

The Patriarch Alexios Stoudites and the Reinterpretation of Justinianic Legislation against Heretics

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USING NORMATIVE LEGAL SOURCES such as law codes and imperial novels to illuminate Byzantine heresy is a very difficult proposition. One of the great problems in the analysis of Byzantine law in general is that the normative legal sources rarely were adapted to subsequent economic, political, or social conditions.¹ When emperors chose to combat contemporary problems via the legal regime, usually they did so via the medium of imperial legislation, and, as other studies have shown, rarely did such legislation influence the normative law codes, such as the *Basilika*, from the end of the ninth century the standard Hellenized redaction of the *Corpus Iuris Civilis*.² With regard to heresy, the *Basilika* thus presents us

¹ This disjuncture within Byzantine law has been the subject of numerous articles ever since Alexander Kazhdan brought attention to it in 1989: “Do We Need a New History of Byzantine Law?” *JÖByz* 39 (1989) 1–28. Bernard Stolte has written a number of thoughtful responses to his critique: “Not New but Novel. Notes on the Historiography of Byzantine Law,” *BMGS* 22 (1998) 264–279; “Balancing Byzantine Law?” *FM* 11 (2005) 57–75; “Justice: Legal Literature,” in E. Jeffreys et al. (eds.), *The Oxford Handbook of Byzantine Studies* (Oxford 2008) 691–698; “The Social Function of the Law,” in J. Haldon (ed.), *The Social History of Byzantium* (Chichester/Malden 2009) 76–91.

² The most prolific legislator of any emperor after Justinian, Leo VI (886–912), despite issuing 113 novels which were very much intended to revise or update Justinianic provisions, was hardly able to effect any change whatsoever to the *Basilika*, as was convincingly demonstrated by Marie Theres Fögen’s study of interpolations in the *Basilika* which can be attributed to the

with a static, sixth-century picture of anti-heretical regulations; no mention whatever is made in the *Basilika* or its scholia of any heresy appearing after the sixth century. The most egregious and noteworthy of these omissions is Islam, despite the fact that Muslims were a substantial as well as commercially and diplomatically important minority, above all in the capital city Constantinople.³ As Stephan Reinert notes, “[c]onceptually, it seems that the late antique trisection of the non-Orthodox into pagans, heretics, and Jews formally persisted, but that the leaders of Byzantine society never elected to define, legally and officially, the category to which any ‘Ishmaelites within’ belonged.”⁴ In fact, as this article will demonstrate, in the eyes of the Byzantine jurist not all heretics were created equal; they suffered from different degrees of legal incapacity under Byzantine law.⁵

If, as in Byzantium, the formal legal regime is unchanging, then the interpretation and implementation of normative laws

novels issued by Leo VI: “Legislation und Kodifikation des Kaisers Leon VI,” *Subseciva Groningana* 3 (1989) 23–35. References to the *Basilika* and its scholia (hereafter *Basil.* and *Basil.Schol.*) are drawn from the standard Groningen edition: H. J. Scheltema, N. van der Wal, and D. Holwerda, *Basilicorum libri LX I–XVII* (Groningen 1953–1988). Translations are my own, as there exists no translation of the Groningen edition of the text, which is one of the reasons for the remarkable persistence (particularly among non-specialists) of the use of the nineteenth-century edition of the Brothers Heimbach, which despite its flaws does include a Latin translation: G. E. and K. W. E. Heimbach, *Basilicorum libri LX I–VI* (Leipzig 1833–1870).

³ See especially the useful overview of the Muslim community in Constantinople in S. W. Reinert, “The Muslim Presence in Constantinople, 9th–15th Centuries: Some Preliminary Observations,” in H. Ahrweiler and A. E. Laiou (eds.), *Studies on the Internal Diaspora of the Byzantine Empire* (Washington 1998) 125–150.

⁴ Reinert, in *Studies* 149.

⁵ For a recent overview of the persecution of heretics in imperial legislation see K. L. Noethlichs, “Revolution from the Top? ‘Orthodoxy’ and the Persecution of Heretics in Legislation from Constantine to Justinian,” in C. Ando and Jörg Rüpke (eds.), *Religion and Law in Classical and Christian Rome* (Stuttgart 2006) 115–125, on Justinian 124–125.

assumes paramount importance. In this article I explore a rare instance where the changing interpretation of a law found in both the *Corpus Iuris Civilis* and the *Basilika* can be documented diachronically. It will be suggested that a number of the edicts of the Patriarch Alexios Stoudites (1025–1043), which were issued to combat illegal practices of the Syrian Orthodox populace in Melitene, affected the interpretation of passages dealing with heretics in the *Basilika*. In particular, a provision of Justinianic law which seemingly forbade Jews from testifying in court (*Basil.* 21.1.45 = *Cod.Iust.* 1.5.21) was reinterpreted as referring instead to “Nestorians,” or adherents of the Church of the East.⁶ By comparing provisions for Jews testifying in court in roughly contemporaneous sources, it can be demonstrated that a reinterpretation probably occurred around the year 1039.

The circumstances which prompted the edicts of Alexios Stoudites and concomitant reinterpretation of Justinianic provisions against heretics were conditioned by the empire-wide geopolitical context of Byzantium in the second quarter of the eleventh century as well as by the local and regional context of the city of Melitene itself and the surrounding region. With regard to the former, the quarter-century of Macedonian rule after the death of Basil II (976–1025) represents a period of increasing dynastic instability. After the passing of Basil’s aged brother Constantine VIII (1025–1028), the continuation of the dynasty’s rule depended upon Constantine’s three daughters: Eudokia, Theodora, and Zoe. The next four Byzantine emperors laid claim to the Macedonian inheritance through Zoe, through either marriage (Romanos III Argyros [1028–1034],

⁶ In this article the designations ‘Syrian Orthodox’ (in contrast to ‘Orthodox’) and ‘Church of the East’ are used rather than the older corresponding terms ‘Jacobite’ and ‘Nestorian’, both of which are best avoided; see S. P. Brock, “The ‘Nestorian’ Church: A Lamentable Misnomer,” *BRL* 78 (1996) 23–35. I use ‘Syrian Orthodox’ and ‘Church of the East’ throughout, except in translations when Byzantine texts explicitly use the terms Ἰακωβίτης or Νεστοριανός.

Michael IV Paphlagon [1034–1041], and Constantine IX Monomachos [1042–1055] or adoption (Michael V [1041–1042]).

The tenuousness of these rulers' claim to authority, based as it was solely on their relationship to Zoe, created a power vacuum which was filled, to a significant degree, by a resurgent patriarchate under the leadership of Alexios Stoudites.⁷ The long reign of Basil II had witnessed a succession of mostly subservient patriarchs (Anthony III Stoudites [974–979], Nicholas II Chrysoberges [979–991], Sergios II [1001–1019], and Eustathios [1019–1025]), with the exception of Sisinnios II (996–998), who was the first layman to become patriarch since Photios. Above all, Alexios, as the arbiter of the legitimacy of Zoe's marriages, was able to translate his authority into concessions: either on behalf of the wider church, such as the abolition during the reign of Romanos III of the *allelengyon*, the responsibility of *dynatoi* and wealthier religious houses to pay the tax arrears of the poor, which had been introduced by Basil II in 1002; or to his person in the form of donations to his personal monastery, for which he reputedly managed to accumulate 25 *kentinaria* of gold.⁸

Alongside these dynastic issues, larger societal trends can be discerned as well. While scholarship over the past thirty-five years has gradually undermined notions of some of the declinist trajectories of Byzantium in the eleventh century, which Paul Lemerle famously described as “une société bloquée,” this should not obscure the fact that the roughly half-century from the end of the reign of Basil II to the ascension of Alexios I Komnenos (1081–1118) represented an epoch of political instability and considerable civil strife.⁹ Among the trends most

⁷ The importance of Alexios' patriarchate is contextualized in V. Stan-ković, “The Alexios Stoudites' Patriarchate (1025–1043): A Developmental Stage in Patriarchal Power,” *ŽRVI* 39 (2001/2) 69–87.

⁸ The *typikon* for the monastery has survived only in an Old Church Slavonic translation: A. M. Pentkovskii, *Tipikon patriarkha Aleksiiā Studita v Vizantiī i na Rusi* (Moscow 2001), English summary 423–428.

⁹ P. Lemerle, *Cinq études sur le XI^e siècle byzantin* (Paris 1977) 249–312.

important for the topic of this paper was the rise of a new class of intellectuals such as Michael Keroularios, Constantine Leichoudes, John Mauroπους, Michael Psellos, and John Xiphilinos who attained prominent positions in the state and church, particularly during the reign of Constantine IX. The growing prominence of this group of Constantinopolitan intellectuals, particularly their interest and involvement in law, can be evidenced in the anti-heretical legislation of the Patriarch Alexios Stoudites.

In addition to this wider context, the local context of the city of Melitene and its hinterland is likewise important for contextualizing the edicts of Alexios Stoudites.¹⁰ After the extensive military successes of the tenth century, beginning with the capture and razing of the city by John Kourkouas in 934 and culminating in the campaigns of the soldier-emperors Nikephoros II Phokas (963–969) and John I Tzimiskes (969–976), large swathes of southeastern Asia Minor and northern Syria which had not been under Byzantine rule since the seventh century were brought under imperial control once again. The ethno-religious composition of the region changed dramatically after the Byzantine conquest; the part of the population which had converted to Islam as well as Muslims who had settled in the region appear to have been driven out of Byzantine territory, particularly during the campaigns of Nikephoros Phokas. As a result of the depopulation of the area this emperor encouraged Syrian Orthodox/‘Jacobite’ settlers living in Muslim-controlled territory to re-people Melitene and its hinterland.¹¹ The Syrian

Many of the assumptions concerning stagnation and decline in eleventh-century Byzantium were questioned in a collected volume devoted to answering the question whether we can speak of a crisis during this period: V. Vlysidou (ed.), *Η Αυτοκρατορία στη κρίση?: Το Βυζάντιο τον 11^ο αιώνα, 1025–1081* (Athens 2003).

¹⁰ On the city of Melitene under Byzantine rule see F. Hill and M. Restle, *Kappadokien* (*TIB* II [1981]) 233–237; B. A. Vest, *Geschichte der Stadt Melitene und der umliegenden Gebiete: vom Vorabend der arabischen bis zum Abschluss der türkischen Eroberung (um 600–1124)* I–III (Hamburg 2007) II 901–III 1442.

¹¹ On the migration of West-Syrians to Byzantine territory see G. Da-

Orthodox patriarch was invited to move his residence from Muslim- to Byzantine-controlled territory, and the region witnessed a period of extensive monastic foundation.

On the evidence of Michael the Syrian, one scholar has hypothesized, albeit somewhat speculatively, that the legal status afforded to the Syrian Orthodox community by the Byzantine state was essentially *dhimmi* status—i.e. conforming to the legal protections allotted to a subordinate religious group under Islamic rule.¹² The reasonably tolerant attitude of the Byzantine administration towards a confession which according to Byzantine legal and political ideology the state was obliged to persecute has a well-known precedent during the reign of Justinian himself, when Syrian Orthodox monastic communities flourished in Constantinople, at roughly the same time when he was reducing their official freedoms in the *Corpus Iuris Civilis*.¹³ In short one need not search out or invent an official contemporaneous recognition of the toleration of the Syrian Orthodox community in the Byzantine Empire. As the Patriarch Alexios Stoudites would later assert in his edicts, it was enough that the local administration and populace ignored already existing Justinianic provisions which had been enacted against Syrian Orthodoxy. In any case, through the end of the reign of Basil II it can be inferred that the Syrian Orthodox in Melitene enjoyed a reasonable degree of toleration.

This amenable situation changed dramatically during the

gron, “Minorités ethniques et religieuses dans l’Orient byzantin à la fin du Xe et au XI^e siècle: l’immigration syrienne,” *TravMém* 6 (1976) 177–216; A. Palmer, “Charting Undercurrents in the History of the West-Syrian People: The Resettlement of Byzantine Melitene after 934,” *OC* 70 (1986) 37–69; Vest, *Geschichte der Stadt Melitene* II 1077–1093. For the history of the West-Syrian Church during the brief period of Byzantine rule in the tenth and eleventh centuries see Th. H. Benner, *Die syrisch-jakobitische Kirche unter byzantinischer Herrschaft im 10. und 11. Jahrhundert* (Marburg 1989).

¹² Benner, *Die syrisch-jakobitische Kirche* 30–31; reconstruction of the *chryso-bullos logos* of Nikephoros Phokas at 31–33.

¹³ P. Hatlie, *The Monks and Monasteries of Constantinople, ca. 350–850* (Cambridge 2007) 143–150.

reign of Romanos III Argyros, as the growing prominence of the Syrian Orthodox community in Melitene aroused the ire of the Orthodox church authorities.¹⁴ The edicts of the Patriarch Alexios Stoudites against the Syrian Orthodox population in Melitene were prompted by the complaint of the Orthodox metropolitan there, John (or, according to later Syriac sources, Nikephoros), that the Syrian Orthodox patriarch, John VIII Bar Abdoun, was denigrating the Orthodox community. This complaint was initially heard by Constantine VIII shortly before his death in 1028. In 1029 his successor Romanos III summoned John Bar Abdoun to Constantinople to be judged before a synodal tribunal (συνοδικὸν δικαστήριον).¹⁵ After an elaborate show trial John Bar Abdoun was excommunicated in October 1029.¹⁶ He was banished to the monastic center of Ganos in Thrace, where he died in exile.¹⁷ In May 1030 the first edict of Alexios against the Syrian Orthodox community in Melitene was issued.¹⁸ The edict also relates that three Syrian Orthodox bishops, who had accompanied John Bar Abdoun to Constantinople, converted to Orthodoxy.¹⁹ Only the signatures

¹⁴ On the arrest and trial of the West-Syrian Patriarch John Bar Abdoun see Benner, *Die syrisch-jakobitische Kirche* 80–89; Dagron, *TravMém* 6 (1976) 200–201; Vest, *Geschichte der Stadt Melitene* II 1196–1223.

¹⁵ G. Ficker, *Erlasse des Patriarchen von Konstantinopel Alexios Stoudites* (Kiel 1911) 11.

¹⁶ The text of the excommunication has not survived; see V. Grumel, *Les registres des actes du patriarcat de Constantinople* I² (Paris 1989) no. 838.

¹⁷ Mount Ganos was a major Middle and Late Byzantine monastic center, which unfortunately is not nearly as well documented as the other primary rural monastic center in the European half of the empire, Mount Athos. For whatever reason another high-ranking West-Syrian ecclesiastic, the Metropolitan Ignatios of Melitene, was also exiled there in 1064; see Grumel, *Les registres* no. 893; Andreas Külzer, “Das Ganos-Gebirge in Ostthrakien (Işıl Dağı),” in Peter Soustal (ed.), *Heilige Berge und Wüsten. Byzanz und sein Umfeld* (Vienna 2009) 42–51, here 43; Vest, *Geschichte der Stadt Melitene* III 1337–1341.

¹⁸ Ficker, *Erlasse* 6–21; Grumel, *Les registres* no. 839.

¹⁹ Ficker, *Erlasse* 12–14.

have survived of another edict, issued in 1032, which approved the edict of 1030.²⁰

Ten years later, in September 1039, Alexios Stoudites took further measures against the Syrian Orthodox community in Melitene in response to reports of illegal practices there, including: the marriage of Orthodox and non-Orthodox; the disinheritance of Orthodox by non-Orthodox; and allowing non-Orthodox to testify against Orthodox in court.²¹ His edict called for the renewal of Justinianic provisions against heretics, which forbade or substantially restricted all these practices. Given that John Bar Abdoun, whose activity had prompted Alexios' earlier measures, had died in exile in 1033, it is sensible to view this edict of 1039 as the long-term culmination of efforts to curtail the rights of the Syrian Orthodox in Melitene and its hinterland, a process which had started in 1028. This process encompassed two parallel activities, both of which are evidenced in this edict of 1039: (1) an exposition of the theological errors of the Syrian Orthodox as well as related heresies; (2) the examination of legal texts with regard to the legal status of heretics.

From the standpoint of heresiology, the edicts of Alexios Stoudites required a taxonomy of the beliefs of the Syrian Orthodox community and related heresies. Who were these "Jacobites," and why were they called so? Which of their beliefs were heretical? How did they differ from Nestorians? The manuscript from which Ficker edited the edicts of Alexios Stoudites, *Escorialiensis* R I 15, also contains a tract on heretics written by Demetrios of Kyzikos between 1026 and 1028, before he became bishop of Kyzikos.²² Demetrios explains in this tract

²⁰ Ficker, *Erlasse* 25–27; Grumel, *Les registes* no. 840.

²¹ Ficker, *Erlasse* 28–42; Grumel, *Les registes* no. 846.

²² The introductory and closing paragraphs of the text are printed in Ficker, *Erlasse* 22–23, while the rest of the text corresponds to *PG* 127.880–884. The text printed in *PG* is erroneously ascribed to "Philippus Solitarius" instead of Demetrios of Kyzikos (the likely author); see Dagron, *TravMém* 6 (1976) 201 n.108; Ficker, *Erlasse* 23; an analysis of the text and a German

that, despite the appellation Jacobite, these heretics are followers of the doctrine of Eutyches, who taught that Christ, rather than having a divine and a human nature, had a combined nature that was both divine and human (*PG* 127.880 A–B). Moreover, Demetrios relates, the followers of Eutyches do not believe that Christ’s human nature suffered on the cross and his divine nature did not, but that Christ’s divinity suffered as well on the cross, hence the Church Fathers called them “God-sufferers,” Theopaschites (880C). While the Melchites in Syria remained loyal to Orthodoxy, the Jacobites rejected the Council of Chalcedon while at the same time accepting the first three ecumenical councils (881A–B). In conclusion, Demetrios emphasizes that the Jacobites were to be treated as heretics, and they had no right to call themselves Orthodox.²³

In addition to this heresiological exegesis a parallel examination of the legal status of heretics took place. Among the signatories of the synod of 1030 were a large number of high legal officials. Particularly prominent were judges of the Hippodrome and Velum, positions whose activities are well documented in the *Peira*: Constantine (judge of the Hippodrome), Michael (judge of the Velum), Nikephoros (judge of the Hippodrome), Leo (judge of the Hippodrome), and Theodore (judge of the Hippodrome), along with the rest of the “city judges” (πολιτικοὶ δικασταί).²⁴ The presence of these legal officials, who represented the most capable jurists in the Byzantine Empire, at an ecclesiastical synod is unusual and explains the sophisticated legal exegesis in Alexios’ edict of 1039, which is by patriarchal standards extraordinary for its use of the

translation in Benner, *Die syrisch-jakobitische Kirche* 123–136.

²³ Ficker, *Erlasse* 22, 29–30.

²⁴ Ficker, *Erlasse* 20–21. Unfortunately there are no entries for these individuals in *PmbZ*, since the edict lies beyond the work’s terminus of 1025. Two plausible identifications suggested by the *PmbZ* of persons in this edict with those mentioned elsewhere are Michael (no. 25383), a *protospatharios* and Judge of the Velum attested by his lead seal, and Nikephoros (no. 25681), a contemporaneous Archbishop of Kios.

writings of the *antecessor* Stephanos to explain Justinianic legislation. Certainly the learned proclivities of the edict, which evidence a jurist of some ability, cannot be ascribed to the Patriarch Alexios Stoudites himself, who, while certainly politically savvy, was to the best of our knowledge a perfectly unremarkable Stoudite monk before he was made patriarch by Basil II.²⁵ Another theory is that the edict of 1039 was the work of the future *nomophylax* and patriarch John Xiphilinos.²⁶ The participation in the synod of a young John Xiphilinos need not be discounted, but the content of the edict of 1039 was undoubtedly the result of a long-term effort to provide a heresiological and legal basis for the state's struggle against the Syrian Orthodox population in the southeastern borderlands. The edict of 1039 is also important in that it documents the growing importance of a legal-professional cadre in the capital, who would become even more prominent during the reign of Constantine IX Monomachos.

As for the actual content of the edict of 1039, this study will focus on the Justinianic provision which proved to be the most problematic for the authors of the edict: the renewal of the prohibition against heretics testifying in court against Orthodox.²⁷ The original constitution, issued on 29 July 531, prohibited non-Orthodox from testifying in court against an Orthodox party, regardless of whether the Orthodox party was the plaintiff or the defendant:

quoniam multi iudices in dirimendis litigijs nos interpellaverunt, indigentes nostro oraculo, ut eis reseretur, quid de testibus haereticis statuendum sit, utrumne accipiantur eorum testimonia an respuantur, sancimus contra orthodoxos quidem litigantes nemini haeretico vel etiam his qui iudaicam supersti-

²⁵ Stanković, *ŽRVI* 39 (2001/2) 73.

²⁶ A. Schminck, *Studien zu mittelbyzantinischen Rechtsbüchern* (Frankfurt 1986) 30–32.

²⁷ *Cod.Iust.* 1.5.21 (T. C. Lounghis, B. Blysidu, and St. Lampakes, *Regesten der Kaiserurkunden des öströmischen Reiches von 476 bis 565* [Nicosia 2005] no. 837) and *Basil.* 21.1.45.

tionem colunt esse in testimonia communionem, sive utraque pars orthodoxa sit sive altera.

1. *inter se autem haereticis vel iudaeis, ubi litigandum existimaverint, concedimus foedus permixtum et dignos litigatoribus etiam testes introduci, exceptis scilicet his, quos vel manichaeus furor (cuius partem et borboritas esse manifestissimum est) vel pagana superstitio detinet, samaritis nihilominus et qui illis non absimiles sunt, id est montanistis et tascodrogis et ophitis, quibus pro reatus similitudine omnis legitimus actus interdictus est.*

2. *sed et his quidem, id est manichaeis et borboritis et paganis nec non samaritis et montanistis et tascodrogis et ophitis, omne testimonium sicut et alias legitimas conversationes sancimus esse interdictum: aliis vero haereticis tantummodo iudicialia testimonia contra orthodoxos, secundum quod constitutum est, volumus esse inhibita.*

3. *ceterum testamentaria testimonia eorum et quae in ultimis elogiis vel in contractibus consistunt, propter utilitatem necessarii usus sine ulla distinctione permittimus, ne probationum facultas angustetur.*

Although the constitution at first used a slightly ambiguous phrase to describe Jews (*qui iudaicam supersitionem colunt*—a phrase that, as will be seen below, was applied to heretics and particularly Nestorians), there is no doubt that Jews were meant (*inter se autem haereticis vel iudaeis*). The constitution did however allow certain heretics to testify in cases contested amongst themselves, as well as to testify in cases involving testaments and contracts. At the time it was issued the constitution represented a major innovation in anti-Jewish legislation for which there was no precedent.²⁸ Yet the *Basilika* passage (21.1.45) cited by Alexios in the edict of 1039, which is a considerably redacted version of the Justinianic constitution, mentions only “those honoring the Judaic religion” (οἱ τὴν Ἰουδαϊκὴν θρησκείαν σέβοντες). Thus the *Basilika*, unlike the Justinianic constitution, makes no unambiguous mention of Jews:

Among heretics neither Manichaeans nor Borboritai nor pagans nor Samaritans nor Montanists nor Taskodrougitai nor Ophitai nor those honoring the Judaic religion shall give testimony in any [court]. And all the other [heretics] shall not be received in

²⁸ E. Klingenberg, “Justinians Novellen zur Judengesetzgebung,” *Aschkenas* 8 (1998) 7–27, here 18–19.

a court having an orthodox person as the defendant, but in all other transactions or wills or legal matters having heretics as litigants they shall witness unimpeded on account of the magnitude of the evidence

τῶν αἰρετικῶν οἱ μὲν Μανιχαῖοι καὶ οἱ Βορβορίται ἢ Ἑλληνας ἢ Σαμαρεῖται ἢ Μοντανισταὶ ἢ Τασκοδρουγῖται ἢ Ὀφῖται ἢ οἱ τὴν Ἰουδαϊκὴν θρησκείαν σέβοντες ἐν μηδενὶ μαρτυρεῖωσαν. οἱ δὲ λοιποὶ πάντες ἐν δικαστηρίῳ μὲν ὀρθόδοξον ἔχοντι ἀντιδίκον μὴ δεχέσθωσαν, ἐν δὲ τοῖς λοιποῖς πᾶσι συναλλάγμασιν ἢ διαθήκαις ἢ δικαστηρίοις αἰρετικούς ἔχουσιν ἀντιδίκους ἀδιαστίκτως μαρτυρεῖωσαν τοῦ πλάτους χάριν τῶν ἀποδείξεων.

These jurists of the commission tasked with scrutinizing the legal status of heretics in general but of Syrian Orthodox in particular interpreted this Justinianic constitution, as they did with all Justinianic law, via the writings of the sixth-century *antecessores* as well as the late-sixth and early-seventh century *scholastikoi*.

First of all, it must have been immediately obvious both to the *antecessores* and to Middle Byzantine jurists reading the Justinianic passage that if Jews are included among the heretics forbidden to testify in court when an Orthodox party is present, then it appears to contradict other laws which allow suits between Christians and Jews to take place.²⁹ But before one can hypothesize regarding the interpretation of the passage, the question whether Byzantine jurists had an accurate Greek translation of the original Justinianic constitution needs to be addressed. Modern scholars know from the scholia to the *Basilika* which have survived that the writings of the *antecessor* Thalelaios constituted the principal means by which Byzantine jurists consulted the *Codex Iustinianus*.³⁰ Thalelaios had written a commentary on the *Codex Iustinianus*, to which a *kata podas* Greek translation, an extremely literal word-for-word rendering of the original Latin, with no regard whatever for the

²⁹ *Cod.Iust.* 1.9.15: *si qua inter christianos et iudaeos sit contentio, non a senioribus iudaeorum, sed ab ordinariis iudicibus dirimatur* = *Basil.* 1.1.41.

³⁰ See A. Schminck, "Thalelaios," *ODB* III (1991) 2030.

syntax of Greek, was affixed later, perhaps at the start of the seventh century.³¹ The *kata podas* translation of Thalelaios' commentary on the passage, which is included in the scholia apparatus, renders "those honoring the [Judaic] religion" as τῶν τὴν θρησκείαν σεβομένων and Jews as Ἰουδαῖοι. Problems of language thus played no role in the interpretation of Justinian's constitution, since Byzantine jurists possessed an exact Greek *ad verbum* translation of the Latin original.

Tracking the history of the reception of this Justinianic constitution is difficult for the period from its promulgation until the eleventh century, but some Byzantine canon law collections which were based on the *Corpus Iuris Civilis* allow us to glimpse how it was interpreted by jurists of the period. The *Collectio Tripartita*, a thematically-organized collection of secular law covering ecclesiastical matters, written between 577 and 619, contains the constitution (1.5.22).³² The *Nomokanon of Fourteen Titles*,³³ which likely was composed in the seventh century before undergoing revisions at the end of the ninth century and in the eleventh, constituted by far the most popular Byzantine canon law collection. It states only that heretics cannot testify against an Orthodox party in court; in the relevant sections on Jews no mention is made of the Justinianic constitution forbidding them from testifying against Orthodox (12.2). It is difficult to make much of the *Nomokanon's* omission of that constitution, but it is interesting that the constitution did not make it from the *Collectio Tripartita* to the *Nomokanon of Fourteen Titles*.

³¹ On his commentaries and the *kata podas* translation see N. van der Wal, *Les commentaires grecs du code de Justinien* (Gravenhage 1953) 64–104; for the date when the *kata podas* translation was affixed to Thalelaios' commentary, 103. A useful discussion of *kata podas* translations in H. J. Scheltema, *L'enseignement de droit des antécédents* (Leiden 1970) 33 ff. (repr. *Opera minora ad iuris historiam pertinentia* [Groningen 2004] 58–110).

³² N. van der Wahl and B. H. Stolte, *Collectio Tripartita, Justinian on Religious and Ecclesiastical Affairs* (Groningen 1994).

³³ *Nomokanon of Fourteen Titles*, in J. B. Pitra, *Iuris ecclesiastici Graecorum historia et monumenta* II (Rome 1868) 433–640.

This at least suggests the possibility that a mere hundred years after its promulgation some Byzantine jurists were no longer interpreting the constitution as Justinian had intended; certainly the older scholia on the constitution suggest this.

Now that it has been established that our eleventh-century jurists had a correct translation of the Justinianic constitution, it remains to be seen what other commentary texts they utilized in interpreting the passage. Another scholion, taken from the *Codex* commentary of Theodore Scholastikos, interprets the passage in a way which presaged how it would be redacted in the *Basilika*.³⁴ He notes that a heretic senator, for example, is still able to give testimony in court in a case involving an Orthodox party, because he is subject to the senate. Moreover, he writes, “note that Jews are not included among the miserable [sects] enumerated here.” As justification for this interpretation, he continues by saying that “For my own teacher, Stephanos, was of this opinion.” Thus although another antecessor read the passage as referring to Jews as well, Theodore, probably realizing that such an interpretation would contradict other laws concerning the legal status of Jews, chose to read the passage in such a way that Jews were not prohibited from giving testimony in court when an Orthodox party was present. Of the scholia which have survived on this particular passage, only three have attributions: Theodore (*Basil.Schol.* 21.1.45.1); Thalelaios, or more accurately, the *kata podas* which was attached to Thalelaios’ *Codex* commentary (21.1.45.2); Thalelaios, this time from his *Codex* commentary (21.1.45.9).

The remaining scholia to *Basil.* 21.1.45 were likely the work of ‘new’ scholiasts, that is, Byzantine jurists of the eleventh and twelfth centuries. These jurists, including those commissioned by Alexios Stoudites to investigate the legal status of heretics,

³⁴ *Basil.Schol.* 21.1.45.1. For the surviving fragments of the *Codex* commentary of Theodore see H. J. Scheltema, “Fragmenta breviarii Codicis a Theodoro Hermopolitano confecti,” *Byzantina Neerlandica* 3 (1972) 9–35, and H. R. Lug, “Ein Bruchstück des Codex-Kommentars des Theodoros,” *Fontes Minores* 1 (1976) 1–15.

had at their disposal the juristic works of the *antecessores*. As we have seen, one of these *antecessores*, Theodore, relating the opinion of Stephanos, had argued that the Justinianic prohibition against heretics testifying in court did not apply to Jews. On the other hand, they had access to a *kata podas* translation of the Justinianic constitution which flatly prohibited Jews from rendering testimony in court. The passage of the *Basilika* with which these jurists had to work divided heretics into two groups with two corresponding degrees of legal incapacity, at least with regard to serving as witnesses: (1) heretics with absolutely no legal status (e.g. Manichaeans); (2) heretics with restricted legal status, who could render testimony in cases involving only other heretics or in particular other circumstances, such as cases involving wills.

The work of the commission is evidenced in the surviving scholia to the passage as well as the edict of 1039. Theodore's line of interpretation was expanded by other scholiasts. An anonymous scholiast noted (*Basil.Schol.* 21.1.45.7):

The constitution does not say Jews (for these, when there is no Orthodox opposing party, are able to render testimony legitimately, as the laws say so about them), but rather Nestorians, for like the Jews they think that Christ was a mere man, believing that Christ and the divine *logos* were separated in his *hypostaseis*. That it refers to the madness of Nestorios as the "Judaic superstition" is clear from chapter 40, book 1 [*Basil.* 1.1.40].

Ἰουδαϊκὴν θρησκείαν σέβοντες – ἡ διάταξις οὐ τοὺς Ἰουδαίους φησὶν (οὗτοι γάρ, ἔνθα μὴ ἔστιν ὀρθόδοξος ἀντίδικος, ὀρθῶς μαρτυροῦσιν, ὡς οἱ περὶ αὐτῶν νόμοι φασίν), ἀλλὰ τοὺς Νεστοριανούς, καθὸ καὶ οὗτοι τοῖς Ἰουδαίοις ἐπίσης ψιλὸν ἄνθρωπον οἴονται τὸν Χριστὸν ἄλλον τοῦτον εἶναι καὶ ἄλλον τὸν θεῖον λόγον ἐν διηρημέναις ταῖς ὑποστάσεσι δοξάζοντες. ὅτι δὲ τὴν τοῦ Νεστορίου παραπληξίαν Ἰουδαϊκὴν θρησκείαν ἀποκαλεῖ, δῆλον ἀπὸ τοῦ μ'. κεφ. τοῦ α'. βιβ.³⁵

³⁵ It should be noted that the reference provided by the scholiast, so far as I can tell, does not provide support for the interpretation that this passage refers to Nestorians rather than Jews.

As Ficker noted in his edition of the edicts of Alexios Stoudites, with some minor deviations the same text appears in the edict of 1039.³⁶ Other scholia follow this interpretation as well.³⁷ The consequences of this interpretation were three-fold: (1) Jews were categorized as heretics with restricted legal status; (2) adherents of the Church of the East, by contrast, were categorized as heretics with no legal status; (3) Syrian Orthodox, against whom the edict of 1039 was directed, like the Jews were classified as heretics with restricted legal status.

As the edict of 1039 attests, there had clearly been confusion regarding whether to allow heretics, in this case the Syrian Orthodox, to render testimony in court; judges, at least in Melitene, had allowed this to happen. The judges mentioned in the edict were likely thematic judges, who in the late Roman tradition were primarily administrators with juridical powers as well. As these judges likely resorted not to the *Basilika* itself but rather to the so-called *Synopsis Maior Basilicorum*, a one-volume abridgement of the *Basilika*, they would have likewise seen the prohibition against heretics testifying in court, but without the explanatory scholia of Thalelaios and Theodore.³⁸

In effect, the findings of the commission of jurists working under the direction of Alexios Stoudites became the official interpretation of this passage in the *Basilika*. Already by the time of the composition of the *Peira*, around 1050,³⁹ it is stated that:

³⁶ Ficker, *Erlasse* 40, lines 8–18.

³⁷ *Basil.Schol.* 21.1.45.15: οἱ Νεστοριανοὶ οἱ σέβοντες τὰ τῶν Ἰουδαίων; see also 21.1.45.16–17.

³⁸ *Synopsis Basilicorum* M.VI.29, in K. E. Zachariä von Lingenthal, *Jus graeco-romanum* V (Leipzig 1869) 484. For the *Synopsis Basilicorum* as well as for the *Peira* (cited below) I have intentionally referred to the original 19th-century editions rather than the 1931 und 1962 reprints of J. and P. Zepos. The Zepos reprints, as is well known, also contain misprints not found in the original editions.

³⁹ There are no hard and fast dates for the composition of the *Peira*. As for the dates of Eustathios Rhomaios, Nicholas Oikonomides (“The ‘Peira’ of Eustathios Rhomaios. An Abortive Attempt to Innovate in Byzantine Law,” *Fontes Minores* 7 [1986] 169–192) conjectured that he was born ca. 970 and

“Neither a heretic nor a Jew shall witness against an Orthodox. But they can testify against one another.”⁴⁰ Unlike the relevant *Basilika* passage, there is no ambiguity in the *Peira* that Jews are meant (ἔβραῖος). Less straightforward is the *Legal Textbook* (Πόνημα νομικόν) of Michael Attaleiates, perhaps written in the 1070s, where it is related that heretics cannot testify against Christians.⁴¹ It is an open question in this instance whether Jews are lumped under the term “heretics”; but this would be unusual, as Jews are almost always treated separately from heretics in the *Corpus Iuris Civilis* and *Basilika*. A possible contributing factor to the rapid acceptance of this interpretation that most heretics and Jews were not allowed to testify against Orthodox in court could have been the authorship of new scholia and the presumed standardization of the *Basilika* apparatus after the founding of the Law School by Constantine IX Monomachos in 1047.⁴²

A stricter interpretation of legislation on Jews rendering evidence in court concides roughly with the first attestations of formulaic oaths which Jews were required to render in court.⁴³

died in the early 1030s, although Andreas Schminck believes that he was born no later than the early 960s (“Zur Einzelgesetzgebung der ‘makedonischen’ Kaiser,” *Fontes Minores* 11 [2005] 269–323, here 305–306) and possibly considerably earlier than that.

⁴⁰ *Practica ex actis Eustathii Romani* 30.16, in Zachariä, *Jus graeco-romanum* I 138: ὅτι αἰρετικὸς ἢ ἔβραῖος κατὰ ὀρθοδόξου οὐ μαρτυρεῖ· κατὰ ἀλλήλων δὲ μαρτυροῦσιν.

⁴¹ A. Sgouta, in J. and P. Zepos, *Jus graecoromanum* VII (Athens 1931) 409–497, here 429: ἀλλ’ οὐδὲ δοῦλοι κατὰ δεσποτῶν μαρτυροῦσιν, οὔτε ἄνηβοι, οὔτε αἰρεκτικοὶ κατὰ χριστιανῶν.

⁴² For the view that the founding of the Law School led to a single, standardized, catena-style scholia apparatus to the *Basilika*, see Schminck, *Studien* 47–52. Some scholars, notably Scheltema, have cast doubt on the existence of a single standardized *Basilika* scholia apparatus, instead postulating the existence of multiple scholia apparatus: H. J. Scheltema, “Über die Scholienapparate der Basiliken,” in *Mnemosynon Bizoukidēs* (Thessaloniki 1960) 139–145 (repr. *Opera minora* 359–364).

⁴³ E. Patlagean, “Contribution juridique à l’histoire des Juifs dans la Méditerranée médiévale: les formules grecques de serment,” *REJ* 124 (1965)

Only a little over a century after the patriarchal edict of 1039 there is mention of an oath which Jews were required to swear in court, in a novel (dated 1148) of Manuel I Komnenos (1143–1180). The novel was a response to the petition of a Jewish convert to Christianity who claimed that he had been promised by Manuel's father the "Jewish house" of his parents and the property within it, which belonged to the Jewish community. When the convert requested that the *praktor* hand over the property, the Jewish community objected.⁴⁴ The *praktor* ordered that the convert swear an oath, the *sykophantikon*, which would confirm that his claim was sincere, and that the Jews likewise swear the *teleion*, swearing that they would tell the truth. The Jews requested that the convert provide a form of the oath for them to swear, but after he did this they objected to it, for reasons unknown. The emperor, with the help of Basil Pe-koules, judge of the Hippodrome and Velum, supplied another form of the oath which, it is claimed, was drawn from the *Book of the Eparch*.

To my knowledge, there still exists no satisfactory explanation for the precise origin of the Jewish oath in Byzantium, and Patlagean's hypotheses have not been overturned. A new explanation will not be offered here, but nonetheless the interpretation of whether heretics and Jews could testify in Byzantine courts is connected with the history of the Jewish oath. Patlagean in her study appears to have been unaware of the Justinianic prohibition against Jews and heretics testifying against Orthodox.⁴⁵ She therefore saw the introduction of the

⁴⁴ 137–156.

⁴⁴ Manuel Komnenos *De juramento Judaeorum*, in K. E. Zachariä von Lingenthal, in *Jus graeco-romanum III Novellae* (Leipzig 1857) collatio IV, nov. 55, pp.440–442.

⁴⁵ Patlagean, *REJ* 124 (1965) 137: "La législation justinienne reconnaît aux Juifs l'accès normal à toutes les actions en justice; ils sont même obligés de se présenter devant le tribunal ordinaire pour un litige avec un chrétien, tandis qu'ils peuvent porter devant un tribunal juif les litiges entre Juifs." See for instance D. Simon, *Untersuchungen zum Justinianischen Zivilprozess* (Munich 1969) 239–240.

Jewish oath in Byzantium as a degradation of Jewish legal status, which in her view had still been intact in the time of Justinian.⁴⁶ Yet as the above has demonstrated, the tradition of Justinianic legislation concerning Jews was much more complicated than that.

The fact that Manuel's novel of 1148 contains the text of an oath⁴⁷ which the convert to Christianity asked the Jews to swear means that, as Patlagean theorized, there were probably unofficial forms of such oaths circulating in Byzantine society before that date. The form and content of these Byzantine Jewish oaths correspond to Jewish oaths which have survived in the Cairo Genizah.⁴⁸ Although a link cannot be proved, it is tempting to see the appearance of the first Jewish oaths in Byzantium roughly a century after the edict of 1039 as a consequence of the interpretation by the juristic commission working under Alexios Stoudites, since from 1039 onward the legal status of Jews was clearly delineated. Before that time, as the practices of the Byzantine judges in Melitene demonstrate, there was greater ambiguity or confusion regarding the degree of legal incapacity of Jews and heretics. Once it had been established which cases Jews could participate in, the procedural difficulty of determining which oath a Jew had to use in court would need to be overcome. It appears to have been the likely period when the first Jewish oaths in Byzantium could have been authored.

This study has delineated how contemporary political events, particularly the reemergence of large non-Orthodox populations on the southeastern frontier, affected the interpretation of the law in the Byzantine Empire during the second quarter of the eleventh century. The way in which Justinianic provisions regarding the testamentary capacity of heretics were interpreted aptly demonstrates that the act of legal interpretation,

⁴⁶ Patlagean, *REJ* 124 (1965) 155–156.

⁴⁷ Formula 1.A in Patlagean, *REJ* 124 (1965) 138–139.

⁴⁸ Patlagean, *REJ* 124 (1965) 151–153.

particularly in societies with codified legal systems, an attribute which is often ascribed to the Byzantine Empire, could produce dramatically different conclusions from what was essentially a static canon of legal texts.⁴⁹

This phenomenon has been remarked upon in a similar context by Marie Theres Fögen, who noted that the Byzantine jurists who created the *Basilika*, when confronted with contradictory laws, appear to have been free to choose among them according to their merits.⁵⁰ Although she restricted her analysis to novels of Leo VI which abrogated older laws, mainly of the emperor Justinian, in this instance we see that the opinion of prominent jurists, Theodore and Stephanos via Theodore, could blunt the intention of imperial constitutions which appeared to upset the logic of the Roman/Byzantine legal order.

Last but not least, the case of the 1039 edict of Alexios Stoudites is a fascinating example of the multi-faceted way in which Byzantine jurists approached legal problems. In this instance, heresiology played an important role in determining a particular heretical group's degree of legal incapacity.⁵¹

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⁴⁹ Stolte, *BMGs* 22 (1998) 270–271.

⁵⁰ Fögen, *Subseciva Groningana* 3 (1989) 33–35.

⁵¹ This article is based on a presentation given at a symposium in June 2012 in Großkmehlen, Germany, celebrating the 200th anniversary of the birth of the renowned German historian of Byzantine law Karl Eduard Zachariä von Lingenthal. I would like to thank in particular Dr. Andreas Schminck for organizing the symposium and for inviting me to attend and present, as well as for his invaluable comments on an earlier draft of this paper. To him and to the other participants of the symposium I am sincerely grateful for their comments and insights. I would also like to extend my thanks to the participants of another forum where I presented an earlier draft of this paper, the Forschungskolloquium zur mittelalterlichen Geschichte of Prof. Michael Borgolte at the Humboldt University of Berlin.