

UCLA

UCLA Previously Published Works

Title

Judicial Torture in Canon Law and Church Tribunals: From Gratian to Galileo

Permalink

<https://escholarship.org/uc/item/0xd5815c>

Journal

The Catholic Historical Review, 101(4)

ISSN

0008-8080

Author

Kelly, Henry Ansgar

Publication Date

2015-09-01

DOI

10.1353/cat.2015.0261

Peer reviewed

Judicial Torture in Canon Law and Church Tribunals: From Gratian to Galileo

HENRY ANSGAR KELLY*

Church historians have thought that the ancient and medieval Church disallowed torture in court proceedings. This view draws on Gratian's Decretum (c. 1140), but Gratian cites canons that permit judicial torture. Deutero-Gratian (c. 1150) added canons from Roman civil law; Huguccio (c. 1190) and the Ordinary Gloss to the Decretum (1215 and later) also adopted Roman criteria but stipulated that the clergy could not apply coercion involving serious injury or bloodshed. Heresy inquisitors added a twist to this practice well before Galileo's trial in 1633: a defendant admitting a heterodox deed but denying evil intent must be examined under torture.

Keywords: canon law, Gratian, heresy, inquisition, torture

Discussed here will be judicial torture both in theory and in practice: in theory, as it is treated in canon law, commentaries on canon law, and practical handbooks on heresy; and in practice, as it is evidenced in church tribunals beginning around the turn of the fourteenth century, especially in the inquisitorial prosecution of heresy. This article will conclude with a brief look at the sixteenth and seventeenth centuries, and describe a theoretical and practical innovation illustrated in the trial of Galileo Galilei.

The canon law examined is mainly that contained in Gratian's *Concordantia canonum discordantium* (Harmonizing of Conflicting Rules), a collection of texts with legal implications, accompanied by commentary. It was first compiled around 1140, but about a decade later a person or persons unknown, perhaps including Gratian, doubled its size; the later redactor(s) can be called Deutero-Gratian.¹ Like other earlier collections, it

*Dr. Kelly is distinguished research professor in the Department of English at the University of California, Los Angeles, email: kelly@humnet.ucla.edu. The author thanks Kenneth Pennington and Edward Peters for much helpful advice.

1. See Anders Winroth, *The Making of Gratian's Decretum* (New York, 2000). Instead of *Gratian* and *Deutero-Gratian*, Winroth employs the terms *Gratian 1* and *Gratian 2*. Used

came to be called *Decreta*, “Decrees,” which was often couched in the singular, *Decretum*. The latest edition of the final text is that of Emil Friedberg,² but the elaborate apparatus that used to surround the text is also important. Cited here is the edition of text and apparatus commissioned by the Council of Trent and brought out under the auspices of Pope Gregory XIII in 1582; it is now available at the UCLA Library Web site.³ The summaries, glosses, cross-references, and subject indexes found here not only tell us how the central texts were received and interpreted but also provide an invaluable help to modern historians seeking to find their way through the intricacies of canon law.

Gratian’s Disavowal of Extorted Confessions

Historians have held the standard view that the Church, up through the early Middle Ages, did not approve of judicial torture. In 1882 Henry Charles Lea professed to have shown “how consistently the Church opposed the use of torture, so that, in the barbarism of the twelfth century, Gratian lays it down as an accepted rule of the canon law that no confession is to be extorted by torment.”⁴ As a more modern statement of this

here is *G1* to refer to the the original contents of Gratian’s collection, listed by Winroth, pp. 197–227, and *G2* for the added material. In “Where Gratian Slept: The Life and Death of the Father of Canon Law,” *Zeitschrift der Savigny-Stiftung, Kanonistische Abteilung*, 130 (2015), 105–28, Winroth finds evidence that Gratian became bishop of Chiusi; he thinks it likely that he did so in 1144 and died in 1145. He suggests that his successor (Gratian 2) produced the second recension of the *Decretum* after Gratian’s move to Chiusi and before 1150. An alternative account with Gratian as sole compiler is tentatively offered by Kenneth Pennington, “The Biography of Gratian, the Father of Canon Law,” *Villanova Law Review*, 59 (2014), 679–706, here 705: he completed *G1* c. 1125–30, finished *G2* c. 1133–35, and added part 3 (*De consecratione*) c. 1140 after his appointment as bishop of a diocese that could have been Chiusi. For discussions and debates about pre-*G1* stages, see Melodie H. Eichbauer, “Gratian’s *Decretum* and the Changing Historiographical Landscape,” *History Compass*, 11 (2013), 1111–25.

2. Emil Friedberg, ed., *Corpus iuris canonici (CIC)*, 2 vols. (Leipzig, 1879–81, repr. Graz, 1959), vol. 1: *Decretum magistri Gratiani*. The earlier edition of Emil Ludwig Richter (1839) was used in vol. 187 of the *Patrologia Latina* (PL). In citations of Gratian, D.=Distinction, C.=Cause (i.e., “case”), q.=question, c.=chapter/canon. In citing civil law, Cod., Dig., Nov.= Codex, Digest, Novels of Justinian. The *Decretales Gregorii IX* (=Liber Extra) is abbreviated by *X*. For all canonistic and civilian abbreviations, see James A. Brundage, *Medieval Canon Law* (London, 1995), pp. 190–205.

3. [*Corpus Juris Canonici*] (*CJC*), 3 vols. (Rome, 1582), <http://digital.library.ucla.edu/canonlaw/index.html>. Vol. 1 is missing the title page; cf. that of Lyons, 1606: *Decretum Gratiani emendatum et notationibus illustratum una cum glossis, Gregorii XIII pont. max. iussu editum, ad exemplar Romanum diligenter recognitum*. See Winroth, *Making*, pp. 9–11, for cautions about the shortcomings of this edition, as well as those of Richter and Friedberg.

4. Henry Charles Lea, *A History of the Inquisition in the Middle Ages*, 3 vols. (New York, 1887), 1:421. Adhémar Esmein, *Histoire de la procédure criminelle en France: et spécialement de*

position puts it, “In canon law torture had always been prohibited, and Gratian (c. 1140) left no doubt about its illegality in ecclesiastical courts.”⁵ This conclusion is based on a supposed *dictum* or pronouncement, *Quod vero confessio*,⁶ that Gratian makes at the beginning of Question 6 of Cause 15: “*Quod vero confessio cruciatibus extorquenda non sit*,” which can be translated as follows: “However, that a confession is not to be extorted by torments [. . .].” But, as can readily be seen, this is only a partial statement; a subordinate noun clause. We ask: What does the rest of the statement say, and what is the context? First, the full statement: “*Quod vero confessio cruciatibus extorquenda non sit, Alexander Papa testatur, scribens omnibus orthodoxis.*”⁷ Translation: “However, that a confession is not to be extorted with torments, Pope Alexander testifies, writing to all the orthodox.” At first look, this appears not to be a *dictum* at all but a standard form of introduction to the canon that follows: namely, *Si sacerdotibus*. The “however” (*vero*) stands most obviously in contrast to the previous canon, *Presbiter*, which says that a person can be convicted of a crime only by adequate proof or a spontaneous confession.⁸

Nevertheless, Gratian’s statement is obviously more than a summary of the following canon; it also hearkens back to the subject of Cause 15, the priest whose confession of guilt is extorted by his bishop’s “questions”—that is, by torture (“finally the bishop with questions extorts a confession”)—and to the query that arises from it, that is, Question number 6:

la procédure inquisitoire depuis le XIII^e siècle jusqu’à nos jours (Paris, 1882), does not take up the matter in his brief paragraph on torture, pp. 77–78, but in his revised version—which unfortunately exists only in a badly translated English version, *A History of Continental Criminal Procedure with Special Reference to France*, trans. John Simpson (Boston, 1913), p. 91—he says that Gratian’s *Decretum* bars and repudiates torture, citing C. 15 q. 6.

5. Kenneth Pennington, “Torture and Fear: Enemies of Justice,” *Rivista Internazionale di Diritto Comune*, 19 (2008), 203–42, here 216–17, repeated in “Torture in the *Ius commune*,” *Mélanges en l’honneur d’Anne Lefebvre-Teillard*, ed. Bernard d’Alteroche, Florence Demoulin-Auzary, Olivier Descamps, and Franck Roumy (Paris, 2009), pp. 813–38, here p. 821.

6. Piero Fiorelli, *La tortura giudiziaria nel diritto comune*, 2 vols. (Milan, 1953–54), 1:76, says that Gratian generalized his dictum from the canon: “Graziano, generalizzando il principio contenuto in una decretale pseudoisidoriana da lui accolta, fissa in un suo *dictum* la norma fondamentale ‘quod . . . confessio cruciatibus extorquenda non sit.’” Some scholars, however, maintain that Gratian allowed torture in certain circumstances, because several of his canons say so; see, for example, Edward Peters, *Torture* (New York, 1985), pp. 52–53.

7. Gratian, *Decretum*, C. 15 q. 6 *Quod vero*, introd. to chapter 1, *Si sacerdotibus* (CIC 1:754).

8. *Ibid.*, C. 15 q. 5 c. 2 *Presbiter* (CIC 1:754): the canon ends thus: “sola ergo spontanea confessio . . . clericum privat proprio gradu” (“therefore only a spontaneous confession deprives a cleric of his rank”).

"[It is asked] if his confession should be extorted by torture."⁹ So we must conclude that Gratian's answer is no, a bishop cannot use torture to obtain a confession from a priest in the circumstances described in the cause—a conclusion that fits the rubric that he gives to *Si sacerdotibus*: "The confession of ministers should not be extorted, but spontaneous."¹⁰

There was, however, a problem for Gratian's interpreters: the canon itself, *Si sacerdotibus*, did not fit the case. (We know now that it is taken from one of the pseudo-decretals of "Isidore"—that is, the pseudonymous Isidorus Mercator, who created a Pseudo-Pope Alexander for the occasion.¹¹) The text does not deal with a judge's efforts to extract incriminating facts or admissions from a defendant, but rather concerns kidnapers of clergy who coerce concessions of property or statements of allegiance from their victims, not only by violence but also by fear or fraud; "Pope Alexander" decrees that such concessions have no binding force.¹² In keeping with this line of thought, Deutero-Gratian added another canon, *Auctoritatem*, in which Pope Nicholas I nullifies oaths of persons who were "coerced by the violence of the impious."¹³ Then he included another three canons showing papal power to absolve subjects of unworthy rulers from their oaths of allegiance.¹⁴

9. *Ibid.*, C. 15, initial dictum (G1, *CIC* 1:744). Quotations: "tandem episcopus questionibus confessionem extorquet"; "[Queritur] an ejus confessio cruciatibus sit extorquenda."

10. *Ibid.*, C. 15 q. 6 rubric to c. 1 *Si sacerdotibus*: "Ministrorum confessio non sit extorta, sed spontanea" (G1). Note that in *CJC* 1:1439–40, the opening words of this canon are given as *Si quandoque a sacerdotibus*, and the same is true in Richter's edition (reprod. in PL 187, here col. 981); see *CIC* 1:xxv, 754–55.

11. The pseudo-decretals have traditionally been dated to the late 840s; see Horst Fuhrmann, "The Pseudo-Isidorian Decretals," in Detlev Jasper and Horst Fuhrmann, *Papal Letters in the Early Middle Ages*, ed. Wilfried Hartmann and Kenneth Pennington, [History of Medieval Canon Law], (Washington, DC, 2001), pp. 135–95; *CIC* 1:xxv, 754–55; PL 130:89–93. But they have recently been associated with the monastery of Corbie and dated to the 830s: see Clara Harder, *Pseudoisidor und das Papsttum: Function und Bedeutung des apostolischen Stuhls in den pseudoisidorischen Fälschungen* (Cologne, 2014), and the review of Eric Knibbs, *The Medieval Review*, <http://scholarworks.iu.edu/journals/index.php/tmr/article/view/19714/25799>. Calling the forger(s) "Pseudo-Isidore," which goes back to David Blondell in 1628, is misleading, from the viewpoint of modern usage; it is like calling Mark Twain "Pseudo-Mark" or Benedictus Levita (Isidore's fellow forger) "Pseudo-Benedict." It suggests that the author was pretending to be a famous Isidore, namely, St. Isidore of Seville—which is what this article's author first assumed, until, many years later, he was set straight. It is the case, however, that medieval authors like Huguccio and Teutonicus believed that he was indeed Isidore of Seville (Fuhrmann, p. 137).

12. *Decretum*, C. 15 q. 6 c. 1 *Si sacerdotibus* (G1, *CIC* 1:754–55).

13. *Ibid.*, c. 2 *Auctoritatem* (G2, *CIC* 1:755). Quotation: "coacti inpiorum violentia."

14. *Ibid.*, cc. 3–5 (G2, *CIC* 1:756).

The greatest of the early commentators on the *Decretum*, Huguccio,¹⁵ says in his *Summa Decreti* (c. 1190) at *Quod vero confessio*, “Here is entitled the sixth question, which is, whether a confession is to be extorted by torments.”¹⁶ Huguccio goes on to discuss the circumstances in which torture is indeed allowable. In contrast, John of Phintona (second half of the thirteenth century), whose *divisio textus* is given in the apparatus to the 1582 *Decretum*, presents a quite different view. He says that the first part of the question, taken up in the first two canons (*Si sacerdotibus* and *Auctoritatem*), asserts that an extorted confession is not prejudicial to the confessant.¹⁷ Well, we must answer, in light of the Ordinary Gloss to *Quod autem* (analyzed later), sometimes such a confession is indeed prejudicial (when it is done rightly, in court), and sometimes it is not (when it is done illegally, as in these two canons).

The *casus* or summary for *Quod vero confessio*, originally by Benencasa Aretinus who was writing shortly after Huguccio,¹⁸ states the substance of Question 6: “Can a confession be extorted?” But, in keeping with Huguccio’s comment, it clearly understands the question to entail “whether torture can be licitly used”—to which it responds: yes, witnesses of base condition can be tortured, but an accuser is not to be tortured by a judge, except in the case of a *crimen exceptum* (an exceptional crime), where any

15. Huguccio should not be identified with the grammarian Huguccio of Pisa, author of the dictionary *Derivationes* that was produced in Bologna in the 1160s. See Wolfgang P. Müller in *The History of Canon Law in the Classical Period, 1140–1234: From Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pennington (Washington, DC, 2008), chapter 5, “The Decretists: The Italian School,” by Pennington and Müller, pp. 142–48. I have not consulted any of the earlier decretists on the subject of torture, except for Rufinus, who finished his *Summa* on the *Decretum* around 1164 (Pennington and Müller, “Decretists,” p. 135). See Rufinus, *Summa Decretorum*, ed. Heinrich Singer (Paderborn, 1902, repr. Aalen, 1963).

16. “Hic intitulatur sexta questio, scilicet, an confessio cruciatibus sit extorquenda”: Huguccio, *Summa Decreti*: Admont, Stiftsbibliothek, MS 7 (folio numbers not visible on the Hill Monastic Library microfilm copy), ad C. 15 q. 6 *Quod vero*. This manuscript is used as the text throughout this article, sometimes emended (with brackets) from Vatican City, Biblioteca Apostolica Vaticana, MS Vat. lat. 2280 (this passage comes on fol. 210ra).

17. *CJC* 1:1439: “*Quod vero*: Hec questio dividitur in duas partes, in quarum prima dicitur quod confessio extorta non prejudicat.” For John of Phintona and other medieval canonists (to 1500), see Kenneth Pennington’s Web page, “Medieval and Early Modern Jurists: A Bio-Bibliographical Listing,” <http://faculty.cua.edu/Pennington/biobibl.htm>. For later canonists, see Johann Friedrich von Schulte, *Die Geschichte der Quellen und Literatur des canonischen Rechts*, 3 vols. in 2 (Stuttgart, 1875–80).

18. The various *casus* of the *Decretum* by Benencasa Aretinus (or Benincasa Senensis) as they appear in the 1582 edition of Gratian were revised by Bartholomew Brixiensis, c. 1240.

accuser, defendant, and witness can be tortured. Otherwise, truth is not to be extracted from a defendant (*a reo*) by torments, as it says in *Si sacerdotibus*, unless presumption is against him; all this is explained in the Ordinary Gloss.¹⁹ However, the Ordinary Gloss explains that *Si sacerdotibus* does not concern defendants (*rei*), but rather captives of hostile forces. The Ordinary Gloss to Gratian as given in the Gregorian edition is the work of Bartholomew Brixiensis (i.e., of Brescia), finished c. 1240–45. It consists mainly of the gloss of John Zemeke, called Teutonicus, produced around 1215.²⁰ Teutonicus's gloss is largely taken from Huguccio, as can be seen in the gloss on *Quod vero confessio* given in modern notation in table 1.

Huguccio (followed by the Ordinary Gloss) immediately makes the point (see table 1, no. 1) that *Si sacerdotibus* and the canon following do not concern official suspects or defendants in a court proceeding but, rather, extrajudicial and illegal situations. He says, "A confession is never to be extorted by an adversary or non-judge, which is the case the first and second chapters speak of." Teutonicus is less clear, since he leaves out "non-judge." But from the text that follows, it is clear that the adversary indicated could not be a judge.

As previously mentioned, *Si sacerdotibus* deals with declarations that are obtained from priests and other church authorities by fear, fraud, or

19. *Ibid.* (the citations are regularized): "*Casus*: Hic intitulatur sexta questio, qua queritur an confessio sit cruciatibus extorquenda. Et respondetur quod viles testes possunt cruciari, ut C. 5 q. 6 c. 1 *Quia juxta* §1 *Presbiteri* [G2, *CIC* 1:552], et C. 2 q. 1 c. 7 *Imprimis* §13 *Quales* [G2, *CIC* 1:442]. Accusator vero non est cruciandus a iudice, nisi in crimine excepto, propter inopiam probationum, vel ne falsitatem dicat, Cod. 9.8.3, ubi quilibet accusator et reus et testis torquetur. Alias, a reo veritas non est cruciatibus eruenda, ut infra, eadem, cap. 1 [i.e., *Si sacerdotibus*], nisi sit presumptio contra eum, ut C. 23 q. 5 c. 1 *Circumcelliones* [G1, *CIC* 1:928–29]. De hoc satis notatur in summa hujus questionis" ("Here is titled the sixth question, where it is queried whether a confession is to be extorted with torture. And the answer is that base witnesses can be tortured. . . . But an accuser is not to be tortured by a judge except in an excepted crime, when there is lack of proof, or to prevent false responses; and here any accuser, defendant, or witness can be tortured. Otherwise, the truth is not to be extracted from a defendant by torture. . . ., unless the presumption is against him. . . . This is sufficiently treated in the summary [i.e., gloss] of this question"). For excepted crimes, see Edward Peters, "*Crimen exceptum*: The History of an Idea," *Proceedings of the Tenth International Congress of Medieval Canon Law*, ed. Kenneth Pennington, Stanley Chodorow, and Keith H. Kendall, [Monumenta iuris canonici, Series C: Subsidia (MICS), vol. 11], (Vatican City, 2001), pp. 137–94.

20. Teutonicus's gloss can be found in Vatican City, Biblioteca Apostolica Vaticana, MS Vat. lat. 1367, untouched by Brixiensis; the comment on *Quod vero* is on fol. 154.

TABLE 1. Huguccio and the Ordinary Gloss on C. 15 q. 6 *Quod vero*

Huguccio on C. 15 q. 6 <i>Quod vero confessio</i>	Ordinary Gloss=Teutonicus + Brixiensis, <i>CJC</i> 1:1439
[1] Et quidem, ab adversario vel a non iudice numquam est extorquenda, quo casu loquuntur primum et secundum capitulum (referring to the following canons in this question, <i>Si sacerdotibus</i> and <i>Auctoritatem</i>).	[1] Ab adversario numquam est extorquenda confessio cruciatus, ut infra, eadem, c. 1 et 2.
[2] A iudice vero licite extorquetur confessio tormentis et questionibus; nam a iudice quandoque torquetur testis, quandoque reus, quandoque accusator.	[2] Sed a iudice licite extorquetur confessio tormentis et questionibus. Nam a iudice quandoque torquetur testis, quandoque reus, quandoque accusator.
[3] Testis torquetur tam in causa civili quam in causa criminali, puta est servus. Liber etiam testis torquetur tam in hac quam in illa causa, puta est criminosus sponte confitens; etiam infamis, etiam vilis et ignobilis vel obscurus et ignotus.	[3] Testis torquetur tam in civili quam in criminali, ut si est servus vel vilis persona, et etiam si sit liber et sit criminosus et infamis, vel obscurus vel ignotus.
Tales non recipiuntur ad testimonium sine questione, etsi sint clerici, ut C. 4 q. 3 c. 3 <i>Si testes</i> §16 <i>Si res exigit</i> , citing in §17 <i>Si autem ea conditio</i> (Dig. 22.5.21§2) [G2] et C. 5 q. 5 c. 4 <i>Illi qui</i> [G1], et C. 5 q. 6 c. 3 <i>Quia iuxta</i> §1 <i>Presbiteri</i> (=Cod. 1.3.8) [G2], et C. 2 q. 1 c. 7 <i>Imprimis</i> §13 <i>Quales</i> [G2] et Nov. 90 pref. § <i>Nos igitur</i> , et c. 2 <i>Et licet</i> , et c. 5 <i>Et quoniam</i> §1 <i>Hec omnia</i> , et Cod. 9.22.21 <i>Si quis decurio</i> . Torquetur et libera persona si vacillet in testimonio, ut Dig. 48.18.15 <i>Ex libero</i> .	Tales enim non recipiuntur ad testimonium sine questionibus, licet sint clerici, C. 4 q. 3 etc., <i>Si res exigit</i> et C. 5 q. 5 c. 4 <i>Illi qui</i> , et C. 5 q. 6 c. 3 <i>Quia iuxta</i> §1 <i>Presbiteri</i> (=Cod. 1.3.8), et C. 2 q. 1 c. 7 <i>Imprimis</i> §13 <i>Quales</i> et Nov. 90 pref. § <i>Nos igitur</i> , et c. 2 <i>Et licet</i> , et c. 5 <i>Et quoniam</i> §1 <i>Hec omnia</i> , et Cod. 9.22.21 <i>Si quis decurio</i> . Torquetur etiam libera persona, licet non sit vilis, dum tamen vacillet in testimonia, ut Dig. 48.18.15 <i>Ex libero</i> ;

Huguccio on C. 15 q. 6 *Quod vero confessio*

[4] **Reus** etiam, licet raro, torquetur, tantum si est suspectus, et non potest ei probari certum, presertim si est vilis persona, et hoc in civili causa, ut C. 14 q. 6 c. 1 *Si res aliena* [G1], et in criminali, ut C. 23 q. 5. c. 1 *Circumcelliones* [G1]

[5] **Actor** vero in civili causa numquam torquetur, sed accusator in causa criminali quandoque torquetur, ut in causa lese majestatis, scilicet cum crimen per alia non plene probatur, ut Cod. 9.8.3 *Si quis alicui*.

Sunt ergo in hoc casu duo specialia in crimine lese majestatis. In aliis torquetur quandoque reus, quandoque testis, et numquam accusator, sed in crimine majestatis torquetur et accusator, ut dictum est. Item in aliis non torquetur nisi viles, infames, criminosi, et hujusmodi, perraro nobiles, sed in crimine lese majestatis torquetur quandoque et testis et accusator et reus, quicumque et quantumcumque nobiles, vel in majore dignitate constitutus; nec auditur ibi volens opponere exceptionem quod non debeat torqueri, quod non contingit in aliis criminibus,

ut C. 6 q. 1 dictum *Porro* ante cap. 23, et cap. 23 *Nullus omnino* (=Cod. 9.8.4) [G2].

Ordinary Gloss=Teutonicus + Brixienis, *CJC* 1:1439

[Brixienis:] *X* 5.37.8 *Super his* (only concerns vacillation, not torture)].

[4] Item **reus** quandoque torquetur, licet raro, scilicet cum est suspectus, et non potest alias res probari, maxime si est vilis persona, et hoc in civili causa, ut C. 14 q. 6 c. 1 *Si res aliena*; similiter in criminali torquetur, ut C. 23 q. 5. c. 1 *Circumcelliones*.

[5] **Actor** vero in civili causa numquam torquetur, sed accusator in criminali causa quandoque torquetur, ut in crimine lese majestatis, cum criminaliter non potest probari, ut Cod. 9.8.3 *Si quis alicui*.

Ibi enim qualicumque dignitate sit preditus, nullo privilegio se potest tueri, sive sit accusator, sive reus vel testis,

ut C. 6 q. 1 dictum *Porro* ante cap. 23, et lex *Nullus omnino* (Cod. 9.8.4). [As the gloss stands in the 1582 edition, Teutonicus's "1. (=lex) *Nullus*" is taken to mean "50 *Nullus*," i.e., referring to a chapter in Gratian's Dist. 50 (none such exists).]

force.²¹ Huguccio has a statement to this effect explaining the canon;²² the *casus* in the apparatus gives a similar explanation.²³

Huguccio then makes a cover-statement about judicial torture (see table 1, no. 2): Judges can use torture on witnesses, defendants, or accusers at certain times.²⁴

Torture of Court Witnesses

In regard to witnesses (table 1, no. 3), those who are slaves are tortured in civil as well as criminal cases; so are free persons who are of base condition or unknown, or if they are known criminals or tainted with infamy. Huguccio specifies that these conditions apply even to criminal witnesses who volunteer a confession. In fact, he says, the testimony of all such persons is not admitted without torture.

The first canon that Huguccio cites to back up these statements is a law from the Digest added by Deutero-Gratian, to the effect that the testimony of a gladiator or similar witness cannot be accepted without torture.²⁵ The next canon he cites is another Isidorian pseudo-decretal, *III*

21. *Decretum* C. 15 q. 6 c. 1 *Si sacerdotibus* (G1, *CIC* 1:754): “Si sacerdotibus vel auctoribus ecclesie quedam scripture quoquo modo per metum aut fraudem aut per vim extortere fuerint,” etc.

22. Huguccio ad C. 15 q. 6 c. 1 *Si sacerdotibus*: “Ut patet ex dictis superius, hoc capitulum loquitur de confessione extorta ab adversariis vel non iudicibus, et dicitur hic quod talis confessio non prejudicat, sive sit facta de rebus dandis et non repetendis, sive de heresi vel secta aliqua sequenda vel secuta, sive de alia causa justa vel injusta, sive talis confessio sit firmata scriptura sive juramento” (“As is clear from the above, this chapter speaks of a confession extorted by adversaries or by non-judges, and says here that such a confession has no legal force, whether concerning things bestowed and not to be given back, or belonging to a heresy or sect, now or in the past, or dealing with other just or unjust matters; or whether such a confession was confirmed by signature or oath”).

23. *Casus* to *Si sacerdotibus* (*CJC* 1:1440): “significatum fuit Alexandro Pape quod quidam capiebant episcopos vel sacerdotes vel auctores ecclesiarum, vel ab eis per metum vel fraudem aut per vim confessiones extorquebant in scriptis, ut sic suis bonis eorum spoliarent,” etc. (“It was reported to Pope Alexander that certain persons were holding bishops or priests or heads of churches captive, or were extorting confessions from them by fear or fraud or force, to despoil them thereby of their goods,” etc.).

24. This statement, as it appears in the Ordinary Gloss, is cited by Vasil Bivolarov, *Inquisitoren-Handbücher: Papsturkunden und juristische Gutachten aus dem 13. Jahrhundert, mit Edition des Consilium von Guido Fulcodii* (Wiesbaden, 2014), p. 301.

25. *Decretum* C. 4 q. 3 c. 3 *Si testes*, §16, *Si res exigit*, referring to what Friedberg designates as §17 (*CIC* 1:539), *Si autem ea conditio* (=Dig. 22.5.21 §2) [G2]: “Si autem ea conditio rei sit ubi arenarium testem vel similem personam admittere cogimur, sine tormento testimonio ejus credendum non est” (“But if the condition of the defendant is such that we

qui, allegedly a letter from Eusebius to the bishops of Gaul, which says that when witnesses are under suspicion because of the state of their Catholic faith or because of enmity, a religious torturer (*religiosus tortor*) should extract the truth from them by various torments.²⁶ The term *religiosus* receives much commentary.²⁷ (The glosses are recorded in the notes,²⁸ and

are forced to admit someone from the arena or a similar person, his testimony is not to be believed without torture”).

26. *Decretum* C. 5. q. 5 c. 4 *Illi qui* (G1, *CIC* 1:550): “*Illi qui aut in fide catholica aut inimicitia suspecti sunt ad pulsationem episcoporum non admittantur. Nec illi qui aliorum sponte crimina confitentur. Et ideo replicanda sollicito est veritas quam sponte prolata in illis habere vox non potest. Hanc diversis cruciatibus e latebris suis religiosus tortor exigere debet, ut dum penis corpora subjiciuntur que gesta sunt fideliter et veraciter exquirantur*” (“Those who are suspect in the Catholic faith or because of enmity are not to be admitted to the removal of bishops. The same is true of those who voluntarily confess the crimes of others. And therefore when the truth cannot be established in such persons with voluntarily offered testimony, it must be diligently sought again. A religious torturer should extract this truth from its hiding places by means of various torments, so that while bodies are subjected to pain the deeds that occurred may be uncovered faithfully and truthfully”).

27. The “Roman Correctors” of the Gregorian edition mistakenly claim that the original reading was *rigorosus* (a point ignored by Friedberg). However, the text reads *religiosus tortor* in Isidore (PL 130:226A), as does the source of the passage, in the *Liber apologeticus* of Magnus Felix Ennodius (PL 63:191B). But when the Isidorian letter was edited as a genuine epistle of Eusebius, the phrase was changed to *rigorosus tortor* (PL 7:1102A), and the celebrated canonist Antonio Agustín, who actively worked with the Correctors, claimed that the letter was mendaciously (*mendose*) rendered by Gratian (PL 96:1086AB). On Agustín, see Mary E. Sommar, *The Correctores Romani: Gratian’s Decretum and the Counter-Reformation Humanists* (Zurich, 2009), pp. 15–19.

28. Both glosses on *religiosus* in the Ordinary Gloss (OG) are in Teutonic. Here is the first:

OG to *Decretum* C. 5. q. 5 c. 4 *Illi qui* s.v. *religiosus* (*CJC* 1:1046): Sed qualiter exercet religiosus vir causam sanguinis, contra illud, C. 23 q. 8 c. 30 *His a quibus* [G1, *CIC* 1:964]? Sed dic quod ecclesiasticus iudex potest virga punire, ut C. 23 q. 5 c. 1 *Circumcelliones* [G1]; et hoc non est iudicium sanguinis. Sed hic facit questiones in causa civili, quod fieri licet in defectum probationum, Dig. 48.18 lex *Divus* [cf. c. 1 §§5, 17, 22], et etiam in ecclesiastica criminali, C. 2 q. 1 c. 7 *Imprimis*, in finali, §13 *Quales autem testes* [G2, *CIC* 1:442]. Quidam etiam ex hoc loco dicunt viles contra clericos generaliter admitti cum tormentis; sed falsum est, quia tantum in exceptis criminibus admittuntur viles, ut supra, C. 4 q. 3 c. 3 *Si testes* §17 *Si autem ea conditio* (=Dig. 22.5.21 §2) [G2, *CIC* 1:539].

(But how can a religious man carry out a “case of blood,” contrary to the rule of *His a quibus* [no blood to be shed by clerics]? Respond thus: that an ecclesiastical judge can punish with a rod (see *Circumcelliones*); and this is not a judgment of blood. Supporting this are tortures in civil cases, allowable when there is a deficiency of evidence (see *Divus*); and also in an ecclesiastical criminal case (see *Imprimis*). Some say from this that base witnesses are as a general rule admitted against clerics, with torture; but this is false, since they are eligible only in excepted crimes.)

Here is the second gloss (in Teutonic, it comes after the gloss on *exigere*):

most of the material they cover will be discussed later.) A further gloss cites a decretal of Pope Celestine III (1191–98) as allowing a prelate to punish those under him corporally, as does the canon *Cum beatus* in Gratian.²⁹ There follows an extensive comment in the Ordinary Gloss, which is entirely missing in Teutonicus, so undoubtedly is by Brixiensis. It begins by stating that the canon refers only to those who confess spontaneously, since an enemy cannot be a witness in any crime—although sometimes an enemy can be tortured at the discretion of the judge. It goes on to doubt that clerics should be subjected to blows in obtaining their testimony and concludes by noting that some say that minor, but not major, clerics can be tortured.³⁰ At this point, the Roman editors add a note in the margin from Archdeacon’s *Rosary*, reporting Huguccio’s comment that when clerics spontaneously recount the crimes of others, they are subjected to blows if the case demands that their testimony be received.³¹

OG to *Decretum* C. 5. q. 5 c. 4 *Illi qui s.v. religiosus* (CJC 1:1045–46): *religiosus*: Istud obtinet in exceptis criminibus, in crimine lese majestatis, ubi accusator torquetur, ut C. 6 q. 1 dictum *Verum* a.c. 22 [G1, CJC 1:559–60], Cod. 9.8.4 *Nullus omnino*, in finali. Sed in civili causa numquam torquetur aliquis, nisi in defectum probationum, ut in Nov. 90.1 *Sancimus*. Vel dic quod prima pars loquitur de accusatore, secunda de teste. Viles enim testes bene torquentur in exceptis criminibus, ut C. 4 q. 3 c. 3 *Si testes* § 17 *Si autem ea* (=Dig. 22.5.21 §2) [G2, CJC 1:539].

(This is true in excepted crimes, the crime of lese-majesty, where an accuser can be tortured . . . But in a civil case no one is tortured except when proofs are deficient. . . . Or, say that the first part speaks of an accuser, the second of a witness. For base witnesses are certainly tortured in excepted crimes.)

29. OG to *Decretum* C. 5. q. 5 c. 4 *Illi qui s.v. exigere* (CJC 1:1046): “non per se, sed per alios, ut D. 96 [recte 86] c. 25 *Non liceat* [G2, CJC 1:304]. Per clericos autem, non per laicos, *Extra, De sen. Excom., Universitatis* [Celestine III: *Compilatio II* 5.18.13, also in *Decretales Gregorii IX* (=Liber *Extra=X*) 5.39.24, CJC 2:897]. Habes ergo hic quod prelati potest subditos corporaliter punire, ut D. 45 c. 8 *Cum beatus* [G2, CJC 1:162–63].”

30. OG to *Decretum* C. 5. q. 5 c. 4 *Illi qui s.v. ut dum* (Brixiensis) (CJC 1:1046): “Hoc non refertur ad omnia predicta, sed tantum ad illos qui sponte confitentur. Inimicus enim non potest esse testis in aliquo crimine, *X* 5.3.31 *Licet Heli* (CJC 2:760–61). Potest tamen dici quod inimicus torqueri quandoque potest; et estimabit iudex an adhibebit ei fidem vel non, ut Dig. 48.18.1 §23 *Questioni*, in finali. Sed utrum clerici debeant subditi verberibus pro testimonio dicendo dubitatur, quod videtur, ut hic, et infra, C. 5 q. 6 c. 1 *Quia juxta* §1 *Presbyteri* (=Cod. 1.3.8) [G2], et D. 45 c. 8 *Cum beatus* [G2]. Dicunt tamen quidam minores clericos posse torqueri, sed non majores.” For the rest of the gloss, see n. 32.

31. CJC 1:1046: Correctores Romani: “Dicit H[u]guccio notandum esse quod clerici sponte aliorum crimina confitentis subjiciuntur verberibus, si res exigat tales recipi in testimonium, ut in hoc cap., *Illi qui*, et ita ipse notat, D. 45 dictum (*Salomon vero*) p.c. 8 [G1, CJC 1:163]. Archidiaconus.” The reference is to Guido de Baisio, Archdeacon of Bologna, *Rosarium decretorum* (1300), who cites many of the glosses of Huguccio omitted by Teutonicus and Brixiensis in the Ordinary Gloss. Used here are the editions of Strasbourg, c. 1473 (missing CC. 5–6) and Venice, 1495.

The Brixienensis gloss continues by reporting the opinion of some that all suspects (that is, defendants, as opposed to witnesses) can be tortured, since vacillating freemen are tortured, and the Church can correct persons with canes. According to Brixienensis, it is certain from the canon *Ante omnia* that the lower-level clergy can be beaten for any crime, whereas the higher-ranking clergy can be so treated only for enormous offenses. But then, referring to the law *Presbyteri* of the Codex incorporated into the *Decretum*, he qualifies that even though clerics can be “tortured” (that is, punished) for committing an offense, many believe that they cannot be tortured for their testimony. “Or,” Brixienensis concludes, “we may say that suspected clerics can be tortured, but only by the bishop, not by a layman.”³² Note that the corporal punishment of subjects by superiors for offenses committed, usually understood to need no proof since they are *flagrantia*, is regularly compared to the use of similar painful techniques to obtain testimony or confession.

In Huguccio’s gloss on *Quod vero*, the next thing he cites (table 1, no. 3) is the law *Presbyteri* for its provision that priests should testify without the application of torture (*citra injuriam questionum*), as long as they do not “simulate falsehoods.”³³ Teutonicus’s Ordinary Gloss on this law as it appears in Gratian has an addendum by Brixienensis, who cites Huguccio as specifying that it applies to priests of good reputation; but Brixienensis disagrees. He goes on to say that it follows from this law that the lower-ranking clergy can be tortured in the presence of the bishop, but not by a layman, although he has his doubts about this as well.³⁴

Imprimis, next cited by Huguccio, is a selection from Gregory the Great, expanded by Deutero-Gratian. At the end, Gregory states that the

32. OG v. *ut dum* (Brixienensis), continued: “Alii dicunt omnes suspectos posse torqueri, nam et liberi vacillantes torquentur, ut X 5.1.16 *Super his*; Dig. 48.18.10 *De minore*. Et Ecclesia virgis potest aliquos corrigere, C. 24 [recte 23] q. 5 c. 1 *Circumcelliones* [G1]. Hoc certum est, quod minores clerici indistincte pro quolibet crimine verberibus subjiuntur, ut D. 35 c. 9 *Ante omnia* [G2, *CIC* 1:133]. Sed majore[s] non, nisi pro enormibus, ut D. 45, in summa [d. *Salomon vero* p.c. 8, G1, *CIC* 1:163]. Tamen licet clerici torqueantur pro delicto, non tamen pro testimonio dicendo, secundum plerosque, qui dicunt non tenere istam legem, infra, C. 5 q. 6 c. 1 *Quia juxta* §1 *Presbyteri* (=Cod. 1.3.8) [G2, *CIC* 1:552]. Vel, dic quod clerici suspecti possunt torqueri, non a laico, sed ab episcopo.”

33. *Decretum*, C. 5 q. 6 c. 3 *Quia juxta* §1 *Presbyteri* (=Cod. 1.3.8) (G2, *CIC* 1:552).

34. OG v. *Presbyteri* (not in Teutonicus, fol. 108): “bone opinionis, secundum H[ugucionem], [citing *Illi qui*], sed hoc non placet. Minores ergo clerici possunt coram episcopo torqueri, non a laico; vel non credo tenere quod hic dicitur” (“[The priests must be] ‘of good reputation,’ according to Huguccio, . . . but this is not acceptable. Therefore, minor clerics can be tortured in the bishop’s presence, not by a layman. Or: I do not believe what is said here is valid”).

basest kinds of witnesses are not to be believed without “corporal discussion,” a practice that he says is sanctioned by many laws.³⁵ Finally, Huguccio goes directly to Roman law and cites some passages from the Justinian Novels and the Codex, ending with a provision from the Digest that even a free person is to be tortured if he vacillates in his testimony.

Torture of Defendants

Next (table 1, no. 4), Huguccio takes up defendants in court, the proper subject of Gratian’s Question 6. According to Huguccio, a defendant can be tortured, although it should rarely happen and only occur if there are suspicions against the accused and if nothing can be proved with certainty—and especially if the person is of base condition.³⁶ This is true in civil cases, he says, as can be observed in the canon *Si res aliena*, where St. Augustine sees nothing wrong with roughing up a suspect if there is no way of recovering the goods that he stole; it can serve as a proleptic punishment for his offense³⁷—even though his guilt for the offense cannot be proved. It also holds true in criminal cases, as can be seen in the canon *Circumcelliones*, in another excerpt from Augustine. Augustine commends a judge for using mild methods of getting confessions—namely, canings or whippings, employed even by schoolmasters and parents, and also by bishops in their court proceedings—rather than racking, clawing, and burning; he recommends that the judge be similarly mild in meting out punishments.³⁸

35. *Decretum* C. 2 q. 1 c. 7 *Imprimis* §13 *Quales*: “Plurimae leges ... etiam illud sancimus ut villissimis testibus sine corporali discussione credi non debeat” (G2, *CIC* 1:442; Gregory I, *Epist.* 13.45, PL 77:1300B).

36. Huguccio on C. 15 q. 6 *Quod vero* concerning defendants (see table 1, no. 4): “Reus etiam, licet raro, torquetur, tantum si est suspectus, et non potest ei probari certum, presertim si est vilis persona, et hoc in civili causa, ut C. 14 q. 6 c. 1 *Si res aliena* [G1], et in criminali, ut C. 23 q. 5. c. 1 *Circumcelliones* [G1].”

37. *Decretum* C. 14 q. 6 c. 1 *Si res aliena* (G1, *CIC* 1:742–43; cf. Augustine, epistle 153.6.20, PL 33:662): “Ubi quidem si aliquos sustinet cruciatus repente [Corr. Rom. emend to “a repetente”], dum existimatur habere quod reddat, non est iniquitas, quia, si non est unde reddat ablatam pecuniam, tamen, dum eam per molestias corporales reddere compellitur, peccati quo male ablata est penas luit” (“But if he should sustain some torments briskly [Aug.: from the asker], it is no evil, because, if there is no way to return the stolen money, still, while he is compelled by corporal pains to return it, he suffers punishment for the sin of wrongly taking it”).

38. *Decretum* C. 23 q. 5 c. 1 *Circumcelliones* (G1, *CIC* 1:928–29): “Noli perdere paternam diligentiam quam in ipsa inquisitione servasti, quando tantorum scelerum confessionem non extendendo eculo, non sulcantibus unguis, non urentibus flammis, sed virgarum verberibus eruisti, qui modus coercionis et a magistris artium liberalium et ab ipsis parentibus adhibetur, ut sepe etiam in iudiciis ab episcopis solet haberi. Noli ergo atrocius vindicare quod

At this point Huguccio could have answered Gratian's question about whether torture is justified in his case of the priest accused of a killing or in similar cases. His answer would have been: Usually not, but in some circumstances it is called for.³⁹ As we will see, the circumstances justifying torture are called *presumptiones*, or, in the jurisprudence of civil law, *indicia*, that is, "indications" or "evidences."

Torture of Accusers, Witnesses, and Defendants in Cases of Treason (and Other Excepted Crimes)

In the last part of his gloss (table 1, no. 5), Huguccio says that plaintiffs in civil cases are never tortured, but an accuser in a criminal case is sometimes tortured—for instance, in a matter of lese-majesty (treason), when the crime cannot be fully proved in any other way, as provided in the Codex, in the law *Si quis alicui*. He explains that torture is one of two unusual measures in such cases:

There are, therefore, two special procedures in such a case dealing with the crime of lese-majesty. In other kinds of criminal cases, the defendant is tortured at times, and sometimes witnesses, but never the accuser. But in the crime of lese-majesty, the accuser is also tortured, as I have just said. Secondly, with other crimes, only base, infamous, criminous, and suchlike persons are tortured, and very rarely the noble classes, but in the crime of lese-majesty witness, accuser, and defendant are tortured at times, no matter who or how noble they are, or of whatever dignity. And in such cases, objections that such persons should not be tortured are not admitted, which does not happen in the case of other crimes.⁴⁰

lenius [invenisti]. Inquirendi quam puniendi major necessitas est. Ad hoc enim et mitissimi homines facinus admissum [*lege occultatum*] diligenter atque instanter examinare debent, ut quibus parcant inveniant" ("Do not lose the fatherly concern that you preserved in the inquisition itself, when you elicited a confession of such great crimes not with the stretching rack, not with furrowing claws, not with burning flames, but with the blows of rods, a type of coercion used even by masters of the liberal arts and by parents themselves, and often also by bishops in their court proceedings," etc.). Corrected by the Roman editors from Augustine, epist. 133; see PL 33:509–10). For the opinion of canonists on beating as punishment, see Henry Ansgar Kelly, "Medieval Laws and Views on Wife-Beating," *Proceedings of the Tenth International Congress*, ed. Pennington et al., pp. 985–1001. For a brief general history, see G. Geltner, *Flogging Others: Corporal Punishment and Cultural Identity from Antiquity to the Present* (Amsterdam, 2014).

39. In contrast, Rufinus cites *Circumcelliones* only for its recommendation of using lighter tortures for witnesses or accusers, to avoid scandal; commenting on C. 5 q. 5 c. 4 *Illi qui* (*Summa*, p. 279). In his comment on C. 15 q. 6 *Quod vero* (p. 349), he says the defendants are not to be tortured, unless they are *servi*, except in certain cases dealt with in the Codex and Digest.

40. Huguccio on *Quod vero* (table 1, no. 5): "Sunt ergo in hoc casu duo specialia in crimine lese majestatis. In aliis torquetur quandoque reus, quandoque testis, et numquam

To prove the second point, Huguccio cites Deutero-Gratian's dictum *Porro*, introducing the law *Nullus omnino* from the Codex. Although the law deals with lese-majesty, Deutero-Gratian says that the crime of simony is equivalent.⁴¹ Gratian himself makes this point in Question 3 of Cause 15,⁴² where, unusually for him, he draws directly on Roman law.⁴³ Heresy came to have the same exceptional status as lese-majesty, as in Deutero-Gratian's discussion about witnesses who have criminal records or are tainted with infamy being able to accuse "those who have orbited out of the faith," for such is the gravity of the offense.⁴⁴ In *Vergentis in senium*, issued in 1199, Pope Innocent III declares heresy to be a graver crime than lese-majesty.⁴⁵

Huguccio himself does not allude to the category of excepted crime but only says that there are some crimes, like treason, in which even the accuser can be tortured. The *casus* to *Quod vero* speaks of excepted crime, probably as it was revised by Brixiensis. Teutonicus, in glossing *religiosus tortor*, uses the expression for treason, without adding that simony and heresy also rank as worthy of torture.⁴⁶

A reader might think that treason could be tried only in a secular court, but as will be seen in the case of Bernard Delicios, treason was one of the charges in a papally commissioned ecclesiastical trial.

Torture in the *Liber Extra* and *Liber Sextus*

The *Liber Extra*, produced for Gregory IX in 1234 by Raymond of Penafort, does not noticeably take up the subject of torture, except for a decretal of Alexander III in which the pope says he directed judges to use tortures and

accusator, sed in crimine majestatis torquetur et accusator, ut dictum est. Item in aliis non torquentur nisi viles, infames, criminosi, et hujusmodi, perraro nobiles, sed in crimine lese majestatis torquetur quandoque et testis et accusator et reus, quicumque et quantumcumque nobiles, vel in majore dignitate constitutus; nec auditur ibi volens opponere exceptionem quod non debeat torqueri, quod non contingit in aliis criminibus."

41. *Decretum* C. 6 q. 1, dictum *Porro* ante c. 23 *Nullus omnino* (Cod. 9.8.4) (G2, *CIC* 1:560): "Porro symonie accusatio ad instar lese majestatis procedere debet."

42. *Decretum* C. 15 q. 3 c. 4 *Sane quisque* = Cod. 1.3.30 §§5–6 (G1, *CIC* 1:752).

43. Winroth, *Making*, pp. 146–53.

44. *Decretum* C. 2 q. 6 dictum *Huic oppositioni* ante c. 23 *Alieni erroris* (G2, *CIC* 1:488).

45. Innocent III, *X* 5.7.10 *Vergentis in senium* (*CIC* 2:782–83). On lese-majesty itself, see V. Piergiovanni, "La lesa maestà nella canonistica fino ad Uguccone," *Materiali per una storia della cultura giuridica*, 2 (1972) 55–88.

46. See n. 28.

chains for forcing a culprit to hand over pilfered funds, a statement much stronger in the pope's original words.⁴⁷ This decretal appeared in the first collection of decretals, *Compilatio I*; Tancred of Bologna, in his commentary around 1220, says, "Note that suspects are to be tortured and detained in chains and afflicted with or subjected to blows,"⁴⁸ a statement repeated in Bernard of Parma's Ordinary Gloss to the *Liber Extra* (c. 1266)⁴⁹ and by Cardinal Hostiensis (c. 1271), who also cautions moderation.⁵⁰

In addition, one of the *regulae juris* at the end of book 5, *Cum in contemplatione*, directs that there should be no torture at the beginning of court cases.⁵¹ In commenting on this rule in his *Novella* (c. 1338), John Andrew cites the canon *Circumcelliones* (dealing with the torture of defendants) and says that, according to Huguccio, torture should be moderate in the ecclesiastical forum, without the sort of methods sometimes employed

47. Alexander III, *X* 3.16.1 *Gravis* (CIC 2:517, with Pennafort's cuts rendered in italics): "Nam et nos ipsi iudicibus dedimus in mandatis ut illum iniquum sub *duris* questionibus ad rationem ponant, et etiam, si oportuerit, vinculis *macerent* alligatum et *affligant*, ut dictam pecuniam reddere compellatur" ("For in addition *we ourselves* gave orders in our mandate to the judges to subject that miscreant to *harsh* tortures, in accord with reason, and also, if called for, to *macerate and afflict him* bound with chains, to compel him to return the said money").

48. Tancred, gloss to 1 *Comp.* 3.14.2 (=X 3.16.1) *Gravis*, cited by Bivolarov, *Inquisitionen-Handbücher*, 301n231.

49. OG to *X* 3.16.1 *Gravis*, s.v. *questionibus* (CJC 2:1120), citing canons of Gratian, including *Circumcelliones* and *Illi qui*. On torturing witnesses in a bishop's court, see OG to *X* 2.1.4 *At si clerici* s.v. *legitima probatione*: "In absentia iudicis testes tales non sunt recipiendi, sed tantum in presentia iudicis, ut si res exegerit, tormentis subjiciantur" ("Such witnesses are not to be summoned in the absence of the judge, but only in the judge's presence, so that, if the case calls for it, they may be subjected to torture"), citing civil law and Gratian's *Illi qui* (CJC 2:524).

50. Hostiensis (Henricus de Segusio/Henry of Susa, Cardinal Bishop of Ostia), *In primum-seximum Decretalium librum Commentaria* (Venice, 1581; repr. Turin, 1963), 3:56A no. 11: "Sic est argumentum quod suspecti torquendi sunt etiam secundum canones, sed citra periculum corporis, moderate" ("Thus this is an argument that suspects are to be tortured, even according to canons, but moderately, with no danger to the body"). Just before this, s.v. *sub questionibus*, he says: "verberibus levibus, non transeuntibus in vindictam sanguinis" ("using light blows, not passing into a judgment of blood").

51. *X* 5.41.6 *Cum in contemplatione* (CIC 2:928): "In ipso cause initio non est a questionibus inchoandum." Here it is attributed to Gregory VII but it actually comes from Gregory I, *Epist.* 1.6 (PL 77:452A), except that in Gregory I the text is a *quaestibus* rather than a *quaestionibus*. Esmein, *History*, 92, observes that it reproduces a Roman rule with regard to torture, citing Dig. 48.18.1 and Cod. 9.41.8 §1. The summary heading to this rule in Friedberg is mistaken: *Tormenta, iudicis non praecedentibus, inferenda non sunt*; the 1582 edition has it right (CJC 2): *Tormenta iudicis non praecedentibus inferenda non sunt*: that is, "When there are no *indicia*, torture is not to be used." As Fiorelli points out, *Tortura*, 1:77, both *Cum in contemplatione* and *Gravis* were collected in the *Breviarium* of Bernard of Pavia (1191).

in secular courts, like the rack or claws and cords (which St. Augustine mentions here in the canon), “but rather rods or switches, or leather whips of the sort that we call *scorezate* (or *correggiate*).”⁵² However, Huguccio does not make this observation concerning *Circumcelliones*, which appears in a part of the *Decretum* for which he did not provide commentary,⁵³ but rather pertaining to the *religiosus tortor* passage in the canon *Illi qui*; it is a comment omitted by Teutonicus and not restored by the Archdeacon Guy of Baisio in his *Rosarium*. Huguccio notes in this comment, like Augustine in *Circumcelliones*, that such beatings resemble those used by schoolmasters and masters of servants. The use of such instruments for torture satisfies the canon *His a quibus*, which prohibits the clergy from participating in a “judgment of blood.”⁵⁴

52. Johannes Andreae, commenting on *X 5.41.6 Cum in contemplatione* (*CIC* 2:928) in his *Novella in Decretales Gregorii IX* (Venice, 1581; repr. Turin, 1966), 5:161, no. 3: “Et quod predixi, questionem esse debere moderatam, declarabat Hugutio, dicens quod in ecclesiastico foro non debent fieri tormenta que quandoque fiunt in seculari, cum scilicet subjicitur equuleis, unguis, fiduculis, et hujusmodi severioribus; sed virgis et scuticis (quas ‘scorezatas’ vocamus) subjici poterunt.”

53. See Wolfgang P. Müller, *Huguccio: The Life, Works, and Thought of a Twelfth-Century Jurist* (Washington, DC, 1994), p. 75: in Cause 23, he reached only to q. 4 c. 33 and did not comment on Causes 24–26. In many manuscripts, the gap is filled by excerpts from another commentary, called *Summa Casinensis* (from its presence in a Montecassino manuscript), written c. 1185–86, wrongly called *Continuatio prima* (it should be termed *Supplementum primum*). Of the two manuscripts used here, Admont begins the supplementary excerpt only with Cause 24, whereas in Vat. lat. 2280 it extends from where Huguccio left off, fols. 284rb–256ra (this manuscript also includes at the end the commentary of Johannes de Deo on these causes, fols. 371ra–388ra); see Müller, *Huguccio*, p. 85, and “Decretists,” pp. 152–54. At C. 23 q. 5 c. 1 *Circumcelliones v. ab episcopis*, fol. 249ra, the Montecassino commentator observes that the canon approves the extortion of confessions by beatings, noting that this canon seems to go against the canons *Si sacerdotibus* and *Auctoritatem*: “Contra C. 15 q. 6 cc. 1–2: dicitur quod non debet confessio verberibus extorqueri. Magister Jo[hannes] dicit, hic est contra istos presumptio, ibi non sic. Sed melius est dicere quod hic erat iudex, ibi non. Et nota quod hic approbatur confessio extorqueri verberibus” (“This is against *Si Sacerdotibus* and *Auctoritatem*, where it is said that a confession should not be extorted by blows. Master John says that here [in *Circumcelliones*] there is presumption against them, which is not so there. But it is better to say that here there was a judge, and no judge there [in the other canons]. And note that there is approval here for extorting confession by means of blows”).

54. Huguccio, ad C. 5 q. 5 c. 4 *Illi qui v. diversis cruciatibus*; he refers to C. 23 q. 8 c. 30 *His a quibus* (G1, *CIC* 1:964) and says: “Contra: ibi enim dicitur quod clerici non debe[n]t agitare iudicium sanguinis nec truncationes membrorum facere vel precipere. Sed non agitur iudicium sanguinis vel *truncationis* [Vat] membrorum. Item in Concilio Urbico, cap. *Non licet*: contra; ibi enim dicitur quod presbiter vel diaconus non debet stare ubi rei torquentur. Qualiter ergo episcopus erit presens et iubebit hujusmodi testes torqueri et ab eis veritatem cruciatibus extorqueri? Sed hujusmodi *testes* [Vat] in iudicio ecclesiastico subjiciuntur tormentis, non illis severioribus quibus in iudicio forensi homines quandoque subjiciuntur, scilicet

The only further *jus commune*, or general law, on torture, appears in the decretal *Multorum querela*, a decree of the Council of Vienne (1312) that required heresy inquisitors and bishops to confer together when they expose persons to torments or use “hard prisons,” with the pope considering the latter as more suitable to punishment than to safe-keeping.⁵⁵ This decretal appears in the *Clementine Constitutions*, made universal law in 1317. It can be reasonably supposed that such coercive imprisonment and tortures, as reported by “the complaint of many,” were being used not only against defendants but also against suspects in the pre-defendant stages of arrest and detention.

In sum: no ecclesiastical voice is on record in the canons of the *Decretum* as saying that torture, even the extreme forms, is forbidden; rather, the usages of Roman civil law are affirmed. Although Augustine in *Circumcelliones* com-

euleis, unguis, fidiculis, et hujusmodi, in quo casu intelligitur prefatum capitulum Urbici Concilii, sed verberibus levioribus, virgis scilicet et scuticis et corrigiis et hujusmodi, quod non prohibetur fieri vel inhiberi a clericis in hoc casu; nam iste modus cedendi et a magistris liberalium artium in discipulos et a parentibus in filios solet adhiberi, ut [in cap. *Circumcelliones* et cap. *Cum beatus*]” (“On the contrary, for there it is said that clerics should not conduct judgments of blood or perform or order amputations of limbs. But [here] no judgment of blood or amputation of members is performed. Likewise in the chapter *Non licet* of the Urbic Council, it is a contrary case; for it says there that a priest or deacon should not be present when defendants are tortured. How then will a bishop be present and order them to be tortured and the truth to be extorted from them? But such witnesses in the ecclesiastical forum are subjected not to those more severe forms to which persons in the secular forum are sometimes subjected, like racks, claws, cords, and the like, which is how the aforesaid chapter of the Urbic Council is to be understood, but rather by lighter blows, that is, by rods and whips and scourges and so forth, which is not prohibited to be done or forbidden to clerics in such cases; for this kind of lacerating is commonly used both by masters of liberal arts on their students and by parents on their children, as in the canons *Circumcelliones* and *Cum beatus*”). Deutero-Gratian refers to the Concilium Urbicum in De cons. D. 2 c. 97 *In altari* (CIC 1:1352), where the rule in question originally comes from the Council of Autun of 578.

55. *Clem. 5.3.1 Multorum querela* (CIC 2:1181–82), §1: “Duro tamen tradere carceri sive arcto, qui magis ad penam quam ad custodiam videatur, vel tormentis exponere illos, aut ad sententiam procedere contra eos, episcopus sine inquisitore, aut inquisitor sine episcopo diocesano . . . non valebit” (“But to commit them to a hard or cramped prison, which seems more fitting to punishment than to custody, or to expose them to torments, or to proceed to sentence against them, the bishop without the inquisitor, or the inquisitor without the bishop . . . will not be valid”). Jessalyn Bird, “The Wheat and the Tares: Peter the Chanter’s Circle and the *Fama*-Based Inquest Against Heresy and Criminal Sins, c. 1198–ca. 1235,” *Proceedings of the Twelfth International Congress of Medieval Canon Law, Washington, DC, 1–7 August 2004*, ed. Uta-Renate Blumenthal, Kenneth Pennington, and Atria A. Larson, [MICS, vol. 13], (2008), pp. 763–856, here p. 799, cites a statement of Robert of Courson in his *Summa* (c. 1210–12), recommending the torture of harsh confinement and diet: the suspects should be held in prison on bread and water until they confessed.

mends a judge for using more lenient alternatives, he does not condemn the harsher methods. In a celebrated passage in the *City of God*, Augustine agonizes over the suffering and injustices caused by judicial torture—for instance, when innocent persons confess to crimes just to stop the pain—but he asserts that the use of torture is necessary.⁵⁶ When Gratian takes up the question explicitly of whether a defendant's admission of guilt can be obtained by torture, he replies in the negative. However, his proof text, *Si sacerdotibus*, does not deal with judicial torture; and elsewhere he cites canons that approve of torture both for witnesses (*Illi qui*) and for defendants (*Si res aliena* and *Circumcelliones*). Deutero-Gratian cites Roman laws on torture with evident approval. Huguccio and his successors underscore these matters. Huguccio, however, sees that there is a problem for the clergy to participate in such activities if they result in the loss of life or limb or the shedding of blood; he says that clergy are restricted to less harmful interventions, ones that use the sort of implements employed by schoolmasters and parents to discipline their charges—which Augustine also recommended, but for reasons of clemency.

Gratian could have cited a perfect passage to support his view that judicial confessions should not be forced—namely, the eighty-sixth response of Pope Nicholas I to the Bulgarians in the year 866, where he insists that all such confessions should be spontaneous and voluntary.⁵⁷ He does cite Nicholas's seventy-first response to answer the eighth and final question to Cause 15 (if a priest confesses that he sinned carnally before ordination, should he be allowed to function as a priest?).⁵⁸ But doubtless Gratian did not know the pope's complete letter and simply found this excerpt among others that he used from the work of Ivo of Chartres.⁵⁹

56. Augustine, *City of God* 19.6.

57. Nicholas I, *XCVII Responsa ad consulta Bulgarorum*, no. 86 (PL 119:110–11). The first part reads, “Si fur vel latro deprehensus fuerit, et negaverit quod ei impingitur, asseritis apud vos quod iudex caput ejus verberibus tundat, et aliis stimulis ferreis, donec veritatem depromat, ipsius latera pungat; quam rem nec divina lex, nec humana prorsus admittit, cum non invita, sed spontanea debeat esse confessio, nec sit violenter elicienda, sed voluntarie proferenda” (“If a thief or bandit is caught and he denies what he is accused of, you say your custom is for a judge to have his head beaten with blows and his sides punctured with iron spikes until he utters the truth; but such conduct is allowed by neither divine law nor human, because confession should not be unwilling but spontaneous, not violently elicited but voluntarily produced”). For the complete response, see Mathias Schmoeckel, *Humanität und Staatsraison: Die Abschaffung der Folter in Europa und die Entwicklung des gemeinen Strafprozess- und Beweisrechts seit dem hohen Mittelalter* (Vienna, 2000), p. 103.

58. Gratian, *Decretum* C. 15 q. 8 c.1 *Qui admiserit* (CIC 1:759).

59. *Decretum* C. 27 q. 2 c. 2; C. 30 q. 3 c. 1; C. 30 q. 5 c. 22. See *CIC* 1:xxxii. The other uses of the letter listed here were contributed by Deutero-Gratian, but all are likewise found in Ivo.

The Mythical Need for Papal Authorization of Torture in the Prosecution of Heretics

Other misconceptions common among historians are that the new inquisitorial form of criminal procedure, as confirmed at the Fourth Lateran Council in 1215, was designed for prosecution of heresy and that the use of torture was restricted to heresy inquisitors—but only after the pope specifically permitted it. According to Lea, the prohibition of the ordeal at the Fourth Lateran Council led to the situation in which “jurists began to feel the need for torture and to accustom themselves to the idea of its introduction,” which set the stage for Pope Innocent IV’s approval of the use of torture “for the discovery of heresy,” with the first version of his bull *Ad extirpanda* in 1252.⁶⁰

However, the inquisitorial procedure set forth by Innocent III at Lateran IV⁶¹ was not intended or designed for the prosecution of heresy, which was to be handled in the traditional way by the use of purgation/compurgation.⁶² Both purgation and inquisition relied on public opinion (*fama*) about a person’s guilt of a specific crime. In the former procedure, when guilt was denied under oath, the judge simply ordered the defendant to produce a certain number of honorable witnesses to act as compurgators and testify to the individual’s good reputation. In the inquisitorial procedure, the judge would try to prove the case against the defendant by witnesses or other methods of proof (if he failed, he could still order purgation).⁶³ Within two decades, however, heresy prosecutors adopted the

60. Lea, *History of the Inquisition*, 1:421–22. Bivolarov, *Inquisitoren-Handbücher*, pp. 58–59n2, and 301–02n235, correctly observes that it is often and wrongly said that this was the beginning of the use of torture, whereas in reality torture was a standard usage before this point (at least in theory). The Lateran Council did not prohibit ordeals but only forbade clergy participation in them. Lea’s notion that the decline of ordeals stimulated the use of torture has proved popular. See, for instance, John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago, 1976; repr. with new preface, 2006), pp. 6–7. No connection has been found in the writings of canonists between the disuse of ordeals and the use of torture; nor do they offer evidence to support another popular notion: that inquisitorial procedure facilitated the use of torture.

61. Innocent III, *Qualiter et quando*, canon 8 of Fourth Lateran=X 5.1.24 (*CIC* 2: 745–47).

62. Innocent III, *Excommunicamus*, canon 3 of Fourth Lateran=X 5.7.13 (*CIC* 2:787–89). See Henry Ansgar Kelly, “Inquisition, Public Fame, and Confession: General Rules and English Practice,” in *The Culture of Inquisition in Medieval England*, ed. Mary Flannery and Katie Walter (Rochester, NY, 2013), pp. 8–29, here pp. 12–13.

63. A form of inquisition may perhaps be seen as early as 1170, in an investigation into simony ordered by Pope Alexander III on the basis of *fama*. See Lotte Kéry, “Inquisitio—

inquisitorial procedure and often distorted its intent by violating the right of due process, notably by forcing suspects to testify against themselves before any charges were established and leveled against them.⁶⁴

As for the second claim concerning torture as restricted solely to heresy prosecutors after approval by the pope, the licitness of torture was already well established for various kinds of cases, both criminal and civil, as is evident from what has been discussed above. An outstanding example of its use can be seen in the tribunal of St. Antoninus, the Dominican friar who became archbishop of Florence in 1446 (d. 1459), who resorted to torture extensively for prosecuting offenses committed by his clergy, employing officials from secular courts to administer it.⁶⁵

In fact, Innocent IV himself, in his professorial role as Sinibaldo dei Fieschi (which he continued even after becoming pope in 1243, finishing his commentary on the *Liber Extra* c. 1245), was fully aware of the juristic doctrine of torture that preceded him. In his remarks on the rule of law *Cum in contemplatione* (about not beginning cases by torture), he states that he will restrict himself to the subject of the torture of clerics, because he already specified those who were to be tortured, as well as when and how torture was to be applied, in his (lost) *Summa*.⁶⁶ He notes that there is a difference of opinion on clerics; some say that they can be tortured, citing Gregory I's mention of the need for "corporal discussion" in the canon *Imprimis*, and citing also *Illi qui*, where the *religiosus tortor* is to work on accusers and witnesses against bishops. The latter canon, Innocent says, can apply only to clerics, since laypeople cannot testify against bishops.

denunciatio—exceptio: Möglichkeiten der Verfahrenseinleitung im Decretalenrecht," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung*, 87 (2001), 226–68, here 227–28. Inquisitorial procedure was developed at the University of Paris and was even used at times against heresy suspects, notably in the Diocese of Auxerre, as recorded in a decretal of Innocent III. See Bird, "Wheat," pp. 804–09.

64. See Henry Ansgar Kelly, "Inquisition and the Prosecution of Heresy: Misconceptions and Abuses," *Church History*, 58 (1989), 439–51. Repr. in *Inquisitions and Other Trial Procedures in the Medieval West* (Aldershot, 2001), article I.

65. Stefano Orlandi, *S. Antonino*, 2 vols. (Florence, 1959–60), 1:95–98; 2:258–61, 286, 293–94, 298. See Henry Ansgar Kelly, "The Law and Nonmarital Sex in the Middle Ages," *Conflict in Modern Europe: Changing Perspectives on Society and Culture*, ed. Piotr Gorecki and Warren Brown (Aldershot, UK, 2003), pp. 175–93, here pp. 178–80.

66. Innocent IV, *In quinque libros Decretalium commentaria* (Venice, 1578) on *X* 5.41.6 *Cum in contemplatione* (fol. 236v): s.v. *a questionibus*: "Qui torqueri debeant, quando, et qualiter, hoc non noto, quia in *Summa* plene de omnibus notavi. Sed tantum de clericis videamus." It is sometimes assumed that Innocent's *Summa*, which is not extant, was exclusively on torture.

Furthermore, clerics can be beaten outside a judicial setting. Other authorities, however, say that it is laypeople, not clerics, who are tortured in the case of excepted crimes. Innocent goes on to specify that, although beatings are allowed, the torture should not endanger life or limb. It is noteworthy, he adds, that according to the first opinion, accusers are tortured in cases against clerics, which goes against (civil) law—unless, of course, it is a question of criminal or suspect accusers admitted in excepted crimes, or when an accused person wishes to evade infamy and desires tainted accusers to be admitted.⁶⁷ Undoubtedly in his fuller treatment he took up the torture of defendants, as discussed by Augustine in *Circumcelliones*.

What, then, did the papal bull *Ad extirpanda* have to do with torture? The bull contains a long set of constitutions addressed not to heresy inquisitors but to civic authorities in northern Italy. Only a brief allusion to torture appears; secular authorities are to use compulsion against the heretics they arrest but without endangering life or inflicting permanent injury, so that the accused may be induced to confess their errors and to reveal other heretics and their supporters, just as robbers and thieves are forced to confess their misdeeds and accuse accomplices.⁶⁸ In other words,

67. *Ibid.*: “Et dixerunt aliqui eos torquendos [citing *Imprimis, Illi qui*], ubi dicitur accusatores episcoporum et testes torquendos, quod non videtur posse intelligi, nisi de clericis, cum alii ad accusationem vel testimonium contras eos non admittantur Arguitur etiam pro eis, quia cum extra testimonium licitum sit eos subjicere verberibus Alii tamen dicunt contra, et in capitulis contrariis dicunt laicos tortos, qui admissi fuerant in exceptis criminibus, de quibus loquuntur preallegati capitula Pro crimine autem bene fatentur aliquos verberandos, sed cavendum est semper, ne adeo graviter torqueantur, quod periculum imminet vite vel membrorum. Item nota in accusatione clericorum torquentur accusatores, secundum primam opinionem [citing *Illi qui*], quod non est secundum legem. Sed mirum videtur quod questio facienda sit in accusatore, cum nullum criminosus vel suspectus sit admittendus ad accusationem Sed dic eos admittendos in exceptis criminibus, vel quando accusatus volens evitare infamiam suam eos vult admittere.”

68. Giovanni Domenico Mansi, *Sacrorum conciliorum nova et amplissima collectio*, 54 vols. (Paris, 1901–27), 23:569–75: Innocent IV, *Ad extirpanda*, May 15, 1252, constitutions issued to the civil authorities of Lombardy, Romagna, and Treviso. The section referring to torture is no. 25 (col. 573): “Teneatur preterea potestas seu rector omnes hereticos quos captos habuerit cogere, citra membri diminutionem et mortis periculum, tamquam vere latrones et homicidas animarum et fures sacramentorum Dei et fidei christiane, errores suos expresse fateri, et accusare alios hereticos quos sciunt, et bona eorum, et credentes et receptatores et defensores eorum, sicut coguntur fures et latrones rerum temporalium accusare suos complices et fateri maleficia que fecerunt” (“Moreover, every mayor or ruler is bound to compel all heretics whom they have arrested, without endangering their lives or permanently damaging any part of their bodies, to confess their errors explicitly, treating them, truly, as robbers and murderers of souls and thieves of God’s sacraments and the Christian faith, and making them accuse other heretics whom they know, and reveal their possessions and those who believe in

civic leaders are urged to use the same methods upon these metaphorical thieves that they do on real thieves. The text says nothing about the use of any such coercion by churchmen when prosecuting heretics judicially. The sort of torture in Innocent's commentary concerns cases where charges have been formally made, whereas the bull seems to authorize an extralegal "third degree"⁶⁹ by secular officials before delivering them to the bishop or inquisitors within the stipulated fifteen days.⁷⁰

Therefore, *Ad extirpanda* marks an important step in the pursuit of heresy. But, although it was reissued at least five times by Innocent IV (between 1252–54), nine times by Alexander IV (between 1255–59), and twice by Clement IV (in 1265 and 1266),⁷¹ it never assumed the status of a *jus commune*; none of its instructions were incorporated into the *Liber Sextus* (1298). However, it is possible that its torture provision encouraged heresy inquisitors to use torture on suspects, once they began the practice of interrogating suspects before charging them, which appears as early as the Council of Narbonne (late 1243 or early 1244), when the prelates advised Dominican heresy inquisitors on how to proceed. In broad fact-finding inquisitions, witnesses were required to testify generally concerning themselves and others (*de se et aliis*).⁷²

A heresy-inquisitor manual used in Italy, *Explicatio super officio inquisitionis* (c. 1260–61), which Antoine Dondaine labels as Manual 3, refers to one of Innocent IV's issues of *Ad extirpanda* but only for its threat of excommunication against recalcitrant town officials.⁷³ However, Don-

them and give them shelter and come to their defense, just as thieves and robbers of earthly goods are forced to accuse their accomplices and to confess the evils they have done").

69. This expression goes back to the turn of the twentieth century; it is defined by the *Oxford English Dictionary* as "an interrogation of a prisoner by the police involving the infliction of mental or physical suffering in order to bring about a confession or to secure information."

70. *Ad extirpanda*, chap. 23. Later, with Boniface VIII's decretal *Ut inquisitionis*, *Sext* 5.2.18, *CIC* 2:1076–77, it was made general law that only ecclesiastical courts could try heresy.

71. Lea, *History of the Inquisition*, 1:337–40. Bivolarov, *Inquisitoren-Handbücher*, gives the details of both issues of Clement IV but of only two of Innocent IV and one of Alexander IV (see his index on pp. 28–29).

72. *Consilium del concilio di Narbonne (1243–44)*, ed. Riccardo Parmeggiani, *I consilia procedurali per l'inquisizione medievale (1235–1330)* (Bologna, 2011), pp. 22–32, cap. 27 (p. 30). See Kelly, "Inquisition and the Prosecution of Heresy," p. 447.

73. Antoine Dondaine, "Le manuel de l'inquisiteur (1230–1330)," *Archivum fratrum praedicatorum*, 17 (1947), 85–194, here 101–04; Riccardo Parmeggiani, ed., *Explicatio super officio inquisitionis: Origini e sviluppi della manualistica inquisitoriale tra Due e Trecento* (Rome, 2012), pp. 1–2; cf. pp. xcvi–xcix. Parmeggiani narrows the date to 1260–61 (pp. lxvi–lxviii).

daine's Manual 4, perhaps by the Franciscan David of Augsburg (d. 1271), cites Innocent's *Ad extirpanda* as authorizing an accused person "by a secular judgment" to be compelled to confess his errors and betray accomplices by tortures and torments, but short of danger to life and limb.⁷⁴ The author here may envisage the secular tribunal as invited to participate in the course of the ecclesiastical trial, once the suspect has been formally charged. Another manual from around 1295, the Italian *Libellus* (Manual 7), simply provides a copy of the 1265 issue of *Ad extirpanda* of Clement IV.⁷⁵ But when Bernard Guy, heresy inquisitor of Toulouse, cites the same bull in his extensive manual a generation later (Manual 9), he says that the bull shows that heretics can be tortured, like thieves and murderers, both to confess their own errors and to accuse others.⁷⁶ He makes no mention of resorting to the secular arm. Later, when dealing with the southern-style Beguines, he makes it clear that torture can be used even on persons who refuse to cooperate in pretrial interrogations.⁷⁷

Early Use of Torture in Church Tribunals

It is difficult to know the extent to which torture, no matter what the justification, was actually used. As Lea points out, "In the fragmentary documents of inquisitorial proceedings which have reached us the references to torture are singularly few."⁷⁸ He assumes that it did happen frequently, and Clement V's *Multorum querela* confirms it. Lea speculates that recording its use "would in some sort invalidate the force of the testimony."⁷⁹ Vasil Bivolarov, citing Yves Dossat, thinks it very likely that the Dominican heresy inquisitor Bernard de Caux in 1243 used the rack on a

74. Wilhelm Preger, ed., "Der tractat des David von Augsburg über die Waldesier," *Abhandlungen der historischen classe der königlich bayerischen Akademie der Wissenschaften*, vol. 14, pt. 2 (Munich, 1878), pp. 181–224, chap. 37 (p. 225): "Quod si aliquis accusatus et detentus non vult sponte confiteri errores suos et prodere alios complices suos, potest per iudicium seculare ad hoc compelli questionibus et tormentis, citra membrorum diminucionem et mortis periculum, accusare aliquos quos scit, et fautores eorum, credentes, et errores suos expresse confiteri, secundum constitutionem Innocentii IV pape." See Johannes Fried, "Wille, Freiwilligkeit und Geständnis um 1300: Zur Beurteilung des letzten Templergrossmeisters Jacques de Molay," *Historisches Jahrbuch*, 105 (1985), 388–425, here 391. This chapter is found in the longer version of Manual 4; see Dondaine, "Manuel," p. 104.

75. Dondaine, "Manuel," pp. 107, 111, 155.

76. Bernard Guy, *Practica inquisitionis heretice pravitatis*, ed. Célestin Douais (Paris 1886), 4.3.2.A.a (pp. 218–19). The work was completed around the beginning of 1324; Dondaine, "Manuel," pp. 115–17.

77. Guy, *Practica*, 5.4.8 (p. 284).

78. Lea, *History*, 1:423.

79. *Ibid.*, pp. 423–24.

heresy suspect, but Dossat himself convincingly argues that the count of Toulouse was responsible for the torture, in pursuit of a monetary matter.⁸⁰ However, Bivolarov does rightly note that around 1278–79 Charles of Anjou authorized his officials to use torture in Sicily at the request of another Dominican heresy inquisitor, Bartholomew of Aquila.⁸¹

Lea cites one example of complaints of abuses by heresy inquisitors and their torture of innocent persons: a rebuke by King Philip of France in 1291.⁸² But he first finds indications of torture in inquisitorial records concerning the prosecution of heresy in Toulouse beginning in 1309 and in the references of Bernard Guy about its utility “on both principals and witnesses.”⁸³ Guy does deal with torture in his manual, but only sparsely. Apart from the appeal to the *Ad extirpanda* of Clement IV and his reference to using it on uncharged suspects, his only other mention occurs in a sample sentence in part 3, where it is related that the defendant made a confession unprompted by torture but then claimed that he had only confessed to heresy while under torture.⁸⁴ Lea cites the actual case in which this allegation of torture occurred in Guy’s *Liber sententiarum*⁸⁵ and deduces that torture must have been used in other cases.⁸⁶ In fact, beginning in 1307, such torture had been ordered and explicitly practiced in the north of France in the persecution of the Knights Templar.⁸⁷

80. Bivolarov, *Inquisitoren-Handbücher*, p. 302n235, citing Yves Dossat, *Les crises de l’inquisition toulousane au XIIIe siècle (1233–1273)* (Bordeaux, 1959), p. 212.

81. Ricardo Filangieri, ed., *I registri della Cancelleria angioina*, vol. 21 (Naples, 1967), p. 270, no. 120; p. 273, no. 142; and p. 305, no. 368. See Bivolarov, *Inquisitoren-Handbücher*, pp. 301–02.

82. Lea, *History*, 2:61–62; Bivolarov, *Inquisitoren-Handbücher*, 302n238, gives an example of the complaints.

83. Lea, *History*, 1:424, referring to Guy’s *Liber sententiarum* (see below).

84. Guy, *Practica*, 3.36 (pp. 138–39): not tortured: “non existens in questionibus seu tormentis”; claims he was tortured: “negare se confessum fuisse aliquid de heresi nisi per violentiam tormentorum.”

85. Lea, *History*, 1:424, cf. 420. The *Liber sententiarum* has now been edited by Annette Pales-Gobilliard, *Le livre des sentences de l’inquisiteur Bernard Gui, 1308–1323*, 2 vols. continuous pagination (Paris, 2002); see 2:1178. Lea’s page numbers refer to the Limborch edition (given here as “LM”).

86. Lea, *History*, 1:424: “There are numerous instances in which the information wrung from the convicts who had no hope of escape could scarce have been procured in any other manner.”

87. Georges Lizerand, ed. and trans., *Le dossier de l’affaire des Templiers*, 2nd ed. (Paris, 1964), doc. 2[.2], pp. 24–29, and Malcolm Barber and Keith Bate, trans., *The Templars: Selected Sources* (New York, 2002), pp. 247–48. See Lea, *History*, 3:260–318; Malcolm Barber, *The Trial of the Templars*, 2nd ed. (New York, 2006).

The case of the Franciscan friar Bernard Delicios of Carcassonne is especially illuminating. After he came to Avignon in 1317 to speak to Pope John XXII on behalf of the Spiritual Franciscans, he was arrested by the mainline friars and, according to a partisan report, was subjected to severe imprisonment and other harsh efforts to extort admissions that could support a heresy charge.⁸⁸ But the prosecution against him was taken up at the papal court at the beginning of 1318. Bernard of Castanet, former bishop of Albi, formulated one set of charges, with another apparently set forth by Bernard Guy, to which Friar Bernard made responses; but then in 1319 the pope transferred the inquisition to a commission of bishops in the defendant's home territory.⁸⁹ One of the two bishops who heard the case was James Fournier, who had already begun heresy inquisitions in his diocese of Pamiers⁹⁰ and would succeed John XXII in 1334 as Benedict XII. Most of the charges against the friar were of favoring heresy by opposing the Dominican heresy inquisitors—alleging that they had forced confessions and accusations of heresy from and about innocent persons by the use of torture.⁹¹ But the friar was tortured on the basis of other charges: treason against the king of France, plotting the death of Pope Benedict XI, and using a book of demonic magic.

Regarding the charge of treason, the bishops on October 2 informed Friar Bernard that, because of the testimony of witnesses and his own

88. Angelo Clareno, *Historia septem tribulationum*, tribulation 6, ed. Franz Ehrle, "Die Spiritualen, ihr Verhältniss zum Franciscanerorden und zu den Fraticellen," *Archiv für Literatur und Kirchengeschichte des Mittelalters*, 2 (1886), 106–64, 249–336, here 147: "Et adinventiones eorum et studia convertebant, si quomodo de ore ipsius verbum possent aliquod capere vel extorquere, per quod occasionem haberent contra eum quasi contra hereticum procedendi" ("And their devices and efforts centered on how they could in any way record or extort from his own mouth some saying that would give them the opportunity to proceed against him as a heretic"). See Alan Friedlander, *The Hammer of the Inquisitors: Brother Bernard Délicieux and the Struggle Against the Inquisition in Fourteenth-Century France* (Leiden, 2000), p. 256: "They submitted him first to torture and then to interrogation."

89. Friedlander, *Hammer*, pp. 258–60; *Processus Bernardi Delitiosi: The Trial of Fr. Bernard Délicieux, 3 September–8 December 1319*, ed. Alan Friedlander (Philadelphia, 1996); Jean Duvernoy, trans., *Le procès de Bernard Délicieux, 1319* (Toulouse, 2001). See Lea, *History*, 2:100–02.

90. Jean Duvernoy, ed., *Le registre d'inquisition de Jacques Fournier, évêque de Pamiers (1318–1325)*, 3 vols. (Toulouse, 1965).

91. He was charged in the Castanet articles nos. 15–16 with interviewing prisoners for details of their torture and the names of those they accused because of the torture; one witness testified, and Delicios denied the charges (*Processus*, pp. 60, 94–95, 109, 170). During the trial, he was asked if he publicly denounced the inquisitors for forcing accusations by torture; he admitted to having done so only privately, based on hearsay rather than his own knowledge (pp. 189, 194–95). He was found guilty of saying that true Catholics were forced to confess *de se et aliis* because of torture (pp. 206–07).

statements, there was a violent presumption that his role in the matter was larger than that described in his responses, and that therefore they were issuing an interlocutory sentence that he be tortured (*supponi questionibus*). The next day they committed the task to the *jurisperitus* Master Hugh de Badafols, for two reasons: he was an expert in inflicting torture (*plene expertus super inferendis vel faciendis questionibus*), and second, as an attendee of the trial, he was completely informed on the testimony and statements concerning the treason charge. Badafols was currently the parish priest (*rector*) of a church in Alet and had been the official, or chief ecclesiastical judge, of the short-lived Diocese of Limoux (1317–18). In the previous year, 1318, he had represented the archbishop of Narbonne at a sentence of exhumation in Limoux delivered by the Dominican inquisitor John de Beaune.⁹² The judges instructed him that he was to use only such temperate tortures as were required by law (*de jure*) upon a person of the age and condition of Friar Bernard, so that neither death nor permanent injury would result. Two notaries were to be on hand to record any confession of the friar, so that Badafols could report to the bishops about the tortures used and any admissions made.⁹³

Badafols went to Friar Bernard at once, and, although the notaries were near enough to hear his cries or shrieks, they clearly were unable to see what was happening, but they concluded from the shrieks that Master Hugh tortured him. After an interval, Badafols returned to the bishops, taking the notaries with him. He reported that he had applied torture on Friar Bernard as they ordered, but the friar had not confessed anything against himself during the process or afterward and rather insisted during torture that the charges against him were false.⁹⁴ When the bishops resumed their interrogation of Friar Bernard the next day, the notaries seemed to be at pains to stress that the torture had not harmed him, for they said with great elaboration that he spoke tranquilly and with no tremor in his voice.⁹⁵

92. *Processus Bernardi*, p. 143 (October 2–3); cf. p. 342; Friedlander, *Hammer*, pp. 190–91; Duvernoy, *Procès*, p. 95n90.

93. *Processus Bernardi*, pp. 143–44. Beaune also attended the trial of Friar Bernard, but not as a participant, except to present witnesses.

94. *Ibid.*, p. 144: “ipsum, ut apparebat ex vocibus et clamoribus supradictis, questionibus supposuit” (“he subjected him to torture, as was evident from the aforesaid cries and shrieks”).

95. *Ibid.*: “Ipse frater Bernardus sponte, plane, et tranquille, deliberate et constanter et sine omni tremore, prout percipi poterat ex verbis suis et modo suo loquendi, respondit et confessus fuit super articulo proditionis predictae ut sequitur.”

Seven weeks later, the bishops decreed that Friar Bernard was to undergo torture once again, this time on the charges of abbreviating the life of Pope Benedict and using a book of black magic (*libellus nigromanticus*). They committed the task to two of their regular assessors at the trial: Peter du Verdier, archdeacon of Majorca, and the *jurisperitus* Bertrand Jurquet of the Diocese of St. Flour, also identified as the rector of the church of St. Stephen in Ségur in the Diocese of Rodez.⁹⁶ Verdier was a cleric of Perpignan who had served as chancellor to the king of Majorca and, after fleeing to France, had been summoned by Bishop Fournier in 1318 to participate in his inquisitions in Pamiers, and he also employed him to issue excommunications against persons in the diocese who failed to pay tithes.⁹⁷ The assessors did not conduct the torturing personally, but reported that Friar Bernard was “put to the questions” in their presence. They continually stood by him as he was tortured, with the two notaries assisting. The friar expressed no wish to admit to anything but rather, both under torture and afterward, constantly asserted that he had not contributed to the pope’s death and had never used the book in question.⁹⁸

Manuals and Consultations of Heresy Prosecution

Unlike the *Directorium inquisitorum* of the Catalan heresy inquisitor Nicholas Eymeric (completed in 1376), Guy’s *Practica*, which is so prominent in modern accounts of heresy prosecution, does not seem to have been influential in its time. Eymeric’s *Directorium* became even more important when Francisco Peña, the most authoritative legal authority of his day, edited and provided commentary on it in 1578.⁹⁹ Among the authorities

96. *Ibid.*, pp. 179–80 (Nov. 20); see also pp. 181, 213, 218, 219, 311n85.

97. Duvernoy, *Procès*, p. 122n118.

98. *Processus Bernardi*, p. 180. The account of the torture is inserted into the record, with no lead-up or follow-up, between the events of November 17 and November 25. It is said to have been ordered on the morning of November 19, but it is not mentioned in other reports of that day (see pp. 153, 193).

99. Nicholas Eymeric, *Directorium inquisitorum* [1376], ed. Francisco Peña, 2 vols. (Rome, 1578). Eymeric’s manual is in the first volume, and Peña’s comments (scholia) are in the second. See Eymeric’s sections in part 3: *De tertio modo terminandi processum in causa fidei: per tormenta; Forma sententie interlocutorie ad supponendum aliquem questionibus et tormentis; Instructio accuratissima circa questiones reorum* (1:313–15) and Peña’s corresponding scholia 53–54 (2:165–69); and Eymeric’s q. 61 *De questionibus et tormentis* (1:372–73) and Peña’s scholium 118 (2:224–31). Cf. Peña’s slightly revised edition of 1585 (used here is in the reprint of Venice, 1595), in which his scholia are renamed *commenta* and printed immediately after the relevant passages in Eymeric. For instance, scholium 118 on torture appears as *commentum* 110 on pp. 592–99, after Eymeric’s Question 61 (pp. 591–92).

used by Eymeric in his discussion of what persons should be tortured are the *Summa de questionibus*—attributed by him to Azo, presumably Azo of Bologna (d. 1230), the famous civil law glossator—and the *Summa* of Innocent IV, neither of which is extant.¹⁰⁰

As a side note, it is interesting to see Peña's account of the first use of torture by heresy inquisitors. He says that, at the beginning of what he calls the *constituta delegata inquisitio*—that is, the use of papally appointed heresy inquisitors (judges-delegate)—it was not thought allowable for inquisitors to torture defendants. Peña attributes this attitude to fear of incurring irregularity, and therefore Innocent IV in *Ad extirpanda* directed secular authorities to do it. But because secret matters were often revealed in this way and other serious problems arose concerning the faith, it seemed a better practice that the inquisitors and bishops should conduct the torture themselves, as is clear from recent laws (principally *Multorum querela*). Notably, *Ut negotium*—a 1264 rescript of Urban IV that was directed to the Dominican heresy inquisitors in Aragon and was recorded by Eymeric—allowed them to absolve each other from any sentence of excommunication or irregularity.¹⁰¹

The oldest treatment of torture in connection with the prosecution of heresy may be that contained in a consultation on episcopal inquisitions, *Consilium peritorum super quibusdam dubitabilibus*, which may be as early as the late 1230s. It is to be found in a French manual of a somewhat later date, Dondaine's Manual 5.¹⁰² The consultation justifies the use of torture on two grounds. First, it cites a decretal of Alexander III, *In archiepiscopatu*, which allows whippings, as long as they do not draw blood, as punishment for Sarracens who abduct/abuse Christian women and children.¹⁰³ Second,

100. Eymeric, *Directorium*, part 3, q. 61 *De questionibus*, 1:372–73.

101. Peña on Eymeric's q. 61, scholium 118 (2:224–25); see Eymeric, pt. 2 (1:84–85). Alexander IV issued a rescript of the same incipit (*Ut negotium*) and purport to the Dominicans of Toulouse in 1256. See Peters, *Torture*, p. 65; Mark Gregory Pegg, *The Corruption of Angels: The Great Inquisition of 1245–1246* (Princeton, 2001), p. 32; Christine Caldwell Ames, *Righteous Persecution: Inquisition, Dominicans, and Christianity in the Middle Ages* (Philadelphia, 2009), p. 166.

102. *Consilium peritorum super quibusdam dubitabilibus*, ed. Parmeggiani, *Consilia*, pp. 49–51. See Dondaine, “Manuel,” pp. 106–07, 141–46; Manual 5 [*Manuel de l'inquisiteur*], appearing in Vat. lat. MS 3978, fols. 17–38. The consultation is on fols. 25v–26; Dondaine says that it seems to have the same origin as the previous consultation, dated at Avignon on June 21, 1235 (pp. 141–42). Parmeggiani dates it “1249–55.” See Bivolarov, *Inquisitoren-Handbücher*, p. 301n234.

103. Alexander III, *In archiepiscopatu*, X 5.17.4 (*CIC* 2:809): “et etiam flagellis affligere, ea moderatione adhibita, quod flagella in vindictam sanguinis transire minime videantur.”

it adduces the canon *Illi qui* (the Isidorian decretal of Pseudo-Eusebius providing for a religious torturer) and concurring canons.¹⁰⁴ The consultation also approves of coercive imprisonment.¹⁰⁵ Although Manual 5 opens with a decretal of Pope Clement IV dated October 31, 1265, in its original form the collection seems to have come from Toulouse around 1256.¹⁰⁶ That the idea of torture in heresy prosecutions was in the air at an early date, at least in Provence, is evident from a consultation of Raymond of Pennafort in 1235, who speaks of persons cited to the tribunal who confess spontaneously and “not out of fear of proofs or of torture.”¹⁰⁷

It has been concluded that a consultation sent by Guy Foulques (the future Pope Clement IV) to the Dominican heresy inquisitors in Provence sometime between 1238 and 1243¹⁰⁸ refers to the torture of witnesses, because it cites a law from the Digest that says that torture (*questio*) can be

104. *Consilium peritorum*, fol. 25vb, answering the third question, about treatment of suspects who deny charges and demand copies of the charges and testimony: the judge reads the testimony without the names of the witnesses, to incite terror; if they are unwilling to submit themselves to the mercy of the judge, “tunc iudex, maxime si habet eos suspectos, minetur eis tormenta et eos duris questionibus submissuros (quod etiam si necesse fuerit potuerit fieri, ut probatur *Extra, De raptoribus, In archiepiscopatu*, et C. 5 q. 3 [recte 5] *Illi qui, cum suis concordanciis aliis*). Tali enim dolo bono ‘manu obstetricante’ est ‘coluber tortuosus’ deducendus.” Translation: “Then the judge, especially if he considers them [particularly] suspect, should threaten them with torments and say that he will submit them to harsh tortures (and in fact this could be done, if necessary, as is proved by the chapter *In archiepiscopatu*, in the title *De raptoribus* in the *Liber Extra*, and by the canon *Illi qui* and its concurring canons). For by such benign trickery the ‘twisting serpent by obstetric hand’ is brought forth.” The last clause cites Job 26:13, “spiritus ornavit caelos, et obstetricante manu ejus eductus est coluber tortuosus” (“His Spirit hath adorned the heavens, and his obstetric hand brought forth the winding serpent,” trans. Douai-Challoner). It goes on to adduce the example of Jesus, appearing in another form and pretending he was going beyond Emmaus (Luke 24:16, 28), and God’s order to Joshua to set ambushes for his enemies.

105. *Ibid.*: “Insuper, si sic veritas non potuerit enucleari, diutius custodia teneantur, ut eis vexatio det intellectum” (“In addition, if the truth cannot be elicited, let them be held in custody longer, so that vexation may give them understanding”).

106. Yves Dossat, *Les crises de l’Inquisition toulousaine au XIII^e siècle (1233–1272)* (Bordeaux, 1959), p. 199. See Kelly, “Inquisition and the Prosecution of Heresy,” pp. 447–48.

107. Raymond of Pennafort, *Credo quod deprehensi in heresi*, ed. Parmeggiani, *Consilia*, no. 1 (pp. 6–8): “Si quis citatus in iure confitetur sponte, id est, non metu probationum vel tormentorum”; see Bivolarov, *Inquisitoren-Handbücher*, 301n234. In a consultation of Pennafort’s from 1242, there is no mention of torture; see *Queritur qui dicantur*, ed. Parmeggiani, no. 4 (pp. 15–22), which Dondaine lists as Manual 1.

108. Guy Foulques (Foucois, etc.), *First Consultation*, ed. Bivolarov, *Inquisitoren-Handbücher*, pp. 225–55. Bivolarov dates the *consilium* between September 1238 and August 1243. On p. 206n1 he gives fifty-one variants of Guy’s surname. The consultation is also given by Parmeggiani, *Consilia*, pp. 58–71, following the 1641 edition of Cesare Carena.

repeated.¹⁰⁹ This seems unlikely. Moreover, it is clear from Foulques's previous question that he is not thinking of the torture of defendants, because he insists that no one can be convicted based on singular witnesses and ill fame; rather, purgation should be ordered for such persons.¹¹⁰ "Civilian" writers of this time would find this sufficient reason to use torture on the defendant in a treason case,¹¹¹ and later authorities on heresy prosecution agreed that the same was true in cases of heresy.¹¹² However, in the consultation that he gave at the end of 1260 as the archbishop of Narbonne, Foulques does refer to torture, but it is the torture of harsh confinement and reduced diet that would be applied to certain suspects who claim to have confessed to other inquisitors.¹¹³

109. Foulques, *First Consultation*, Q. 15 (p. 251): "Quod fieri posse scilicet iterari testium interrogations omissas, dicit decretalis *De testibus, Per tuas* [X 2.20.48], et concordat lex, ff. *De questionibus, Repeti* [Dig. 48.18.16: 'Repeti posse quaestionem']" ("But that omitted interrogations of witnesses can be repeated, the decretal *Per tuas* declares, and the law *Repeti* agrees"). See Bivolarov, p. 301 and n. 232. Foulques follows with the warning (which Bivolarov quotes in n. 232) that great care must be taken in questioning witnesses, because heresy suspects are not given the usual legal right to know the identities of those who testify against them (pp. 251–52). Foulques's consultation appears in Manual 5, fols. 21–25.

110. Foulques, *First Consultation*, Q. 14 (p. 249): "An autem per singulares testes et famam possit aliquis in hoc crimine condemnari, queri non oportet. Constat enim quod non [X 2.20.33], presertim cum in criminibus probationes esse debeant luce clariores [Cod. 4.19.25], et in hoc crimine nemo sit ex presumptione dampnandus. Indicetur ergo purgatio, ut ostensum est supra" ("But whether anyone can be condemned for this crime by single witnesses and fame, should not be asked. For it is clear that the answer is no . . . , especially since proofs of crimes should be clearer than light . . . , and in this crime no one is condemned out of presumption. Therefore, purgation is to be ordered, as was shown above").

111. Accursius in his Ordinary Gloss (ca. 1230) to Cod. 9.8.3 *Si quis aliqui s.v. convictus* says that the testimony of a single witness is enough by itself to order torture: "Sed dic quod convictus per unum testem, et sic semiplene est probatum, vel per aliud indicium, quod oportet precedere questionem" ("But say that he is convicted by one witness, and so the case is half proved, or by some other *indicium* that should precede torture"). See *Corpus juris civilis Justiniani*, ed. Johannes Fehus of Gailsdort, 6 vols. (Lyons, 1627; repr. Osnabrück, 1966), 4:2331.

112. Eymeric, *Directorium*, pt. 3, Q. 61 (1:372–73): "Secunda regula est, quod si quis reperitur de heresi diffamatus, et cum hoc probatur habere contra se unum testem de scientia, talis questionandus est [cites authorities], quia unus testis et fama dicuntur facere semiplenam probationem; immo unus testis solus dicitur facere indicium competens, ut notat Azo in *Summa de questionibus*" ("The second rule is, that if anyone is defamed of heresy and it is proved that he has one eye-witness against him, he is to be tortured . . . , because one witness and fame are said to constitute half-proof; in fact one witness alone is said to be a sufficient *indicium* as Azo notes in his *Summa on Torture*").

113. Guy Foulques, *Second Consultation* (1260). See Bivolarov, *Inquisitoren-Handbücher*, p. 192, no. 12; it is edited by Parmeggiani, *Consilia*, pp. 71–73, no. 13, but the author's initial, "G.," is mistakenly expanded to "Guillelmus" instead of to "Guido," and the year is

Interestingly, a series of consultations produced in Italy around 1281 recommends the use of torture without causing bloodshed, administered by the secular authorities to Jews suspected of encouraging Jewish converts to the Christian faith to return to Judaism.¹¹⁴

As noted, Dondaine counts Bernard Guy's treatise as Manual 9. Manual 11, the last treated by Dondaine, is the *De hereticis* of Zanchino Ugolini, an Italian jurist advising a Franciscan heresy inquisitor.¹¹⁵ Ugolini does not perpetuate the abuse of pre-arraignment interrogation but rather has the suspect plead after the proper charges are filed.¹¹⁶ But the question arises: If the defendant denies the charges, but they are nevertheless partially proved (for example, by one solid witness), can the accused be tortured, as is the case with other crimes? The answer is: yes, he can be tortured, either by the inquisitor or the bishop, in accord with the Clementine *Multorum* and Gratian's *Imprimis* (Gregory the Great's statement that vile witnesses need "corporal discussion") and *Ante omnia* (minor clerics can be

given as 1261 rather than 1260. The text reads: "Sic credimus distinguendum, quod, si predictae persone sunt suspecte et de heresi infamate, iuxta qualitatem personarum per durum carcerem et vitam artam est ab eis confessio extorquenda; et si sic extorqueri non potest, ex quo confitentur quod olim hereses suas confessi fuerint, cum presumatur quod per maliciam veritatem occultent, nec appareat quod penitentiam receperint, credimus eos ad crucem vel carcerem condemnandos" ("We believe that it should be distinguished thus: if the aforesaid persons are suspect and defamed of heresy, according to their status a confession should be extorted from them by means of hard prison and restricted life; and if it cannot be thus extorted, so that they confess that they had confessed their heresies before, we believe that, since it is presumed that they are hiding the truth through malice, and if it appears that they will not be brought to penitence, they should be condemned to the cross or to prison"). For the punishment of wearing cloth crosses, see Lea, *History*, 1:468.

114. Parmeggiani, *Consilia*, nos. 30–32 (pp. 121–30), from Padua, Bologna, and Ferrara, c. 1281; Bivalarov lists these consultations as nos. 32–34 (*Inquisitoren-Handbücher*, pp. 200–02, 302). For instance, no. 30, article 3, reads: "Dicunt quod si habeat violentas presumptiones contra tales quod in predictis excessibus et aliis similibus, quando inquit contra eos, veritatem non dicunt, potest et debet eam extorquere supplicii citra effusionem sanguinis per executorem vel iudicem secularem" ("They say that if he [the inquisitor] has violent presumptions against such [Jews], when he holds inquisition against them, that they are not telling the truth concerning the foresaid excesses and other similar offenses, he can and should extort it by torments, short of shedding blood, performed by a secular official or judge").

115. Zanchino Ugolini, *De hereticis*, first edited by Camillo Campeggi in 1568, and then included in *De iudiciis criminalibus Sanctae Inquisitionis* (Venice, 1584), which is vol. 11, pt. 2 of *Tractatus universi iuris*, 25 vols. in 28 (Venice, 1584–86), fols. 234–69v, but here Campeggi's comments are updated, since they refer to Peña's 1578 edition of Eymeric. (The entire volume is often erroneously said to be edited by Peña; this notion is refuted by a note from the Bibliopola, the actual editor, on fol. 233v.)

116. Ugolini, *De hereticis*, chap. 9, *Modus procedendi* (fol. 240v).

beaten), as well as the rule of law in the *Liber Extra, Cum in contemplatione*, that says that trials should not begin with “questions.”¹¹⁷

It should be noted that the gigantic procedural manual (finished around 1291) of the great “Speculator,” William Durand, has only a few lines on torture: A judge can torture a homicide suspect if it is proved that the suspect threatened the victim or had been offended by the victim.¹¹⁸ In the commentary on Durand by John Andrew (his last work, completed in 1348) there are a few brief comments on the *indicia* or evidences needed for torture.¹¹⁹ They refer back to his treatment in his *Novella* on the *Liber Extra* dealing with the rule of law, *Cum in contemplatione*, that cases should not begin with torture. There he presents a *summa* on torture, but it mainly involves the subject of who can be tortured (witnesses in an *accusatio*, for instance), and cites the Digest that the torture-question should not be whether a certain person, Titius, committed the crime, but should ask *who* did it, therefore not suggesting but inquiring.¹²⁰ Earlier he refers to the Ordinary Gloss to Gratian’s *Quod autem* on torturing accuser/plaintiff, defendant, and witnesses (*actor, reus, testes*),¹²¹ and he repeats the treatment of Innocent IV and also that of Cardinal Hostiensis on *Cum in contemplatione*. Andrew specifically cites Hostiensis on the allowability of torture in ecclesiastical courts, not only for criminal cases but also civil, where money matters are being litigated, as long as the torture is moderate (this is where Andrew cites *Circumcelliones* on the torture of defendants, quoting Huguccio on the kind of instruments to be used).¹²²

The commentary of Archdeacon Guy of Baisio (c. 1300) on *Circumcelliones* states that, where the final gloss notes that an ecclesiastical judge can order caning (*virgis*) as punishment, even on clerics, this is an argu-

117. *Ibid.*, no. 7 (fol. 240vb): “Sed pone quod facta est aliqua probatio contra inquisitionem, non tamen plena, puta per unum testem bone opinionis et fame, et ipse interrogatus omnino negat in inquisitione contenta, nunquid poterit torqueri? . . . Dic quod torqueri poterit, per inquisitorem vel episcopum. Et hoc casu intelligam [cap. *Multorum*], et concordat . . . *Imprimis* [et] *Ante* [et] *Extra, De regulis juris, Cum in contemplatione*.”

118. Gulielmus Durandus, *Speculum juris*, 2 vols. (Basel, 1574), with the commentary of Johannes Andreae, repr. as *Speculum judiciale* (Aalen, 1975), book 2, pt. 2, rubric *De presumptionibus*, §2 *Species*, nos. 7–8 (2:740).

119. *Ibid.*, Johannes Andreae commentary, 1:626, 738, 740; 2:47.

120. Johannes Andreae, *Novella* 5:161–161A on X 5.41.6 *Cum in contemplatione*, specifically no. 5: “Non debet questio fieri, an Titius commiserit, sed quis commiserit, ne plus videatur suggerens quam querens,” citing Dig. 48.18.1 §21.

121. Johannes Andreae, *loc. cit.* no. 3.

122. *Ibid.* See Hostiensis, *Comm.*, 5:134, on X 5.41.6 *Cum in contemplatione*, no. 7: “et est hoc verum non solum cum de crimine queritur sed etiam si de pecunia agatur.”

ment that prelates can force the truth out of clerics by torture. He cites *Illi qui* and specifies that it is not contrary to *Si sacerdotibus*, since in *Si sacerdotibus* there was no presumption (not to mention that the coercion did not take place in a court of law), whereas in *Illi qui* there were many presumptions; therefore, torture could be used to obtain their confessions.¹²³

Eymeric, however, replicated Bernard Guy in allowing the torture of mere suspects before they were charged, as long as there is sufficient evidence against them (in the opinion of the inquisitor and his consultants). Peña¹²⁴ approved of this position, as did Prospero Farinacci, who was the fisc (public prosecutor) of Rome, in his 1616 treatise on heresy, where he cites Diego de Simancas (1568), Camillo Campeggi (1568), and Tiberio Deciani (1590).¹²⁵ The heresy inquisitor of Genoa, Eliseo Masini, also concurred, in his popular handbook of 1621, *Sacro Arsenale*.¹²⁶ In so holding, Masini contradicts what he praises as a noble principle of the Holy Office—namely, that no person can be tortured before defenses are offered formally (that is, until he is officially charged and given the opportunity to deny the charges and mount defenses against them).¹²⁷ Peña, too, ends his discussion of torture with the stipulation that the defendant's advocate needs to participate in any discussion as to whether there is sufficient evidence to justify submitting the accused to torture¹²⁸—which could hardly be satisfied before charges are made and before the case is presented against the defendant.

123. Archdeacon Guy de Baisio, *Rosarium* (Strassburg, c. 1473, unfol.) on Gratian C. 23 q. 5 c. 1 *Circumcelliones*: “Et sic habes hic argumentum quod eciam prelati per cruciatum corporis possunt eruere veritatem; ad idem, C. 5. q. 5 c. 4 *Illi qui*; nec est contra supra, C. 15 q. 6 c. 1 [*Si sacerdotibus*], quia ibi nulla erat presumptio, sed hic multe erant contra tales, et ideo per tormenta potuit ab eis extorqueri confessio.”

124. Eymeric, pt. 3, *Cautele inquisitorum decem contra hereticorum cavillationes et fraudes*, no. 6 (1:292), cited by Peña, *Praxis inquisitorum*, 2.21, fol. 142v.

125. Prospero Farinacci, *Tractatus de haeresi* (Lyons, 1650), title 185, no. 139 (p. 148). This treatise is the last part (title 18) of Farinacci's vast work, *Praxis et theorica criminalis* (or *Variae quaestiones et communes opiniones criminales*), finished in 1614 and first printed in 1616. See Nicolò Del Re, “Prospero Farinacci, giureconsulto romano (1544–1618),” *Archivio della Società Romana di Storia Patria*, 98 (1975), 135–220, here pp. 172–84, and A. Mazzacane, “Farinacci, Prospero,” in *Dizionario biografico degli Italiani (DBI)*, ed. Alberto M. Ghisalberti (Rome, 1960–), 45:1–5. The first three titles of the *Praxis* first appeared in 1589. For Farinacci's treatment of torture in title 5 (first printed in 1593), see Pennington, “Torture in the *Ius commune*,” pp. 830–34.

126. Eliseo Masini, *Sacro Arsenale, ovvero Pratica dell'Officio della Santa Inquisitione* (Genoa, 1621), pt. 6, *Del modo d'interrogare i rei nella tortura*, pp. 146–47.

127. Masini, pt. 4 (dealing with the “repetitive” and defensive aspects of the trial), pp. 97–98.

128. Peña on Eymeric, scholium 118 (2:231).

Torture and the Holy Office in the Time of Galileo

It was routine to discuss torture in the handbooks and treatises on criminal law in the sixteenth century. For example, Peña states that there is a great controversy over the question of whether being “various” (that is, inconsistent in one’s responses) is by itself an *indicium* that can support a decision to torture.¹²⁹ According to Peña, Carrerius denies that variation qualifies as an *indicium*, citing common opinion,¹³⁰ a view with which Marsilius,¹³¹ Grammaticus,¹³² and Johannes de Amicis¹³³ agree, along with others referred to by Carrerius. On the other side, Eymeric holds that variation is indeed an adequate *indicium*, and Gondisalvus,¹³⁴ Guido de Suzaria, Franciscus Brunus,¹³⁵ Marcus Antonius Blancus,¹³⁶ and others who follow them concur. They say that the latter was also the view of Baldus and Bartolus, although some doubt that Bartolus thought so. Peña goes on to cite Paris de Puteo,¹³⁷ Julius Clarus,¹³⁸ Simancas,¹³⁹ and Plotus.¹⁴⁰

However, since the present study focuses on church tribunals, I wish to conclude by pointing out a new element in the standard practice of the Holy Office, as represented by Masini’s *Sacro Arsenale*: namely, the routine

129. Peña on Eymeric, scholium 118, 2:226–27.

130. Citing Ludovico Carerio, *Tractatus de haereticis* (Lyons, 1562).

131. Hippolytus de Marsiliis of Bologna (d. 1529), *Practica criminalis*. See Schulte, *Geschichte*, 2:360–61; Fiorelli, *Tortura*, 1:149–50.

132. Citing one or other volume of *Decisiones* of Tommaso Grammatico (d. 1556); see *DBI*, 58:409–11. See Viviana Ventura, “Profilo di Tommaso Grammatico, giurista e letterato,” *Scritti di storia del diritto offerti dagli allievi a Domenico Maffei*, ed. Mario Ascheri (n.p., n.d.), pp. 353–76.

133. Giovanni de Amici, *Consilia* (Venice, 1544, 1577; Lyons, 1548, 1549).

134. Gondisalvus de Villa Diego, *De haereticis* (Lyons, 1536).

135. The *Tractatus de indicis et tortura* of Francesco Bruni (d. 1510), first published in Siena in 1495 (Fiorelli, *Tortura*, 1:149), was printed along with the thirteenth-century *Tractatus de tormentis* sometimes attributed to Guido da Suzzara (*ibid.*, 1:132–45), and another version of it attributed to Baldo de’ Perigli (*ibid.*, 1:135–36), *Tractatus tres de indicis et tortura d. Francisci Bruni, ... d. Guidonis de Suzaria, ... et d. Baldi de Perigli* (Rome, 1543), with later editions published in Lyons in 1546 and 1553.

136. Marcantonio Bianchi, *Tractatus de indicis homicidii ex proposito commissi, et de aliis indicis homicidii et furti, ad legem finalem ff. “De quaestionibus”* (Lyons, 1546, 1549).

137. Paride del Pozzo (d.1493), *De syndicatu* (Lyons, 1548).

138. Giulio Claro (d. 1575), citing his *Practica criminalis* (published with his *Sententiarum receptorum liber quintus*) (Venice, 1568).

139. Diego de Simancas, *De catholicis institutionibus*; the third edition of 1575 is in the *Tractatus universi juris*, vol. 11.2, fols. 119–207.

140. Joannes Baptista Plotus, *Tractatus de “In litem jurando”; sive, Aurea et solennis repetitio* (Venice, 1565).

torturing of a suspect who admitted, or was proved guilty of, committing a heretical offense, while maintaining that he did not do it with a heterodox motivation. In this situation, the suspect—or, rather, admitted or convicted culprit—would be tortured to find out his true “intention.” For instance, if a suspect admits to having made a statement against the existence of purgatory but claims that he was only joking, he then would be asked if he has ever believed or still believes that purgatory does not exist. If he says no, the same question is put to him under torture.

In the case of Galileo, the inquisitor persuaded him, in an informal meeting outside of court after Galileo’s initial pretrial interrogation, to confess the fault he committed in giving stronger arguments to the Copernican system (which Holy Office consultors had designated previously as heretical) than to the Ptolomaic system in his *Dialogue* (1632). Galileo agreed and made a formal admission to this effect. But since he insisted that he had acted merely out of vanity, with no intention of affirming heliocentrism, he was subjected to a “rigorous examination” of his present and past beliefs. The original plan seems to have been to examine him before the actual trial,¹⁴¹ as Masini seems to say should be done.¹⁴² But in the event, it was only after he was formally charged and he responded with his plea (on May 10, 1633) that the examination was ordered, to be limited in his case to the threat of torture rather than its actual use.¹⁴³

As previously mentioned, the form of bloodless torture recommended by Huguccio was beating with rods or sticks. By Galileo’s time, the usual method, timed by an hourglass, was to tie a rope to the hands of the subject and to elevate his whole body.¹⁴⁴ But when physical defects made this method impracticable (for example, if the subject had only one arm), or if the subject was too young, other forms could be used: fire, the *stanghetta*, *cannette* (otherwise called *suffoli*), or the *bacchetta*. The fire treatment

141. *Le opere di Galileo Galilei*, ed. Antonio Favaro, 20 vols. (Florence, 1890–1909, repr. 1929–39), no. 2486 (15:106–07); no. 70 in Thomas F. Mayer’s collection of documents in English translation, *The Trial of Galileo, 1612–1633* (Toronto, 2013), pp. 170–71. See also Mayer’s *The Roman Inquisition: A Papal Bureaucracy and Its Larvae in the Age of Galileo* (Philadelphia, 2013); *The Roman Inquisition: On the Stage of Italy, c. 1590–1640* (Philadelphia, 2014); and *The Roman Inquisition: Trying Galileo* (Philadelphia, 2015).

142. Masini, *Sacro Arsenale*, pp. 37, 46–48; see also pp. 124–31.

143. Sergio Pagano, *I documenti Vaticani del processo di Galileo Galilei (1611–1741)* (Collectanea Archivi Vaticani 69, Vatican City, 2009), no. 138, p. 193 (Mayer, *Trial of Galileo*, no. 78, p. 184; no. 80, pp. 186–88).

144. Masini, *Sacro Arsenale*, pp. 122–24. It did not include the so-called *strappado*, or jerking drop.

(which, we are told, was rarely used because of the danger involved) consisted of coating the subject's feet with lard and holding them near flames.¹⁴⁵ The *stanghetta* involved squeezing the heel of the right foot with a makeshift metal clamp.¹⁴⁶ *Cannette* were tubes put between fingers, which were then squeezed.¹⁴⁷ A *bacchetta* was a cane, for use on children older than age nine. The child was stripped, with hands tied in front, and then struck many times.¹⁴⁸ It must be remembered, of course, that the inquisitors had to be careful not to spill any blood or cause any permanent damage, for otherwise they would have to be cleared of clerical irregularity (which, however, could be done with little formality or trouble).

Masini's handbook and other authorities of the time give the distinct impression that torture had become very much a routine part of the ecclesiastical court system, with few qualms about its use.

145. Masini, *Sacro Arsenale*, pp. 131–34: “Cum ipse constitutus tormento funis torqueri non posset, eo quia manifeste esset brachio mancus vel ruptus, etc., decreverunt ipsum constitutum torquendum esse tormento ignis Mandaverunt eundem dicto tormento ignis supponitur Qui sic suppositus, nudatis pedibus, illisque lardo porcino inunctis et in cippis juxta ignem validum retentis,” etc. (“Since the constituent could not be tortured with the torture of the rope because he was lacking an arm or damaged, etc., they decreed that he should be tortured with the torture of fire They ordered him brought to the torture of fire, . . . and when this was done, his feet were bared and coated with pig lard and held by stakes near a strong fire,” etc.).

146. *Ibid.*: “Decreverunt ipsum esse torquendum tormento taxillorum, quod *stanghetta* nuncupatur.... Qui sic dicto tormento suppositus in terra prostratus, talo pedis dextri denudato inter duos ferreos taxillos concavos posito et ministro eos *stanghetta* comprimente,” etc. (“They decreed that he should be tortured with the torture of clamps, which is called the *stanghetta* [pincers].... Who when he was brought to the said torture was prostrated on the ground and, with the heel of his right foot bared, it was placed between two concave iron clamps, while the minister squeezed them with the pincers,” etc.).

147. *Ibid.*: “Decreverunt ipsum esse torquendum tormento sibilorum.... Qui sic dicto tormento suppositus, manibus ante junctis et inter binos earum singulos digitos sibilis accommodatis, et ministro fortiter praemente,” etc. (“They decreed that he should be tortured with the torture of the tubes [*cannette*].... Who when brought to the said torture, with his hands tied before him and the tubes placed between his fingers, and the minister strongly squeezing them together,” etc.).

148. *Ibid.*: “Del modo di batter con la bacchetta i fanciulli, che però trapassino il nono anno della loro età” (“On the method of using the cane to beat youths, who, however, must be older than the age of nine”). “Cum ... ipse constitutus ob ejus minorem aetatem torqueri minime valeret, decreverunt ipsum constitutum ferula caedendum esse.... Qui sic ductus, spoliatus, et manibus ad funem ante faciem alligatis . . . cum pluribus et pluribus verberibus caesus,” etc. (“since the constituent could not be tortured because of his minor age, they decreed that he was to be beaten with the cane Who when so taken, after being unclothed and his hands tied before him . . . was struck with many, many blows,” etc.).

Conclusion

Until Gregory IX's *Decretales* or *Liber Extra* was issued in 1234, there was no universal canon law. Rather, there were a number of canons (decrees, pronouncements, directives, advice) addressed to individual persons and regions. But many of these canons, as they appeared in great collections, were taken to apply universally. Of these collections, the last and greatest was recognized to be that of Gratian of Bologna (it is only recently that we have come to see that his original collection was heavily supplemented by "Deutero-Gratian"—that is, an unknown person or persons, possibly Gratian himself or including Gratian). One of Gratian's goals was to point out and resolve contradictions in various laws. Another goal, equally pedagogical, was to illustrate the workings of law in sample court cases; the great bulk of his collection was divided into such cases—the *causae* of part 2. Gratian's opinions, or *dicta*, were highly valued, almost as if he were a lawmaker himself. Such an attitude may have been fostered by the informal title given to his work, *Decretum Gratiani* (as if the whole were a pronouncement by Gratian), along with a seeming convention among his commentators never to contradict him openly.¹⁴⁹

Gratian himself brings up the matter of judicial torture only once: in Case 15, concerning a priest, who, among other things, is accused of killing a person; the priest's bishop extorts a confession from him by torture. This raises Question 6 of the case: Should the confession have been obtained by torture? When Gratian reaches this point in his treatment, he does not present the straightforward dictum "No, it was not justified to extort the confession by torture." Rather, he says: "The following letter by Pope Alexander shows that a confession should not be extorted by torture."

When Huguccio in the 1180s came to comment on this statement, he could have agreed that the priest in the case should probably not have been tortured for his confession, while pointing out that the example that Gratian gives is not appropriate, since it does not involve court cases but criminal kidnappings; then going on to say that torture is indeed appropriate in many kinds of judicial actions, as is clear from other canons cited by Gratian: they include the sort of homicide case in Gratian's illustration, but only if presumptions against the defendant are sufficiently strong. Instead, Huguccio ignored the context of Gratian's court case and simply professed to agree with Gratian's judgment about the canon *Si sacerdotibus*—that it was wrong

149. Exceptions to the practice of not criticizing Gratian are to be found in the *Summa parisiensis*; see Terence P. McLaughlin, ed., *The Summa Parisiensis on the Decretum Gratiani* (Toronto, 1952), pp. xvi–xvii.

for kidnappers to torture their victims, and that concessions made under torture were invalid. He went on to state that it was right for judges to use torture in many cases, as Gratian shows in other canons. Elsewhere, drawing on another canon in the *Decretum*, *His a quibus*, Huguccio cautioned that clerics were not to employ methods of torture that would result in bloodshed or permanent damage, since it would render them canonically “irregular.”

Huguccio’s analyses were taken over a generation later by John Teutonicus, whose commentary was accepted as the Ordinary Gloss to Gratian, as it was edited another generation later by Bartholomew Brixiensis and aligned with the laws of the *Liber Extra*. These glosses were the starting point of all further discussions, including those of Fieschi; and it is hardly likely that when Fieschi became Pope Innocent IV in 1243, he should have thought that heresy inquisitors needed special permission to use torture in their tribunals.

Both heresy and simony had come to be recognized, along with treason (lese-majesty) as a *crimen exceptum*. In such crimes, torture could be used even against accusers in the practically obsolete procedure of *accusatio*, as well as against witnesses and defendants. But it is wrong to think that torture of defendants was allowable in heresy trials only because of the exceptional heinousness of the crime. If clerics charged with ordinary offenses could be tortured in church courts, why not persons charged with heresy? Augustine’s perceived authorization of the torture of criminal defendants in the canon *Circumcelliones*, collected by Gratian himself, was sufficient; moreover, another canon of Augustine’s, *Si res aliena*, also in Gratian’s original compendium, supported the use of torture in civil cases on pecuniary matters. However, the fact that heresy was an exceptional crime undoubtedly influenced judges to be less demanding in determining what *indicia* were sufficient to warrant the torture of defendants. But the main “advantage” to prosecutors of excepted crimes was that usually unsuitable witnesses, even *criminosi et infames*, could be used against the defendants.

If, however, there was no need for papal permission to use torture in heresy cases, what was the significance of the instruction to lay authorities in the bull *Ad extirpanda* (issued multiple times by Innocent IV, Alexander IV, and Clement IV) to use the sort of nonlethal force on heresy suspects that they employed on common criminals to obtain information? One answer suggested above is that the popes were authorizing pretrial torture on suspects before they were delivered to the heresy inquisitors. The bull seems to have been taken by the Toulouse inquisitor Bernard Guy as permission for the inquisitors themselves to torture suspects when interrogating them before officially charging them with crimes.

It is in Guy's time, at the beginning of the fourteenth century, that definite proof is found of the use of torture in heresy proceedings, in the actions in France against the Knights Templar. It also is found by inference in Guy's practice and in the complaints that reached the Council of Vienne in 1311–12, resulting in the Clementine constitution *Multorum querela*. Striking examples of its use on nonheresy charges—namely, treason, attempted murder, and black magic—can be seen in the trial of Bernard Delicios in 1319. Bishop Fourniers of Pamiers was one of the presiding bishops, making use in one instance of a priest well known for his expertise in inflicting judicial torture and, in another, of an archdeacon who was assisting him in heresy inquisitions in his diocese.

The shady practice by French inquisitors of forcing heresy suspects to testify as witnesses against themselves as well as others (*de se et aliis*) was adopted by Eymeric and subsequent authorities, including Peña and Masini; they also accepted the use of torture at this stage. Like the interrogations themselves, such use of torture was a violation of due process, which required the prosecution's case to be presented against the defendant and the opportunity for the accused to offer a defense before any torture could be used.

This sort of coercive invasion of a suspect's realm of conscience was further extended at the turn of the seventeenth century to entail a mandatory examination of past and present belief under torture.

Earlier in this article, the use of torture at the pre-arraignment stage was likened to the illegal American practice of the third degree. There is a further similarity, in that the implements of choice in the administering of the third degree have traditionally been rubber hoses and telephone books. The reason for these methods was to escape detection by leaving no telltale marks, whereas the use of less severe methods in ecclesiastical tribunals was not only to prevent serious injury to the suspects but also to avoid the spiritual contamination of bloodshed. It might be thought that the theoretically bloodless methods of scourging and caning would fall short of any meaningful definition of torture. But authorities like Innocent IV recognized that such torture could indeed result in permanent mutilation or death. It should also be obvious that the newer methods of bloodless torture that had developed by the seventeenth century readily answered, *prima facie*, to any understanding of judicial torture. As for earlier methods that were likened to domestic or school discipline, recent changes of opinion about the corporal punishment of children seem to indicate that views will vary on what methods of judicial coercion should be classified as torture.

Copyright of Catholic Historical Review is the property of Catholic University of America Press and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.