Introduction

Vernacular Writing and the Transformation of Customary Law in Medieval France

'No one before me ever undertook this thing, such that I have a model', wrote Pierre de Fontaines around 1253 in the preface to his *Conseil à un ami*.[1] Pierre had written the *Conseil* in response to the pleas of an unnamed friend who wanted his son to study the laws, customs, and practices of the secular courts in his region of Vermandois, which was just north-east of Paris, lying between Flanders and Champagne.[2] This young man was to succeed his father and govern his lands. Upon inheriting, he would have to become a legal actor: he would have to provide justice to his subjects, keep his lands according to appropriate laws and customs, likely represent himself in court, and provide good advice to his friends.[3]

There was no easy way to learn these subjects, which together constituted the sorts of knowledge necessary to understand the legal culture of secular courts and to navigate them successfully. Procedural manuals had been written in the twelfth century to clarify, establish, and demystify the legal process in the Church courts, complementingan already rich body of rules that formed its substantive law.[4]

[1] 'nus n'enprist onques devant moi ceste chose, dont jaie examplaire' (Pierre de Fontaines, *Le Conseil de Pierre de Fontaines*, 1.3; hereafter Pierre de Fontaines, *Conseil*). An exemplar widely meant an example or model as well as a copy of a book.

[2] 'voudriez qu'il s'estudiast ès lois et ès costumes du païs dont it est, et en usage en cort laie' (*ibid.*, 1.2).

[3] These are the skills the entreating friend hoped his son would acquire from Pierre's book (*ibid.*, 1.2).

[4] Linda Fowler-Magerl, '*Ordines iudiciarii*' *and* '*Libelli De ordine iudiciorum*'.

However, none of this existed for secular courts. Pierre's friend's son would have to attend court sessions, watch, observe, and try to remember as much as he could. He could learn from his father. He could ask for advice from friends and administrators. He might familiarize himself with the family's documents, affirming their rights and attesting to transactions. Ultimately, it would take him much time and effort to get a good handle on how he should run his own court for his vassals and the residents of his land, as was his duty as a lord, and how to navigate others. For this reason, his father implored Pierre 'so many times' to compose a written text that his son could use to learn how to become a legal actor.[5] Pierre was a native of Vermandois. He owned lands there, arbitrated disputes in the area, and worked in the court of Mahaut d'Artois in a legal and administrative capacity.[6] He made enough of a name for himself to become the royal justice for Vermandois in 1253, an appointment that did not last the year before he went off to work for the royal Parliament in Paris.[7] At some point in this career, he wrote his *Conseil*, and the book makes clear that he was a man of bothexperience and learning.[8] He was comfortable with the discursive tools of rhetoric, opening his book with the common trope of a humble author with a great task.[9] The book was framed as a scholastic dialogue, and the textual sources he quoted at length

[5] 'vos m'avez tantes fois proié et requis' (Pierre de Fontaines, *Conseil*, 1.1), 'de ce m'avez vos requis, et requerez que je li face un escrit selonc les us et costumes de Vermandois et d'autres corz laies' (*ibid.*, 1.2).

[6] Quentin Griffiths, 'Les origines et la carrière de Pierre de Fontaines, Jurisconsulte de Saint Louis', 549.

[7] *Ibid.*

[8] We know very little about Pierre's early career before he entered royal service. The *Conseil* is commonly dated 'around 1253' because Pierre had official judicial functions as a royal justice in Vermandois in 1253. We do not know whether Pierre conceded to his friend's request and wrote the text when his career as royal justice of Vermandois was taking off or once he had become a man of the king and it had reached its summit.

[9] This was the *captatio benevolentiae*, a rhetorical tool developed in classical Roman rhetoric. It was common a trope in medieval prefaces to works on diverse subjects meant to gain the sympathies of an audience by showing the importance of a text without overpraising the author. Rhetoric was part of the education of any schoolboy. It could certainly be an asset in the courtroom; a couple of decades after Pierre, William Durand advised lawyers pleading in ecclesiastical courts to gain the judge's favor with 'immoderately unctuous' praise (James A. Brundage, *The Medieval Origins of the Legal Profession*, p. 427).

were books of late antique Roman law, the form of law one could study at university alongside ecclesiastical law.

Yet despite his experience and learning, Pierre's task felt new and unfamiliar to him. How exactly should he compose a work on a subject without a model indicating how to construct a coherent account of customary law, let alone a genre? Without examples to follow, Pierre had to engage in the creative act of choosing which of his myriad observations and experiences to draw upon, which abstract and substantive ideas from his studies to use, and how to write about all of these things.

Adding to the difficulty was the fact that Pierre was expanding access to the study of law to a new audience – laymen, like his addressee – and so he composed the *Conseil* in their vernacular rather than Latin, the general language of legal writing.[10] Unlike clerics and scholars who spent years in Latinate study, 'the mind of a layman cannot spend much time studying such things'.[11] Addressing those 'who wish to learn how to administer justice and hold land', and eschewing 'hard or obscure or long words', Pierre decided that the best approach would be to write with brevity, simplicity, and clarity.[12]

This book tells the story of Pierre and similar authors in northern France who composed the lawbooks, known as *coutumiers* in the French legal tradition, that shaped customary law into a field of knowledge. 'Customary law' typically refers to a type of rule made in practice, and in the courts, by the community, which can include 'the people' in some form, lords and kings, or lawyers and judges.[13]

[10] Laymen and the knightly class played an active role in the development of vernacular literature and writing more generally (Martin Aurell, *Le chevalier lettré.*).

[11] Pierre de Fontaines, *Conseil*, 1.2. [12] Pierre de Fontaines, 1.2.

[13] 'Customary law' can mean significantly different things depending on time, place, and context. For the medieval Latin European West, 'customary law' generally refers to legal rules that are created out of community practice. It can designate the legal rules of both dominant and minority or subjugated populations. Looking beyond the medieval period, its meaning can range from Western European law during the Middle Ages before it was professionalized, to the laws of colonies as opposed to the laws of their metropoles, forms of indigenous law rather than the law of the colonial order, or a form of legal-political rhetoric of the post-colonial order (Jacques Vanderlinden, 'Here, there and everywhere… or nowhere?', p. 143). Customary law holds an important place in modern law, but it tends to be underrecognized outside of international law (Gary Brown and Keira Poellet, 'Traditional and Modern Approaches to Customary International Law', 757). Instead, in contemporary soci- ety, customary law is most often identified with the law of so-called 'primitive',

Customs concerning specific rules of property, succession, and other subjects certainly emerged out of this oral practice. *Coutumier* authors, however, both known and anonymous, successfully crafted customary law into an expository genre of writing, and these expositions are an excellent starting point for understanding the legal culture of later medieval France.

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If what Pierre accomplished – compiling and systematizing disparate rules of custom into a body of coherent law – seems like a natural way to package customary law, it is because he and other *coutumier* authors gave it the form that is familiar and even obvious to us today. Pierre reminds us that it was no obvious thing to decide how to write customary law. Pierre was not actually the first author of a written customary law as his comment implied. Comparable texts had been and were being written elsewhere in Europe and a couple closer to home in northern France, and indeed the textualization of legal ideas was not restricted to Christian communities.[14] Pierre was thus participating in a wider cultural movement that began around the twelfth century, in which lay court practices and ideas about law were gathered and crafted into bodies of written rules.

The 'classical age' of the *coutumiers* stretches from the twelfth century, when this form of lawbook began, to the fifteenth, when the French king demanded that every region compose one official version of its custom.[15] The historiography of the *coutumiers* is incredibly rich but missing a larger view: there is no large-scale work devoted specifically to the northern French or French *coutumiers* as a whole. They appear variously as part of histories of French law, within larger histories of custom and its lawbooks in Europe, or in a multitude of articles on a specific text or legal subject.[16] This book focuses on what

traditional, subaltern, or preliterate peoples (David J. Bederman, *Custom as a Source of Law*, pp. 3–15). All of these meanings of customary law bear some connection to Roman categories of legal order – where 'custom' and 'law' together described 'civil law,' a law proper to a people, as opposed to natural law and the law of nations.

[14] Talya Fishman, *Becoming the People of the Talmud*.

[15] Van Dievoet, *Les coutumiers, les styles, les formulaires*, p. 22.

[16] As a genre of writing, the Northern French *coutumiers* are part of Guido van Dievoet's typology of *coutumiers* written across Europe from the twelfth to fifteenthcenturies (Van Dievoet, *Les coutumiers, les styles, les formulaires*). The collected works of Paul Ourliac, Jean Yver, André Gouron, and Robert Jacob are foundational

I call 'the first *coutumiers*'. These are the earliest *coutumiers* of northern France, which were composed from the mid-thirteenth century to the first years of the fourteenth.[17] This group of texts includes the *Très ancien coutumier de Normandie* (early thirteenth century with later additions); the *Coutumes d'Anjou et du Maine* (1246); Pierre de Fontaines' *Conseil à un ami* (1253); *Summa de legibus Normannie* (between 1254 and 1258); the *Livre de jostice et de plet* (ca. 1260); the *Établissements de Saint Louis* (1272 or 1273); the *Livre des constitutions demenées el Chastelet de Paris* (between 1279 and 1282); Philippe de Beaumanoir's *Coutumes de Beauvaisis* (1283); the *Ancien coutumier de Champagne* (ca. 1295); *Ancien coutumier de Bourgogne* (end of thirteenth century); and the *Coutumier d'Artois* (between 1283 and 1302).[18] Generally, the

reading for understanding these texts. F. R. P. Akehurst's important English translations and studies illuminate not only the meaning but also the courtly context of customary law. The *coutumiers* appear in Yvonne Bongert's analysis of the practice of the lay courts between the tenth and thirteenth centuries, and in Esther Cohen's sociocultural analysis of law and legal practice in the later Middle Ages (Bongert, *Recherches sur les cours laïques de Xe au XIIIe siècle*; Cohen, *The Crossroads of Justice: Law and Culture in Late Medieval France*). John Gilissen provides an analysisof the concept of custom in the European Middle Ages that includes a discussion the *coutumiers* (Gilissen, *La coutume*). The *coutumiers* are an important part of various introductions to French legal history or the history of French private law. Other essential works on the history of custom in Europe include the Jean Bodin Society's series of volumes entitled *La Coutume = Custom*, notably the one devoted to the medieval period edited by John Gilissen, and the wonderful volume on custom edited by Per Andersen and Mia Münster-Swendsen (Gilissen, *La Coutume = Custom*, vol. 2, *Europe occidentale médiévale et moderne*; Andersen and Münster- Swendsen, *Custom: The Development and Use of a Legal Concept in the Middle Ages*). There are many scholars who have studied custom in the general area of Northern France, too many to list here. The reader can refer to the bibliography, looking out notably (but certainly not exclusively) for articles and books by Fredric Cheyette, Jean Gaudemet, Gerard Giordanengo, Dirk Heirbaut, Jean Hilaire, Emily Kadens, Jacques Krynen, Laurent Mayali, and Laurent Waelkens.

[17] The traditional manner in which medieval French law is described is through the distinction between the North of France as the land of customary law (*pays de droit coutumier*), where oral customary law reigned, and the South of France as the land of written law (*pays de droit écrit*), where law was written and Roman. Although specialists have long emphasized that the former made use of Roman law while the latter also relied on custom, this distinction is still commonly repeated. Those terms are used in medieval sources with a rhetorical purpose that needs additional study.

[18] I exclude the *Livre Roisin*, which describes the customs of the city of Lille, from my analysis of the first *coutumiers* because it is an early theorization of municipal law, and its urban context and thus political and legal culture are significantly different.I draw upon but do not focus on the *Livre de Jostice et de Plet* (ca. 1260). This text is

coutumiers of the classical age have been defined as works penned by a *patricien* (someone elite or privileged, a judge, a municipal official, a lawyer), who principally treats local or regional law, written in a 'popular' style, often in regional vernaculars.[19]

My approach to these *coutumiers* departs from assumptions in existing scholarship in two critical respects. Scholars tend to emphasize the regional and purely private, 'unofficial' character of the *coutumiers*, as well as the importance of distinguishing them from the learned law studied and composed by canonist and Romanist jurists.[20] These two points, while correct, tend to suggest that all redactors of custom did the same thing; namely, simply to transcribe custom. But when taken as a whole, we can see that the first *coutumiers* each tell a unique story about what it meant to take various elements – live legal practice, observation, opinion, texts recording specific transactions or specific cases, and some learning – and turn these into a largely coherent interpretation of customary law. Instead of copyists who transcribed legal practice, those who composed *coutumiers* were authors who made

usually included as part of the Northern French *coutumiers* but it is largelya translation of Roman law with medieval cases inserted as examples. It stretchesthe meaningfulness of the category of '*coutumier*,' though in doing so it does form an important contrast to other contemporary *coutumiers* and tells an important story about how one person (we have one manuscript), likely someone associated with the university of Orléans, imagined thirteenth-century legal life within a Roman law framework. I do include the *Livre des constitutions demenées el Chastelet de Paris*, which is often overlooked, but is an early theorization of the *coutume de France* (i.e.the royal domain). The *Ancien coutumier de Bourgogne* is the least studied of this group. The title was given to the text in the nineteenth century, but from the incipit it should be the *Usages of Bourgogne.* The date is drawn from the earliest manuscripts, which are from the late thirteenth century (M. Petitjean, 'La coutume de Bourgogne. Des coutumiers officieux à la coutume officielle', p. 14). It may very well be an earlier text. Some provisions seem to go back to the late twelfth or early thirteenth century (André Castaldo and Yves Mausen, *Introduction historique au droit*, s. 445). Where there are ambiguities, the dates of the *coutumiers* listed here are discussed in the brief descriptions of the *coutumiers* near the end of Chapter 1 in 'Brief Descriptions of the "First" *Coutumiers*'.

[19] Van Dievoet, *Les coutumiers, les styles, les formulaires*, p.14.

[20] The line between private and unofficial and public and official for van Dievoet is the legislative intent expressed in the text, not consistent enforcement or other forms of more direct link between text and practice. So in official redactions, he includes the *leges barbarorum*, the *fureos*, the *statuta* of Northern Italian cities, some Scandinavian lawbooks (*ibid.*). Emphasis on the *coutumiers* as 'private redactions' and 'private customals' is a common thread in modern scholarship (Cohen, *Crossroads of Justice*, pp. 30–1). It is not a distinction found in the *coutumiers*.

individual and idiosyncratic choices in how they wrote about custom, some without available models or prototypes. While the *coutumiers* authors hold an important place in French legal history, there is sometimes a tacit resistance to thinking of them as jurists, with the exception of Philippe de Beaumanoir and sometimes Pierre de Fontaines. It is certainly the case for the anonymous authors and thus the majority. Tellingly, a recent volume on the *Great Christian Jurists in French History* includes no *coutumier* author in these ranks.[21]

Coutumier authors deserve to be recognized as jurists.[22] The texts and *techne* of *coutumier* authors differed, of course, from those of Roman and canon law scholars in substance as well as style, the latter with their voluminous Latinate texts and apparatus, formal modes of citation, and scholarly erudition. *Coutumier* authors generally wrote shorter texts in the vernacular for a lay audience that operated in lay courts – they aspired not to complexity but brevity and clarity. Even so, they were persons with an expert legal knowledge, who analysed and offered their commentary on law. I argue in these chapters that their dynamic engagement with a variety of legal ideas from different milieus and the inventive approach they had to have to shape individual customs into holistic bodies of customary law are evidence of expansive juristic minds.

Through these efforts, *coutumier* authors created a form of 'learned law' for the lay jurisdiction. Learned law normally refers to Roman and canon law as these branches of knowledge grew and developed in the university context, with the specific modes of 'teaching, writing, disputing, and questioning' used there.[23] My book considers *coutumiers* alongside books of Roman and canon law as a form of learned law but one whose learning was quintessentially different

[21] The recent book of this title has chapters on Ivo of Chartres, Stephen of Tournai, Guillaume Durand, Jacques de Revigny, and Pierre de Belleperche to represent the jurists of the Middle Ages (Olivier Descamps and Rafael Domingo, *Great Christian Jurists in French History*). While such a volume has to be selective, it really should have a chapter on Philippe de Beaumanoir and, arguably, on 'anonymous' as an author.

[22] The transition from diffuse and undifferentiated to professional customary law has almost exclusively been studied in relation to the rise and development of Roman law studies and their diffusion (Susan Reynolds, 'The Emergence of Professional Law in the Long Twelfth Century', 351).

[23] Kenneth Pennington, 'Learned Law, *Droit Savant*, *Gelehrtes Recht*', 206.

because it consisted of a lay, vernacular law for the secular courts. The vernacular law composed by *coutumier* authors made customary law into a body of knowledge in its own right, with its own modes of writing, thinking, performing, and arguing. The composition of customary law should be seen neither in opposition to learned law nor as its lesser derivative but as a wholly different endeavour in the formation of legal knowledge.

The 'unofficial' *coutumiers* – those composed before the mid-fifteenth century, when the French king called for each region to write a conclusive and official version of its customs – tend to be treated together and as essentially alike. However, it meant something very different for Pierre de Fontaines to conceive of how to compose his *Conseil* in the mid-thirteenth century without a model than for Jean Boutillier to write his *Somme rural* near the end of the fourteenth century on the heels of many earlier prototypes. Also, the century and a half or so between the two texts saw many fundamental changes in the administrative, legal, and political culture of France. Treating the first *coutumiers* as a discrete set permits us to appreciate what made these texts so innovative and important. They illuminate the writing of custom at its genesis, when *coutumier* authors had to imagine how to create original texts that provided a comprehensive narrative for the customs of the secular courts, before seeing a model or before there was a written tradition showing how to complete the task. In this way, we can glean the evolutionary steps of customary law, distinguishing between the first writing of custom and the written tradition of customary law that developed out of these first texts by the fourteenth century.[24]

[24] The vast changes in legal culture and court practice that occurred in the four centuries of the 'classical age' of the *coutumier* are well known. While this fact is commonly mentioned, it is often not reflected in actual analysis of the *coutumiers* and the customs they describe. It is not uncommon to find scholars talking about customary law by lumping thirteenth-century *coutumiers* together with ones from the late fourteenth century (ex. describing an aspect of custom using the *Établissements* together with Jacques d'Ableiges' *Grand coutumier* though there is a century between them) or explaining something in thirteenth-century *coutumiers* by using texts or cases from the fourteenth or fifteenth centuries. This collapses the differences between them and makes it difficult to track change over time. This is the case for Van Dievoet's typology. Though it is a useful and important study, it is divided thematic- ally with analysis skipping back and forth between centuries. While he consistently provides dates, he moves around so much in time that it is difficult to have a clear

As regards the second scholarly assumption, it is certainly true that the *coutumiers* were unofficial and private compositions, in the sense that they were not legislation promulgated by a sovereign. The designation of these texts as private or unofficial belies the nature of the courts in thirteenth-century northern France, which themselves referred preponderantly to custom rather than legislation.[25] Indeed, while the practice of legislating kept increasing throughout the thirteenth century, legislation alone offers a significantly incomplete view of the legal culture of northern France.[26] The binding nature of law in the customary legal culture of the period was not the monopoly of the state or of formal enactments, as shown by the importance of custom and the popularity of Roman law. In other words, unofficialand influential were certainly not mutually exclusive.

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Authors of *coutumiers* wrote about custom, but what did that mean? It was custom – and not legislation or regulation, although these things existed – that animated legal life in medieval France. Customary law defined the legal practices of the medieval period but, even within this period, the term referred to significantly different forms of legal culture. Roughly the first half of the medieval period – around the end of the fifth century to the beginning of the eleventh – is understood

picture of the stages of development of the *coutumiers* between the twelfth and fifteenth centuries and the relationship between these and more general changes in legal culture. This slippage is common in the treatment of the *coutumiers*, and datesare not always included, so the reader may not be aware of it. This practice is at least partially due to the richness of documentation from the fourteenth century onward. Professionalization and specialization led to a vast expansion in record keeping, not only in the number of judicial proceedings recorded but also in the detail of information about legal arguments and witnesses' testimony. Using these to understand an earlier period whose records are less forthcoming if done must be explained. Another reason is the periodization of the *coutumiers* themselves. The unofficial private works of the thirteenth through the mid-fifteenth centuries are grouped together and distinguished from the official legislated redactions from 1454 onward, giving the formeran illusion of sameness. Lastly, an underlying assumption about the unchanging stability of custom and the fixity of written custom is likely shaping how this historyis written.

[25] While true, this classifies the *coutumiers* using categories that were not meaningful until later. These categories are awkward for much of the Middle Ages and better fit the centralizing state of the fifteenth century onward, the period where the distinction between official and unofficial starts to matter, where 'unofficial' starts to seem insufficient, and where the crown asks for official texts to be composed.

[26] Gérard Giordanengo, 'Le pouvoir législatif du roi de France (XI–XIIIe siècles)'.

as an age of customary law.[27] People spoke of 'law', but the things encompassed by that term were often all but indistinguishable from other forms of obligation; courts were comparatively unprofessionalized; and the resolution of disputes was often more of a negotiation aimed at peace rather than the selection of a winner and loser according to an established set of rules.

The term custom (*consuetudo*) proliferated in the tenth and eleventh centuries, as local and regional lords in the area that became France claimed political and legal powers held by the Carolingian king.[28] Criminal and policing functions became part of seigneurial jurisdiction. Local and regional lords and their courts became the site of justice and 'custom' typically designated the rights of lords and the exactions they could impose.

At this time communities resolved disputes through negotiation and mediation, political wrangling, or according to a collective sense of what seemed right. The main 'legal' documents produced were charters and brief texts that testified to contracts and transactions or that granted rights, often in land. Developed notions of law based on nuanced categories underlay these terse accounts of what was agreed upon or what happened, but rarely do these documents express legal principles and frameworks.[29] Norms thus existed and left traces in grants; individual agreements; and the occasional, more or less laconic piece of legislation but were not articulated descriptively in comprehensive form.[30]

[27] This at one time was described as an 'age without jurists' (Manlio Bellomo, *The Common Legal Past of Europe*, p. 34), and, 'if there were "jurists" in Western Europe, they were capable of little more than knowing how to read, comprehending what they read as best they could. They did not bother to weed out what they did not understand; nor did they take the trouble to reflect on the materials they handled or to wonder whether anthology could become law' (*ibid.*, p. 36). Implicit here was a definition of jurist and what counted as legal thinking, and thus what deserved to be counted as legal history. The period looks different and less lacking when histor- ians inquire into modes of governance and nature of dispute resolution (see Janet Nelson, *The Frankish World*; Geoffrey Koziol, *Begging Pardon and Favor*; Warren C. Brown, *Violence in Medieval Europe*).

[28] J.-F. Lemarignier, 'La dislocation du "pagus" et le problème *des* "consuetudines" (Xe–XIe siècles)', pp. 401–10.

[29] See Stephen D. White, 'Inheritances and Legal Arguments in Western France, 1050–1150'; John G. H. Hudson, 'Court Cases and Legal Arguments in England'; Matthew W. McHaffie, 'Law and Violence in Eleventh-Century France'.

[30] Reynolds, *Kingdoms and Communities*, pp. 14–17.

This began to change around the twelfth century, with the composition throughout Europe of anonymous and authored texts that described custom holistically. Northern French *coutumiers* were part of a unique flurry of legal writing. These lawbooks were written at roughly a similar time for regions geographically proximate and with relatively similar politics and culture. This distinguishes the *coutumiers* from the Latin lawbooks that described laws and customs of the royal courts of England, and from the vernacular *Siete partidas* composed for Alfonso X of Castile, and indeed even from the vernacular *Sachsenspiegel* ('Mirror of the Saxons'). Unlike these lawbooks, the first *coutumiers* formed a unique group of texts. Instead of offering one representative text for a specific time and place, the *coutumiers* of northern France provide a variety of approaches and perspective at a similar time and place. Because of this, they invite a different perspective on the formative moment when customary law was first shaped into written text: they show that customary law, despite overlapping elements, could be imagined in different ways in roughly similar contexts. In this respect, the process is better described as legal authorship rather than transcription. This also shows that, though often imperceptible, individual agency and choice could have an important role in shaping customary law.

The efflorescence of writing of the twelfth and early thirteenth century, both Latin and vernacular, was not limited to the scholarly or literary but also included the administrative and legal. A growing multitude of charters recorded everyday transactions, individual privileges, rights and freedoms of communities, and the resolution of disputes either through peace agreements or court decisions. Increasing regulation affected all sorts of associations, including merchant and craft guilds. The powers and jurisdiction of lay lordship were being negotiated and became more clearly defined in relation to the church and its courts. Methods of proof shifted, and inquests, where proof was obtained by inquiry, became more important judicially as 'irrational' procedures such as the ordeal gradually became obsolete.[31] Ad hoc courts professionalized, as did some of their personnel. Some acquired their legal knowledge by frequenting the courts or participating in cases; some by working in the chancery;

[31] Robert Bartlett, *Trial by Fire and Water*.

and others by attending university and studying Roman law, canon law, or both. Generally, law was experienced as a multiplicity of jurisdictions, and this experience also depended on one's status. Not only was there more legal writing in this period, but it also witnessed important transformations of ideas and practices.

By the mid-thirteenth century, when Pierre was puzzling through how to compose his book, 'custom' was a commonly used but nonetheless somewhat elusive term. Very generally, it designated a legal rule drawn from community practice. The rules and procedures of local and regional secular courts were referred to as custom (*consuetudo*, *coutume*) or usage (*usus*, *usage*), and connected to this, custom also designated the norms of territorial lordship and lordly exactions. Customary law in the thirteenth century generally refers to the form of law used and cited in lay courts as opposed to ecclesiastical courts. Even here, however, customary law, Simon Teuscher writes, could 'most easily be described *ex negativo* as the totality of rules that were neither defined by Roman and canonical law – the *ius commune* – nor enacted by established authorities'.[32]

Even in the second half of the thirteenth century, when most *coutumiers* were written, their authors were describing custom in a society whose legal culture was undergoing rapid and fundamental change. While it is expedient to speak of 'France' here, the idea, the physical territory, and the power of kings were still in flux. Conquests and acquisitions in the thirteenth century began to give 'France' its recognizable modern shape.[33] Likewise, while I refer to 'French' to speak generally of the vernacular, medieval France was multilingual. The languages of the North were known as *langue d'oil* and the South as *langue d'oc*, both of which were composed of a diversity of regional

[32] Simon Teuscher, *Lord's Rights and Peasant Stories*, p. 16. Even once distinguished from learned laws, custom remained ambiguous: 'In point of fact, it included norms that not only varied from place to place but also were not necessarily regarded as part of a unified system in a given place' (*ibid.*).

[33] Jean Dunbabin, 'The Political World of France', pp. 24–27. The South of France came under effective power of the French crown in the aftermath of the Albigensian Crusade. The Statute of Pamiers (1212), Simon de Montfort's new charter for the conquered South, contains an early reference to the 'custom of France' (the royal domain) in the area around Paris. Southern resistance to northern expansionism continued, despite repressive tactics, and the Hundred Years' War was also a famed theatre of contestation until the end of the conflict in 1453.

dialects.[34] North and South were not only important political, linguistic, and cultural zones. They also influence how we understand law in medieval France and the place of custom in it: the North ofFrance is described as the *pays de coutume* (the land of custom) and theSouth as the *pays de droit écrit* (the land of written law, or Roman law). These designations do appear in thirteenth-century sources, but the stark difference between a 'Germanic' customary North and a Romanized South is overemphasized.[35] In the South, it is true that the Roman law of the Theodosian Code (438) survived through Alaric's *Breviary* (506) and, in the twelfth century, Justinian's *Corpus iuris civilis* (529–534) spread in the region and deeply influenced legal practice.[36] However, while both Louis IX and Philip the Fair made clear that Roman law had authority in the South, this authority derived from its quality as custom.[37] Conversely, Roman law also spread in the northern 'land of custom'– and in fact some of the first *coutumiers* are excellent examples of its popularity in the north – but local custom had greater authoritative weight. (The distinction between the two *pays* would become extremely politicized in the sixteenth century, when jurists debated whether the 'common law of France' emerged from old French custom or from the Roman law tradition that reached back to antiquity.) Since the c*outumiers* were written for areas within the royal domain, they show the nature of royal jurisdiction in the region vis-à-vis custom in two ways: the jurisdiction of royal justices, and discussions of the appeal to the crown. Justices known as *baillis* or *sénéchaux* were chief financial, administrative and legal agents of the crown in the royal domain and in the regions. The king and lay lords without formal training or studies had long been involved in areas of law and governance, but especially through the latter half of the thirteenth century, this would increasingly become the purview of career administrators, many of whom had degrees in Roman or canon law by the end of the century. Royal power also grew in the regions as kings

[34] David Potter, introduction to *France in the Later Middle Ages*, p. 3.

[35] Jean Hilaire, *La vie du droit*, pp. 105–83.

[36] Antonio Padoa Schioppa, *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century*, p. 185.

[37] C. Ginoulhiac, 'Cours de droit coutumier français dans ses rapports avec notre droit actuel', 70–1; Padoa Schioppa, *A History of Law in Europe*, p. 185.

took on the role of protectors of custom. The development of the appellate function was also key to extending royal power into the regions, as the aggrieved could appeal to the crown if their lords did not give them their day in court or issued an incorrect judgment.[38]

Kings began issuing what can properly be referred to as legislation around the mid-thirteenth century, although ultimately the ruler's duty was 'to impose respect for custom rather than legislate'.[39] Hence, the idea of 'custom' could be deployed in political discourse both as an assertion of local or regional identity and an affirmation of royal power: local custom could be asserted against the encroachment of royal rights and jurisdiction, but it could also affirm royal power when the king was asked to help protect or confirm local custom or when that custom was upheld upon appeal in his courts. While French historiography has emphasized a conflict-driven narrative of state-formation, recent suggestions also point to a process of 'discursive cooperation' where the development of centralizing institutional government went hand in hand with the growth of regional aristocratic identity.[40] In the *coutumiers*, we find assertions of the customs of Champagne or the customs of Vermandois, but we also see the development of a 'common law' of the kingdom of France that transcended these regional delimitations.

Medieval sources commonly referred to the king's 'sovereignty' but it looked more like what today we would describe as 'suzerainty', where royal control co-existed with general regional autonomy. As Philippe de Beaumanoir noted in his *coutumier* in the 1280s, it was both the case that 'the king is sovereign over all and has, as his right, the general care of his whole kingdom' and that 'each baron is sovereign in his barony'.[41] Later medieval France is certainly characterized by the

[38] Cohen, *Crossroads of Justice*, pp. 39ff. [39] *Ibid.*, p. 36, 41.

[40] Alice Taylor, 'Formalising Aristocratic Power in Royal Acta in Late Twelfth- and Early Thirteenth-Century France and Scotland', pp. 35ff. This is not to deny that conflict occurred but that increasing royal domination and aristocratic resistance provide insufficient explanation for the transformations of the twelfth and early thirteenth centuries. New forms of consolidation of royal power created a new 'common vocabulary of legible aristocratic power', where assertions of regional or aristocratic power were not necessarily conflictual but could also be part of royal consolidation and centralization (*ibid.*, p. 62).

[41] 'Li rois est souverains par-dessus tous et a de son droit la general garde de tout son roiaume' and 'chascuns barons est souverains en sa baronie' (Beaumanoir, *Coutumes de Beauvaisis*, XXXIV.1043) This passage is commonly quoted in discussions of medieval ideas of sovereignty. Barons and counts were just as 'sovereign' as kings

growth of royal power.[42] But the region and its custom remained a formidable political entity, leading to the great fiefs and principalities of the fifteenth century, even as the power of kings expanded.[43] Indeed, changes in genre and vernacular writing can be especially revealing of such tensions.[44]

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Out of shifting meanings and uses of custom, *coutumier* authors crafted a written customary law. This book advances three main arguments about these lay jurists. The first is that *coutumier* authors created a vernacular written law that contributed something new, different, and fundamentally important to lay legal culture specifically and legal culture generally. By 'vernacular law', I mean both a shift in language as well as a distinct approach to forum, audience, and hermeneutics that changed the world of law. By the mid-thirteenth century, there was a general consensus among *coutumier* authors in northern France that the vernacular was preponderantly the language of choice and vehicle of expression for customary law.[45] *Coutumier* authors were not primarily writing for the educated who conducted their intellectual lives in Latin and whose training in rhetoric had introduced them to Roman legal thought through Isidore of Seville, Cicero, and Quintilian. Some among these educated ranks would continue their studies beyond the roughly six years it took to gain a Master of Arts at one of the higher faculties: Law, Medicine, or Theology. The study of law could consist of the study of Roman law, canon law, or both. Legal practice, however, functioned in the vernacular, and now it had a vernacular form of written legal thought to match.[46]

but with an important exception. Royal sovereignty was different, Beaumanoir explained, because below the king there was no one who could refuse to be sum- moned before the king's court for appeals of default of judgment or false judgment or in cases where the king himself was implicated (*ibid.*).

[42] For broad views of the development of Capetian power and historiographical trends in the field, see William Chester Jordan, 'The Capetians from the Death of Philip II to Philip IV'.

[43] Potter, introduction to *France in the Later Middle Ages*, pp. 6–7.

[44] See Gabrielle M. Spiegel, *Romancing the Past*.

[45] Outside of the Norman *coutumiers*, these were all written in French.

[46] While language serves as the basis of any expression of law, relatively little has been written about language and the lawbook in France. Van Dievoet has a short section listing the European *coutumiers* that were written in vernacular languages without discussing the implications of this. The exception is Serge Lusignan's seminal comparative study of 'the language of kings' in France and England (Lusignan, *La langue des rois au Moyen Âge*). Lusignan examined the shifting relationship between the vernacular and Latin in these royal courts and their chanceries through the high and late Middle Ages. The medieval development of the vernacular as a written language of law has mostly come out of the field of diplomatics, the records of legal practice (see *ibid.*, pp. 45ff). While legal translation in France has received important attention recently, there is no larger account of it for the medieval period, neither as a vernacular language movement nor as a phenomenon in legal history. French legal translations are included in the monumental Claudio Galgerisi (ed.), *Translations médiévales*, vol. 2. For specific studies, see for instance, Leena Löfstedt, *Gratiani decretum*; Willy van Hoecke, notably 'La "première reception" du droit romain'; Hans van de Wouw, 'Quelques remarques sur les versions françaises médiévales'; Claire-Hélène Lavigne, 'La traduction en vers des *Institutes* de Justinien 1er'; Hélène Biu, 'La *Somme Acé*'; Kuskowski, 'Translating Justinian'.

This shift in the language of law, of course, did not completely displace established institutional culture.[47] Latin was the languageof text and instruction at the university – a language that united students who had assembled from different parts of Europe.[48] No one who wrote Latin from the eighth century onward could do so without a conscious endeavour to acquire the language through study and perseverance.[49] Learning Latin was a rite of passage for learned men that bonded them in the rarefied culture and small elite club of *latinitas* and signalled their social positions.[50] Language was an agent of delimitation and social exclusion as much as understanding and social connection. Latin brought elite intellectuals together but excluded those who did not understand the language.

The sophisticated Latin legal language of the universities, based on the *auctoritas* of ancient Roman texts, had provided a way of accessing, knowing, and expressing legal truth on the continent.[51] Beyond this, language itself is a representation of symbolic power.[52] The addition of the vernacular as a language of law was a '*bouleversement culturel*', a true cultural upheaval.[53]

Aside from the earliest examples from Normandy, *coutumier* authors from northern France all wrote in French vernaculars.

[47] Sebastian Sobecki, *Unwritten Verities*, p. 12.

[48] Robert S. Rait, *Life in the Medieval University*, p. 133.

[49] Carin Ruff, 'Latin as an Acquired Language'.

[50] Ruth Mazzo Karras, *From Boys to Men*, p. 94.

[51] The laws of early-medieval England were written in the vernacular and are a well-known exception.

[52] See generally Pierre Bourdieu, Language and Symbolic Power; Patrick J. Geary, Language and Power in the Early Middle Ages.

[53] Lusignan, *La langue des rois au Moyen Âge*, p. 254.

Those who composed this vernacular law likely read Latin, and several of them evince familiarity with aspects of Roman or canon law. Many *coutumiers* reveal unmistakable scholastic, Romanist, or canonist resonances, the extent and nature of which vary in each text, from tacit expression to explicit citation.

However, scholarship has overestimated the extent to which *coutumiers* were patterned or modelled after Roman law and, more specifically, the *Corpus iuris civilis*. I suggest in this book that even those *coutumier* authors who most relied on Roman law so dramatically repurposed it that their efforts cannot accuratelybe characterized as a form of modelling or imitation.

In the most direct, practical terms, the vernacularization of law expanded the place of non-Latin languages in the field. The vernacular gained new terms to capture concepts that were either developing out of practice or imported from the Latin terminology of learned law. The lexical range of the vernacular expanded, and it also
increasingly developed a specifically legal register of language – a specialized legal jargon – that overlapped with but was not always the same as ordinary language. To think of custom in the vernacular, however, meant much more than the replacement of Latin words with French ones, or the development of a technical vocabulary. The development of the vernacular as a written language was crucial for the development of customary law, and this legal change cannot be separated from cultural change. Lay people, who had long held court and participated in judicial processes, gained a new way to interactwith legal ideas, a new ability to shape or be shaped by them, and a new capacity to exchange and transmit them. And so, vernacular law extended beyond the courts to become an erudite vernacular form of knowledge, constructed and written by lay thinkers.

I use 'vernacular law' to designate both the shift in language and culture. This law spanned the various subjects that constituted custom, from transactions to pleading in court; it was written with clarity and brevity, to help a lay audience think in terms of categories of law and argumentation; it taught lay people how to interpret information and craft it into normative statements and legal lines of reasoning; in a general sense, it taught them how to 'think like a lawyer'.

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My second argument is that the importance of the *coutumiers* went far beyond the content of their specific rules and procedures. Indeed, they created a discourse and tradition for thinking about custom. With this framework, *coutumier* authors taught their readers and listeners ways of thinking, knowing, and arguing that would empower them in diverse roles in the secular courts.

To the mass of charters describing individual agreements, imaginative descriptions of trials, nascent records of court proceedings, and intermittent legislation, *coutumier* authors added coherent, holistic accounts of custom. In other words, *coutumier* authors shaped a conceptual law – a law based on explicit, generalized rules, procedures, and practices. In so doing, they created a new way of understanding customary law and fundamentally transformed it. Drawing on a wide array of experiences and thought, *coutumier* authors created the broader conventions through which we have come to understand custom.

Each *coutumier* author had to puzzle through how to writea book on lay court customs around diverse subjects as the treatment of murder, land reclamation, wardship, inheritance, arbitration, court procedure, property claims, descriptions of capital crimes, matters of jurisdiction, appeals, and judicial ethics. They had to think about how to contextualize their work in the preface or front matter and decide which practices and themes to include or exclude. They had to find a way to investigate and account for subjects and issues they had not seen in practice, read about in books, or been taught in some way. They had to select sources and authorities to use and decide how they would incorporate their ideas and reference them in their texts. That no two *coutumier* authors arrived at the exact same conclusions shows the subjective element in composing a text of customary law.

Previously, all of the subjects covered in *coutumiers* had been dispersed throughout individual records, memories, and opinions. Pierre and his colleagues gathered, labelled, and organized them. And in this sense the *coutumiers* narrated the law because they created essential groundwork for the written expression of legal custom in the vernacular. Narrativity in law has received a great deal of attention from scholars, but usually in cases that involve the 'fictions in the archives', as Natalie Zemon Davis describes it; the drama of the

trial; or cases that explicitly involve a lot of storytelling.[54] Lawbooks create narrative in more subtle ways but thinking about how they do so reveals how they created something that looked like, and became, legal reality. The *coutumier* is a wonderful example of how, as Lawrence Rosen writes, 'legal systems create facts in order to treat them as facts'.[55] Even texts that present themselves as lists of facts, such as the annal, create narrative.[56] Likewise, while the *coutumiers* may look like simple compilations of rules and procedures, they also created narratives, this book argues, and these narratives give us a holistic picture of 'customary law'.

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My third argument, following logically from the last, is that the writing of custom was not a simple transcription of tradition that existed in community consciousness. Instead, it was an authorial act of composition that was individual, intentional, innovative, and creative. *Coutumier* authors were doing something more ambitious, novel, and groundbreaking than the scholarship usually assumes. For a medieval society reputed for interpreting change as a continuation of tradition, Pierre's claim of innovation might have sounded startling, and especially so since his subject was the customary law of secular courts, a law seemingly synonymous with tradition and replication of the past. Medieval customary law has been understood by scholars to be backward- and not forward-looking, at least in pretence: customary law purveyed the myth that it was ancient or originated from a time beyond memory, a form of 'invention of tradition', purportedly whereby innovation is construed as a preservation of 'old law'.[57] Medieval law purportedly drew on communal memory and, in such a narrative, there is no space for the efforts of individual – let alone innovative – authors.

Arguing against this view of medieval law, I contend that those who authored texts such as the *coutumiers*, as well as those who adjusted the texts in subsequent manuscript versions, were makers of customary

[54] Natalie Zemon Davis, *Fiction in the Archives*.

[55] Lawrence Rosen, *Law as Culture*, p. 68.

[56] Hayden White, 'The Value of Narrativity in the Representation of Reality'.

[57] M. T. Clanchy, 'Remembering the Past and the Good Old Law', E. J. Hobsbawm and T. O Ranger, *The Invention of Tradition*. I develop my views on this idea that innovation had to be construed as a preservation of tradition in a forthcoming article titled 'The Time of Custom and Medieval Myth of Ancient Customary Law'.

law. Unlike legislation, which is enacted by a governing body, custom comes from multiple places and is made in multiple ways. It may come from allegations undisputed or disputed and resolved, repetition in practice, a communal notion of what should be done, testimony about what has been done, court judgment, or conventions surrounding records of transactions. Inscription – the addition of written text to an oral culture – is itself a pivotal moment in the history of law and legal practice.[58] But *coutumier* authors did morethan inscribe; rather, they composed. They selected the tone of the text and its subjects, formulated narratives, and chose how to combine experience, memory, and learning. The substance of the text included all sorts of customs – old, new, current, good, and bad – about which authors wrote their own opinions. These texts created the perception that medieval customary law was a body of law with clear rules and a coherent logic that could be known and understood. In other words, these figures were true authors rather than transcribers.

Authorship has not been an important part of the history of the *coutumiers*. The composition of custom is usually described impersonally as '*la mise en écrit*', or 'the putting into writing'. Described in this way, the story of the *coutumier* is one about a static and fixed custom that is simply transferred into a different medium. Indeed, modern

[58] The rise of written records in law has seen much attention from scholars. The shift from 'memory to written record' was the subject of Michael Clanchy's far-reaching study of the growth of literacy and record-keeping in post-conquest England (Clanchy, *From Memory to Written Record*). Following Walter Ong and Eric Havelock, scholars have placed the textualization of law within a narrative of the shift from orality to literacy (Ong, *Orality and Literacy*; Havelock, *The Muse Learns to Write*. See for instance, Brian Stock, *The Implications of Literacy*; Brenda Danet and Bryna Bogoch, 'From Oral Ceremony to Written Document'; Innes, 'Memory, Orality and Literacy in an Early Medieval Society'; Maria Dobozy, 'From Oral Custom to Written Law'; Geary, 'Oblivion between Orality and Textuality'; Paul Hyams, 'Orality and Literacy in the Age of Angevin Law Reforms'; Teuscher, *Lords' Rights and Peasant Stories*). Oral forms continued even when law was textualized, which could include much performative speech or give a performative valence to text itself (Marco Mostert and P. S. Barnwell (eds.), *Medieval Legal Process*; Koziol, *The Politics of Memory and Identity*). The simultaneousness of oral and written legal culture is especially well illuminated by Simon Teuscher in his study of witness testimony and its relationship to the Swiss *Weistümer*, which he sees as an aspect of lordship and the creation of bureaucrats rather than a custom that developed locally and organically (Teuscher, *Lord's Rights and Peasant Stories*). Teuscher's work shows, among other things, that there was no simple transition from oral to writing, but a complex interrelationship that is particular to its contexts.

assumptions about the inflexibility of the *coutumiers* have led to descriptions of their formalism, namely, a rigid adherence to specific formulaic words and procedural forms and a focus on technicality.[59] And yet, as we will see, the manuscript tradition of the *coutumiers* – each manuscript copy of the text with its emendations, deletions, and additions – shows that written custom continued to be a living law, continuously adjusted and sometimes transformed in, and through, its rewriting.

The manuscript tradition of the *coutumier* is key to understanding the place of writing in a customary legal culture. The writing and ongoing revisions of vernacular law, as conveyed in *coutumiers*, reveals something very important about how written texts were assimilated into a legal culture that remained oral to a large extent. *Coutumiers* were written before an understanding of legal text as fixed predominated, and they invite us to think about two questions central to this book: what is the place of text in a customary legal culture that had just begun to use it, and how does law work in a culture that does not think in terms of fixed legal text?

While individual authors of *coutumiers* such as Pierre de Fontaines and Philippe de Beaumanoir have been studied extensively, the larger meaning and implications of authorship have not. This might be partially because the choice of anonymity made by most of the authors does not lead to the analysis of specific individuals (only two *coutumier* authors studied in this book chose to reveal their identity) and partially because questions of authorship and style might be considered the domain of the literary scholar rather than the legal historian. The neglect of authorship might also have something to do with the theory that
medieval customary law had only aggregate authors: it was created through repetitive practice by 'the people'. Yet an additional and complementary understanding of customary law emerges when we focus on the authorship of written custom. Here, we can see how

[59] Bongert, *Recherches sur les cours laïques*, p. 183. Bongert used charters to show flexibility but left the perception that it was the *coutumiers*, rather than how modern scholars talk about them, that created the impressions of inflexibility and formalism. Thus the *coutumiers* are still seen as describing a formalist practice and as responsible for scholars' wrongful understanding of practice as formalist (see Chapter 7).

customary law was filtered through the mind of each individual author who crafted, refined, and shaped it.[60]

The *coutumiers* should interest legal historians, and so too should they interest literary scholars, because they show us an as-yet unestablished genre in formation. Each text expressed one legitimate way in which a thirteenth-century author could conceive of customary law as a unit with particular characteristics. Indeed, authors differed significantly in how they chose to handle their common subject matter and common goal of giving custom written expression as a coherent entity.

Even *coutumier* authors who were working with copies of earlier *coutumiers* (we know this because these authors copied sections into their own texts), chose not to replicate exactly the form of the earlier text but instead improvised, innovated, and used authorial discretion and latitude. Authors made individual contributions to the process of shaping custom into a distinct body of knowledge. For example, some relied more on declarations of custom, some described custom through cases, others quoted selections from Roman law, others looked to canon law, and some eclectically used several sources. Together they forged a new field of legal knowledge. These individual authors, who decided what procedures and practices counted as custom, determined how to give them written form, described them as general rules, and inscribed them as bodies of law, were creators of customary law just as much as the communal and oral traditions typically considered the domain of custom.

Each *coutumier* was a witness to customary law in northern France in the thirteenth century, in the sense that witnesses have a personal immediate experience and in the sense that witnesses have subjective experiences that are not all identical. Every subsequent copy also offers an idiosyncratic perspective on customary law. For this reason, the *coutumiers* are useful not only because they demonstrate customary norms but also because they are a gateway into the creative mentalities of written customary law.

This brings us back to Pierre de Fontaines' assertion of innovation and originality. Pierre was familiar with other legal writing and openly

[60] In this sense, the *coutumiers* contribute to an ongoing discussion of medieval subjectivity and individual agency (see Brigitte Bedos-Rezak, 'Medieval Identity: A Sign and a Concept'; Bedos-Rezak and Dominique Iogna-Prat, eds. *L'individu au moyen âge*; Ionu Epurescu-Pascovici, *Human Agency in Medieval Society, 1100-1450*).

incorporated lengthy quotations from Justinian's *Code* into his *Conseil*. Pierre was educated, and doubtless his educationtransformed how he thought, but scholars still need to examine exactly what that meant. For all the continued scholarly focus on the influence of Roman law on the *coutumiers*, it is notable that Pierre used Roman law as a source but understood himself to be creating something different – something he had not seen before. This book argues that Pierre's self-perception was correct. Roman law was not a model – it was a platform to innovate something connected to it and yet fundamentally new.[61]

Pierre followed his comment about the unprecedented nature of his written work with an exhortation that future readers improve his text.[62] Pierre knew that he was inventing an original and creatinga model – a palimpsest – that others would work with, and revise. He did not expect his written version of custom to be the final word – a transcription of an oral tradition, frozen and immutable – but rather perceived both his *coutumier* and the custom it contained as moments in a fluid, continuous process of creation. This is not to say that all custom constantly underwent drastic change because it did not. Rather, the *coutumiers* show an awareness that – whether because of future need, contestation, more specific definition, changing opinion, or rewriting – it always had the potential to change.

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This book is divided into three parts. The first part contextualizes the *coutumiers* and their authors in the legal landscape of thirteenth-century northern France in three ways. I contextualize them within the struggle to define custom from late antiquity up to the time of the

[61] In this sense, customary law is a space in which to explore ideas of newness in the medieval period, where 'new combines with tradition, innovation with repetition' (Patricia Clare Ingham, *The Medieval New*, p. 17).

[62] Specifically, he addresses those who will see the written version of the text and asks them to excuse him for three reasons: because no one undertook such a thing and so there is no model, because customs are corrupted and differ between castellanies, and because to have everything in memory and not to err belongs to God. Then he encouraged readers to change the text: 'And it is very pleasing to me that they add their amendments, if they feel it is useful' (*et molt me plest que il i mettent lor amendement, s'il voient que mestier en soit*; Pierre de Fontaines, *Conseil*, preface). This sort of invitation was not uncommon, and it is worth noting how welcoming and positive he is about the idea.

first *coutumiers* and discuss precedents for written secular law before the *coutumiers* (Chapter 1). I then examine the predominant choice of the first *coutumier* authors to write in the vernacular and, to the extent that they can be discerned, their perceptions of laymen who participated in lay courts (Chapter 2).

Unwritten law, or *ius non scriptum*, was a prominent definition of custom in the later medieval period developed especially in learned circles. Though 'written custom' should be a contradiction, this was unevenly perceived. Unlike the authors of the *Bracton* treatise in England, for instance, the *coutumier* authors did not seek to understand or legitimate their writing of custom within this learned framework.[63] Those *coutumier* authors who addressed the question of writtenness viewed the idea of 'written custom' as unproblematic. Instead, they saw writtenness and its lack through a practical lens, as an aspect of custom's potential to be retained in memory. This does not mean they viewed written custom as 'fixed'. Writing in a time of fundamental legal change, they understood that even the custom expressed in written text was mutable. While writing custom couldhelp to keep it in memory, it was potentially changeable in future versions of the text (Chapter 3).

The second part extends the argument about the development of vernacular law by looking at issues of jurisdiction and authority. The *coutumiers* expose real anxieties about the boundaries of power. Expressed either tacitly or explicitly, these anxieties appeared in concerns over jurisdiction, and especially ecclesiastical jurisdiction (Chapter 4). In contrast to legal histories that usually approach the issue of authority in written custom by examining the reliance on and influence of Roman law, I look instead at Roman law within the general use of sources and their associated citation practices in order see what the authors of customary law themselves counted as authorities (Chapter 5). Roman law was certainly an important source for some *coutumiers*, but rather than treat it reverentially as an authority, their authors used Roman law to build something new, lay, customary, and vernacular. The question, then, is not so much about the influence of

[63] For an important reassessment of the relationship between *Bracton* and Roman law, *see* Thomas J. McSweeney, *Priests of the Law: Roman Law and the Making of the Common Law's First Professionals*.

Roman law as it is about the agency of *coutumier* authors who customized something different out of this as well as other sources.

As the third part of this book contends, 'vernacular law' was not only law expressed in a vernacular language but also a distinct conceptualization of law that itself created new possibilities for legal thought. The three final chapters explore these possibilities. I begin with the relationship between the *coutumiers* as texts that describe custom and custom as it is reflected in other remaining records of practice (Chapter 6). I demonstrate how the *coutumiers* represent practice differently from other contemporary records of practice and how, in part, their authors used what they saw in practice to extract principles and articulate norms. By offering this form of generalization, the *coutumier* authors helped transform 'custom' into 'customary law'.

I argue that the goal of these legal texts was to change patterns of thought and teach lay people a set of ideas and skills that would permit them to perform convincingly in lay court (Chapter 7). The last chapter then examines the larger effect of written custom on legal culture. The new technology of writing combined with the social choice of the vernacular permitted customary legal ideas to be transmitted and shared outside their local setting. This increased circulation of ideas was a component setting the stage for the development of a French 'common law' (Chapter 8).

Vernacular Law offers a new account of the formation of customary law. It shows that customary law was not only the product of mass social forces expressed in popular practices but also the product of individual thought, innovation and craft. The lay thinkers who composed custom took these practices and articulated them as rules, and moreover as coherent bodies of rules. They thus transformed social practices into a field of knowledge known as customary law.