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Dear Participants in the Columbia Legal History Workshop:

I am delighted to have the opportunity to present *Writing the Common Law in Latin in the Later Thirteenth Century* to you. I wanted to give you some context for this project. I'm interested in treatise-writing as a practice. Why do people choose to write treatises? I published my first book, *Priests of the Law*, a little over a year ago. *Priests of the Law* is about *Bracton*, a major treatise of the early to mid-thirteenth century. I have now moved on to a project on the later thirteenth century. A number of (mostly shorter) tracts on the common law survive from the period between about 1260 and 1300. These texts are some of the earliest evidence we have for the education of the lawyers who practiced in the English royal courts. Some even appear to be derived from lecture courses on the common law that we otherwise know nothing about. And yet many of them have never been edited. I have begun to edit and translate some of these texts. As I have been working my way through them, I have been looking for connections and trying to make sense of some of the oddities I have been finding in these texts. This paper is my attempt to make sense of the differences in language I have found. This is still very much a work in progress, and I look forward to your comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thomas J. McSweeney', written in a cursive style.

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Writing the Common Law in Latin in the Later Thirteenth Century

By Thomas J. McSweeney¹

I. Introduction

The English common law has historically used three languages: Latin, French, and English. The former two predominated in the common law's early centuries. Although some English was probably always spoken in court, the lawyers' courtroom debates were probably conducted in French from the beginning and certainly were by the middle of the thirteenth century, when they were recorded in French in the law reports.² Latin was the language of administrative documents. It was the language in which the royal administration communicated internally and the language in which it recorded the words that had been spoken in court.³ Clerks translated the French of the courtroom into the Latin of the plea rolls. When people began to write treatises on the common law in the twelfth and thirteenth centuries, they initially wrote in

¹ Robert and Elizabeth Scott Research Professor of Law, William & Mary Law School. I would like to thank the participants of the 2019 British Legal History Conference at St. Andrews, the Oxford Legal History Forum, the Cambridge Legal History Seminar, the Harvard Legal History Workshop, and the Yale Legal History Forum for their comments on earlier versions of this piece.

² This French oral procedure had a long subsequent history. Although the lawyers' oral arguments shifted to English in the later Middle Ages, the formal pleadings that preceded argument continued to be delivered in French until abolished by a statute of 1731. Sir John Baker, "The Three Languages of the Common Law," in *Collected Papers on English Legal History*, Vol. II (2013), 533. Law reports, which recorded the oral arguments, continued to be written in French until the seventeenth century. *Ibid.* 532.

³ The writs, both those that initiated litigation and those used by the court in its process, were written in Latin. The plea rolls, the records of what had happened in court, were also kept in Latin. Charters were kept in Latin for a long time in England. The earliest surviving deed in the English language dates to 1376. Baker, "Three Languages," 532. The earliest charter in French dates to ca. 1140, but there are very few examples of French-language charters before the middle of the thirteenth century, and even after that, Latin remained the predominant language for charters. M.T. Clanchy, *From Memory to Written Record: England 1066-1307* (2nd ed., 1993), 219; Helen Richardson, "A Twelfth Century Anglo-Norman Charter," *Bulletin of the John Rylands Library*, Vol. 24 (1940): 172. Richard Britnell found that out of more than seven hundred legal instruments, such as charters, that survive from Coventry for the entire medieval period, only one is written in French, and the rest are in Latin. Richard Britnell, "Uses of French Language in Medieval English Towns," in Jocelyn Wogen-Brown et al., eds., *Language and Culture in Medieval Britain: The French of England c. 1100-c. 1500* (Woodbridge, Suffolk; York Medieval Press, 2006), 82. The royal chancery did not issue any charters in French until the reign of Edward I, and even after that French was confined to charters sealed with the king's privy seal. Charters sealed with the great seal were written exclusively in Latin until the 16th century. Serge Lusignan, "French Language in Contact with English: Social Context and Linguistic Change (mid-13th-14th centuries)," in Jocelyn Wogen-Brown et al., eds., *Language and Culture in Medieval Britain: The French of England c. 1100-c. 1500* (Woodbridge, Suffolk; York Medieval Press, 2006), 21.

Latin, the written language of the courts, but as the thirteenth century progressed, more and more were written in French. By the late thirteenth century, a lawyer's reference book might contain tracts on the common law in both French and Latin, often alternating between them. This article will examine the choices that treatise-authors made. Why did some choose to write their texts in Latin and others in French?

The examples of literature about the common law written before 1250 are admittedly few, but most of them are written in Latin. From the late twelfth century, we have the *Glanvill* treatise.⁴ An updated version of it was created sometime in the first half of the thirteenth century.⁵ Around the same time *Glanvill* was updated, someone wrote a text titled *Consuetudines Diversarum Curiarum*, which outlined the basics of procedure in ecclesiastical and secular courts.⁶ The Latin text known to the lawyers of the late thirteenth century, who copied it in large numbers, as *Judicium Essoniorum* (*The Judgment of Essoins*), was originally a letter of advice from one justice to another.⁷ A set of Latin *quaestiones* copied into the Red Book of the Exchequer may also date to the first half of the thirteenth century.⁸ And, of course, the largest legal-literary project of the early common law, the *Bracton* treatise, was written in Latin.⁹ When

⁴ G.D.G. Hall, ed. and trans., *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (reprint ed., 2002).

⁵ See Sarah Tullis, *Glanvill After Glanvill* (D.Phil Thesis, University of Oxford, 2007), 95-96.

⁶ H.G. Richardson and G.O. Sayles, eds., "Consuetudines Diversarum Curiarum," in *Select Cases of Procedure Without Writ Under Henry III* (Selden Society vol. 60; London: Bernard Quaritch, 1941), cxcii-cciii.

⁷ Paul Brand has dated it to the period between 1218 and the early 1230s. Paul Brand, "'Nothing Which is New or Unique'? A Reappraisal of 'Judicium Essoniorum,'" in *The Life of the Law: Proceedings of the Tenth British Legal History Conference Oxford 1991*, ed. Peter Birks (London: Hambledon, 1993): 1-7, at 4-6. For the dozens of known manuscripts of *Judicium Essoniorum*, see J.H. Baker and J.S. Ringrose, *A Catalogue of English Legal Manuscripts in Cambridge University Library* (Woodbridge, Suffolk: Boydell Press, 1996) 78-79.

⁸ Paul Brand, "Legal Education in England Before the Inns of Court," in *Learning the Law: Teaching and the Transmission of English Law 1150-1900*, ed. Jonathan A. Bush and Alain Wijffels (London: Hambledon, 1999): 50-84, at 58; *Red Book of the Exchequer*, ed. Hubert Hall (London: Her Majesty's Stationery Office, 1897), vol. 2, 764-5.

⁹ Bracton appears to have been written in stages between about 1225 and 1256. See Thomas J. McSweeney, *Priests of the Law: Roman Law and the Making of the Common Law's First Professionals* (Oxford: Oxford University Press, 2019), 48-59.

texts about the common law really began to proliferate in the second half of the thirteenth century, however, a great deal of this new literature was written in French. Law reports survive from 1268, and although a few early examples of Latin reports survive, French established itself early on as the language of reporting.¹⁰ Most importantly for my own purposes, many of the didactic texts we find in the codices known as statute books—legal handbooks that were apparently made for lawyers, estate stewards, county office-holders, and landholders—were composed in French. The French-language literature of the later thirteenth century does indeed appear to have been something new; we do not have any surviving examples of French-language texts written prior to the 1250s. Something had changed.

What should we make of this shift to French? It has, at times, been conflated with a shift in the culture of the royal courts. T.F.T. Plucknett created a framework that has proven to be influential. In a discussion of the French-language text known as *Brevia Placitata*, he tells us that “If Bracton was Latin, Roman, and clerical, this author was French, insular, and lay.”¹¹ He thought this author represented a broader shift that was occurring in the legal profession around this time. In his view, the center of gravity in the royal courts shifted away from learned, Latinate clerks and justices to practicing lawyers, “who understand Latin but are really fluent only in French.”¹²

In previous work, I have argued that the break with the past was not quite so stark as Plucknett’s framework might make it seem.¹³ The treatise known as *Hengham Magna*, which was written in Latin in the early 1260s and is seemingly of the more insular (if not French and

¹⁰ See Paul Brand, *The Earliest English Law Reports, Vol. 1* (Selden Society vol. 111; London: Selden Society, 1995), xli, lxxiii, xciii, cxi, cxvi.

¹¹ T.F.T. Plucknett, *Early English Legal Literature* (Cambridge: Cambridge University Press, 1958), 84.

¹² Plucknett, *Legal Literature*, 81.

¹³ Thomas J. McSweeney, “Creating a Literature for the King’s Courts in the Later Thirteenth Century: Hengham Magna, Fet Asaver, and Bracton,” *The Journal of Legal History*, Vol. 37, 41-71.

lay) character, relies heavily on *Bracton*, and could be seen as an extension of the textual traditions of the early thirteenth century. *Fet Asaver*, a text of roughly the same period that checks the French, insular, and lay boxes, relies on *Hengham Magna* and probably also relies directly on *Bracton*.¹⁴ There was, therefore, more continuity between the “Latin, Roman, and clerical” tradition of the early thirteenth century to the “French, insular, and lay” of the later part of the century. Plucknett was right, however, to point to change in this period. The practice of writing treatises in French was indeed new. And, as Plucknett points out, there were good reasons for it. Many of the new treatises taught the oral skills of counting and pleading, which would have been conducted in French. Moreover, French was more widely understood than Latin in thirteenth-century England, so the audience for a French language treatise would have been larger.

All of this leaves us with an interesting question, however. While Plucknett was correct to point to the shift *towards* French, his scheme would also seem to hint at a shift *away from* Latin. And yet, many of the legal treatises that were copied with such zeal in the later thirteenth century were written in Latin. French and Latin texts appeared beside each other in contemporary lawyers’ handbooks. The people who used these treatises seem to have regarded them as part of the same universe of texts on the common law; some manuscript copies of the Latin-language *Hengham Magna* and the French-language *Fet Asaver* contain cross references to each other, for instance.¹⁵ People were also writing new treatises in Latin in the later thirteenth century. *Divisiones Brevium*, *Exceptiones Contra Brevia*, and the *Articuli qui in narrando*

¹⁴ McSweeney, “Creating a Literature,” 50-52, 61-62.

¹⁵ See, e.g., George Woodbine, *Four Thirteenth Century Law Tracts* (New Haven: Yale University Press, 1910), 55, n. 11-12.

indigent observari all appear to have been composed between 1275 and 1285.¹⁶ *Hengham Parva* may have been composed in its earliest form sometime before 1285, with a second recension completed between 1285 and 1290, and *Modus Componendi Brevia* appears to have been written sometime around 1285.¹⁷ The popular *Summa de Bastardia* appears to have been a rough contemporary of these treatises, probably written before 1289.¹⁸ The 1280s and 1290s also seems to have been a period of increased interest in *Bracton*, and two epitomes of *Bracton*, known as *Thornton* and *Fleta*, were written in Latin. Other treatises that circulated less widely, and that are less well known to historians, were written in Latin around this time.¹⁹

It would be easy to treat the Latin texts as a relic of an older style of writing that was fast being replaced by a new, French-language literature. But authors continued to make the conscious choice to write in Latin, even when French might seem more appropriate. This article will examine the reasons why people in England continued to write treatises in Latin through the end of the thirteenth century. Those reasons ranged from the practical to the political. Although the focus of the article will be on the authorship of the treatises rather than their reception, the second section will explain the our sources for these treatises, legal handbooks known as statute books that were produced in large numbers in the later thirteenth century. The third will present evidence that a norm existed in the later thirteenth century that certain types of subject matter

¹⁶ On the dating of the *Divisiones Brevium*, see Paul Brand, “Courtroom and Schoolroom: The Education of Lawyers in England Prior to 1400,” in *The Making of the Common Law* (Hambledon Press, 1999), 73-74. Patrick Philbin has suggested that the *Exceptiones Contra Brevia* and the *Articuli* were part of the same lecture course, and probably written by the same person, around the same time. Philbin, “Exceptiones Contra Brevia,” 135-137, 148. The shorter text known as the *Exceptiones Generales* may also have been part of this package of texts. *Ibid.*, 134.

¹⁷ Brand, “Courtroom and Schoolroom,” 64. On the dating of *Hengham Parva* see William Huse Dunham, *Radulphi de Hengham Summae* (Cambridge: Cambridge University Press, 1932), lxxv. For a discussion of earlier and later recensions of *Hengham Parva*, see Brand, “Legal Education,” 80.

¹⁸ Baker and Ringrose, *English Legal Manuscripts*, 65-66.

¹⁹ For a set of Latin-language lectures on counting and pleading in the courts of the city of Lincoln, which survives in at least one manuscript, see Brand, *Law Reports, Vol. 1*, xcii; British Library MS Add 38821 121v-123r. The treatise *Officium Justiciariorum*, likely written in the 1280s or 1290s, can be found in Cambridge University Library Dd.7.14. fos. 229r-231v. Baker and Ringrose, *English Legal Manuscripts*, 75.

called for French and certain types called for Latin. The fourth will examine treatises in which the language and the subject matter seem to be mismatched. Why would people use Latin when the subject matter seemed to call for French? In some cases, the answer is fairly mundane, and this section uses one particular text, the *Articuli qui in narrando indigent observari*, to explore the different ways in which people used Latin in and around the royal courts, to explain why some of these treatises were written in Latin. Not all Latin was created equal, however, and in section five I will argue that we should think about the Latin treatises as belonging to two distinct registers, an “administrative” register with a simpler syntax and limited vocabulary that drew heavily from French and a “scholastic” register that mimicked the styles of university writing and borrowed terminology from Roman law. In section six, I will discuss the resurgence of the scholastic register in the last two decades of the thirteenth century, and argue that this may have been a reaction against the vernacularization of the common law. Some people working in the royal courts may have wanted to reassert the “Latin, Roman, and clerical” nature of the common law, in the face of a profession that was looking less to high-Latin, systematic texts like *Bracton* to tell them about the common law than to the short, practical treatises written in French and administrative Latin.

II. The Sources: Statute Books

These legal texts I will be discussing, generally short texts with a didactic function, are found in statute books. These books are usually fairly small; a size of about nine inches by seven inches is not uncommon.²⁰ They survive in the dozens from the late thirteenth and early

²⁰ See, e.g., Cambridge University Library MS Ee.1.5; Baker and Ringrose, *English Legal Manuscripts*, 171. There are larger examples, however, such as CUL Dd.7.6, which is 20 inches by 9.5 inches. Baker and Ringrose, *English Legal Manuscripts*, 68.

fourteenth centuries. Most of them appear to have been working manuscripts, books that a person might keep around for reference. They seem to have been used by a wide range of people who needed to know something about the workings of the king's courts. Professional lawyers—the attorneys who handled the procedural aspects of cases and the serjeants, *conturs*, or *narratores* who made legal arguments in court—were likely creators and consumers of statute books. But they were made by and for other types of people who had legal dealings, as well. The presence of treatises on estate management in some of the statute books hints at ownership by county elites and estate stewards.²¹ A steward would often manage land litigation for the lord of the land, sit in the lord's place in the county court, and preside over the lord's own manor courts.²² County elites might serve as sheriffs, under sheriffs, coroners, escheators, regarders, or eyre jurors, all positions that required some knowledge of the law. Two of the earliest examples of statute books were created by a father and son, both named Robert Carpenter, who were local landholders, county officials, and estate stewards on the Isle of Wight.²³

Each statute book is unique. Each individual compiler took what was useful to him. They take their name from the statutes that are usually a major feature of this type of manuscript. The reigns of Henry III and Edward I saw the rise of statutory law as a major form of lawmaking in England, as well as the development of a statutory “canon,” and most statute books contain a complete or nearly complete collection of the statutes that had been issued up to the point the book was made. It is also fairly common for a statute book to contain a register of writs.²⁴ This is essentially a formulary that gives the forms of writs available for litigation in the king's courts.

²¹ See, e.g., CUL MS Dd.7.14, fos 228v-233v; Baker and Ringrose, *English Legal Manuscripts*, 75.

²² Paul Brand, “Stewards, Bailiffs and the Emerging Legal Profession in Later Thirteenth-Century England,” in Ralph Evans (ed), *Lordship and Learning: Studies in Memory of Trevor Aston* (Boydell Press 2004) 139, 146, 148.

²³ Gonville and Caius College, Cambridge, MS 205/111; CUL MS Mm.1.27. See discussion in Tullis, *Glanvill After Glanvill*, 88-90.

²⁴ See, e.g., CUL Dd.9.38, fos. 165v-205r; CUL Ee.1.1 194r-211r; CUL Ee.1.5 fos. 193r-274v; Baker and Ringrose, *English Legal Manuscripts*, 99, 153, 171.

Apart from that, the books differ wildly. In some cases the creators appear to have carefully chosen texts that would be helpful to them. Some are focused narrowly on issues such as how to draft deeds and wills. In many cases, however, the creators of these books appear to have been fairly indiscriminate, searching for any text that could tell them anything about how the king's courts operated. The manuscripts do not always differentiate clearly between statutes, enacted at great councils of the realm, and treatises or other texts created by private parties. The creators of the statute books usually placed the statutes and the tracts in separate sections, indicating that contemporaries did distinguish between these two different types of texts, but some texts could end up in either. The text known as *The Office of the Coroner* sometimes appears among statutes and sometimes appears among tracts, and it is no surprise that compilers were confused about its nature; although it reads like a tract on the duties of a coroner, it was actually enacted as a statute in the fourth year of Edward I.²⁵ The text known as *Extenta Manerii*, on surveying manors, usually appears among the statutes, but it is not clear that it was ever enacted as one.²⁶ Among the didactic texts, there are certain thematically related texts that often travelled together, such as *Hengham Magna* and *Fet Asaver*, or the *Exceptiones Contra Brevia* and the *Articuli qui in narrando indigent observari*.²⁷ But the statute books often mix together texts on different sets of legal skills: conveyancing, counting, pleading, securing the appearance of the defendant, and other topics. This may be because the creator of a given text had need for a wide range of skills, but these tasks were often performed by different types of people, and in many cases, it actually looks like the copyist was not being terribly discriminating. He was looking for anything that

²⁵ SR 1, 40; See British Library Add MS 38821, where it appears among a variety of texts.

²⁶ SR 1, 242; BL Add MS 38821.

²⁷ Patrick Philbin, "The *Exceptiones Contra Brevia*: A Late Thirteenth-Century Teaching Tool," in Jonathan A. Bush and Alain Wijffels, eds., *Learning the Law: Teaching and the Transmission of Law in England* (London: Hambledon, 2006), 143; Dunham, *Radulphi de Hengham Summae*, lxvii; Woodbine, *Law Tracts*, 55, n. 11-12.

could tell him about the law and how it worked. Just as some copyists were more targeted in their choice of subject-matter than others, some clearly preferred one language over the other. We also find statute books that alternate between Latin and French texts, however.

III. Different Skills, Different Languages

The earliest evidence we have for writing in French about the common law dates to the 1250s. The earliest versions of *Brevia Placitata* and *Casus Placitorum*, each of which is really a grouping of texts that share some commonalities, date to that decade. They appear to have been part of a course of study on counting and pleading—the oral parts of the legal procedure, which were conducted in French—and were probably created from students’ notes.²⁸ The tract known as *Fet Asaver* dates from around the same time, the late 1250s or early 1260s.²⁹ The earliest surviving law reports, most of which purported to be verbatim records of courtroom arguments, date to 1268. Some early ones were written in Latin, but French very quickly became the standard for law reports.³⁰ Although I have framed this article around the question of why Latin was retained, we might ask why people working in and around the king’s courts shifted to French at all. In fact, Michael Clanchy has argued that Latin was seen as a “stronger preservative for legal purposes” in the twelfth and thirteenth centuries, and that, while contemporaries thought that something might be lost by translating French *verse* into Latin, they treated prose differently.³¹ Thus, even words that were originally drafted or spoken in French prose might be translated into Latin for preservation with no sense that something was being lost by doing so.

²⁸ Brand, “Courtroom to Schoolroom,” 62-4; Brand, “Legal Education,” 59-60.

²⁹ Brand, “Legal Education,” 60-1.

³⁰ Huntington Library MS HM 19920 contains a series of reports dating to 1268 and alternates between Latin and French. Brand, *Earliest English Law Reports, Vol. 1*, 1-5.

³¹ Clanchy, *Memory to Written Record*, 220.

England's courts did, in fact, use Latin as the language of preservation. The plea rolls, the records of the royal courts, were kept in Latin. The clerks of the royal courts translated the parties' counts and pleadings, the words that were spoken in French in court, into Latin for purposes of preservation. By the 1250s the clerks had standardized ways of doing that, so that they had developed conventional Latin translations for formulaic or technical phrases that appeared in French courtroom speech. For every law reporter taking down those words in French, there was a clerk who was taking the same words down in Latin.³² In a sense, the odd thing is that common lawyers began writing in French at all. There was a cultural logic that gravitated towards preserving things in Latin, as well as a group of people who had perfect facility with the act of translation from spoken French to written Latin.

There are a couple of possible explanations for this shift to French. The thirteenth century saw the beginning of a shift towards vernacular writing throughout Europe. Earlier generations of scholars generally saw this move towards the vernacular as related to a growth in national identity. This view has been widely criticized.³³ In any event, it is difficult to explain the shift to a *French* vernacular in thirteenth-century England in terms of a budding English nationalism. Scholars have posed alternate explanations for the shift to the vernacular, however, that have explanatory power for the French of England. First, scholars have pointed to the use of the vernacular as a way of preserving oral acts that had been performed in the vernacular. Thus, Patrick Geary argues, the oaths of Strasbourg of 877—which preserve the earliest surviving writing in a Romance language—were written in Romance and German because the oaths themselves were taken in Romance and German, and the scribes wished to preserve the words as

³² Although law reports are thought to have been written by a variety of people, some of them were probably made by the same clerks who were translating the courtroom speech into Latin for the rolls.

³³ See Patrick Geary, *Language and Power in the Early Middle Ages* (Waltham, MA: Brandeis University Press, 2013), 68.

they had been spoken in this important ritual, as a way of preserving the sounds themselves.³⁴

Geary advances a similar hypothesis for the appearance of German-language charters, which record oral transactions, in the thirteenth century.³⁵

Second, scholars generally posit that the vernacular was more widely understood than Latin. Although French was not the vernacular of most of the population in England, it does appear to have been more widely understood than Latin. There is debate about whether French continued to be a language learned in childhood and spoken as a first language in the later thirteenth century, but there are indications that at least some people in England learned it in childhood.³⁶ Even people who did not learn it as a first language could have learned it in school; because it was ubiquitous in the royal and ecclesiastical administration, grammar schools taught French.³⁷ The landholding elites and the merchant classes in the towns probably sent their children to learn it. Even the occasional prosperous peasant who aspired to a career in the Church or in some type of administration for his children might send them off to learn French.³⁸ Moreover, even though Latin was the medium through which reading was taught in the schools, the way reading was taught would have actually allowed Francophone students to pick up reading skills in French before they learned to read Latin. Schools taught students to sound out letters, syllables, and words before they taught Latin vocabulary and grammar. A Francophone

³⁴ Ibid, 68-71

³⁵ Ibid, 58.

³⁶ Richard Ingham argues that certain syntactic changes in Anglo-Norman French that occurred in the thirteenth and fourteenth centuries are more consistent with a native language learned in childhood than with a learned language. Richard Ingham, "The Persistence of Anglo-Norman 1230-1362: A Linguistic Perspective," in Jocelyn Wogen-Brown et al., eds., *Language and Culture in Medieval Britain: The French of England c. 1100-c. 1500* (Woodbridge, Suffolk; York Medieval Press, 2006), 54.

³⁷ Nicholas Orme, *Medieval Schools From Roman Britain to Renaissance England* (New Haven: Yale University Press, 2006) 75; Baker, *Three Languages*, 532.

³⁸ Orme, *Medieval Schools*, 132-133.

student who had only received an elementary level of education, therefore, would have been able to read and understand a French text, but not a Latin one.

We find evidence for both of these motives in French-language legal texts of the later thirteenth century. There is significant evidence that some texts were written in French simply because it was more widely understood than Latin. The author of the *Mirror of Justices* (ca. 1290), a French-language text that relies heavily on the pointedly Latinate *Bracton*, says in his introduction that he wrote the text “in a language easy to be understood” (*en langage plus entendable*).³⁹ We can also see evidence for this motive in acts of translation that we find in legal texts. The texts that go under the name *Brevia Placitata* contain sample counts and defenses, in French, but they also give sample writs, translated into French from the original Latin. Indeed, some manuscripts of *Brevia Placitata* title the tract *Brefs Enromancees* (“Gallicized Writs”) or something similar, indicating that the copyist thought this was a central feature of the text.⁴⁰ Statutes were sometimes translated into French from Latin, as well. Some of the statutes of the thirteenth-century were issued in French and others in Latin. Most statute books contain the Latin statutes in Latin and the French statutes in French. Paul Brand has discussed a number of statute books, however, that translate all of the Latin statutes into French, suggesting that the patron of the text did not understand Latin as well as he did French.⁴¹

There is also evidence that some authors wrote in French to preserve oral acts in the language in which they were made. It is probably significant that many—although not all—of the earliest texts written in French were texts that either taught or preserved the words spoken in

³⁹ W.J. Whittaker and F.W. Maitland, eds., *The Mirror of Justices*, Selden Society vol. 7 (London, Bernard Quaritch, 1895), 3; Baker, *Three Languages*, 527, n 48.

⁴⁰ Plucknett, *Legal Literature*, 83; Baker, “Three Languages,” 528.

⁴¹ Paul Brand, *The First Century of Magna Carta: The Diffusion of Texts and Knowledge of the Charter*, William & Mary Bill of Rights Journal, Vol. 25 (2016), 450.

court.⁴² Although clerks had little trouble translating the words of the count and the defense into Latin, there may have been some who thought it was more appropriate to record these kinds of speech in the original French. Clanchy points out that the earliest texts to be written in the vernacular were poetry, not prose. He posits that, although Latin was generally perceived as a better language for preserving words in writing, there was a sense in the twelfth and thirteenth centuries that something was lost when verse was translated from the vernacular into Latin, a concern that did not apply with the same force to prose.⁴³ This might help to explain why writing in French began with texts such as *Brevia Placitata*, which came out of a course on counting and pleading. The plaintiff's count was certainly not verse, but it might not have been perceived as ordinary prose, either. The count might have been perceived as a kind of ritualized speech that opened the plaintiff's case, a statement that required precision, and that therefore had to be recorded in the original language for some of the same reasons verse was recorded in the vernacular.

Although some authors may have had a cultural commitment to recording these significant speech acts in the language in which they were made, there were practical and mundane reasons for reporting the count in French, as well, which we can elucidate more clearly by looking at law reports. Law reports purport to be verbatim accounts of courtroom debates between the parties' lawyers and the justices. They record the plaintiffs' counts, the defendants' denials and exceptions, the oral arguments that ensued, and the justices' responses. All of this was actually done in French. As I stated above, the fact that these oral parts of the procedure were conducted in French does not necessarily mean that they had to be recorded in French; the

⁴² The exception is the tract called *Fet Asaver*, which is primarily about the process of securing the defendant's appearance in court.

⁴³ Clanchy, *Memory to Written Record*, 220.

clerks who kept the plea rolls—the courts’ records of litigation—recorded all of these oral acts in Latin.⁴⁴ Given that clerks recorded these oral acts in Latin on the plea rolls, their use of French was probably not the result of some kind of cultural commitment to preserving orality. The authors of law reports were probably more concerned with the practicality of their texts. Perhaps they wrote these texts in French because law reports were meant to serve as precedents for counting and pleading and were, therefore, most useful when they preserved oral forms precisely as they were spoken in court. Several of the French-language tracts written in this period include sample counts, denials, and exceptions in French and, as we will see, some of the Latin treatises even switch to French when giving oral forms. The subject matter of the text may, therefore, have dictated the language, because texts on certain subject matter were simply more useful when written in French.

We can test these possibilities—that there were norms favoring the preservation of speech acts in the original language and that the reason for preserving the language was primarily practical—against the texts themselves. Latin and French tracts do group roughly by subject matter. The haphazard nature of many of the statute books probably hinders our understanding of the legal literature of the later thirteenth century and how it was produced. Where the manuscripts mix many different types of texts on different subjects related to the

⁴⁴ This kind of off-the-cuff translation sounds like a difficult practice, but it was not necessarily hard to do. Latin was often used as a language of note-taking in the middle ages. Britnell, “Uses of French,” 82. The Latin used on the rolls was fairly formulaic and could be written by someone who didn’t have the level of Latin learning necessary to read Cicero or Bernard of Clairvaux. The clerks of the courts had developed a conventional grammar and vocabulary to translate the French of the courtroom into Latin. See Paul Brand, “The Latin of the Early English Common Law,” in Richard Ashdowne and Carolinne White, eds., *Latin in Medieval Britain* (Oxford: Oxford University Press, 2017), 133-145. The Latin used in administration was apparently easy enough that Hubert Walter, the justiciar and chancellor who revolutionized record-keeping in the chancery and courts in the first decade of the thirteenth century, claimed that he learned his Latin on the job, while working in the treasury. Richard Ashdowne and Carolinne White, “Introduction,” *Latin in Medieval Britain* (Oxford: Oxford University Press, 2017), 36. Some clerks do appear to have had significant knowledge of Latin letters, however. At least one clerk of the early thirteenth century demonstrated a knowledge of Horace. C.T. Flower, Introduction to the Curia Regis Rolls 7-9.

king's courts, when we step back and consider the production of those texts, they probably had their origins in different communities of legal practitioners who had different language skills. There seem to have been several communities of people producing texts about the common law, some of whom preferred Latin and some of whom preferred French. The creators of statute books were combining texts that originated in several distinct courses of study.

Indeed, we should probably not lump all of the statute-book treatises together as texts about the “common law.” The common law comprised a number of distinct types of tasks that might be performed by different people. It is now well-known that most of the surviving treatises on conveyancing came out of a particular course of study in Oxford, which historians have dubbed the “Oxford Business School.” It was related to the University of Oxford, although not part of it, and appears to have been geared towards teaching students practical skills that would be required for a clerk or an estate steward, such as how to write deeds and wills and the rudiments of legal procedure in the secular and ecclesiastical courts.⁴⁵ The texts that came out of this school were almost all written in Latin. A series of French-language texts that give sample counts and pleadings for different types of actions may all belong to a separate course of study that existed from at least 1250, focused on the courts of Westminster, where one could learn about the writs the originated litigation in the king's courts and the counts and pleadings proper to each writ.⁴⁶ These courses of study probably had distinct audiences—a person who knew how

⁴⁵H.G. Richardson, 'The Oxford Law School under John', *Law Quarterly Review*, 57 (1941), 319-38 at 319-28; H.G. Richardson, 'Business Training in Medieval Oxford', *The American Historical Review*, 46/2 (1941), 259-80 at 275.

⁴⁶*Brevia Placitata* and *Casus Placitorum* are the earliest surviving witnesses to this course of study, dating to the 1250s or 1260s. The texts known as *Novae Narrationes* is probably derived from a later instantiation of this course in the 1280s or later. Elsie Shanks, “General Introduction” to *Novae Narrationes*, Selden Society vol. 80, (London:Bernard Quaritch, 1963), x. Milsom thought that the differences between *Brevia Placitata* and *Novae Narrationes*, namely that *Brevia Placitata* gives the form of the writ while *Novae Narrationes* does not, hinted that by the time *Novae Narrationes* was written down this course of study had been bifurcated into a preliminary course on writs, which used the register of writs as a textbook, and an upper-level course on counting and pleading. S.F.C. Milsom, “Legal Introduction” to *Novae Narrationes*, xxx.

to compose writs might not need to know very much about making an oral count—although there may have been some overlap.

Some of these contexts and audiences called for Latin and some for French. It is not surprising that a course on conveyancing—on drafting deeds and wills—would be conducted in Latin, given that the deeds and wills themselves were written in Latin. It is not surprising that the author of *Modus Componendi Brevia*, literally “The Manner of Composing Writs,” would write in Latin, since the writs were composed in Latin. In both cases, the treatise is written in the language of the underlying skill it teaches. Nor is it surprising that texts such as *Novae Narrationes*, *Brevia Placitata*, and *Casus Placitorum*, on counting and pleading, would be written in French, as the counting and pleading were conducted in French. Even *Brevia Placitata*’s French-language specimen writs make sense in this context; the text was probably aimed at *conturs*, who would need to know something about the writs so he could handle the pleadings for actions based upon them, but who would not need to be able to draft them.

While many authors appear to have chosen their language based on the subject matter of the treatise, there were certain legal genres that could appear in either Latin or French. There are a number of texts that focus on the process of securing the defendant’s appearance in court (although the emphasis they place on the possibilities for delaying the defendant’s appearance might invite a more cynical reading: that they are focused on how the ways in which the defendant may drag out the litigation for as long as possible). *Hengham Magna*, a Latin text of this type, was adapted into the French-language treatise *Fet Asaver*. Texts that are composed of a series of hypothetical cases seem to comprise another genre of treatise composed in the later thirteenth century. These could also be composed in either Latin or French. Thus, a text that exists in three manuscripts, and that is titled *Summa de Casibus* in one of them, is composed of a

series of hypothetical cases, some of which are in Latin and others of which are in French. There does not appear to be any rhyme or reason to which are in Latin and which are in French, and the treatise switches back and forth. The *Summa de Bastardia*, also composed of hypothetical cases, is written in Latin, but some manuscripts contain a few bits of French.⁴⁷

Subject matter may also be behind the practice, in some Latin texts, of switching to French when recording oral statements. The treatise known as *Hengham Magna* is an early example of this phenomenon. I have argued in previous work that we should probably think of *Hengham Magna* as an extension of the earlier tradition of legal literature exemplified by *Glanvill* and *Bracton*. It was likely written by a senior clerk of the Common Bench in the 1260s.⁴⁸ He had access to the *Bracton* treatise, very possibly from Henry of Bratton himself. There are certain ways in which *Hengham* reflects the high Latinate culture of *Bracton*. Although it does not revel in Romanism as *Bracton* does, its author does seem to have wanted to show off his own learning. The choice of language itself seems to have stemmed from a desire on the author's part to demonstrate that he was a learned man: *Hengham* is written in a difficult, showy Latin.⁴⁹ The Latin seems to be intended to make a point about the treatise and its author.

The matrix language of the treatise is Latin, but there are nine passages that are written in French.⁵⁰ All of them record speech acts that would have taken place in court. All are given in direct speech, giving the actual words that would have been spoken in court. Among those nine passages we find examples of exceptions, counts, and defenses, parts of the process that would

⁴⁷ Most manuscripts of the treatise contain one sentence in French. See, e.g., British Library Harley MS 1208, fo. 232v. Some copies contain a dictum of Justice Brompton at the end, in French. See Cambridge University Library MS Hh.4.1 fo. 141v

⁴⁸ Paul Brand, "Hengham Magna: A Thirteenth-Century English Common Law Treatise and Its Composition," in *The Making of the Common Law* (London: Hambledon, 1992) 378..

⁴⁹ McSweeney, "Creating a Literature," 44-45; Brand, "Hengham Magna," 384.

⁵⁰ Dunham, *Hengham*, 15, 20, 25, 29, 34, 35, 39, 41, 42.

have been conducted by the plaintiff's serjeant.⁵¹ But not all of the French passages deal with counting and pleading; the plaintiff's request that the court take the defendant's land into the king's hand is given in direct speech and in French, for instance, and that part of the process would probably have been handled by the party's attorney.⁵²

Every part of the treatise apart from these nine short passages is written in Latin. In most of these passages, after the author gives the language that would be spoken in court, in French, he then switches back to Latin to give the words the clerk would use to enroll what had occurred. On the plea rolls these French speech acts would be rendered into Latin, in indirect speech, and the author of the treatise is concerned to make sure he provides the proper form for that, as well. Indeed, the French passages themselves switch between French and Latin, largely retaining Latin as the matrix language of the text even when they present speech acts in French. In the following translation of one of the nine passages, I have italicized the portions of the text that appear in Latin:

*What is the ordo: such a one, Richard le Jay, proffers himself by his attorney against William Huse concerning a plea of land. William or his attorney says: William refuses this. Richard's contur says: Richard who is here lays before you this etcetera just as below and against everything else. William's contur answers thus: Tort and force etcetera William denies etcetera, and demands the hearing of the writ. With this writ having been read and heard, however, thus: We imparl with your leave.*⁵³

⁵¹ In one passage, the defendant excepts that he was not summoned according to the law of the land. Ibid., 15. Another passage, discussed below, gives us a sample dialogue that includes the defendant or his attorney, followed by the *conturs* giving their count and defense. Ibid., 34.

⁵² Ibid., 20.

⁵³ "Qualis est ordo: talis, Richard le Jay, se profre par son atorne vers William Huse de plai de terre. Dicit Willelmus vel eius attornatus: Veez ci William. Le contur Richard dirra: Ceo vous muster Richard qui ci est etcetera sicut inferius e contera tut outre. Le contur William respondira issi: Tort e force etcetera defende William etcetera, e demande la oye del bref. Lecto autem et audito brevi sic: Nus enparlerons a vos congez." Ibid., 34.

In this passage, although the author is presenting the speech acts in French, most, although admittedly not all, of the connecting material appears in Latin.⁵⁴ The author's concern may have been with preserving significant oral acts in the language in which they were made. The count and defense were formal oral acts that had legal effects. There does seem to have been a convention among treatise-writers that favored rendering French-language speech acts in French. At the very end of *Modus Componendi Brevia*, the author provides a very brief discussion of exceptions, in which he indicates that exceptions will be discussed below, perhaps in another treatise that was intended to be copied along with the *Modus*. The author then hints that that text will be in French, not in Latin, when he explains that

[B]ecause the custom of the realm of England is such that pleas before the justices are recited by *narratores* in Romance words, and not in Latin; on that account exceptions likewise are rendered in writings in the Romance tongue.⁵⁵

This may have had something to do with a sense that oral forms should be preserved in the original language, but it need not. Perhaps the authors of this text had some normative commitment to preserving oral forms just as they would have been spoken. It is just as likely, however, that the commitment to presenting counts and defenses in to French was about ensuring that the treatise was useful to its reader.

⁵⁴ Two of the manuscripts Dunham examined had even more of the connecting material in Latin than we see in the passage here. In those manuscripts. In one manuscript in place of "Richard's contur says," we find "Richard dicit hoc modo." Ibid., 34, n.5. Another has "et dicit narrator sic." Ibid., 34, n.6.

⁵⁵ "Sed consuetudo regni Angliae talis est, quod placita coram iusticiariis per narratores in romanis verbis, et non in latinis, pronunciantur; idcirco huiusmodi exceptiones lingua romana in scriptis rediguntur." Woodbine, *Law Tracts*, 162. This also suggests something about the author's imagined audience for the treatise. Although he says he is writing for chancery clerks, to teach them how to draft writs, he probably also anticipated that people studying to be serjeants would read his text, as they would need to know something of the writs as preparation for making counts based on those writs. He also assumes that those budding serjeants will be comfortable both in Latin and French.

The author of *Hengham Magna* does not seem to have been working from a normative position that speech acts needed to be preserved in the language in which they were spoken. He is not consistent in presenting speech acts—even particularly significant or formal ones—in French. There are passages in which the author represents what the parties are saying in Latin, both in direct and indirect speech.⁵⁶ Formal statements, such as the words a party should use to appoint an attorney are given in Latin and in direct speech, for instance, as are the words the summoners should use to summon a tenant.⁵⁷ Less formal conversations also appear in Latin. In two separate passages, the treatise gives us a script for an exchange between the prothonotary of the court, the defendant’s essoiner, and the plaintiff, again in Latin.⁵⁸ The passages appear to be crafted to give the reader a sense that they are reading the actual words that would be said in court, as the prothonotary asks where the parties are, and addresses them by name:

The prothonotary says to the crier: Bring forth the essoiner of Richard le Jay. The essoiner should answer: Here I am. Again the prothonotary: Where is William Huse? And if he has asked for the plaintiff he says similarly: Here I am. You, essoiner of Richard, pledge faith for having your warrantor here in the quindene of St. Michael, and you, William, save the same day with faith having been pledged in your hands or upon the rod of the crier. They both go out if they wish.⁵⁹

⁵⁶ For a passage in which the parties’ speech is represented in Latin and in indirect speech, as it would be on a plea roll, see *Ibid.*, 48, 18.

⁵⁷ *Ibid.*, 15, 18.

⁵⁸ *Ibid.*, 16, 28.

⁵⁹ “Dicat prenotarius clamatori: Exige essoniatores Ricardi le Jay. Respondeat essonator: Ecce assum. Iterum prenotarius: Ubi est Willelmum Huse? Ac si diceret petens qui similiter dicat: Ecce assum. Tu- essonator Ricardi, affida habendi warantum tuum hic a die Sancti Michaelis in xv dies, et tu, Willelme, serva eundem diem affidato in manibus vel super virgam clamatoris. Recedant utrique si velint.” *Ibid.*, 16

This looks like the work of someone who was fairly comfortable translating the French spoken in court into the Latin of the plea rolls. If the treatise was written by a senior clerk of the central courts, he would have had significant experience doing just that. At the very least, this shows us an author who, although he sometimes presented speech acts in French, did not think it was absolutely necessary to do so.

It may not, then, have been the desire to memorialize vernacular, oral acts in the vernacular that predominated. There are obvious practical reasons why parts of the procedure conducted in French should be written about in French. The courts had developed a technical terminology of pleading in French and it makes sense that pleaders would want to learn that terminology in the language in which they would actually be delivering the counts and pleadings. If they learned pleading in Latin, they would then have to go back and learn the conventional French terminology for words that appear regularly in the count and defense such as *injuria* (Fr. *tort*), *vis* (Fr. *force*), and *producit* (Fr. *profre*).⁶⁰ Counting and pleading required some precision; mistakes in the count could be fatal to the plaintiff's case.⁶¹ It would only be practical to teach them in the form in which they would be conducted.

IV. Mismatched Subject Matter

It is interesting that not every treatise aligns well with its subject matter. For the most part, treatises about how to draft charters and wills are written in Latin. For the most part, treatises on counting and pleading are written in French. Some groups of treatises, like those on process, can be written in either language, as can the “hypothetical case” genre. But sometimes

⁶⁰ See Brand, “Latin of the Early English Common Law,” 140-141.

⁶¹ Milsom, “Legal Introduction,” xxxii.

when the subject matter appears to call for French, the treatises are composed in Latin. There are several surviving treatises on counting and pleading, for instance, that are written in Latin.

The count was the opening oral statement of the plaintiff's case. This was an important part of the legal proceedings. A mistake in the count could be fatal to one's case, so the count needed to be precise and needed to align with the statement of the case made in the plaintiff's writ. Indeed, counting quickly became a professional activity; one of the groups of lawyers that emerged over the course of the thirteenth century was known as *conturs* or *narratores* after this function.

The practice of writing about counting in Latin had precedents in the literature of the late twelfth and early thirteenth centuries. Both *Glanvill* and *Bracton* contain sample counts, and all of these sample counts are presented in Latin translation, not in French. The most likely explanation for this is that Latin is the matrix language of both treatises. *Glanvill* predated the vernacular turn in legal literature by several decades and in the case of *Bracton*, where the authors were emulating texts of Roman law produced in the universities, it may not have seemed desirable to the authors to write in any language other than Latin. The authors of *Bracton*, moreover, do not seem to have been much concerned with the activity of the *conturs*. *Conturs* are never directly mentioned in the treatise, which addresses itself to justices and clerks of the royal courts, the people who would be translating the counts into Latin on the plea rolls. There are far fewer sample counts in the treatise than one might expect from a treatise of its size, written at a time when counting and pleading were becoming professional activities.⁶²

⁶² *Bracton* never directly acknowledges the existence of *conturs* in the royal courts, which is interesting in and of itself, given that there were certainly *conturs* working regularly in the royal courts at the time work on the treatise was begun in the 1220s, and quite a number of them by the time work on the treatise seems to have ceased in the 1250s. Paul Brand, *The Origins of the English Legal Profession* (Oxford: Blackwell, 1992), 50-65. There is some indirect recognition of *conturs*. While several of the sample counts in the treatise are given in the first person, as a litigant would have spoken them, others are given in the third person, as they would have been spoken by a *contur*. Ibid. 54; McSweeney, *Priests of the Law*, 63.

By the 1260s, 1270s, and 1280s, the decision to write a text about counting or pleading in Latin was much more of a conscious choice, as there were plenty of texts circulating by that time that discussed the topic in French, such as *Brevia Placitata*, *Casus Placitorum*, and *Novae Narrationes*.⁶³ They give sample counts and defenses in the French in which they would have been spoken, and expound them in the same language. And yet we have surviving texts of the later thirteenth century that discuss counting and pleading in Latin.

The *Articuli qui in narrando indigent observari* is a curious text. The text bears different titles in different manuscripts, but the title given above, which appears in some of the manuscripts, is a good indication of the contents. It translates as “the articles which need to be observed in counting.” It is a barebones text that provides very specific, practical advice on how to make a count:

And first concerning the writ of right. Of the size of the tenement with appurtenances in which vill. Of his right. Of his inheritance. Of time of peace. Of the time of which king. Of the taking of esplees to half a mark or more...⁶⁴

If we compare this to a specimen count for the writ of right in the B text of *Novae Narrationes*, we can see that the author is giving us a list of things that need to be mentioned in the count:

William de M., who is here, lays before you this: that John de C., who is there, wrongfully deforces him of one messuage, one carucate of land, ten acres of woodland, one hundred acres of pasture, one water-mill, and twenty shillings of rent with the appurtenances in N. and wrongfully because it is his right and his inheritance; and of it a certain ancestor of his, Richard by name, was seised in his demesne as of fee and of right,

⁶³ Brand, “Legal Education,” 59-60.

⁶⁴ *Articuli Qui in Narrando Indigent Observari*, BL MS Harley 1208 f. 133r.

in time of peace and in the reign of such a king, and took the esplees, as in rent of the messuage, in grain, in herbage, in sale of wood and underwood, in pasturing of cattle, in toll from the mill, in rents and arrears of rent, and in other manner of issues...⁶⁵

The *Articuli* seem to have been a companion to the text known as the *Exceptiones Contra Brevia* (“Exceptions Against Writs”), which is written in a similar style, albeit with more expository and linking material. The *Exceptiones* also give advice on how to make statements in court, statements that would have been given in French. It contains quite a bit of information on what a defendant can say when making an exception to the plaintiff’s count, and even presents sample language, albeit in Latin and in *indirect* speech. The author likes to use the phrase “*potest dici quod*” to introduce the kinds of things the serjeant could raise in his pleading: “It can be said (*potest dici quod*) that he ought not to answer because he never had common in such a pasture except through the will of the tenants.”⁶⁶ Why write texts such as these in Latin? French seems more appropriate to the subject matter involved and writing in Latin presumably narrowed the audience.

The *Articuli* and the *Exceptiones* can serve as useful examples of the kinds of uses Latin could be put to in the royal courts of the thirteenth century. Just as I have argued that we should probably think of the common law as consisting of a number of different skills, not all of which would have been studied by every person who needed to know something of the law, it is

⁶⁵ “Ceo vous moustre W. de M. ke ci est qu Johan de C. ke illoqes est atort lui deforce vn mies, vne carue de terre, x. acres de Bois, C. acres de pasture, vn molyn eweret et .xx. souz de rente oue les appurtenanz en N. Et pur ceo atort qe ceo est sun droit et sun heritage et dount vn soen auncestre, Richard par noun, en fust seisi en sun demeine com de fee et de droit en temps de pees et en tempts de teu Roi les espleez enprist com en lowage de mies, en bleez, en herbage, en vente de bois et de suthbois, en pessant ces auers, en tolnu de molin, en rentes et en arrerages de rentes, et en alter manere de issu...” Shanks and Milsom, *Novae Narrationes*, 25.

⁶⁶ “Potest dici quod non debet respondere quia nunquam habuit communam in tali pastura nisi per voluntatem tenentium.” *Exceptiones Contra Brevia*, BL MS Harley 1208, f. 127r.

important to remember that knowledge of the Latin language also consisted of a number of different skills. A person who could read Latin could not necessarily write it. A person who could write Latin could not necessarily speak it. A person who could not say anything much more profound than “Where is the Library?” off the cuff might be able to give a Latin oration, such as a sermon or a lecture, from a prepared text or be able to comprehend a decent amount of spoken Latin. We need to think about the context in which these texts were produced. Indeed, Patrick Philbin has suggested that the *Articuli* and the related *Exceptiones Contra Brevia* might have originated as a lecturer’s notes.⁶⁷ People in the later thirteenth century were looking everywhere for texts on practice in the royal courts, even in the private letter that was adapted into *Judicium Essoniorum*. It is entirely plausible that someone found a set of notes left by a lecturer and decided to copy them into a statute book to use as an elementary treatise. Philbin thought that the barebones nature of this text could be explained if we think of it as a point of reference that the lecturer could elaborate on when he delivered the lecture. If Philbin is correct, we have to ask what language the lectures themselves were given in. Are these texts evidence of a course on counting and exceptions that was given in Latin?

Probably not. If these were Latin lecture notes for a lecture delivered in Latin, the lecturer and his audience would have had to be a high-brow lot. A lecturer working from notes such as these, which would have required him to fill in quite a bit on the spot, would have required Latin skills that few people probably had in thirteenth-century England. Julie Barrau has made a convincing argument that even among monks, people who were exposed to Latin on a daily basis, full conversational fluency in Latin was probably much more limited than we generally

⁶⁷ Philbin, “Exceptiones Contra Brevia,” 146.

think.⁶⁸ French was often used as the language of political debate, even when the debate revolved around a Latin-language document. The early drafts of the Provisions of Westminster of 1259 were written in French, even though the final version was produced in Latin.⁶⁹ Elisabeth van Houts analyzes an episode in which the prior of a religious house in Rouen, writing to Thomas Becket about a meeting he had with the Empress Matilda to discuss the Constitutions of Clarendon, said that “she ordered us to read them in Latin and explain them in French (*precepit nobis eas latine legere et exponere gallice*),” suggesting that the Empress could understand spoken Latin, but probably not so well as she understood French.⁷⁰ She then proceeded to discuss the Constitutions with the cleric, but in French rather than in Latin. It may be that the only spaces in which Latin was regularly spoken in England were the universities. Some of the earliest college statutes at Oxford and Cambridge forbid students, upon pain of fine, to speak in any language other than Latin.⁷¹ But even in the universities, the drafters of college statutes appear to have assumed that many members of the university community would not be fully fluent in spoken Latin.⁷²

Not all speech in Latin was extemporaneous, of course. When the prior read the Constitutions of Clarendon to the Empress Matilda, he was reading from a text. Latin sermons were usually given from prepared texts and lectures in the schools probably were, as well. There were presumably people who had the skill to compose in Latin and then to read from that prepared script who would not have been able to carry on a deep conversation in Latin, although

⁶⁸ Barrau produces evidence that the ability to converse in Latin was restricted to a small elite in most monasteries. Julie Barrau, “Did Medieval Monks Actually Speak Latin?,” in Stephen Vanderputten, ed., *Understanding Monastic Practices of Oral Communication (Western Europe, Tenth-Thirteenth Centuries)* (Turnhout, Belgium: Brepols, 2011), 293.

⁶⁹ Paul Brand, *Kings, Barons, and Justices*, 93; Elisabeth van Houts, “The Abbess, the Empress, and the ‘Constitutions of Clarendon,’” in *English Legal History and its Sources: Essays in Honour of Sir John Baker*, 260.

⁷⁰ Van Houts, “Constitutions of Clarendon,” 256.

⁷¹ Robert Swanson, *Elephants in Camera: Latin and Latinity in 15th- and Early-16th-Century England*, 115

⁷² *Ibid.*

if the *Articuli* and *Exceptiones* were lecture notes that required the lecturer to fill in on the spot, they would have required a lecturer with the skill to speak Latin off the cuff.

If the lectures were given in Latin, that would also have required an audience that could understand it. Presumably the ability to understand spoken Latin was at least somewhat more widespread than the ability to converse in it. We do know that some *conturs* had studied in the universities and therefore would likely have had the ability to both understand and speak Latin.⁷³ The number who had attended the universities does not appear to have been large, however, and a lecture course on counting in Latin still presumably would have had a smaller and more rarified audience than a lecture course in French. If Latin was as widely understood as French, then why translate the writs into French in a text such as *Brevia Placitata*, which appears to have originated as a lecture?

Of course, the fact that the notes were kept in Latin does not necessarily indicate that the lectures were given in Latin. It is possible that the *Exceptiones* and the *Articuli* were intended to be conveyed in French. That would indicate that the lecturer had a high level of Latin comprehension, but it would not require him to be a fluent speaker of Latin. This is not entirely out of the realm of possibility. In the thirteenth century sermon collections circulated in Latin. This allowed for their transmission in different parts of the world, where different vernaculars were spoken. The Latin would then be translated into the local vernacular when the sermon was delivered, perhaps extemporaneously, or perhaps from some notes prepared in the vernacular.⁷⁴ In the case of the *Articuli* and the *Exceptiones*, there is an added level of complication, because the topic being discussed in the lectures is counting and pleading. The lecturer would not only

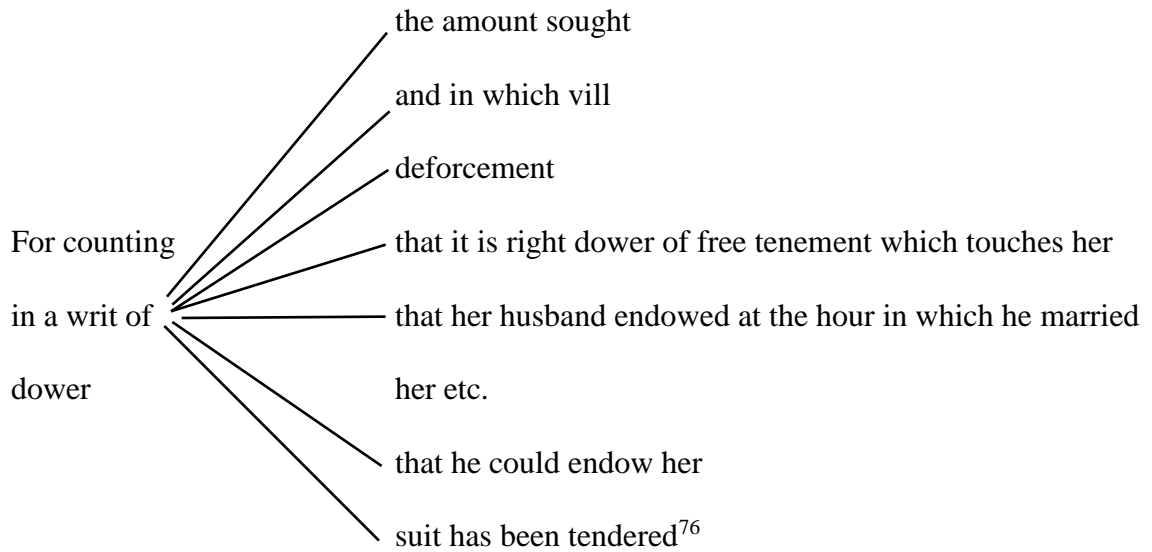
⁷³ Brand, *Legal Profession*, 155.

⁷⁴ D.L. d'Avray, *The Preaching of the Friars: Sermons Diffused from Paris before 1300* (Oxford: Clarendon Press, 1985), 94, 95, 103, 128.

have had to translate from Latin to French, but would also have to give the count in an accurate form, of a kind that would be acceptable in court. Of course, if the lecturer was an experienced *contur* who had given many counts in court, he may have committed the forms of counts to memory, and have been able to reproduce them from memory.

It is also possible that the *Articuli* and the *Exceptiones* were not lecture notes at all. Philbin thought it unlikely that they were a student's *reportatio* of a lecture—a genre of text that was familiar in the universities, in which a student took down an extensive transcript of the lecture—because they are recorded in such a barebones fashion, but the skeletal nature of the *Articuli* does not exclude the possibility that they are a student's *reportatio*; sermons were often written down in outline form, even in *reportationes*.⁷⁵ The student may not have intended to give a full, verbatim report of the lecture. People do seem to have thought Latin was a useful language for taking notes in the middle ages, even when recording vernacular speech, and it would have been fairly easy in this case, with simple Latin phrases as reminders of what needed to be included in the count. Indeed, there are surviving copies of the *Articuli* laid out in diagrammatic form that actually look like they could be a student's notes:

⁷⁵ Ibid. 95.



Latin note-taking, even in diagrammatic form, was not uncommon in the thirteenth century. As mentioned above, the clerks of the courts recorded the oral transactions of the court in Latin on the plea rolls. Vernacular sermons were sometimes taken down in Latin by members of the audience.⁷⁷ Even the Latin outline format we find in the *Articuli* and the *Exceptiones* was not an uncommon way to report vernacular speech acts. Again, reports of sermons, taken down by listeners, not the speakers themselves, are sometimes written in outline form.⁷⁸ Richard Britnell, in his study of medieval English borough records, found that town clerks tended to prefer Latin when they had the choice.⁷⁹ Notes-to-self and memoranda were generally written in Latin. French was reserved for particular types of texts, such as diplomatic letters.⁸⁰ The fact that some people were inclined to keep their own notes in Latin also raises the possibility that the *Articuli*, and the related *Exceptiones Contra Brevia*, were not derived from lectures at all. They

⁷⁶ Cambridge University Library MS Dd.7.6., fo. 29. I have maintained the formatting of the Latin text.

⁷⁷ D'Avray, *Preaching of the Friars*, 94.

⁷⁸ *Ibid.* 95.

⁷⁹ Richard Britnell, "Uses of French Language in Medieval English Towns," *Language and Culture in Medieval Britain: The French of England c.1100-c.1500*, ed. Jocelyn Wogan-Browne et al. (York: York Medieval Press, 2009), 82-3.

⁸⁰ *Ibid.* Although clerks did not always have good Latin. The clerk who composed the sole surviving manuscript of the treatise *Lex Mercatoria* badly mangled the Latin. Mary E. Basile et al., eds. *Lex Mercatoria & Legal Pluralism: A Late Thirteenth-Century Treatise and its Afterlife* (Cambridge, MA: Ames Foundation, 1998).

may simply have been a *contur*'s own notes on what to include in various types of counts, written down as a reference for his own purposes.

The people who copied these texts into statute books appear to have been drawing from many different types of texts, looking for them virtually wherever they could find them. It is entirely plausible that someone found a set of notes, whether derived from a lecture or not, that was then incorporated into a statute book as a tractate. The reasons why a text was written in either Latin or French may, therefore, have been idiosyncratic, tied to the context in which the text was created rather than in a strong set of norms about which language was superior for a particular purpose. Some may have written in Latin because the subject-matter seemed to call for it. Others may have written in Latin because they preferred to take notes in Latin. Some, however, seem to have had what might be described as cultural or even political reasons for choosing Latin.

V. Different Registers of Latin

The *Articuli* give us some purchase for thinking through the roles that Latin might have played in the culture of the royal courts of the thirteenth century. It may have been spoken by some of the attorneys, clerks, *conturs*, and students who were involved in the educational structures of the early common law, but it was more likely to be found in written contexts, and at times probably reflected an underlying French-language discussion, debate, or lecture. The Latin that we see in the *Articuli* and the *Exceptiones* is fairly simple. This Latin would not have been difficult for a person with even a rudimentary knowledge of Latin to read or write. But not all Latin was created equal. Patrick Geary has developed a useful framework for thinking about Latin in Carolingian Francia, a framework that might be helpful for thinking about the roles that

Latin played in thirteenth-century England. Geary posits that three Latin registers were in regular use in Francia: 1) the type of Latin that was being spoken by the ordinary people, 2) a written Latin that was used in formal documents, and 3) a newly (re)constructed classical Latin, spoken by lay and clerical elites around the imperial court. As elites began to adopt a high-register classical Latin, non-elites became more aware that the ordinary spoken Latin had diverged quite a bit from written Latin, causing them to think of the spoken Latin as a separate Romance language.⁸¹ I am more interested in the relationship between the other two registers, the documentary Latin and the classical Latin. These two registers were both recognizably Latin. The documentary form, as a living language that had been developing for several centuries, had adopted new, non-classical vocabulary and grammatical structures. More importantly, people who could read and write the documentary Latin could not necessarily write, speak, or even easily read or understand Latin of the neo-classical register.

This framework may help us to think through the role Latin played in thirteenth-century England. There were likely a number of people in every community in England who could write in Latin, and even more who could read it. But the Latin these people were dealing with was a particular type of Latin. Writs and plea rolls are formulaic and not terribly difficult to read. The sentences are generally short and do not usually contain multiple subordinate clauses. They do have a technical vocabulary, but it may have actually aided in language acquisition, as readers and writers of these texts only needed to learn a limited vocabulary. This Latin is similar to Geary's middle register, the documentary Latin of the clerks. It is not clear that people who could read that type of Latin could easily read the scholastic Latin that one finds in works of law and theology produced in the universities, or a text such as *Bracton*, that employs the same kind

⁸¹ Geary, *Language and Power*, 64-66.

of style and register. We have surviving evidence that laymen often had some degree of literacy in Latin, and also that they were not expected to have too much. H.G. Richardson and G.O. Sayles cite a number of examples of landholders, some very humble, who appear to have written their own responses, in Latin, to administrative requests. The Latin is very simple, however.⁸² And as Ralph Turner points out, Gerald of Wales begins one of his works with an apology for its simple style, which he claims he adopted so it could be read by “laymen and princes not too well grounded in letters.”⁸³

This administrative register of Latin was heavily inflected with French. The Latin terminology of the plea rolls is full of Latinizations of French terms, such as the decidedly non-classical verb *warrantizare*. This likely would have made it easier for a French-speaker to understand. Many of the Latin treatises of the thirteenth century confine themselves to this formulaic, French-influenced register of Latin. The texts on conveyancing that survive from the thirteenth century are more in the form of formularies than treatises; they mostly contain texts of different forms of charters, with very little (and very simple) linking material.⁸⁴ Even treatises that contain more explanatory and expository material, such as the *Articuli*, the *Exceptiones*, the *Summa de Bastardia*, the *Summa de Casibus*, and the *Modus Componendi Brevia* could be described as being written in fairly easy Latin. They seem to have been written for readers who used Latin for administrative purposes, but who may not have been able to read a schools text.

⁸² Richardson and Sayles, *Governance of Medieval England*, 275.

⁸³ Quoted in Turner, 129.

⁸⁴ The texts produced in the fourteenth century and later are more elaborate. A whole series of lectures by Thomas Sampson, apparently a lecturer on conveyancing in Oxford, survives from the second half of the fourteenth century, and contains much more connecting material. Baker and Ringrose, *English Legal Manuscripts*, xxx. As noted above, this course of study, sometimes referred to as the “Oxford Business School,” was not directly connected to the university, although it may have shared students in common with it, and may have had its origins in the twelfth century. It appears to have been designed to teach the skills necessary to be a clerk or steward. Students were taught how to draft letters, deeds, and wills, and seem to have received some basic instruction on proceedings in both secular and ecclesiastical courts.

The Latin of these treatises borrows from French. One of the most curious features of these short, simple Latin treatises is that the French definite article makes appearances in most of them. The author of *Modus Componendi Brevia* discusses writs of *quod permittat*, which were used to claim rights in common. The courts distinguished between writs of *quod permittat* that were based on the plaintiff's own seisin of the common rights, which contained the verb *solet* ("he is accustomed to") and writs of *quod permittat* that were based on the seisin of the plaintiff's ancestor, which contained the verb *debet* ("he ought to").⁸⁵ When the author of *Modus Componendi Brevia* discusses the use of the word *solet*, he marks the word *solet* with the French definite article: "*Et si in brevi ponatur le solet, vel in eo omittatur, secundum quod conquerens de seisina propria aut de seisina antecessoris sui heres ipse est, voluerit narrare.*" ("And whether the *solet* is placed in the writ or is omitted from it according to whether the plaintiff wishes to count concerning his own seisin or concerning the seisin of his ancestor, whose heir he is").⁸⁶ Here, the French definite article is being used to clarify the use that's being made of a Latin word in a Latin sentence. When the author of *Modus Componendi Brevia* says "*in brevi ponantur le solet,*" he's using the definite article to signal that *solet* is not being used as a verb in this sentence. It is, rather, an indeclinable noun. The author is talking about the *word* *solet*.

The author of *Modus Componendi Brevia* is not alone in doing this. The use of *le* before indeclinable nouns is commonplace in the Latin treatises of the common law. The author of *Exceptiones Contra Brevia* twice refers to a writ of *quod permittat* that contains the word *debet* as "*le debet.*"⁸⁷ Writs of entry also required this kind of precision. These were writs in which the

⁸⁵ Writs "in the *solet*" contained the verb *solet* to show that the plaintiff himself was accustomed to use the common right he was claiming. Writs "in the *debet*" did not assert that the plaintiff was himself accustomed to have the common right, but only that he was owed it. Milsom, "Legal Introduction," lxxxiv-lxxxv.

⁸⁶ Woodbine, *Legal Treatises*, 158.

⁸⁷ ECB transcription, 5, 9. On 5 it's "del debet"

plaintiff claimed that the current tenant of the land, or his ancestor or grantor, had entered the land, in most cases legally, but that the tenant was now claiming a greater right than he actually had. An example would be if the tenant of the land had entered lawfully for a term of years, but that term of years had ended. The writs contained different phrases depending on how many generations had passed since the entry. For entries that had been made within a set number of generations—and contemporary texts differ on exactly how to count them—the writ would recite all of the various alienations from the person who made the original entry to the current tenant of the land and would also recite the descent of the right of the land from the original grantor to the current plaintiff in the case. This would be called a writ “in the *per*,” because the word *per* (through) was used in the writ to show that the tenant had entry *through* a certain person.⁸⁸ If too many generations had passed, however, the plaintiff would bring a writ that simply stated that the tenant had taken title after (*post*) some earlier entry, without spelling out exactly how the land and the right to it had descended.⁸⁹ Such a writ was said to be “in the *post*.” Both *Exceptiones Contra Brevia* and the *Articuli* speak of the “breve del *per*”⁹⁰ and the “breve del *post*” to distinguish these types of writs of entry.⁹¹ The manuscripts of these treatises additionally use the definite article to mark the Latin names of writs. Both *Exceptiones Contra Brevia* and *Divisiones Brevium* refer to “le quod permittat” and the “breve del quod permittat” and the *Divisiones* also refers to “le quare impedit.”⁹²

This kind of importation of a Romance definite article into Latin was not entirely unusual in the thirteenth century. A sort of definite article featured in scholastic Latin. Theologians used

⁸⁸ Milsom, “Legal Introduction,” cxxxiv-cxxxv; Philbin, “Exceptiones Contra Brevia,” 139.

⁸⁹ *Ibid.*

⁹⁰ British Library Harley MS 1208, fo. 126v (*Exceptiones Contra Brevia*), 133r (*Articuli*).

⁹¹ *Ibid.*

⁹² British Library Harley MS 1208, fo. 127r (*Exceptiones Contra Brevia*), 138v, 139r (*Divisiones Brevium*).

li, *ly*, or *lu* for the same sorts of purposes we find *le* used for in these texts about English law, to indicate “that a term or word is being discussed precisely as a term or word.”⁹³ It could even be that authors of texts on the common law picked up this admittedly useful practice from works produced in the faculties of arts or theology in the universities. There is an interesting divide when it comes to the use of *le* in texts of the common law, however. I have not found it in *Bracton*, *Fleta*, or *Thornton*, the Latin-language treatises that most directly mimic the forms of scholastic texts. Perhaps this is a sign that *le* came from a different register of Latin, more heavily inflected with French from the Francophone context in which it arose.

Le was conscripted for other purposes in Latin texts of the period. Scholars have noted that in texts of the 14th and 15th centuries, *le* is sometimes used to signal a switch from the matrix language of the text to another language; in Latin-language texts, it is, at times, used to signal a switch to French or even English, even when a *le* is grammatically superfluous or incorrect in the context.⁹⁴ In these cases, it seems to have been adopted because the writers of the Latin texts were working in a Francophone context. I think it likely that the same was true of the use of *le* in these Latin texts on the common law.

VI. The Politics of Latin

Not all Latin was of the administrative register, however. Some of the Latin treatises used much more complex syntax. Here I would like to offer a hypothesis: at least some of the people who wrote treatises in Latin did so for what we might call cultural or political reasons. They

⁹³ Dylan Schrader, *The Shortcut to Scholastic Latin* (Padeia Institute, 2019), 27, 28.

⁹⁴ Laura Wright, “A Pilot Study on the Singular Definite Articles *le* and *la* in Fifteenth-Century London Mixed-Language Business Writing,” in Richard Ingham, ed., *The Anglo-Norman Language and its Contexts* (Woodbridge, Suffolk: York Medieval Press, 2010), 130-142; David Trotter, “Bridging the Gap: The (Socio)linguistic Evidence of Some Medieval English Bridge Accounts,” in Richard Ingham, ed., *The Anglo-Norman Language and its Contexts* (Woodbridge, Suffolk: York Medieval Press, 2010), 52-62; Britnell, “Uses of French,” 88.

wrote in Latin to make a point about the common law as a learned discipline, to connect it to other fields of study that had prestige, and to differentiate it from fields such as estate management, which were developing in French.

Using Latin as a medium could signal that one's treatise was a work of learning. The treatises produced in the universities by scholars in the faculties of theology, law, medicine, and the arts were written in Latin, which had become the medium of scholastic discussion. Latin, therefore, had a certain degree of prestige as a learned language. Perhaps this was the reason why some of the authors of the later thirteenth century used Latin even in contexts where French seemed to be called for. The author of a treatise on pleading in the courts of Lincoln, which survives in a single manuscript, may simply have been trying to show off when he translated his sample counts into Latin (and in direct speech, not the indirect speech of the plea rolls), but some authors took what looks like a more deliberate approach to presenting their treatises as works of learning.⁹⁵ Some of the treatises use a register of Latin that would likely have been perceived as more scholarly and more prestigious than the administrative Latin that we find in the treatises discussed above. Several of the treatises of the later thirteenth century are more heavily inflected with the vocabulary of Roman law than with that of the plea rolls. *Hengham Parva*—a Latin-language text of the 1280s that, unlike *Hengham Magna*, was probably written by the justice Ralph de Hengham—generally uses the Roman terms *actor* and *reus* for plaintiff and defendant, rather than the *petens* and *tenens* that had become conventional in the usage of the royal courts.⁹⁶

⁹⁵ British Library Add MS 38821, fos. 121v-123v.

⁹⁶ Dunham, *Hengham*, 50, 53, 59, 64. At the very least, the attribution to Hengham has not yet been challenged. At one point the treatise speaks of the “*tenens*, who is called *reus*,” noting the English equivalent for the Roman term. *Ibid.*, 64. *Hengham Magna*, which it is important to remember was probably a work of the early 1260s, does something even more interesting. It uses both the Roman *actor* and *reus* and the *petens* and *tenens* used in the English royal courts. More often, however, it mixes the two and describes plaintiff and defendant as *petens* and *reus*, taking half from the Roman vocabulary and half from the English. This is reminiscent of David Seipp's observations that lawyers of the later thirteenth century tended to distinguish between writs of *right* and writs of *possession*, taking half of the English binary of *right* and *seisin* and half of the Roman binary of *ownership* and *possession*.

Hengham even uses the Roman definition of a *iudicium* as the act of three people, *actor*, *reus*, and *iudex*, a definition which appeared in a number of works on Roman law that would have been available at the time, as well as in the *Bracton* treatise.⁹⁷ It also employs the Roman-law distinction between real and personal actions.⁹⁸ The French-language *Fet Asaver* and a set of French-language lectures on the common law given in the late 1270s instead replaced with the distinction between writs of land and writs of trespass.⁹⁹ It could be that some of these Roman-law terms were just becoming commonplace in the common law at this time. As David Seipp has pointed out, the *actor-reus-iudex* definition appears in the French-language *Mirror of Justices* and probably even provides the structure for part of the treatise.¹⁰⁰ But still, *Hengham*'s use of this tripartite division of the *iudicium* probably would have signaled to a reader that the work was one of learning.

The appropriations of Roman-law in these treatises rarely run very deep; it is nothing like the kind of commitment to Roman law and its methods that we find in *Bracton*.¹⁰¹ But even if these uses of Roman law were fairly superficial, the authors might have used Roman legal terminology to signal that they wanted their readers to perceive the common law as a learned discipline. The Romanisms are one part of the broader register of the Latin in these texts, which

David J. Seipp, "Roman Legal Categories in the Early Common Law," in *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference* (London: Hambledon Press, 1989), 9, 22, 25-26; McSweeney, *Priests of the Law*.

⁹⁷ Azo, *Summae Codicis... (Institutionum et Digestorum) & Brocardica* (Vico Verlag 2008), reprint of *Summa Azonis Sive Locuples Iuris Civilis Thesaurus* (Venice 1581), 158 (commentary on Cod. 3.1.3). William of Drogheda, *Die Summa Aurea des Willhelmus de Drogheda*, ed. Ludwing Wahrmund (Wagner, 1914), 180; *Bracton* 2:302, 4:179. At 4:340, *Bracton* actually replaces the *actor* and *reus* with the *petens* and *tenens* in this formulation.

This distinction even does some work in *Hengham Parva*. *Hengham* discusses cases where judgment failed because one of these three people was lacking and even discusses real cases heard before the king's justices in these terms. Dunham, *Hengham*, 64

⁹⁸ Dunham, *Hengham*, 53.

⁹⁹ Woodbine, *Law Tracts*, 53; British Library Lansdowne MS 467 fo. 143r.

¹⁰⁰ David J. Seipp, "The Mirror of Justices," in *Learning the Law: Teaching and the Transmission of English Law 1150-1900*, ed. Jonathan A. Bush and Alain Wijffels (London: Hambledon, 1999): 85-112, at 92.

¹⁰¹ See McSweeney, *Priests of the Law*, chapter three.

is more difficult and sophisticated than that found in texts such as the *Articuli* or the *Exceptiones*. *Hengham Magna* is well-known for its showy style. Its author began the treatise with an introduction that is composed of a single long, complex sentence and used impressive-sounding Latin words, such as *aliquantisper*, which are only attested a few times in the entire corpus of Latin texts.¹⁰² *Hengham Parva*, although somewhat more spare, still tends to favor a more complex sentence structure than the treatises examined above.¹⁰³

The authors of several of the treatises found other ways, apart from their choice of vocabulary, to signal the learned nature of their subject. Some mimicked the styles of the universities. *Divisiones Brevium*, a text written between 1275 and 1285, begins with a typical scholastic introduction, asking of the writ of right, what is its *modus, causa, titulus, effectus*, and *intentio*.¹⁰⁴ It is the type of introduction one would find in any work produced in the schools in the arts, medicine, law, or theology.¹⁰⁵ *Divisiones Brevium* and *Hengham Parva* both proceed by categorization, a common strategy in schools texts, rather than taking the reader through the process for a sample plea, as some other texts of the time do.¹⁰⁶

¹⁰² Brand, "Hengham Magna," 383-384; McSweeney, "Creating a Literature," 47.

¹⁰³ These treatises were popular with the compilers of statute books, which may tell us something about the reading ability of the consumers of those texts. It is worth noting that the experience of reading one of these texts from a statute book differs substantially from reading a modern critical edition. The case endings of nouns and adjectives are often not expanded, and abbreviations are often even more severe than that. In many cases, this leads to ambiguity as to the precise meaning of the text. Sometimes endings are expanded, but expanded incorrectly (hinting that the text was copied from one that originally cut off the endings). This kind of ambiguity of meaning hints that readers were probably not reading these texts for precise meaning, but for general impressions.

¹⁰⁴ British Library MS Harley 1208 fo. 137r. Paul Brand has suggested that *Divisiones Brevium* might have been created on the fringes of the universities. Brand, *Courtroom and Schoolroom*, 73. In other words, it might have been created as part of a course on common law given for students studying in Oxford or Cambridge, to introduce them to common law in language that was familiar to them. *Ibid.* This is certainly one possibility, but I do not think the author would have needed to be around the schools for too long to pick up the elements of the treatise that make it look like a work of the schools.

¹⁰⁵ Alastair Minnis, *The Medieval Theory of Authorship: Scholastic Literary Attitudes in the Later Middle Ages* (2nd edition, Philadelphia: University of Pennsylvania Press, 2012). *Bracton* has a similar introduction. *Bracton*, 2: 20.

¹⁰⁶ See Dunham, *Hengham*, 55; British Library Harley MS 1208 fo. 137r.

For some, then, the decision to write in Latin was probably designed to make a statement about the text and about the common law more generally: that it was worthy of being considered a learned discipline, on par with Roman and canon law, the laws studied in the universities. Latin did not necessarily correlate with the kind of prestige these authors were looking for. Latin was the language of administration and documents, as well. But a certain register of Latin, combined with other marks of learning, could signal that the knowledge contained in the text was a particularly prestigious form of knowledge. This was certainly part of the impetus behind the *Bracton* project. The authors of *Bracton* not only packaged their text on “English laws and customs” as a *summa* of the style written by the doctors of Bologna; they also tried to demonstrate that the laws they administered in the king’s courts could be reconciled to Roman law.¹⁰⁷ They sought to borrow some of Roman law’s prestige for their own work. It would seem significant, then, that many of these Latin treatises were being written around the same time that we can see renewed interest in *Bracton*.

The fifty-two surviving manuscripts of *Bracton* all date to the late 1270s onward.¹⁰⁸ This has always posed something of a puzzle to historians. The 1270s, 1280s, and 1290s were an odd time for people to start copying *Bracton* manuscripts in large numbers. By the 1270s, *Bracton* was so out-of-date that it was just as likely to mislead as to illumine. The version of *Bracton* that began to be copied in the 1270s had been updated to include changes in the law brought about by the Provisions of Merton of 1236, but it was completed before the major changes brought about by acts such as the Statute of Marlborough of 1267 and the First Statute of Westminster of

¹⁰⁷ See McSweeney, *Priests of the Law*, Chapter 3.

¹⁰⁸ See *Bracton*, 1: ix-x. McSweeney, *Priests of the Law*, 67. None of the surviving manuscripts appear to be closer than three generations removed from the original source text. *Bracton*, 1: 24.

1275.¹⁰⁹ We do not find the first mention of *Bracton* until 1278, when Robert of Scarborough, a chancery official and future chancellor himself, wrote that he had borrowed “the book which Lord Henry of Bratton composed” from Master Thomas Bek, a royal official and former chancellor of the University of Oxford, who was acting as agent for the chancellor, Robert Burnell.¹¹⁰ A few people of high rank within the chancery were obviously interested in *Bracton* in the late 1270s. And we have evidence that some people within the royal courts were interested in it by at least the 1290s. In 1294, the chief justice, John of Mettingham, told a serjeant who could not give him a satisfactory answer on a point of law “go to your *Bracton*, and it will teach you.”¹¹¹

Although there appears to have been ample interest in the unedited version of *Bracton* in the 1270s, 1280s, and 1290s, we find further evidence of interest in the treatise in the attempts to update the treatise in the 1280s and 1290s. The prominent serjeant and future justice Gilbert de Thornton was probably working on his epitome of *Bracton* by 1285.¹¹² *Fleta*, a second epitome of *Bracton*, was written around 1290.¹¹³ We admittedly do not have evidence for a wide circulation for either of these treatises. Only one full manuscript of *Fleta* exists today.¹¹⁴ We know of only two manuscripts of *Thornton* that existed at one time.¹¹⁵ The Latin epitomes may not have been very popular.¹¹⁶ Indeed, the most popular reworking of *Bracton* was the French-

¹⁰⁹ Some copyists or owners of *Bracton* manuscripts added marginal annotations on the statutes in an attempt to bring it up to date. See, e.g., British Library Harley MS 653. *Bracton*, 1:9.

¹¹⁰ McSweeney, *Priests of the Law*, 67.

¹¹¹ Lincoln’s Inn MS Misc 738 fo 121v, quoted in Brand, *Legal Profession* (n 2) 113;

¹¹² Anne L. Spitzer, *The Summa de Legibus of Gilbert de Thornton* (Ph.D. dissertation, Harvard University), 31.

¹¹³ The author may have been working on it in the 1280s, however. G.O. Sayles, *Fleta, Vol. 4, Book V and Book VI* (Selden Society vol. 99; London: Selden Society, 1984), xv.

¹¹⁴ British Library Cotton MS Julius B.viii. A few passages also appear in BL Cotton MS Nero D.vi.

¹¹⁵ The only surviving manuscript currently resides at Harvard University. John Selden quoted extensively from another, somewhat different, manuscript. A manuscript of *Bracton* at Lincoln’s Inn Library appears to be Thornton’s first draft. S.E. Thorne, “Gilbert de Thornton’s *Summa de Legibus*,” *University of Toronto Law Journal*, vol. 7 (1947): 1-26, at 1-6.

¹¹⁶ There is some circumstantial evidence for *Thornton*’s circulation. A surviving copy of *Britton* says in its introduction that “This is the Bracton, which Sir Gilbert of Thornton translated from Latin into French.” This seems

language *Britton*.¹¹⁷ These Latin epitomes do appear to show, however, that there was renewed interest on the part of authors in creating large, systematic, Latin-language treatises in the later thirteenth century. And we should not lose sight of the zeal with which *Bracton* itself was being copied; it survives in more manuscripts even than *Britton*.

Bracton, *Thornton*, and *Fleta* are not merely expository texts. To write a scholastic work about the common law was to make a political point about the status of the common law. The authors of texts such as *Hengham Magna*, *Hengham Parva*, and *Divisiones Brevium* may have been trying to make the same point. They may have been part of a movement to make the common law look more like the subjects studied in the schools, and to assert the common law's prestige as a field of study. But why would this become a salient issue in the 1280s and 1290s? Why would people start copying *Bracton* then, and why would Justice Mettingham expect a serjeant practicing before him to know his *Bracton*?

This can only be a hypothesis, but I think it is possible that what we are seeing in the higher-register texts of the 1280s and 1290s is a reaction against new forms of professionalization. The authors of these texts, written in what contemporaries would have perceived as a prestigious register of Latin, were trying to differentiate their texts not only from French-language texts, but also from Latin-language texts written in the administrative register, to demonstrate that common law was not some mechanical form of administration that could be practiced with an administrator's grasp of Latin, learned on the job. I have argued elsewhere that *Bracton* was an inward-looking project. It was written by justices and clerks of the royal courts, for justices and clerks of the royal courts. Its authors viewed justices and clerks as the only types

to suggest that Thornton was known as a treatise-writer, even the scribe was confused about what he had written. CUL Add. MS 3584, fo. 3r.

¹¹⁷ *Britton* exists in over forty surviving manuscripts. Baker and Ringrose, *English Legal Manuscripts*, 63.

of legal professionals who really counted. The text addresses itself to clerks who are studying to “ascend the judgment seat” and, as noted above, it never directly acknowledges the existence of *conturs*.¹¹⁸ It also insists on a certain type of training and education for clerks aspiring to be justices. They should be educated in Roman law. *Bracton* presents a vision of the people who should staff the king’s courts going forward.

As work on *Bracton* progressed, it must have become obvious that this model was not the only model of professionalization within the royal courts. The *conturs* and professional attorneys were becoming a more significant presence, particularly after 1250. Although some of them were trained in Roman law, the predominant model for these lawyers was not one that the *Bracton* authors likely would have appreciated. Plucknett posited that, as part of the shift from the “Latin, Roman, and clerical” to the “French, insular, and lay,” by the 1260s “law and business are sharing the services of a new class of lettered laymen” and that what we are seeing is not yet “a profession of legal specialists whose work is entirely and strictly legal.”¹¹⁹ There was much overlap between the work of *conturs* and attorneys, on the one hand, and clerks and estate stewards, on the other. Stewards were usually responsible for presiding over the lord’s manor courts, for his lesser tenants.¹²⁰ From at least the middle of the thirteenth century, it became common for stewards to attend the county courts in place of their lords, both as suitors of the court and to look after the lord’s legal interests. People who worked as serjeants and attorneys might also work as estate stewards or bailiffs.¹²¹ Several royal justices served as manorial bailiffs

¹¹⁸ *Bracton*, 2:19; See McSweeney, *Priests of the Law*, 59-68.

¹¹⁹ Plucknett, *Legal Literature*, 81.

¹²⁰ Indeed, legal work could be seen as the quintessential work of a steward. In the 1280s, a steward appeared in court claiming that he had only been hired to “hold the lord’s courts and defend his liberties.” Paul Brand, “Stewards, Bailiffs, and the Emerging Legal Profession in Later Thirteenth-Century England,” in Ralph Evans, ed, *Lordship and Learning: Studies in Memory of Trevor Aston* (Boydell Press 2004) 139, 146, 148.

or stewards earlier in their careers. One even left the court *coram rege* to return to work as an estate steward.¹²²

The work of an estate steward would probably not have required the kind of learning one would get from *Bracton*, or the kind of high-level appreciation of Latin in all its complexity that the author of *Hengham Magna* revealed in. People who did this kind of work needed to know something about law, but they probably were not concerned with the systematics of it, as the *Bracton* authors were. They would have needed to understand the mechanics of how to choose a writ and make a count, or even more simply, of how to supervise a lawyer who was doing this on one's behalf. The choice of a prestigious Latin register may, therefore, have played a role in a conflict between two visions of practice in the common-law courts.

A new literature aimed at stewards and bailiffs was developing around the same time these new, shorter treatises on the common law were coming onto the scene. Robert Grosseteste's *Reules...de garder e gouverner terres e hostel* was written in Latin for the countess of Lincoln in 1242, but was translated into French and became a popular text that was copied many times.¹²³ The other surviving texts of this estate-management genre, *Seneschaucy*, Walter of Henley's *Husbandry*, and the anonymous *Husbandry*, all date roughly to the late 1260s through about 1300, the same period that gives us most of the shorter tracts on counting, pleading, and legal procedure.¹²⁴ These treatises are similar to the legal tracts found in the statute

¹²² See McSweeney, *Priests of the Law*, 100. Henry de la Mare retired from the court *coram rege* in 1249 so he could return to the service of William Longespée, whose steward he had been before his service on the king's court, and manage William's estates while he was on crusade. *Ibid.*; C.A.F. Meekings, "Henry of Bracton, Canon of Wells," *N.&Q. for Somerset and Dorset* (1951-1954) 141, reprinted in *Studies in 13th Century Justice and Administration* (London: Hambledon Press, 1981), item VII.

¹²³ William Rothwell, "Husbandrie and Manaungerie in Later Medieval England: A Tale of Two Walters," in *The Anglo-Norman Language and its Contexts*, ed. Richard Ingham (Woodbridge, Suffolk, UK; York Medieval Press, 2010), 44.

¹²⁴ *Ibid.*

books in that they are all fairly short.¹²⁵ More significantly, apart from the earliest version of Grosseteste's *Reules*, all are written in French. Indeed, some authors appear to have thought that French was particularly appropriate for estate management. William Rothwell points out that the surviving treatises on estate management have their own "specialized French lexis" and that, where the Latin version of Grosseteste's *Reules* borrows quite a bit of technical terminology from French, the French-language texts do not appear to rely on Latin or English terminology.¹²⁶ There is even a surviving text, Walter of Bibbesworth's *Tretiz*, which seeks, in verse, to teach young men how to speak the French necessary for "*husbondrie e manaungerie*."¹²⁷ It begins with a long list of technical terms related to agriculture.¹²⁸ The *Tretiz* often appears alongside the French-language texts on estate management in the manuscripts.¹²⁹ This would all seem to suggest that, as estate management developed into a professional activity, French became the language of that profession. French was necessary if one wanted to become a steward or bailiff.

These short treatises on estate management were of interest to the same group of people who consumed legal treatises. Walter of Henley often sits beside texts such as *Fet Asaver* or *Hengham Parva* in Manuscripts.¹³⁰ His treatise sometimes appears bound together with larger legal treatises such as *Bracton*.¹³¹ *Fleta* even incorporates parts of Walter of Henley and

¹²⁵ Ibid.

¹²⁶ Rothwell, "*Husbonderie and Manaungerie*," 46.

¹²⁷ Walter of Bibbesworth, *Le Tretiz*, ed. William Rothwell (London: Anglo-Norman Text Society, 1990), 3.

¹²⁸ Bibbesworth, *Le Tretiz*, 3.

¹²⁹ Rothwell, "*Husbonderie and Manaungerie*," 47.

¹³⁰ In Cambridge University Library MS Mm.1.27, a manuscript likely made for the estate steward Robert Carpenter in the second half of the thirteenth century, *Seneschauncy* appears along with *Judicium Essoniorum*, *Placita Corone*, *Casus Placitorum*, and *Curia Baronis*, among other texts. Cambridge University Library MS Mm.1.27 fos. 118v-143r; Baker and Ringrose, pp. 475-476.

¹³¹ See, e.g. Cambridge University Library MS Dd.7.6, a manuscript of the early fourteenth century, in which Walter of Henley's treatise and *Seneschauncy* appear in the manuscript one after the other. They are preceded by *Divisiones Brevium*, *Modus Componendi Brevia*, the *Articuli*, *Judicium Essoniorum*, a set of French-language lectures on procedure and pleading, and *Fet Asaver*. Cambridge University Library MS Dd.7.6, part I, fo. 28r—part II, fo.10v; Baker and Ringrose, pp. 55-58. This rather large manuscript also contains a copy of *Bracton*. Cambridge University Library MS Dd.7.6, part IV, fos. 3r-75r; Baker and Ringrose, 68.

Seneschaucy, translated into Latin.¹³² The appearance of short French-language treatises on estate management together with short French-language treatises on law had the potential to change the way people perceived the legal treatise as a genre and how they perceived legal practice. A reader seeing both together might think that these are both practical manuals for professional men.

As a profession of estate managers developed in England, in tandem with and overlapping with the professions of counters and attorneys in the king's courts, perhaps there was some resistance from people who shared the *Bracton* authors' vision of the legal professional. *Hengham Magna* was probably an outgrowth of the *Bracton* literature. Its author relied on *Bracton* and, based on when it was written, is likely to have gotten access to it from Henry of Bratton himself.¹³³ But it addressed issues of process; it is largely concerned with how to ensure the defendant's appearance in court, and was therefore probably written with practicing lawyers in mind as an audience. It was probably one of the first attempts to expand the audience for treatises beyond the clerks and justices. Still, *Hengham Magna* seeks to maintain that same sense that the common law is a learned profession. I suspect that justices and clerks who were writing some of the treatises of the higher register were trying to shape the lawyers in what they saw as the right direction. Mettingham wanted the lawyers practicing before him to be familiar with *Bracton*, a long, difficult, and expensive text. The justices who wrote *Bracton* had clearly placed the developing common law in the context of the schools. Common law, to them, should

¹³² Oschinsky, *Walter of Henley*, 81; W. Cunningham, Introduction to Elizabeth Lamond, ed., *Walter of Henley's Husbandry* (New York: Longmans, Green and Co., 1890), xxxi. *Fleta* includes these portions of the treatises on estate management to supplement his discussion of rendering account by writ, which discussed new remedies lords could use against their bailiffs or stewards for fraud or mismanagement created by the second statute of Westminster. Oschinsky, *Walter of Henley*, 73. The author of *Fleta* was probably not interested in estate management for its own sake, but for its connections to the statute. It is also worth noting that *Fleta* appears to have been the least popular of the *Bracton* epitomes.

¹³³ McSweeney, "Creating a Literature," 51-52.

be understood as an academic discipline. One could apply the same type of dialectical method to the cases decided in the courts of the English king that jurists in the schools could apply to the imperial legislation found in Justinian's *Codex*.¹³⁴ Perhaps people trained in the tradition of *Bracton* were not happy with the parallels being drawn between law and estate management. Eager to reassert the common law's status as a learned discipline, writing in Latin was one way to do it.

It may be significant, then, that Chief Justice Hengham, who is thought to have written *Hengham Parva*, and Chief Justice Mettingham, who told the serjeant practicing before him to go find his answer in *Bracton*, had both begun their careers as judicial clerks in the 1250s and 1260s.¹³⁵ Their views of the proper education for a person who worked in the king's courts may have been colored by people like Henry of Bratton, who was active in judicial business up until his death in 1268. Of course, this cannot explain Gilbert de Thornton's interest in epitomizing *Bracton*, a project he seems to have begun in the 1280s, while he was still a practicing serjeant, but a practicing serjeant, particularly a king's serjeant, could very well adopt the mores of group associated with the judicial bench.¹³⁶

The most popular of the treatises derived from *Bracton* was not *Fleta* or *Thornton*, but the French-language *Britton*. If there was a learned reaction in the later thirteenth century, a reassertion of Latin as a language of common-law instruction, it does not appear to have been terribly successful. No further Latin treatises on the common law were written for about 200

¹³⁴ See McSweeney, *Priests of the Law*, chapter 5.

¹³⁵ Brand, Paul. "Hengham, Ralph (b. in or before 1235, d. 1311), justice." *Oxford Dictionary of National Biography*. 23 Sep. 2004; Accessed 28 Sep. 2020. <https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-12924>; Brand, Paul. "Mettingham, John of (d. 1301), justice." *Oxford Dictionary of National Biography*. 23 Sep. 2004; Accessed 28 Sep. 2020. <https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-37608>.

¹³⁶ Spitzer, *Gilbert de Thornton*, 8.

years. The major form of legal literature written between the end of the thirteenth and the middle of the fifteenth centuries were the French-language law reports.

In 1381, John Cavendish, the chief justice of the King's Bench, began to write his will in Latin, but switched to French partway through. He actually explains in the will, in *Latin*, that he is doing this “because the French language is...more common and better known to me and my friends than the Latin language”¹³⁷ It may be that in the later thirteenth century, teachers of the common law were endeavoring to prevent just such an outcome.

¹³⁷ Thomas Ruggles, “Notices of the Manor of Cavendish, in Suffolk, and of the Cavendish Family while possessed of that Manor,” *Archaeologia, or, Miscellaneous tracts relating to antiquity*, vol. 11 (London: Society of Antiquaries of London, 1778): 50-61, at 55, available at <https://babel.hathitrust.org/cgi/pt?id=njp.32101076451317&view=1up&seq=79> ; Baker, *Languages of the Law*, 233.