PART I

1

Normative Texts and Practices of the First Millennium

Philip L. Reynolds

This book explores how Christian leaders, scholars, and clerics of the first millennium in the West[1] understood, interpreted, and contributed to law and to lawlike normative texts and practices. The book covers four categories of normative texts, each with the corresponding practices: laws (*leges*), monastic rules (*regulae*), penitential prescriptions (*iudicia poenitentiae*), and canons (*canones*). These categories were not necessarily mutually exclusive. For example, the earliest surviving penitential prescriptions are canons decreed by church councils. Again, although the distinction between penance and judicial punishment is clear in principle, penitential regimes could be used to maintain social order, with penances functioning as quasi-judicial punishments. There were other Christian norms that might be considered in this normative setting, such as creeds and the canon of sacred Scripture, but the aforesaid fields were the most lawlike and the most relevant to the long history of Christian law and jurisprudence.

Scholars who study any of these normative fields during the first millennium are necessarily preoccupied with collections of texts. These include compilations of laws, ranging from private collections to promulgated codes (see Chapters 2–3); penitential books, or penitentials, which reflect early-medieval penitential practice (Chapter 8); and canonical collections (Chapter 7). The collecting and comparison of monastic rules by the Carolingian monk Benedict of Aniane (d. 821, see Chapter 9) was a crucial stage both in the West's conception of the regular life and in the establishment of the *Rule of Benedict* (see Chapter 16) as the monastic rule *par excellence*.

Although the texts and collections can be studied in themselves as literary artefacts, normative texts are essentially practical and performative. They cannot be understood in abstraction from their use and intended results, just as one cannot understand the tools of ancient artisans without knowing how they were meant to be used and to what end. Each class of texts was designed to achieve a certain practical good, or desirable result.

[1] In what follows, for convenience, the term "first millennium" refers by default only to the West, and not to Byzantium or to Eastern Orthodox Christianity.

Moreover, in most cases the texts achieved their ends by means of corresponding normative practices. A penitential prescription, for example, was designed to achieve reconciliation with God and with the Christian community by means of the prescribed penitential performance. Each set of texts and practices, considered in relation to the desired result, constitutes what I have called a normative field. But whereas many normative texts and collections from the first millennium have survived intact, independent evidence of how the texts were applied and of the corresponding practices is scarce, uneven, and sometimes difficult to interpret.

The four normative fields shared a common purpose, which was to guide and correct human action or right living by means of explicit rules or measures.[2] The terms "norm," "canon," and "rule" (*regula*), which are conspicuous in Christian writing of the period, referred to externally imposed standards and correctives. For example, the Latin word *norma* denoted literally a square used in carpentry and masonry to check right angles, and by extension any standard or measure. In the Latin versions of Jeremiah 31:39, the term denotes a long measuring cord. Christian writers used the term "norm" metaphorically to denote anything proposed externally to regulate or correct human action, such as a teaching, an exemplar, an Idea (in the Platonic sense), or sacred Scripture. For example, Augustine spoke of the need to discipline children by teaching them a "norm of living" (*norma vivendi*).[3] The phrase "norm of justice" (*norma iustitiae*) was common and could describe any external measure of equity. Benedict of Nursia, advising advanced monks who had outgrown his own "little rule" as to what they should read, recommends Scripture above all, for "what page or what word [of Scripture] is not the straightest norm [*rectissima norma*] of human life?" (RB 73.3)

Each normative field involved something preconceived and imposed from without by persons of authority and power. As external means to right living, these were quite different from such means as virtue, prayerful intimacy with God, and divine grace, which were understood to work from within, often in unpredictable ways. Again, inasmuch as the texts stated explicit rules of conduct, they needed to be univocal and unambiguous. In this respect, they were unlike beatitudes, aspirational maxims, and moral counsels, which invited personal reflection, new interpretations, and diverse appropriations – although some monastic rules, including Benedict's, *included* aspirational maxims and moral counsels.

The history of creeds, such as the so-called Nicene and Apostle's creeds (which are Trinitarian in structure), illustrates the points that I have made in the foregoing remarks.[4] Although their early history is murky and contested, they probably began

[2] I am echoing Thomas Aquinas, *Summa theologiae* I–II.90.1, resp., who characterizes law as a species of "rule [*regula*] and measure [*mensura*] of actions by which someone is induced to act or restrained from acting."

[3] Augustine, *Enarratio in Ps* 37, §34, CCL 38, 398, line 21.

[4] J. N. D. Kelly, *Early Christian Creeds*, 3rd ed. (London: Longman Group, 1972) is still valuable for details, but for a more up-to-date appraisal, see W. Kinzig and M. Vinzent, "Recent Research on the Origin of the Creed," JTS 50.2 (1999): 535–59.

as interrogatory confessions of faith that were performed when converts were baptized by triple immersion in the name of the Father, the Son, and the Holy Spirit (cf. Matt 28:19). From there, they soon acquired a second application: in catechesis (the instruction of converts). A third application first appears in formulations of a creed-like "canon of truth" (*kanōn tēs alētheias*) or "rule of faith" (*regula fidei*) as a defense against heterodoxy, which we find in Irenaeus (d. c. 200) and Tertullian (d. 225). These authors used rules of faith not only to articulate core beliefs but also to proscribe "heresies" – i.e., Gnostic sects – by setting limits on what could be taught and on how the Scriptures might be interpreted. The use of declaratory creeds as rules of faith became prominent in the fourth century, when church councils used them to exclude heterodox teachings about the Godhead and Christ. The earliest known examples of this dogmatic use come from two councils held at Nicaea in 325, which proposed creeds to proscribe Arius's theology. The second of these two councils was convened by Constantine and came to be regarded as the first Ecumenical Council. Finally, the liturgical recitation of creeds probably began during the fifth century. Thus, although the creeds can be studied as theological and literary texts – the so-called Nicene Creed, for example, while Trinitarian in structure, also outlines a cosmic narrative of going forth and returning – the history of creeds is a story of normative *use* and of *performance*: baptismal, catechetical, dogmatic, and liturgical.

Again, from around 350, the term *kanōn*, which literally denoted a measuring reed or rod, was used to denote the sacred Scriptures as constituting a rule or norm of life. This usage coincided with an effort to determine what was and was not included in the Word of God. Scholars and bishops asked which books were canonical and which non-canonical.[5] The designation of certain texts as canonical meant that special uses and performances were exclusively appropriate to them, for example, as regards liturgical reading and accompanying rituals, preaching, the application of "spiritual" (i.e., nonliteral) methods of interpretation, and monastic meditation. Countless texts were worthy of reading and study, but only canonical texts were the subject of these special practices.

LAWS (*LEGES*)

To introduce his treatise on laws in the *Etymologies* (*De legibus*, V.1–27), Isidore of Seville (d. 636) reviews the lawgivers and legal systems known to him (V.1). He begins with ancient Jewish law, explaining that "Moses, of the Hebrew race, was the first of all to explicate, in the Holy Scriptures, the divine laws." King Phoroneus was the first to make laws for the Greeks, Isidore continues, Hermes Trismegistus for the Egyptians, Solon for the Athenians, and Numa Pompilius for the Romans. Isidore

[5] Carl Holladay, *Introduction to the New Testament: Reference Edition* (Waco: Baylor University Press, 2012), 398.

then outlines the history of Roman law before coming at last to Constantine's constitutions and the *Theodosian Code*: the most advanced form of law known to him.

After his initial survey of legislators and legal systems, Isidore distinguishes between divine law (*lex divina*) and human law (*lex humana*). Whereas human law is different for each people (*gens*), since it is a form of custom (*mos*), divine law is universal (and presumably unchanging as well, although Isidore does not say so). Isidore equates divine law (*lex divina*) with *fas*, and human law (*lex humana*) with *ius*. In classical, polytheistic tradition, *fas* regulated interactions among the gods and between human beings and the gods, whereas *ius* regulated the interactions among human beings.[6] Isidore takes a more philosophical view, equating *fas* with the natural law (*ius naturale*), the notion of which he owed to Roman jurisprudence (V.2, V.4).[7]

The Mosaic Law as Christians Understood It

Christ said that he had come to fulfill the law, not to abolish it (Matt 5:17). On one occasion, however, pressed to condemn a sinner according to the law, Christ remained silent while writing in the dust (John 8:1–11). Christians inherited from St. Paul a complex argument about the relationship of their religion to Jewish law (*nomos* in Greek, *lex* in Latin), which was a species of written law. In their view, the Old Testament recorded a phase in which the people of God had tried to attain righteousness through laws alone, which operated from the outside inward; and this effort had proved inadequate and counterproductive, albeit in a salutary, divinely disposed way: "Wherefore the law was our pedagogue in Christ, that we might be justified by faith. But after the faith is come, we are no longer under a pedagogue" (Gal 3:24–25).

From the Christian point of view, then, Christ had bestowed instead an interior transformation – a gracious change of heart – which worked from the inside outward. In his treatise *On the Spirit and the Letter*, Augustine elaborated metaphors of writing to expound this claim. Augustine combined in particular two ideas from Paul: that there is a law "written in their hearts" (Rom 2:15); and that Christ wrote the Gospel "not with ink, but with the Spirit of the living God; not on tablets of stone, but on the fleshy tablets of the heart" (2 Cor 3:3).[8] Christian authors sometimes construed this inward transformation as something that had superseded law, and

[6] On the classical *fas* / *ius* distinction, see Matthew M. McGowan, *Ovid in Exile: Power and Poetic Redress in the Tristia and Epistulae ex Ponto* (Brill: Leiden, 2009), 121–33.

[7] Isidore based his exposition of natural law creatively on opinions by the jurists Ulpian (*Dig.* 1.1.2–4, *Inst.* 1.2 pr.) and Gaius (*Dig.* 1.1.9, 1.2.1–2). See P. L. Reynolds, "Isidore of Seville," in R. Domingo and J. Martínez-Torrón (eds.), *Great Jurists in Spanish History* (Cambridge: Cambridge University Press, 2018), 31–48, at 36–40.

[8] Augustine, *De spiritu et littera*, esp. cc. 21–22, 29–30, 46 (CSEL 60:175–76, 183–84, 200–201). As well as Rom 2:15 and 2 Cor 3:3, Augustine cites Rom 5:5 ("the charity of God is poured forth in our hearts by

sometimes as law of a new and radically different kind: Paul's "law of Christ" (*lex Christi*, Gal 6:2), or Augustine's "law of faith" (*lex fidei*), which is "not letter but spirit."[9] The four gospels spoke *about* the New Law, but they did not state it, for it was essentially unwritten.

The usual view of the Mosaic law among Christian writers and clerics of the first millennium was that it had been futile as the exclusive means to righteousness and excessive in its details. But they did not infer that Christian communities should not use laws and other norms as means to achieve right living. Indeed, a conspicuous feature of the Christian view of life during the early Middle Ages was an anxious determination to guide human action through extraneous regulations and practices. There was perhaps no period in European history when people were less confident that their "fleshy hearts" alone would guide them adequately. This preoccupation may have owed something to the relative weakness and instability of centralized secular governance, in contrast to the relative strength, coherence, and authority of ecclesiastical organization. Among pious persons, it seems, the question, "Good Master, what good thing shall I do, that I may have eternal life?" (Matt 19:16) was urgent and terrifying and called for explicit and detailed answers.

Unlike the Decalogue, which was revealed in writing only as a last resort, much of the Mosaic law was strictly positive, which is to say that the "force" (*virtus*) of the law, and thus one's reason for obeying it, was due solely to the acknowledged power of the lawgiver. Consider the following law from Leviticus, the first in a series on clean and unclean foods:

> And the Lord said to Moses and Aaron: Say to the people of Israel: These are the living things which you may eat among all the beasts that are on the earth. Whatever parts the hoof and is cloven-footed and chews the cud among the animals, you may eat. Nevertheless, among those that chew the cud or part the hoof, you shall not eat these: The camel, because it chews the cud but does not part the hoof, is unclean to you. And the rock badger, because it chews the cud but does not part the hoof, is unclean to you. And the hare, because it chews the cud but does not part the hoof, is unclean to you. And the swine, because it parts the hoof and is cloven-footed but does not chew the cud, is unclean to you. Of their flesh you shall not eat, and their carcasses you shall not touch; they are unclean to you. (Lev 11:1–8)

Here, deductions are drawn from a premise: that the flesh of four-footed beasts is clean if and only if the beast is both cloven-hooved and ruminant. Nevertheless, regardless of whatever historical or anthropological reasons one might invoke to explain how this premise emerged, it demanded obedience only because it expressed a divine command. Christians assumed, on the contrary, not only that

the Holy Spirit, who is given to us") and Jer 31:33 ("I will give my laws* in their hearts, and I will write it in their heart"). *Sic: The word was *leges* (plural) in Augustine's Old Latin version.

9 Ibid., c. 22 (CSEL 60:176). On Paul, see T. R. Schreiner, "Law of Christ," in G. F. Hawthorne and R. P. Martin (eds.), *Dictionary of Paul and His Letters* (Downers Grove, Ill: InterVarsity Press, 1993), 542–44.

canonical norms ought to be reasonable, but also that the reasons were sufficiently accessible to guide interpretation and application. For example, a church council at Orléans in 538 rejected the belief that Christians ought not to travel on horseback or use vehicles on Sundays, explaining that these were matters of Jewish, and not of Christian observance. (Anxiety about Jewish influence on Christians was a recurrent issue throughout the Middle Ages.) But the canon adds that the church prohibits routine work in the fields and vineyards on Sundays – not because of Sabbath observance, but because it prevents the faithful from coming to church.[10]

The Mosaic law was what first came to mind when Christians considered law from a theological point of view. Precepts were paramount in this conception: commandments determining what must or must not be done. The Mosaic law reminded Christians of the limitations of written law as a means to righteousness, but it was also a form of divine law, expressing at some level norms that were unchanging and universal. Moreover, it had prefigured Jesus Christ, who had come to fulfill the law, not to abolish it (Matt 5:17).

Biblical, theological, and pastoral reflection gave rise to ways of talking about law that roamed far from the mundane regulation of mortal human life in community. Christian writers used the term *lex* to denote Scripture as the truest written norm of human life, and even to describe God as the ultimate norm. When Christians thought about law on a grand scale, reflecting theologically on the Christian life and its underlying reasons and structures, their models came chiefly from Scripture, even if they borrowed some of their terms and distinctions from Roman law and jurisprudence and from pagan philosophy. Laws were typically enacted by a legislator, written down, applied through judgment, and enforced with penalties. But when God was the lawgiver, the notions of enactment, writing, judgment, and punishment could be greatly extended by analogy. For example, the New Law is "written" on the heart. Although the term *lex* in Latin was not as expansive in its meanings and connotations as *nomos* was in Greek, its semantic range in Christian discourse was still very broad.

Roman Law

Early Christians were familiar in their daily lives with Roman private law (Chapter 2), which typically ensured fairness by fine-tuning and limiting civil interactions that were basically instinctive and customary. In this context, written law was used as the last resort, when custom and instinctive fairness failed to function or were insufficient. Consider this example:

> If any man should contract for the marriage of a girl to himself and should fail to effect such marriage within two years, and if after this time has elapsed the girl should proceed to marry another, no fraud should be imputed to her for hastening

[10] Conc. Aurelianense A. 538, can. 31, CCL 148A, p. 125.

> her marriage and not allowing her marriage vows to be mocked any longer. (*Cod. Theod.* 3.5.4)[11]

This law pertained to an established custom whereby a man would give a substantial gift to his bride-to-be to confirm their betrothal. What if the betrothal failed, and the two never came together in marriage? Then a law determined that if the breakdown was the suitor's fault, he forfeited the gift, whereas if it was the fault of the girl or her parents, they had to return to the gift (*Cod. Theod.* 3.5.2.1–2). The point of the law quoted above was that a girl and her family were not liable if the suitor had failed to fulfill his promise and they had accepted another offer of marriage rather than waiting any longer, for then the failure of the betrothal was the suitor's fault. To make this principle work, it was necessary to define how long betrothed girls or their parents should be expected to wait, and this limit was set at two years.

Educated Christians of the Western Roman Empire, especially those of Rome, Milan, and North Africa, were steeped in Roman law. Legal advocacy was a popular way to earn a living, and it required skills in rhetoric. Augustine of Hippo, for example, would have offered instruction in legal argument as a professor of rhetoric (see Chapter 12). Conversely, the study of rhetoric, which was fundamentally necessary for any educated person, included at least basic information on law. Although expertise in jurisprudence was a secondary consideration for run-of-the-mill advocates, therefore, rhetorical manuals included some law and jurisprudence. Isidore of Seville's most extended discussion of law in his *Etymologies* (V.1–27) was dependent on juristic sources, but his treatment of rhetoric, too, included paragraphs on law in general (II.10) and on legal argument (II.5), which he must have collected from rhetorical sources.

Roman law was the obvious example of merely human law during the patristic period. Although it did not have much theological significance, it provided Christian writers with categories and techniques of argument. Among Latin patristic authors, the presence of legal language and concepts is especially evident in Tertullian and Ambrosiaster.

The North African theologian Tertullian, active during the first quarter of the third century, freely adapted legal concepts in denouncing the Gnostic heresies and defending Christianity against its pagan Roman opponents. He also demonstrated skills in legal argument. Indeed, according to what used to be the standard account of his life – until T. D. Barnes demolished it in 1971 – Tertullian had been a professional lawyer who practiced in Rome.[12] This claim was based on Eusebius's remark that Tertullian was knowledgeable in the laws of the Romans and had belonged to a circle of distinguished men in Rome (*Ecclesiastical History* II.2.4). The fact that there had been a Roman jurist of the same name bolstered the

[11] Trans. Pharr, 67.
[12] T. D. Barnes, *Tertullian: A Historical and Literary Study* (Oxford: Clarendon Press, 1971; revised edition, 1985).

notion. But the claim that Tertullian dwelled in Rome is otherwise unsupported, and the identification of the two Tertullians is implausible – although Jill Harries has reflected playfully on the possibility that the jurist and the Christian Apologist were father and son.[13] While it is possible that the latter practiced as an advocate, he could have acquired his familiarity with Roman law from rhetoric or even from the ambient culture of North African cities.

Ambrosiaster is perhaps a more interesting example. As David Hunter explains in Chapter 11, Ambrosiaster's thought was permeated with language and concepts from Roman law and administration. He saw parallels between traditional Roman models of authority and the new Christian ones, and he spoke about church offices in Roman terms, which had legal implications. For example, bishops were "legates" (*legati*) and "vicars" (*vicarii*) of Christ, and they acted as judges (*iudices*) and as agents of God (*actores Dei*). Likewise, the emperor was the "vicar of God," and both emperor and bishop derived their authority (*auctoritas*) from God.

Several chapters in this anthology explore how Christian thinkers regarded law from a perspective that was informed by Scripture, theology, and an understanding of God's gradually unfolding plan. (See especially Chapter 10, on Lactantius; Chapter 11, on Ambrosiaster; Chapter 12, on Augustine; Chapter 13, on Leo the Great; Chapter 14, on Gelasius I; Chapter 17, on Gregory the Great; and Chapter 21, on Hincmar.) Thus, Ambrosiaster reflected theologically on the nature, purpose, and divisions of law in relation to sacred history and to the fall from original righteousness, applying insights from Roman jurisprudence to an essentially biblical account of law. So, too, did Augustine of Hippo and Hincmar of Reims. Ambrosiaster distinguished among the natural law, the Mosaic law, and the laws of the secular "nations," such as the Roman Empire (Chapter 11). Augustine distinguished among eternal, temporal, natural, and divine law (Chapter 12). Hincmar's legal categories included natural law, written law, Mosaic law, and human law. Hincmar also attributed the force of law to the four gospels and to at least some of the church's canons, especially those of the first four Ecumenical Councils (see Chapter 21). Of all such divisions, Augustine's would prove to be the most enduring and fruitful after the first millennium. It is striking that canonical regulations were either not included in these divisions and schemata or at best had only a tenuous or implicit presence. (The same is still true of Thomas Aquinas, although he lived in an era replete with canon law and its processes, professions, and jurisprudence.)

The term "divine law," as used in writing of the first millennium, is tricky and often difficult to interpret. It implies a distinction between *lex divina* and human law (*lex humana*).[14] Although Isidore equated divine law with the natural law, the term

[13] D. I. Rankin, "Was Tertullian a Jurist?" *Studia Patristica* 31 (1997): 335–42. David E. Wilhite, *Tertullian the African: An Anthropological Reading of Tertullian's Context and Identities* (Berlin: De Gruyter, 2007), 20–22. Jill Harries, "Tertullianus & Son," in Zuleika Rogers (ed.), *A Wandering Galilean: Essays in Honour of Seán Freyne* (Leiden: Brill, 2009), 385–98.

[14] Compare Philip L. Reynolds, *Marriage in the Western Church* (Leiden: Brill, 1994), 121–72, where I discuss the *lex divina / lux humana* distinction as regards marriage, especially in Gregory I and Leo