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WRITTEN LAW

"The concept of writing should define the field of a science," Jacques Derrida has said (has written, I mean),\(^1\) and this has been conspicuously true for the science of law. In the continental European—that is, the Roman or Romanoid—tradition, law is conceived as *jus scriptum*, which means that in order to have force, to be enacted, law had to be recorded, and therefore depended in every way on written proof and procedure.\(^2\) Human will and human acts are psychological and social phenomena, no doubt; but in the law "acts" and "wills" are transformed into written instruments; and in this connection Justice, too, while remaining blind, has had to learn to write. In the Renaissance, of course, she also had to learn history, philosophy, and other academic disciplines, and was thereby initiated into the elitist and politicized world of print culture.\(^3\)

Yet in a rudimentary way law was the product of custom—*jus non scriptum* preceded *jus scriptum*—as both Roman lawyers and their European descendants generally believed. As particular actions underlie unwritten custom and social rules, so particular judgments underlie legal rules; and however indirectly, the cumulative record and interpretation of such rules are the basis for later codifications, systems of law, and various attempts to improve and to "reform" these formal legal creations. Such at least is the ideal history on which the professional legal tradition and its self-image seems to be based.

"Justice is the constant and perpetual desire to render everyone his

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due." 4 This is the famous Roman formula heading both the Institutes and the Digest of Justinian, who represented his great codification as a temple erected in the honor of Justice. 5 Medieval jurists, too, worshipped Justice as a virtual deity, a holy mediator (Justitia Mediatrix) between natural and positive law. 6 The twelfth-century glossator Placentinus pretended to have discovered the temple itself, containing representations not only of the goddess but also of daughters, including equity and all the civic virtues. According to the standard etymology, law was itself derived from—was the "mother" and the "cause" of—justice (jus a justitia), 7 though linguistically it had to be the other way around. Justice is glorified, too, in the great fresco of Ambrogio Lorenzetti, enthroned next to Good Government, again surrounded by all the moral and political virtues. 8 And if Justice was a goddess, the jurists were, from classical times on, her priests (sacerdotes Justitiae), as modern commentators (including some on the Napoleonic Code) continue to insist. 9

This is the view taken by scholars, philosophers, and especially lawyers. In popular culture, by contrast, Justice has often shown another face. My purpose here is to suggest some aspects of the other and darker side of the diptych. In the sixteenth century the legal establishment and its pretensions to a monopoly over public virtue was the object of almost as much popular indignation as the Roman church. "Good jurist, bad Christian" was one famous proverb, (bonus jurista, malus Christus, with variations in the vernacular languages), repeated by Luther, 10 but there were secular outcries as well. "God save us from many things," ran one sixteenth-century adage. "God save us from the et cetera of the notaries." "God save us from the equity of the Parlements." 11 In our own century, according to Eugen Weber, French farmers were still praying, "Lord, deliver us from all evil and from justice." 12

Such countercultural protests pointed to more than suspicion and hatred of lawyers, however. It suggested a larger distrust of the devices

4. I. INST. 1.1.1; DIG. 1.1.10.1; DEO AUCTORE; see generally ADOLPH BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW, Transactions of the American Philosophical Society, n.s., XLIII, pt. 2 (1953).
5. CODE J. 1.17.1.5.
7. DIG. 1.1.1 (Accursius), and many other glossators and commentators.
9. DIG. 1.1.1; cf. J.E.D. BERNARDI, COURS DU DROIT CIVIL 3 (1803).
10. MARTIN LUTHER, Table Talk, in LIV LUTHER'S WORKS 474 (Theodore G. Tappert trans., 1967); see also R. STINTZLING, DAS SPRICHWORT "JURISTEN böSE CHRISTEN" (1875); C. Kenny, Bona Jurista, Mala Christa, 19 L.Q. REV. 326 (1903).
11. "Dieu nous garde de l'équité des parlements" (16th cent.), in LOCUTIONS LATINS ET ADAGES DU DROIT FRANÇAIS CONTEMPORAIN (Henri Roland & Laurent Boyer eds., 1970) I.211; "Dieu nous garde de l'ét coetero du notaire" (16th cent.) id. at I.216.
and engines of modern “justice.” For many modern critics the enemy was “written law” itself, which in general meant Roman law in its modern incarnations and transmutations. French jurists of the sixteenth century traced all their legal and social ills to the infiltrations of civil and canon law, with their reliance on written procedures, written commentaries, and various forms of “chicanery.”

In France justice was originally something to be dispensed not in written acts but in face-to-face communications, the conventional image here being that of justice dispensed under the oak tree—not only the famous oak of Vincennes under which Saint Louis used to hold court but also the oak of Rousseau under which the People first made their Social Contract. Ultimately, in fact, the conflict arose because justice was tied to the idea of popular custom, which by definition was *jus non scriptum*, a phenomenon of oral culture often at odds with forms of law based exclusively on writing and legislation.

To some extent the contrast between popular usage and official forms of law is a stereotype fashioned by early modern counterparts of Critical Legal Studies. Nevertheless, the theme figures prominently in the writings of professional jurists. On the one hand there was custom, which (as the fourteenth-century jurist Bartolus put it) “represents the will of the people” (*consuetudo repraesentat mentem populi*).

In form, custom was virtually a social compact (*consuetudo quasi ex contractu*, according to another famous formula), which theoretically could not only “interpret” and “correct” but even “abolish” written law. On the other hand there was the authoritarian principle enshrined in Justinian’s Digest that law expressed the will not of the people but only of the prince. “What pleases the prince has the force of law” (*Quod principi placuit, legis habet vigorem*) was the famous formula drawn from the Corpus Juris Civilis. Thus, starting with Justinian, the only source of law was imperial legislation (not enactments of the senate, decisions of the jurisconsults, or popular custom).

On the one hand there was the immovable body of popular usages and on the other the irresistible force of legislative will underlying the modern “sovereign” state—and it was the latter that ultimately (ostensibly) prevailed.

**UNWRITTEN LAW**

In France the transition to modern ideas of justice was clear. “For a long time,” wrote one seventeenth-century commentator, “the customary


15. See, e.g., GUy DE COQUILLE, Commentaires sur les coustumes de Niverois, in LES OEUVRES 2 (1646).

16. Dig. 1.3.32 (Accursius).

17. Dig. 1.4.1, on which there is a huge tradition of commentary and later literature.
law [of Paris] was observed without being written anywhere except on 
the hearts of the citizens who keep it; and if in doubt, the proof lay not in 
books but in the assemblies of those who knew the practice and common 
usage." The proof referred to by this feudist took the form of a royal 
inquest (inquisitio, enquête), in which a group of men (sometimes expert, 
usually twelve in number, and almost always elderly) testified to the 
existence of certain usages from time immemorial (usually three genera-
tions) and allowed the king’s men to produce an official “redaction.”

The reformation of customs in the sixteenth century followed a similar 
procedure, with the text of the coutumier being rewritten and “regular-
ized” by royal agents with the consent of representatives of the three 
estates—the fiction of the “popular” basis of customary law thus being 
retained. As Montesquieu summed up six centuries of French legal 
history, “our customs were written down, they were made more general, 
and they received the stamp of royal authority.” Thus the customs 
were modernized, politicized, and absorbed into royal legislation, judge-
made and university-taught law, and learned jurisprudence. Officially, it 
would seem, the transformation of custom into law stilled the voice of 
the people and locked justice away in a “prison-house” of written 
language.

To historians these processes of redaction and reformation are fasci-
nating. The confrontation of actors and legislators, of the subjects and 
agents of sovereignty, seems to represent a magic moment in legal his-
tory—the shift from oral to literate culture—and indeed it marks the 
closest thing in the historical record to the transition from the state of 
nature to that of civil society. Unfortunately, we can follow this transi-
tion from fact to law only through its written remains, and these are 
scarce and skimpy. Almost all extant collections of medieval and early 
modern customary law are themselves based on records or previous 
notes. Even the procès-verbaux of oral discussions are necessarily sec-
ond-hand—not only hearsay, as it were, but hearwrite—which com-
ponds the problem of communication. Like the myth that has the

18. GILES FORTIN, CONFEREICE DE LA COUSTUME DE PARIS, AVEC LES AUTRES COUSTUMES 
DE FRANCE (1605), EPISTRE. For French customary law see especially the listings in ANDRÉ 
GOURON & ODILE TERRIN, BIBLIOGRAPHIE DES COUSTUMES DE FRANCE (1975); JEAN CASWELL 

19. E.g., JACQUES D’ABLEIGES, LE GRAND COUTUMIER DE FRANCE 102 (Louis Le Caron ed., 
1598); JEAN BOUTEILLER, SOMME RURALE 6 (1603). Still valuable is HIPPOLYTE PEISSARD, ESSAI 
SUR LA CONNAISSANCE ET LA PREUVE DES COUTUMES EN JUSTICE, DANS L’ANCIEN DROIT 
FRANÇAIS ET DANS LE SYSTÈME ROMANO-CANONIQUE (1910).

20. See especially RENÉ FILHOL, LE PREMIER PRÉSIDENT CHRISTOPHE DE THOU ET LA 
RÉFORMATION DES COUTUMES (1937).


22. One useful example is BIBLIOTHÈQUE NATIONALE MS Fr. 5281, Premier project de la 
nouvelle Coutume de Paris; MS 5282, Second project; and MS 5254, Observations by Simon Marion, 
spokesman for the Second Estate; see also CHARLES A. BOURDOT DE RICHEBOURG, NOUVEAU 
COUTUMIER GÉNÉRAL I.18, II.1169, III.392, etc. (1724). See the further discussion in my Second 
Nature, supra note 3.
earth resting on a turtle, itself resting on another turtle, there is no Ur-
source that gives access to oral culture. As it is turtles all the way down,
so it is written records all the way down; and many of them—the records
I mean—are missing, corrupt, or suspect. Even through the most
advanced historical methods or sensitive literary techniques we cannot
reach into the mind of the people; we cannot recover the state of nature.

Nevertheless, these legal remains do reflect popular assumptions about
the contrast between the simplicity of justice in a natural setting and the
recondite language of the lawyers. In France the discourse of custom,
followed through the great corpus of droit coutumier and the accumu-
lated commentaries first in Latin and then in French, is continuous
across at least five centuries; and the assumptions remain remarkably
constant even as issues and contexts changed. “Twice makes a custom,”
according to a medieval proverb.23 People themselves were living proof
of this custom. And, according to another proverb, “ten makes a peo-
ple.”24 In post-redaction society, however, memory and usage were
largely replaced by the written word, compared to which an oral protest
counted for nothing—it “was not valid against a written instrument”
(protestatio non valet contra actum).25 It had long been the case in
Roman law that judicial determinations must be accepted as truth (res
judicata pro veritate accipitur),26 but now printed documents came also to
occupy this position of authority. Roman law itself (which was common
law in the provinces of the south) was defined as “written reason” (ratio
scripta, la raison écrite), a formula that was commonplace by the thir-
teenth century.27 Moreover, as Charles Dumoulin declared in his great
commentary on the coutume of Paris, “Public documents prove them-
selves” (scripta publica probant se ipsa).28 The reformation of customs—
whose principal theorist was this same Dumoulin—carried the assault on
custom further by subordinating local liberties to the ideal of national
unity. No wonder the three Estates fought over every clause of their
provincial coutumes; no wonder they opposed the idea of a code down to
the bitter end—that is, down to the Revolution.

Of course, customs could be bad as well as good; mala consuetudo was
a label of protest over several centuries.29 The term was applied not only
to the burdens of taxes and tolls (common meanings of consuetudo) but
also to the sort of abuses that provoked many a peasant uprising between
the twelfth and the eighteenth century. Theoretically, the test of any

25. LOCUTIONS LATINES II.305.
26. DIG. 50.17.207.
28. Commentarii in Parisiensi totius Galiae supremi parliamenti consuetudinis I.8
(D. Godefroy ed., 1603); cf. C.CIV. 1319. See also Locutions Latines II.472.
29. F. OLIVIER-MARTIN, HISTOIRE DE LA COUTUME DE LA PRÉVÔTÉ ET VICOMTÉ DE PARIS I.
(1922).
custom was natural law, or reason, for the French feudists, like the English common lawyers, believed that their customs were indeed expressions of natural law. "This custom is proved by the jus naturale," wrote one sixteenth-century commentator on the coutume of Bourges, "by which all men are born equal." 30 The legislators of the French Revolution agreed with this premise, but they also agreed with the judgment of another old regime jurist that in fact "custom" had come to mean not natural liberty but only "an expression of the authority of the lord of the fief and a collection of the rights he had exacted from his vassals." 31 The leaders of the French Revolution opposed their own universalist conceptions of liberty and equality against the particularist "liberties" of le droit coutumier. The upshot in 1789 was the destruction of the whole structure of customary law and its replacement by an authoritarian Code. 32

THE REFORMATION OF JUSTICE

In general, the transition to written law (and perhaps the implicit ideal of a uniform code) was certainly appealing to those who identified social improvement with the national State. To many observers—proto-Jacobins we might almost say—the legal reformers of the sixteenth century seemed to be social physicians if not social engineers. 33 One supporter compared the eloquent Justifications of Christofle de Thou, president of the Parlement of Paris and leader of the reformation movement, to the actions of a skilled surgeon administering a soothing anesthetic to a patient before amputating one or more of his or her limbs. Their enterprise was indeed radical in appearance; and it is significant that their enterprise was usually referred to as not merely the reformation of custom or of law but more pretentiously as la Reformation de la Justice.

Did justice benefit from such modernizing surgery? Members of the non-noble proprietary class—the bourgeois, or roturier—certainly gained by the undermining of the feudal courts; and married women, who were generally regarded as incapable of guarding their own interests, benefited by being guaranteed disposition of the property they brought into the nuptial union. In these and other ways royal justice tended to put an end to various abuses, prejudices, usurpations, and dispossession inherited from immemorial custom, and to offer protection to the so-called "poor subjects" (pauvre sujets) excluded from feudal or churchly privilege.

In France, as elsewhere in Europe, property in one sense or another

30. NICOLAS BOHIER, CONSUETUDINES BITURICENSES f.1 (1543).
31. RENÉ DE LA BIGOTIERRE, Avertissement, Commentaires sur la Coutume de Bretagne (1702).
33. For what follows, see especially FILHOL, supra note 20.
was a central question, and here again the written word became decisive, especially through what we might call the *quo warranto* principle. No land without a lord (*nulla terre sans seigneur*) was the customary maxim; but how, in literate culture, could one prove lordship if not by writing? The peasantry was especially vulnerable to the encroachments and usurpations over customary holdings and rights, but under conditions of that fearful oxymoron of written custom all interested parties were vulnerable. In the redaction of the *coutume* of Troyes in 1493, for example, the nobility argued that there was no such thing as a free allod (*franc-alleu*), while the Third Estate took their stand on the contrary maxim that “every inheritance is free if not shown [by title] to be held in fief.” The nobles objected that they would lose many of their customary rights thereby, for “they were not accustomed,” they said, “to prepare a title or written obligation but only to write it down in the seigneurial records, and this would not serve as written proof.”

Again, the reformation of provincial customs reinforced this march toward modernization—or, as sixteenth-century critics like Rabelais and Hotman saw it, descent into “chicanery.” In the reformation of the *coutume* of Amiens in 1567 the local Vidame complained that the alterations would deprive him of territories held by “immemorial possession.” Under such circumstances the only one to gain was the king, or rather the sovereign court of the Parlement of Paris, the first president of which, Christofle de Thou, was also the leader of the Reformation movement. The people were no longer consulted about their “liberties,” and indeed a sixteenth-century act officially “prohibited any of the advocates of the realm from alleging or proposing other customs, usages, and styles except those written down, agreed upon, and ordered.” Not that the state itself scrupled to employ custom for its own benefit, for it was on the basis of the maxim *Nulle terre sans seigneur* that Louis XIV issued his edict of 1667, which confiscated all allodial land being held without written title.

# The Survival of Custom

The force of custom was not completely removed from the body politic by the legal surgeons. It survived not only in ancient maxims but also in the memories of judges; and at least in theory custom continued often to be celebrated (in the old juridical maxims) as the “best interpreter,” “corrector,” and even “abrogator” of law. In some circumstances cus-

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34. ANTOINE LOISEL, INSTITUTES COUSTUMIÈRES 43 (2.2.214) (1611).
35. BOURDOT DE RICHEBOURG, supra note 22, at III(1), 289.
36. FILHOL, supra note 20, at 92 and passim.
37. RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANÇAISES IX, 253 (F. Isambert et al. eds., 1821-33).
38. DIG. 1.3.37, and many commentaries and "extensions"; e.g., “Et quidem videtur quod
tom even became a revolutionary force. From the thirteenth to the eighteenth century, peasant uprisings were defended on the grounds of custom and its violation by unjust laws (another not uncommon oxymoron). In the rebellions of seventeenth-century France, as Roland Mousnier has shown, outrage was directed not against custom but against practices that were newly instituted by lawyers. 39

Custom could produce litigation as well as violence, of course. In the later seventeenth century, for example, some Burgundian peasants sued their lords in the attempt to eliminate abuses which were not in accord with the more general custom of French provinces. 40 In the courts of Louis XIV, moreover, custom was unofficially reinforced by a new way of invoking unwritten law, that is, the concept of the “spirit of customary law” (esprit du droit coutumier) 41—a concept identified not with the “spirit of the law” in Montesquieu’s sense but with the spirit of the people, the Volksgeist as German scholars called it, which was to say, in 1789, the sovereign nation.

The revolutionary potential of custom was still more evident in the peasant uprisings in Reformation Germany, which were aimed at the intrusions of the newly received written law and more generally against anything foreign, novel, or uncustomary (ungebrauchlich). 42 This attitude was in keeping, too, with Lutheran opposition to canon law and the threats of secular learning. Although Luther himself did not hesitate to exploit the printed book, he thought that true faith was basically a matter of hearing the word (fides ex auditu) and that writing was all too often a source of the corruption of spiritual truth. 43 The righteousness of God was a whole world and a heaven apart from what Luther condemned as “the law,” meaning Judaic as well as canon law—and I hope I need not remind you that this righteousness in its original form was really the “justice of God” (justitia Dei).

In less conspicuous ways, too, custom lived on in the spirit of the people as well as in the rhetoric and memory of the jurists. Like the profession of law itself, written law continued, in many quarters, to be regarded with suspicion and hostility. Over many centuries, critics who preferred the Germanic tradition of custom to the Roman tradition of written law denounced the tyrannical and acquisitive character of Justinian’s code. Such was the view of François Hotman and many other anti-Romanists

consuetudo sit conditrix legis, et abrogatrix, et interpretatrix;” in Azo, In jus civile summa f.233v (1564).

41. Pierre Grosely, Recherches pour servir à l’histoire du droit français 122 (1752).
42. See Gerald Strauss, Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany 100 (1986).
43. Kelley, supra note 13, at 103 and passim.
in the sixteenth century, and such was the view of Heinrich Heine in the nineteenth century. "What an awful book the Corpus Juris is," Heine wrote, "this Bible of selfishness." 44

By the time of Heine, the Romanist evil was best illustrated in the institution of private property, directly imported from the Code of Justinian into that of his epigone Napoleon. Indeed property rights became its primary theme. 45 The contemporary assault on this aspect of written law was mounted by nineteenth-century socialists like P.-J. Proudhon, whose mission was to resolve the central paradox of society, which was the disparity between possession and property. 46 Property was, of course, a matter of written title, while possession was an amphibious concept that included both fact and law—both the realities of economic activity and the legalities of document and proof. For Proudhon, who often invoked the autonomy of unwritten custom, possession was the natural condition of human life, while property, which was bound to written instruments and mercenary lawyers, was nothing less than "theft." Even though free from writing, possession still represents, proverbially and perhaps morally, "nine points of the law." Whatever the merits of Proudhon's argument in seeking what Paolo Grossi calls "another kind of property" (an altro modo di possedere), 47 the point is that possession, linked both to the ancient law of saisine and to modern ideals of social justice, represents a significant survival of the ancient regime of popular custom.

The passage of time did not weaken popular opposition to the processes of modernization and literalization. As Eugen Weber has argued, it was not until our own century that the forces of modernity finally turned "peasants into Frenchmen." 48 In principle (or at least in popular opinion) custom continued to represent a source of justice beyond the letter of the law. It was grounded on a sort of sociological jurisprudence that required legal rules to conform to the character of a particular society and, like equity, it took into account particular conditions of persons as well as places. In extreme cases custom might even justify resistance to laws which, though "on the books," had become inequitable or outmoded (the old concept of desuetudo, the opposite of consuetudo). 49 In this context the authority of custom could also be enhanced by modern natural law, which likewise represented a "higher," unwritten limitation on written, "positive" law.

44. Cited in MAX BROD, HEINE 77 (1956).
45. See KELLEY, supra note 32, at 127 and passim.
47. Grossi's book of this title has been translated by Lydia Cochrane as AN ALTERNATIVE TO PRIVATE PROPERTY (1981).
48. See supra note 12.
49. Dig. 1.3.32.1.
This is not the place even to begin tracing the fortunes of the modern concept of custom and the "unwritten law" in their relationship to justice. Suffice it to say that in the nineteenth century the idea of custom, though for a time central to the new sciences of society, especially anthropology and sociology, seems to have become marginal in modern legal traditions. Jacobins, Bonapartists, Utilitarians, and Austinians all looked to legislation as the true science of law and society, and even in the historical and sociological schools of law, "custom" was a matter of legal convention or judicial determination. It was left for the most part to the social and cultural historians to read the mind of the "people"—and in their own way to reduce it to writing.

In *The Greek Concept of Justice*, Eric Havelock traces justice from what he calls its oral "shadow" in Homer to its literate "substance" in Plato, and represents it finally as a "philosophy of the written word." 50 This seems to accord, too, with the medieval and early modern European experience, which progressed (in M. T. Clanchy's words) "from memory to written record." 51 Another of Havelock's studies of the transition from orality to literacy is entitled *The Muse Learns to Write.* 52 Well, Justice, too, while remaining blind, has had to "learn to write"—and indeed, since the Renaissance, to adapt to the public world of print culture and literacy. In this process the voice of the people represented by custom has been muted, if not silenced. Justice writes, and those seeking justice must learn to read and write; that is, they must rise to a level of cultural skill demanded by modern legal systems. Therein lies an abundance of inequities, or so History (whose muse also writes) seems to suggest. A final and more up-to-date conclusion about this paradox of western civilization I leave to scholars, judges, advocates, and witnesses more expert than myself.


52. **ERIC HAVELock, THE MUSE LEARNS TO WRITE: REFLECTIONS ON ORALITY AND LITERACY FROM ANTIQUITY TO THE PRESENT** (1986).