Convergence and the Colonization of Custom in Pre-Modern Europe

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European legal scholars have in recent decades been attracted to the idea of the convergence of the legal systems of the countries within the European Union. Borrowing a phrase from the distant past, they speak of a new *ius commune*, or common law shared by all member states.[1] In their ideal, the unified law would be a neutral distillation of the region's major legal traditions, though in actuality the law they envision follows the continental civil law approach, while leaving the apparently non-compatible English common law by the wayside.[2] This convergence, scholars claim, could occur through unified codes and legislation perhaps, but more happily through voluntary mechanisms such as the diffusion of a new "European" legal mentality in law schools and legal scholarship, the drafting of model principles of law, and the competition among states borne of the ability of individuals and entities to vote with their feet and demonstrate their preference for the set of national rules they most prefer.[3]

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[1] *See*, *e.g.*, Reinhard Zimmermann, *Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit*, 47 JURISTENZEITUNG 10 (1992).

[2] Christian Von Bar & C. Lando, *Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code*, 10 EUROPEAN REVIEW OF PRIVATE LAW 183, 222, 228 (2002); Arthur Hartkamp, *Principles of Contract Law*, *in* TOWARDS A EUROPEAN CIVIL CODE (A. S. Hartkamp & E. H. Hondius eds., 3d ed., 2004) 125, 131; Reinhard Zimmermann, *Der europäische Charakter des englischen Recht*, 4 *Zeitschrift für Europäisches Privatrecht*, 4 (1993). *Cf.* Pierre Legrand, *Antivonbar*, 1 JOURNAL OF COMPARATIVE LAW 13, 15, 20 (2006).

[3] Jan M. Smits, *Convergence of Private Law in Europe: Towards a New Ius Commune?*, *in* COMPARATIVE LAW, A HANDBOOK (Esin Örücü & David Nelken eds. 2007) 219, 227-35.

For all the optimism about convergence, civil and common law lawyers today think about law in profoundly different ways.[4] The civil lawyer reasons from rules; the common lawyer from facts. The civil lawyer thinks of law as an organized collection of rules; the common lawyer thinks of law as a disorganized collection of judicial decisions. The civil lawyer can place new concepts or disputes within a hierarchical system; the common lawyer has little interest in system. He deals instead just with the case before him. The civil lawyer focuses on the code in the present; the common law looks backward to precedent.

These variances arise from the lawyers' mental universe formed by the totality of their legal—educational, judicial, and commentary—culture or *mentalité*.[5] The modern *mentalités* come from the traditions of medieval Europe. The rule-focused, code-based, systematizing civil lawyer is the direct descendant of the law school-trained Roman lawyers of the Middle Ages. The fact-focused, casuistic, pragmatic common lawyer continues the habits of mind of a customary law society.

The convergence of two these quite dissimilar legal *mentalités* has happened before in European history when the learned Roman law emerged in the Middle Ages to challenge the prevailing customary law. Then too, legislation and codification played a role in the shift, as did the diffusion of ideas through law school teaching and legal commentaries. The result of the confluence of these two opposing legal worlds, however, was not a gently compatible harmonization but rather the colonization of the less sophisticated, though older and more widespread, customary law mindset by the upstart learned laws, and the reduction of custom to a legal footnote. While the developed English common law is more likely than medieval custom was to hold its ground against the civil law in today's intra-European legal competition, we have no more reason to believe now that disparate legal mindsets can converge on equal terms than was the case eight hundred years ago.

Prior to around 1200, custom provided the predominant source of law, though it was a law that did not much look like the statements of positive rules of decision that a trained lawyer might call law. After 1200, a profound change occurred.[6] Having been rediscovered in the early twelfth-century, the Roman law

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[4] For what follows see Pierre Legrand, *European Legal Systems are Not Converging*, 45 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 52, 64-74 (1996).

[5] *Id*. at 60-61; ESTHER COHEN, THE CROSSROADS OF JUSTICE: LAW AND CULTURE IN LATE MEDIEVAL FRANCE 1 (1993).

[6] *Preface*, *in* CUSTOM: THE DEVELOPMENT AND USE OF A LEGAL CONCEPT IN THE MIDDLE AGES i, iii (Per Andersen & Mia Münster-Swendsen eds. 2009).

expanded its influence, creeping into most corners of continental legal culture. Meanwhile the traditional customary law progressively lost its unique character and, in an attempt to survive in the face of the new legal innovations, mimicked more and more of the traits of enacted law, including written codification, the articulation of formal rules, and legalistic, rational proof in court. By the early modern period, most custom that served as more than local folkways had come to look almost indistinguishable from enacted law, and as it did so, its importance as a living source of law declined.[7]

This essay examines the clash of medieval legal mindsets by considering, first, how the understanding of law held by a member of a customary law society differed from that of a learned lawyer, and, second, how the jurists used definitions and procedure to co-opt custom and turn it into something very much like enacted law.

Imagine a teenage boy who sets out from his German village around 1150 to go to Bologna to study law with the renowned masters teaching there. What idea of law had he imbibed growing up in his local community? He would have understood that some law came from the rules announced and enforced by the lord or the elders, but these legislators were constrained in their lawmaking by tradition and custom, and they probably meddled little with matters governing private transactions.[8] By contrast, the idea that rules might form a legal system, especially one set out in canonical texts, would likely have been inconceivable to him.

Most of the regulation of behavior in his village would have come from custom, a law borne of tradition, arising from behavior, and characterized by a backward-looking focus on the past, the assumption that continuity with the past provided present authority, and a considerable pragmatism that used both the authority and malleability of memory to resolve specific disputes.[9] Members of a community perceived their custom as found, not made,[10] and they thought of it as arising in the distant past—even when it did not.[11] Custom took its authority from the belief in its repetition "since time out of mind,"[12] which gave individuals the

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[9] Martin Krygier, *Law as Tradition*, 5 LAW & PHILOSOPHY 237, 240 (1986); COHEN, *supra* note 5, at 10.

[10] FRITZ KERN, KINGSHIP AND LAW IN THE MIDDLE AGES 149-180 (1956).

[11] See below at notes ++.

[12] MARC BLOCH, FEUDAL SOCIETY 113 (L.A. Manyon trans., 1961).

sense that the practice was inevitable and immutable: a certain behavior had always been done this way; those around me continued to do it this way; therefore, I must do it this way.[13] That behavior could go unarticulated for decades, allowing variations to flourish unaddressed. Custom could also provide a sense of local identity—each hamlet had its own custom, often one that differed significantly from that of its neighbors.[14]

And yet, despite its apparent rootedness in past behavior, custom was anything but static.[15] Communities used custom pragmatically, relying on its authority to defend claims that achieved present aims. A custom could be remembered in such a way that its articulation in a particular instance satisfied the purpose desired by the community, even if that articulation varied from a prior statement or even prior performance of the custom.[16] Despite the learned lawyers' expectation that someone asserting a custom should point to a history of acts conforming to the claimed custom, and despite the medieval layman's apparent instinct to ask whether the custom had been adjudged before,[17] the only precedents a judge had were those that the community remembered, and memory was fallible.[18] As the English legal historian Michael Clanchy has pointed out, in

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[13] ALAN WATSON, THE EVOLUTION OF WESTERN PRIVATE LAW 108 (expanded ed. 2001); COHEN, *supra* note 5, at 10-11.

[14] *Id*. at 28 (quoting the Grand Coutumier de France from the late fourteenth century).

[15] THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 307-08 (5th ed. 1956) ("The remarkable feature of custom was its flexibility and adaptability. . . . Indeed nothing is more evident than that custom in the middle ages could be made and changed, bought and sold, developing rapidly because it proceeded from the people, expressed their legal thought, and regulated their civil, commercial, and family life.").

[16] David Ibbetson, *Custom in Medieval Law*, in THE NATURE OF CUSTOMARY LAW 174-75 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007) ("That something was customary was a backward-looking reason for a forward-looking conclusion, and the more the conclusion was desired the flimsier might be the reason provide[d] for treating it as law"); Lloyd Bonfield, *The Nature of Customary Law in the Manor Courts of Medieval England*, 31 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 521 (1989) (describing how English manor court juries "remembered" custom in a way that resulted in the outcome they preferred given the facts of the case and the status of the litigants).

[17] L. WAELKENS, LA THÉORIE DE LA COUTUME CHEZ JACQUES DE RÉVIGNY 487 (*repetitio ad* Dig. 1.3.32, § 3) ("Vnde quando dicitur esse consuetudinem, querunt isti laici: 'Vidistis unquam iudicare?'").

[18] M. T. Clanchy, *Remembering the Past and the Good Old Law*, 55 HISTORY 165, 171 (1970).

illiterate societies "[h]istorical facts in the remembered past are under constant pressure from the needs of the present. The memory adapts them, transposes them, or eliminates them altogether, when they are no longer useful."[19] Medieval legal authors even knew this was happening. The late thirteenth-century author of a massive collection of the customs of the northern French county of Beauvaisis complained that the customs would not remain as he had stated them because they would be remembered differently in the future.[20]

The fallibility of memory and the pragmatism of communities bound by the inherited authority of their custom were not the only reasons custom could evolve. Its very nature meant that a custom's exact parameters could be difficult to pin down. Customs arose as individuals in a community observed and mimicked the behavior of others in the community.[21] Superficially, the behavior, if it were articulated, might appear quite specific. For example, early thirteenth-century Italian jurists tell of a custom in Bologna that if the owner of wine, which is being transported in a carter's wagon, should touch the wagon, the risk of loss lies with the owner, even if the owner was acting to prevent the cart from tipping.[22] But the custom itself may not have been articulated within the community, with the result that people had different understandings of it.[23] As a consequence, each individual (family, clan, etc.) within the locality might perform the custom in a slightly different way.[24] Person A learned from his father when A was a boy that he should never touch a carter's wagon, no matter what it carries. Person B learned that it was alright to touch the wagon except when it was traversing unstable ground where it might tip. Person C learned that only the carter could load the wagon, and the owner moved the loaded goods at his own risk. Person D picked up from watching others that owners should not touch wagons carrying wine because it was unlucky. Each person's understanding of the custom is formed by what he knows of how others perform and how he acted in the past.

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[19] *Id*. at 166.

[20] THE *COUTUMES DE BEAUVAISIS* OF PHILIPPE DE BEAUMANOIR 725, ¶ 1982 (F.R.P. Akehurst trans., Univ. of Pa. Press 1992); COHEN, supra note 5, at 39.

[21] R.C. van Caenegem, *Aantekening bij het middeleeuwse gewoonterecht*, 64 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 97, 107 (1996).

[22] *See*, *e.g.*, GLOSSA ORDINARIA, at Cod. 8.52(53).1, gloss to *praeses*; 2 ODOFREDUS, LECTURA SUPER CODICE 177r. (Lyon, Petrus Compater & Blasius Guido 1550) (reprint Bologna, Forni 1967) (*repetitio ad* Cod. 8.52(53).1, § 3) (the Gloss suggests this custom is made up, while Odofredus states that it really existed).

[23] GILISSEN, LA COUTUME 26 (1982).

[24] Van Caenegem, *supra* note 21, at 106.

Unless a dispute arises or accusation of non-conformity is levied, each individual would have reason to believe that the actions he observes and engages in are conforming. And his behaviors may change subtly or significantly over time without his realizing it.[25]

Such a situation of diversity within an overarching assumption of conformity could exist for a long time in a customary society.[26] No one would have reason to believe that his behavior violated the custom until a dispute arose. But where a custom is common and well-accepted, in other words, where it is universally acknowledged to be the custom and whatever variation that exists is tolerated, no disputes will arise. As Philippe de Beaumanoir wrote, some customs are "so clear that I have never seen [them] challenged."[27]

In addition, people living under medieval custom also seemed able to exist peacefully without having a notion of the rules ostensibly governing them. We have ample evidence that they were satisfied with law that was found, or invented, as needed. In late fifteenth-century France, for instance, one of the catalysts for the writing of custom was the problem courts confronted in not being able to determine the geographic extent of a custom.[28] In medieval Germany, towns built by emigrants would write back to their "mother" town to be informed of what the custom was when they needed to resolve diputes.[29] Unlike an enacted law which remains available with an invariant articulation whether or not it is needed, a custom exists only when it needs to be called upon under a specific set of circumstances and in a specific context. As the seventeenth-century French jurist wrote, "custom protects possession 'only when the crops are showing.'"[30]

And even when disputes did arise, custom flourished as a source of law in small and closely-knit communities, which often did not share the modern need for fixed rules and winners and losers.[31] Such societies are, instead, generally

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[25] Van Caenegem, *supra* note 24, at 106-07.

[26] WATSON, *supra* note 13, at 97-98.

[27] PHILIPPE DE BEAUMANOIR, THE COUTUMES DE BEAUVAISIS OF PHILIPPE DE BEAUMANOIR 249, ¶ 683 (F.R.P. Akehurst, ed. and trans. 1992).

[28] John P. Dawson, *The Codification of the French Customs*, 38 MICH. L. REV. 765, 767-68 (1940).

[29] ALAN WATSON, SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY 35 (1984); JOHN P. DAWSON, THE ORACLES OF THE LAW 162-65 (1968).

[30] Donald R. Kelly, *"Second Nature": The Idea of Custom in European Law, Society, and Culture*, *in* THE TRANSMISSION OF CULTURE IN EARLY MODERN EUROPE 131, 141 (Anthony Grafton & Ann Blair, eds. 1990).

[31] WATSON, *supra* note 13, at 97-98.

more concerned with maintaining relationships, which tends to mean that disputes are resolved equitably with an eye toward restoring the peace rather than establishing rights and rules.[32] At best, in such a situation, the custom would be remembered so that it accommodated the optimal outcome the community wanted in any given dispute. At worst, for the purposes of establishing a rule, the whole dispute might be put to God's will in the form of an ordeal.[33] In either case, the community might not need to articulate what the custom precisely was.

Thus, the overall picture of custom before it became legalized by trained lawyers and proceduralist courts is of a system for controlling behavior that does not concern itself overmuch with legal and illegal, winners and losers, or the niceties of when a rule became binding, or what, exactly, the rule requires. Instead, custom allows for the equitable development of social norms and tolerates a certain degree of variance as long as peace and cooperation can be maintained. Custom, in other words, does not create formal rules of decision that look or function the same as enacted law.

This is likely the concept "law" that our medieval German village boy had as part of his worldview when he embarked on the study of the Roman law in Bologna. Once there, he learned to speak a new language of law, both literally because the Roman law was written and studied in Latin, and figuratively. While boy had assimilated his community's custom, that is, the proper way to act in his society, "by watching and listening to older people,"[34] he learned the Roman law of definitions, terms of art, and categories in lectures and moots at a *studium* or, later, a university. He became bilingual, inhabiting a diglossic universe in which he lived surrounded by the less prestigious "low" language of custom but worked in the more prestigious, elite "high" language of the learned lawyer.[35] Trained lawyers, of course, did not, could not forget about custom. It continued to be an important source of law in their society, and they were forced to accommodate at

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[32] *Id.*; James Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason*, 58 U. CHI. L. REV. 1321, 1331 (1991).

[33] John Gillisen, *La Preuve de la coutume dans l'ancien droit belge*, *in* HOMMAGE AU PROFESSEUR PAUL BONENFANT 563, 564 (Brussels 1965).

[34] Paul R. Hyams, *What Did Edwardian Villagers Understand by "Law"?*, *in* MEDIEVAL SOCIETY AND THE MANOR COURT 71, 88 (Zvi Razi & Richard Smith, eds. Oxford: Clarendon Press, 1996).

[35] *See* Joshua A. Fishman, *Bilingualism With and Without Diglossia; Diglossia With and Without Bilingualism*, 23 JOURNAL OF SOCIAL ISSUES 29 (1967).

least some of its substantive rules.[36] They talked about it, and, in the case of feudal custom and later some regional French customs, even came to specialize in it. Yet even if he applied customary law in local courts,[37] the learned lawyer did not think in the language of custom. The high language had crowded out the low in his legal *mentalité*.[38]

The Roman law taught in Bologna started from the basis of words rather than actions. These words were written in texts rather than held in men's fallible memories. They acquired definitions. They required interpretation; interpretation required expertise. Experts developed techniques and moves to further their interpretations; they created a common language and method that allowed them to talk to each other but which made them largely unintelligible to the untrained.[39] Whereas custom was the property of the community, the Roman law was the domain of the learned—the jurists even referred to it as "*nos leges*," "our laws."[40]

In a customary law society, disputes revolved around particular facts. The decision in that set of facts only applied to a later similar set of facts if the earlier dispute was both remembered and felt by the community to resolve the current dispute in the way they desired. The *Digest* of the Roman law contained a great deal that was casuistic, because the Roman jurists, too, had largely dealt with discrete cases.[41] But in learning to work with the law, the medieval jurists moved

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[36] Walter Ullmann, *Bartolus on Customary Law*, 52 JURIDICAL REV. 265, 265 (1940); Kees Bezemer, *French Customs in the Commentaries of Jacques de Révigny*, 62 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 81 (1994); PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 72 (1999).

[37] *See*, FRANÇOIS HOTMAN, ANTITRIBONIAN OU DISCOURS D'UN GRAND ET RENOMME IURISCONSULTE DE NOSTRE TEMPS 36-37 (1603).

[38] DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION 92 (1990).

[39] James Gordley, Ius Quaerens Intellectum: *The Method of the Medieval Civilians*, *in* THE CREATION OF THE *IUS COMMUNE* 77, 77 (John W. Cairns & Paul J. de Plessis, eds., 2010).

[40] *See*, *e.g.*, 1 ODOFREDUS, LECTURA SUPER DIGESTO VETERI 14r. (Lyon, Petrus Compater & Blasius Guido, 1550) (reprint Bologna, Forni, 1967) (*repetitio ad* Dig. 1.3.32, § 1).

[41] Gordley, *supra* note 39, at 78.

beyond those cases to rules (*regulae*) and then from rules to categories.[42] The jurists analyzed these rules and categories using the tools of scholastic reasoning to determine how they related to each other.[43] When learned lawyers tried to solve problems they worked "from their texts to a conclusion, whether they were generalising a text, limiting it, or applying it by analogy."[44] The authority of their answer derived from the authority of their lawbooks, not, as in custom, from tradition and the approbation of the community.

Finally, the jurists of the medieval Roman law lacked the customary law's sense of "pastness."[45] The Roman law lived in the eternal present. The jurists understood, of course, that the texts had been written long ago and that the world was different then,[46] but the rules themselves were to be applied now, and would similarly be in the future, as they had been in the past.[47] The Roman law was timeless. And the commentaries on it also had an element of timelessness. Sixteenth-century lawyers cited thirteenth- and fourteenth-century commentators as much as they did the commentators of their own day. To the extent that a hierarchy of interpretative texts existed, it derived from the authoritativeness of the author rather than from the date of the writing.

Once he had gone through a course of study in the Roman law, our German student could no longer return to his prior view of law as simply the amorphous "way we have always done things." He had become "trapped within his cosmogony."[48] He could not unlearn "the law-world into which he [had been] inducted" or stop believing that he had learned the one "right way to do law."[49]

If he considered the concept of custom as a trained lawyer, he would see it differently than he had as he grew up. The jurists defined custom, as they did all legal topics. They looked for their definition to the Roman law, as they looked for the definitions of nearly all legal terms of art. The Roman law described custom

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[42] Kees Bezemer, *The Infrastructure of the Early* Ius Commune*: The Formation of* Regulae, *or Its Failure*, *in* THE CREATION OF THE *IUS COMMUNE* 57, 58 (John W. Cairns & Paul J. de Plessis, eds., 2010).

[43] Gordley, *supra* note 39, at 79.

[44] *Id*. at 89.

[45] *See* Krygier, *supra* note 9, at 240.

[46] *See*, *e.g.*, AZO, SUMMA AZONIS 875 (Venice, Franciscus Bindonus, 1566) (commentary on Cod. 8.52(53).2, § 6) (discussing the theory that in ancient times, the Roman people could make law but now that power has been transferred to the prince).

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[48] Legrand, *Antivonbar*, *supra* note 2, at 21.

[49] *Id*.

as: 1) some behavior ("*moribus constitutum*")[50] that was 2) frequently and tenaciously followed ("*frequenter . . . servata sunt*" and "*servata tenaciter*"),[51] and 3) observed over an indeterminate long period ("*inveterata*" or "*per annos plurimos observata*"), and which was accompanied by 4) the tacit agreement of the community to observe the behavior ("*tacita civium conventio . . . servantur*").[52] A custom that met these criteria had the force of law.[53]

As should become clear below, the definition the jurists created from their criteria did not map particularly well onto medieval legal reality. Nonetheless, immersed as they were in the intellectual framework of the Roman law, and being endued with virtually absolute respect for the authority of the Roman texts, the medieval jurists accepted the Roman criteria and did not attempt to revise them or to question their applicability to their society. They merely sought to explain.

According to that explanation, custom was a type of law ("*ius*") distinguished from enacted law, *lex*, by two fundamental characteristics: custom arose from repeat behavior over time, and it became binding when the community tacitly consented to be bound to perform the behavior.[54] By contrast, *lex* arose from a single decision taken at a particular moment in time and based on the express agreement of the lawmaker.[55]

In considering the implications of these characteristics, the jurists quickly discovered that their definition created insoluble difficulties:[56] how is tacit consent to be ascertained? How long does the behavior have to have continued, and how many times does it have to have been repeated before it qualifies as customary?

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[50] 1 THE DIGEST OF JUSTINIAN 13 (Alan Watson, ed. 1985) (at Dig. 1.3.32). Other texts also discuss custom but the basic elements can be found in the three that are quoted. Other important texts directly on point and used by the pre-modern jurists as a locus of discussion on the topic are found in book 52 of the Codex.

[51] 2 CORPUS IURIS CIVILIS: CODEX IUSTINIANUS 362 (Paul Krueger, ed. 1906) (Cod. 8.52.1 and 8.52.3).

[52] 1 DIGEST OF JUSTINIAN, *supra* note 50, at 13-14 (at Dig. 1.3.32 and 1.3.35). Other texts also discuss custom but the basic elements can be found in the three that are quoted. Other important texts directly on point and used by the pre-modern jurists as a locus of discussion on the topic are found in book 52 of the Codex.

[53] *Id*. at 13 (Dig. 1.3.32: "Inueterata consuetudo pro lege non immerito custoditur"). I leave to the side the question of whether a custom could abrogate a statute. Professor Conte addressed that complexity in his paper.

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[55] Odofredus (Dig. 1.3.32, no. 12).

[56] Mayali, *La Coutume*, at 15.

The jurists eventually settled on some answers, though they seemed to understand were unsatisfactory and the debates continued for centuries.[57]

And yet, the twelfth-century jurists initially appear not to have focused on these constitutive issues and instead took a particular interest in the relationship between custom and *lex*, asking whether and when custom could abrogate statute.[58] This was, perhaps, due to an interest in the famous antimony created by the Digest and Codex texts. In Digest 1.3.32.1, Julian states that custom has the same force of law as *lex* and could abrogate statute.[59] In Codex 8.52(53).2, Constantine describes custom as inferior to *lex* and ordains that custom cannot abrogate statute.[60] On the other hand, the early jurists' interest in the issues of

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[57] *See*, *e.g.*, 1 JOSEPHUS MASCARDUS, DE PROBATIONIBUS 418-19 (Frankfurt am Main, Erasmus Kempfferus 1619) (collecting the disputes and received wisdom of three centuries of jurists on the issue of custom) (*conclusio* 424, nn. 11, 15 (disputes about witnesses), 17-21 (disputes about the number of acts), 29 (disputes about length of time to show custom)); PETRUS REBUFFUS, *Tractatus de consuetudine, usu, et stylo, in judiciis valde frequens et utilis*, *in* IN CONSTITUTIONES REGIAS COMMENTARIUS 474 nu. 41 (Amsterdam, Johannes Schipper 1668) (discussing the argument that as many acts were needed as showed both a repeat practice and tacit consent).

[58] *See*, *e.g.*, 4 FRIEDRICH CARL VON SAVIGNY, GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER 459 (2d ed. 1850) (Irnerian gloss); GUSTAVUS HAENEL, DISSENSIONES DOMINORUM 151-53, 585 (Leipzig 1834); PLACENTINUS, SUMMA CODICIS 416 (1536 [1962 repr.]). See also André Gouron, *Coutume contre loi chez les premiers glossateurs*, *in* RENAISSANCE DU POUVOIR LÉGISLATIF ET GENÈSE DE L'ÉTAT 117 (André Gouron & Albert Rigaudière eds., 1988).

[59] 1 THE DIGEST OF JUSTINIAN 13 (Alan Watson, ed. 1985). (Dig. 1.3.32 (Julian, *Digest*, book 84): ("What ought to be held to in those cases where we have no applicable written law is the practice established by customs and usage. And if this is in some way deficient, we should hold to what is most nearly analogical to and entailed by such practice. . . . 1. Age-encrusted custom is not undeservedly cherished as having almost statutory force, and this is the kind of law which is said to be established by use and wont. For given that statutes themselves are binding upon us for no other reason than that they have been accepted by the judgment of the populace, certainly it is fitting that what the populace has approved without any writing shall be binding upon everyone. What does it matter whether the people declares its will by voting or by the very substance of its actions? Accordingly, it is absolutely right to accept the point that statutes may be repealed not only by vote of the legislature but also by the silent agreement of everyone expressed through desuetude.").

[60] 2 CORPUS IURIS CIVILIS: CODEX IUSTINIANUS 362 (Paul Krueger ed., 1906). ("Cod. 8.52.2. Emperor Constantine to Proculus. An ancient custom and long usage is of no mean authority, but it shall not have the effect of contravening common sense or the

sovereignty rather than definition could indicate their sense that they understood from experience what custom was and did not feel the need to explain it. They had not yet completely incorporated the new, lawyerly mindset. Only a few generations into the study of the Roman law, the inherited customary-law way of thinking still had influence.

By the time of Azo (d. *ca*. 1230) in the early thirteenth century, the discourse had changed. Azo's *Summa*, and following soon after, the *Accursian Gloss*, raised the obvious questions about how to ascertain when mere behavior became binding custom. They tried to resolve the questions by focusing on the three main characteristics of custom: time, acts, and consent,[61] and their answers are enlightening more for what we might glean from them about the jurists' attempts to find ways to wrestle unruly custom into the harness of formal legal rules than for their success as actual explanations.

The debate over time is particularly interesting because the earliest jurists expected a real custom to have existed since time immemorial.[62] This made sense in a society that believes that custom is "what we have *always* done." In such a world, the members of the community cannot reconcile "remembering" a time before the custom with considering themselves bound to abide by it. This is true even if the custom was, in fact, of relatively recent vintage.[63] By Azo, however, the commentaries had begun to put a defined time limit of ten, thirty, or forty years (depending upon the jurist, law—Roman or canon, and situation) on custom.[64] This change in perspective may, again, reflect not just a developing view of the theory of custom, but also the increasing power and influence that the Roman law mindset had on later generations of lawyers.

Frequency of acts also proved difficult to pin down, but the requirement of repeated acts was important because the jurists saw repetition as a key indicator of *tacitus consensus*. According to the great medieval jurist, Bartolus, "the people are

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law.") (Bluhme translation available at http://uwacadweb.uwyo.edu/blume&justinian/Book%208PDF/Book8-52.pdf).

[61] *See* REBUFFUS, at nu. 54 (citing Bartolus on the four characteristics of custom, the fourth being *ratio*).

[62] PLACENTINUS, at 416.

[63] Clanchy, *supra* note 18, at 172.

[64] AZO, SUMMA AZONIS, 874 (Venice, Franciscus Bindonus 1566).

not understood to have consented unless the act occurs frequently."[65] How many times during a decade did an act have to be repeated in order for its repetition to establish the requisite consent? Certainly "as many concrete instances would have to be proved as would sufficiently indicate the tacit consent of the people."[66] The Gloss promoted the idea that "twice makes a custom," but not everyone agreed.[67] Some thought that when the Roman law text on which they were all commenting said, "*frequenter*," it literally meant "frequently," and twice was not frequent.[68] On the other end of the spectrum, the French jurist, Jacques de Révigny (c. 1230–1296), took a position likely more attuned to the reality of how custom functioned when he offered a hypothetical about the creation of the custom of primogenitor based on the single act of a community in passing property to the eldest son after all the fathers were killed in a war.[69] As long as the community continued to maintain the usage of primogenitor, he said, the single act introduced a custom.[70]

But even if they accepted the Gloss's maxim that "twice makes a custom," the jurists fretted over how that corresponded to the duration requirement. For example, they argued over the custom-creating efficacy of the following situation: an act happens on day one, and is repeated the next day. Then ten years goes by and the act is not repeated again, though no one has opposed it. Is there a

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[65] Ullmann, *Bartolus*, at 276 (citing Bartolus *repetitio ad* Cod. 8.52.2, § 12: "populus non videtur consensisse, nisi frequenter illum actum exerceat"); BARTOLUS, IN PRIMAM DIGESTI VETERIS PARTEM COMMENTARIA 19r. (Turin, Nicholaus Beuilaquam 1574) (*repetitio ad* Dig. 1.3.32, § 10) ("tacitus co[n]sensus, quod colligit[ur] ex vsu, & moribus" [tacit consent, which is gathered from usage and practices"]).

[66] Ullmann, *Bartolus*, at 279.

[67] GLOSSA ORDINARIA, at Dig. 1.3.32, gloss to *inveterata*.

[68] BARTOLUS, at 19r. (repetitio ad Dig. 1.3.32, § 11).

[69] L. WAELKENS, LA THÉORIE DE LA COUTUME CHEZ JACQUES DE RÉVIGNY 485 (*repetitio ad* Dig. 1.3.32, § 2) (1984) ("Pone quod totus populus huius ciuitatis uel maior pars utuntur uno actu tacite. Simus in initio introductionis illius consuetudinis quod maior natu habet totum. Tota ista ciuitas quadam die iuit in exercitum. Omnes uel fere omnes mortui sunt. Filii una die sic utuntur quod maior totum habet et sic tacite habetur consensus populi uel maioris parties uno actu. Estne statutum? Certe non, quia statutum est habito tractatu in communi et expresso quod sit ius in futurum.")

[70] *Id*. at 485-86.

custom?[71] The Italian law professor Odofredus (d. 1265) wrote that his predecessors, Johannes Bassianus (late twelfth century) and Azo Porcius (fl. 1150–1230), believed that such a scenario did introduce a custom.[72] But Odofredus's teacher, Jacobus Balduinus (d. 1225), "hounded master Johannes and Azo to the ends of the earth,"[73] arguing that "this certainly cannot be, because custom is said to be an habitual practice, but can two acts or three be said to be an habitual practice? Certainly not, because lawmakers disdain what happens once or twice, and rights are adjusted to that which happens frequently."[74] Odofredus, however, sided with Johannes and Azo.[75]

Jacobus Balduinus and his opponents appear to be thinking about different things. Jacobus is surely correct that custom forms through repeat behavior. The community must mimic, and believe they should police, each other's acts. But for Odofredus and Azo the question was more importantly one of proof: how can a court know that a custom has been formed. They are focusing on the legal question rather than on the anthropological one.

Lay people would have laughed at the jurists' fine distinctions. They knew what custom was and did not need definitions. For the layman, if for one hundred years every male in the village has done the pilgrimage to Santiago de Compostella upon turning twenty-one, the question of whether the pilgrimage were a custom would not be difficult to answer. For the jurists, by contrast, this hypothetical created problems because many jurists believed that until the community opposed an act contrary to the custom, tacit consent could not be shown.[76]

Once the jurists defined custom, they also had to create elaborate distinctions dividing custom (repeat behavior binding the whole relevant community due to

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[71] BARTOLUS, at 19v. (repetitio ad Dig. 1.3.32, § 17); 1 ODOFREDUS, LECTURA SUPER DIGESTO VETERI 16r. (Lyon, Petrus Compater & Blasius Guido 1550) (reprint Bologna, Forni 1967) (*repetitio ad* Dig. 1.3.32, § 13).

[72] *Id*.

[73] *Id*. at § 14 ("scandalizavit dominus Johannem et Azonem usque ad extremos indos").

[74] *Id*. ("certe hoc esse non potest. quia [con]suetudo d[icitu]r vsus co[n]suetus: sed potest ne dici vsus co[n]suetus binus vsus vel trin[us] vsus certe no[n]: q[uia] que semel aut bis accidunt despiciunt legislatores & ad ea que freque[n]ter accidunt iura adaptantur").

[75] *Id*.

[76] L. WAELKENS, LA THÉORIE DE LA COUTUME CHEZ JACQUES DE RÉVIGNY ++ (*repetitio ad* Dig. 1.3.32, § +) (1984).

the "people's will or their tacit consent")[77] from other legal categories.[78] Mere longstanding practices (*usus* or *mos*) did not count as a custom, nor did the processual habits, what we might call the "local rules" (*stylus curiae*), of a court or chancery,[79] or the implied contract terms of traders,[80] or the rules of a guild,[81] or the prescriptive rights of some individuals against others.[82] All of these similar categories lacked one or another of the vital elements of custom: the community had not given its tacit consent; the community giving consent did not have law-creative jurisdiction; or the entire community was not bound.

For laywers trying to decide how to plead in court, such distinctions mattered.[83] For example, the Italian jurist Cynus da Pistoia (1270 – *ca*. 1336) discussed the following question.[84] According to the feudal custom of many places, a lord may collect monetary duties in three circumstances: when he goes on crusade, when his men are knighted, and when his daughter is married. Assume the situation in which a nobleman married off his daughter, and he went to his vassals and demanded the duty. They responded that he could not collect the payment because neither he nor his predecessor had ever sought it before. The lord pointed out that it did not matter that neither he nor his predecessor had never asserted the custom, because such custom existed. The vassals did not back down, claiming that even if such a custom might exist, the lord's failure to assert it

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[77] PETRUS REBUFFUS, *Tractatus de consuetudine, usu, et stylo, in judiciis valde frequens et utilis*, *in* IN CONSTITUTIONES REGIAS COMMENTARIUS 471 nu. 26 (Amsterdam, Johannes Schipper 1668) ("voluntas populi, seu consensus tacitus").

[78] BARTOLUS, IN PRIMAM DIGESTI VETERIS PARTEM COMMENTARIA 19r. (Turin, Nicholaus Beuilaquam 1574) (*repetitio ad* Dig. 1.3.32, § 10) (listing categories).

[79] 1 JOSEPHUS MASCARDUS, DE PROBATIONIBUS 416 (Frankfurt am Main, Erasmus Kempfferus 1619) (*conclusio* 423, nu. 34).

[80] Walter Ullmann, *Bartolus on Customary Law*, 52 JURIDICAL REV. 265, 270 (1940) (describing Bartolus's discussion of the difference between contract and custom).

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[82] *See*, *e.g.*, PETRUS REBUFFUS, *Tractatus de consuetudine, usu, et stylo, in judiciis valde frequens et utilis*, *in* IN CONSTITUTIONES REGIAS COMMENTARIUS 472-74 nn. 14-35 (Amsterdam, Johannes Schipper 1668) (describing twelve ways in which prescription differs from custom).

[83] *See*, *e.g.*, 2 ALEXANDER DE IMOLENSIS, CONSILIORUM SEU RESPONSORUM 94r. (Lyon 1544) (cons. 136, § 17, explaining that the custom claimed by the litigant is not a custom but a privilege).

[84] CYNUS DA PISTOIA, LECTURA SUPER CODICE 221v. (Frankfurt am Main, Sigismund Feyerabendt, 1578)(reprint Rome, Il Cigno Galileo Galilei 1998) (*repetitio ad* Cod. 8.52(53).2, § 7).

in the past means he cannot do so in the present. The answer for Cynus depended upon whether the right to collect the duty was a custom or a prescription. If it were a custom, the lord could enforce it; if a prescription, he could not.[85]

Laymen living in a society that they perceived as governed by custom did not need to draw such distinctions. They called many things custom, including the particular obligations or payments owed to a lord,[86] and even the written codifications consisting of local customs, aldermanic regulations, important public contracts, judicial opinions, and charters granted to a town.[87] If they had been asked to, laymen probably would have defined custom as "the rules we have made for ourselves" or simply, "the way we do things" without regard for the nature or source of the rules.[88]

In confronting custom, the learned lawyers attempted to do what subsequent centuries have demonstrated to likely be impossible:[89] teach community-based

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[85] *Id*. ("Advertatis, in quisbusdam partibus nobiles sunt privilegiati, ut possing subditos suos collectare, in tribus casibus, videlicet, quando vadunt ultra mare. Item cum efficiuntur novi milites. Item cum maritant filiam suam. Modò pone, q[uod] nobilis maritavit filiam suam. Venit ad subditos suos, & vult eos collectare. Dicunt subditi, domine, quod vultis facere non potestis: quia nunquam fuimus collectati à vobis vel praedecessore nostro. Respon[dit] dominus: non facio vim. Nam licet nunquam eratis collectati, tamen consuetudo est, quòd nobiles isto casu collectant subditos suos. Ergo, &c. Dicunt subditi, licet sit talis consuetudo & ius nobelium, quia tame[n] nunquam fuistis usus hoc iure, modò uti non potestis, licet alij usi fuerint. Quaeritur nunc quid iuris sit? Dico: aut istud ius collectandi, q[uod] nobiles habent, est eis quaesitum per consuetudinem, & tunc potest nobilis praefatus collectare: aut est quaesitum per praescriptionem, & tunc non potest.")

[86] Paul Brand, *Law and Custom in the English Thirteenth Century Common Law*, *in* CUSTOM: THE DEVELOPMENT AND USE OF A LEGAL CONCEPT IN THE MIDDLE AGES 17, 18 (Per Andersen & Mia Münster-Swendsen eds. 2009); John G.H. Hudson, *Introduction: Customs, Laws, and the Interpretation of Medieval Law*, *in id*. at 2.

[87] John Gilissen, *Loi et coutume: quelques aspects de l'interpénétration des sources du droit dans l'ancien droit belge*, 21 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 257, 278 (1953).

[88] See, e.g., ERNEST-JOSEPH TARDIF, SUMMA DE LEGIBUS NORMANNIE IN CURIA LAICALI, OU COUTUMIER LATIN DE NORMANDIE: INTRODUCTION (Paris, Simon 1896) ("Consuetudines sunt mores ab antiquitate probati, a principibus approbati et a populo conservati.").

[89] *See*, *e.g.*, Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 117-18, 122 (2005) (arguing that the traditional theory of custom does not work but still developing a new theory in terms of, though partly in opposition to, *opinio juris* and behavior); Gerald Postema, *Custom in International Law: A Normative Practice Account*, *in* THE NATURE OF CUSTOMARY LAW 279, 281-82, 285, 287-88 (Amanda

norms embedded in social practice to look like the formal rules that fit into their image of what law should look like.[90] But the reality of custom did not make this a simple task because custom did not function like law. Enacted law establishes a rule. Play no doubt remains in the exact parameters of the rule, in its meaning, its interpretation, and its application. But a written rule has some firm boundaries. It has been articulated; its very existence is securely known. The medieval jurists' challenge was to articulate amorphous, malleable behavior as law.[91] To accomplish this, they used the legal tools at their disposal, and in particular the rules of evidence.[92]

Why do rules of evidence turn custom into rules of decision? In its natural habitat, custom took the under-determined and under-articulated, but no less binding, form of community practice. This is a "behavior-custom," or something like the usages that German scholars call *Rechtsgewohnheiten*.[93] In this form, the behavior-custom could allow for some variation within non-identical but nonetheless conforming acts. A custom could remain solely a behavior-custom as long as no disputes arose that required the expression of the custom as a formal rule.

Not every dispute within a customary society would require the articulation of the custom, but if the dispute came into a court applying what even modern lawyers would recognize as rules of procedure, witnesses would be called or an inquest summoned into being with the express purpose of stating the rule. To articulate the custom for the use of the court, the witnesses would have to select among the constellation of conforming acts making up the behavior-custom and express it as a single, definite rule. Thus, once a custom was proved in court, and in particular once the court opined on claims, it acquired a more rule-like mirror image to go along with its anthropological behavioral original. This was the "rule-custom." Each subsequent lawsuit served to further define the boundaries of this

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Perreau-Saussine & James B. Murphy eds., 2007) (criticizing the traditional theory of custom and offering a new theory that still speaks of "normative," habitual behavior that the agent understands ought to be followed).

[90] Laurent Mayali, *La Coutume dans le doctrine romaniste au Moyen Age*, 2 LA COUTUME 11, 18 (1990); 1 ÉDOUARD LAMBERT, LA FONCTION DU DROIT CIVIL COMPARE 123 (Paris 1903).

[91] Mayali, *supra* note 90, at 12, 18.

[92] *Preface*, *supra* note 6, at iii.

[93] *See* Martin Pilch, *Rechtsgewohnheiten aus rechtshistorischer und rechtstheoretischer Perspektive*, 17 RECHTSGESCHICHTE 17 (2010).

rule-custom in a process very similar to the functioning of the English common law.[94]

This point can be illustrated with an analogy. In its geological youth, a river flows broad and shallow. The water, while bounded at some point, has not yet cut a channel. Over time, the flow of the river digs a progressively deeper and narrower channel. The banks of the river move closer together and become increasingly well defined. Custom is like the river. While it remains a behavior-custom, the community tolerates variant performances, within limits, because no one has yet articulated a restrictive description of proper behavior. With each lawsuit requiring the proof, and therefore the expression, of the custom, the banks bounding acceptable behavior become steeper and clearer and the allowance for the variant performances is restricted within narrower boundaries. By the end of the process, custom is either written as a specific rule or has boundaries that allow only the same degree of play and interpretation that an enacted law would have.

Unfortunately, custom did not lend itself to easy proof. As the claimed remembrances of a community concerning its past behavior, custom does not present a court with a clean set of facts. According to the sixteenth-century French jurist, Petrus Rebuffus, "Panormitanus says that custom is difficult to prove. Many believe they can prove it, but they are wrong. Hostiensis and others say that it is almost impossible to prove custom because sometimes it is black, and sometimes it is white."[95] (Dumoulin later added that not only is it black and

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[94] The late fifteenth century German jurist Ulrich Zasius (1461–1536) used different terms to describe this phenomenon. He said that custom had judicial and extrajudicial sides. "Judicial is when two similar judicial sentences concerning some matter have been produced [as evidence of the custom], that is, when [the custom] has been adjudicated at least twice in similar cases in adversarial proceedings. Extrajudicial is that which has been introduced by the longstanding practice of the populace and which has existed for at least ten years." UDALRICUS ZASIUS, IN PRIMAM DIGESTORUM PARTEM PARATITLA 8 (Basel, Michael Ising 1539) ("Iudicialis, quando duae sententiae co[n]formes super aliquo negocio productae sunt, id est, quando ad minus bis iudicatam est in causis similibus in iudicio co[n]tradictorio. Extraiudicialis, quae per diuturnu[m] usum populi indicitur, ad quod ad minus decem anni exigu[n]tur") (internal citations omitted). *See also* 1 ODOFREDUS, LECTURA SUPER DIGESTO VETERI 16r. (Lyon, Petrus Compater & Blasius Guido 1550) (reprint Bologna, Forni 1967) (*repetitio ad* Dig. 1.3.32, § 16) (expressing a similar sentiment several centuries earlier).

[95] *Id.* at 480 (art. I, gl. 3) ("Panor[mitanus] dicit difficillimum esse probare consuetudinem. Et multi credunt probare illam, sed aberrant. Host[iensis] et alii dicunt esse quasi impossibile probare consuetudinem, quia modo alba, modo nigra.") [Internal citations omitted].

white, it is also "multi-colored even in the same town.")[96] Authors of vernacular collections of customs expressed the same sentiment. In the fourteenth century, Jehan Boutillier, author of an important French customal, "warn[ed] that relying upon the proof of private customs 'was highly dangerous', as inquests were unpredictable and records rare."[97]

In an attempt to address this uncertainty, the jurists, of course, established rules. The person alleging the custom had to make full proof of it. This was normally done through witness testimony, and required at least two credible witnesses (or ten in France)[98] testifying to the performance of the customary act for the requisite amount of time (ten years or longer depending upon the custom and whether the issue came within the orbit of civil or canon law).[99]

The rules went into great detail about the witnesses testimony. Mere testimony that "such was the custom" was considered "silly."[100] The witnesses had to testify to affirmative acts about which they had actual knowledge, and they had to agree on the details.[101] Their testimony had to demonstrate sufficient repetition of the acts as would show the community had tacitly consented to be bound, and the witnesses had to testify to the community's awareness of the acts as a custom.[102]

Perhaps under the influence of the jurists, in 1270, the King of France promulgated an *ordonnance* establishing an official procedure for proving customs.[103] This so-called *enquête par turbe* required that,

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[96] CHARLES DUMOULIN, *Oratio de concordia et unione consuetudinem Franciae*, in 2 OPERA OMNIA 1771 (Paris, Officina Nivelliana 1612) ("modo alba, modo nigra, modo versicolor erat etiam in eodem municipio").

[97] COHEN, *supra* note 5, at 40; John Gilissen, *La preuve de la coutume dans l'ancien droit belge*, *in* HOMAGE AU PROFESSEUR PAUL BONENFANT 563, 567 (Brussels 1965).

[98] 1 JOSEPHUS MASCARDUS, DE PROBATIONIBUS 417 (Frankfurt am Main, Erasmus Kempfferus 1619) (*conclusio* 424 n. 5) (collecting the disputes and received wisdom of three centuries of jurists on the issue of custom).

[99] *Id*. at 417-19, 421 (nn. 2, 13–14, 23-24, 58).

[100] *Id*. 57, at 420 (*conclusio* 424 nu. 63) ("Immo testimonium talis testis ita deponentis, videlicet quod ita est consuetudo, est fatuum").

[101] *Id*. at 417-19 (nn. 3, 22).

[102] *Id*. at 418, 420 (nn. 15, 18, 52-53); ALEXANDER IMOLENSIS, LIBER SECUNDUS CONSILIORUM ALEXANDRI IMOLENSIS 94r. (Lyon, Thomas Bertheau 1544).

[103] L. Waelkens, *L'Origine de l'enquête par turbe*, 53 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 337, 337-39 (1985).

> a number of wise men, above suspicion, be called together. The custom is put to them orally by one among them after they have gathered, and it is given to them in writing. The custom having been set forth, they are to swear that they will honestly speak and recount that which they know and believe and have seen to have been done concerning that custom. The oath having been taken, they shall take themselves to another place, and they shall deliberate, and they shall record those deliberations, and they shall relate amongst themselves what they have seen of that custom, and who in what case, and in what place, and if it had been adjudged and under what circumstances. And all of this should be written down and given to the court sealed under the seals of the members of the inquest, and they shall all speak for themselves and relate the case as a group.[104]

The evidentiary requirements of the *enquête par turbe* sound objective enough. They seem effectively to answer the lawyers' desire to turn "the way we have always done things" into an express legal rule. And yet, litigants disliked the procedure. Not only was it expensive, but people also doubted that the *turbiers* told the truth. The French even had a proverb, "Fol est qui se met enqueste, car qui mieux abreuve, mieux preuve"—"He is crazy who puts himself upon an inquest, because [the *turbiers*] who drink better, prove better."[105] In other words, the *turbiers* could be bribed.

Part of the problem with the perceived trustworthiness of witnesses may have been that a claimed custom could be litigated precisely because agreement lacked

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[104] 1 EDGARD BOUTARIC, ACTES DU PARLEMENT DE PARIS: 1254-1299, 242, no. 2547 B (Paris, 1863).

> Inquiretur de consuetudinis in hunc modum. Vocabuntur pluers sapientes carentes suspicione. Ipsis vocatis proponetur eis consuetudo per os unius ex ipsis et dabitur eis in scripto. Qua proposita iurabunt quod ipsi dicent et fideliter referent illud quod sciunt et credunt et viderunt usitari super illa consuetudine. Quo iuramento praestito, trahent se ad partem et deliberabunt et referent deliberationem illam, et dicent inter quos viderunt illam consuetudinem, et qui in quo casu et quo loco, et si fuerit iudicatum et de circumstanciis et omnia redigentur in scriptis et mittantur in curiam clausa sub sigillis inquisitorum et reddent omnes causam dicti sui etiam in turba.

[105] M. GUILLEMARD, L'ENQUÊTE CIVILE EN BOURGOGNE SPÉCIALEMENT À L'ÉPOQUE DES DERNIERS DUCS 35 (Dijon: J. Noury, 1906).

within the community.[106] Thus witnesses could well and honestly differ in their interpretations and experiences. We find many examples in the historical record of customs being found despite contradictory witness testimony.[107] In addition, customs probably often came to litigation at precisely the moment at which they ceased to have the unquestioned support of the community, perhaps because of social or economic change. Thus, ironically, when customs are turned into a rule, they may no longer have the consensus of the community.

The uncertainty surrounding custom—whether because of honest differences of understanding or because of the ease with which claims of custom could be manipulated—could result in self-serving assertions.[108] An interesting, behind-the-scenes look at how this might work comes from a late sixteenth-century English manuscript.[109] The author, clearly in a pique, describes the process by which claims of custom were brought before the London Insurance Court.[110] He explained that when an accident occurred that was not addressed by the policy, the insured or the underwriters sought to win their suits by convincing the court

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[106] WATSON, *supra* note 13, at 97 (quoting the Ordonnance de Montil-les-Tours of April 1453 by Charles VII of France: "it often happens that in one single region, the parties rely on contrary customs and sometimes customs are silent and vary at will").

[107] *See*, *e.g.*, 2 LES OLIM OU REGISTRES DES ARRÊTS 678-81 (J-C. Beugnot, ed., Paris, Imprimerie Royale 1842) (appeal concerning "notorious" custom in which witnesses for each side testified to different rules); Alain Wijffels, *Business Relations Between Merchants in Sixteenth-Century Belgian Practice-Orientated Civil Law Literature*, *in* FROM LEX MERCATORIA TO COMMERCIAL LAW 270 (Vito Piergiovanni ed., 2005) (custom concerning thief in the chain of title found despite conflicting testimony); 2 SELECT CASES CONCERNING THE LAW MERCHANT 87-88 (Hubert Hall ed., 1930) (fourteenth-century dispute over custom concerning distraining a foreign merchant's goods).

[108] *Cf.* Sally Falk Moore, *History and the Redefinition of Custom on Kilimanjaro*, *in* HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY 287 (June Starr & Jane F. Collier eds., 1989) ("It goes without saying that the Chagga know as well as anyone else that there are occasions when it is convenient to invoke tradition to obtain property. For other purposes, the very same people are likely to say that times have changed and new ways of doing things are more appropriate. The choice of the 'modern' perspective or the 'traditional' is often clearly a matter of strategy.").

[109] London, British Library, Add. 48020. Concerning the various texts in this manuscript and the context of the late sixteenth-century insurance industry conflict resolution mechanisms, see David Ibbetson, "Law and Custom: Insurance in Sixteenth-Century England," *Journal of Legal History* 29 (2008), 291.

[110] BL Add. 48020, fol. 348r.

that a custom existed. To accomplish this, each side would create a *perrera*—a sort of petition recounting the facts of the case (but concealing identifying details) and stating, often inventing, a custom to determine the matter. Each litigant, of course, alleged opposing customs. The parties then sought signatures, first from friends and later from a wider circle of merchants and brokers, attesting to agreement with the statement of the custom in their own *pererra*. If one were lucky, some of the signatories would be the people one was suing. When it came time to litigate the dispute, the court would view the competing *perreras* and base its judgment on various factors, such as the identity of the signatories or which party was more likely to be a repeat player before it, but not on an investigation into the veracity of the claimed customs. The court's decision to adopt one of the statements effectively created a legal rule, despite the fact that no such custom or practice might actually have existed previously.[111] Custom for laymen, in other words, did not need to be old; it did not need to be repeated; it did not, in fact, even need to exist. All it needed was for the community to decide in any given dispute that something called a "custom" controlled the decision.

Perhaps unsurprisingly, given the potential for fraud and the interest of lawyers and judges in proving custom in a manner befitting their formal procedures, the trajectory of the *enquête par turbe* led in the sixteenth century to using the lawyers themselves as *turbiers*. The commissioner of the inquest would summon ten well-known lawyers, who would give their response to the question seriatim. The answers were recorded in writing and signed by the *turbiers*.[112]

By the late seventeenth century, the *enquête par turbe* had been abolished, and courts were admonished to look to the sixteenth-century codifications of custom instead. Under pressure from the mindset introduced into continental Europe by lawyers trained in the Roman law, custom as the binding norms of a tight-knit community had disappeared as a living source of law. In the process of defining it, surrounding it with rules, and creating a procedure for it, the jurists had altered what custom was. It now looked, and functioned, as something the lawyers could understand as law. In the twelfth century, two concepts of law had flourished. By the seventeenth, only the more sophisticated survived. European law did not see convergence. It saw conquest.

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[111] BL Add. 48020, fol. 348r.-348v.

[112] GUILLEMARD, *supra* note 105, at 35.