created “customary law.”

APPENDIX

Chapter IV outlined the range of citations that appeared in the *coutumiers* and the place of Roman law within this spectrum. These citations, and how they changed over time, can best be seen by following a group of related texts that cite both customary sources of normativity as well as “learned” ones, and seeing how citation practices developed over time. The *Coutumes d’Anjou et Maine* (1246) is the earliest vernacular Northern French *coutumier*, and its author barely used any citation at all. Then the compiler of the *Etablissements de Saint Louis* (1272/3) used the *Coutumes d’Anjou et Maine* as the base of Book I of his work and when he did, he added numerous citations to the text that included citations to practice, custom, Roman law and the Decretals. Later, the author of the *Coutumier d’Artois* (1283-1302, prob. 1300) copied sections of text from the *Etablissements de Saint Louis* into his work (as well as from Pierre de Fontaine’s *Conseil*), vastly expanded both how often citations were used, as well as the range sources to which they referred. This permits us to see how layers of citation were added over time in a connected group of texts.

This is not a tabulation of all the law words, but a tabulation of how often the authors use specific normative terms to validate specific rules. (usually introduced by the word “by” (*par*, *selonc*) or X “says that” (*dit que*), or simply “from” (*de*). Because the tables tabulate citations, they do not account for the parts of the text where the authors write without attributing to anything, like when the author opens by saying “You can,” “if it happens that,” “no one can,” “it should be known that,” “whoever” or state a rule as fact (ex. “The baron has all justice in his land” *Coutumier d’Artois*, XI.12). In these parts of text, the authority is presumably the author’s own, or that of “custom” itself.

Coutumes de Anjou et Maine (1246)

(or, *Etablissement* Book I, before the compiler made any additions)

Usage	Custom	By law/ right (<i>par droit</i>)	Other part of this text ⁸⁶²
27*, 72, 140*,	title 101, explicit	1, 10, 11, 25, 44, 46, 51, 52, 60, 76, 115, 116, 136, 158, 167,	113, 145, 160,

*= pointing out a negative usage, what usage is not.

⁸⁶² I have chosen to include this as a type of citation. It seems to be more than just the author not wanting to repeat himself, because it seems to point to a consciousness of the text as a composition, it makes his own text the referent.

The *Etablissements de Saint Louis* (1272/3)

The citations for Book I include only the citations added by compiler of the *Etablissements* to show how much he added to the *Coutumes d'Anjou et Maine*. The citations to Book II include both because, since we do not have this text, where the original ended and the compiler's insertions began is Viollet's conjecture. Also, it is worth noting that the compiler's additions change in nature in the second book, with a remarkable surge in citation to custom, usage, his own work, and the king's statutes. Why is unknown, perhaps there was more than one compiler who had a different understanding of what should be cited, perhaps the change was due to a patron's wishes, it is impossible to know—but it does show a general concern with citation rather than a privileging of Roman texts.

Note: the numbers in parentheses are the number of repeat mentions of the same source within the same provision.

Code	Digest	Decret. Greg. IX	Custum	Usage ⁸⁶³	This book	New Digest	Institutes	Kings statutes	Town charter	Com L
I.1 (4), I.3(2), I.28(2), I.29, I.36, I.39, I.41, I.55, I.69(2), I.83, I.85, I.86, I.93, I.97 (2), I.102(2), I.106, I.122, I.127(2), I.133, I.171(+auth) , I.173(2)	I.2, I.38, I.69, I.102, I.106, I.138, I.153, I.173(2)	I.4, I.28(2), I.36, I.69, I.89, I.90, I.91, I.106, I.127(2), I.173	(I.8 adde d area), I.90, I.102 , I.122		I.96, I.102, I.171,	I.4,		title		
II.4(2), II.8, II.9(5), II.12, II.13(3), II.14(4), II.15(3), II.16(4), II.18(2),	II.4, II.8, II.9(6), II.14(2), II.16(2), II.17(4),	II.7, II.9(5), II.14,	II.2, II.4, II.10, II.15, II.16, II.18(2), II.19,	II.3, II.4(2), II.5, II.7, II.8, II.9(3), II.14(2), II.16,	II.4(2), (in II.12, II.16(3), II.16(4), II.17, II.18,		II.1, II.13	II.4, II.11, II.12, II.16(4) ,	II.2 1, II.2 4	

⁸⁶³ Of the Orléans district, barony, secular courts.

II.20(2), II.22, II.23(2), II.28, II.31(3), II.32(2), II.36, II.37(2)	II.20, II.22, II.23, II.31(2), II.36, II.37	II.21, II.28, II.31(2), II.34(2), II.37	II.23, II.26, II.31(2), II.32(2), II.34, II.36, II.38(3)	II.17, II.19(2), II.20, II.21(2), II.22(2), II.23, II.24, II.26, II.27, II.28, II.29, II.30(2), II.31(8), II.32(3), II.33(3), II.34(2), II.36(4), II.37, II.38(2)	II.21, II.33(4), II.35(3), II.36, II.37, II.38			, II.30, II.31, II.35, II.38(2)		II.38
Code	Digest	Decret.	Cust.	Usage	This Book	New Dig.	Inst.	King	Town Charter	ComL

Some other sources of note: “Law and reason” (I.83), “Law and usage” (I.85), “Law and custom” (I.54), “Law and practice” (II.31), “General custom” (II.26), “Practice and custom” (II.31, II.32), “Tested custom of the area and the practice of the secular courts are in agreement” (II.34), and “King’s domain” (II.35).

***Coutumier d'Artois* (between 1283 and 1302, probably ca. 1300)**

The author of the *Coutumier d'Artois* copied sections from several texts into his work, and many citations were transferred from earlier works into his in this manner. He certainly copied from Pierre de Fontaines' *Conseil*, from the *Etablissements*, and from Tancred's *Ordo*. The citations have been staggered according to the narrative so that we can see different sources being used in different parts of the text, and what other sources they accompany.

Lois/ ec. ⁸⁶⁴	Cust. 865	usage s ⁸⁶⁶	Digest	Co de	Empe ror	Lit.	Bible	droit	case	reaso n	Com L	Decr etal	Ex. 867	Droit ec. ⁸⁶⁸	R oy	Je di
						Pro. 4	Pro.17									
		I.1, II.8,						II.2,	II.3,	II.3,	II.3					II.8,
		III.1,						II.5,	II.7,	III.22,						II.10,
III.16,	III.5,	III.22,	III.6,					II.9,	II.9,	IV.1,						III.1,
III.18,	III.6,	IV.1,	IX.1					III.6,	III.19,	V.4,		III.6,	III.17	III.33 ⁸⁷⁴	IV.	III.7,
III.22*,	III.18,	VII.2,						III.32,	III.34,				,		1,	III.23,
III.26,	V.1,							IV.4,	V.3,		III.32,					III.26,
III.34	XI.10,							VII.2,	VI.2,		III.33,					III.29,
	XI.11,							VII.5,								III.32,
	XIX.4,												???			IV.1,
	XIX.6,	VII.1		IX.2												Vi.1,
	XX.6,	IX.4,		,												VII.3,
																VII.5,

⁸⁶⁴ The author seems to use “lois” and “lois écrite” synonymously.

⁸⁶⁵ Can be the custom of the lay courts, of the barony, of Artois...

⁸⁶⁶ Can be the custom of the lay courts, of the barony, of Artois...

⁸⁶⁷ When author explains he is introducing an example (dont je te montrerai un essample) and does not provide detailed case information (names, locations). If case information is provided, it falls in the case column.

⁸⁶⁸ This section includes when then author says specifically “droit écrit” or when he cites “droit” and then quotes something written in Latin.

⁸⁷⁴ Quote of uncertain source, it is a maxim cited to “droit écrit” (have note about it coming from the Exoralia Magistri Guidonis, possibly Guido of Certona, cannot verify). The author seems to use “lois écrites” to denote the Roman texts, and “droit écrit” to denote those texts as well, but also the medieval scholars of those texts, also decretals.

	XXI.1, XLIII.3 XLIV.1, XLIV.2, XLV.1, XLV.4, XLVII.1, XVII.1 6, XLIX.10 , LII.7, LIII.12, L.1, L.12, L.13, L.14, LIII.19, LIV.78 LIII.18, LIV.18, LIV.29, LIV.36, LIV.71, LIV.74, LIV.76, LV.12, LVI.4, LVI.13, LVI.21,	XLVIII. 3, XLVIII. 7 XLVIII. 4(2), XLVIII. 6(2), L.1, L.12, L.13, L.14, LIII.18, LIV.18, LIV.29, LIV.36, LIV.71, LIV.74, LIV.76, LV.12, LVI.4, LVI.13, LVI.21,						L.12 869 L.19, L.15 870, LIV.58, LIV.73 *, LVI.3, LVI.6 871,	L.17, XXXIX .11, XL.15, XLII.3, XLVII. 5., XLVII. 13, L.17, L.19, L.15, L.22, LII.3, LII.4, LII.5*, LIII.5, LIII.8, LIII.9, LIII.14, LIII.17, LIII.18, LIV.7 8, LIV.7						XLVII. 10, XLVII. 17, L.6, L.15,(2) L.22, LII.3, LII.4, LII.5*, LIII.5, LIII.8, LIII.9, LIII.14, LIII.17, LIII.18, L.1, L.1, LIII.13,	XLVII .11 XLIX.3 (2), L.1, LIII.13,
--	--	--	--	--	--	--	--	--	---	--	--	--	--	--	---	--

⁸⁶⁹ Author refers to “verse”, but it likely some part of an *ordo iudiciarius*.

⁸⁷⁰ The author also simply cites this by saying it is a verse, but he it from Tancred, who also cites the same line, also introducing it as verse (*see Pillii, Tancredi, Gratiae libri de iudiciorum ordine*, ed. by Friedrich Bergman (Gottingen: Vandenhoeck & Ruprecht, 1848) p.238). Several sections of this title were copied from Tancred’s *Ordo*.

LVI.3		LVI.23, LVI.27, LVI.29,					LVI.8 872, LVI.1 1 ⁸⁷³ ,											LIV.6 0,
LVI.6,																		
LVI.32																		
Lois	Custom	Usage	Digest	Cod e	Empero r	Lit.	Bible	Droit	Case	Raison	ComL	Decret.	Ex	Droit ecrit	Ro y	Je di		

*= author cited only to disagree with the citation.

Some other sources of note: “Law and custom” (Pro.3, Pro.4, III.6, VII.3), “Customs and Usages” (In the prologue that opens to the table of contents, before actual prologue), reference to another part of the text (XLI.1), a maxim (VII.5),⁸⁷⁶ and “lay justice” (XI.2).

⁸⁷¹ The author cites “*selonc le droit Nostre Signeur*” (*Coutumier d’Artois* LVI.6)

⁸⁷² Author says “*selonc Dieu*” (*ibid.*, LVI.8).

⁸⁷³ Author says “*selonc Dieu*” (*ibid.*, LVI.11).

⁸⁷⁶ Convenience loy vaint.

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