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THE BIBLE IN THE SERVICE OF THE CANON LAW

R.H. HELMHOLZ*

INTRODUCTION

This Article describes the uses that were made of that most venerable source of law, the Christian Bible, in the formulation and development of the classical canon law. The Article's approach is selective in its choice of subjects, and its coverage extends over a long period, from 1100 to 1600. Its aim, however, is simple and twofold: first, to discover the extent to which the canon law made use of the Scriptures; and second, to understand the ways in which the Scriptures were put to use in the canon law. More particularly, the Article investigates the nature of the Bible's citation in the early commentaries written about the canon law. The Article's purpose is to draw conclusions about the role of the Bible in the development of the canon law, including a judgment about what is sometimes described as the "real significance" of the Bible in the formulation of the law. Behind this lies the author's desire to learn whether the scriptural references found in the early canon law were fundamental or purely ornamental.

Somewhat surprisingly, when one considers the large amount of scholarship devoted to the history of the canon law over the course of the past fifty years, the existing literature on the subject of the importance of the Bible is not abundant. There is much less than, say, books and articles relating to the history of collections of the canons of Church councils during the early medieval period. The more technical subject has been the more studied. This is not to say that there is no scholarship that deals with the Bible's place in the canon law.

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Dist. 1 c. 1	DECRETUM GRATIANI, Distinctio 1, canon 1
C. 1 q. 1 c. 1	_____, Causa 1, quaestio 1, canon 1
X 1.1.1	DECRETALES GREGORII IX, Book 1, tit. 1, cap. 1
Sext. 1.1.1	LIBER SEXTUS, Book 1, tit. 1, cap. 1
Clem. 1.1.1	CONSTITUTIONES CLEMENTIS V, Book 1, tit. 1, cap. 1
gl. ord.	*glossa ordinaria* (to texts of Corpus iuris canonici)
s.v.	*sub verbo* (reference to *glossa ordinaria* or other commentary on a legal text)
Dig. 1.1.1	DIGESTUM JUSTINIANI, Book 1, tit. 1, lex 1
Cod. 1.1.1	CODEX JUSTINIANI, Book 1, tit. 1, lex 1

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Some good articles exist.[1] But there is no comprehensive book, and there are fewer articles than one might expect. Indeed, the authors of these few articles have themselves actively bemoaned the paucity and incompleteness of earlier scholarly writing on the subject.[2] Examination of the *Bibliography of the Bible in the Middle Ages*, published in 1989, confirms this conclusion; its entry for the canon law is extremely short.[3] In fact, the entry's compiler was driven to list several general works about the canon law, even though these works contained only the most passing treatment of the subject of the Bible's role.[4] Evidently, this is a legitimate area for research.

I. THE CLASSICAL CANON LAW

It will be helpful to begin by placing the history of the classical canon law into its historical context. The formation of the classical law of the Church formed one part of the movement Charles Homer Haskins described as the Renaissance of the Twelfth Century.[5] The same progressive currents of thought, expanding and systematizing human knowledge, which produced scholastic theology and European universities, also produced the canon law.[6] It would be a stretch to connect the formulation of the canon law directly with the revival of European economic and social life that also occurred during this period and an even greater leap to draw causal connections between it and the beginnings of Romanesque and Gothic art. Nonetheless, it was the same era that witnessed them all.

1. *See, e.g.*, Gerard Fransen, *Écriture Sainte et droit canonique*, 43 REVISTA ESPAÑOLA DE DERECHO CANÓNICO 7 (1986); Peter Landau, *Alttestamentliches Recht in der "Compilatio Prima" und sein Einfluss auf das kanonische Recht*, 20 STUDIA GRATIANA 111 (1976); Brian Tierney, *"Sola Scriptura" and the Canonists*, 11 STUDIA GRATIANA 347 (1967).

2. *E.g.*, Carlo Guido Mor, *La Bibbia e il diritto canonico*, *in* SETTIMANE DI STUDIO DEL CENTRO ITALIANO DI STUDI SULL'ALTO MEDIOEVO [hereinafter SETTIMANE] 163 (1963) ("Non è un compito facile, il mio."); *see also* Walter Ullmann, *The Bible and Principles of Government in the Middle Ages*, *in* SETTIMANE, *supra*, at 181.

3. ANDRÉ VERNET, LA BIBLE AU MOYEN ÂGE 94-96 (1989). It lists only twenty-four titles.

4. *Id.* at 94; the first entry refers to the seven-volume DICTIONNAIRE DE DROIT CANONIQUE (R. Naz ed., 1935-65), but this designedly comprehensive treatment contains no entry under "Bible" or "Scriptures." By contrast, the same DICTIONNAIRE DE DROIT CANONIQUE devotes twenty-five columns to the subject "Bibliothèques." *See* 2 *id.* at 800, 801-25.

5. CHARLES H. HASKINS, THE RENAISSANCE OF THE TWELFTH CENTURY (1927); *see also* ANTONIO PADOA-SCHIOPPA, IL DIRITTO NELLA STORIA D'EUROPA 195-212 (1995); Stephan Kuttner, *The Revival of Jurisprudence*, *in* RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY 299 (Robert Benson & Giles Constable eds., 1982).

6. For up-to-date and good instructions on the subject, see JAMES A. BRUNDAGE, MEDIEVAL CANON LAW (1995), and JEAN GAUDEMET, ÉGLISE ET CITÉ: HISTOIRE DU DROIT CANONIQUE (1994).

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Of course, the eleven centuries of the Church's history that had gone before the twelfth-century Renaissance had not been wholly without law. The *canones* were distinguished from the *leges* from the earliest times after the establishment of Christianity.[7] The early ecumenical councils had issued decrees that observers would undoubtedly describe as legal in content. Even recognizing, however, that the classical canon law had antecedents, it remains true that only in the second millennium of the Church's existence did a coherent body of canon law, properly speaking, come into existence. Historians rightly contrast the *ius novum* of the thirteenth century with the *ius antiquum* that preceded it, and Haskins was also right to speak of the "confusion and contradiction in the authorities" of the Church's law inherited by the century of his Renaissance.[8] The gap that separates the classical canon law as it emerged in the twelfth and thirteenth centuries from the early medieval collections is not a chasm, but it is more than a fissure.[9]

As it had come to exist by the mid-thirteenth century, the essential texts of the canon law were contained in two large volumes, together referred to as the *Corpus iuris canonici*.[10] The first was the *Concordantia discordantium canonum*, the "Concordance of discordant canons" that was also known familiarly as the *Decretum*. It was a collection formed from the canons of Church councils, excerpts from the Church fathers, decisions of popes, and extracts from Roman law. The *Decretum* was compiled by Gratian, probably a monk who taught or at least flourished in Bologna about the year 1140. The second was the collection of papal decretals, that is papal letters and decisions from individual cases, most subsequent to the *Decretum*. These decretal letters were put together at the direction of Pope Gregory IX by

7. JEAN GAUDEMET, LA FORMATION DU DROIT SÉCULIER ET DU DROIT DE L'ÉGLISE AUX IVe ET Ve SIÈCLES 143-44 (2d ed. 1979).

8. HASKINS, *supra* note 5, at 214.

9. See, for example, the description of the sources of the canon law of marriage by F.W. Maitland, *Magistri Vacarii Summa de Matrimonio*, 13 LAW Q. REV. 133, 135 (1897) ("A few brief texts in the Bible; a few passages in the works of the Fathers, some of which were but too mystical, while others were but too hortative; a few canons and decretals that were not very consistent with each other—these were the unsatisfactory materials out of which law was to be made.").

10. There are several useful treatments to the medieval canon law in English. HAROLD J. BERMAN, LAW AND REVOLUTION 199-254 (1983); BRUNDAGE, *supra* note 6. For brief introductions of slightly earlier date, see E.W. KEMP, AN INTRODUCTION TO CANON LAW IN THE CHURCH OF ENGLAND (1957); R.C. MORTIMER, WESTERN CANON LAW (1953); WALTER ULLMANN, LAW AND POLITICS IN THE MIDDLE AGES 119-59 (1975); G. LeBras, *Canon Law*, *in* LEGACY OF THE MIDDLE AGES 321-61 (C.G. Crump & E.F. Jacob eds., 1964). Another more recent and general exposition of the subject is JEAN GAUDEMET, ÉGLISE ET CITÉ: HISTOIRE DU DROIT CANONIQUE (1994).

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Raymond of Peñafort in 1234. To Raymond's original compilation were later added several other collections of decretals and conciliar decrees, similar but smaller, that were compiled during the next hundred years or so. The material in these two volumes was organized by subject matter, and it was designed to cover all the areas where the medieval Church exercised jurisdiction over clergy and laity.[11]

Connected with the *Corpus iuris canonici* were the writings of the canonists, the contemporary commentators on the law of the Church. Most of these men were academics, though an academic career was not thought incompatible with rising to higher office in the Church. The formulation of the canon law as a system of living law cannot be understood, or even approached, without considering the work of these men. They played a much larger role in the interpretation of the law than do most law professors in English-speaking lands. The canonists, for example, produced the *glossa ordinaria*, the standard commentary on the texts. It came to have an authoritative character—so much so that it was commonly said that what the gloss itself did not recognize, no court would recognize. The gloss was in time added to by large numbers of other writers. The great names from the Middle Ages are Hostiensis, Innocent IV, Joannes Andreae, Panormitanus, all of them authors of commentaries on the *Corpus iuris canonici*, or at any rate parts of it. There were many more, both during the Middle Ages and afterwards, and the volume of works they produced is enormous. It dwarfs in size the literature of the English Common Law. For present purposes, however, it is probably most important to emphasize that these works and their authors stood within a common tradition. They shared ideas and approaches. One of those was the approach to the Bible that is the subject of this paper.

II. The Bible in Canonical Texts and Commentaries

A. *Frequency of Biblical Citation*

That the Bible could be relevant to the development of the classical canon law was suggested by its first compiler. The opening *Distinctio* of Gratian's *Decretum*, now admirably presented and translated by Augustine Thompson and James Gordley,[12] began by stating that

11. R.H. Helmholz, The Spirit of Classical Canon Law, at ch. 1 (forthcoming 1996).

12. Gratian, The Treatise on Laws (Decretum DD. 1-20) with the Ordinary Gloss (1993). The standard modern edition of the Latin texts is contained in Corpus iuris canonici (A. Friedberg ed., 1879). For the medieval gloss to the Decretum Gratiani, I have used an edition of the Corpus iuris canonici published in Venice in 1615. For the similar ordinary gloss to the Decretales Gregorii IX, I have used an edition published in Lyons in 1554.

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the human race was ruled by two things, natural law and customary usages. It added a point of greatest importance for the subject of this paper: that natural law consists of what is contained in the Law and the Gospel.[13] The subsequent texts in the *Decretum* bear out this theoretical statement of the Bible's legal importance. Scriptural passages were cited frequently. Professor Gaudemet's calculations put the number of references to biblical texts in the *Decretum* at between thirteen and fourteen hundred.[14] Early commentators on the *Decretum* followed this lead, themselves citing passages from the Scriptures with regularity.[15]

Although it is common, and almost certainly also accurate, to say that the influence of the Bible on the canon law diminished after 1200 in favor of a more purely legal science,[16] the Bible was clearly not excluded altogether by later developments.[17] The law of the Church did become a subject distinct from theology in a way that it had not earlier been, but that division did not necessarily spell the end of the Bible's utility in the law. Canons included in the Decretals continued to cite passages from the Bible.[18] Despite any diminution of influence, it is certain that use of biblical citation in the creation of law was neither excluded on principle nor ended in fact by the separation of law from theology.[19]

13. GRATIAN, *supra* note 12, at 3 (Dist. 1 c. 1).

14. *See* Jean Gaudemet, *La Bible dans les Collections canoniques*, *in* LE MOYEN AGE ET LA BIBLE 368-69 (Pierre Riché & Guy Lobrichon eds., 1984).

15. *See, e.g.*, PAUCAPALEA, SUMMA ÜBER DAS DECRETUM GRATIANI 54 (Johann Friedrich von Schulte ed., photo. reprint 1965) (1890) (citation of three passages from the books of *Kings*); RUFINUS VON BOLOGNA, SUMMA DECRETORUM 112 (Heinrich Singer ed., photo. reprint 1963) (1902) (citing *Psalm* 36:32 and *Jeremiah* 10:23; perusing the text at random will produce many more examples); THE SUMMA PARISIENSIS ON THE DECRETUM GRATIANI 72 (Terence P. McLaughlin ed., 1952) (citation of Book of *Acts* on the various orders of clergy).

16. *See, e.g.*, Thomas M. Izbicki, *La Bible et les canonistes*, *in* LE MOYEN AGE ET LA BIBLE, *supra* note 14, at 377 ("Avant même la fin du xiie siècle, le droit canon tendait à devenir une science purement légale sous l'influence des légistes civils."); *see also* Raymonde Foreville, *Le recours aux sources scripturaires. A quel moment de l'histoire l'Écriture a-t-elle cessé d'être source directe du droit de l'Église?*, *in* 21 L'ANNÉE CANONIQUE 49 (1977); Gabriel le Bras, *Les écritures dans le Décret de Gratien*, 27 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE KAN. ABT. 47 (1938).

17. For a recent example showing the Bible's continuing role in Western political and legal thought, see HEINRICH JANSSEN, DIE BIBEL ALS GRUNDLAGE DER POLITISCHEN THEORIE DES JOHANNES ALTHUSIUS (1992). See also the examples in Foreville, *supra* note 16, at 53-55.

18. *See* Gabriel le Bras, *Les écritures dans la codification des Décrétales*, *in* 1 MÉLANGES EUGÈNE TISSERANT 245, 247 (1964) (noting 200 direct references to Scripture in the Decretals and mentioning the importance of general references to ideas evidently drawn from the Bible).

19. On the nature of this break, see G.H.M. Postumus Meyjes, *Exponents of Sovereignty: Canonists as Seen by Theologians in the Late Middle Ages*, *in* THE CHURCH AND SOVEREIGNTY C. 590-1918: ESSAYS IN HONOUR OF MICHAEL WILKS 299 (Diana Wood ed., 1991).

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There was a decline in frequency however, both relatively and absolutely. This decline occurred, at least in part, naturally and inevitably. Fewer works of the Church fathers commenting on the Scriptures were included in the later canonical collections than in the earlier versions. The Decretals consisted mostly of contemporary papal letters. Although citation of the Bible was not excluded from such letters, and indeed is sometimes found in them because they rested upon papal authority, it was entirely natural that they should contain scriptural references less often than had the writings of the Church fathers that were so central in the *Decretum*.

When one concentrates on the writing of the canonists instead of the texts, roughly the same picture emerges. There are signs of a continuing importance being ascribed to the Scriptures in the works of the canonists during the later Middle Ages. For example, two of the most sophisticated canonists, Innocent IV and Joannes Andreae, began their commentaries with biblical citations purporting to demonstrate how one should approach the canon law.[20] In the fourteenth century, at least four canonists found it worthwhile to compile tables of authorities from the Old Testament and the New that appeared in the *Decretum* and the Gregorian Decretals.[21] Citations to the Bible continued to be made by canonists throughout the Middle Ages.[22] They appear in the *Summae* compiled for use of parochial clergy in the cure of souls.[23] Biblical citations also maintained a regular place in canonical literature even into the sixteenth century, as for example in the many handbooks of Church law that were produced during the period[24] or in the many specialized treatises written on individual topics

20. JOANNES ANDREAE, IN QUINQUE DECRETALIUM LIBROS NOVELLA COMMENTARIA at Proem. § Hieronymus (photo. reprint 1963) (Venice 1581) (citing Jerome's preface to 1 *Kings* and *Revelation* 21) [hereinafter NOVELLA COMMENTARIA]; INNOCENT IV, APPARATUS IN QUINQUE LIBROS DECRETALIUM at Proem. (Frankfurt 1570) (1968) (citing *Ezekiel* 3:3).

21. Written by Jesselin de Cassagnes, Joannes Calderini, Bernardi Oliverii and Simon Vayreti. *See* 2 J.F. VON SCHULTE, DIE GESCHICHTE DER QUELLEN UND LITERATUR DES CANONISCHEN RECHTS 250 (1875); Jacqueline Tarrant, *The Life and Works of Jesselin de Cassagnes*, 9 BULL. MEDIEVAL CANON L. 37, 62-63 (1979).

22. ANTONIUS DE BUTRIO (d. 1408), COMMENTARIA IN LIBROS DECRETALIUM, at ad X 3.20.14, no. 5 (Venice 1578) (citing *Leviticus* 27:30 on the obligatory nature of payment of tithes); ALBERICUS DE ROSATE (d. 1354), DICTIONARIUM IURIS TAM CIVILIS QUAM CANONICI, at s.v. Aegyptios (Venice 1573) (citing *Exodus* 14:24-27 as an example of God's punishing sinful men); PANORMITANUS (d. 1443 or 1445), COMMENTARIA SUPER DECRETALIUM LIBROS, at ad X 2.24.8, no. 6 (Venice 1617) (citing *Luke* 11:41 on the nature of the obligation to make charitable gifts).

23. *See, e.g.*, THOMAE DE CHOBHAM SUMMA CONFESSORUM lxiii (F. Broomfield ed., 1968) (the Bible and commentaries on it are among the main sources).

24. *E.g.*, ANON, LEXICON IURIDICUM: HOC EST IURIS CIVILIS ET CANONICI, at s.v. Catechumenus (Frankfurt 1607) (defining term on the basis of *Romans* 2); PETRUS GREGORIUS (d. 1597), IURIS CANONICI SEU PONTIFICII PARTITIONES IN QUINQUE LIBROS DIGESTAE, at Lib. III, tit. 2, c. 2 (Lyons 1595) (citing *Genesis* 28:20 and *Numbers* 21:2 to show the legitimacy of conditional

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within the canon law.[25] Use of the Scriptures did not disappear with Gratian.

What did unquestionably happen over the course of the later Middle Ages was a proliferation in the commentaries of the number of references to other kinds of authorities and a relative decline in biblical references. As the literature of the *ius commune* accumulated and as the habit of bolstering virtually any proposition with a learned citation took hold, the Bible inevitably seems to have been playing a lessened role in the law and in the works of the canonists. Examining almost any fifteenth or sixteenth century treatise, one finds very long compilations of references to treatments of the same subject by other writers within the traditions of the *ius commune*. These citations are not wholly unlike the "string cites" common in modern American law reviews and treatises.[26] Correspondingly, one finds relatively fewer biblical citations. Sometimes there are none at all for long stretches of text.

Whether this development proves the Bible's legal irrelevance is, however, a more open question. Passages from the Bible continued to be used and cited by some authors. They came to the fore particularly in times of crisis or conflict.[27] There was variation among the canonists. Perhaps the result depended upon the nature of the subject and the predilections of particular authors. Overall however, references to the Bible were being "squeezed out" in relative terms by the scholastic habit of listing other authorities in ever longer lists. It is obviously not sensible to measure influence simply by counting the numbers of citations. But except for references to legal texts that themselves incorporated biblical passages (not a negligible number), the Bible played a quantitatively smaller role in the formation of the law than it

vows); JOANNES PAULUS LANCELLOTUS (d. 1590), INSTITUTIONES IURIS CANONICI . . . CUM GLOSSIS, at Lib. II, tit. 21, gl. s.v. nomine (Venice 1704) (citing Jesus' command in *Matthew* 22:21 to render unto Caesar the things that are Caesar's and unto God the things that are God's as application to levying dues in favor of the Church).

25. *E.g.*, STEPHANUS DE AVILA (d. 1601), DE CENSURIS ECCLESIASTICIS TRACTATUS, at Pt. II, cap. 5, disp. 1, dub. 1 (Lyons 1608) (requiring contumacy before a person could be excommunicated on the basis of *Matthew* 18:15); JACOBUS SBROZZIUS, TRACTATUS DE OFFICIO ET POTESTATE VICARII EPISCOPI, at Lib. I, qu. 3, nos. 12-13 (Venice 1630) (citing *Matthew* 9:37 and *Luke* 10:2 to justify the diffusion of episcopal authority among their officials); BARTHOLOMAEUS UGOLINUS (fl. c. 1600), TRACTATUS DE IRREGULARITATIBUS, at cap. 44 § 1, no. 2 (Venice 1601) (citing *Deuteronomy* 23:2 to justify the exclusion of all illegitimate children from the ranks of the clergy).

26. The cumulations of references are also about as useful. They are not signs of original thought, but they were useful for others looking for additional information about the subject under discussion.

27. *See, e.g.*, PHILLIP H. STUMP, THE REFORMS OF THE COUNCIL OF CONSTANCE, 1414-1418, at 182 (1994).

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had in the twelfth and early thirteenth centuries, and this was as true in the works of the canonists as in the *Corpus iuris canonici* itself.

B. Canonical Understanding of the Scriptures

Apart from the question of frequency, there is the parallel question of the canonists' basic attitude towards the Scriptures. As lawyers, how did they regard the Bible? A twentieth-century reader will probably find Gratian's easy association of the Scriptures with natural law noted above quite unexpected. When we think of law in the Bible, it is apt to be the detailed rules of conduct found in the Book of Leviticus or the Book of Deuteronomy. This was obviously not the approach of the Father of the Canon Law. He associated the Scriptures with natural law, a changeless source of law written on our hearts by God.[28] This perspective was also found in the writings of the canonists who followed Gratian. The attitude was congenial, even self-evident to them. They regarded the Bible, and they used it, primarily as a way of showing what natural law (or principles of fundamental justice in more modern terms) required of the Church's legal system. It was common coin among the canonists of the later Middle Ages, for example, that any law that contradicted the Scriptures was not true law.[29] The Bible provided juridical norms that were useful in evaluating legislation and in providing guidance for positive law of all sorts.

From the medieval point of view at least, the approach characteristic of the canonists made perfect sense. They held, in common with other educated men and women of the time, that God had caused the Scriptures to be written for the edification of mankind.[30] He had similarly created a natural law, accessible to human intelligence, in order to guide men in their conduct and in the formulation of human laws. What could be more natural than to find in the pages of Holy Writ good indications of the nature of this permanent order by which human society was to be governed? The Bible showed in particular

28. On the meaning of *natura* in canon law, see Brian Tierney, *Natura Id Est Deus: A Case of Juristic Pantheism?*, 24 J. HIST. IDEAS 307 (1963).

29. PANORMITANUS, *supra* note 22, at ad X 1.6.4. no. 2 ("Nota quinto quod papa non potest aliquid disponere contra Evangelium, de quo vide bo. tex. in c. sunt quidam 25 qu. 1."). For modern treatment, see 1 FRANCESCO CALASSO, MEDIO EVO DEL DIRITTO 470-76 (1954), and the remarks and authorities collected in Hermann Schuessler, *Sacred Doctrine and the Authority of Scripture in Canonistic Thought on the Eve of the Reformation*, *in* REFORM AND AUTHORITY IN THE MEDIEVAL AND REFORMATION CHURCH 55, 63-65 (Guy F. Lytle ed., 1981).

30. *See generally* HENRI DE LUBAC, EXÉGÈSE MÉDIÉVALE: LES QUATRE SENS DE L'ÉERITURE (1959-64).

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ways, and in particular episodes, how men and women ought to arrange their lives. It was up to them to understand its lessons and to apply them. These lessons the canonists sought to draw from the Bible's pages.

The Bible was rarely used as enacted law, however. The canonists did not treat biblical texts as direct sources or as statutes; they did not take passages from the Bible and call them a *canon* or a *lex*. Instead, they drew legal lessons and legal principles from them.

Their approach on this point was not inevitable.[31] There had been canonical collections in the early Middle Ages where direct use of the Scriptures had been tried. The seventh-century *Collectio Hibernensis*, for example, contained at least 500 biblical passages, each of them transcribed and described as a law.[32] The classical canon law, however, stood in contrast to this approach. The canons of the *Decretum* were taken, not from the Bible, but from the decrees of Church councils, the writings of Church fathers, the letters of popes, and Roman law. The Gregorian Decretals likewise were drawn from canons of contemporary councils and decretal letters of the popes. Any influence of the Bible on the legal system of the Church was thus likely to be indirect in character. The legitimate question, therefore, is how important it was. For this, it is necessary to pass from general conclusions to specific examples.

III. Examples of Canonical Usage of Biblical Texts

Going beyond these generalizations requires a closer examination of the actual uses made of the Scriptures in specific areas of the canon law. For this purpose, this Article takes up two general categories and three specific examples. The first two will be treated summarily, because of the obvious and immediate relevance of the Bible in them. The following examples are treated at more length. They provide a fairer test. In them the Bible did not *necessarily* play a pivotal role. The law on each subject could have been formulated without making more than passing reference to the Christian Scriptures. These three "ordinary cases" thus better illuminate the ways the Bible was used in

31. *See* Jean Gaudemet, *Sagesse biblique et droit canonique*, *in* La Doctrine canonique médiévale, at no. 5 (1994) (examining the use of the books of the Septuagint in canonical collections between the fourth and twelfth centuries).

32. The basic edition is that of Hermann Wasserschleben, Die irische Kanonensammlung 122 (1885). *See also* Maurice Sheehy, *Influences of Ancient Irish Law on the Collectio Canonum Hibernensis*, *in* Proceedings of the Third International Congress of Medieval Canon Law 31 (Stephan Kuttner ed., 1971).

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the formation of the canon law. In them there was no pressure from without.

A. *Necessary References to the Bible*

Many of the canons in the *Decretum* and some in the Decretals did cite passages or events from the Bible as direct justifications for the rules enacted. A number of these were obvious. In point of fact, they were inevitable. The canon law dealt with the Christian sacraments, and it could not help devoting some attention to theological questions.[33] Here the Scriptures came into unquestioned prominence. No Christian writer, even no lawyer, could deal with a theological question or with the sacramental life of the Church without mentioning the Bible.

The law of baptism provides an accessible example. The question of whether a person had been validly baptized might be relevant to the canon law because only the baptized were ordinarily subject to the compulsory jurisdiction of the Church's courts.[34] Therefore, the canonists had to address the question of whether litigants had been validly baptized. Under the canon law, the correct baptismal formula was determined by the commands of Jesus as found in the Bible. He had directed his followers to baptize in the name of the Father, the Son, and the Holy Spirit.[35] No canonist or theologian could responsibly have ignored the biblical commands in discussing the canon law on the subject. None did so.

B. *Controversial References to the Bible*

Some of the uses made of scriptural texts in the canon law occurred because they were the subject of fierce disagreement at the time. They have become famous among historians of the subject. The passage from Luke 22:38, in which the disciples said to Jesus, "Lord, behold, here are two swords," and in which Jesus replied "It is enough," was held to prefigure and to authorize the division of coercive legal jurisdiction between spiritual and temporal powers.[36] It was said to guarantee the Church's legal competence over significant parts of human life. The passage from Matthew 16:19, in which Jesus said

33. The first title of the Decretals, for instance, is "De Summa Trinitate et Fide Catholica."

34. *See* C. 2 q. 1 c. 18; X 5.6.14. There were exceptions developed in the course of time. *See* BRUNDAGE, *supra* note 6, at 162-63.

35. *Matthew* 28:19.

36. *See* GAETANO CATALANO, IMPERO, REGNI E SACERDOZIO NEL PENSIERO DI UGUCCIO DA PISA 66 (1959).

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that he would give to Peter the keys of heaven, was held to lay the groundwork for the papal monarchy that came to govern the Western Church in the Middle Ages.[37] Its exact reach was much disputed.[38] The passage from Matthew 18:15-17, to the effect that a Christian who trespassed against his brother should first be warned privately and then reported to the Church if he persisted in refusal to amend his life, was used to justify the creation of a new, more efficient form of procedure called the *denunciatio evangelica*.[39] It was not irrelevant in the creation of the Inquisition.

These scriptural passages were controversial at the time in the sense that men disagreed about how far the principles found in the biblical passages could be extended. They remind us that the Bible has long been referred to in moments of change or crisis, to justify or to condemn a new doctrine or movement.[40] In a Christian society, radical or strident views required grounding in the Bible. Many of the questions raised in these circumstances have remained controversial among historians and theologians even to the present day. The arguments made usually swirled around whether a particular reading of the Scriptures was a natural one, or was instead being invoked in the interests of the institutional Church in order to justify something very unlike what the Scripture itself authorized—in the last case cited, for example, a judicial regime that served as an engine of repression.[41] The Protestant Reformation, with its assertion that human traditions had perverted the true meaning of the Bible, has also greatly affected modern attitudes towards the subject. Scripture comes into play in justifying controversial and fundamental positions.

1. Blasphemy

When one moves beyond these areas, areas where the Bible was obviously relevant in an immediate sense, several more neutral exam-

37. INNOCENT IV, *supra* note 20, at X 3.34.8. For an instructive and interesting example of the use of the Bible in the service of the papacy, see Diana Wood, *Clement VI and the Political Use of the Bible*, *in* THE BIBLE IN THE MEDIEVAL WORLD 237 (Katherine Walsh & Diana Wood eds., 1985).

38. *See, e.g.*, MICHAEL WILKS, THE PROBLEM OF SOVEREIGNTY IN THE LATER MIDDLE AGES: THE PAPAL MONARCHY WITH AUGUSTINUS TRIUMPHUS AND THE PUBLICISTS (1963).

39. *See* Charles Lefebvre, *Contribution à l'étude des origines et du développement de la 'denunciatio evangelica' en droit canonique*, 6 EPHEMERIDES IURIS CANONICI 60 (1950).

40. *See* MAX HACKELSPERGER, BIBEL UND MITTERALTERLICHER REICHSGEDANKE: STUDIEN UND BEITRÄGE ZUM GEBRAUCH DER BIBEL IM STREIT ZWISCHEN KAISERTUM UND PAPSTTUM ZUR ZEIT DER SALIER (1934); Jean Leclercq, *Usage et abus de la bible au temps de la Réforme Grégorienne*, *in* THE BIBLE AND MEDIEVAL CULTURE 89-108 (W. Lourdaux & D. Verhelst eds., 1979).

41. *See generally* R.I. MOORE, THE FORMATION OF A PERSECUTING SOCIETY (1987).

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ples present themselves for study. One can choose among them. The first chosen here is the law of blasphemy. On this subject, it was not clear that the Scriptures would be important in the development of the canon law. Roman law, papal decretals, or local statutory enactments could have controlled the law's development.

On the other hand, it was also undeniable that there was no scarcity of biblical material from which to draw. The Book of Leviticus, for instance: "He who blasphemes the name of the Lord shall be put to death: all the congregation shall stone him."[42] Or the Second Book of Samuel: as punishment for having "given great occasion to the enemies of the Lord to blaspheme," King David's son was taken from him.[43] And there was the case, which was probably the most frequently cited of the biblical authorities, of King Nebuchadnezzar from the Book of Daniel. Gratian employed references to Nebuchadnezzar in no fewer than five places in his treatment of blasphemy in the *Decretum*.

Readers will recall that Nebuchadnezzar had Shadrach, Meshach, and Abednego cast into a fiery furnace when they refused to fall down and worship the golden idol he had caused to be constructed. When the three emerged from the experience unharmed, Nebuchadnezzar was sufficiently impressed by the efficacy of their faith to issue a decree punishing with death any person who spoke against their God.[44] The incident was much commented upon. St. Augustine had made use of this story as showing one man's repentance and amendment of life, approving in the course of his argument Nebuchadnezzar's decree against blasphemy as a commendable example of the fruits of repentance.[45]

In the hands of the later canonists, the incident, together with St. Augustine's treatment of it, became a strong argument in favor of enacting and enforcing public laws against blasphemy. This biblical example, they thought, demonstrated that laws backed by severe punishments were the proper response to blasphemers.[46] The Old Testament story was more than an example of the fortitude requisite in God's children. It was also a demonstration that they would be properly rewarded for that fortitude, and that the reward would be a decree approximating that issued by King Nebuchadnezzar.

42. *Leviticus* 24:16.
43. 2 *Samuel* 12:14.
44. *Daniel* 3:29.
45. *See* Dist. 9 c.1.
46. *See* Dist. 9 c. 1; C. 11 q. 3 c. 98; C. 23 q. 4 c. 22; C. 23 q. 4 c. 39; C. 23 q. 4 c. 41.

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This biblical precedent served as a general statement of principle rather than as a rule of positive law. No one contended that Nebuchadnezzar's decree remained in force. No canonist or civilian went so far as to recommend that it be re-enacted. The Scriptures demonstrated the crime's heinousness, but they were not treated as statutes dictating the exact punishment to be imposed in medieval Europe. Neither in canonical theory nor in the court practice of the day was the death penalty to be exacted for simple blasphemy, as might have been expected had the canonists followed the Bible text literally. A sixteenth-century Italian advocate wrote that the severest penalty he recalled being imposed for nonheretical blasphemy was a sentence to the galleys.[47] Even this was quite rare; normally money fines or corporal punishments were used in practice.[48] Some of the latter were gruesome enough—perforation or amputation of the tongue for instance. Still, they were not the same penalty ordered by Nebuchadnezzar's decree.

This apparent (to them) leniency does not mean that the medieval canonists regarded the severe biblical injunctions about punishment as irrelevant to their subject. By prescribing the death penalty, the texts proved the seriousness of the offense and provided more than ample reason for the sanctions that were actually imposed. The biblical example thus encouraged the jurists to describe blasphemy as "a great crime, [and] contrary to natural, divine, and human law."[49] The opinion that blasphemy was "a graver crime than homicide" was shared, or at any rate asserted, by more than a few of them.[50] When asked to explain why Nebuchadnezzar's mandate was not being fully implemented, commentators commonly ascribed practice to what they regarded as a lamentable "want of religion" in their own time. They did not see any disproportion between capital punishment and the just desserts of a blasphemer. They found no fault apparent in the man-

47. PROSPER FARINACIUS (d. 1618), VARIARUM QUAESTIONUM ET COMMUNIUM OPINIONUM CRIMINALIUM LIBER, at Lib. I, qu. 20, no. 67 (Venice 1589-93) (also citing *Leviticus* 24).

48. *Id.*

49. Didacus Covarruvias y Leyva (d. 1577), *Relectio, Ex rubrica de pactis, Lib. VI c. Quamvis pactum, Pt. I § 7, nos. 27, in* 1 OPERA OMNIA 271-72 (Lyons 1661) (citing *Leviticus* 24 and 2 *Kings* 19 and describing blasphemy as, "maximum crimen, legi equidem naturali, divinae et humanae contrarium").

50. LUDOVICUS GILHAUSEN (d. 1642), ARBORIS IUDICIARIAE CRIMINALIS LIBER, at cap. II, tit. 1, no. 20 (Cologne 1642).

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date itself.[51] The problem, they said, was that if blasphemy were punished as it should have been, too few men would be left.[52]

Besides providing general support for the canonical penalties, the Bible as a whole also created a problem for the canonists. It was, however, a problem that demonstrates the Bible's importance to them. The problem lay in the necessity of defining the crime. Since the criminal law of the Church embraced the principle of natural justice that there could be no punishment without a specific law, it was incumbent upon the Church's lawyers to fix blasphemy's meaning exactly enough to pass muster under this test. The Bible presented an apparent obstacle, for some of the many uses of the term "blasphemy" found in it were quite imprecise. St. Paul, for example, spoke of himself as a "blasphemer,"[53] apparently meaning no more than that he himself had once been a persecutor of Christians. Passages from the Old Testament used the term to refer generally to all insults or wrongs against God.[54] There was also a startling reference in the Gospels with which commentators had to contend. Jesus had said that although all manner of sins could in the end be forgiven, the sin of blasphemy against the Holy Spirit would not.[55] What exactly had he meant? What did it mean to blaspheme against the Holy Spirit?

These problems were solved. With a little effort—and some help from the theologians—the problematical passages from the Scriptures were eventually brought within a working definition of blasphemy. Blasphemy was defined either as ascribing to God properties that he did not possess or as denying to God properties he did possess.[56] To say that God was unjust in visiting a flood or a famine upon a city constituted the first form; to say that God could not prevent the disasters was the second. Some strenuous efforts were needed to bring all the prior texts under this umbrella.[57] For the present topic, however, it is important only to note that the canonists did not regard themselves as being at liberty to ignore the biblical examples. Even if the

51. NICHOLAUS BOERIUS (d. 1539), DECISIONES BURDEGALENSES, at Dec. 301, no. 9: "ob defectum religionis" (Geneva 1620); *see also* JOSEPHUS MASCARDUS (d. 1588), CONCLUSIONES PROBATIONUM OMNIUM QUAE IN UTROQUE FORO QUOTIDIE VERSANTUR, at Lib. I, Concl. 194, no. 1 (Frankfurt 1593) (giving examples from the Bible of blasphemers punished by death).

52. "[S]i omnes blasphemi decapitarentur pauci superessent qui possent blasphemare." PROSPER FARINACIUS, *supra* note 47, at Lib. I, qu. 20, no. 64.

53. 1 *Timothy* 1:13.

54. *Ezekiel* 20:27.

55. *Mark* 3:29.

56. This was taken from the theologians. *See* THOMAS AQUINAS, SUMMA THEOLOGIA, at 2a 2ae, qu. 13, art. 1 (1920-25) (1474).

57. *See, e.g.*, PROSPER FARINACIUS, *supra* note 47, at Lib. I, qu. 20. To the same effect is JODOCUS DAMHOUDER (d. 1581), PRAXIS RERUM CRIMINALIUM, at C. 61, no. 11 (Antwerp 1601).

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distinctions and analogies they drew in the process may seem forced and sterile to modern tastes, it remains true that they felt obliged to draw them. They did not simply ignore what they found in the Bible.

2. Prescription

The Bible was relevant, or at least used, in two particularly important ways in the formulation of the canon law of prescription. This was also an area which could have been developed without using the Bible, since the Roman law of prescription was sophisticated and its texts abundant.[58] But in fact the Scriptures were used. The first way came in the enactment of a rule requiring good faith on the part of anyone asserting title to property by virtue of prescription. The second came in the adoption of rules disqualifying certain types of possession in computing the running of the prescriptive period. Again, it will be readily apparent that the Bible furnished juridical norms for the canonists, rather than specific rules of law.

A decree of the Fourth Lateran Council in 1215, later inserted into the second book of the Gregorian Decretals, enacted a requirement of good faith on the part of all claimants to prescriptive title.[59] If they had occupied property or possessed a right knowing they had no title to it, then they were excluded from claiming prescription under the canon law. The inherited Roman law was to the contrary. It admitted the possibility of *mala fide* prescription under several circumstances,[60] and because the large part of the canon law of prescription was taken over from the Roman law, it would have been natural had the two laws been identical on this point. But they were not, and the reason given for the divergence in the canon was a principle stated in St. Paul's Letter to the Romans: "Whatever is not of faith, is sin."[61] This principle, the canon law held, must be applied to the law of what we call adverse possession.

The biblical source of the rule was not lost on later writers. The decretal and its Pauline source became a standard reference point to show that the law must in no circumstance become *nutrix peccati*.[62]

58. *See, e.g.*, HERBERT HAUSMANINGER, DIE BONA FIDES DES ERSITZUNGSBESITZERS IM KLASSICHEN RÖMISCHEN RECHT (1964).

59. "Quoniam omne quod non est ex fide, peccatum est, synodali iudicio diffinimus, ut nulla valeat absque bona fide praescriptio tam canonica quam civilis." X 2.26.20. For background and assessment, see ANGEL DE MIER VÉLEZ, LA BUENA FE EN LA PRESCRIPCIÓN Y EN LA COSTUMBRE HASTA EL SIGLO XV 52-74 (1968).

60. On the concept in Roman law, see HAUSMANINGER, *supra* note 58.

61. *Romans* 14:23.

62. *See* gl. ord. ad X 2.26.20 s.v. tam canonica.

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Joannes Andreae, probably the most sophisticated of the fourteenth-century canonists, stated specifically that the requirement of good faith had been adopted "so that the law of the Gospel might be fulfilled."[63] Panormitanus, the greatest of the fifteenth-century commentators on the law of the Church, cited and interpreted Paul's words in his treatment of prescription, also making reference to the fuller discussion of the biblical texts found in Gratian's *Decretum*.[64]

On the other hand, this biblical quotation did not solve many of the questions with which the law had to deal. What of the case where there was supervening bad faith, that is, where the possessor was in good faith at the beginning but not at the close of the prescriptive period? Or what about the situation where a community of persons, say a bishop and cathedral chapter, asserted prescriptive title and some of them were in good faith, some in bad faith? The larger part of the medieval commentaries was taken up with these questions; they rarely cited the Bible in answering them. This was natural enough. The Pauline injunction did not supply an answer for these and other hard problems of legal detail. It rather stated an underlying principle that was essential to the canon law. Most practical consequences were worked out using other tools, principally those drawn from the ample storehouses of Roman law.

The second aspect of the Bible's use in the law of prescription disqualified possession of certain types of actual possession as a means of creating sufficient title, no matter how long they continued. It had two separate parts. One held that force or hostilities prevented the prescriptive clock from running. It did not, I think, depend entirely upon a biblical precept. It was commonly supported, however, by this biblical example. In the book of Exodus, it was recorded that Pharaoh held the Israelites captive in Egypt for four hundred and thirty years. Yet, even after this long period, God had led them out of slavery.[65] Had force given rise to title, God would have been violating a legitimate right by freeing the Israelites from Pharaoh's yoke. That obviously could not be so. It was not, therefore, to be supposed that Pharaoh's kind of bondage, or anything resembling it, could be the source of legitimate prescriptive right.[66] In the eyes of the canonists,

63. NOVELLA COMMENTARIA, *supra* note 20, at ad Sext 5.12.2, no. 20 (distinguishing Roman law on the subject from the canon law, "nam suus finis principalis est ordinare in Deum et in legem Evangelicam ut homo gloriam assequatur").

64. PANORMITANUS, *supra* note 22, at X 2.26.20, rubr. ("[S]unt verba Apostoli ad Rom. 14 in fi. quae expone, ut plus prosequitur Gratian 28 q. 1 ca. 1 § ex his.").

65. *Exodus* 12:40-41.

66. C. 16 q. 3 c. 14.

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legitimate prescriptive right could not arise out of pure force without contradicting this biblical authority.[67]

The other part held that spiritual rights could not be the subject of legitimate prescription and that this principle of exclusion extended to material aspects of the spiritual rights. To prove this, a decretal of Innocent III cited the words of Apostle Paul in First Corinthians 9:11, to the effect that the person who had sown spiritual things must be entitled to their fruits, even if the fruits are themselves material things.[68] The canonists perceived a principle behind the Apostle's words, one that was fully applicable to the case; namely that material things (in this case the right to income from visitations) that accompanied spiritual things (the right of visitation) should be governed by the identical, spiritual law. The biblical passage was not about either income or episcopal visitations, of course, but in the eyes of the canonists there was a relevance all the same. The meaning of the Scriptures was not exhausted by one kind of reading.[69] The Bible supplied a juridical norm that could be applied to a specific legal problem.

3. Procedural Law

Use of the Bible was unexpectedly more frequent in the writing of the canonists devoted to procedural questions than in the other two subjects just described. It was contended, for example, that the story of Susanna and the elders in the Book of Daniel vindicated the manner of receiving testimony customary in the *ius commune*, that is by private and separate examination of each witness.[70] The Book of Daniel recounts that when Susanna resisted the advances of the elders, they resolved to revenge themselves by accusing her of adultery with an imaginary young man. After Susanna had been condemned to death in an open trial, Daniel intervened. He questioned the two elders separately about the supposed crime. One of them placed her action under a yew tree; the other under a clove tree. Thus was their

67. This argument was among those used to justify the Crusading movement, the argument being that since the Holy Land had once been in Christian hands and was being detained by force—no prescription could legally occur. *See generally* FREDERICK H. RUSSELL, THE JUST WAR IN THE MIDDLE AGES 89-94 (1975).

68. X 2.26.16.

69. So far as I have been able to discover, however, the canonists did not refer systematically to the three or four different senses of Scripture that were common among biblical commentators during the medieval period. *See* 1 HENRI DE LUBAC, EXÉGÈSE MÉDIÉVALE: LES QUATRE SENS DE L'ÉCRITURE 129-38 (1959-64).

70. *Daniel* 13:50-61. This was the placement of the story in the Latin Vulgate; today the story is placed in the Apocrypha. *See* THE NEW ENGLISH BIBLE WITH THE APOCRYPHA 204-06 (1970).

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perjury revealed and the life of an innocent woman saved. Proceduralists saw in this story clear support for their system of canonical procedure.[71] If it had received God's blessing in this famous scriptural trial, how much more appropriate was it for the *ius commune*.

The great importance given to the rule requiring testimony of two witnesses and to the additional requirement that they testify to the *same* act in order to constitute full proof thus found their inspiration, or at least their justification, in this biblical story. The proceduralists went further than the story required. They refined the subject, dividing "singularity" of witnesses into several categories.[72] Where the underlying act was one that could easily have been repeated, or where it was a customary action, then the singularity might not be fatal. In other words, if the act was the making of a contract, the witnesses had to agree as to time, place, and detail. Where it was a custom of tithing, exact agreement need not always be required.

There are many other invocations of the Bible to be found in the writing of the canonists, paralleling that of Susanna, but perhaps the most significant is the usage made of the story of the expulsion from the Garden of Eden in the second and third chapters of Genesis, the story of Adam, Eve, the serpent, and God. In this story, the canonists saw the pattern for the *ordo iuris*. They saw it as defining the elements of what we would describe as due process of law.[73] It demonstrated, moreover, the existence of law in the world before there was legislation or even a human legislator.[74] To modern readers, what they wrote will perhaps seem fanciful. We no longer base arguments about due process of law upon scriptural authority. But the story was used frequently enough by the canonists that we are nonetheless encouraged to believe that they took it seriously.

71. ROBERTUS MARANTA, SPECULUM AUREUM, at Pt. 3 § Iudicium, no. 134 (Frankfurt 1586) ("Idem probatur per id quod dicimus de Susanna ut habetur Dan. c. xiii ubi [relating the story] et Susanna tanquam innoxia liberata.").

72. *See* WILLIAM DURANTIS, SPECULUM IUDICIALE, at 321-22, Lib. I, Pt. 4, tit. De teste § 6 (Iam), nos. 16-18 (Basel 1574). The subject is examined in Bernard S. Jackson, *Susanna and the Singular History of Singular Witnesses*, *in* 2 ACTA JURIDICA 1977: ESSAYS IN HONOUR OF BEN BEINART 37 (1979).

73. *See* MARANTA, *supra* note 71, at Pt. 3 § Iudicium, no. 133 ("Queritur unde habuit originem iudicium, . . . et sic habuit originem in paradiso unde expulsus fuit Adam.").

74. *See* HOSTIENSIS, SUMMA AUREA, at Proem. no. 5 (Venice 1574) ("Hi naturali lege et communi (quia erat eis omnia communia) vixerunt et potest dici haec lex, ius naturale rationale, quod coepit ab exordio humane naturae.").

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Here is the story. The beginning was God's command to Adam: "[O]f the tree of the knowledge of good and evil, thou shalt not eat."[75] This statement contained one of the basic principles of what would become an accepted part of due process of law: *nulla poena sine lege*.[76] No one may be punished for an action that has not been prohibited and sufficiently defined by the criminal law. God's express prohibition against fruit eating, issued in so many words to the first man, served as a model for human law. It should conform to the principle.

Adam ate the fruit of the tree. He disobeyed the command. As a consequence, in Genesis 3:9 one reads, "And the Lord God called unto Adam, and said unto him, Where art thou?" Thus was Adam called to answer for his action. This passage, too, was read as establishing one of the basic elements of criminal procedure, the necessity of a sufficient summons. Did God not know where Adam was? That could not have been the fact. But if God knew, then why did he call out to Adam as if he were ignorant of Adam's whereabouts? Why indeed? The reason was to demonstrate that defendants must be summoned before they can be lawfully punished.[77] Procedural justice must be accorded to all, even the manifestly guilty. That required a citation. As the formless procedure once used to execute swift justice upon the "hand-having" thief disappeared in English law,[78] so it disappeared in the canon law. Under the impact of scientific jurisprudence, making use of this biblical example as its immediate source of reference, a vital principle of canonical due process came to be established.[79]

Further along the same lines came God's next words to Adam: "Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat?"[80] Again, one might reasonably ask whether God did not know the answer before he put the question. The obvious answer is that of course he did. But God asked the question and laid

75. *Genesis* 2:17.

76. *See generally* VOLKER KREY, KEINE STRAFE OHNE GESETZ (1983).

77. There was also a nice amplification of this theme in DURANTIS, *supra* note 72, at 435, Lib. II, Pt. 1, tit. De citatione 4 § 4 (Sequitur), no. 2 (use of Ecclesiasticus 12:10 to treat question of whether citation by one's adversary was lawful).

78. 2 FREDERICK POLLOCK & F.W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 496-97 (2d ed. 1968).

79. Also used to make the same point was *Genesis* 18:20-21, to the effect that God by descending to investigate the sins of Sodom and Gomorrah had shown the necessity for a full investigation of the fact of guilt before punishment. *See, e.g.*, HOSTIENSIS, LECTURA IN LIBROS DECRETALIUM, at ad X 5.1.24, no. 2 (Venice 1581).

80. *Genesis* 3:11.

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the charge nonetheless. So must an earthly judge do. There must be no Kafkaesque trial where the defendant does not know exactly with what he has been charged.[81] He must be informed of the nature of the crime of which he stood accused. Nor could he be compelled to answer questions about his conduct until he had heard the charge.

Moreover, the person accused of a crime must be given a chance to answer the charge. The very next words in the Book of Genesis are, "And the man said." Here, at least in the opinion of some canonists, was the origin of pleading. It was also an explicit demonstration that defendants must be given the opportunity to speak in response to the charge. God knew full well that Adam was guilty. He nonetheless afforded Adam the opportunity to reply. The canonists said that even where it was certain that a defendant was guilty, this same opportunity must be given to him in the procedure of the *ius commune*. God had acted in this instance, "so that he might give an example to the judges of this world."[82] Moreover, it might be that the guilty would be able to offer mitigating circumstances that could at least affect the severity of punishment. As it happened, Adam did offer some mitigating circumstances in his own defense, though not apparently enough to exonerate himself, and this event demonstrated that mortal judges must stand ready to listen to excuses and justifications, just as God himself had done. Of course, all this is a long way from the dilatory exceptions, the replications and triplications, the interlocutory appeals, and the other procedural devices that came to characterize the *ius commune*. But the biblical example was understood as establishing a floor, not as providing actual rules of pleading. God's action in the Garden of Eden had provided a principle from which the details of human law could be worked out.

Finally, the end. Having heard the confessions and such "extenuating circumstances" as Adam and Eve had to offer, God said to Adam: "[I]n the sweat of thy face shalt thou eat bread till thou return

81. The contemporary commentary on the Bible itself left some room for maneuver here by distinguishing the treatment of the serpent from Adam's situation. The serpent had not been summoned or questioned and was punished nonetheless. The reason given was that "the devil who was in the serpent had already been condemned for his sin." *See* gl. ord. ad Gen. 3:12 s.v. dixitque Adam. Evidently some egregious cases might call for summary justice, therefore, and the canon law developed what was called excommunication *latae sententiae* where exactly this happened. *See generally* Peter Huizing, *The Earliest Development of Excommunication* latae sententiae *by Gratian and the Earliest Decretists*, 3 STUDIA GRATIANA 319 (1955).

82. SEBASTIANUS VANTIUS (d. 1570), TRACTATUS DE NULLITATIBUS PROCESUUM, at tit. Ex defectu citationis, no. 7 (Venice 1567) ("sed ut iudicibus seculi in sententiis proferendis exemplum daret."). The texts in the canon law most cited were in the DECRETUM GRATIANI, at C. 2 q. 1 c. 20 (Venice 1615), and in the DECRETALES, at X 5.1.17.

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unto the ground; for out of it was thou taken."[83] Dramatic words. They were, in the opinion of the canonists, the precursor of the canonical sentence. The judge speaks the words aloud, announcing the sentence to the defendants and to the court. God gave a reason: "Because thou has hearkened unto the voice of thy wife and has eaten of the tree."[84] So does any upright judge. Again, God's action established a juridical norm.

The issues of procedural law implicit in this use of the biblical story came into particular relief in the wake of adoption by the Church of summary procedure. Although summary procedure had been used at least from the thirteenth century, its formal adoption for canonical procedure came only at the Council of Vienne in 1311-1312.[85] The canon permitted "a simple, easy process without the noise and rhetoric of a court."[86] A few years later, Pope Clement V issued a decree (*Saepe contingit*) purporting to define what that process would be.[87] Even this definition was not comprehensive or altogether clear, however. It left loose ends. For the canonists, the question therefore became to decide just how summary summary procedure could be. They needed to know what parts of the full formulary procedure could be abridged or dropped entirely and still be consistent with the basic law of the Church. And for this, the Bible was their guide, or at least their companion. They used the story of the Garden of Eden to define the basic procedural elements that *had* to be retained in summary process. The conciliar and papal decrees were interpreted in such a way as to stand in harmony with the biblical precepts, as these were understood by the canonists. To have adopted a form of procedure contrary to what God had himself abided by in the Scriptures would be to pervert the judicial system, not to make it more efficient.

It must have seemed tempting to many medieval judges to have done without the citation and to condemn notorious criminals without giving them a formal summons. The difficulty of finding malefactors and the certainty of their guilt would have rendered the citation a

83. *Genesis* 3:19.

84. *Genesis* 3:17.

85. *See* c. 6, *in* 1 DECREES OF THE ECUMENICAL COUNCILS 363 (Norman P. Tanner et al. eds., 1990). The canon was placed into the Corpus iuris canonici (Clem. 2.1.2).

86. *Id.* ("simpliciter et de plano ac sine strepitu iudicii et figura").

87. Clem. 5.11.2. On summary procedure, see generally HANS K. BRIEGLEB, EINLEITUNG IN DIE THEORIE DER SUMMARISCHEN PROCESSE (1859); Knut W. Nörr, *Von der Textrationalität zur Zweckrationalität: das Beispiel des summarischen Prozesses*, 81 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, KAN. ABT. (forthcoming 1995); Charles Lefebvre, *Les origines romaines de la procédure sommaire aux XII et XIII siècles*, 12 EPHEMERIDES IURIS CANONICI 149 (1956).

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technicality in many instances. There were precedents from early medieval practice that would seem to have permitted the citation to be omitted in such cases. That would be *real* summary procedure. But in its way stood the inconvenient third chapter of the Book of Genesis. God himself had not foregone the citation's necessity in a case of most manifest guilt. Thus, the canonists held, summary process could not omit this step.

IV. COMMON CHARACTERISTICS

These cases discussed above have been examples. They are illustrations of what is found in most (though not all) areas of the classical canon law. The Bible was referred to and used in the canonical texts and in the later commentaries on them, although not exactly in the same way or with the same intensity in every area. It would be fair to say that there was scarcely an area of the canon law where the Scriptures played *no* role. The meaning ascribed to scriptural passages seems, for the most part, also to have been arrived at by the canonists themselves. It was not simply a product of repeating contemporary theological commentaries.[88]

This conclusion, however, stops far short of allowing us to conclude that the Bible played the pivotal role, or even any but a supplementary or supernumerary role, in the formulation of the canon law. Many writers who have examined this subject have raised the question of what the "real significance" of the Scriptures was in the canon law.[89] And several have been quite skeptical of ascribing any fundamental importance to the usage they found.[90] This raises an important and quite legitimate question. Before tackling it, it will be useful first to summarize the common characteristics that emerge from an examination of these examples. There are three points to be made.

First is an obvious, but important, point—one that is, however, too easy for modern writers to overlook. The usage of the Bible found in the medieval canon law differed at many points from modern understanding of the Scriptures. Few readers today would take Jesus'

88. This statement is based upon the author's comparison of the texts cited by the canonists with the medieval *glossa ordinaria* to the Bible. There were a few exceptions, *supra* note 82, but they were not common among the examples cited in this Article.

89. *E.g.*, Fransen, *supra* note 1, at 9 (common interrogations "sur la signification réelle de ces références").

90. *E.g.*, Richard M. Fraher, *IV Lateran's Revolution in Criminal Procedure: The Birth of Inquisitio, the End of Ordeals, and Innocent III's Vision of Ecclesiastical Politics*, *in* STUDIA IN HONOREM EMINENTISSIMI CARDINALIS ALPHONSI M. STICKLER 97, 108 (R.I. Castillo Lara ed., 1992).

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admonition[91] that things that belong to Caesar should be rendered to Caesar and things that belong to God should be rendered to God as an endorsement for ecclesiastical taxation.[92] The canonists did. They understood the Bible as it had been handed down to them and as it was interpreted by the clerical interpreters of their day. Their use of biblical texts does not always correspond with a "common sense" reading, still less with modern scriptural exegesis. What they saw in the Bible was "filtered" through the schools. This undeniable fact—true indeed of all medieval thought—does not render inconsequential the consistent use the canonists did make of the Bible. It simply affected the conclusions they drew. Modern critics must approach the whole subject with this limitation in mind.

Second, the canon law and canonists did sometimes invoke rules of law or morality taken directly from the Bible, as in the case of the use of St. Paul's statement "whatever is not of faith, is sin" and the law of prescription[93] or in the invocation of words of Jesus in urging the virtues of what we now call "alternate dispute resolution" over formal and protracted litigation.[94] Just as often, however, it was a passage we would describe as a biblical story that the canonists found particularly useful. I have illustrated this tendency by the story of the Garden of Eden and the encounter between Nebuchadnezzar and Shadrach, Meshach, and Abednego. There are many other such examples. Jesus' ejection of the money changers from the Temple was said to demonstrate by divine authority that justice must not be sold.[95] Jesus' words to his disciples at the Last Supper, "One of you will betray me,"[96] were said to show that a judge must base his decision upon facts that have been shown by legitimate proof, not upon his private knowledge.[97] The parable from Luke 14:15-24, of the feast to which the master required his servant to compel guests to attend, was held to

91. *Matthew* 22:21.

92. *See supra* note 24.

93. *See supra* notes 61-64 and accompanying text.

94. *E.g.*, JOHANNES URBACH, PROCESSUS IUDICII QUI PANORMITANI ORDO IUDICIARIUS A MULTIS DICITUR 13 (Theodor Muther ed., 1882) (citing *Matthew* 5:40 to this effect); *see also* DECRETUM GRATIANI, at C. 21 q. 1, c. 1 (Venice 1615) (statement that "no man can serve two masters" in *Matthew* 6:24 is used to show that a cleric could not hold more than one benefice at one time).

95. C. 1 q. 3 c. 10. In the *glossa ordinaria* ad id s.v. *iusticiam*, this was said to provide argument for holding that even a just sentence purchased with a bribe was invalid.

96. *Mark* 14:18.

97. X 1.31.2.

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justify the use of compulsion against persons who resisted the authority of the Church.[98]

The canonists drew legal lessons from events like these. They did not regard them as "merely stories" or even as chapters in the unfolding of the life of the people of God. It seems to me, in fact, that their view was not unlike that described by Geoffrey Miller as characteristic of the approach the ancient Hebrews took to the Scriptures.[99] The events recounted in the Bible were meant to stand as a pattern for men to follow. They were to be a guide to conduct and also sometimes a clear indication of the baleful consequences of deviating from God's law. What may seem to us to be stories were actually lessons. Men must only learn to understand the meaning they conveyed.

Third, and somewhat in reiteration of a point already made, in the hands of the canonists, the texts and biblical examples rarely stated a straightforward legal rule. They were not laws in the sense of enactments that could be applied directly by a judge or lawyer. Instead, they demonstrated the existence of a norm or a basic legal principle.[100] The passages of the Bible where it appears that a literal rule of statute law appears to have been laid down were not, for the most part, those used and applied by the canonists, and when they were, they were apt to be regarded as illustrating a general legal standard rather than a literal rule to be put into practice.

Indeed, the canon law treated the Scriptures as stating a principle not wholly unlike those of a constitution. By this I mean a basic legal norm. It was not exactly the kind of constitutional principle with which most modern American lawyers are familiar, one that permits courts to strike down legislation they conceive to violate basic norms of fairness and to contravene specific constitutional prohibitions. They were, however, constitutional in the sense that they provided a standard against which to test, and by which to interpret, specific features of the law. The canonists did not suppose, for example, that Nebuchadnezzar's decree against blasphemers should be re-enacted. They did suppose that it indicated that there should be some sort of forceful rule against blasphemous utterances. A society without such a rule would have been deviating from the right order of social organization. The details, however, were contingent.

98. *See* INNOCENT IV, *supra* note 20, at X 3.42.4 (drawing a distinction between Jews and others who were not to be compelled and Christians who were to be compelled).

99. *See* Geoffrey P. Miller, *Contracts of Genesis*, 22 J. LEGAL STUD. 15 (1993).

100. WALTER ULLMANN, LAW AND POLITICS IN THE MIDDLE AGES 50 (1975) ("[I]t provided the scaffolding but was not the building.").

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V. CONCLUSION

The basic question, however, remains. It is whether the usage of the Bible described here had any real force in the construction of the canon law. Were the usages noted in this Article merely ornamental "proof texts"? Were they strained and forced justifications for decisions actually taken for other reasons? Or did they actually determine the canonical rules? Having examined the evidence, I must say that it remains very difficult to answer this question satisfactorily. The distance that separates us from the world of the medieval canonists is great. We are accustomed to utilitarian ways of thinking about legal rules, and we are not accustomed to taking seriously a legal argument based upon a biblical text. The opposite was true for the writers of the early *ius commune*. It is hard to bridge this divide, and this makes it difficult for us to form a secure opinion on the subject.

What one can say with more assurance, at least on the basis of the evidence surveyed here, deals with the attitude characteristic of the canonists. They considered their work to be more than human science. It was part of a divine plan for the world. For them, the science of the law was not simply a way of meeting societal needs. It was part of the unfolding of God's plan for mankind,[101] a plan they saw set forth preeminently in the Scriptures. This was the fundamental reason they saw no incongruity between biblical narratives and legal conclusions.[102] This was the reason they continued to cite the Bible and to draw legal conclusions from it even after the canon law was established as an independent subject for study in the European universities. There are admittedly uncertainties that remain, but the understanding of their role that led the canonists to use the biblical narratives in the service of the canon law seems more certain.

101. Thus it was common to say that, "two things are mixed together in this [canon] law, namely the divine and the human, joined together however in diverse respects." Franciscus Vargas (fl. 1550), *Tractatus de auctoritatibus pontificis maximi*, *in* 13 TRACTATUS UNIVERSI IURIS, at Axioma 12, no. 1 (Venice 1584).

102. *See* Knut W. Nörr, *Der Kanonist und sein Werk im Selbsverständnis zweier mittelalterlicher Juristen*, *in* EX IPSIS RERUM DOCUMENTIS: BEITRÄGE ZUR MEDIÄVISTIK: FESTSCHRIFT FÜR HERALD ZIMMERMANN 373 (1991).

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