

# Introduction

## *Canon law*

Regino of Prüm's *Two Books on Synodal Causes and Ecclesiastical Disciplines* is usually described as a canon law collection composed by a Carolingian churchman in the first decade of the tenth century to aid bishops in carrying out their work of oversight over their clergy and people. Clear as that may sound, it still remains somewhat challenging to decide where to start in telling inexperienced readers of such a text what it is that they may be reading and why they ought to make the effort.

Canon law, for quite some time now, has not been thriving. Familiarity with the expression does not dispel the sense that it denotes something esoteric and out of its time. Even in the Catholic Church, it appears to have long since yielded its primacy to theological opinion; to read the news is to become quickly aware that bishops and priests do not feel bound by it in any significant way and that an active effort has been made to purify the collective memory from those ages when the Church strove to be, among other things, a society ruled by law. As a consequence, it requires an enormous imaginative effort to consider that canon law – the oldest continuous juridical order in the West and its associated traditions of reflection – was of central importance for many centuries and constituted the forge in which many of our public and private institutions, political and ecclesiological doctrines, and even anthropologies, in the Church and out of it, were shaped.<sup>1</sup> The reasons for this state of things are complex and manifold and to outline them

1. For a short and clear introduction to the history of canon law in the Middle Ages, see James A. Brundage, *Medieval Canon Law* (London and New York: Routledge, 2013). Paolo Grossi, *A History of European Law*, tr. Laurence Hooper (Chichester: Wiley-Blackwell, 2010), p. 17, assesses the place of canon law in the history of the medieval West in the following terms: “The Church of Rome is the pre-eminent figure at every level of medieval culture: religious, cultural, socio-economic, political and legal. Indeed, one could say that medieval culture is, for the most part, a creation of the Church. The history of the Roman Catholic Church is of particular interest to the legal historian because it is the only religious denomination which takes it upon itself to create its own original body of law, drawing its authority directly

all goes beyond our brief. But it may be necessary to touch upon some of them, if we are to try to aid our mythical inexpert reader to approach the text here offered in translation with some degree of confidence and understanding.

The expression itself, canon law, is not free of difficulty and may easily cause misunderstanding. Any dictionary will convey its meaning as law of the Church, particularly in the Catholic tradition. But living as we do within juridical orders in which positive legislation has formally triumphed, we will almost unavoidably construe the expression to indicate positive legislation passed by the Church to regulate its social life. Just as it would be very reductive to think of the English common law as consisting exclusively of statutes passed by Parliament, so it would be reductive to think of canon law as consisting only of written law as promulgated by popes and bishops. In either case, we would be canonizing a specific moment in the long history of a juridical order as constituting the whole. In English, this difficulty is compounded by the cumbersomeness and imprecision with which we can currently render the distinction between *ius* and *lex*, a distinction which in other European languages is preserved by the juxtaposition of analogues of “right” and law.<sup>2</sup> Canon law translates the expression *ius canonicum*, or “canonical right,” as it were, but we are tempted to understand it as if it translated *lex canonica*, an expression which is almost wholly foreign to canon law until recent times.<sup>3</sup> Even the first expression, *ius canonicum*, is not used in the first mil-

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from that of Christ as divine legislator, rather than from any temporal political system. This body of law develops into a unique legal system: canon law. Canon law is by no means the discipline of an isolated priestly caste: in a historical context such as that of the Middle Ages, where Heaven and Earth meet, sacred and secular intermingle, and the citizen and the believer join in one complete unity, canon law cannot but be integrated into the medieval legal order and, indeed, it makes a significant contribution to the shape of that order as we find it.” The argument for the centrality of canon law to the whole Western juridical tradition has been set forth most compellingly and successfully by Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983). For a careful and shrewd assessment of the early reception of Berman’s argument, see R.H. Helmholz, “Harold Berman’s Accomplishment as a Legal Historian,” *Emory Law Journal* 42 (1993): 475–96.

2. Somewhat analogous reflections on the difficulties presented by the dominance of “law” in English juristic language are presented by Patrick Wormald, *Legal Culture in the Early Medieval West: Law as Text, Image and Experience* (London, Rio Grande: Hambledon Press, 1999), p. 179, where he notes that “English-language scholars need to be aware that they are handicapped by a linguistic muddle when it comes to distinguishing, as early medievalists must, between (say) *underlying* and enacted law.”

3. Brundage, *Medieval Canon Law*, p. 60, notes that “Canonists prior to the late thirteenth century usually refrained from using the term ‘law’ (*lex*) to describe the material of their discipline. ‘Law’ comes into general use to describe the canons only after the Council of Trent in the mid-sixteenth century.” For further reflection on this, Brundage refers to Stephan

lennium. And if we have recourse to a quaint word like *right*, it is because it would not be good to see the alternative to positive law as being merely unwritten law. Certainly, *ius* is capable of bearing that meaning, but it also, and perhaps more relevantly for our purposes, points to traditions of reflection and practice that do not rely primarily on positive law-making as the obvious way to develop and enforce norms for a common life. In the foundational case of Roman law, *ius* points both to the institutions inherited from the past (*mos maiorum*) and to the contribution made by magistrates and jurists to the development of the complex and rich Roman legal order. These elements may be the ones most fruitfully kept in mind in striving to understand canon law before the so-called classical age (1140–1378), when positive legislation first came to characterize it in a big way.

For the first thousand years of its existence, then, what we call canon law carefully avoids referring to itself as law. As one would expect, the word law is well-known, but it is used almost exclusively to refer to the Law of the Old Testament, or the Mosaic law, and to the legislation of secular governments. One probable reason for what looks very much like a deliberate choice to avoid applying the term law to the standards devised for the disciplining of Church life is the way in which law is treated in some of the Christian Gospels.<sup>4</sup> Law can be a pitfall and legalism may be antithetical to the aims that Christianity pursues. The Church, being also a human society, cannot live its social life without norms, but it cannot be satisfied with pursuing and achieving a merely external submission on the part of its members. The particularity of the Christian vision of law as it applies to the body of believers that is the Church finds a durable expression in the adoption of the term “canon” to mark a norm that is thought to be relevant to Christian social life.

The adoption of canons as the preferred appellation for the Church’s legal norms is sometimes treated as if it were a distinction without a difference. In such

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Kuttner, “Some Considerations on the Role of Secular Law and Institutions in the History of Canon Law,” in *Scritti di sociologia e politica, in onore di Luigi Sturzo* (Bologna: Zanichelli, 1953), vol. 2, pp. 351–62, and “Reflections on Gospel and Law in the History of the Church,” in *Liber amicorum Monseigneur Onclin*, Bibliotheca ephemeridum theologiarum Lovaniensium 42 (Gembloux: Duculot, 1976), pp. 199–209, both reprinted in Kuttner’s *Studies in the History of Medieval Canon Law* (Aldershot: Ashgate, 1990). Also Gérard Fransen, “De analogia legis apud canonistas,” *Periodica de re morali, canonica, liturgica* 66 (1977): 535–47.

4. The Gospels of Mark and Matthew are particularly scathing on the problems that can arise from adhering to a legalistic vision of life and the deformations that can occur from lawyers being let loose on the social body. For a recent and thorough consideration of the Gospel evidence, see John P. Meier, *A Marginal Jew: Rethinking the Historical Jesus: Volume IV: Law and Love* (New Haven: Yale University Press, 2009). For an earlier consideration by the greatest historian of canon law in our time, see Stephan Kuttner, “Reflections on Gospel and Law in the History of the Church.”

a view, the Church may have started off with some aversion to law, but then, faced by the necessity of making provisions to regulate its life, it freely adopts laws, but calls them something else in order to avoid or mitigate the embarrassment of violating its founding principles.<sup>5</sup> This view fits well with certain confessional traditions regarding Church history and can be particularly plausible if one begins an assessment of the canonical tradition from the classical period, when canonists took particular pleasure in pointing out the analogies between Roman and canon law and did not dwell unduly on the particularity of the latter. However, to be convinced by such a view, one needs to disregard the extent to which even the canonists of the classical age regarded their discipline as being concerned with more than peace, order, and good government or the fact that the analogies that most interested them and which were most creative in their own work were those with Roman *ius*, rather than with Roman *lex*.

The canons must and do include provisions to pursue the usual ends of law, namely peace, order, and good government within the community, but they also include many other provisions which can seem rather distant from, if not contradictory with, such aims. It may be difficult to understand this paradox, if one does not keep in mind that the purposes of a legal order strive to be congruent with the way in which the human person and the purposes of human life and action are perceived by the participants in such an order. For Christianity, the human person is a flawed divine creation. Created in freedom and for freedom, human beings fell from participation in the divine life by the sinful choice of their progenitors. They are the heirs and bear the consequences of this original sinful choice, most notably in their inability to pursue fruitfully the good which they weakly perceive. Mercifully, God, in the person of Jesus, man and Word of God, came, lived, and

5. Robert Somerville and Bruce C. Brasington, *Prefaces to Canon Law Books in Latin Christianity. Selected Translations, 500–1245* (New Haven and London: Yale University Press, 1998), p. 2, say that the expression canon law is “etymologically perhaps a redundancy.” Brundage, *Medieval Canon Law*, p. 5, thoughtfully outlines the problem in these terms: “Christians have from the beginning felt ambivalent about the proper role of law in religious life. Jesus expressed grave reservations about the Mosaic law as a source of spiritual guidance and enlightenment, although he denied that he wished to abolish the law [cf. Mt. 5:17–20 and Mt. 23:23]. The ambivalence was even more marked in St Paul’s letters. Some Pauline passages strongly hinted that law was an altogether inappropriate mechanism for defining the spiritual goals of Christian believers, although elsewhere Paul described the Law of Moses as sacred, just, and good [cf. Rom. 7:12 with Rom. 10:4, Gal. 3:10–13, and Col. 2:14]. Despite the evident reservations of its founder and early teachers about the place of law in Christian life, the church soon began to develop its own legal system, for its leaders quickly discovered that a viable community not only needed goodwill and fraternal love, but also required some rules and regulations for the orderly conduct of its business, to define the functions of its officers, and to govern relationships among its members.”

died to offer redemption to fallen human beings. That offer of redemption, which must be freely accepted to be fruitful, continues through the Church, instituted by Christ himself to continue his redemptive presence and work in history. This presence and work summon human beings to rediscover their original nature, to repent of their shortcomings, and to live in a way that is congruent with their nature, that is to say, to live in adherence to God's original design for humankind. This process of discernment and change is called conversion, a process, usually gradual, of turning toward God in love which, with extremely rare exceptions, is never perfectly achieved in this life.<sup>6</sup> If the Church were to achieve in its members perfect conformity of outward behaviour with its requirements, it would be perfectly successful in achieving what legal orders usually set out to achieve, and it would fail perfectly when measured by its own premises regarding its reasons for being. Any account of the canons that fails to take notice of this paradox is bound to be a misleading description of their nature and purposes.

Canon is a Greek term, usually translated as rule. It is a difficulty that, in our current usage, rule is often used as a synonym for law. This may lead us to conclude uncritically that canon is also a synonym for law and so to read canons as written laws. This is not a conclusion which the least familiarity with the Latin jurisprudential tradition ought to allow.

### *The Roman precedent*

The claim may at first seem preposterous that jurisprudence, or legal science, is the particular creation of Rome, and only comes into existence in cultures which encounter the Roman jurisprudential tradition.<sup>7</sup> Obviously, this does not and cannot mean that law is not a ubiquitous phenomenon. What it does mean is that legal cultures unconnected with the Roman one do not usually allow themselves the luxury of a body of learning whose purpose is to examine the law critically, and of a body of learners whose purpose is to cultivate "the art of goodness

6. Two articles by Gerhart B. Ladner remain beautiful reflections on the particularity and fruitfulness of Christian anthropology in the Middle Ages: "Homo Viator: Mediaeval Ideas on Alienation and Order," *Speculum* 42 (1967): 233–59; "Greatness in Mediaeval History," *The Catholic Historical Review* 50 (1964): 1–26.

7. The claim is made eloquently and convincingly by Carlo Augusto Cannata, *Per una storia della scienza giuridica europea. 1. Dalle origini all'opera di Labeone* (Turin: G. Giappichelli Editore, 1997), pp. 17–18. In this part, I take up again some of the arguments made in Giulio Silano, "The *regulae iuris* and the Jurists. Reflections in Margin to *Liber Sextus* 5.13," in *Rule Makers and Rule Breakers*, ed. J. Goering, F. Guardiani, G. Silano (New York, Ottawa, Toronto: Legas, 2006), pp. 171–92.

and fairness.”<sup>8</sup> The jurists themselves, members of this body, would recount the history of their role and discipline by pointing back to an ancient and odd priestly body which had existed in Rome almost from its origins, namely the college of pontiffs. This body is odd in the sense that its role is not the more usual priestly one of divination and the performance of religious rituals; other priestly bodies did this in Rome, while the pontiffs were established as expert consultants to advise citizens about the proper performance of any action that might be relevant in the eyes of the gods.<sup>9</sup> Given that a number of legal acts are not devoid of a sacred or religious dimension (e.g. adoption, involving the rejection of the gods of one’s family of origin and the assumption of the obligation to venerate the gods of the adoptive family),<sup>10</sup> it is perhaps not surprising that the consulting function of the pontiffs should have extended also to the proper forms to be used for the performance of legal transactions. Certainly, the jurist Pomponius, in recounting the origin of Roman jurisprudence, squarely associates it with pontifical activity.<sup>11</sup> For Pomponius, the *interpretandi scientia* was born almost at the

8. *Digest* 1.1.1.1: “Ulpian, *Institutes*, book 1: A law student at the outset of his studies ought first to know the derivation of the word *jus*. Its derivation is from *justitia*. For, in terms of Celsus’ elegant definition, the law is the art of goodness and fairness. 1. Of that art we [jurists] are deservedly called the priests. For we cultivate the virtue of justice and claim awareness of what is good and fair, discriminating between fair and unfair, distinguishing lawful from unlawful, aiming to make men good not only through fear of penalties but also indeed from allurements of rewards, and affecting a philosophy which, if I am not deceived, is genuine, not a sham.” Here and below, we quote from the Alan Watson translation, *The Digest of Justinian*, 4 voll. rev. ed. (Philadelphia: University of Pennsylvania Press, 1998).

9. Livy, *The History of Rome*, tr. William Masfen Roberts, 6 voll. (London: J.M. Dent, 1912), vol. 1, p. 20. Livy described the functions of the pontiff in these terms: “He [King Numa] placed all other sacred functions, both public and private, under the supervision of the Pontifex, in order that there might be an authority for the people to consult, and so all trouble and confusion arising through foreign rites being adopted and their ancestral ones neglected might be avoided. Nor were his functions confined to directing the worship of the celestial gods; he was to instruct the people how to conduct funerals and appease the spirits of the departed, and what prodigies sent by lightning or in any other way were to be attended to and expiated.”

10. For this and other instances of intersection between legal activities and the sacred, see Mario Bretone, *Storia del diritto romano*, 7th ed. (Bari: Editori Laterza, 2000), pp. 111–12.

11. *Digest* 1.2.2.6: “Then about the same time actions-at-law whereby people could litigate among themselves were composed out of these statutes [the laws of the *Twelve Tables*]. To prevent the citizenry from initiating litigation any old how, the lawmakers’ will was that the actions-at-law be in fixed and solemn terms. This branch of law has the name *legis actiones*, that is, statutory actions-at-law. And so these three branches of law came into being at almost the same time: once the statute law of the *Twelve Tables* was passed, the *jus civile* started to emerge from them, and *legis actiones* were put together from the same source. In relation to all these statutes, however, knowledge of their authoritative interpretation and conduct of the actions at law belonged to the College of Priests, one of whom was appointed each year to preside over private matters.”

same time as the law itself. This same science, together with the function of free consultation, by stages which are hard to trace, would eventually be “laicized,” and claimed as their prerogative by the jurists.<sup>12</sup> They would also claim as their burden the duty to provide education in the law – a claim which the same Pomponius would trace to the beginning of the third century B.C.<sup>13</sup>

The attachment of the function of teaching to the more ancient one of consultation may have served as a spur to reflection about whether there was not a need to arrange legal learning in a form that revealed its underlying assumptions to the student. A development of this sort appears to be what Pomponius credits to Quintus Mucius, of whom he says: “... Quintus Mucius, son of Publius and a *pontifex maximus*, became the first man to produce a general compendium of the civil law by arranging it into eighteen books.”<sup>14</sup> This same Quintus Mucius, here described as the first to produce a compendium of the law *per genera*, was also the first jurist to write a book of definitions. These developments have been read as testifying to the attentiveness of the Roman jurists to Greek notions of what constitutes a science and to their willingness to “set out to discover the peculiar principles of their law and formulate them into propositions.”<sup>15</sup>

Cicero saw in these efforts of Quintus Mucius a small beginning of the development of jurisprudence as a science, but he was convinced that this was only a beginning, and that jurists ought to undertake more seriously and thoroughly the task of showing forth the systematic nature of their science. To this end, he composed a little work, which does not survive, on the reduction of the civil law to an art.<sup>16</sup> But the need for jurists to learn from the practitioners of geometry, astronomy, and grammar how to reduce their own learning to scientific form was also expressed by Cicero in the *De Oratore*. His proposal was that the whole of Roman legal learning ought to be distinguished into some general classes, further subdivided into members to be clearly defined.<sup>17</sup> This would be sufficient,

12. For a plausible description of the process by which jurists came to replace the pontiffs in the function of consultation, see Cannata, *Per una storia*, pp. 89–206; the transition is described very economically by Bretone, *Storia del diritto romano*, pp. 153–56.

13. *Digest* 1.2.2.35.

14. *Digest* 1.2.2.41.

15. Peter Stein, *Regulae iuris. From Juristic Rules to Legal Maxims* (Edinburgh: University Press, 1966), p. 36; Stein provides examples of Mucius’ work on pp. 36–41.

16. On Cicero’s *De iure civili in artem redigendo*, see Cannata, *Per una storia*, pp. 289–90, who disagrees with the view, expressed among others by Stein, *Regulae iuris*, p. 41, that the lost work was an attempt, rather than a proposal of the desirability, to produce a systematic outline of Roman law.

17. Cicero, *De Oratore*, bk. 1.190, tr. E.N.P. Moor (London: Methuen and Co., 1892): “As it is, I will state in one sentence the object I have in view. If I am allowed to carry out a long-cherished purpose, or if someone else forestalls me owing to my many engagements, or com-

he was convinced, to transform a difficult and obscure branch of learning into a perfect science. The jurists never took Cicero up on his invitation. And yet they had taken the lessons of the grammarians to heart, hence their propensity to frame rules; this task of rule-framing is, in a sense, the jurists' crowning achievement in the practice of their art.<sup>18</sup>

### *Canons as rules, canonists as jurists*

Our brief tracing of the classical jurists' move toward the ordering of their learning, and their concurrent resistance to accepting invitations such as Cicero's to move whole hog into the effort to apply dialectics to the task of making their discipline easily apprehensible, is intended to suggest that the framers of canons, at least in the first millennium, may have been moved by concerns and interests similar to those of the grammarians and jurists, with which they were not entirely unfamiliar. The latter ultimately resist Cicero's efforts because of the essentially casuistic nature of their own efforts and the deep conviction that to yield to Cicero's chimeric proposals would require a degree of abstraction that was wholly undesirable within the ambit of jurisprudence. Their interest, in the framing of their own rules, is in retaining a provisional and problematic character in their formulation of the principles that appear to underlie cases.<sup>19</sup> Perhaps we ought to consider that the canons, too, are intended to be read as rules which are provisional and problematic in character rather than as restatements of legislation, and that this is the case even when the canon in question may originally have been a legislative enactment.

Let us use an example relevant to our text below. Many of the chapters of Regino's work consist of the canons of various Councils which had been held at various times in different parts of the world (e.g. Africa, Spain, Italy, etc.). In later terms, it has certainly proved possible to conceive of these texts as written

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pletes the work in event of my death – if, I mean, he makes a digest, first of all, of the civil law according to the different classes of case (which are really very few), then distinguishes the different organic divisions, so to speak, of these classes, adding, finally, the definition significant of the exact nature of each class or division, then you will have a complete system of civil law, whose difficulty and obscurity will be nothing compared with the magnitude and wealth of its utility.”

18. The tracing of the origin and development of this practice and its long life in the history of Western jurisprudence is the task brilliantly carried out in Peter Stein, *Regulae iuris*.

19. On these aspects of classical jurisprudence, illuminating remarks are those of Bretonne, *Storia del diritto romano*, pp. 303–14.

law intended to bind those who were subject to their original authors. But even by those terms, Regino and his readers were not among those who were so subject; they did not live in those places and were not subject to the authors of those texts or to their successors. So, what can it mean for them to “canonize” such texts? It is surely plausible to suggest that such “canonization” both raises and lowers the status of these texts. It lowers them, if that is the right term, in the sense that they cease to be texts which one is bound to observe literally since one is not subject to the jurisdiction of their authors, that is to say, one is not within the class of persons for whom the original authors were stating the law; it raises them because they are taken to contain something which is valuable and instructive beyond the place, time, and circumstances in which they were originally conceived.

If we backtrack to the original framers of the canons which Regino collects, we may find that our excursus into the Roman jurists may still not be without relevance. They, too, in their approach to problems and in the solutions which they propose, seem to us predominantly closer to the jurists than to positive law-makers. Their texts hardly ever speak in terms of commands; they often take the form of recognition that a problem has emerged and that it requires resolution by reflecting on Scripture and the past experience of the Church as it is expressed in the canons. Their approach is better seen as driven by a desire to elicit and convey rules from, and regarding the circumstances of, particular cases than as being concerned with devising any sort of chimerical systematic body of positive law. Their aim is usually as much to instruct and move to conversion as to compel observance.

### *Monks as canonists*

These sorts of concerns and attitudes may have been especially powerful for those who were the principal cultivators of canonical learning in the first half of the Latin Middle Ages, namely the monks.<sup>20</sup> If a canon is a rule, then surely those who lived their whole lives under a Rule may very well have approached the canons as if they were in some way the same sort of document as their Rule. Most of the monks who gathered canons, like our very own author, lived their lives

20. A wonderfully graceful presentation of the role of monasteries in the cultivation of canon law is Abigail Firey, “How Carolingians Learned Canon Law,” in *Proceedings of the Fourteenth International Congress of Medieval Canon Law, Toronto, 5–11 August 2012*, ed. J. Goering, S. Dusil, and A. Thier (Vatican City: Biblioteca Apostolica Vaticana, 2016), pp. 355–68.

under the Rule of St. Benedict.<sup>21</sup> The nature and purpose of this document may easily be gathered from the opening lines of its prologue: “Listen carefully, my child, to your master’s precepts, and incline the ear of your heart (Prov. 4:20). Receive willingly and carry out effectively your loving father’s advice, that by the labor of obedience you may return to Him from whom you had departed by the sloth of disobedience.” The text professes to have as its author someone with experience of the monastic life (hence master) who has taken the trouble to isolate some of the precepts that underlie it and wishes to convey them to those who believe that they can profit from such an exercise. This set of precepts may become the law under which the disciples live their whole lives, but only if they choose it. That life will not be fruitful, unless they incline the ear of their heart to its precepts; a merely external conformity to the prescriptions of the Rule will make for good order in the monastery, but it will not result in the monk’s return to God, which is the purpose of the monastic life. The monastic life is to be a life-long exercise of the free choice to become more and more faithfully and consciously subject to what the Rule prescribes so that the original flaw of sinful human nature, best expressed by the term disobedience, may be curbed and the converted person may participate more fully in the divine life.

Benedict’s Rule is full of “laws,” that is, of definite and possibly binding prescriptions about the monastery, its officers, and their respective discipline, from the election and obligations of the abbot to the quantity of wine that the monks may drink. But its overall framework is one of a “canon” and not one of a written law. The author does not have any more authority than those who pick up his Rule are willing to grant to him, and his claim to insight is grounded in his experience and reflection, and not in any sort of public or institutional power. Like a jurist, he has pondered the life of a monk in its specific difficulties and has formulated possible solutions to those difficulties. Like a jurist, he has accepted a responsibility to educate, and he does so by reducing his experience and reflections to a set of rules within the Rule which often provide the reasoning on which a provision is based. From beginning to end, the desire to inform and to educate is at least as prominent as any desire to obtain observance of what he is prescribing. Nor is he afraid to make prescriptions which might easily be perceived to be contradictory, as, for example, in setting out how an abbot is to be chosen.<sup>22</sup> Election by the whole community (clearly to be preferred), or by a small

21. An easily accessible English version of the Rule, from which we cite, can be found at <http://www.archive.osb.org/rb/text/toc.html#toc>. For reflections on the juridical dimension of the Rule, see Lawrin Armstrong, “Rule-Maker or Law-Giver? Legal Forms in the *Regula Benedicti*,” in *Rule Makers and Rule Breakers*, pp. 7–15.

22. (c. 64): “In the constituting of an Abbot let this plan always be followed, that the office be conferred on the one who is chosen either by the whole community unanimously in

more qualified group, or even intervention by outsiders are all contemplated as possibilities, if the case should warrant it. Even on something as crucial as this, there is no anxiety to have the sort of clarity for which the written law usually strives; any one of the solutions proposed may be acceptable, so long as, in the specific circumstances, it results in the best possible choice of an abbot and keeps the community faithful to its purposes.

### *Canon law and philology*

A final preliminary consideration ought to be entertained before we address our text specifically, and that concerns the relationship between canon law and philology. Modern philology emerges in the course of the Renaissance; one of its signal early achievements is the finding that the Donation of Constantine, considered by some to be a canonical text, is a forgery. The divisions of the Protestant Reformation fruitfully pick up this line of enquiry and strive to show that many of the documents on which the Roman Church founded its claims to authority were equally unreliable.<sup>23</sup> The upshot is that the philological treatment of canon law texts at times seems more concerned with putting them on trial than with restoring them to the form in which they left their authors' hand. As a consequence, a philologically sound edition of a canonical text often is one which strives to show how its author mishandled, mangled, or forged texts. This involves the risk that the reader is invited to consider more how such a text ought to have been composed than to attend to what was actually composed. It also involves premises about the nature and purposes of a canonical work which may not be those that moved the author (e.g. that such a work *ought* to be an anthology of legislative provisions and patristic authorities which the author *ought* to convey with as great a fidelity to their originals as possible) and which may prejudice the

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the fear of God or else by a part of the community, however small, if its counsel is more wholesome. Merit of life and wisdom of doctrine should determine the choice of the one to be constituted, even if he be the last in the order of the community. But if (which God forbid) the whole community should agree to choose a person who will acquiesce in their vices, and if those vices somehow become known to the Bishop to whose diocese the place belongs, or to the Abbots or to the faithful of the vicinity, let them prevent the success of this conspiracy of the wicked, and set a worthy steward over the house of God. They may be sure that they will receive a good reward for this action if they do it with a pure intention and out of zeal for God; as, on the contrary, they will sin if they fail to do it."

23. For a brief examination of instances of this process in the 16th and 17th centuries, see Giulio Silano, "Paolo Sarpi and Canon Law," in *Going for Baroque. Cultural Transformations 1550–1650*, ed. Francesco Guardiani (New York, Ottawa, Toronto: Legas, 1999), pp. 93–110.

reading of the actual text. What the philologist tells us about the sources of a particular text and the permutations which those sources have undergone at the hands of our author or of others can be of great interest and utility in reconstructing the settings in which such texts were composed and makes an important contribution to our knowledge of many topics of historical relevance. What it does not do is to enable us to read the text as the author intended it to be read. It has been our intent, in producing this translation, to place the modern reader roughly in a position similar to that of its medieval reader. To that end, the translation does not reproduce the information about sources which its nineteenth-century editor provides.<sup>24</sup>

Because philology tends to treat the author of canonical collections simply as a compiler, it judges him on the degree to which he is faithful to his sources. In this regard, it is customary to distinguish between material and formal sources. Material source designates the original source from which a text purports to come; formal source indicates the collection or work from which the compiler has actually drawn his text. An author is likely to be chastised for being unfaithful to either of these, although in most instances he was unlikely to look beyond his formal source, so that, if he is faithless, it is with this latter source that he fails to keep faith. But the question ought to be asked: what faith does he owe to such a source? Here, too, we are likely to be caught in the presupposition that these compilers are conveying legislative texts and ought to treat them with the deference that such important texts seem to us to deserve. If we consider that the compilers might believe instead that they are compiling rules and framing them for pedagogical effectiveness, it is possible that our judgment will be less lapidary.

It is worth pointing out that compilers of canonical materials generally did not carry out philological analyses of their formal sources. Even when their libraries contained volumes which would have allowed them to do so, they did not go back to the material sources in order to correct what we have come to regard as errors, or worse, in the transmission of those texts. It seems noteworthy, for example, that Regino – a Benedictine monk and abbot who had lived his life under, and instructed his monks in, the Rule of Benedict, in including selec-

24. Regino of Prüm, *Libri duo de synodalibus causis et disciplinis ecclesiasticis*, ed. F.G.A. Wasserschleben (Leipzig: Engelmann, 1840), repr. with some corrections and partial German translation in Wilfried Hartmann, *Das Sendhandbuch des Regino von Prüm* (Darmstadt: Wissenschaftliche Buchgesellschaft, 2004). The Wasserschleben text is easily available on the Internet; hence readers with a basic knowledge of Latin may easily consult its notes on each chapter. An examination of sources is best conducted on the Latin texts and is not easily served by a translation, but, for those interested, the tracing of the fate of each of Regino's chapters in earlier and subsequent canon law collections, found in Wasserschleben's synoptic tables on pp. 497–516, is instructive.

tions from the Rule in his collection, does not go beyond what earlier collections had already excerpted from it, making no selections of his own. It seems too easy to hold that this failure, if such it is, is due to laziness. It seems more plausible to hold that compilers expect, and even value the fact, that their predecessors in the compilation of the canons have exercised a useful discretion and freedom in their choice and presentation of those texts. Perhaps they are even endowing these earlier collections with a “magisterial” authority which ought to be appreciated and gratefully received. Exactly because they are compiling rules, and not laws, they are expected to present them in a form that makes them more accessible, understandable, attractive, relevant, and useful to their audiences. This is a freedom which they will then exercise themselves in the compilation of their own works, even as they usually preserve the changes made by their predecessors. It does not seem far-fetched to suggest that a compiler of canons may be regarded somewhat like Benedict in the compilation of the Rule. At the most basic level, it will never be his aim to gather all the canons he can possibly get his hands on. Such a compiler is implicitly making a claim to a mastery of his material which allows him some latitude in its reshaping, a claim, in other words, to the prerogative to decide which canons one ought to read and which ones one is free to forget, based on the assumption of some competence in doing so (tested, of course, by the usefulness of the work). In the face of such a power to accept or reject, the practice of silent correction, emendation, or addition seems remarkably mild. And yet the users of these works were clearly grateful for the efforts of earlier compilers to make the whole massive tradition more manageable by their work of selection and presentation.

This freedom in selection and presentation seems to confirm the contention that the compilers of canonical works did not regard themselves as being the transmitters of legislative texts. If they had so regarded themselves, they ought to have felt bound to transmit all the canons of the various Councils and other authorities from which they cull their texts, since they are all formally the same sort of text. As we will see Regino doing, these authors claim for themselves the right to choose which of these texts are instructive and relevant in the present moment, so that there is an explicit or implicit premise that the compiler is making a judgment as to what the current problems of the Church in a specific place and time are and what bits from the rich canonical tradition may provide instruction and solutions in the present circumstances. Indeed, it is precisely this nature of the canonical compilations as thoughtful and educated judgments about the state of Church and society at a given time and place that can make them still interesting even to those who have no other reasons to be interested in them. Apart from serving as barometers of the state of legal, theological, and socio-political reflection, they constitute uniquely valuable windows into the problems

of life as they were considered by often thoughtful and engaged observers and provide materials which those observers regarded as possibly useful for their solution. It is for the reader to judge whether Regino's work meets this test.

### *Regino of Prüm*

One of Regino's most recent students has rightly pointed out that "[t]he career, mental world and writings of Regino ... were all defined by the Carolingian empire and, more particularly, by its end."<sup>25</sup> Regino himself, in his capacity as a chronicler, was aware of living at the end of an age.<sup>26</sup>

A late Prüm tradition gives Altrip near Speyer as Regino's birthplace and describes his family as noble.<sup>27</sup> At some unspecified date, he had become a monk at Prüm, an important abbey with close links to the Carolingian dynasty. Women of the dynasty had founded it, and King Pippin had refounded and richly endowed it. Emperor Lothar I was also one of its patrons; he became one of its monks, shortly before his death, and was buried there.<sup>28</sup> Within this community, Regino rose steadily to positions of responsibility. In 892, Abbot Farabert resigned, perhaps exhausted by the vicissitudes to which the community had been subject due to repeated Viking incursions. Pursuant to a royal privilege allowing the community to elect its own abbot, the monks chose Regino. As abbot, Regino saw to the completion of a survey of the properties of the monastery as they had been left after the Viking attacks. He also became the keeper of Hugh, the blinded rebellious son of Lothar II.

25. Simon MacLean, *History and Politics in Late Carolingian and Ottonian Europe: The Chronicle of Regino of Prüm and Adalbert of Magdeburg* (Manchester: Manchester University Press, 2009), p. 1; although MacLean has nothing to say regarding Regino as a cultivator of the canons, his reading of Regino's life and experiences within the dissolution of the Empire is masterful. For a brief restatement of the known facts regarding Regino's life and works, see Wilfried Hartmann, "Regino von Prüm," in *Neue deutsche Biographie* 21 (2003), pp. 269–70. The most recent discussion of Regino and his canonical work is to be found in Greta Austin, "Regino of Prüm," in *Great Christian Jurists and Legal Collections in the First Millennium*, ed. Philip L. Reynolds (Cambridge: Cambridge University Press, 2019), pp. 444–57.

26. See Simon MacLean, "Insinuation, Censorship and the Struggle for Late Carolingian Lotharingia in Regino of Prüm's *Chronicle*," *The English Historical Review* 124 (2009): 1–28, at p. 3 and *passim*.

27. The tradition seems plausible because a local monastic cell had become a dependency of Prüm; see F. Kurze, ed., *Reginonis abbatis Prumiensis Chronicon cum continuatione Treverensi*, MGH *Scriptores Rerum Germanicarum in usum scholarum separatim editi* 50 (Hanover, 1890), p. v.

28. MacLean, *History*, pp. 5–8, presents more fully what we know of Regino's biography.

Regino was to remain in office until 899; in that year, the very importance of the abbey in the roiling politics of the age made for his ejection from the abbacy. He found refuge in Trier, where he enjoyed the friendship and patronage of Archbishop Ratbod, who entrusted him with the care of the abbey of St. Martin, also destroyed by the Vikings. Far from living out his final years peacefully licking his wounds, Regino, among other things, turned to literary activities, becoming in turn the first chronicler of the demise of the Carolingian empire, an important contributor to musical theory, and the author of the canonical work which is of special interest to us.<sup>29</sup> According to a tomb inscription discovered at St. Maximin of Trier, Regino died in 915 and was there buried.<sup>30</sup>

### The Two Books on Synodal Causes and Ecclesiastical Disciplines

Wasserschleben published his edition of Regino's canon law work under the above title because that expression is used in the description of the work in its prologue.<sup>31</sup> He regarded it as not superfluous to edit Regino's work since its

29. Regino's chronicle was last edited by Kurze in the work cited above, at n. 27; it was translated by MacLean in *History*, where the work is intriguingly assessed at pp. 8–28. On his musical work, see M.P. LeRoux, "The *De harmonica institutione* and *Tonarius* of Regino of Prüm," Catholic University of America, Ph.D. thesis, 1965. The texts of these works, as edited by LeRoux, can also be found at <http://www.chmtl.indiana.edu/tml/9th-11th/REGDHI> and <http://www.chmtl.indiana.edu/tml/9th-11th/REGTONA>. An Italian translation with commentary was produced by Alessandra Fiori, *Music: Ubaldo di Saint-Amand. Epistola de harmonica institutione: Reginone di Prüm; introduzione, traduzione e commento* (Florence: Edizioni del Galluzzo, 2010). Regino seems to have thought rather highly of his contribution to the restoration of sound singing practices, if it is true that he compared himself to Gregory the Great and the institution of Gregorian chant: see Warren Sanderson, "Archbishop Radbod, Regino of Prüm and Late Carolingian Art and Music in Trier," *Jahrbuch der Berliner Museen* 24 (1982): 41–61.

30. The inscription is reported by Wasserschleben, p. ix.

31. For a listing of the manuscripts (including those not known to Wasserschleben) and editions of, and bibliography on, Regino's work, see Lotte Kéry, *Canonical Collections of the Early Middle Ages (ca. 400–1140): A Bibliographical Guide to the Manuscripts and Literature* (Washington, D.C.: Catholic University of America Press, c1999), pp. 128–33. To the editions and literature there listed are to be added Wilfried Hartmann's contributions, namely, *Das Sendhandbuch des Regino von Prüm*: "Die *Capita incerta* im Sendhandbuch Reginos von Prüm," in *Scientia veritatis. Festschrift für Hubert Mordek zum 65. Geburtstag*, ed. O. Münsch, Th. Zotz (Ostfildern: Jan Vorbecke Verlag, 2004), pp. 207–26; "Zu Effektivität und Aktualität von Reginos Sendhandbuch," in *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington*, ed. W.P. Müller, M.E. Sommar (Washington, D.C.: Catholic University of America Press, 2006), pp. 33–49.

importance and authority is clear to all, given the extent to which it would influence later and sometimes less worthy collections; more importantly, it provides a true and sincere image of the disciplines and customs that were at work in those times and instructs us as to the manner of proceeding in synodal causes, so that it is the principal source for knowing the practice of tribunals in ecclesiastical matters. The authority of the work is increased by the fidelity, care, and diligence with which the author gathered his sources.<sup>32</sup> That Regino's work was destined for court use is clear, Wasserschleben believes, from Archbishop Ratbod's mandate, from the preface addressed to Archbishop Hatto, and from the very nature and condition of the collection. Hence the division in two books, of which the first concerns clerics and ecclesiastical matters, the second lay people and their crimes. Hence also the instructions set out before each book, and the formulae of inquisition that the bishop or his vicar could use at a synod and the samples of oaths to be sworn there, taken from the practice of the diocese of Trier, as also the examples of *epistolae formatae*, the formed letters of reference inscribed in the name of Ratbod, Trier's archbishop.<sup>33</sup>

The editor is clear and succinct in outlining the sources of the chapters of both books: they are taken from the canons of Councils, the decretals of popes, the capitularies of Frankish kings, Roman law, the writings of Church Fathers, and penitential books. But distinctions are in order. The Greek, African, Gallic, and Spanish conciliar canons and the papal decretals which are contained in the *Dionysio-Hadriana* and in the *Hispana* were not drawn directly from those collections, but from some intermediate ones such as a Vatican collection, the *Dacheriana*, and Halitgar's compilation. Citations from the Church Fathers, the bits from the Rule of Benedict, excepting the fragments from the works of Ambrose, Jerome, and Ferrandus, are taken from the Vatican collection. The canons of the more recent Councils of Germany and Gaul, which provided abundant material for Regino, appear to have been taken from their several documents, as also the fragments of the decretals of Pope Nicholas I. The capitularies of the kings of the Franks are from the works of Ansegisus. The source for the Roman law is the *Breviarium Alaricianum*. The penitential canons are from the Vatican collection, Halitgar's collection, Rabanus' works, and a penitential in a Darmstadt manuscript. The formulae are taken from practice. Regino handled his sources with care and diligence; that not a few inscriptions are false or lacking is due for the most part to his sources.<sup>34</sup> As for the

32. Wasserschleben, p. v.

33. Wasserschleben, p. ix.

34. Wasserschleben, pp. ix–xiii. For the various canonical collections mentioned here, see Lotte Kéry, *Canonical Collections of the Early Middle Ages*. The Vatican collection has been

three appendices – evidence of interest in and study of Regino’s collection in the decades after its composition – Wasserschleben dates the first to shortly after Regino’s composition of the work, the second to sometime after 952, and the third to Regino’s own time.<sup>35</sup> Apart from the appendices, Regino’s work survives in two recensions because some unknown critic decided to rearrange some of Regino’s chapters in a different order; Wasserschleben’s edition restores the original order.<sup>36</sup>

Many of the conclusions reached by Wasserschleben have remained largely uncontested in the intervening decades. They were thoroughly tested, largely approved, and greatly expanded by Paul Fournier.<sup>37</sup> For Fournier, Regino’s work is a notable product and expression of the Carolingian ideals of Church reform for which the institution of the synod as an investigative and judicial body was pivotal. It is also a necessary tool to inform the bishops who preside over the synod so that they may function effectively.<sup>38</sup> Regino’s simple plan for this tool divided his material into two books covering the types of matters that might come before the synod: the first deals with cases involving the clergy, the second with those of the laity. Since the synod proceeded chiefly by investigation through the questioning of synodal witnesses, Regino provides two model questionnaires to be used. The materials are then arranged in each book according to the order in which problems are raised in the questionnaires, expressing the rule at issue, and providing indications for the punishments that might follow a finding of infringe-

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identified as the so-called *Quadripartitus*, see Franz Kerff, *Der Quadripartitus. Ein Handbuch der karolingischen Kirchenreform. Überlieferung, Quellen und Rezeption* (Sigmaringen: Jan Thorbecke Verlag, 1982), p. 7. See Gerhard Schmitz, “Ansegis und Regino. Die Rezeption der Kapitularien in den Libri duo de synodalibus causis,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 74 (1988): 95–132, who argues convincingly that Regino only used Ansegisus for the capitularies. The Darmstadt source has been identified as Cologne, Dombibliothek, Cod. 118 (Darmst. 2117) containing the *Paenitentiale Pseudo Bedae-Egberti mixtum*, see Reinhold Hagenmüller, *Die Überlieferung der Beda und Egbert zugeschriebenen Bußbücher* (Frankfurt am Main: Lang, 1991), p. 67.

35. Wasserschleben, pp. xiii–xiv.

36. Wasserschleben, pp. xiv–xv.

37. The fundamental study is Paul Fournier, “L’œuvre canonique de Régino de Prüm,” *Bibliothèque de l’École des chartes* 81 (1920): 5–44; the conclusions of the study were republished, with slight changes and less detail, in Paul Fournier and Gabriel Le Bras, *Histoire des collections canoniques en Occident depuis les fausses décrétales jusqu’au Décret de Gratien* (Paris: Sirey, 1931), vol. 1, pp. 244–68.

38. Fournier, “L’œuvre,” pp. 5–7. Fournier ties Regino’s work to the Council of Tribur of 895 as an important summation of the Carolingian ideals of reform; the same Ratbod, who was to be Regino’s patron and at whose command Regino claimed he had composed his canonical work, had been present at the Council, and Hatto, the archbishop of Mainz to whom Regino dedicates his work, had presided over it.

ment of a rule. Some forms are added for the swearing in of witnesses, the proclamation of excommunication, and the issuing of absolution.<sup>39</sup>

Rich as Regino's collection is, it should not be thought of as containing the whole of the Church's legislation. Fournier claims that it limits itself to matters of morality and discipline as they arise from the questioning of the synodal witnesses.<sup>40</sup> He also points out that Regino does not only collect texts; if rarely, he intervenes in the first person to explain what he is doing, to explain reservations about the bearing of a rule which he has presented, or to show the utility of some of his texts.<sup>41</sup> Fournier's tally of the sorts of texts collected by Regino, even if more detailed than Wasserschleben's, does not much differ from it, although his analysis of Regino's use of the Tribur canons was ground-breaking.<sup>42</sup> Regarding the three appendices, on the grounds that chapters 1–28 of the first one come from the same sources as Regino's work, he is not averse to regarding Regino as their compiler. The other two appendices he judges to be quite removed from Regino's time.<sup>43</sup> Usefully, he points out that, in quoting from Roman law, if Regino has a choice between a legislative text and its interpretation, he unflinchingly chooses to reproduce the latter.<sup>44</sup> This practice seems like a small, if telling, confirmation of Regino's distinct preference for rules over laws. Fournier summarizes his conclusions about the sources used by Regino as follows:

In sum, Regino's work is composed by fusing texts of Roman origin with texts that were characteristic of the reforming work undertaken by Charlemagne and pursued with more or less zeal under the rule of his successors: canons of Carolingian Councils, fragments of capitularies, penitential canons in use in the ninth century in the Frankish lands. The Church whose features this collection reveals is truly the Frankish Church, regenerated, at the beginning of the Carolingian age, by Roman influence, but allowing, to a certain degree, institutions foreign to the Roman world, such as synodical jurisdiction, compurgators, ordeals.<sup>45</sup>

39. Fournier, "L'œuvre," p. 8.

40. Fournier, "L'œuvre," p. 9.

41. Fournier, "L'œuvre," p. 9, n. 1, in which Fournier points to examples of each of the types of first-person exchanges in which Regino has engaged.

42. Fournier, "L'œuvre," p. 10; the use by Regino of the Tribur canons in a version other than the Council's official one constituted the subject of the whole second part of – indeed of a separate second study in – Fournier's essay, at pp. 30–44.

43. Fournier, "L'œuvre," pp. 7–8.

44. Fournier, "L'œuvre," p. 11.

45. Fournier, "L'œuvre," p. 12.