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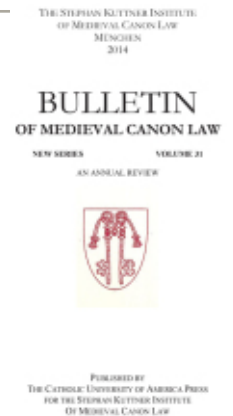
## Gratian and the Jews

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## Gratian and the Jews

Kenneth Pennington

Since Anders Winroth and Carlos Larrainzar discovered earlier versions of Gratian's *Decretum*, legal historians have explored these manuscripts for evidence that they hoped would reveal how Gratian's changes and additions to his text could provide insights into how his thought and ideas developed.<sup>1</sup> Although there is still a vigorous debate about exactly how the manuscript tradition reflects the evolution of his *Decretum*, we know far more about Gratian now than we did before. Not everyone agrees on what we know. I think that Gratian began teaching in the 1120s, that the Saint Gall manuscript 673 is the earliest witness to his teaching, and that the other manuscripts discovered by Winroth and Larrainzar provide evidence that a version of his *Decretum* circulated widely in the 1130s. The final version of his *Decretum* ca. 1140 was compiled by gradually adding canons to various parts of the text over an extended period of time.<sup>2</sup> That is an outline of what I think we know.

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<sup>1</sup> Anders Winroth's book, *The Making of Gratian's Decretum* (Cambridge 2000), was responsible for opening wonderful new vistas for understanding the development of the *Decretum*. On the St. Gall manuscript see Carlos Larrainzar's essays, 'El borrador del la 'Concordia' de Graziano: Sankt Gallen, Stiftsbibliothek MS 673 (=Sg)', 9 (1999) *Ius ecclesiae: Rivista internazionale di diritto canonico* 593-666 and 'El decreto de Graciano del código Fd (=Firenze, Biblioteca Nazionale Centrale, Conventi Soppressi A.I.402): In memoriam Rudolf Weigand', *Ius ecclesiae: Rivista internazionale di diritto canonico* 10 (1998) 421-489. I will limit my citations to the rather large literature that has been published since 1998. Almost all the relevant essays touching upon the issues that I mention in my first paragraphs are dealt with in essays printed in the BMCL between 1998 and 2013 and the ZRG, Kan. Abt. during the same period. See especially Melodie H. Eichbauer, 'Gratian's *Decretum* and the Changing Historiographical Landscape', *History Compass* 11/12 (2013): 1111-1125.

<sup>2</sup> Melodie H. Eichbauer, 'From the First to the Second Recension: The Progressive Evolution of the *Decretum*', BMCL 29 (2011-2012) 119-167.

The value of the Saint Gall manuscript is particularly controverted.<sup>3</sup> In my opinion no one has been able to prove conclusively that it is an abbreviation — or the contrary. The winnowing and sifting of the evidence proceeds apace. The status of Saint Gall is primarily important for understanding how Gratian began to teach canon law. My conviction that it represents how Gratian first began to teach canon law in the 1120's cannot be proven conclusively now and probably never will be unless we find other manuscript evidence. Still, the format of the manuscript contains a powerful clue. It only contains the *causae*. They were Gratian's remarkable contribution to twelfth-century education. He invented a system of teaching law that depended on introducing his students to hypothetical cases based on legal problems that could have easily been heard in the courts during the first half of the twelfth century. In addition Gratian employed the dialectical methodology created by the masters in northern France to legal problems. I think the great success of the *Decretum* and its immediate and enthusiastic adoption by teachers from Italy to Spain and from Austria to northern France (to rely on the manuscripts that have survived), can be attributed to his case-law methodology that reflected legal problems that Gratian and his students would have encountered when they had visited episcopal tribunals and heard about various cases.<sup>4</sup>

When Winroth and Larrainzar established the existence of different recensions of Gratian's *Decretum* in the manuscripts, scholars immediately realized that they might begin to see how Gratian's thought evolved on various subjects. Unfortunately, to date they have uncovered very little evidence about the development of Gratian's thought in any area of law. Winroth

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<sup>3</sup> I discuss St. Gall at length in 'The Biography of Gratian: The Father of Canon Law', *University of Villanova Law Review* 59 (2014) 679-706.

<sup>4</sup> Not everyone agrees that Gratian drew upon real life for his examples; Anders Winroth argued that Gratian's hypothetical cases were not real court cases, 'The Teaching of Law in the Twelfth Century', *Law and Learning in the Middle Ages: Proceedings of the Second Carlsberg Academy Conference on Medieval Legal History*, 2005, edd. Helle Vogt and Mia Münster-Swendsen (Copenhagen 2006) 41-61 at 47.

has attempted to demonstrate that Gratian changed his opinion about the primacy of spousal consent in marriage law and about the validity of the marriage of slaves.<sup>5</sup> In both of these cases the evidence is not without ambiguity.

While preparing a talk on Gratian's treatment of the Jews, I noticed that the canons Gratian included in his *Decretum* to establish norms for the legal status of the Jews were not in St. Gall or in the other pre-vulgate manuscripts. He treated the legal status of Jews only in his last, vulgate version of the *Decretum*.<sup>6</sup> This fact raises the question why did Gratian become interested in the Jews ca. 1140, the date of Gratian's final recension?<sup>7</sup> I have yet to find a convincing explanation. There were notorious Jewish cases in the mid-twelfth century that might have attracted Gratian's notice, but he provided no clues in the dicta around these canons which events may have captured his attention. These additional canons are not, however, an example of the evolution of Gratian's thought; they are an example of Gratian's beginning to have thoughts on an issue rather late in the game.

Gratian introduced his students to the legal status of Jews in four significant clusters of texts that are not in St. Gall nor in the pre-vulgate manuscripts. He added them to two distinctions

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<sup>5</sup> Anders Winroth, 'Marital Consent in Gratian's *Decretum*', *Readers, Texts and Compilers in the Earlier Middle Ages: Studies in Medieval Canon Law in Honour of Linda Fowler-Magerl*, ed. Martin Brett and Kathleen G. Cushing (Farnham, Surrey and Burlington, CT: 2009) 111-121 at 115 n.29 and his essay 'Neither Slave nor Free: Theology and Law in Gratian's Thoughts on the Definition of Marriage and Unfree Persons', *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington*, edd. Wolfgang P. Müller and Mary E. Sommar (Washington, D.C. 2006) 97-109.

<sup>6</sup> They are in the margins or the appendices of Florence, Barcelona, and Admont. That means the canons came to Gratian's attention well before he stopped working on the *Decretum*, see Eichbauer, 'From the First to the Second Recension' 154, 156, 161, 164.

<sup>7</sup> For the evolution of Gratian's *Decretum* see Peter Landau, 'Gratian and the *Decretum Gratiani*', *The History of Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and K. Pennington (History of Medieval Canon Law; Washington, D.C. 2008) 22-54.

and two *causae*. In *Distinctio* 45 canons 3, 4 and 5, Gratian raised the issue of the validity of coerced conversions of Jews and more generally how Christian rulers, especially ecclesiastical authorities, should treat them. *Distinctio* 54 canons 13, 14, 15 established that Jews cannot have or own Christian servants, they cannot hold public office, and Jewish slaves who convert to Christianity are freed. Further along in the *Decretum* he added C.17 q.4 c.31 and *dicta* p.c.30 and p.c.31, in which he repeated the norm that Jews cannot hold public office. In *Causa* 2 *quaestio* 7 canons 24-25, Gratian discussed procedure and noted that Jews could not bring suit against a Christian in court. Finally, in his treatise on marriage, *Causa* 28 *quaestio* 1 canons 10, 11, 12, 13, 14, he included canons that forbade interreligious marriages and mandated that Jews who marry Christian women must convert. Further, Christian children must be removed from Jewish parents and relatives, and Jewish converts must be separated from other Jews. Finally, Christians may not marry Jews under any circumstances. In this essay I will focus on the problems raised by the coerced conversion of Jews in *Distinction* 45.

The dictum at the beginning of D.45 is strange: ‘*Sequitur “non percussorem”.*’ Friedberg’s footnote explains that this is a reference to 1 Timothy c.3 verses 2-5, which reads:

*Oportet ergo episcopum irreprehensibilem esse, unius uxoris virum, sobrium prudentem, ornatum, pudicum, hospitem, doctorem, non vinolentum, non percussorem, sed modestum, non litigiosum . . . non neophytum.*

A little searching in the *Decretum* reveals that Gratian cited the first part of 1 Timothy at the beginning of D.36, and that he dealt with ‘*ornatus et hospitalis*’ in D.40 and D.41-D.42, ‘*pudicus*’ in D.43, a ‘*vinolentus*’ and clerical drunkenness in D.44, ‘*non percussorem*’ in D.45, ‘*non litigiosum*’ in D.46,<sup>8</sup> and ‘*neophyti*’ in D.48 as guidelines to episcopal rectitude.<sup>9</sup> After D.48 Gratian abandoned 1 Timothy as a framework for discussing clerical

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<sup>8</sup> 1 Timothy 3.3.

<sup>9</sup> It was quite natural that Gratian would have used 1 Timothy as an outline for episcopal and clerical rectitude. I discuss Gratian’s use of Timothy in ‘*Biography of Gratian*’ 696-697.

discipline. In Gratian's notation at the beginning of D.45 in all the recensions of Gratian, he seems to have assumed that the reader would remember from his reference to 1 Timothy in D.36 and, from his using words from 1 Timothy in D.40-44, that 'non percussorem' followed 'vinolentum' in the epistle of the Pseudo-Paul. The dictum in St. Gall was more helpful as a aide-mémoire than the dictum in the later recensions:<sup>10</sup>

Neque percussor iuxta eundem (i.e. the author of 1 Timothy) esse debet. Non enim oportet episcopum irascibilem et animi esse turbati ubi percutiat quia patiens debet esse et eum sequi qui dorsum posuit ad flagella.

This more extensive reminder to the reader was necessary there, perhaps, because St. Gall did not include the texts in D.44 on drunkenness nor did he include the texts from D.40-41-42-43. St. Gall did contain D.46. Do these omissions provide evidence that St. Gall is an abbreviation? I think not. In St. Gall, Gratian was discussing a particular case. In his later recensions he outlined the norms for proper clerical behavior using Timothy as a rough guide.

In St. Gall and the other pre-vulgate manuscripts, the texts contained in D.45 focused on irascible prelates who abused their subjects. Although the connection between cantankerous Christian prelates and Jews is not obvious, Gratian inserted three canons on the legal status of Jews in his vulgate recension at D.45. Pope Gregory I's letter provided the text for c.3, Pope Gregory IV's for c.4, and the Fourth Council of Toledo (A.D. 633) canon 57 was the final addition. Pope Gregory I's letter reminded Pascasius, the bishop of Naples, that the Jews of Naples should not be prevented from celebrating their festivities. Pope Gregory IV's letter emphasized that prelates should not correct their subjects harshly, including, he stated, the 'presumption of the Jews'.

The most important text in D.45 was the canon from the Council of Toledo that stipulated that that Jews should not be coerced to accept the Christian faith, but if they became Christians, they should be compelled to remain Christian. This

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<sup>10</sup> St. Gall, Stiftsbibliothek 673 p.13a.

canon circulated widely in pre-Gratian canonical collections. Twenty-two extant collections contain it. Uncharacteristically, Gratian resolved the question without creating any distinctions. His reading of the conciliar canon was brutally simple: 'Jews should not be forced to convert to the faith, but if they were unwillingly converted, they must remain Christian'.<sup>11</sup> In short, if a Jew was baptized, he became a Christian. What if the baptism was coerced? All the later jurists talked about the forced conversion of Jews when they glossed D.45. Gratian's successors developed a flexible doctrine. They created a distinction between conditional and absolute coercion, which was determined by the Roman law principles but not by the language of Roman law.<sup>12</sup> They concluded that a forced conversion or baptism of a Jew was valid if bestowed under only moderate terror.

The text of the conciliar canon was not precise on what ceremony or step constituted a valid conversion. It did state that if Jews had been forcibly converted and received the major sacraments, they could be coerced to remain Christians (D.45 c.5):

De Iudeis autem precepit sancta sinodus, nemini deinceps uim ad credendum inferre. 'Cui enim uult Deus miseretur, et quem uult indurat'. Non enim tales inviti salvandi sunt, sed volentes, ut integra sit forma iustitie. Sicut enim homo propria arbitrii voluntate serpenti obediens periit, sic vocante se gratia Dei proprie mentis conversione quisque credendo salvatur. Ergo non vi, sed libera arbitrii facultate ut convertantur suadendi sunt, non potius inpellendi. Qui autem iampridem ad Christianitatem coacti sunt, sicut factum est temporibus religiosissimi principis Sisebuti, quia iam constat eos sacramentis diuinis associatos, et baptismi gratiam suscepisse, et

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<sup>11</sup> D.45 c.5; Gratian concluded in his dictum after c.4 that this conciliar canon meant that 'Iudei non sunt cogendi ad fidem, quam tamen si inviti susceperint, cogendi sunt retinere'. On the Jews in canon law see Walter Pakter, *Medieval Canon Law and the Jews* (Abhandlungen zur rechtswissenschaftlichen Grundlagenforschung 68; Ebelsbach 1988).

<sup>12</sup> For a detailed discussion of when fear invalidated an action, see Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX: Systematisch auf Grund der handschriftlichen Quellen dargestellt*. (Studi e Testi 64; Città del Vaticano 1935, reprinted 1961) 299-314.

crismate unctos esse, et corporis Domini extitisse participes, oportet, ut fidem, quam vi vel necessitate susceperint, tenere cogantur, ne nomen Domini blasphemetur, et fides, quam susceperunt, vilis ac contemptibilis, habeatur. (This holy synod commands that Jews not be forced to believe. Rather, God has mercy on those he chooses and punishes others he does not (Rom. 9:18). The unwilling must not be saved but only the willing, as an example of a complete model of justice. As man perished by willingly obeying the serpent, he is saved through the grace of God by believing. Therefore the Jews are not to be converted by force but by persuasion and through their free will. Those who have already been forced to convert to Christianity, as had occurred during the time of the most pious ruler Sisebut, since they have accepted the divine sacraments, received the grace of baptism, the anointed with holy oil, and taken the body of the Lord, they must remain in the faith that they received whether by force or by necessity so that the name of the Lord and the faith they hold not be considered vile and contemptible.)

Must a Jew have received all the appropriate sacraments to become a Christian? Christian thinkers had very early on concluded that a valid baptism was the key to becoming a Christian.<sup>13</sup> An anonymous glossator commented on the words ‘willing, as an example of a complete model of justice,’ ‘Namely to come to the sacrament of baptism’.<sup>14</sup> From the early twelfth century on, baptism became the liturgical act and the sacrament that defined a Christian from a non-Christian and established ‘citizenship’ within the Christian church.

The most important canonist of the twelfth century, Huguccio established the jurisprudential ground rules for defining what constituted a forced valid conversion or baptism. In a gloss to the Toledo conciliar canon, Huguccio explored what constituted consent of a Jew to baptism. Rufinus had already defined coercion as either absolute or conditional when he

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<sup>13</sup> Jean Gaudemet, “‘Baptismus, ianua sacramentorum’” CJC, c. 849: Baptême et droits de l’homme’, *Rituels: Mélanges offerts au R.P. Pierre-Marie Gy*, edd. P. d Clerck and E. Palazzo (Paris 1990) 273-282, reprinted in *La doctrine canonique médiévale* (Collected Studies; Aldershot-Brookfield 1994).

<sup>14</sup> Köln, Erzbischöfliche Diözesan- und Dombibliothek 127, fol. 43v interlinear gloss to D.45 c.5 s.v. *volentes*: ‘scilicet ad sacramentum salutis uenire’.



discussed the validity of oaths.<sup>15</sup> Huguccio applied the terminology to coerced baptisms.<sup>16</sup>

I distinguish between absolute and conditional coercion: If anyone is baptized by absolute coercion, for example if one person tied him down and another poured water over him, unless he consents afterwards, he ought not to be forced to embrace the Christian faith.

Because he believed that baptism was valid whether willing or unwilling, awake or sleeping, he concluded posterior consent made a Jew a Christian.<sup>17</sup> Not all later jurists accepted Huguccio's reasoning. They held that invalid acts could never been validated by later consent. For example, invalid confessions extracted by torture were never valid *ex post factum*.<sup>18</sup> Huguccio specified in some detail exactly what constituted conditional coercion:<sup>19</sup>

If someone is baptized under conditional coercion, for example if I say I will beat, rob, kill, or injure you, unless you are baptized, he can be forced to hold the faith, because from conditional coercion an unwilling person is made into a willing person, and as a willing person is baptized. A coerced choice is a choice, and makes consent.

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<sup>15</sup> Rufinus, *Summa decretorum* to C.22 q.5 c.1 s.v. *Qui compulsi*, ed. Heinrich Singer (Paderborn 1902, reprinted Aalen 1963) 399-402.

<sup>16</sup> Huguccio, *Summa* to D. 45 c.5 s.v. *associatos unctos corporis Domini*, Lons-le-Saunier, Archives départementales du Jura 16, fol. 61v, Admont, Stiftsbibliothek 7, fol. 61v, Vat. lat. 2280, fol. 44r: 'De coactione autem distinguo, aut est absoluta aut est conditionalis. Si absoluta coactione quis baptizetur, puta unus tenet eum ligatum et alius superfundit aquam, nisi (ubi Lons-le-Saunier) postea consentiat, non debet cogi ad fidem Christianam tenendam'. Condorelli, *Libertà* 55-56 prints this text from Franz Gillmann, *Die Notwendigkeit der Intention auf Seiten des Spenders und des Empfängers der Sakramente nach der Anschauung der Frühscholastik* (Mainz 1916) 16.

<sup>17</sup> Ibid.: 'quia sive volens sive nolens, vigilans sive dormiens quis baptizetur in forma ecclesie sacramentum accipit'.

<sup>18</sup> See my essay 'Torture and Fear: Enemies of Justice', RIDC 19 (2008) 203-242.

<sup>19</sup> Huguccio, *Summa* to D. 45 c.5 s.v. *associatos unctos corporis Domini*, Lons-le-Saunier, Archives départementales du Jura 16, fol. 61v, Admont, Stiftsbibliothek 7, fol. 61v, Vat. lat. 2280, fol. 44r: 'Si vero coactione condicionali quis baptizetur, puta: te verberabo vel spoliabo vel interficiam vel leda, nisi baptizeris, debet cogi ut fiedm teneat, quia per talem coactionem de nolente efficitur quid volens, et volens baptizatur. Voluntas enim coacta voluntas est et volentem facit, ut xv. q.i. Merito (C.15 q.1 c.1)'.

Thirteenth-century jurists found Huguccio's definitions of conditional coercion persuasive. Raymond of Peñafort (ca. 1234) accepted conditional coercion conferred a valid baptism but did not accept Huguccio's conviction that absolute coercion could confer a valid sacrament. Pope Innocent III had issued the decretal *Maiores* in which almost the entire last part of *De Iudeis* was quoted. The pope declared that if a Jew had adamantly and steadfastly refused to accept baptism, the sacrament and the conversion were not valid.<sup>20</sup> Innocent's decretal was the last piece of papal canonical jurisdiction that directly touched upon the issue of coerced baptisms.

*Maiores* and *De Iudeis* left many questions open. A significant issue was the fate of Jewish children in families in which one of the parents became Christian or in which the parents did not convert, but in which a child had been baptized. A case decided in 1229 at the papal curia about the status of a Jewish child became a bench mark for deciding the rights of the father, mother and child for centuries. Raymond de Peñafort included the appellate decision in the *Decretales of Gregory IX*.<sup>21</sup> A Jew in Strasbourg had converted to Christianity and left a staunchly Jewish wife and four year old son behind. He had petitioned the bishop to grant him custody of his son. He wanted to baptize him and raise him as a Christian. The man made only one argument, at least only one argument was reported in the decision: his son should be given to him immediately to be raised a Catholic. Remarkably, the mother appeared before an episcopal synod which heard the case. She presented arguments that still resonate with maternal love. The boy was young. He needed the consolation of his mother more than his father. His gestation had been difficult, his birth painful, and his post partum strenuous. From these facts the court should understand that the legitimate conjoining of a man and a woman is called

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<sup>20</sup> *Summa de penitentia* (Rome 1603) 33: 'quia corporaliter cum violentia traherentur et super infunderetur aqua, non conferretur character baptismi, extra de bapt. et eius effectu, *Maiores*, circa finem (3 Comp. 3.34.1 = X 3.42.3)'.  
<sup>21</sup> X 3.33.2.

matrimony, not patrimony. A mother's rights should not be abrogated to appease a paternalistic jurisprudence. It was a strikingly clever argument that the jurists pondered for centuries afterwards. Her last argument was especially touching. The bishop had custody of the boy during the hearing, but his mother pleaded that the boy should remain with her since her husband had only recently converted. Failing that solution, neutral custodians should take care of the boy until he reached majority.<sup>22</sup> This mother's plea did not move the court.

After the mid-thirteenth century, the jurists used a new genre of literature, the *consilium*, to expand their discussion of the legal status of converted Jews and their children.<sup>23</sup> Two of the earliest *consilia* I know that deal with the legal status of Jews date from the second half of the thirteenth century. They treated the baptism of Jewish children and much more. A Dominican inquisitor, Florio da Vicenza, was particularly interested in relapsed baptized Jews who had 'Judaized'.<sup>24</sup> A similar problem was posed by Jews who persecuted other Jews who had converted to Christianity. The inquisitor's zeal led him into

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<sup>22</sup> X 3.33.2: 'Ad quod illa respondit, quod, cum puer adhuc infans exsistat, propter quod magis materno indiget solatio quam paterno, sibi que ante partum onerosus, dolorosus in partu, [ac] post partum laboriosus fuisse noscatur, ac ex hoc legitima coniunctio maris et feminae magis matrimonium quam patrimonium nuncupetur, dictus puer apud eam debet convenientius remanere, [quam apud patrem ad fidem Christianam de novo perductum transire debebat, aut saltem neutrius sequi, priusquam ad legitimam aetatem perveniat. Hinc inde multis aliis allegatis: tu autem praedicto puero medio tempore in tua potestate retento, quid tibi faciendum sit in hoc casu nos consulere voluisti (pars decisa in the *Decretales*).]'.  
<sup>23</sup> Mario Ascheri has devoted a lifetime of scholarship to the medieval and early modern *consilia*, e.g. "Consilium sapientis", perizia medica e "res iudicata": Diritto dei "dottori" e istituzioni comunali', *Proceedings Berkeley 1980* 532-579 and 'Legal Consulting in the Civil Law Tradition', *Legal Consulting in the Civil Law Tradition*, edd. Mario Ascheri, Ingrid Baumgärtner, and Julius Kirshner (Studies in Comparative Legal History; Berkeley 1999) 11-53.

<sup>24</sup> Riccardo Parmeggiani, *I consilia procedurali per l'inquisizione medievale (1235-1330)* (Bologna 2011) 121-122; Bolognese jurists repeated much of the *consilium* in their own that Parmeggiani prints on pp. 126-128. The jurists debated this question in *consilia* until the early modern period.

uncharted legal territory. A number of jurists from Padua or possibly Bologna responded to his questions about several cases on his docket that involved Jews. The questions posed by Brother Florio indicate that Jews were only recently coming to the attention of inquisitors and also reveal how little help the normative texts in the canonical collections were in solving more intricate problems. The jurists dealt with eight questions that Florio must have asked them to answer. The first was whether relapsed Jews should have the legal status of heretics and be subject to the inquisitor's court. The answer was simply yes, without any explanation of their reasoning.<sup>25</sup>

The second question was more ominous and threatening to the Jewish communities. Could Jews who aided and abetted relapsed Jews be tried in inquisitorial courts as 'supporters, receivers, and defenders of heretics?'<sup>26</sup> The jurists said yes. They also provided insight into their reasoning: the Jews held their legal rights in Christian society only as a privilege, not as a right. The jurists concluded by citing legal maxim that had long been embedded in canonical jurisprudence: those that abused their privileges lost them.<sup>27</sup>

The next two questions involved procedure. When and how could Jews be tortured? If the proofs contained 'presumptiones violentae', that is evidence that fell just short of complete proof, Jews could be tortured. This standard was common in the procedural literature of the *Ius commune* for

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<sup>25</sup> Ibid. 124.

<sup>26</sup> Ibid: 'dicunt eum posse et debere procedere contra eos sicut contra fautores, receptores et defensores hereticorum'. This language was taken from decretals and secular legislation; see my 'Pro peccatis patrum puniri: A Moral and Legal Problem of the Inquisition', *Church History* 47 (1978) 137-154, reprinted with additions in *Popes, Canonists and Texts, 1150-1550* (Aldershot 1993) XI pp. 3-16, especially at 11-12.

<sup>27</sup> Ibid. 124: 'Licet Iudei ab ecclesia in suis ritibus tollerentur, tamen ratione delicti quod in ecclesiam committunt, sunt severitate ecclesiastica cohercendi. Et privilegium meretur amittere qui permissa sibi abutitur potestate'. See D.74 c.6 and C.11 q.3 c.63 for the earliest appearance of this maxim in canon law. It did not have its roots in Roman law.

determining whether a person could be tortured.<sup>28</sup> It is striking that the jurists applied the same principles to Jews as they did to Christians. They also concluded that Jews could not be tortured in ways that would draw blood.<sup>29</sup> This limitation seems to imply that the jurists did not consider relapsed Jews to have committed a crime.

The other points in the ‘consilium’ covered Jews who used their synagogues to wash away baptisms of Christians or in which they circumcised Christians. These synagogues should be destroyed.<sup>30</sup> The seventh question in the ‘consilium’ was what should be done with a Jewish child of a baptized Jew (i.e. Christian), who was away or in regions unknown. Could the child remain with Jewish mother? The jurists did not hesitate to take the child away from his mother on the grounds of the ‘favor fidei’. It had become the common opinion of the jurists, following the precedent of Pope Gregory IX’s decretal (X 3.33.2) (discussed above) that a Jewish child of a mixed marriage should live with the Christian parent.<sup>31</sup> The Church, the local bishop, or the Christian prince should take the child to be raised by Christians who were not suspect and who were baptized. They granted an exception: unless the child had the ‘impediment of a contrary will (obex contrariae voluntatis)’. This strange terminology dates back to a similar phrase of Saint Augustine and had been employed by Pope Innocent III, theologians and canonists to evaluate the intentions of those who received

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<sup>28</sup> Pennington, ‘Torture and Fear: Enemies of Justice’, RIDC 19 (2008) 203-242.

<sup>29</sup> Parmeggiani, *I consilia procedurali* 124: ‘potest et debet eam extorquere suppliciis citra effusionem sanguinis per executorem vel iudicem secularem’.

<sup>30</sup> Ora Limor, ‘Christians and Jews’, *The Cambridge History of Christianity*, 4: *Christianity in Western Europe c. 1100-1500*, edd. Miri Rubin and Walter Simons (Cambridge 2009) 494-556, with bibliography; also R. Po-Chia Hsia, *The Myth of Ritual Murder: Jew and Magic in Reformation Germany* (New Haven 1988).

<sup>31</sup> Pakter, *Medieval Canon Law and the Jews* 318-321.

baptism in order to judge whether the baptism was validly bestowed.<sup>32</sup>

Pope Nicholas III declared in a letter dated 1277 that Jews who converted under threats of death cannot return to Jewish practices because they were not ‘absolutely and exactly coerced (absolute seu precise coacti)’. Gradually the ‘*praecisa coactio*’ replaced ‘*absoluta coactio*’ in the terminology of the jurists.<sup>33</sup> Pope Boniface VIII used that terminology in his decretal letter *Contra Christianos* that was later included in his *Liber Sextus*. The pope also confirmed the opinions of the jurist who advised Florio da Vicenza that relapsed Jews were to be equated with heretics and that any Jews who aided or abetted those Jews who had apostatized were subject to the jurisdiction of Christian courts and could be punished with the same penalties as those imposed upon relapsed Jews.<sup>34</sup>

Gratian inclusion of the Fourth Council of Toledo’s fifty-seventh canon on Jews shaped the legal discussion of the legal status of baptized Jews for centuries. One puzzle must remain unresolved: why did Gratian not include canons on Jews in earlier recensions? An easy answer that I do not find convincing is that from the First Crusade on, Jews became a legal problem in the Latin West. Gratian was well aware that the major pre-Gratian canonical collections, which were all divided into books and titles, often had sections devoted to the Jews.<sup>35</sup> Jews had

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<sup>32</sup> Parmeggiani, *I consilia procedurali* 125: ‘parvulus filius Iudei baptizati existens apud matrem que remansit in Iudaica cecitate patre absente in remotis partibus et ignotis, favore fidei est accipeindus ab eo per ecclesiam vel loci ordinarium seu principem Christianum, cuius subest dominio; et nutriendus apud fideles non suspectos et baptizandus, nisi obex in eo contrarie voluntatis’. On the phrase ‘obex contrariae voluntatis’ and issue of forced baptism, see Mario Condorelli, *I fondamenti giuridici della tolleranza religiosa nell’elaborazione canonistica dei secoli XII-XIX: Contributo storico-dogmatico* (2nd. ed. Università di Catania Pubblicazioni della Facoltà di Giurisprudenza 36; Milano 1960) 88-105.

<sup>33</sup> ‘*Praecisa coactio*’ is not a term of Roman law; the Roman jurists did use ‘*praecise*’ in several different contexts’, e.g. Dig. 36.3.1.20.

<sup>34</sup> VI 5.2.13.

<sup>35</sup> E.g. Burchard of Worms, Decretum 4.81-88, Collection in Three Books 3.6, Polycarpus, Collectio canonum 7.13 and many others.

always presented legal problems. There were many earlier texts in canonical collections that treated Jews. Gratian knew them. It is possible that the idea slowly dawned on Gratian that he should consider Jews, perhaps for a number of different reasons. Unlike all earlier collections Gratian did not divide his collection into books and titles. None of Gratian's *distinctiones* and *causae* dealt with Jews in Christian society. When he decided to include canons on Jews, the structure of the *Decretum* limited the places where he could place Jewish material. Consequently, all the canons he included treating the legal status of Jews were awkwardly placed in *causae* that dealt with other issues. Perhaps that is a metaphor for the status of Jews and other non-Christians in medieval Christian society.

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