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What Is Custom? Concept and Literary Practice

If the *coutumiers* were written as a response to a specific question, then surely that question was 'What is custom?' Its substance was obvious in some ways and not in others. Custom could refer to a wide range of personal and social habits. The *coutumier* authors were writing in response to a question about custom as a form of law, about practices and rules that were understood to have gained legal force.[1] Despite this specification, the question could still be answered in multiple ways – both implicitly by choosing which set of individual customs counted as 'the custom' of a particular place and in choosing how to discuss them, as well as explicitly through attempts to define the term itself.[2] Indeed, *coutumier* authors were not the only ones tackling

[1] In the Middle Ages as today, 'custom' could denote a convention, tradition, or usage with the general sense of a behaviour or procedure practised and accepted by a particular individual, society or community ('custom, n. and adj.', *OED Online*, Oxford University Press, March 2020, www.oed.com/view/Entry/46306 (accessed 30 April 2020)). The term also has a juridical valence. The modern dictionary definition, drawn directly from late-antique Roman jurists, described this juridical custom as a usage established by long continuance to have the force of law (*ibid.*). English language scholarship tends to describe it as a source of law while French-language scholarship tends to describe it as a type of law.

[2] The core question of 'what is custom?' overlapped with another, 'what are the customs?' A primary aim of these texts was certainly to specify particular rules and procedures. In choosing which rules and which procedures to group together and how to present them, each *coutumier* author offered their own understanding of the contours and substance of custom. Each text thus implicitly presented a vision of what custom was, even where the term was not defined or this was not explicitly stated as a goal of the text.

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the question. As they embarked on the task of defining custom and figuring out how to write about it, communities of canonists and Roman lawyers had already started wrestling with the notion of custom and continued to do so throughout the thirteenth century.

Each of these communities approached custom in overlapping yet distinct ways because of different interests, source material, and practical concerns. Jurists who studied Roman law tried to make sense of custom by theorizing its definition as well as its applicability through the notion of proof. Meanwhile, medieval ecclesiastics and canon lawyers sought to understand the place of custom in the framework of the church.

These different communities have given rise to different modern fields of study, and histories of custom in these fields have different starting points and emphasis. The history of custom in Roman law might touch on a Greek legacy but normally begins with Cicero and then turns to imperial jurists and codes of late antiquity. It often elides the early medieval period before looking to the Roman law revival and the robust juristic commentary practices on custom that developed thereafter. The history of custom in canon law normally begins with biblical notions of custom (usually with the New Testament), and then turns to the bishops of antiquity and the continuity of the tradition in the early medieval period, before looking to the great books and pronouncements on the subject in the central and high Middle Ages.

The history of custom in secular law, for northern France, generally divides into two periods. One covers the early Middle Ages to the end of the eleventh century, understood as a period of customary law because legal practice was not professionalized and notions of law blurred with other forms of moral imperative.[3] The next phase of this history begins around the twelfth century, when custom came to describe the primary norm of common transactions and lay lordships. Sources on the practice of the lay courts thus began to emphasize a consistency with practice, with 'usage' or 'custom', as justification for following a certain rule or procedure rather than, for instance, justifying it with an official act of lawmaking by a specified authority.

Some scholars describe this as the 'crystallization' of custom, by which individual customs that usually expressed a lordly exaction

[3] Reynolds, *Kingdoms and Communities*, p. 14.

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coalesced into rules or procedures tied to a specific lordship and were labelled by contemporaries as usages or customs.[4] They see crystallization in expressions that appeared in charters recording various transactions that tied custom to territorial lordship – ones such as '*secundum consuetudinem partrie*' or '*ad usus et consuetudines Normanniae*', where the particular rule or procedure followed the custom of the land or accorded with its usages and customs.[5] Other scholars describe the 'emergence' of custom, which is similar language for a different idea. By this interpretation, local or regional custom materialized under the influence of Roman law, which enjoyed an intellectual renaissance in twelfth-century universities and provided a new vocabulary, new legal categories and methods, and a new framework for understanding legal life.[6] Lastly, the appearance of the *coutumiers* is also explained by the history of literate practices: as orality

[4] The '*cristallisation coutumière*', the shift from the mores of a people to the usages and customs of a specific lordship (e.g. a duchy or a county), in southern France is described as occurring between the fifth and twelfth centuries – so the *mos Burgundiorum* from around the year 1000 shifted to the *bons us et coutumes* of the lordship of the area (Lauranson-Rosaz, 'Des "mauvaises coutumes" aux "bonnes coutumes"', p. 51). Such explicit references to custom only started to become common in northern France in the early thirteenth century: the *Statute of Pamiers* (1212) contains an early mention of custom and usage of France around Paris, while the customs of Champagne, Poitou and Flanders are explicitly referred to around the 1220s onward (Paul Ourliac and Jean-Louis Gazzaniga, *Histoire de droit privé français*, p. 66). While we in retrospect can identify patterns that indicate consistent use of certain practices, these were not labelled as custom or explicitly articulated. For example, John Baldwin writes that patrilineal succession in the Paris region was apparent in practice at the beginning of the reign of Philip Augustus (1180–1223), but it had virtually no express written formulation at that time and that references to 'customs' (*consuetudines*) were exceedingly rare in ecclesiastical charters even in the first couple of decades of the thirteenth century (Baldwin, *Knights, Lords, and Ladies in Search of Aristocrats in the Paris Region*, pp. 65–6).

[5] Jean Yver, 'Les caractères originaux', pp. 2ff; Olivier Guillot, 'Sur la naissance de la coutume en Anjou au XIe siècle'. The Norman customs have been especially studied in this regard because of the earlier development of strong ducal power in the region between the eleventh and twelfth centuries (Gilduin Davy, 'Les chartes ducales, miroir du droit coutumier normand?', 202–5; Mark Hagger, 'Secular Law and Custom in Ducal Normandy').

[6] André Gouron argued over thirty years ago that it was artificial to treat canon-law, Roman-law, and secular-law communities as though they were undergoing isolated developments, and much of his work has been devoted to showing that customary law developed under the influence of Romano-canonical law (Gouron, 'La coutume en France au Moyen Âge', p. 194). In his words: 'Sans renaissance des droits "universitaires", point de coutume' (*ibid.*, p. 205). See also Gouron, 'Aux origines de l'émergence du droit'.

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shifted to literacy, these histories argue, oral legal practices were transferred into the written lawbook.[7]

I begin in a different place from these studies, with concepts and texts. This chapter provides a history of the idea of custom and of texts about lay legal life that predate the *coutumiers*. The first part of the chapter examines the struggle to define custom from late antiquity to the time of the *coutumiers*. It shows that the conceptualization and definition of custom in its legal dimension was no obvious thing: common definitional elements existed, but debate and a lack of consensus around the definition of custom would continue through the thirteenth century onward.

I speak here of Roman and canon law communities not to assess their influence on the *coutumiers* but to show the intellectual churn around the concept of custom.[8] The *coutumiers* were composed at a time when the question 'What is custom?' sparked lively debate. Academic communities discussed how to prove individual customs and how to define the term generally. Definitions that later proved marginal, unpopular, or fleeting are as important as the ones that left a lasting imprint in legal thought because together these all show the breadth of ideas about custom in the twelfth and thirteenth centuries. My goal is to shift the discussion from the well-worn analysis of 'influence' towards different community cultures of customary law in Romanist, canonist, and secular circles.

The second part of the chapter briefly examines custom as a subject of literary practice. It begins by considering where and how secular practice was written about in the period before the first *coutumiers* and ends with brief descriptions of each of the *coutumiers* at the heart of this study. My first goal is to place the *coutumiers* not just in the history of the lawbook, as has been done before, but more generally in the history of descriptive or expository writing about secular law.[9] This shift in approach reveals a long interest in and desire for the written exposition of secular law and permits the inclusion of theological and monastic writings that do not get meaningful attention in the history of

[7] Stock, *The Implications of Literacy*, p. 56; Clanchy, *From Memory to Written Record*, p. 29ff; Cohen, *Crossroads of Justice*, pp. 5ff.

[8] The idea of influence is discussed in Chapter 5.

[9] The relationship between the *coutumiers* and acts of practice (such as transactional documents and court records) is treated in Chapter 6.

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the *coutumiers*. My second goal is to provide descriptions of the *coutumiers* of thirteenth-century northern France in order to show that, notwithstanding obvious and important commonalities, each text actually showcases a unique approach to writing custom. This reveals the importance of authorial approach and an element of subjectivity inherent to the contents of the *coutumiers*. It adds a key element to the current background narratives of the *coutumiers*, which focus on how individual practices and rules were identified as territorial customs, the pre-eminent influence of Roman law, and the shift from oral to written form. Also, some *coutumiers* are better known and more studied than others, so the descriptions in this chapter permit the group to be viewed as a whole.

Custom and Law in Late-Antique Juristic Thought

Dictionary definitions of custom might seem obvious or natural, but they are the product of a long history. The Roman law of late antiquity played a fundamental role in the history of custom as a form of law in the European Latin West. Its language and categorization had such an impact that modern definitions derived from them still follow them closely. This history shows how the definition of custom developed in contrast to developing notions of law, especially legislation, and that custom is not a static notion but one that changed over time. The jurists of late Roman antiquity, just as later medieval thinkers, found it difficult to choose precisely when and how certain practices came to be obligatory. What tipped the scales from habitual practice to law? Why should unlegislated norms be enforced? A look at the late Roman legal tradition helps illuminate what medieval Romanists constructed out of that tradition as well as the *coutumier* authors' quite different understanding of custom.

We know about Roman views on custom from the writings of orators and jurists. Orators, advocates who did the pleading in court, commonly used arguments from custom in litigation, drawing variously on the wide range of terms for custom: *consuetudo*, *usus*, mos.[10] Cicero (106–43 BCE), in *De Inventione*, was already defining

[10] Caroline Humfress, 'Law and Custom under Rome', p. 24.

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custom according to what would become its classic attributes: 'what age has approved by the will of all in the absence of statute'.[11]

The classical jurists (fl. first to third century CE) developed a more technical interest in custom as they sought to account for unlegislated aspects of the civil law, reframing the political ideals of *mos maiorum* (ancestral custom, or the way of the ancestors) into an explanation for contemporary legal practices and institutions.[12] For them, custom with the appropriate sedimentary layers of age accrued into something like law.[13] The second-century jurist Julian (Salvianus Julianus), for instance, explained that 'age-encrusted custom [*inveterata consuetudo*] is not undeservedly held as law [*pro lege*], and this is a kind of Law [*ius*] which is said to be established by habit [*mos*]'.[14] The third-century jurist Modestinus echoed this sedimentary aspect of custom but saw it as a source of law rather than a form of law: 'every rule of Law [*ius*] is either made by agreement, or established by necessity, or solidified [*firmavit*] by custom [*consuetudo*]'.[15]

Classical jurists saw custom as a practice or factual circumstance that acquired legal force through recognition by statute, imperial rescript, magistrate's edict, or the consistent opinion of jurists.[16] For instance, if statute law was ambiguous, Septimus Severus (r. 193–211)

[11] Peter Stein, 'Custom in Roman and Medieval Civil Law', 337.

[12] José Luis Alonso, 'The Status of Peregrine Law in Egypt', 370–1.

[13] The *Corpus iuris civilis* was composed by sixth-century jurists at the behest of Emperor Justinian and issued between 529 and 534 CE. The *Institutes*, the introductory textbook of Roman law, was a new composition. The other parts of the *Corpus* were composed by cutting and pasting earlier sources together. While this preserved the earlier sources, it also presented them altered: the *Digest* contains removed and decontextualized passages taken from the works of jurists rearranged and collated according to its own subject matter divisions, and the *Code* contains removed and decontextualized passages drawn from imperial rescripts that are rearranged and collated in a similar manner. The *Novels* is an addendum of new law issued after 534. I present ideas about custom here in chronological order so that the evolution of thinking about custom in late antiquity might be seen more clearly.

[14] 'Inveterata consuetudo pro lege non immerito custoditur, et hoc est ius quod dicitur moribus constitutum', Justinian, *Digest* 1.3.32. There is a difficulty in translation because English uses the term law for both statute/legislation and larger notions of right and justice, unlike Latin which differentiates *lex* as statute/legislation and *ius* as right and justice (as do many continental languages). To distinguish the latter in English Law is written with a capital 'L'.

[15] 'Ergo omne ius aut consensus fecit aut necessitas constituit aut firmavit consuetudo', Justinian, *Digest* 1.3.40.

[16] Stein, 'Custom in Roman and Medieval Civil Law', 338.

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indicated that it ought to be interpreted through custom or an unbroken pattern of similar judicial decisions.[17] Unlike later medieval jurists, they were not particularly interested in elaborating a theory of customary law as a form of legal obligation in its own right but rather in understanding how to use custom in specific legal contexts, most notably, provincial contexts.[18] Even references to geographically specific custom seem to indicate less a fixed, longstanding, and established custom than a dynamic interest in how the concept could be deployed in legal argumentation.[19]

Juristic writings and imperial rescripts from the late third and fourth century show that the nature of custom continued to be unsettled and opinions on the subject contradictory. Hermogenian, a jurist under Diocletian (r. 284–305), emphasized length of time in his characterization of custom while pushing its theory a little further: 'we also keep to those rules that have been sanctioned by long custom [*longa consuetudine*] and observed over many years [*per annos plurimos observata*]; we keep to them as being a tacit agreement of the citizen, no less than we keep to written rules of law'.[20] Custom still had to be long, but he clarified 'long' as several years. Longevity, however, was not sufficient to elevate custom to the same force as law: it also had to have been observed through time.[21] That this gave custom the force of law was not necessarily the received

[17] David J. Bederman, *Custom as a Source of Law*, p. 19; Justinian, *Digest* 1.3.38.

[18] Humfress, 'Law and Custom under Rome', pp. 25, 47. Custom created a category of law or legal thinking for very specific contexts, notably provincial contexts (*ibid.* pp. 26ff). In 224, Emperor Severus Alexander made it the duty of the provincial governor to follow local custom in local disputes (Justinian, *Code* 8.52.1). As he explained, 'preexisting custom [*consuetudo praecedens*] and the reasons that gave rise to it should be upheld, and the provincial governor will make it his business to prevent anything being done contrary to longstanding custom' ('*Nam et consuetudo praecedens et ratio quae consuetudinem suasit custodienda est, et ne quid contra longam consuetudinem fiat, ad sollicitudinem suam revocabit praeses provinciae*'; Justinian, *Code* 8.52.1). This may be the problem Ulpian (ca. 170–223) sought to address in his Duties of a Proconsul, when he noted that the first line of inquiry to be pursued when someone alleged a custom in court was whether it had previously been upheld in contentious proceedings (Justinian, *Digest* 1.3.34).

[19] Humfress, 'Law and Custom under Rome', p. 30.

[20] '*Sed et ea, quae longa consuetudine comprobata sunt ac per annos plurimos observata, velut tacita civium conventio non minus quam ea quae scripta sunt iura servantur*' (Justinian, *Digest* 1.3.35).

[21] The jurist Paul mentioned the principle of approval earlier, but in a manner that might be deemed more descriptive than constitutive: 'This kind of law is held to be of

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view, as can be seen in Constantine's (r. 306–37) statement that longstanding (*longaevi*) custom (*consuetudo*) and usage (*usus*) were 'of not insignificant authority' but that they did not contravene reason or law (*lex*).[22]

Custom achieved firmer standing as a legal norm in itself, one distinct from general habitual action, with the post-classical jurists from about the fourth century onward. Notably, jurists of the pre-eminent law school of the late-antique Roman world at Beirut tended to equate custom with law.[23] In fact, it was at this time that jurists are thought to have developed the theory of desuetude: the abrogation of custom by inaction or silent agreement over time.[24]

Christian theology had also been developing a doctrine of custom. This doctrine first appears in the writings of Tertullian (ca. 160–240), who justified the authority of custom for the church by looking to secular law, which turned to custom in the absence of law.[25] However, he wrote that custom should only be granted by this authority if it was reasonable and conformed to Christian truth.[26] Custom and truth were not necessarily comfortable allies. It was the same Tertullian who first noted that Christ had called himself 'the Truth' and not 'the Custom', a dictum that would have traction in the medieval period.[27]

Indeed, custom came to be linked to resistance to truth, and thus to heresy.[28] While arguments from custom were made at church councils,

particularly great authority, because approval of it has been so great that it has never been necessary to reduce it to writing' (Justinian, *Digest* 1.3.36).

[22] 'Consuetudinis usuque longaevi non vilis auctoritas est . . . ' (Justinian, *Code* 8.52.2).

[23] Stein, 'Custom in Roman and Medieval Civil Law', 339.

[24] As Peter Stein notes, a post-classical addition was probably made to Julian's text that mentioned desuetude, though the notion that some early statutory rules had lost force *per desuetudinem* did exist in Gaius' *Institutes* (Stein, 'Custom in Roman and Medieval Civil Law', 339).

[25] '*Consuetudo etiam in civilibus rebus pro lege suscipitur cum deficit lege*' (Tertullian, *De corona*, IV.6 in Jean Gaudemet, 'La coutume en droit canonique', p. 44).

[26] Gaudemet, 'La coutume en droit canonique', p. 44. [27] *Ibid.*

[28] Ancient custom was a problem for the early church. Tertullian stated that heresy was condemned not for being novelty but for being contrary to truth, and everything contrary to truth is heresy, even ancient custom ('*Sed dominus noster Christus veritatem se non consuetudinem cognominavit. Hersim on tam novitas quam veritas revincit. Quodcumque adversus veritatem sapit, hoc erit heresis, etiam vetus consuetudo*'; Tertullian, *De virginitatis velandis*, 1.2 in René Wehrlé, *De la coutume dans le droit canonique*, p. 47. Cyprian (ca. 200–58) invoked the dictum of Christ as Truth and not Custom in his discussion of the contentious issue of the rebaptism of heretics (*ibid.*, pp. 50ff; Gaudemet, 'La coutume en droit canonique', p. 45). Later, Theodoret

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these could be invalidated by allegations that the custom in question went against reason.[29] Basil (ca. 330–79) described custom as having force of law.[30] Augustine (354–430) held that where Holy Scripture had left uncertainties, the custom of the people of God or the institutions of the ancestors should be held as law.[31] Myriad practices, rituals, and ceremonies were fine if they did not contravene 'true doctrine' or 'sound morality' and led towards a better life.[32] However, practices not contained in Scripture, established by councils, or reinforced by the custom of the universal church – practices that varied enormously by place and habit – should be unhesitatingly ended when the reasons for them were no longer perceptible.[33] We can see here a tension around the idea of custom in Christian thinking, one that did not seem to be a preoccupation in the work of jurists. The latter were less interested in judging customs as good or bad than the former, but, this judgement aside, Christian thinkers and jurists deployed very similar if not identical definitions of custom.

The *Theodosian Code* (438) placed a new onus on custom by reserving an entire section for the subject of customary law, titled 'Longstanding Custom' (*De longa consuetudine*), although it was buried at the end of the fifth book of the *Code* and contained only one provision: 'To insist upon things established of old [*veteribus institutis*] is the discipline of future times. Therefore, when nothing that is in the public interest interferes, practices which have long been observed [*quae diu servata sunt*] shall remain valid.'[34] This went

of Cyrrhus (ca. 393–ca. 457) exhorted pagans to convert to Christianity and so to choose truth over the customs of their ancestors and the mores of their country (Wehrlé, *De la coutume dans le droit canonique*, p. 64).

[29] For church councils, see Wehrlé, *De la coutume dans le droit canonique*, pp. 54ff and Gaudemet, 'La coutume en droit canonique', p. 46.

[30] Wehrlé, *De la coutume dans le droit canonique*, pp. 56ff.

[31] 'In his enim rebus de quibus nihil certi statuit Scriptura divina, mos populi dei, vel instituta maorum pro lege tenenda sunt' (Augustine in Wehrlé, *De la coutume dans le droit canonique*, p. 60).

[32] Augustine of Hippo, 'Letter 55 (A.D. 400)' trans. Cunningham, chap. 18.34 (accessed 30 April 2020).

[33] *Ibid.*, chap. 19.35.

[34] 'venientium est temporum disciplina, instare veteribus institutis. ideoque quam nihil per causam publicam intervenit, quae diu servata sunt, permanebunt. dat. iv. kal. mart. constantinopoli, iuliano a. iv. et sallustio coss', *Theodosian Code* 5.20.1. (equivalent to Alaric's *Breviary* 5.12 and Justinian's *Code* 8.52). 'Veteribus institutis'

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beyond earlier statements, as it made practices that have been observed over a long period of time legally valid as long as they were not against the public interest. Emperors Leo and Anthemius went beyond this in 469, stating that 'Custom, approved of old and tenaciously adhered to [*antiquitus probate et servata tenaciter consuetudo*], also imitates and upholds the statutes themselves.'[35]

By the time of the great compilation of the *Corpus iuris civilis*, completed between 529 and 534, the authority of custom did not sound too different from that of legislation. The introductory handbook for students, the *Institutes*, stated clearly that 'long-standing custom [*diuturni mores*] founded on the consent of those who follow it is just like legislation'.[36] Custom shared a title with laws and decrees of the senate (*senatus consulta*) in the *Digest* and an independent title in the *Code* detailing how long custom should be understood, '*Quae sit longa consuetudo*'.[37]

The definitions and debates of jurists and theologians of the Roman world had a great impact on understandings of custom in the Middle Ages. The technical language of this custom had not been definitively set, and the boundaries between the various words for custom, *consuetudo*, *mos*, and *usus*, were rather blurry. However, the lexical and rhetorical concepts of custom described here would be deployed and redeployed throughout the medieval period. Late-antique Christian thought established a tension between truth and custom, an uneasiness about how to negotiate unity and diversity, and an emphasis on the subservience of custom to reason. Late-antique

is sometimes translated as 'ancient customs', and it could include these but seems originally to have been wider in meaning, including other types of old law. *Institutum* can mean anything from custom to principle, decree, intention, institution, habit, or plan. This is the one and only provision placed under *Theodosian Code*'s heading of 'Longstanding Custom', but it is itself vague. What is interesting is that Alaric's Breviary, promulgated in 506 under the Visigothic king Alaric II, summarized that statement in the interpretation in terms of *consuetudo* and *lex*: 'Long established custom [*longa consuetudo*] shall be observed as law [*pro lege servabitur*] when it does not interfere with the public welfare [*interpretatio. longa consuetudo, quae utilitatibus publicis non impedit, pro lege servabitur*]' (*Theodosian Code* 5.20.1, equivalent to *Breviary* 5.12).

[35] '*Leges quoque ipsas antiquitus probate et servata tenaciter consuetudo imitator ac retinet*' (Justinian, *Code* 8.52.3).

[36] Justinian, *Institutes* 1.2.9.

[37] Alonso, 'The Status of Peregrine Law in Egypt', 379. See Justinian, *Digest* 1.3.32ff, *Code* 8.52.

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jurists' categorizations and descriptions of custom – as longstanding, unwritten, assumed to express the tacit consent of 'the people', sometimes the rival of *lex* (law) and sometimes its interpreter – provided medieval thinkers with a set of resources from which to construct their own theories of custom.[38]

Defining Custom in Medieval Canon Law and Roman Law

The terminology and classification of legal norms found in late-antique Roman legal texts were not at the forefront of legal thought in the early Middle Ages. The exception to this was Isidore of Seville (ca. 560–636), who echoed Roman definitions in the fifth chapter of his *Etymologies*, the first half of which was devoted to laws and was essentially a very brief abridgement of the key ideas of Roman law. Isidore, like his Roman predecessors, pitted custom against law (*lex*), describing it variously as 'usage tested by age'; unwritten law, although it was immaterial whether it was written or unwritten; and a longstanding and common usage drawn from mores, taken as law in the absence of law.[39]

The early Middle Ages is known as an age of customary law. At the same time, those who composed the early medieval laws, once known as barbarian laws, described the texts as laws or legislation.[40] Defining custom and separating it from law was not a preoccupation in these

[38] David Ibbetson, 'Custom in Medieval Law', p. 152; Jacob, 'Les coutumiers du XIIIe siècle ont-ils connu la coutume?, pp. 103–20.

[39] '1 *Ius generale nomen est, lex autem iuris est species. Ius autem dictum, quia iustum est. Omne autem ius legibus et moribus constat.* 2 *Lex est constitutio scripta. Mos est vetustate probata consuetudo, sive lex non scripta. Nam lex a legendo vocata, quia scripta est.* 3 *Mos autem longa consuetudo est de moribus tracta tantundem. Consuetudo autem est ius quoddam moribus institutum, quod pro lege suscipitur, cum deficit lex: nec differt scriptura an ratione consistat, quando et legem ratio commendet.* 4 *Porro si ratione lex constat, lex erit omne iam quod ratione constiterit, dumtaxat quod religioni congruat, quod disciplinae conveniat, quod saluti proficiat. Vocata autem consuetudo, quia in communi est usu*' (Isidore of Seville, *Etymologia*, 5.3. 1–4: LacusCurtius, https://bit.ly/3PRywe8 (accessed 28 April 2020)). The distinction between written and unwritten in this definition is discussed in Chapter 3.

[40] These texts fit Roman or Isidorian definitions of law as written statute but do not fit modern perceptions of law's relationship to applicability and enforcement. Scholars have been moving away from the idea that a Germanic *Volksrecht* survived via the principle of personality of law to be redacted centuries later and have come to see these texts as the result of various expediencies of their particular moment.

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texts, which are best known for listing compensation payments for specific infractions. The *Lex Baiuvariorum*, or Bavarian Laws (mid-eighth century), was an exception within this group in that it reflected uniquely on Roman categories of law and custom. While the prologue traces the Bavarian laws back to Merovingian times, the text in the form we know was a product of Carolingian scriptoria and reflects ideologies of these latter times.

The preface of the Bavarian Laws argued that the text itself was legitimate law. The first two-thirds of the preface was drawn directly from Isidore of Seville's *Etymologies* with some small but important changes. The text began with a genealogy of lawmakers, from Moses to the Greeks to the Twelve Tables to codification by emperor Theodosius (429–34). Rather than ending with the *Theodosian Code* as did Isidore, the Bavarian Laws then noted that a new age began after the *Code*, one where 'each people selected their own law from customary practice'.[41]

The preface next incorporated Isidore's definitions of law and custom but fashioned these into an argument in favour of law. After noting that custom was a type of law, the preface stated that Theoderich, king of the Franks, asked men learned in 'ancient laws' to write the 'laws' of the Franks, Alamans, and Bavarians, keeping what was necessary and discarding the rest.[42] The prologue referred to those norms as 'law' and afterwards differentiated them from 'custom', making this a term associated with a pagan past.[43] Echoing late-antique theologians who opposed heretical custom to Christian truth, the text explained that pagan 'customs' were displaced by 'Christian law'.[44] The preface to the Bavarian laws was clear: it was significant to

[41] 'Deinde unaquaque gens propriam sibi ex consuetudine elegerunt legem' (*Leges Baiwariorum*, ed. von Schwind, preface (accessed 28 April 2020), p. 258).

[42] *Ibid*. The prologue's emphasis on the legitimacy of Merovingian rulers, beginning with Clovis' son Theuderic, indicated opposition to Carolingian reforms of Frankish policy but also legitimized laws through ethnicity (Helmut Reimitz, *History, Frankish Identity and the Framing of Western Ethnicity, 550-850*, p. 329).

[43] The text also refers to Theodorich's personal custom (*secundum consuetudinem suam*) in the same sentence (*Leges Baiwariorum*, preface, p. 259).

[44] '*Et quae erant secundum consuetudinem paganorum mutavit secundum legem christianorum. Et quicquid Theodericus rex propter vetustissimam paganorum consuetudinem emendare non potuit, post haec Hildebertus rex inchoavit, sed Lotharius rex perfecit.* [...] *omnia vetera legum in melius transtulit et unicuique genti scriptam tradidit, quae usque hodie preserverant*' (*ibid.*).

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have a written law, one that reflected Christian law, rather than *consuetudines*, which here were now relegated to pagan customs.[45] Roman law via Isidore's *Etymologies* combined here with a theological tradition that understood custom as a valid norm but also associated it with wrong forms of religious thought, whether pagan or heretical.

Only later, in the twelfth century, however, did a real distinction between law and custom gain traction once again in Christendom.[46] Before then, there were certainly norms and legislation, but these were generally not taxonomized or articulated as a body of rules. Rather, they infused specific grants, individual agreements, and occasional though rare legislation.[47] While there were courts and while there was dispute resolution, the world of law was not based on a professional practice and often blurred law and morality, principle and specific instance, and law and fact.[48]

For legal historians of France, this raises the question of when and how law as a concrete category 'emerged' from all of this.[49] Answers tend to point to the rebuilding of 'public' power and the study of Roman law at universities. This question, and the answers, are partly connected to the debate over the extent to which order fell apart in the post-Carolingian West and thus the extent to which domination and violence had supplanted law and the extent to which the ability to think theoretically about law could continue in a world where public governmental institutions had been displaced by banal rights and exactions. The answer is also partially connected to whether, if we accept a world of domination and fines, we accept the university study

[45] Patrick Wormald noted that the *Lex Salica* was a basic inspiration for the Bavarian Laws (and others), but effort was made to convey Bavarian custom (Wormald, *The Making of English Law: King Alfred to the Twelfth Century*, vol. 1, *Legislation and Its Limits*, p. 44). The Franks, he noted, were less interested in creating a law for their subject peoples to use than in 'coaching them in the value of having written law' (*ibid.*). He thus emphasized the importance of written legislation for the text, but it also offers an important view on the tension between *lex* and *consuetudo* that builds on a Roman legacy but combines it with Christian thought.

[46] Reynolds, *Kingdoms and Communities*, p.16; Gouron, 'La coutume en France au Moyen Âge', p. 200.

[47] Reynolds, *Kingdoms and Communities*, pp. 14–17, Gilissen, *La coutume*, p. 52.

[48] Reynolds, *Kingdoms and Communities*, p. 14.

[49] See for instance, Jacques Ellul, 'Le problème de l'émergence du droit'; Gouron, 'Aux origines de l'émergence du droit'; Lemarignier, 'La dislocation du "pagus"'.

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of Roman and canon law as the necessary condition for a return to legal theory. Those scholars who emphasize the study of Roman law at universities as an explanation generally hold one of the following two positions. The maximalist viewpoint claims that the very use of the term *consuetudo* (as opposed to other normative terms) was itself an indication that an author was not only using the categories of learned law but, beyond that, also signalling their desire to be understood as a branch of learned law.[50] Others more moderately argue that the idea of custom as a category of law resulted from the influence of university study of Roman and canon legal texts.[51]

The predominant definition of *consuetudines* in France in the eleventh century was customary dues, or exactions – the rights and duties owed to a lord, usually translated into monies or services to be paid or done for various obligations or privileges.[52] Yet this was not the sole use of the term. There was some continuity in the notion of *consuetudo* as norm from the sixth to the twelfth centuries, alongside uses of the term that ranged from various forms of habit to exaction.[53] *Consuetudo* was used between the eighth and eleventh centuries on its own but also collocated with law. That is evident in the *Lex Baiuvariorum*. We can also see it in the Carolingian formula 'law and custom demands…'.[54] Abbo of Fleury (ca. 945–1004) invoked the concept of custom in his *Collectio Canonum*, a definition he took from Cicero.[55] Abbo quoted Cicero's definition of custom but shifted its focus from natural law to civil law, reorienting the source for his own purposes.[56] References to custom as exaction abound in early

[50] Kroeschell in Teuscher, *Lords' Rights and Peasant Stories*, p. 7.

[51] Robert Jacob, 'Les coutumiers du XIIIe siècle'.

[52] See Olivier Guillot, '*Consuetudines*, *consuetudo*'; Reynolds, *Kingdoms and Communities*, p. 17; Gilissen, *La coutume*, p. 23. Gilissen describes the various meanings the word 'custom' could have (*ibid.*).

[53] See Jean-Louis Thireau, 'La territorialité des coutumes au Moyen Âge', pp. 453–4.

[54] '*lex et consuetudo exposcit* …' (*ibid.*, 455).

[55] For Abbo the contrast is between *lex* and *mos* (defined as *consuetudo vetustate probata*), and written and unwritten law (Mostert, *The Political Theology of Abbo of Fleury*, p. 110). See Chapter 3 for more on this subject. Cicero's definition: 'Consuetudine autem ius esse putatur id quod voluntate omnium sine lege vetustas comprobarit' (Cicero, *De inventione; De optimo genere oratorum; Topica*, trans. Hubbell, 2.22.67).

[56] Mostert, *The Political Theology of Abbo of Fleury*, p. 68.

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eleventh-century sources, but instances of custom as norm also persisted.[57]

The desire to further develop the concept of custom can be seen in glimpses before the Roman revival. While the phrases *jus consuetudinarium* and *lex consuetudinaria* did not appear in Roman legal texts and had long been attributed to the legal renaissance of the twelfth century, they have been traced back earlier to eleventh-century texts in northern France and Germany, before Justinianic learning spread to that area.[58] While not frequent, these expressions do point to the existence of the concept of a 'customary law', though one that largely designated fiscal dues or privileges.[59] It was at the very end of the twelfth century, in large measure due to canonists and Romanists trying to understand the nature of custom, that these expressions began to designate a broader customary law in opposition to *jus scriptum* and *jus ecclesiasticum*.[60] Thus, a notion of and vocabulary for 'customary law' as a body of law existed though only later came to designate the norms of particular jurisdictions.

In other words, the meaning of the term *consuetudo* as norm or the idea that it could designate a body of rules were not completely lost or absent and then rediscovered or created apace with the 'rediscovery' of Roman law in the later eleventh century. Nonetheless, the renewed study of Roman law is indeed vitally important to this history. Without a doubt, the popularization of Roman law categories discussed above, the development of these categories by medieval authors, and their dissemination by university-trained graduates led to their diffusion and, by the thirteenth century, their ubiquity.

And indeed, it was canonists who first dusted off older ideas about custom to wage new political battles.[61] Famously, Pope Gregory VII

[57] The uses of the term *consuetudo* in the *Theodosian Code* often referred to public administrative practices related to fiscal issues and some treated *exactions* specifically, making the link to seignorial exactions less of a stretch than it may seem (Franck Roumy, '*Lex consuetudinaria*, *Jus consuetudinarium*', 287–8).

[58] See Roumy, '*Lex consuetudinaria*, *Jus consuetudinarium*'. [59] *Ibid.*, 262ff, 288.

[60] *Ibid.*, 290. These three overlapped in practice as it was common for bishops to hold land and rights in the same way that secular lords did, and the boundaries were not always easily discernable. Different subject matter jurisdiction could give them claims in the same issue for different reasons (Amelia J. Uelmen, 'A View of the Legal Profession', 1520).

[61] It is somewhat artificial to divide the canonists and Romanists as these communities have much overlap and often grappled with similar ideas and categories. However,

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(1021–85) revitalized the late-antique dictum that Christ had identified himself as the truth and not the custom and utilized it in the effort to wrest the church from secular control.[62] In his words, 'any custom, no matter how old and no matter how widespread, must certainly be considered secondary to truth and a usage that is contrary to truth must be abolished'.[63] In this way, a succession of popes curtailed the importance of custom as a form of law in canon law, changing it from an autonomous form of law to one that was subject to *aequitas canonica*.[64]

Canonical collections also touched on the subject of custom. Generally, the canonists of the twelfth century agreed that the diversity of customs was not a threat to the unity of the church; that truth vanquished custom; and that law superseded a custom that was contrary to it, but custom that confirmed law should be approved.[65] From Ivo of Chartres to Gratian's *Decretum*, emphasis was placed on custom that conformed to reason.[66] Gratian opened his *Decretum* by saying that the human race was 'ruled by two things, namely, natural law and customs [*iure et moribus*]'.[67] Gratian took up Isidore's definition, noting that *consuetudo*-custom was a form of law established by common usage, recognized as legislation in the absence of the same, and confirmable by writing or reason.[68] He did not make the difference between *mos* and *consuetudo* entirely clear.[69] Beyond that, he also seems to collapse the difference between custom and legislation.[70]

there were also notable differences, and to make these evident, I discuss them separately, first the canonists and then the Romanists.

[62] Wehrlé, *De la coutume dans le droit canonique*, p. 81.

[63] '*Et certe (ut beati Cypriani utamur sententia) quaelibet consuetudo, quantumvis vetusta, quantumvis vulgata veritati omnimodo est postponenda et usus qui veritati est contrarius, est abolendus*', Gregory VII in W. J. Zwalve, *Law & Equity*, p. 24.

[64] Zwalve, *Law & Equity*, pp. 23–4.

[65] Wehrlé, *De la coutume dans le droit canonique*, p. 84.

[66] Jacques Krynen, 'Entre science juridique et dirigisme', §11.

[67] 'Humanum genus duobus regitur, naturali videlicet iure et moribus', Gratian, *Decretum*, D. 1. He continued, 'All ordinances are divine or human. Divine ordinances are determined by nature, human ordinances by usages; and thus the latter vary since different things please different people.' ('*Omnes leges aut divine sunt aut humane. Divine natura, humane moribus constant. Ideoque hee discrepant, quoniam alie aliis gentibus placent*', *ibid.*, D 1.1.1).

[68] *Ibid.*, D. 1 c.5.

[69] '*Mos autem longa consuetudo est de moribus tracta tantumdem*' (*ibid.*, D. 1 c.4).

[70] He did so when he said 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 into writing is called

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Gratian also described a genealogy for the origins of customary law, one that placed the creation of custom after the creation of natural law, when human beings began to live together.[71] He explained that it nearly disappeared with the Great Flood and reappeared in the time of Nimrod, at the moment when he along with some others began oppressing people, who then foolishly submitted to him.[72] In its ecclesiastical origin fictions, custom was associated with lordly dominance and oppression.

The thirteenth century was characterized by a tremendous proliferation of decretals, papal decrees on issues of canon law, and conciliar legislation. As the authority of the papacy expanded, custom increasingly came to be identified with the voice of dissention. This can be seen in the Third Lateran Council (1179), the main goals of which were to address the problem of schism and the dispute between the pope and the Holy Roman emperor. Canon 16 explicitly confirmed the authority of the majority vote against those who made arguments from *consuetudo*.[73] Arguments based on custom were described as linked to individual will rather than reason, and custom was not to be upheld unless supported by reason and in accord with sacred decrees.[74] This solidified that reason as a general category overrode custom.[75]

In the history of custom, the Fourth Lateran Council (1215) is normally cited for prohibiting clerical participation in judicial rituals that involved the 'judgment of God' – ordeal and judicial duel – and thus pushing secular jurisdictions towards the so-called rational procedure of the inquest.[76] Importantly, however, it also included an

enactment or law, while what is not collected in writing is called by the general term custom' (*ibid.*, D. 1 c.5). More on this in Chapter 5.

[71] '*Jus vero consuetudinis post naturalam legem oxordium habuit, ex quo homines convenientes in unum ceperunt simul habitare*' (Gratian, *Decretum* D. 6 c.3 §2).

[72] ' . . . *postea a tempore Nemroth reparatum sive potius immutatum existimatur cum ipse simul cum aliis alios cepit opprimere; alii sua imbecilitate eorum ditioni ceperunt esse subjecti*' (*ibid.*).

[73] Paul Valliere, *Conciliarism*, p. 127.

[74] The Third Lateran Council, Canon 16, www.papalencyclicals.net/councils/ecum11.htm (accessed 27 May 2020).

[75] Valliere, *Conciliarism*, pp. 127–8. Third Lateran Council, Canon 16.

[76] Of course, this prohibition was implemented at different paces by different jurisdictions and the non-sacral nature of the judicial duel gave it a much longer life post-ban than other forms of ordeal (Bartlett, *Trial by Fire and Water*, pp. 122, 127ff). The Fourth Lateran Council regulated an inquisitorial procedure that was already in use in church courts (see Pennington, 'The Fourth Lateran Council').

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affirmation of the separation between ecclesiastical and secular jurisdiction:[77]

Canon 42. Clerics and laity are not to usurp each other's rights. Just as we desire lay people not to usurp the rights of clerics, so we ought to wish clerics not to lay claim to the rights of the laity. We therefore forbid every cleric henceforth to extend his jurisdiction, under pretext of ecclesiastical freedom, to the prejudice of secular justice. Rather, let him be satisfied with the written constitutions and customs hitherto approved, so that the things of Caesar may be rendered unto Caesar, and the things of God may be rendered unto God by a right distribution.

The importance of Canon 42 is less a matter of novelty than of emphasis: it shows that the contestation of jurisdictional boundaries was an important issue from both ecclesiastical and secular perspectives. It speaks to why jurisdictional issues were such a common theme throughout the thirteenth century, as evidenced in legal texts ranging from the Fourth Lateran Council to the cases before the French royal court in and before the *Olim*, as well as in the *coutumiers*, as we shall see.

Beyond this, the canons show the importance of the rhetoric of custom to the church. It could be used to diminish particular local rites that may seem uncomfortably foreign, for instance, the customs and rites of the Greeks (Canon 4). At the same time, these rites were often to be accommodated: bishops had to provide celebrants of divine services for multicultural communities 'having one faith but different rites and customs' and languages (Canon 9). Various canons also reveal custom to be a common base of counterargument or protest.[78] The worst of these may be defences of simony based 'on the grounds of long-established custom', which 'should rather be termed a corruption'

[77] Fourth Lateran Council, www.papalencyclicals.net/councils/ecum12-2.htm (accessed 16 June 2020). For Latin: Antonio García y García, ed., *Constitutiones Concilii quarti Lateranensis*. This canon repeats nearly verbatim the words of a letter Innocent III likely sent to Bishop Peter des Roches, showing how the drafters of the Lateran canons borrowed from earlier papal decretals or, one might say, how they linked principles and practice (Pennington, 'The Fourth Lateran Council', pp. 17ff).

[78] For instance, it designated a method of protest against punishment for offenses, and canon 7 had to specify that prelates should correct their subjects' offenses and 'no custom or appeal can impede the execution of their decision, unless they go beyond the form which is observed in such matters' (Fourth Lateran Council, Canon 7, www.papalencyclicals.net/councils/ecum12-2.htm (accessed 16 June 2020)).

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than custom (Canon 63). Custom whose observance led to mortal sin had to be disregarded, and rights were subject to good faith.[79] While some particular or regional customs had a neutral or positive valence, other regional customs had to be suppressed.[80]

Martial customs are one example of the tension between and co-existence of universalism and regionalism in canon law, whereby regional custom could continue even within an increasingly unitary church.[81] While scholars tend to associate the regionalism of custom with secular law, especially in France, we can also see its importance for the church. It not only referred to minority or foreign practices but also to much broader regional trends: *consuetudo romanae ecclesiae* and *consuetudo generalis Gallicanae ecclesiae*.[82]

The term *consuetudo* was used frequently in the *Decretals* of Gregory IX (1234), also known as *Liber Extra*, composed by Raymond of Peñafort for the pope. *Mos* and *usus* fell by the wayside, and *consuetudo* was the term for a legal form of custom, as opposed to other types of habit or use, though it continued to designate exactions as well.[83] While the great authority of custom was acknowledged, it was not authoritative enough to set aside natural law and could only set aside positive law if it was reasonable and established legitimately by the passage of time.[84]

[79] This was said in the context of Canon 41, concerning prescription, which stated that 'since in general any constitution or custom which cannot be observed without mortal sin is to be disregarded, we therefore define by this synodal judgment that no prescription, whether canonical or civil, is valid without good faith'. Also, one could not gain a right through prescription if one knew it belonged to someone else.

[80] Neutral or positive customs: Cistercian custom (Canon 12), extension of special regional custom of publicly announcing bans of marriage to other regions (Canon 51), praiseworthy custom of not demanding payment for funerary rites (Canon 66). Negative customs: regional custom concerning clerical marriage (Canon 14), vicious custom of patrons and bishops collecting incomes from churches that should go to priests (Canon 32), regional custom concerning absolution of excommunication upon payment of a monetary fine (Canon 49).

[81] Korpiola, 'Regional Variations in Matrimonial Law', pp. 1–20, esp. 5ff.

[82] Terms used in canonists' discussions of marriage (see for instance, Lefebvre-Teillard, *Autour de l'enfant*, p. 14).

[83] Wehrlé, *De la coutume dans le droit canonique*, p. 100.

[84] Zwalve, *Law & Equity*, p. 24. 'Licet etiam longaevae consuetudinis non sit vilis auctoritas: non ontradic usuquedeo valitura, ut vel iuri ontradi debeat praeiudicium generare, nisi fuerit rationabilis et legitime sit praescripta' (X. 1.4.11 in *ibid*., n. 31).

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Henry of Segusio (ca. 1200–71), known as Hostiensis, synthesized this foment of ideas though, importantly, did not finalize it. His innovation was to bring together various elements used to define custom: 'Custom is a rational usage prescribed or hardened by an appropriate amount of time, not interrupted by any contrary act, introduced by two acts or by contrary judgment or by something that no longer exists in memory; a usage approved by those who make use of it.'[85] He had much to say about what exactly each of these elements meant: what could make a custom reasonable or unreasonable; how much time it takes to form a custom, which he relates to the very similar concept of prescription; the number of acts (i.e. cases) it takes to introduce a custom, and so on.[86]

Beyond definition, he was also interested in how custom was proven. That there was disagreement on the subject is clear from his detailing of various views on the question held by different jurists, with whom he disagreed.[87] He proposed the following methods, each of which he presented with much qualification and potential sources of vitiation.[88] The people or the sovereign introduced an unwritten custom over an extended time period. Two judgments made according to the alleged custom over a long duration of time introduced a custom if there were no contradictory judgments. A custom was introduced by a contradictory judgment.[89] A custom was introduced if the practice was so old and widespread that no one did anything else.

This process of defining custom continued in the thirteenth century, notably by Thomas Aquinas, and in the fourteenth century by more

[85] 'Consuetudo est usus rationabilis competenti tempore praescriptus vel firmatus; nullo actu contrario interruptus, binario actu seu contradictorio judicio vel quod non extet memoria, inductus, usuque communi utentium comprobatus' (Summa Hostientis (Venice, 1498) in Wehrlé, *De la coutume dans le droit canonique*, p. 155).

[86] *Ibid.*, pp. 155–63. See also his discussion of customary aids, which tap into these categories (Elizabeth A. Brown, *Customary Aids and Royal Finance*, pp. 36ff, esp. 39).

[87] Wehrlé, *De la coutume dans le droit canonique*, pp. 163–87.

[88] *Ibid.*, pp. 164–8.

[89] We saw earlier that Ulpian referred to contrary judgments. It is likely that such contrary judgments occurred in cases where at least two conflicting customs were proposed and the judgment affirmed one over the other(s). This position was not generally accepted. According to Hostiensis, 'certain jurists' disagreed, saying that the custom affirmed in this situation should only be maintained outside of that particular case if it can be proved that the judge intended for it to be used again (i.e. intended to create a precedent; *ibid.*, p. 167).

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professors, popes, councils, and synods. Ideas, definitions, and modes of proof relating to custom were in a continuous process of appraisal and reappraisal in the canonistic communities of the thirteenth century and beyond.

This was also the case for medieval Roman jurists who, like their late-antique counterparts, had many different opinions about custom. Many of these opinions developed alongside canonistic developments with clear similarities, as both were erected on late-antique Roman law, although with somewhat different concerns, as well. For Irnerius (d. ca. 1125), custom was an unwritten law (*ius non scriptum*) that went beyond the memory of man, but it was an opinion and not something that could be known.[90] In the second half of the twelfth century, Roman lawyers had developed a definition of custom as *ius non scriptum moribus populi diuturnis inductum*: an unwritten law created by social habit and the passage of significant time.[91] This definition was found in the work of Placentius and proved popular afterwards, including with Azo (d. ca.1220) who used it verbatim in his *Summa Codicis* in the early thirteenth century.[92]

It was not enough for Azo to define custom, however – he wanted to bring some precision to the concept. Late-antique Roman sources, he said, only provided obscure answers to what, exactly, constituted a long custom. In fact, there were also many different contemporary scholarly opinions on the subject. For Azo, a long (*longa*) custom was ten or twenty years old, a very old one was thirty years old (*longissimo tempore*), and a custom of great age (*longaeva*) was forty years old or more.[93] He compared custom to prescription, which was deemed *longa* when it lasted ten years.[94] Some jurists said that a long custom is one whose introduction does not exist in memory, but Azo responded in no uncertain terms, 'That does not please me.'[95]

[90] William E. Brynteson, 'Roman Law and Legislation in the Middle Ages', 432.

[91] This appears in the work of Placentinus and is repeated in Azo's *Summa Codicis* (Mayali, 'La coutume dans la doctrine romaniste au Moyen Âge', p. 15).

[92] *Ibid.* The date of Azo's death is uncertain and may have been after 1230 (Bellomo, *The Common Legal Past of Europe*, p. 167).

[93] Mayali, 'La coutume dans la doctrine romaniste au Moyen Âge', p. 15. I discuss these times more later.

[94] *Ibid.*

[95] 'Quidam esse tamen dicunt eam esse longam cujus non extat memoria. [...] Quod non placet' (*ibid.*).

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Azo identified three methods to determine whether a custom had been introduced: if it was received without contradiction, without petitions of complaint against it, and if upon contradiction it was judged by the court to be custom.[96] While it was generally agreed that once did not a custom make, opinions differed widely beyond that as to how many times or how much time it took to generate custom.

Azo also defined custom in a way that likened it to nature rather than law: 'The word custom signifies a common habit and we also say that, in a different definition, custom is "other" nature.'[97] This dichotomy between nature and custom went back to the pre-Socratics in Western thought, beginning with the distinction between nature (*physis*) and man-made law (*nomos*).[98] But it was Aristotle who distinguished between a primary and secondary nature, the latter being custom (*ethos*), which approached or took the place of nature.[99] He described the link between repetition and permanence that animated the notion of custom in his *Rhetoric*: 'that which has become habitual becomes as if it were natural; for the distance between "often" and "always" is not great, and nature belongs to the idea of "always," and custom to that of "often"'.[100] This idea of custom as 'other' or 'second' nature proved popular among medieval jurists, as a gloss by Accursius

[96] '*Ex quibus dignoscitur esse inducta? Et quidam ex tribus ontradic. Primum est, quia sic est obtentum sine ontradiction. Secundem quia libelli quaerimoniarum de re tali non recipiebantur. Tertium, si cum contradiceretur non esse consuetudinem, ontradic ontradiction judicatum est esse consuetudinem*' (Azo, *Summa Codicis*, 8.53.1, in R. W. Carlyle and A. J. Carlyle, *A History of Mediaeval Political Theory in the West*, vol. 2, p. 54).

[97] '*Diciturque consuetudo, quasi communis assuetudo: et alias dicitur consuetuso, et in alia significatione, altera natura*', *Summa Azonis* (Lyon, 1564) in Wehrlé, *De la coutume dans le droit canonique*, p. 139. Donald Kelly translates *aletera natura* as second nature because that is how it was referred to by the early modern authors who were the focus of his study. I translate it here more literally as 'other nature' because *altera natura* to me seems to imply an equal or almost equal standing with nature, as in Aristotle's *Rhetoric*. It was later that early modern authors created a hierarchy by distinguishing a primary law of nature (*ius naturale primarium* or *primaevum*) and a secondary law of nature (*ius natural secundarium*) rooted in convention and utility (Donald R. Kelley, '"Second Nature"', p. 134).

[98] Kelley, '"Second Nature"', p. 131. [99] *Ibid.*

[100] *Ibid.* Note also the Aristotelian formula of 'twice makes a custom' (*ibid.*, p. 135). This was echoed in the base number of repetitions for the creation of a custom by some medieval jurists.

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confirms, and was even more important later, in early modern conceptions of custom.[101]

While enormously influential, Azo's *Summa* was by no means the last word on custom, and jurists continued to debate definitions, status, and proof throughout the thirteenth century and into the next. One of the difficulties, for instance, was distinguishing the different custom terms – *consuetudo*, *mos*, and *usus* – from each other. For his part, Accurisius effectively collapsed the difference between *usus* and *consuetudo* in his *Glossa ordinaria* (ca. 1230).[102] And what was custom's relationship to law? Some jurists emphasized its subsidiary role, while Accursius placed custom above law by declaring that 'custom abolishes law'.[103]

There was also a question about who generated custom – the people or the prince, or both. Roman jurists began to discuss custom in terms of consent and the will of the people. They found in Roman law descriptions of the legislative right of the people: 'What pleases the prince has the force of law, by the Regal Act relating to his sovereign power, the people conferred on him its whole sovereignty and authority.'[104] The Romanist interpretation was that the prince had a delegated power in the form of legislation and that the people reserved some of this law-making power in the form of custom.[105]

[101] 'id est consuetudo, quae est altera natura', The Ordinary Gloss on *Digest* XIV, vi, 1, v. *natura* in Brynteson, 'Roman Law and Legislation in the Middle Ages', 433.

[102] Mayali, 'La coutume dans la doctrine romaniste au Moyen Âge', p. 17.

[103] '*Consuetudo vincit legem*' in Kelley, '"Second Nature"', p. 136. Later, in the fourteenth century, Baldus (1327–1400) adjusted this to 'later custom annuls earlier law'(*ibid.*).

[104] '*Sed et quod principi placuit, legis habet vigorem, cum lege regia, quae de imperio euis lata est, populus ei et in eum omne suum imperium et potestatem "concessit"*' (Justinian, *Institutes* 1.2.6). This statement appears in the context of an explanation of the different types of law. Law comes in two forms, written and unwritten, and 'written law includes acts, plebeian statutes, resolutions of the senate, imperial pronouncements, magistrates' edicts, and answers given by jurists' (*ibid.*, 1.2.3). What then did the emperor get when the plentitude of power of the 'people' was transferred to him? The *Institutes* clarified that 'Plebeians and people differ as species and genus. "The people" is a citizen-body including the patricians and senators. "The plebeians" is the same minus the patricians and senators' (*ibid.*, 1.2.4). The 'people' was a corporate political entity, whose legislative power the emperor received. But written law could still be produced by plebeian statute or resolution of the senate.

[105] Mayali, 'La coutume dans la doctrine romaniste au Moyen Âge'.

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Though they expressed it differently, canonists also understood this passage as an affirmation of a legislative right of the people.[106]

But who counted as 'the people'? Generally, this meant the *populus christianus*, and not those of other faiths living in the Latin West, and could refer to any sort of community, small or large, that adhered to a particular custom.[107] 'The people' was reduced further to those with full legal capacity, sometimes to the exclusion of those considered ignorant.[108] Beyond that, 'the people' was an abstraction that could be represented by ten individuals.[109] While on the surface, placing the custom of the people above the law of the prince may sound radical, the voice of the 'people' was often that of the judiciary, jurists, or high-status people, lay and ecclesiastical.

The ideas of two jurists from the law school of Orleans exemplify the foment of ideas as well as different interpretations generated by Romanists at the time the first *coutumiers* were being written.[110] For Jacques de Revigny (ca. 1230–96) custom did not have to be unwritten,

[106] Gratian used the same portion of the *Institutes* to say that 'an ordinance is an enactment by the people, by which the plebeians together with those greater by birth have established something' (Gratian, *Decretum*, D. 2 c.1). This quite consensual sounding description is made a relic of the past in the Ordinary Gloss, which expanded on the term 'people': 'At one time the people made ordinances, but today they do not because they transferred this power to the emperor. *Institutes* 1.2.6. Or, it may be said that today the people may still do so, and that in that text "transferred" means "conceded"' (Gratian, *Decretum*, D. 2 c.1g).

[107] From empire to kingdom, region, village, guild, monastic community, or other forms of groups (*ibid.*).

[108] Later, in the fourteenth century, Bartolus explained that those excluded were those who had lost their senses (*ements et furiosos*), women, minors and sometimes *rustici* because of their ignorance (Mayali, 'La coutume dans la doctrine romaniste au Moyen Âge', p. 22). As we will see later, *rustici* simply meant lay people to some Romanists.

[109] This notion can be seen in the gloss to Gratian's comment that customary law was almost extinct after the biblical flood because of the scarcity of people. The Ordinary Gloss explained that customary law did not end, nor could it begin, because at first there were just seven people, but at least ten people were needed to form a community (Gratian, *Decretum*, D. 6 c.3 §2b). Later, this becomes a dictum: '*Decem faciunt populum*' (Kelley, "Second Nature"', p. 136).

[110] The bull *Super specula* prohibited the teaching of Roman law in Paris in 1219 and displaced its teaching to Orléans, where we can speak of a law school from 1235 onward, and Jacques de Revigny was one of its great professors (Waelkens, 'La théorie de la coutume à l'école de droit d'Orléans'). For more on Jacques de Revigny and Pierre de Belleperche, see articles by Paul J. du Plessis and Yves Mausen in Olivier Descamps and Rafael Domingo, *Great Christian Jurists in French History*, chapters 4 and 5.

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but for Pierre Belleperche (ca. 1230–1308) unwrittenness was one of its essential characteristics.[111] Previously, usage had seemed to generate *consuetudo*, but Jacques de Revigny saw the consent of the people, whether explicit or implicit, as the special ingredient.[112] Pierre de Belleperche added to implicit or explicit consent the passage of time.[113] If statute and custom dealt with the same issue, then Jacques felt the older of the two should be followed, while Pierre felt the court could choose either one.[114]

Both the Bolognese and Orleanais doctors agreed that judicial precedent was one way of establishing custom but was not necessary to its formation. Judicial precedent had probative value for them in that it could be used to indicate popular consent, and, indeed, the notion of judicial precedent as constitutive of custom would become generally accepted by scholars only at the end of the Middle Ages.[115]

The fourteenth century was a watershed in the history of custom, notably in its relation to 'the people'. Bartolus (1313–57) ultimately went back to Isidore's definition that custom was a form of law (*ius*) instituted by habit (*moribus institutum*), which is seen as legislation (*lege*).[116] However, he refined this by describing 'tacit consent' as the proximate or efficient cause of *consuetudo*, relegating *usus* and *mos* to 'remote causes'.[117] For Bartolus, 'custom represents the will of the people'.[118] He would also submit custom to the inquisitorial rule of proof by two witnesses.[119] The idea of 'the people' only became meaningfully concrete later: Bartolus' student Baldus (1327–1400) understood the *populus* as a legal personality, one filtered through the idea of the corporation (*universitas*).[120] While the corporate

[111] Waelkens, 'La théorie de la coutume à l'école de droit d'Orléans', p. 35, *La théorie de la coutume chez Jacques de Révigny*, pp. 119ff, 206ff, 212.

[112] Mayali, 'La coutume dans la doctrine romaniste au Moyen Âge', p. 20.

[113] 'Usus non est causa consuetudinis, sed tacita voluntas populi' (*ibid.*, p. 21).

[114] Waelkens, 'La théorie de la coutume à l'école de droit d'Orléans', p. 35.

[115] *Ibid.*, pp. 35–6.

[116] *Ibid.* Bartolus' definition: '*consuetudo est jus quoddam moribus institutum, quod pro lege suscipitur*' (Mayali, 'La coutume dans la doctrine romaniste au Moyen Âge', p. 16).

[117] *Ibid.*, pp. 20–1. [118] 'Kelley, "Second Nature"', p. 136.

[119] For Bartolus, disputed custom was proved by the testimony of two witnesses from the community in question or by such great notoriety that it should be under judicial notice (Bederman, *Custom as a Source of Law*, p. 24).

[120] Joseph Canning, *The Political Thought of Baldus De Ubaldis*, p. 189.

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nature of the 'the people' cannot be assumed for the period before Baldus, it was certainly a key development for ideas of popular sovereignty and of a rhetoric of custom as a form of resistance that would develop in early modern Europe and beyond.[121]

There is no doubt that aspects of definitions of custom and ideas about its proof in canon law and Roman law made their way into the *coutumiers* – texts that occupy a space somewhere between legal practice and academic thought. They also made their way into practice itself, with the ever-increasing number of law school graduates entering the judiciary as the thirteenth century gave way to the fourteenth. This is well known, but I want to emphasize that despite the impression of static immutability that accompanies the notion of custom as tradition and repetition, the concept of custom was itself not only mutable but also debated. It varied between communities as well as within communities. At the time the *coutumier* authors composed their texts, many different voices offered many different opinions about what custom was, how it was made, and how it could be recognized. The capaciousness of *consuetudo* continued far beyond this time. From the glossators to elite canonists of the fifteenth century, scholars continued to struggle when they tried to describe the difference between *consuetudo* as exaction and as norm.[122] Even after many centuries of defining, parsing, and interpreting, Jason of Mayno (1435–1519) would still describe the question of custom as profound and ambiguous.[123]

The variety of ideas about custom in learned communities testify to its enduring conceptual haziness. Definitions abandoned are as important as definitions embraced and lastingly popular because, together, they attest to a society that continued to grapple with the perplexing question of what, exactly, custom was and how, exactly, it could be identified.

It was the great preoccupation of medieval canonists and Romanists to domesticate custom with words. Thinkers constructed methods of proof, attempting to make custom tangible and knowable based on their definitions. The lexical history of the term thus cannot be

[121] See generally, Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought*; E. P. Thompson, *Customs in Common*.
[122] Fredric L. Cheyette, 'Custom, Case Law, and Medieval "Constitutionalism"', 382.
[123] Mayali, 'La coutume dans la doctrine romaniste au Moyen Âge', p. 18.

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dissociated from ideas about methods of proof, the other preoccupation of learned jurists.

Writing about Secular Legal Practice before the *Coutumiers*

Coutumiers authors wrote about the practice of secular law in northern France because there was no other holistic description of the subject available, at least in written form and likely not in oral form either.[124] To look for written legal ideas about the courts of laymen or associated with lay people before the *coutumiers* means to look through scattered sources, ones that were not necessarily 'legal' and often were not even lay, but ecclesiastical. A brief look at the history of writing secular law in the couple of centuries before the *coutumiers* reveals a desire and attempt to write about lay legal ideas and practice and so give them greater clarity, specificity, and accessibility.

Glimpses of custom, or at least habitual practice, can be found in the multitudes of documents that contained records of transactional law. These sometimes indicate a specific custom, or a pattern can be identified among them that indicates a habitual practice. These are not addressed in this section because the goal here is to examine writings that sought to synthesize ideas about the norms and practices of the courts of lay lords or lay people.[125] This section begins a little before the papal revolution, covers the general efflorescence in written and normative secular law in the twelfth century and ends around the mid-thirteenth century when the *coutumiers* began to be written. I give more space to ecclesiastical writing than is normally done because this receives very little attention as background for the *coutumiers* but is vital to this history.

The era of papal reform and 'rebirth' of Roman law was a great watershed in law, both secular and ecclesiastical.[126] Written record- and document-making increased sharply, leading to new forms of

[124] There were of course people who knew the law better than others and were seen as a resource, but northern France does not seem to have had a lawspeaker tradition with the public recitation of law such as in Iceland.

[125] The relationship between charters and the *coutumiers* is discussed in Chapter 6.

[126] See generally, Harold Berman, *Law and Revolution*; Paul Fournier, 'Un tournant de l'histoire du droit'; Bellomo, *The Common Legal Past of Europe*, p. 58.

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writing and documentation as well as expanded bureaucracies.[127] However, the demand for legal texts existed before all of this.[128] Even with their heavily oral and ritualistic nature, both secular and ecclesiastical law continued to make use of text in the early Middle Ages.[129] But where exactly could writing about secular law be found in the time leading up to the *coutumiers*?

The correspondence of Fulbert of Chartres (ca. 960–1028) provides a glimpse into different aspects of secular law. Several manuscripts of his letter collection were in fact preserved by others for later legal use.[130] Fulbert indicates which legal texts might be considered of value to a highly educated ecclesiastic around the turn of the millennium. His book chest included a collection of Carolingian capitularies, the collection of capitularies compiled by Ansegisus of Fontanelle, the forged capitularies of 'Benedict Levita' (the pseudonym of the author who purported to continue Ansegius' collection), and the Pseudo-Isidorian Decretals.[131] His familiarity with legal writing extended beyond the cache in his book chest. Notably, he quoted from Roman law in the *Theodosian Code*, which he likely knew from the *Breviary* of Alaric.[132]

[127] See generally, Clanchy, *From Memory to Written Record*.

[128] Christof Rolker, *Canon Law and the Letters of Ivo of Chartres*, pp. 85ff.

[129] Bruce C. Brasington, *Order in the Court*, p. 25. Notably, we can find legal literacy not only in charters, formularies, and capitularies, but we can also trace it beyond clerical elites and see its regular use in Frankish government and administration (Rosamond McKitterick, *The Carolingians and the Written Word*; Alice Rio, *Legal Practice and the Written Word in the Early Middle Ages*, *The Formularies of Angers and Marculf*). Geoffrey Koziol has shown that we cannot not simply see documents like these as straightforward judicial documents issued and guaranteed by a centralized sovereign state, but that there is an incredible richness to the life of these legal texts in terms of both politics and dispute (Koziol, *The Politics of Memory and Identity*). The diplomas he examines demonstrate the dynamic and performative nature of documents that seem like rote and repetitive statements of rights and privileges at first glance (*ibid.*, p. 22ff, 37ff). This was also the case beyond Frankish lands. Ottonian kings also, while not producing much legislation, exercised justice via case-by-case petitions (Laura E. Wangerin, *Kingship and Justice in the Ottonian Empire*, Chap. 5). Law became more sophisticated in practice and the subject of study in places such as Ravenna and Pavia, where we find late-antique Roman law in documents of the tenth century (Simon Corcoran, 'Roman Law in Ravenna', esp. pp. 193ff; Charles M. Radding, *The Origins of Medieval Jurisprudence*).

[130] Rolker, *Canon Law and the Letters of Ivo of Chartres*, p. 55.

[131] Edward Peters, 'Death of the Subdean', p. 58. He likely had abbreviated versions of these texts (Rolker, *Canon Law and the Letters of Ivo of Chartres*, p. 57).

[132] *Ibid.*

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Fulbert's famous description of the feudal oath shows lay people demanding the theorization of legal practice. Replying to William V, Count of Poitou and Duke of Aquitaine, he said: 'Asked to write something concerning the form of fealty, I have noted briefly for you on the authority of the books the things which follow.'[133] The resulting mini-tractate on feudal obligations was to have a very long legal history, wending its way into secular law, canon law, and academic law.[134]

Fulbert composed his theorization of fealty in response to a secular lord's desire for concrete written explication of this form of obligation. Fulbert answered not based on observation but on books. Presumably, this was exactly what William wanted, since he himself would have been familiar with instances of fealty in practice. This episode reveals the lay desire to go beyond impressions provided by their own experiences and to seek out a normative – if idealized – statement of these practices. This also shows that we must look for secular law in ecclesiastical writing, as those who study charters of this period well know.

We also must look to collections of canon law that assembled the rules and procedures of the church for early theorization of legal ideas and practice. While their heyday is considered to be the later eleventh century onward, such collections were not only written in the tenth and early eleventh century, but a number were even better organized than later ones.[135] Alongside these collections were numerous unsystematic collections, some of which have been shown to be influential through the eleventh and into the twelfth century.[136]

Burchard of Worms (c. 965–1025) is interesting in this regard because he both composed a collection of canon law and was the instigator of a collection of laws for secular governance. Burchard obtained full control of all justice of the *familia* of Worms from Emperor Henry II with a charter of immunity from interference by

[133] 'De forma fidelitatis aliquid scribere monitus, haec vobis quae sequuntur breviter ex librorum auctoritate notavi', Fulbert of Chartres, 'Letter from Bishop Fulbert of Chartres, A.D. 1020', ed. Cheyney, vol 4, no. 3, p. 23.

[134] Pennington, 'Feudal Oath of Fidelity and Homage', p. 93.

[135] Rolker, *Canon Law and the Letters of Ivo of Chartres*, pp. 50–1. Rolker mentions those of Regino of Prüm (d. 915), Abbo of Fleury (d. 1004), and Burchard of Worms (d. 1025) in this regard, noting that that of Burchard became the model for a large number of later collections (*ibid.*).

[136] Rolker, *Canon Law and the Letters of Ivo of Chartres*, p. 59.

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local lords in 1014.[137] In his view, these lords had been oppressing the community with their laws and judgments. Burchard therefore had a set of guidelines or precepts composed, known as 'Laws of the *familia* of Worms', and these 'laws', which applied equally to both rich and poor, were to be followed thereafter.[138] A series of rules and prohibitions followed, presented in the language of legislation, which offer a rare insight into crime, property, and family law.[139] Burchard also compiled a practical manual of canon law in his *Decretum* based on principles that unify the canonical tradition that he had identified, as well as examples of the concrete application of these principles.[140]

Burchard's *Decretum* and several other collections of canon law circulated in northern France, influencing the next generation of writers, including Ivo of Chartres (ca. 1040–1115). Unlike Burchard, who separated his canonical collection from laws of general governance that included the laity, Ivo chose to incorporate it.[141] Not only was that an unprecedented move, but the chapter devoted to lay affairs was one of the longest and most elaborate portions of his canonical collection.[142] Additionally, he included a great deal of secular legislation: the *Theodosian Code*, Justinian's *Code*, the *Institutes*, the *Digest*, the *Sententia Pauli*, the *Epitime Juliani*, and Alaric's Breviary, as well as both genuine and forged Carolingian capitularies.[143]

137 Greta Austin, 'Jurisprudence in the Service of Pastoral Care', 931.

138 'Lex familiae Wormatiensis' in Lorenz Weinrich, ed., *Quellen zur deutschen Verfassungs-, Wirtschafts- und Sozialgeschichte*, trans. Lane, document 22, www.fordham.edu/halsall/source/lexworms.asp, preface (accessed 31 May 2022). Such texts at this time are better viewed as precepts, warnings, or admonishments (Sara McDougall, *Royal Bastards: The Birth of Illegitimacy*, p. 62). While they seem to present fact, even the definition of marriage was not clear or consistent across texts (*ibid.*).

139 'if anyone ... ' or 'This shall be the law of the *familia* ... ' or 'We also establish this ... ' ('Lex familiae Wormatiensis', s. 1, s. 2, s. 19). Many of the provisions punish specific infractions with fines. Some elucidate rules on inheritance or specific aspects of procedure. On one occasion, a custom is specifically abrogated, and the reason is explained: in order to decrease false oaths, the practice of taking oaths to deny and so get out of a debt could be rejected by the lender, who could demand a trial by battle to prove the veracity of his claim (*ibid.*, s. 19).

140 Greta Austin, *Shaping Church Law Around the Year 1000*, p. 223.

141 Rolker, *Canon Law and the Letters of Ivo of Chartres*, pp. 177–8.

142 *Ibid.*, p. 178.

143 *Ibid.* This was in contrast to Burchard who got what Roman law he had from *Anselmo dedicata* and then obscured the secular origins with some choice alterations (*ibid.*).

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The late eleventh century also saw greater assessment of ecclesiastical procedure in writing: while earlier sources only shed a 'faint' light on it, more common references were made to the *ordo iudiciarius* by the 1070s.[144] The writing of French bishops illuminates the development of thought about the *ordo iudiciarius* before it was affected by the diffusion of Roman legal thought from the universities.[145] Indeed, in his letters, Ivo not only included detailed and studied descriptions of procedure but also integrated Roman law into his argument and used it for probative value.[146] The body of works on ecclesiastical procedure only continued to grow afterwards, and, by the twelfth century, much of it heavily incorporated or was based on Roman legal procedure.[147] While this may seem like a straightforward reception, there was actually much debate about procedure, and legists and canonists wrote many, many works treating different aspects of the trial throughout the twelfth and thirteenth centuries.[148]

Monastic communities were also early and prolific compilers of rules and regulations. This went back to the sixth-century rule of Benedict, but from the late tenth century onward, there was a new enthusiasm for monastic rule-making.[149] The writing of liturgical custom began at Cluny around 990, and that text later came to be known as the *consuetudines antiquiores*.[150] Thirty years later, the so-called *Liber Tramitis* began to be written, a text with broader range that included technical matters of administration, policy, and procedure.[151] Around the 1070s, a monk of Cluny named Bernard

[144] Brasington, *Order in the Court: Medieval Procedural Treatises in Translation*, p. 20, 31 (see his introduction and first chapter for an excellent analysis of this transition). Sources refer to both the *ordo iudiciarius* and the *ordo iudiciorum* to refer to ecclesiastical procedure, though the latter was more common and other terms were used as well (*ibid*., xiii).

[145] *Ibid*., p. 35. [146] *Ibid*., pp. 42–51.

[147] See Fowler-Magerl, *'Ordines iudiciarii' and 'Libelli de ordine iudiciorum'*, pp. 17–28.

[148] *Ibid*., pp. 34ff.

[149] The texts of various monastic customals are available in K. Hallinger, ed., *Corpus Consuetudinum Monasticarum*.

[150] Gert Melville, *The World of Medieval Monasticism*, pp. 67–8. It seems to be a later practice to refer to these rule-texts as *consuetudines*.

[151] References to the collection appear around 1020, with a first revision after 1033 and second revision between 1050 and 1060 (*ibid*., p. 68).

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composed a new text at the behest of Abbot Hugh I to capture their practice as it had developed and was currently used.[152] Yet another set soon appeared, a little after 1079, by another monk of Cluny, named Ulrich, for William abbot of Hirsau, who wanted to introduce 'customs' to his monastery for the purpose of reform.[153]

These forms of regulatory writing contain important lessons for legal history.[154] English monks, for instance, were developing sophisticated juridical thinking before Roman-law influence, which shows that the development of sophisticated legal thinking was possible as an organic intellectual development and not necessarily the result of influence of university-level Roman law.[155] Indeed, this helps explain why Roman law attracted eager interest. We can see monks, for instance, embracing Roman law. The customs of the abbey of St Gilles, for instance, were compiled in the twelfth century. We have this text in an edited thirteenth-century version, but it is likely that the Roman law, in the form of Justinian's *Code* (probably via the Provençal summa *Lo Codi*) and some of the *Novels*, was already part of the twelfth-century version.[156]

Regulatory writings also flourished in lay contexts. City customs began appearing in the eleventh century, associated with the communal movement. These could be part of a peaceful process or of dramatic founding moments that pitted lords against communities and produced charters in which the rights and responsibilities reflected a new balance of power. These city customs were negotiated rights, like a contract. Galbert of Bruges provided a dramatic account of revolt that led to the founding of a commune and its charter in 1127.[157] This

[152] *Ibid.*, pp. 68–9. [153] *Ibid.*, p. 69.

[154] Monastic communities have been part of this history for their spirit of reform, notably in the context of the Investiture Controversy and papal 'revolution' that created a context for a renewed interest in Roman law and set the stage the birth of a Western legal tradition (Berman, *Law and Revolution*, chaps. 2–3). There has been less recognition of the innovative procedural, normative, and regulatory aspects of monastic writing, with the exception of the work of Alain Boureau.

[155] Alain Boureau showed that new legal consciousness and judicialization could grow organically from extant knowledge and did not necessarily have to be the result of the rediscovery of Roman law (Boureau, 'Droit naturel et abstraction judiciaire', 1464; *La loi du royaume*, pp. 198ff; Boureau also points to the demonstration made by Wickham in *Legge, pratiche e conflitti*).

[156] *Coutumes de St. Gilles*, pp. 24–49.

[157] See Galbert of Bruges, *The Murder of Charles the Good*, trans. Ross.

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'little charter of agreement' between the count and the citizen, which he described as 'about the remission of the toll and the ground rent on their houses', was actually the product of radical urban self-assertion.[158]

Beyond this, custom also designated the protections subjects received from their lord and so, in this sense, designated a category of rights.[159] Lords could also make men personally free by granting them *franchisa*, meaning free tenure, and numerous villages and townships paid significant fees for this freedom.[160] Charters of liberties outlined freedoms and rights demanded by and granted to subjects, as well as the powers and obligations of their rulers. The Coronation Charter of Henry I of England, issued around 1100, included such protections and responsibilities, and Magna Carta (1215) became the most famous example. While 'liberty' was primarily an attribute of lordship, litigation action seeking to protect franchises and liberties in the thirteenth century reveals that a notion of individual, personal liberty was also at play.[161]

Charters of municipal rights known in Iberia as *fueros* appeared in the tenth century.[162] Burgos and Castrojeriz received their *fueros* then, and the counts of Castile also made their earliest grants of this kind at this time.[163] Notably, a collection of 'usages' known as the Ustages of Barcelona appeared in Catalonia in the mid-twelfth century, composed during the rule of Count Ramon Berenguer IV of Barcelona (1131–62).[164] It aimed at overriding old Visigothic laws because these were no longer seen as a good fit for current issues. These *ustages* were not described as practices repeated over time – the preface insisted three times that they were decreed – but the description of what was essentially legislation as *ustages* still suggests a conceptual shift.[165]

The recovery and renewed study of Justinian's *Digest* began in the last quarter of the eleventh century.[166] The 'rediscovery' of Roman law

[158] *Ibid.* [159] Reynolds, 'Law and Communities in Western Christendom', 209.

[160] Alan Harding, 'Political Liberty in the Middle Ages', 427. [161] *Ibid.*, 436–7, 441.

[162] Roger Collins, *Early Medieval Spain*, p. 244.

[163] These are known through later versions (*ibid.*).

[164] *The Ustages of Barcelona*, trans. Kagay, p. 2.

[165] For instance: 'With the approval and counsel of his good men, along with his very prudent and wise wife Almodis, [Lord Ramon Berenguer the Old] issued and decreed the rules of customary law' (*ibid.* s. 2).

[166] Brundage, *The Medieval Origins of the Legal Profession*, p. 78.

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through the books of Justinian's *Institutes*, *Code*, *Digest*, and *Novels* grew into a fundamental conceptual transformation about what law was and how it should be done. These texts began to be read, studied, and taught and formed the basis of the early university in Bologna around the end of the eleventh century. The enthusiasm for these new legal studies was captured in a letter written around 1127 by a Benedictine monk to his abbot at Saint Victor in Marseille, in which he described crowds of students flocking to Bologna to study law and noted the great benefit this knowledge could have for the monastery in its legal disputes.[167] This was the seed of an intellectual revolution that would ultimately transform legal and political thought in Europe, even though the impact of Roman law on medieval legal practice varied by region and was uneven and diverse.[168]

The impact of ancient Roman jurists on medieval notions of custom was vast.[169] Their definitions and modes of thought gave medieval society a new way of thinking – one might even say a new language – with an expansive vocabulary and a rhetoric based on precision of thought. James Brundage writes that they found new ways to 'frame sophisticated legal arguments, how to manipulate legal categories, how to analyse problems, and how to find solutions to them' that proved to be intellectually exciting but also of practical utility.[170]

That Roman law was seen as having contemporary relevance in its medieval context is evident from the incorporation of a text of secular legal practice into the corpus: the *Libri feudorum*. This was a compilation of treatises of earlier Lombard origin that had been 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.[171] In the early thirteenth century, the text was appended to the *Corpus Iuris* by Hugolinus, accrued layers of glosses, and was used in university teaching as well as occasionally in court

[167] J. Dufour, G. Giordanengo, and A. Gouron, 'L'attrait des *leges*'. See generally Brundage, *The Medieval Origins of the Legal Profession*, especially chap. 3.

[168] Mayali, 'The Legacy of Roman Law', p. 375.

[169] For introductory histories of the *ius commune*, see Stein, *Roman Law in European History*; Bellomo, *The Common Legal Past of Europe*; R. C. Van Caenegem, *An Historical Introduction to Private Law*.

[170] Brundage, *The Medieval Origins of the Legal Profession*, p. 96.

[171] Magnus Ryan, 'Succession to Fiefs', p. 144. Pillius of Medicina (fl. 1169–1213) gave it its first apparatus of civilian glosses.

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practice.[172] It is from this text that, later, lawyers and then historians drew a feudal vocabulary that they then used to describe a 'system' throughout Europe.[173]

Imaginative literature provided an additional forum where lay society could explore ideas of law. The crises of power and of lordship in the twelfth century proved fertile ground for literary narratives that exposed tensions and enabled critiques of the political order as well as of justice and its dispensation.[174] *Raoul de Cambrai* was a commentary on inheritance, lordship, different understandings of the 'fief', and the relationship between vengeance and justice.[175] The trial of Ganleon in the *Song of Roland* explored the responsibilities of men to their lords, notions of treason and felony, and the dispensation of justice. Beyond notions of justice and injustice, romances and *chansons de geste* were permeated with procedural questions, perspectives on punishment, and other juridical themes.[176] These dramatic enactments of law revealed the ethical dimension of society.[177]

Through its themes, language, narrative, and assumptions, imaginative literature showed a society thinking about and questioning its political and normative order. Andreas Capellanus, in

[172] It was then that it was glossed by Accursius, who used Pilius' gloss, and this gloss ended up forming more than half of the Accursian standard gloss. As Ryan explained, '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', p. 144); see also Kathleen Davis, 'Sovereign Subjects, Feudal Law, and the Writing of History', 226.

[173] Reynolds, *Fiefs and Vassals*, p. 6. See her explanation of the nature of the problem (*ibid.*, pp. 1ff). This book, following Elizabeth Brown's groundbreaking article, is devoted to undoing the 'construct of feudalism' as an interpretative framework for the Middle Ages (Elizabeth A. R. Brown, 'The Tyranny of a Construct: Feudalism and Historians of Medieval Europe', 1063–88). Renaissance humanists and lawyers were especially concerned with the origins of the *Book of Fiefs* and its authenticity (Kelley, 'De Origine Feudorum').

[174] Thomas Bisson, *The Crisis of the Twelfth Century*.

[175] Stephen D. White, 'The Discourse of Inheritance in Twelfth-Century France'.

[176] Bernard Ribémont, 'Justice et procédure dans le Tristan de Béroul', 'Le 'crime épique' et sa punition', 'La chanson de geste, une "machine judiciaire"?'

[177] Mary Jane Schenck, 'Reading Law as Literature, Reading Literature as Law'.

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On Love (1184/6), developed a complex legal universe complete with illustrative cases and a set of laws.[178] The notion of custom, specifically, was also explored. The various compositions of Chrétien de Troyes mentioned custom on numerous occasions, sometimes a 'custom of the castle' arbitrarily imposed and to be circumvented, sometimes a form of obligatory community behaviour.[179]

Romano-canonical legal thought and methods were brought to bear on the writing of secular law. The *Assizes of Ariano* (also known as the *Assizes of Roger II*) were composed around 1140 by authors familiar with Roman law. This text was unique because no other secular ruler in the early twelfth century had promulgated such a body of law, one that was not only systematically organized but displayed some strong connections to the developing study of Roman law in northern Italy.[180]

The Anglo-Norman world had a long tradition of legal writing from Old English laws to post-Conquest *Leges* – texts that presented themselves as legislation and that foregrounded the early legal literature of English Common Law.[181] The 'first textbook' of English royal law, the *Laws and Customs of England,* known as *Glanvill* because it was once attributed to Ranulf Glanvill, appeared around 1188.[182] It was framed not as assizes or constitutions but as 'laws and customs'.[183] Arguably an 'early, somewhat unusual *coutumier*', Glanvill described the Anglo-French custom that was administered in the king's court by itinerant justices.[184] Soon afterwards, around 1200, the first part of the *Très Ancien Coutumier de Normandie* was composed, and thus the era of the 'first' *coutumiers* began.

[178] Andreas Capellanus, *On Love*, trans. Walsh. For more on this, see Peter Goodrich, *Law in the Courts of Love*.

[179] The latter meaning is found in *Yvain* (Donald Maddox, 'Yvain et le sens de la coutume', 2).

[180] Pennington, 'The Birth of the *Ius commune*', 24. See the most recent edition: Ortensio Zecchino, ed., *Le Assise di Ruggiero II*.

[181] See Early English Laws website (https://earlyenglishlaws.ac.uk/).

[182] G. D. G. Hall, trans., *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, p. xi. The *Glanvill* author was familiar with Roman legal texts and drew on Justinian's *Institutes* for his preface.

[183] Though this language occurred earlier in the so-called *Leges Willelmi*: 'Cez sunt les leis e les custumes que li reis Will. Grantad al people de Engleterre . . . ' ('The (So-Called) Laws of William I' in *The Laws of the Kings of England from Edmund to Henry I. Part Two: William I to Henry I*, p. 252).

[184] Hyams, 'The Common Law and the French Connection', p. 83.

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Texts focused on secular law proliferated throughout the European West by the 1230s. The jurists who composed the *Constitutions of Melfi* (or *Liber Augustalis*) for Frederick II in 1231 incorporated more than half of the earlier *Assizes of Ariano* into their *Constitutions*.[185] Eike von Repgow was finishing his German-language *Sachsenspiegel*, or *Saxon Mirror*, by 1235. Various texts of Danish laws – the Laws of Scania, Valdemar's Law of Zealand, Erik's Law of Zealand, the Law of Jutland – were written also in the vernacular between 1150 and 1250.[186] By about 1240, various authors layered their writings to produce the similarly named *Laws and Customs of England*, once attributed solely to Bracton.[187] The *Coutumes d'Anjou et du Maine* was composed in 1246, Pierre de Fontaines' *Conseil* in 1253, and the *Summa de legibus Normannie* was likely composed between 1254 and 1258. At a similar time, the *Siete Partidas* were compiled for Alfonso X of Castile (1252–84).[188]

The writing of the northern French *coutumiers* was deeply associated with the developments described above: the persistent desire for exposition and assessment of practice, the arguments and ideas that animated the lay courts, the foment in ecclesiastical regulatory and procedural writing, the study of Roman law and various types of writing that developed around it, royal and imperial legal literatures, forms of vernacular legal literature (see Chapter 2), and, behind this, the ever-increasing sophistication of legal business in

[185] Pennington, 'The Birth of the *Ius commune*', 24.

[186] Ditlev Tamm and Helle Vogt (eds.), *The Danish Medieval Laws*.

[187] Thomas McSweeney has shown how much England was not exceptional but also part of this history. Far from being an inward-looking English text, *Bracton* was intended for an audience that knew its Roman law, indeed the justices who composed the text saw themselves as justices in the Roman model, and the text was written to show that English law too could fit within the framework of the *ius commune* (see McSweeney, *Priests of the Law*); on authorship, see also Paul Brand, 'The Age of Bracton'.

[188] See Jesús D. Rodríguez Velasco's new study which examines the *Siete Partidas* though the aesthetics of lawmaking and as forging an affective relationship between the king and 'the people' (Jesús D. Rodríguez Velasco, *Dead Voice: Law, Philosophy, and Fiction in the Iberian Middle Ages*). Some themes examined here, such as vernacularity and the impact of writtenness, resonate but take on a significant aspect in Castile and would be worth a detailed study. See also, the multi-volume translation, the first of which is *Las Siete Partidas,* vol. 1, *The Medieval Church: The World of Clerics and Laymen (Partida I)*, ed. Robert I. Burns, SJ; trans. Samuel Parsons Scott.

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various forms and contexts. The *coutumiers*' discussions of procedure, jurisdiction, and (to some extent) their use of sources certainly situates them in a larger, familiar movement in legal composition throughout Latin Europe.

At the same time, this group is also unique. From the 1240s, at least one new *coutumier* was composed in northern France every decade of the thirteenth century. This shows an exceptional zeal for theorizing the activities of lay courts. This dynamism in legal writing characterized not just the top royal or imperial level but also lower jurisdictions, which speaks to the political background of the texts; namely, the expansion of Capetian power. The regions associated with the first *coutumiers* of northern France became part of the Capetian demesne in one way or another in the thirteenth century, though they were not always under specifically royal control, because of the practice of granting apanages to younger sons. The *coutumiers* thus reflect both local and regional aspects as well as common ones relating to royal jurisdiction.

The 'first' *coutumiers* of northern France were written in a short period of time, in regions that were geographically close, and in a political context that was relatively similar. Beyond this, some of the *coutumier* authors from the later thirteenth century knew the earlier ones.[189] And yet, no two authors constructed their texts in exactly the same way. There were similarities, certainly, but each author elaborated their text uniquely and distinctively. The first *coutumiers* thus show an experimentation with the writing of custom, framing, the use of sources, subject matter, and authorial voice. In other words, they show that there were different ways to think about the question of 'What is custom?' for the secular courts.

The following brief descriptions of the first *coutumiers* illustrate the individual character of each text and provide a general sense of its contents. This is neither meant to be a taxonomy nor to provide an exhaustive list of the contents, sources, and methods of all of the texts. Rather, the descriptions are intended to show the particularity of each text before they are treated as a group in the remainder of this book.

[189] Though there are significant differences in exposition, some features of the *coutumier* – vernacularity, the regional aspect of the group, knowledge of earlier texts, and questions of authority – could fruitfully be compared to the Danish laws (see Ditlev Tamm and Helle Vogt (eds.), *The Danish Medieval Laws: The Laws of Scania, Zealand and Jutland*).

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The work inherent to composing a comprehensive vision of custom included gathering and assembling information – specific legal facts, rules, or procedures – but also an element of subjectivity and originality. This means that the *coutumiers* afford us a glimpse into the minds of some of the authors who were creating a professionalized customary law in the thirteenth century.

Brief Descriptions of the 'First' *Coutumiers*

Très ancien coutumier de Normandie *(ca. 1200 and ca. 1220)*

Ernest-Josef Tardif, author of the critical editions of the *Très ancien coutumier de Normandie*, described the text as a composite of two works written anonymously: one around 1200 before Normandy was taken by Philip Augustus for the French crown, and the other around 1220.[190] The text comes in both Latin and French versions. Tardif had three incomplete Latin manuscripts and a more complete French manuscript, and thus used the incomplete Latin version filled in with the later French version to construct his critical editions of the texts. However, we now have a new Latin text in a Vatican manuscript that was unknown to Tardif while editing the text, one that is more complete and the basis of a new edition.[191] The *Très ancien coutumier de Normandie* has no prologue, but the new manuscript provides the title of '*Antiqua consuetudo normannie*'. It begins with a discussion of the dukes of Normandy, and the second part begins with an inquest that took place in the reign of Henry II.[192] It has been suggested that the first

[190] *Coutumiers de Normandie*, ed. Tardif, vol. 1. See discussion of different possible dates for the earliest text of the *Très ancien coutumier* and their implications in Daniel Power, *The Norman Frontier in the Twelfth and Early Thirteenth Centuries*, p. 170).

[191] I am very grateful to William Eves, who shared his edition and translation of this manuscript with me prior to its publication (Eves, *The Antiqua Consuetudo Normannie*). His transcription of the text of the Vatican manuscript (*Ottobono Latin 2964*) is available online and provides an introduction to the problems of this text, which he explores in detail in his edition of the first part of the text (Eves, *The Earliest Treatise within the Materials Comprising the So-Called Très Ancien Coutumier of Normandy, as found in Vatican Library ms. Ott. Lat. 2964*).

[192] Eves, *The Antiqua Consuetudo Normannie*, p. xix. Eves notes the text may divide further and that the parts may be composite themselves and different elements may have been written at different times.

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part is a later text and presents a version of earlier Norman customs adapted to the needs of the later thirteenth century.[193] The subjects of the first part include the duties of the duke, excommunication, inheritance, dower, wardship, land tenure, homicide, punishment, trial procedure, service, and jurisdiction. The subjects of the second part include homicide, ecclesiastical liberties, actions to recover dispossessed land (desseisin), possession, bastardy, minors, dower, marriage, trial procedure, jurisdiction, warranty, trial by battle, fiefs, outlaws, gifts of land to the church, and the sale and grants of land. The earliest manuscripts are from the late thirteenth century, and all the manuscripts of the *Très Ancien Coutumier de Normandie* also include the *Grand Coutumier de Normandie*, either in Latin or French.

Coutumes d'Anjou et du Maine *(1246)*

The *Coutumes d'Anjou et du Maine* was composed in French in 1246 by an anonymous author.[194] We have two manuscripts of the text, one of which opened with 'These are the customs of Anjou and Maine,' which gives us the title. The text has no preface to indicate authorial intention or ideology. It does not often refer to the concept of custom. Rules and procedures are rather validated '*par droit*', so 'by Law' or 'by Right'. The contents include a great variety of subjects briefly presented, without obvious reasoning for the order. *Anjou et Maine* goes back and forth between substance and procedure. Much of the text envisages different sorts of problems that different sorts of people might face. The text treats diverse subjects such as inheritance, dower, jurisdiction, marriage between classes, theft of animals, guaranteed peace, consorting with murderers and thieves, co-holding of fiefs, rape, army summons, novel

[193] N. Vincent, 'Magna Carta (1215) and the Charte aux Normands (1315)'. See also, Eves, The *Antiqua Consuetudo Normannie*, p. lvi.'.

[194] Beautemps-Beaupré felt it was not possible to fix an exact date to this text (*Coutumes d'Anyou et dou Maigne*, ed. Beautemps-Beaupré, p. 40). Viollet argued that it was composed either in Touraine or in Anjou, and not in Maine, though the legal cultures of the three were not significant enough to matter (*Les établissements de Saint Louis*, ed. Viollet, 1:22–23). It must have been composed after May 1246, because it refers to an ordinance issued then, but before the separation of Touraine and Anjou. Touraine, Maine, and Anjou were united in the hands of Louis IX 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. (*Les établissements de Saint Louis*, ed. Viollet, 1:24).

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desseisin, court procedure, heretics, usurers, foreigners, bastards, seizure, quit-rents, excuses for not appearing in court, appeals, mills, gifts, status, issues for commoners, slander, redemption; it ends with lost bees, dower, and judicial battle between brothers and judicial battle fought by champions for the infirm. This text regularly mentions the sorts of things said in court and appropriate responses to them. It does not cite the learned laws, nor does it discuss specific cases. *Anjou et Maine* was used as the basis of Book I of the *Établissements de Saint Louis* some twenty or so years later in the early 1270s.

Le conseil de Pierre de Fontaines *(1253)*

The *Conseil* was written in French by Pierre de Fontaines (see Figure 1.1). Pierre was employed in various courts, notably in the

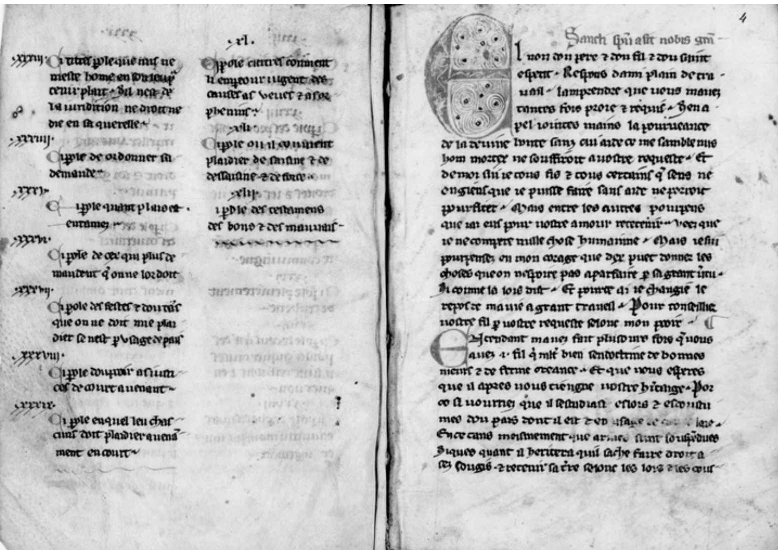

FIGURE 1.1 Pierre de Fontaines' *Conseil*. Some *coutumier* manuscripts contained text without illuminations. This thirteenth-century manuscript of Pierre de Fontaines' *Conseil* was unembellished outside of decorated capitals and section titles written in red ink, which made it easier to locate desired sections of the text. *Coutumier* texts were generally either alone in a manuscript, as in this one, or coupled with other legal texts either composed in French or in French translation. Pierre de Fontaines, *Conseil à un ami*, Bibliothèque nationale de France, ms. fr. 13983, fol. 4v, 5r.

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service of Countess Mahaut of Artois (the widow of Louis IX's brother Robert) and then became a royal justice.[195] He began his career in Vermandois, the region commonly associated with this book. He eventually became counsellor to Louis IX.[196] He appeared in Jean de Joinville's *Life of Saint Louis*, where he dispensed justice on the king's behalf under the oak tree in the Bois de Vincennes, and also sat several times in Parliament.[197]

The text is presented as advice written for a friend's son.[198] Scholars have long speculated about the identity of this friend. It is quite commonly claimed that Pierre wrote the text for Philip III at the behest of his father, Louis IX. This view does not seem likely. This is supported by one manuscript from the late thirteenth or fourteenth century.[199] Another manuscript claims the book was written for 'Queen Blanche', Louis IX's mother, while another simply says it was written for a queen of France.[200] Most manuscripts do not specify who the friend or his son were.[201] It seems rather familiar for Pierre to

[195] Griffiths, 'Les origines et la carrière de Pierre de Fontaines', 550.
[196] Pierre de Fontaines, *Conseil*.
[197] Pierre Petot, 'Pierre de Fontaines et le droit romain', p. 956.
[198] Pierre de Fontaines, *Conseil*, 1.2.
[199] Bibliothèque nationale de France, ms. fr. 19758 (previous shelfmark Harlay 432). This manuscript, from the late thirteenth or fourteenth century, adds this royal pedigree at the outset of the prologue: 'Ci commence li livres des lois en françois selonc les usages et les coustumes de France que messire Pierres de Fontaines fist pour son ami le roy Phelippe de France et par l'ammonestement au roy Loys son pere, et bien est profitables à touz juges pourvoir' (Henri Klimrath, *Mémoire sur les monumens inédits de l'histoire du droit français au moyen âge*, p. 36). This manuscript refashions text making it specifically useful to a royal heir. Pierre's friend's remark about his hopes that his son will take over his landed inheritance ('vos espérer que après vos tiegne vostre éritage') remains but 'inheritance' is replaced with 'reign' ('vos espérer que après vos tiegne vostre règne'; BnF ms. fr. 19758 *ibid.*).
[200] The former is Bibliothèque nationale de France, ms. fr. 1279, and the latter is the manuscript known as 'Le livre la roine', Bibliothèque nationale de France, ms. fr. 5245. The latter is in a composite manuscript that also includes translated Roman law from the *Institutes* and *Digest* and a translated version of the Norman *Summa de legibus Normannie* (Klimrath, *Mémoire sur les monumens inédits*, p. 35). Henri Klimrath (1807–37), the great nineteenth-century commentator of French customary law, suggested that the 'books of the queen' referred not just to the first text, namely Pierre's *Conseil*, but to the entire vernacular compilation of customary and Roman law texts within the manuscript (*ibid.*, pp. 38–9).
[201] Though the friend seems consistently male, even in the 'livre la roine', where the first title indicates a male friend (*a son ami*) (BnF, ms. fr. 5245, 1v.). This makes it more likely that it was not the original composition but copies of the text that were commissioned by a queen. Note that Blanche de Castile died in 1252.

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address Louis IX or his son as 'friend', and rather odd not to use the authority of Louis IX, his son, or mother to amplify the prestige of the text if any of these were indeed the original addressee of the text. A manuscript recently sold at auction, claimed by the auction house to be the earliest version, simply began with 'Here speaks [*parole*] my lord Pieres de Fontaines of the rights, and laws and customs of Vermandois'.[202] It is more likely that the association with Louis IX and his mother and son is a later thirteenth-century development associated with the promotion of Louis' memory by his successors.[203]

The text has a pedagogical tone and is written as the teacher's side of a conversation between teacher and student. Pierre had some legal education and incorporated significant portions of a French translation of Roman law into his text, most heavily Justinian's *Code* but also the *Digest*, without citation details. This Roman law is sometimes incorporated into the text and sometimes indicated as the speech of individual Roman emperors. The text treats summons,

[202] *Chi parole mon sires Pieres de Fontaines des drois et des lois et des coustumes de Vermandois* (the auction notice has unfortunately been taken down, but a glimpse of the beginning of the manuscript can be found in the auction publicity video here at the 1:20min mark: https://bit.ly/3NPJzCy). The claim that it is the earliest manuscript and original text rests, as far as I can tell, on the identification of the script and illumination as contemporary to the writing of the text, the title of 'parole' which the auction house claims is the original title, the Picard dialect of the text, and the inclusion of passages not extant in other manuscripts (Interencheres, 'Les paroles de Pierre de Fontaines', https://bit.ly/3yay046). These are not decisive. The decorated initial to me seems to be a little more ornate but in the same style and extremely similar to BnF ms. fr. 13983 (formerly Fonds Saint-Germain Harlay MS supp fr. 406), which Marnier dates to the end of the thirteenth century (1280–1300), while the script also seems extremely similar between the two manuscripts (M. A. J. Marnier, introduction to *Le Conseil de Pierre de Fontaines*, p. xxxvii). It is unclear why 'parole' would indicate an original rather than a manuscript variation that reflects the form of the text. The dialect of the text could reflect the language of the author but also of the copyist or recipient and is inconclusive. The inclusion of additional passages does not permit us to say the text is earlier rather than later. Lastly, though the auction house claims that this is the original exemplar composed by Pierre de Fontaines and the one that was offered by Louis IX to his son, it is unclear what in this manuscript permits that claim (Interencheres, 'Les paroles de Pierre de Fontaines'). This manuscript is in private hands, and I have not been able to study it. It is therefore difficult to make any solid claims about it at this time, and I do not include it in my analysis here.

[203] On the memorialization of Louis, see M. Cecilia Gaposchkin, *The Making of Saint Louis: Kingship, Sanctity, and Crusade in the Later Middle Ages*.

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continuances, sureties, advocates, judges, minors, contracts, fraud, cases concerning people abroad, arbitration, taverners, judgments, appeals for false judgment, how to structure a complaint and initiate a suit, noting days when suits are not permitted, judges, jurisdiction, different subjects of suits, wills, gifts, and good and bad faith. Pierre notes some, but not many, cases in which he participated.[204] Pierre appraises arguments and ideas but does not provide examples of words to use when pleading or arguing. The goal of the text is to understand how courts work, relevant rules, and connections to Roman law.

Summa de legibus Normannie *(between 1254 and 1258)*

Summa de legibus Normannie in curia laicali was composed by an anonymous author either sometime between 1235 and 1258 or, more narrowly, between 1254 and 1258. [205] The latter date is supported by much more evidence. [206] It was composed first in Latin and then translated

[204] For instance, Pierre de Fontaines, *Conseil*, 22.23–4.

[205] *Summa de legibus Normanniae in curia laicali*, in *Coutumiers de Normandie*, ed. Adolphe Tardif, vol.2; *Le Grand Coutumier de Normandie*, ed. William Laurence de Gruchy, trans. Judith Anne Everard. Tardif's edition is a reconstruction of the 'original' Latin version of the text. Everard's edition is based on an edition of the French and Latin texts published in 1539 (reprinted by William Laurence de Gruchy in 1881 because, he said, fifteenth- and sixteenth-century books were becoming rare and expensive). There are thus some differences in the text between this and Tardif's edition, and the chapter numbers do not always correspond. When I refer to the *Summa de legibus Normanniae in curia laicali*, I am referring to Tardif's edition. The manuscripts give this text a variety of names, including *Jura et consuetudines quibus regitur Normannie*, *Jura et statute Normannie*, *Cursus Normannie*, *Liber consuetudinis Normannie*, *Registrum de judiciis Normannie*, and *Summa de legibus in curia laicali* (*Summa de legibus Normanniae in curia laicali*, in *Coutumiers de Normandie*, ed. Adolphe Tardif, pp. cxl–cxlvi). *Summa de legibus Normanniae in curia laicali* was the title chosen by Tardif because that was the title in seven of his twenty-four manuscripts, which – though not the majority – made it the most common in his corpus (*ibid.*, p. cxliii).

[206] Tardif dated the composition to 1254–58 while Robert Besnier (partially based on work by Robert Génestal) dated it to 1235–58 (*Coutumiers de Normandie*, ed. Tardif, vol. 2, p. cxciv; R. Génestal, 'La formation et le développement de la coutume de Normandie'; Robert Besnier, *La Coutume de Normandie: Histoire Externe*, p. 105). Scholars of Norman law employ both dates (for Tardif's date, see Power, *The Norman Frontier in the Twelfth and Thirteenth Centuries*, p. 185; and for Génestal's date, *see* Davy, 'Les chartes ducales, miroir du droit coutumier normand?', p. 200; François Neveux, 'Le contexte historique de la rédaction des coutumiers normands', p. 18). Tardif provides much more extensive reasoning for his dates. The strongest of these in my view is that the *Summa* replicates the form of

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into French prose, and later into French verse as well.[207] It is also referred to as the *Grand coutumier de Normandie*; this title is sometimes used for the French text only and sometimes for the Latin text as well. There are many manuscripts. Tardif used twenty-four manuscripts for his Latin edition that he grouped into nine families and three principal types: those with a long and complete text, those that end a little earlier (at chap. cxxiv), and a third group that ends even earlier (at chap. cxii.4).[208] The largest number of manuscripts are from the first type, with the longest text, but the text 'varies so much and offers so little unity' that it is in fact difficult to see it as the work of one author.[209] Tardif concluded that the shortest type (ending at chap. cxii) constitutes the earliest version of the *Summa* to which were added additional texts, some inserted within the text itself and others appended at the end.[210] Viollet found seventeen manuscripts of the French version.[211] There is also a French verse translation of the Latin text composed around 1280.[212] The prose Latin text has two prefaces, the first of which is concerned with how the book is organized, and the second with why the author decided to write it. He explains that his intention was 'to declare the laws and statutes of Normandy [*jura et instituta Normanniae*]'; that is, the laws and statutes legislated by Norman princes on the advice of prelates, counts, and barons.[213] The duke is, of course, the king of France at this point.[214]

the oath for *baillis* and royal functionaries that was first enunciated by Louis IX in his famous ordinance of 1254, and so it must have been written afterwards (*Coutumiers de Normandie*, ed. Tardif, vol. 2, p. clxxxvii).

207 *Coutumiers de Normandie*, ed. Tardif, vol. 2, pp. lxv–lxxvii, xciii–xciv, clxxv–clxxxix.

208 *Coutumiers de Normandie*, ed. Tardif, vol. 2, pp. x–c (manuscripts and their family groupings), p. ci. (three principal types). His edition is of the longest of these three types. Beyond the variation already noted, it also circulated in abridged versions.

209 *Ibid.*, p. ci. This can be seen in the amount of repetition in those manuscripts, with some questions treated over and again two or three times (*ibid.*, p. cii). Tardif distinguishes between the repetitions that are brief and go back to another part of the text and those that indicate the ideas of another person, such as when the subject is repeated but views on it are contradictory or where there are doctrinal differences (*ibid.*, ciii). Considering the difficult manuscript situation, Tardif had to make difficult choices in establishing a unitary text and in choosing what variants to include (see *ibid.*, cxliii–cxlvi).

210 *Ibid.*, p. cix.

211 Paul Viollet, 'Les Coutumiers de Normandie', p. 67.

212 *Coutumiers de Normandie*, ed. Tardif, vol. 2, p. cxxxvii.

213 *Summa de legibus Normanniae in curia laicali*, first and second preface.

214 While the text consistently refers to the 'duke of Normandy', it also acknowledges that this position is held by the king of France (*ibid.*, chap. xii).

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The text refers to places in western Normandy and may have been written there. It does not reveal much about the identity of the author, who may have been someone named Maucael.[215]

In form, the text is a *summa* – a genre of writing that aimed at synthesizing the entirety of a subject, commonly used in scholastic writing and in the work of canonists and romanists.[216] The author thus takes a scholastic approach, and his tone is expository. It combines substance and procedure throughout. The text begins with basic definitions associated with law and justice, judicial organization, the jurisdiction of the duke, services and dues owed to the duke from his vassals, succession, and forms of tenure. It then moves to the trial and courts: delays, excuses, claims, secular court, the clamour of haro, the assise, the exchequer, complaints, pledges, summons, witnesses, lawyers, and conducting views.[217] Next it returns to suits of specific types and how they are conducted: murder, jurors, assault, breach of truce, suits of women, sanctuary, compurgation, possession, debt, and contracts.[218] It proceeds to claims related to landed inheritance, the

[215] The Channel Islands continued using Norman law after the break with Normandy in 1204. There was a Latin copy of the *Summa de legibus Normanniae* in Jersey in the early fourteenth century that was referred to as '*Summa de Maukael*' (see *Coutumiers de Normandie*, ed. Tardif, vol. 2, pp. cc–ccxxxiv; Tardif, *Les auteurs présumés du Grand coutumier de Normandie*; Viollet, 'Les Coutumiers de Normandie', pp. 74ff; Besnier, *La Coutume de Normandie: Histoire* Externe, pp. 106ff; John Le Patourel, 'The Authorship of the Grand Coutumier De Normandie'). Le Patourel summarizes the views of Tardif, Viollet, and Besnier on the subject.

[216] This choice of genre – also that of *Bracton* – suggests a cross-channel legal culture that continued after Normandy was conquered by Philip Augustus, as England and Normandy shared the genre of the *summa* as a way of talking about law (Thomas J. McSweeney, 'Between England and France: A Cross-Channel Legal Culture in the Late Thirteenth Century', pp. 77, 84ff). The Channel Islands broke with Normandy in 1204 and joined England (Le Patourel, 'The Authorship of the Grand Coutumier De Normandie').

[217] The clamour of haro was a particular procedure where by crying out a verbal formula, a plaintiff created an immediate temporary injunction (without judicial sanction) against someone who wrongfully interfered with their property, whereby the latter had to stop this interference until the court resolved the issue.

[218] Sanctuary in its medieval form, Karl Shoemaker explains, protected a wrongdoer who had fled to a church from forcible removal and from corporal and capital punishment, but took different forms and was in constant flux throughout the period (Karl Shoemaker, *Sanctuary and Crime in the Middle Ages, 400-1500*, ix). Compurgation was also known as wager of law or oath helping, this was a way of proving the innocence of the accused via a group of oath-helpers who testified in support of the veracity of the oath of the accused.

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shape of the inquest, novel disseisin, mort d'ancestor, dowry, records (both oral and written), advowson, various claims relating to fiefs, records (made orally), proof, compurgation again, judicial duel, and prescription.[219] Sections on specific legal claims generally show the form of the writ one should use. The text rarely mentions oral language to be used at court and refers to no specific cases.[220] It sometimes offers examples or hypotheticals using contemporary medieval names such as Robert and Richard.[221] Roman and canon law are not cited overtly in the text.[222] There is vague Roman influence in that the text very loosely follows the divisions of the Justinian's *Institutes* and employs some Roman law terms.[223] However, more generally, the text gives the impression of a clerical author familiar with scholastic thought and canon law.[224] He also used secular sources, such as Louis IX's

[219] Novel desseisin was an action to recover recently dispossessed land. Mort d'ancestor was an action to claim one's landed inheritance upon the death of an ancestor. Advowson was a right of patronage to nominate someone or appoint them for a vacant benefice of the church. Also known as trial by combat or wager of battle, the judicial duel was a method of resolving cases by single combat between accuser and accused (or a representative in case of incapacity). Prescription is the acquisition or loss of a right through use or disuse over time.

[220] Very rarely, the text refers to an act by a specific person, such as a privilege granted by Philip Augustus to prelates (*Summa de legibus Normanniae in curia laicali*, chap. cxi). Everard's edition includes the text of the actual charter as chap. cxii, Tardif does not include it.

[221] This can be seen in Tardif's edition. These names are often Latinized in the 1539 edition published by Everard. Robert and Richard in Tardif are later renamed Titius and Getus in Everard's text (*Summa de legibus Normanniae in curia laicali*, xciii).

[222] After the Middle Ages, the laws and institutions of medieval Normandy became a topos in the rallying cry against the uniformization of law (Gilduin Davy, 'La Normandie, terre de traditions juridiques', 21). The study of Norman lawbooks has tended to attract scholars devoted to an image of Norman law as original, so while an affinity between Norman lawbooks and ideas from the learned laws have been noted, they still need further study (*ibid.*).

[223] This can be seen in the language of property law (McSweeney, 'Between England and France'). Like the *Institutes*, the *Summa* begins with general considerations of justice and then addresses things and then actions, though it skips over persons (*ibid.*, p. 86). The author may have been inspired by Azo for his definitions of law (*ius*) (Viollet, 'Les Coutumiers de Normandie', p. 81). However, his interest in definitions could also have been influenced by Isidore of Seville's *Etymologies*.

[224] The second prologue seems to be inspired by the letter Gregory IX sent with his *Decretals* (1234) to the universities of Paris and Bologna (Viollet, 'Les Coutumiers de Normandie', p. 80). The author's scholastic education seems apparent in the division of the work into distinctions and chapters, in the use of Aristotelian categories and of scholastic terminology (*ibid.*, pp. 80ff). Most strikingly, the author separated law (*ius*) into natural and positive law. The expression 'positive law' was not used in

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ordinance from 1254. The author did not make his sources obvious and rephrased and moulded them for his own purpose.

Li livre de jostice et de plet *(ca. 1260)*

The *Livre de jostice et de plet* was written in French by an anonymous author around 1260.[225] There is one sole manuscript.[226] The manuscript begins with Louis IX's great ordinance on the reform of the kingdom (1254), much of which addressed the royal *baillis*, and a royal ordinance on trial procedure – the latter also forms the beginning of the *Établissements de Saint Louis* composed about a decade later.[227] The text refers to the 'customs of France', meaning the royal domain, and many times to 'king Louis'.[228] The *Livre de jostice et de plet* is commonly grouped with the *coutumiers*, but it is an awkward fit for the corpus because it inserted instances of medieval customary legal practice into what was mainly a text of Roman law in

juristic circles in the mid-thirteenth century but had a continuous tradition in scholastic scholarship at least since Peter Abelard a century earlier (*ibid.* p. 81; Stephan Kuttner, 'Sue les origines du terme 'droit positif'').

225 *Li livre de jostice et de plet*, ed. Rapetti. Rapetti's edition contains about half of the text and so presents a partial version. Rapetti, drawing on preparatory work by Henri Klimrath, prioritized the portions of the text that had some relation to customary law, canon law, or constituted a significant revision of Roman law, and did not include the portions of the text that were simple translations of Roman law (*ibid.*, p. li; Graziella Pastore and Frédéric Duval, 'La tradition française de l'"infortiat" et le "Livre de jostice et de plet"', 200n.6). A new edition of the full text edited by Graziella Pastore (http://elec.enc.sorbonne.fr/josticeetplet/) helpfully indicates the portions edited by Rapetti in black text and the portions newly edited by Pastore in blue.

226 Paris, BnF, ms. fr. 2844.

227 The title of *Livre de justice et de plet* is drawn from the beginning of the table of contents, which is at the end of the manuscript. The manuscript begins with the ordinance of 1254, and so the tone is one of royal pronouncement: 'Lois, par la grace de Deu roy de France, A toz ceaus qui ceste presente page verront, saluz'. Rapetti described these ordinances as a preliminary text separate from the *Livre de justice et de plet* and placed the texts in an appendix (*Li livre de jostice et de plet*, ed. Rapetti, p. 335). However, the manuscript goes from one text to the other seamlessly, and these ordinances appear to be introductory matter to the *Livre de justice et de plet*. The ordinance of 1254 was focused on reforming administration conducted by royal baillis but also aimed to reform public morality concerning issues such as usury, blasphemy, prostitution, and gaming (Louis Carolus-Barré, 'La Grande Ordonnance de Réformation de 1254', p. 181).

228 *Li livre de jostice et de plet*, ed. Rapetti, p. vii.

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translation, while other *coutumiers* that deploy Roman law do the opposite. The text chiefly consists of a French translation of large swathes of Justinian's *Digest*, and its plan follows the *Digest*: it begins with general concepts of law and justice, moves on to legal officers, and turns to trial procedure, judgments, and then legal issues by subject.[229] The author included significant material from canon law, most significantly from the *Decretals* of Gregory IX. He weaves in descriptions of cases, examples and passing references to issues drawn from contemporary society. The names of Roman jurists in the *Digest* are often but not always replaced with those of prominent royal judicial officers of the mid-thirteenth century.[230] Some have argued that the text was the notebook of a student or in some way associated with the University of Orleans, where professors made an effort to integrate Roman law and customary law.[231] Others have argued that it is the work of a royal *bailli*, based on the fact that the judicial officers mentioned by name in the text are preponderantly royal *bailli* and officers of the king.[232] The cases and examples described by the author offer insight into the administration of royal justice, from the cases of butchers and drapers to disputes within and between cities, in the Orléanais, the Gâtinais, Bauvaisis, and the Vexin region of Normandy.[233]

[229] The *Livre de jostice et de plet* is composed of twenty books: books I–X are based on the *Digestum Vetus* (with Book X drawing on the *Decretals* of Gregory IX), books XI–XII are based on the *Infortiatum*, and books XIII–XX are based on the *Digestum Novum* (Pastore and Duval, 'La tradition française de l'infortiat et le Livre de jostice et de plet', pp. 199–200).

[230] The contemporary royal officers named included Jean de Beaumont, Geoffroy de la Chapelle, Étienne de Sancerre, Renaud the bailli of Gisord, Renaud de Tricot. Many of these were senior counselors in the court of Louis IX, whose activities ranged from the 1230s to the late 1250s (see Stein, Henri, 'Conjectures sur l'auteur du 'Livre de jostice et de plet'', pp. 347ff).

[231] Rapetti, *Li livre de jostice et de plet*, p. xxxi; E. M. Meijers, 'L'Université d'Orléans au XIII siècle', pp. 3ff.

[232] Henri Stein, 'Conjectures sur l'auteur du 'Livre de jostice et de plet'', p. 347ff. Stein also argued that Philippe de Rémy, the father of Philippe de Beaumanoir, could have been the author of this text (*ibid.*, p. 372). He provides much circumstantial evidence that is intriguing, but ultimately it is indeed a conjecture as there is no clear direct link. A new prosopography of the individuals mentioned in the *Livre de justice et de plet* is available at http://josticeetplet.huma-num.fr/.

[233] *Li livre de jostice et de plet*, I.iii.5–6, I.v.1ff; for these locations, see Stein, 'Conjectures sur l'auteur du "Livre de jostice et de plet"', p. 372.

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Les établissements de Saint Louis *(1272 or 1273)*

The *Établissements de Saint Louis* was a French-language text created by an unknown compiler (see Figure 1.2).[234]

We have over twenty manuscripts of the text, as well as other derivative texts.[235] Beyond this, parts of the text were also copied into or paraphrased in later *coutumiers*.[236] This text is generally identified in manuscripts as a description of regulations (*établissments*) of the king of France for the *châtelet* of Paris and Orleans. The king is commonly unnamed earlier on and the royal aspect is not emphasized until later. The compiler-author created the *Établissements* by putting together two royal ordinances with two earlier texts of customs and then incorporating numerous citations into the text, many of which referred to the Roman law of the *Code* and *Digest* and to the canon law of the *Decretals* of Gregory IX.[237] Three late thirteenth-century manuscripts contain an added prologue that presents the text as an ordinance issued by Louis IX in 1270 (just before his last crusade and death in Tunis), one that he imposed in all the secular courts of the kingdom and within his own domain. This later tradition has Louis IX as proactive originator of the text, which this prologue presents as composed by a commission of 'wise men' and 'good clerks', and makes the text part of his program of reform of law, justice and the judicial and administrative personnel.[238]

Book I begins with the procedure of the Châtelet in Paris, covering judicial duties, proof, jurisdiction, and appeal. It continues with the *Coutume de Touraine et Anjou*, which is heavily based on the *Coutumes d'Anjou et du Maine* described above, and follows the earlier text closely. The contents are about the same, although the compiler *of the Établissements* did make some changes to the text.[239] Book II

[234] *Les établissements de Saint Louis*, ed. Viollet; *The Etablissements de Saint Louis*, trans. Akehurst.

[235] *Les établissements de Saint Louis*, ed. Viollet, vol. 1 and vol. 3, respectively.

[236] *Ibid.*, 1:280.

[237] Since we have no copies of the *Établissements* as a whole without the citations, the tradition has been to assume that the person who brought together the earlier component texts and the person who wove in the various citations are the same person.

[238] *Les établissements de Saint Louis*, ed. Viollet, 1:3.

[239] He made some structural changes. He provided more explanatory titles for each section. He sometimes grouped the sections differently (e.g. *Coutumes d'Anjou et du*

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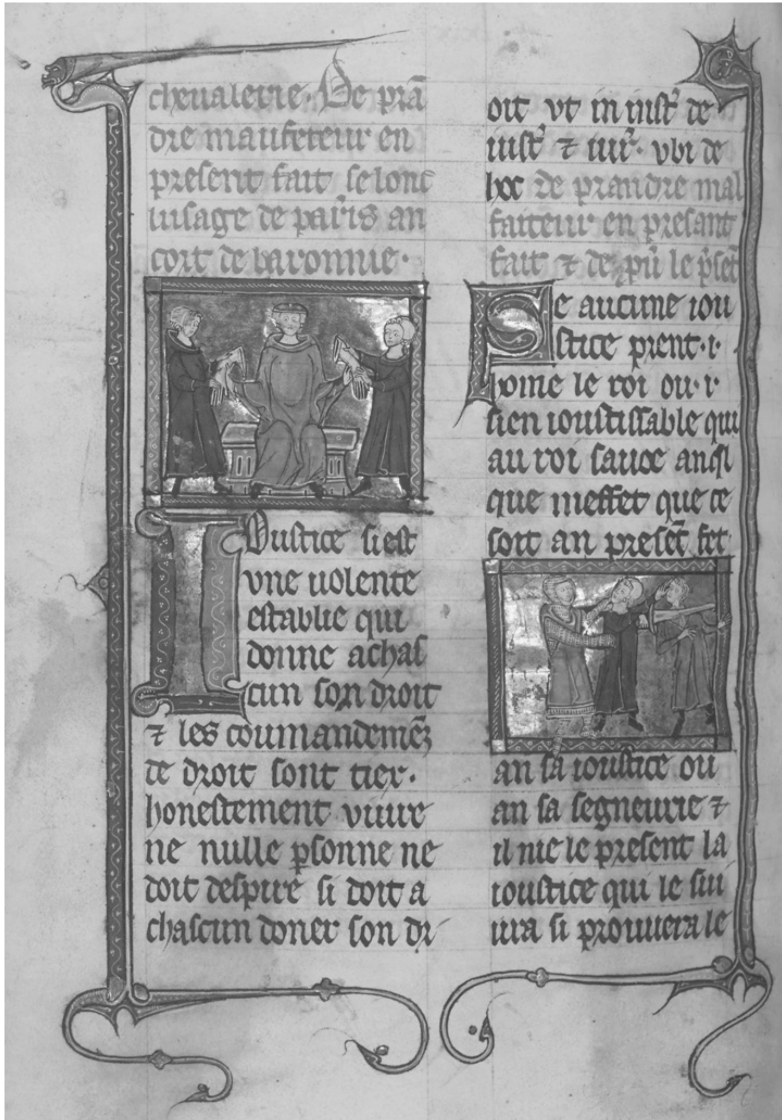

FIGURE 1.2 *Établissments de Saint Louis*. Illuminations in the *coutumiers* captured scenes that reflected the action of the lay courts. Scenes of the judge sitting in judgment and perpetrators being caught were some of the most common throughout the *coutumiers*. In addition to these, this thirteenth-century manuscript of the *Établissments de Saint Louis* includes an image of the judge receiving this book, a witness taking their oath, a trial by battle, a guilty person being punished by hanging, and two relating to homage and fealty. Illuminated *coutumiers* were not so ornately decorated as manuscripts of canon law or Roman law could be. Those *coutumier* manuscripts that were illuminated commonly contained, with a few exceptions, between one and ten images. *Établissments de Saint Louis*, Bibliothèque nationale de France, ms. Fr. 5899, fol. 69v.

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contains the court procedure in the baronial courts of the Orleans region. It discusses arrests, requests and complaints, jurisdiction, appeals, summons, duties of advocates, judging, the king's rights, fines, vassal–lord relations, and execution of judgments and ends with complaints to the king against those who come onto one's land armed without right. The manuscripts vary as to the regional attributions of the texts. Both books regularly explain how one should speak to make various sorts of legal claims. The *Établissements* does not refer to specific cases.

Le livre des constitutions demenées el Chastelet de Paris *(between 1279 and 1282)*

This text was written in French by an anonymous author and survives in one known manuscript dating from the beginning of the fourteenth century.[240] The title is drawn from the *explicit*, which labels the text as the 'Book of constitutions carried out in the Châtelet of Paris in all cases'.[241] The *Demenées* is a book for pleaders and 'teaches how one should intend to speak before all judges and especially in lay courts'.[242] Unlike the other *coutumiers* studied here, most of the text concerns trials where non-nobles would be tried before a lone judge (as opposed to a noble tried by peers or appealing to a sovereign).[243] It has a procedural framework that begins with the initial complaint and takes the reader through various aspects of the trial process, though it presents these in a mixed order rather than following the trial from beginning to end. Substantive law is woven into some sections, for

Maine s. 19–21 equates to *Établissements* 1.27). Both Viollet and Akehurst bracket what was drawn from *Anjou et Maine*, which shows what was used by the *Établissements* compiler and what he added. Sometimes word changes, even small, change the meaning of the text. For instance, *Anjou et Maine* explains that 'the king cannot impose customs (*coutumes*) in the land of the baron without his consent' (s. 19), while the *Établissements* changes *coutumes* to *ban*, and so states that 'the king cannot issue proclamations in the baron's lands without his consent' (s. 26). The issue of textual variation will be discussed in more detail later in Chapter 7.

[240] *Le livre des constitutions demenées el Chastelet de Paris*, ed. Mortet. Paris, BnF, ms. fr. 19778. The marginal notes are from the end of the fourteenth or the fifteenth century. Mortet is 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.

[241] *Le livre des constitutions demenées el Chastelet de Paris*, ed. Mortet, *explicit*, and Mortet's introduction, p. 7.

[242] *Ibid.*, preface.

[243] Either the judicial officer of a lord or a royal magistrate (*ibid.*, p. 11).

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instance, descriptions of types of proof or the nature of custom. Much of the text is devoted to advising pleaders on how to present information and arguments at various stages of a trial and depending on the nature of legal issue. The tone is expository, and explanations are brief. The text makes several references to the 'custom of France', meaning the custom of the royal domain. It draws very little on texts of canon law and Roman law, which are mentioned once each, and does not refer to specific cases. French scholarship refers to highly procedural texts like this one that describe the manner of proceeding in court as a *style* (or *stile*).

Philippe de Beaumanoir, *Coutumes de Beauvaisis* (1283)

This text was written in French by Philippe de Beaumanoir (1247–96) while he was a justice in the County of Clermont in Beauvaisis for Count Robert of Clermont, one of Louis IX's younger sons.[244] Amédée Salmon has fourteen manuscripts for his critical edition.[245] Local to this area, Beaumanoir was made *bailli* of Clermont in 1279 and held the position until 1284.[246] It was while in this post that he composed his *coutumier* and was knighted close to the end of his tenure in Clermont. He then went into royal service as an administrative and judicial officer as *sénéchal* of Poitou (1284–87), *sénéchal* of Saintonge (1287–89), *bailli* of Vermandois (1289–91), *bailli* of Touraine (1291–92), and *bailli* of Senlis (1292–96).[247] He and his father were for some time mistakenly thought to be one person. His father, known as Philippe de Rémy, was a *bailli* in Artois and writer of imaginative literature such as *Jehan et Blonde* and *La Manekine*.[248] Phillipe de

[244] Beaumanoir, *Coutumes de Beauvaisis*, ed. Salmon; Beaumanoir, *The Coutumes de Beauvaisis of Philippe De Beaumanoir*, trans. Akehurst.

[245] Beaumanoir, *Coutumes de Beauvaisis*, ed. Salmon, pp. xviii–xxix. He also noted two abridged version (*ibid.*, xxx–xxxii).

[246] Bautier, 'Philippe de Beaumanoir', 6–8. Beaumanoir explains in the first paragraph that he is from the area and speaks of being charged by Robert with upholding the laws and customs of the area as being in the present ('nous sommes de celui païs et [. . .] nous nous sommes entremis de garder et faire garder les drios et coutumes de ladite contée par la volonté du très haut home et trea noble Robert, fil du roi de France, conte de Clermont . . . '; Beaumanoir, *Coutumes de Beauvaisis*, ed. Salmon, prologue s. 1).

[247] Carolus-Barré, 'Origines, milieu familial et carrière de Philippe de Beaumanoir', pp. 29ff.

[248] His father was a *balli* in the Gâtinais region from 1237–50 for count Robert of Artois, brother of Louis IX (*ibid.*, p. 23). Philippe de Beaumanoir inherited some minor lands from his father (*ibid.*, p. 28).

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Beaumanoir was his third son, a comital and royal *bailli* as well as a great jurist. His was by far the largest of the first *coutumiers*, with seventy chapters which are each in-depth treatments of a subject. The arc of the text is based on the trial process, beginning with judges, summons, lawyers and complaints, issues of jurisdiction and proof, and ending with judicial battles and judgments. Within this narrative, Beaumanoir treats a variety of subjects at length, including wills, inheritance, minority, illegitimacy, consanguinity, highways, measurements, crimes, novel desseisin, written legal documents, loans, rental, arbitration, property of various types, creditors' remedies, marital maintenance, private war, truces, usury, cases that arise out of bad luck ('misadventure'), and gifts. He discusses the form of written legal documents, from wills to advocate's appointment letters, as well as legal language – how one should make different sorts of claims or statements and their implications. The *Coutumes de Beauvaisis* is written with erudition and has been lauded by later commentators as the most important, best, and most original juridical work of medieval France.[249] Though clearly familiar with ideas from the learned laws, Beaumanoir never cited or quoted texts of Roman law or canon law. Consequently, from the 1840s onward, scholars have debated the nature of his education and his textual sources, variously arguing that at the base of his thinking lay Tancred's *Ordo*, Justinian's *Digest*, other *ordines judiciarii*, or the *Établissements de Saint Louis*.[250] Beaumanoir chose neither to reveal his textual sources nor to borrow their language directly and instead wrote a text whose erudition was evident but presented without debts or ties to outside authority.[251] However, he did refer to practice throughout the text. He made many comparisons between the functioning of lay courts and ecclesiastical courts and cited close to a hundred cases in secular courts that he had either seen, tried himself, or heard about from other counties.[252]

[249] F. R. P. Akehurst, introduction to Philippe de Beaumanoir, *The Coutumes de Beauvaisis of Philippe de Beaumanoir*, trans. Akehurst, p. xiii.

[250] Beaumanoir, *Coutumes de Beauvaisis*, ed. Salmon, pp. xvii–xviii. Salmon suggests that these might best be seen, in this context, as texts worth knowing to appreciate the scope and nature of Beaumanoir's work.

[251] *Ibid*., p. xix.

[252] Beaumanoir, *Coutumes de Beauvaisis*, ed. Salmon; Beaumanoir, *The Coutumes de Beauvaisis of Philippe De Beaumanoir*, trans. Akehurst, p. xxiii.

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L'ancien coutumier de Champagne *(ca. 1295)*

The *Ancien coutumier de Champagne* was written in French by an anonymous author around 1295, after Champagne had been incorporated into the royal domain through the marriage of Philip the Fair to Joan of Navarre.[253] This was when the Grands Jours de Troyes, the court of the count of Champagne (who was now also the king), was in transition from one composed of barons to one manned by royal commissioners.[254] Nine known manuscripts of the text survive, the earliest – four of the texts – dating from the fourteenth century. The text begins with an ordinance about the division of inheritance among male children, which was issued in 1224 by Thibaut IV Count of Champagne and King of Navarre with the consent of his nobles. This ordinance gives the text the appearance of legislation, but the rest of the text is an exposition of substantive law. With a few exceptions, each section begins with a substantive rule of law introduced by the locution 'It is custom in Champagne that ... ' or 'The manner in which we do things in Champagne is ... '.[255] Nearly half of these statements of substantive law were supported with cases, described in varying degrees of detail.[256] The text begins with inheritance, dower, guardianship of minors, escheat, forest law,

[253] The text includes cases, the latest of which date to 1295 and give us the approximate date of the text (*L'ancien coutumier de Champagne*, ed. Portejoie, p. 11) Philip and Joan married in 1284, and Philip became king of France in 1285.

[254] *Ibid.*, pp. 4–7. The relationship of Champenois aristocracy to the count changed in 1284: from then on, a bureaucracy made up of outside appointees would liaise with them for a count that no longer resided there (Evergates, *The Aristocracy in the County of Champagne, 1100–1300*, pp. 61, 194).

[255] 'Il est coustume en Champagne que ... ' (*L'ancien coutumier de Champagne*, s. 2), 'Encor us'on en Champagne que ... ' (s. 5).

[256] *L'ancien coutumier de Champagne*, p. 7. The cases are sometimes very brief and sometimes provide a description of pleadings, parties, forum, judges, and date. 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.*, p. 11). The judgments themselves are mostly from the Grands Jours de Troyes (both before and after the accession of Philip the Fair), six are from a court of barons that functioned concurrently with the Grand Jours after the latter became dominated by royal personnel, four are judgments of the Parlement of Paris, and a handful cannot be identified (*ibid.*, pp. 7–8). Émile Chénon theorized a primitive text of substantive rules to which the judgments were added later and believed the judgments may have been drawn wholly or in part from a register that he thought was compiled by Guillaume du Châtelet (Chénon, 'Quelques mots sur les deux manuscrits récemment découverts du coutumier de Champagne', 67).

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warranty, mortmain, seisin, punishments and fines, marriage between people of different status, and generally includes law relating to the governance of the county.[257] The text does occasionally touch on procedural questions, but reading this text would not be enough to learn court procedure.[258] The substantive law comes in the form of concrete rules and not as an explanation of terminology or abstract principles. It contains no Roman or canon law.

Coutumier d'Artois *(between 1283 and 1302)*

This text was written in French by an anonymous author sometime during the last couple of decades of the thirteenth century or the beginning of the fourteenth.[259] It is preserved in two manuscripts written in different dialects.[260] The text was composed during the rule of Robert II (1250–1302), Count of Artois, grandson of Louis VIII, and nephew of Louis IX.[261] Robert II was an absentee lord, and the county was governed without his presence.[262] Unlike in other regions, the *baillis* of Artois had important duties relating to the administration of justice but did not have their own courts; rather, they called together the men of the

[257] Escheat is the reversion of one's property to the crown when one dies without an heir. Seisin is a medieval property concept akin to legal possession, though the equivalence is not nearly that simple (see Ernest Champeaux, *Essai sur la vestitura*).

[258] The procedural law included addresses specific points (for instance, *L'ancien coutumier de Champagne*, s. 33, 34). It cannot have been meant to provide a general overview of trial procedure.

[259] *Coutumier d'Artois*, ed. Tardif.

[260] Paris, BnF, ms. fr. 5249 from the fourteenth century (A); Paris, BnF, ms. fr. 5248 which contains three texts: the *Établissements 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 lieus* (B). The two dialects are Artesian and Picard.

[261] Artois came within royal orbit under Philip Augustus, who claimed it for his son (future Louis VIII) as heir to his mother, Isabelle de Hainaut. Louis VIII made it an apanage for his second surviving son, Robert, who held Artois from Louis IX beginning in 1237 when he came of age. Robert I died on crusade and his widow, Mahaut de Brabant (who married the count of Saint-Pol), served as regent until Robert II came of age in 1265. He ruled until 1302. The fissure between the nobility and the counts of Artois became clear under Robert II's successor, Mahaut d'Artois, incidentally the first in this line to govern in residence. (See Lalou, 'Le comté d'Artois (xiiie–xive siècle)', pp. 23ff.)

[262] Small, 'Artois in the Late Thirteenth Century: A Region Discovering Its Identity?', 201–2.

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count who judged in the count's name at the level of the castellany.[263] The *Coutumier d'Artois* author explains in the preface that the text contains the 'customs and usages' of Artois, as they should be and have been practised, part of which conform to the 'written law' of Rome and the church.[264] The text begins with trial procedure – summons, exceptions, delays (essoins) – and then turns to more substantive material on the role of attorneys and jurisdiction of the king, barons, and minor nobles. It then returns to procedure and initiating cases, before coming back to substantive issues of inheritance, succession, and dower. It finishes with appeals, criminal procedures, and the duties of judges. The author used a wide range of sources. He incorporated sections of Pierre de Fontaines' *Conseil* and the *Établissements de Saint Louis* into his text and cites Roman law, Decretals, *ordines iudiciarii* (procedural manuals for canon law), Horace, and the Bible. The author discussed several cases he saw at court himself. The details in these case discussions vary but usually included the court where the proceeding took place, the nature of allegations, and the judgment.[265]

Li usages de Bourgogne (date uncertain, perhaps end thirteenth century)

Li usages de Bourgogne was composed in French by an anonymous author.[266] Recent opinion places the text in the thirteenth century, although dating is difficult: while the extant manuscript is from the late

[263] The *bailli* arranged trials, arrested suspects, found witnesses, obtained evidence, but did not act as judges, because the castellany was the center of justice, an anomaly at a time when castellanies were becoming outdated as a unit of political importance in France (*ibid.*, 199). There was no appeal to the count himself and centralized administration in Artois occurred very slowly (*ibid.*, 199–200). However, the *baillis* of the count played a big part in arbitration (see also Maxime de Germiny, *Les lieutenants de Robert II*, pp. 21–2). The subject of arbitration is one of the longest sections of the *coutumier* (*Coutumier d'Artois*, LIII). Artesians could appeal to the Parliament of Paris, which they did from the late 1260s, often in disputes over jurisdiction (Small, 'Artois in the Late Thirteenth Century', 201n.44).

[264] *Coutumier d'Artois*, preface.

[265] The parties to the disputes were mentioned sometimes by name, sometimes by positions (e.g. the *bailli* of a particular place), and at other times generically by 'man' or 'bourgeois'. The author did not provide dates.

[266] *Ancien coutumier de Bourgogne*, ed. A.-J. Marnier and N. Marnier. This title is drawn from the incipit and from the text's continued references to the *us de Borgoigne* as primary norm. Ange Ignace Marnier published it under the title of the *Ancien coutumier de Bourgogne* (*ibid.*).

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fourteenth century at the earliest, some provisions seem to go back to the late twelfth or early thirteenth century, and it is possible the text dates to the thirteenth century.[267] The thirteenth-century dating is plausible as the concern of the text is to show the reader how to plead in court using witnesses, and clarifying inquisitorial procedure for lay contexts was certainly a preoccupation of the thirteenth century.[268] Despite the difficulty of dating the text with certainty, I am adding it here – conditionally and pending potential future manuscript discoveries – because it provides an intriguing addition to the corpus and widens the idea of what it meant to write a *coutumier*, although everything said about this text must be taken with the proviso of uncertain dating.

The *Usages de Bourgogne* is an introduction to pleading, and the trial is entirely framed in terms of argumentation. The author thus focuses on explaining the sorts of things one should say in court, the sorts of replies one might get, and the sorts of responses one should make. Despite this similarity to aspects of the *coutumiers* described above, the *Usages de Bourgogne* pays a lot of attention to the preoccupations of rural society. Substantively, the text focuses on the contractual obligations of farmers and wrongs committed by animals.[269] The text begins with how to plead, bring witnesses, types of witness, actions of debt, disagreement among judges, pledges, things purchased at markets and outside markets, lost animals (*betes*), borrowed animals, killing a neighbour's animals, lending animals to others, pigs and other animals that cause damage, how to defend oneself from the charge of being a thief, encroachments on land, delays in paying the *cens*, defences against accusations of treason, defences against accusations of murder, trial by battle, defences women should use if accused of sorcery, defences against accusations of being a leper, and a last incomplete provision on inheritance. The

[267] Marnier dates his manuscript to the end of the fourteenth or beginning of the fifteenth century but said that it contained a copy of a more ancient manuscript (*ibid.*, 525). Michel Petitjean states the text is from the late thirteenth century (Petitjean, 'La coutume de Bourgogne. Des coutumiers officieux à la coutume officielle', 14). Castaldo and Mausen note the text contains rules that go back to the thirteenth century if not the late twelfth (Castaldo and Mausen, *Introduction historique au droit*, s. 445).

[268] Of course, this does not bar the text from being later.

[269] Petitjean, 'La coutume de Bourgogne', p. 14.

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text is thus generally focused on procedure, though aspects of substance are incorporated, and the text refers to the *us de Borgoigne* and justifications of rules or procedures 'by Law' (*par droit*). The text mentions ecclesiastical courts and treats proof by witnesses but does not cite, quote, or paraphrase texts of Roman law or canon law. Aspects relating to royal justice do not appear in the text.

Additional Note

The *coutumiers* were not the only texts that testified to the energy and experimentation invested in finding a good way to discuss the inchoate stuff of customary law and the business of secular courts. There were shorter texts of various types composed in the thirteenth century on aspects of the lay courts. These tracts do not often appear in recent historiography of the *coutumiers* but are important because they show that the *coutumiers* were part of a broader productive foment surrounding the lay courts and that their authors, while singular for writing more extensive works, were part of an intellectual milieu that was receptive to if not eager for such works. While they are comparatively short, these tracts could be listed with the *coutumiers* because they also deal with cases, abstract rules, or pleading in some way. That I do not include them in my corpus is not a reflection of their importance but of a desire to keep manageable what is already a large source base. It also reflects my view that these texts need their own in-depth study. I provide two examples of these shorter works here, for perspective.

A text known as the *Assises de Normandie* was composed by an anonymous author who was attached in some way to the *baillage* of Caen. It exists both in Latin and French. The title gives the impression that this a formal court record of cases and the author framed it as a record of what he saw at assises: 'The year of the incarnation of the Lord 1234, the Tuesday before the feast of blessed Michael, in the month of April, in Caen. The following Wednesday, I heard what follows in the assise.'[270] However, while the text is based on court judgments rendered between 1234 and 1237 at various Norman

[270] 'L'an de l'incarnation du seigneur mil deux cent trente quatre, le mardi avant la fête du bienheureux Mathieu, au mois d'avril, à Caen. Le mercredi suivant j'ai endendu en assise ce qui suit' ('Assises de Normandie au treizième siècle' in Marnier, ed., *Etablissements et coutumes, assises et arrêts de l'échiquier de Normandie*, p. 89).

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assises, the case descriptions are extremely brief, and many have no case at all but are descriptions of abstract principles or procedure.[271] The author's goal seemed not to be recounting the specifics of individual trials but writing down the principles he saw at play in them.[272]

Another example is a tract on the customs of Anjou known today as the *Compilatio de usibus Andegavie*, to which tradition has given a Latin title, even though the text was entirely in French.[273] We have only one manuscript, which also contained the *Établissements de Saint Louis* and was written in the early fourteenth century.[274] Beautemps-Beaupré did not find a date for the text but leans towards the later 1270s, while Paul Viollet places it after 1315.[275] The text refers to usage and right/law (*drois*) of the courts in almost every provision, starting virtually every provision with 'it is usage that' or 'it is usage and law that'. The text has no overt citation of Roman or canon law. The provisions in this text are very short and are forms of rules and procedures formulated in their most pithy essence, perhaps best described as customary '*regulae iuris*'.

[271] M. L. Delisle, 'Mémoire sur les recueils de jugements rendus', 373. The text covers assises held in Caen, Bayeux, Falaise, Exmes, and Avranches and cites a handful of decisions made by the Exchequer of Normandy (*ibid.*). We have one manuscript from the thirteenth century, three from the fourteenth, one from the fifteenth, and one from the sixteenth (*ibid.*). Tellingly, the text often accompanied the *Grand Coutumier de Normandie*.

[272] For example: '*De la dot engagée*. Les héritiers du mari deffunt qui a obligé la dot de sa femme, sont tenus de la dégager, et de mettre leur propre héritage entre les mains des créanciers: cela fut jugé pour l'épouse de Philippe de feu Montfort' (*ibid.*).

[273] *Compilatio de usibus et consuetudinibus andegavie* in *Les établissements de Saint Louis*, ed. Viollet, 3:117ff.

[274] Paris, BnF, ms. fr. 13985. See *Coutumes d'Anyou et dou Maigne*, ed. Beautemps-Beaupré, p. 44.

[275] *Coutumes d'Anyou et dou Maigne,* ed. Beautemps-Beaupré, pp. 37–8; *Les établissements de Saint Louis*, ed. Viollet, 3:116. Viollet postulates this date based on one provision in the text that seemed to refer to an ordinance of 1315. Beautemps-Beaupré's explanation for the date seems a little more convincing, and the constant repetition of the word 'usage' rather than 'custom' could suggest an earlier rather than later date.

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