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# The Marriage of Justinian and Theodora. Legal and Theological Reflections.\*

DAVID DAUBE\*\*

PERHAPS NO POPE HAS BEEN ACCLAIMED as a father *urbi et orbi* so universally as John XXIII. If I may use a Jewish expression, he was among the *šaddige 'ummoth ha 'olam*, among the righteous of the peoples of the world. It is fitting that a lecture in his honour sponsored by a renowned centre of jurisprudence should furnish an illustration from the history of law of the fraternization of Eros and Agape. I shall present a piece of legislation from ancient Byzantium which, brought about by the loves and hates of the mighty, and serving their personal interests, yet aimed at widening the scope of charity and extending a helping hand to many in lowlier positions. With its roots in worldly errors, entanglements and aspirations, it reached out towards the divine—and it did achieve lasting good.

Around A.D. 523, the Emperor Justin I lost his wife and was left without children. He was about seventy years of age. He had been born of poor parents near Skoplie, in present-day Yugoslavia, had risen in the army and had finally gained the throne in that great state which, with its centre on the eastern shores of the Mediterranean, carried on the name and heritage of Rome. He was illiterate; indeed it is his description by the contemporary historian Procopius which has bequeathed the term "analphabet" to modern Western languages.<sup>1</sup> (About Procopius I shall have a little to say further on.<sup>2</sup>) But he had summoned his brilliant nephew Petrus Sabbatius, whose original home

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<sup>1</sup> Anecd. 2.17. Considering that this term appears on and off in Greek writings from about 400 B.C., I am a bit puzzled why Procopius introduces it as somewhat special: he tells us that Justin had not learnt the letters, adding "and he was, to use a familiar phrase (*to legomenon*), analphabet." Apparently, the word was still not quite ordinary. (As we meet it in the third century A.D.—Athenaeus, Deipn. 176E—it cannot be a question of its having become obso-

was in the same region as his own, to join him at the capital, Constantinople, had adopted him—on which occasion the two names Petrus Sabbatius were replaced by the one name Justinian, to indicate the relationship—and had given him an excellent education. Justinian was about forty years old at the time.<sup>3</sup>

For several years the nephew had wanted to marry one Theodora, then in her early twenties. But Justin's wife, Justinian's aunt, firmly opposed the match; and though Justin had long left virtually all government in the younger man's hands, in this matter he deferred to his wife who had the law—time-hallowed law—on her side.<sup>4</sup> Theodora had been an actress—of a rather inferior type—and possibly worse. Justinian, of course, was now a member of the aristocracy, the senatorial class. Under the then prevailing marriage regulations which, basically, dated from the founder of the monarchy, Augustus, a member of the aristocracy could not marry an actress. Nor did her giving up her profession make any difference: once an actress, always an actress.<sup>5</sup>

This is a socio-legal point of some interest. The law then, as today, knew conditions which stuck to a person, involving permanent degradation, and conditions which did not stick. For example, if you were found guilty of certain offences— theft, assault—you suffered various disabilities in civic life, and these went on forever.<sup>6</sup> In the case of disreputable trades, there was more discrimination. Lasting infamy was incurred by a man who sold himself, hired himself out, as a gladiator.<sup>7</sup> (It is against this background that we must read

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lete by Procopius's time and his reviving it.) That it is this chapter of Procopius from which modern languages get the term is demonstrable. It is not only that other passages containing it are too recodite; we can actually trace the route, namely, via the tenth-century lexicon Suidas, where the term is listed with just this reference, I SUIDAE LEXICON 175 (Adler ed. 1928). In DU CANGE, incidentally, GLOSSARIUM MEDIAE ET INFIMAE LATINITATIS 238 (Favre ed. 1883), it is said that Suidas applies the epithet to Justinian. Suidas, however, correctly names Justin. The slip in DU CANGE is due to the Benedictines who added the entry *analphabeticus*, not given in the first edition by Du Cange himself. It is a slip easily committed, Justinian being so much more in the historian's mind than Justin. In the authoritative eleventh-to-twelfth-century MS. of Justinian's Code, Casinas 49, the legislation which forms the main subject of this lecture, C.J. 5.4.23, Justin A.D. 520-23, is mistakenly attributed to Justinian; see 2 CORPUS JURIS CIVILIS, 11th stereot. ed. [CODEX JUSTINIANUS 196 (Krueger ed. 1954)]. Similarly, the MSS. of John of Ephesus' LIVES OF THE EASTERN SAINTS (see *infra* note 66), ch. 13 at the beginning, substitutes Justinian for Justin; BROOKS, in MIGNÉ, 17 PATROLOGIA ORIENTALIS 187 (1923).

<sup>3</sup> See below, p. 387.

<sup>4</sup> See VASILIEV, JUSTIN THE FIRST 92ff. (1950).

<sup>5</sup> Procopius, Anecd. 9.47ff.

<sup>6</sup> D. 23.2.44, Paul I ad legem Juliam et Papiam, C.Th. 4.6.3. = C.J. 5.27.1, Constantine, A.D. 336, Nov. Marc. 4.3. = C.J. 5.5.7.2., Valentinian and Marcian, A.D. 454. Paul quotes the statute as referring to *quae ipsa cuiusve pater matere artem ludicram facit fecerit*, "one who herself or whose father or mother practises or has practised stagecraft." C.Th. 4.6.3. = C.J. 5.27.1 attacks even concubinage, a recognized union of a lower grade, between a senator and an actress or her daughter. It would appear, incidentally, that even an ordinary freeborn citizen was forbidden to marry an actress, though not her child: Ulp.Reg. 13.2, 16.2. There is some uncertainty and I shall not go into the matter.

<sup>7</sup> See LENEL, DAS EDICTUM PERPETUUM 77 (3d ed. 1927), Tabula Heracleensis 110f.

<sup>8</sup> LENEL, *op. cit.* *supra* note 6, at 79, Tabula Heracleensis 112f.

the Talmudic stories about Resh Laqish, an eminent Rabbi of the middle of the third century A.D., who in his youth had fought in the arena and then switched over to sacred studies—not the normal career for a Rabbi. Though immensely respected, to the end of his life he was liable to be taunted by his colleagues with his earlier occupation and remained sensitive to such taunts.<sup>8</sup>) Similarly, prostitution,<sup>9</sup> pimping<sup>10</sup> and, indeed, the theatre<sup>11</sup> rendered a man infamous for good: no use turning respectable. By contrast, a public crier or auctioneer was reduced in status only while holding that job.<sup>12</sup> The distinction was not just a game of the jurists; the ordinary citizen was fully alive to it. In Cicero's correspondence we meet a craftsman of a superior kind anxiously enquiring whether a municipal constitution just put into force denies membership of the Council even to a former auctioneer, and Cicero is able to reassure him.<sup>13</sup>

It was far from the only distinction in this field: there were countless shades of degradation in law. A certain measure attached to anyone engaged in a mercenary occupation;<sup>14</sup> an auctioneer, even while at the job, suffered less of

<sup>8</sup> Bab. Gittin 47a, Baba Metsia 84a; see BACHER, I DIE AGADA DER PALÄSTINENSISCHEN AMORÄER 342ff (1892). Lenel points out that a gladiator's infamy resulted, not from fighting, but from selling himself to fight. Significantly, the Talmud does speak of Resh Laqish having sold himself. It should be borne in mind, however, that the Talmudic stories refer to social snubs, not (or not directly) to legal disabilities.

<sup>9</sup> See LENEL, *op. cit. supra* note 6, at 76, Tabula Heracleensis 122f. Both the Edict and the Tabula contemplate males only: women are excluded from advocacy and City Councillorships by virtue of their sex, so no special bar in the event of misconduct is needed (cp. LENEL, *op. cit. supra* note 6, at 90). The Edict, incidentally, penalizes pathics in general, not prostitutes only—though pathics often are prostitutes.

<sup>10</sup> LENEL, *op. cit. supra* note 6, at 77, Tabula Heracleensis 123, both contemplating male pimps only (see the preceding note). It is true that the Tabula says *lenocinium faciet*, "practises pimping," instead of, as in comparable cases of permanent infamy, *fecit fecerit*, "has practised or shall have practised." But this is mere carelessness. That a pimp becomes infamous for good is clear not only from general considerations but also from the Edict, which has *fecerit*, "has practised," in this as in all cases of lasting disability. It has long been seen that in the Tabula the clause about pimping does not come where, logically, it ought to. It ought to come a little earlier on, together with prostitution. Omitted in its proper place, it is appended after the instructor of gladiators and the actor. Such addenda are frequently slipshod. There is much literature; see above all GRADENWITZ, SITZUNGSBERICHTE DER HEIDELBERGER AKADEMIE DER WISSENSCHAFTEN, Phil.-Hist. Klasse 7, 1916, no. 14, 18, and v. PREMERSTEIN, 43 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE (1922, Rom. Abt., 120f (where Mommsen's implausible explanation of the crux is adduced). I am expressing no view on the nature of the Tabula Heracleensis. Cp. below, note 20.

<sup>11</sup> LENEL, *op. cit. supra* note 6, at 77, Tabula Heracleensis 123, both contemplating male actors only (see the preceding two notes). The Edict reads *qui artis ludicrae pronuntiandiue causa in scaenam prodierit*, "he who has appeared on the stage in order to act or recite"; the Tabula *queive lanisturam artemve ludicram fecit fecerit*, "or he who has practised or shall have practised the instruction of gladiators or stagecraft." Both definitely embrace the past as well as the present.

<sup>12</sup> So expressly Tabula Heracleensis 104f., *dum faciet*, "while he practises."

<sup>13</sup> Ad Fam. 6.18.1. The questioner's anxiety becomes all the more understandable if, as is likely, earlier, similar constitutions were less liberal: see v. PREMERSTEIN, *op. cit. supra* note 10, at 49.

<sup>14</sup> See GREENIDGE, INFAMIA 12, 34, 194 (1894).

it than an actor;<sup>15</sup> an actor suffered less than a prostitute.<sup>16</sup> Even the antithesis of permanent reduction and transitory reduction covers a multitude of degrees. One way in which a legal system can manipulate the matter is by the extent to which it will recognize truth as a defence in an action brought on the ground of injury to reputation. Obviously, where truth is an absolute defence, a tainted past mercilessly remains a tainted present. The Roman discussions of the action show remarkably little concern with this question; possibly because, as damages were assessed according to what was equitable in each individual case, it presented no particular difficulty—truth was a defence where it seemed equitable that it should be (a full defence or a partial one, according to the circumstances) and no defence where it seemed wrong.<sup>17</sup> Professor T. B. Smith, for Scots Law, favours the retention of the doctrine—prevalent in several states of the U.S.A.—that wanton publication of an old scandal is actionable irrespective of truth.<sup>18</sup> To outline the precise implications of permanency of infamy at Rome would mean to present almost every group affected individually and follow it up through the centuries.

There were strange quirks. When Caligula imposed a tax on harlots, he saw to the insertion of a proviso extending it to retired harlots. The very fact that he needed a special clause shows that, but for it, they would not have been thought of as included—even though they did share with practising harlots a number of disabilities, for instance, the incapacity to act as witnesses in certain cases.<sup>19</sup> The disabilities which stuck to them were such as had their *raison d'être* in inferiority of character: the character of a prostitute does not ordinarily change when she retires. A tax on trade, unless vindictive, is designed to take a slice from the earnings: a retired prostitute does not earn, and to apply the principle of permanency to this area was unfair. Suetonius, the Roman historian from whom we learn of Caligula's procedure, does condemn it.<sup>20</sup>

A striking feature of the Augustan and subsequent marriage regulations was

<sup>15</sup> Unlike the actor, the auctioneer does not figure in the Edict: see LENEL, *op. cit. supra* note 10, at 77. His right of advocacy was not restricted.

<sup>16</sup> While an actor's right of advocacy was severely restricted, a pathic lost it completely: LENEL, *op. cit. supra* note 6, at 76f. It is largely failure to take seriously enough the legal differentiation between an actress and a harlot which has led scholars to overlook major points in C. 5.4.23—the enactment I propose to analyse—and to misinterpret subsequent reforms by Justinian such as Nov. 117, A.D. 542; see below, notes 53 and 64ff.

<sup>17</sup> D. 47.10.18 pr., Paul LV ad edictum, represents truth as an absolute defence. But Justinian's compilers may well have simplified the classical decision. There need not be much interference with the wording: the mere suppression of the original context might produce the present unconditional ruling. Even as it stands, it makes equitableness the basic consideration.

<sup>18</sup> See 2 SCOTLAND, THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 732f (The British Commonwealth), (Keeton ed. 1962).

<sup>19</sup> D. 22. 5.3.5, Callistratus IV de cognitionibus. He quotes the *lex Julia de vi* as referring to her who *palam quaestum faciet feceritve*, "practises or has practised prostitution."

<sup>20</sup> Caligula 40. Retired pimps were also taxed.

that a parent's condition might be transmitted to the offspring. Augustus kept even the children of an actor or actress from marriage into the senatorial class.<sup>21</sup> This harsh—if understandable—course was taken by lawgivers more persistently in regard to daughters than in regard to sons. In the ordinances of Constantine and his successors we hear only of the daughter of an actress or, say, the daughter of a female tavernkeeper or a pimp, not of the son.<sup>22</sup> A young man was more likely than a young woman to strike out on his own, away from his background; and once he had attained a position to attract a lady from the upper orders, it no longer made much sense to enquire into his antecedents. A young woman might find a noble suitor interested in her looks even if she was still very much part of her original setting. There seems to be no evidence, incidentally, that the daughter of a harlot was as such placed under any marriage restriction.

When we add to the nuances sanctioned by the legal order those which would enter into a person's social relations, the matter becomes infinitely complicated. Then, as today, legal evaluation might be in conflict with social. Mere poverty did not in law exclude a woman from an aristocratic union; in social reality it might be as serious a handicap as a legal bar,<sup>23</sup> but, manifestly, it was curable from one moment to the next. In modern life, a person sentenced for fraud may be re-established within a short time as far as the law is concerned, yet remain unclubbable for ever; while a political offence may entail civic disabilities of long duration, yet have only the briefest effect on social status. Language may afford clues. The expression "to live down" a reproach exists exclusively in English, though German, for instance, would have no difficulty in producing a corresponding formation, *niederleben* (or French *souffrir* or *dériver*). Originally it was used of the rebuttal by years of blameless behaviour of an unjust imputation. Among the elements that went into this usage were a simple division of good and evil, an optimistic belief in the power of the former and a dose of self-righteousness. The earliest recorded evidence dates from 1842, when non-conformism is declared (by a non-conformist) to have lived down the prejudice against it.<sup>24</sup> The idea, though not the expression, can be paralleled in antiquity: it was by his exemplary life that Socrates—so his disciple Xenophon affirms<sup>25</sup>—prepared his defence before the court that was to try him, and Augustus, according to Suetonius, "refuted the defamatory charge of unnatural vice by the chastity of his present and subsequent mode of life."<sup>26</sup>

<sup>21</sup> D. 23.2.44, *supra* note 5.

<sup>22</sup> C. Th. 4.6.3 = C.J. 5.27.1, Nov. Marc. 4.3.2 = C.J. 5.5.7.2, quoted *supra* note 5.

<sup>23</sup> Actually, in some circles it was evidently thought that it did constitute a legal bar, and the Emperors had to declare this opinion unfounded: Nov. Marc. 4.1 = C.J. 5.5.7 pr., 1.

<sup>24</sup> 6 OXFORD ENGLISH DICTIONARY, pt. 1, 357 (Bradley ed. 1903), quoting EDWARD MIALL, 2 NON-CONFORMIST 1.

<sup>25</sup> Apology, towards the beginning.

<sup>26</sup> Augustus 71: *infamiam impudicitiae refutavit et praesentis et posterae vitae castitate.*

It was only at a later stage that "to live down" acquired the sense in which it is now common: to cause a discreditable past to be forgotten by prolonged, consistent good behaviour.<sup>27</sup> To this there are no really close approximations in antiquity.<sup>28</sup>

Theodora had renounced the stage and become a serious Christian before she met Justinian. None the less his aunt was adamant. She had not prevented her Emperor-husband from conferring the high rank of a Patrician on the lady their nephew courted, but of marriage she would not hear. Who was this puritan Empress?

She had been born a slave, and originally was called Lupicina. Justin had bought and manumitted, freed, her; and she assumed the more decorous name of Euphemia when she ascended the throne with him. But how could a freedwoman, a woman of servile provenance and on released from slavery in the course of her life, be married to the Emperor? The very same Augustan statutes which forbade a member of a senatorial family to marry an actress or her daughter also forbade him to marry a freedwoman, and later enactments extended the prohibition even to a freedwoman's daughter.<sup>29</sup> There is indeed some evidence that, to begin with at any rate, she was merely Justin's concubine, a kind of recognized mistress.<sup>30</sup> But from Constantine onwards, even concubinage between a senator and a freedwoman or her daughter was outlawed,<sup>31</sup> and in any case Euphemia almost certainly finished up with the full status of wife.<sup>32</sup>

The answer is twofold. For one thing, her union with Justin probably antedated his rise to senatorial rank;<sup>33</sup> and already the late classical jurists, around A.D. 200, had wondered whether an existing, valid marriage between an ordinary citizen and a freedwoman should be dissolved by the former's elevation to the aristocracy.<sup>34</sup> However, this can hardly be the complete solution, if only

<sup>27</sup> The earliest occurrence quoted by the OXFORD ENGLISH DICTIONARY is in ARCHIBALD CLAVERING GUNTER, *MISS DIVIDENDS* 158 (1892): "How long do you think it will take in New York society for a girl with sixty thousand dollars a year to live anything down?"

<sup>28</sup> It would be easier to find approximations to the related, yet different, slang phrase "to make good."

<sup>29</sup> D. 23.244, C.Th. 4.6.3 = C.J. 5.27.1, Nov. Marc. 4.3 = C.J. 5.5.7.2, quoted above, notes 5 & 21.

<sup>30</sup> Procopius, *Anecd.* 6.17: *palakē*. My slight doubt stems from the consideration that Procopius, whenever making a damaging statement about the imperial house, is not absolutely trustworthy; see below, p. 387. For other sources see VASILIEV, *op. cit. supra* note 3, at 61.

<sup>31</sup> C.Th. 4.6.3 = C.J. 5.27.1, quoted above, note 5. That went against the widespread feeling that, however highly placed a man was, at least concubinage with a slave woman he had himself manumitted was all right: D. 23.2.41.1, Marcellus XXVI digestorum, 25.7.1pr., Ulpian II ad legem Juliam et Papiam, 48.5.14pr., Ulpian II de adulteriis.

<sup>32</sup> A letter of A.D. 519 written by the Patriarch of Constantinople to the Pope speaks of Justin's "most pious spouse, our daughter, Euphemia," *piissimam eius coniugem, nostram autem filiam, Euphemiam*, MIGNE, 63 *PATROLOGIA LATINA* 450 (1860). Procopius himself writes l.c.: "He lived in wedlock with her as wife," *gynaikei xynoikei*.

<sup>33</sup> Under Anastasius I, 491-518; see VASILIEV, *op. cit. supra* note 3, at 63.

<sup>34</sup> C.J. 5.4.28pr., Justinian, A.D. 531 or 532: *apud Ulpianum quaerebatur*, "the question was raised in Ulpian."

because the prevalent opinion seems to have been that the marriage was indeed ended; it was Justinian himself who, later on when he had succeeded his uncle as Emperor, reversed this harsh trend.<sup>85</sup> Anyhow, we may be sure that, if there was a non-controversial method of keeping or rendering his union lawful, Justin must have chosen it. There was such a method, and this brings me to the second point of the answer.

From some date in the second half of the second century A.D., a slave could not only be freed but also be made freeborn.<sup>86</sup> This sounds, and is, queer, but it is a historical fact; I shall come back to it.<sup>87</sup> It was indeed a very special thing, and whereas freedom could be conferred by a slave's master, freebornhood could be conferred only by the Emperor. The institution belongs to those interferences with the past held possible in certain settings in antiquity, and maybe even in our day. Remember the "new creation" of the New Testament,<sup>88</sup> drawing on the then current Jewish teaching about proselytism: a convert to Judaism was newborn in so real a sense that he was no longer related to, say, his sister and (provided she too converted) could marry her.<sup>89</sup> A freedman made freeborn by the Emperor had never been a slave. As Mommsen noticed,<sup>40</sup> if, for example, such a man, prior to the grant of freebornhood, held one of those offices which were normally entrusted to freedmen, his tomb inscription, in recording his career, would suppress it. It would do so even though the office might have been extremely important and honourable: as by the time of his death he was freeborn, he could never have held it. If you study successive editions over the past fifty years of the leading German or Russian encyclopedias, you will find not dissimilar modern attempts to refashion the past in this direct manner. I have with my own eyes seen a group painting of a party conference where one of the heads originally there had been erased: that man now never was at the conference. George Orwell in *Nineteen-Eighty-Four* depicts in detail this control of yesterday. Doubtless Lupicina-Euphemia was made freeborn, so the Augustan marriage restrictions were not applicable to her, her union with Justin was unobjectionable.

Otherwise quite passive in politics, she put her foot down against Justinian's marriage plans. She was simple, worthy, narrowly old-fashioned, and an actress was just not tolerable. But about A.D. 523, as remarked, she died.

Now Justinian got his uncle to legislate. This law, laying down that a

<sup>85</sup> C.J. 5.4.28, just quoted; cp. *infra* note 78.

<sup>86</sup> For details, see part IV (Interference with the Past) of my lecture "Greek and Roman Reflections on Impossible Laws," delivered at Notre Dame University in October 1964, and to appear in the 1967 number of NATURAL LAW FORUM.

<sup>87</sup> Below, notes 44f.

<sup>88</sup> II Cor 6.17.

<sup>89</sup> Bab. Yebamoth 22a, 97b f., Pal., Yebamoth 12a.

<sup>40</sup> § RÖMISCHES STAATSRICHT, pt. I, 518f.



penitent actress can be rehabilitated, is preserved in Justinian's Code and commented on by Procopius, whom I have mentioned already, in his *Anecdota* or *Secret History*.<sup>41</sup> As he flourished under Justin and Justinian, and therefore was a witness of those events, his account is invaluable—yet it must be taken with a grain of salt. He was Justinian's court historian and obtained many tangible expressions of the Emperor's gratitude for eulogistic descriptions of his wars, his buildings and so forth. But all the while the same author was engaged on a venomous attack on the reign—the *Anecdota*—taking good care to see that it was not published till after his death. His hatred for Justinian and Theodora was clearly extreme, so in using his work some allowance must be made for distortion. Let us now inspect the law.

An introductory paragraph says that the Emperor has the welfare of his subjects at heart; that women who have slipped into a dubious way of life should be offered suitable aid; and that they should not be deprived of hope of rehabilitation which might work as a stimulus to renounce their objectionable doings. In this way (the paragraph concludes) the Emperor can imitate the clemency of God, always willing to accept a penitent sinner and reinstate him in a better condition. If the Emperor fails to do so to his subjects, he himself will not be worthy of divine forgiveness.

There is much here that is reminiscent of New Testament thought: the role of hope, the inducement to be held out to the erring, the emulation of the example of God—*imitatio Dei*—the latter's mercy to penitent sinners, the postulate that you must forgive if you want to be forgiven.<sup>42</sup> Nevertheless we must not forget that remarkably similar sentiments are entertained by pagan Stoic ethics. This ethics had long been a major influence on Roman imperial ideology and categories derived from it were deeply entrenched in the legislative tradition inherited by Justin and Justinian. They must have been a far from negligible factor contributing to the result before us. It will suffice to quote Seneca:<sup>43</sup> "Since I have made mention of gods, I shall do well to establish this as the standard after which the prince should model himself—that he should be so to his citizens as he would wish the gods to be to himself. Would he, then, desire to have deities that cannot be moved to show mercy to our sins and errors?" And again: "You will more easily reform offenders by a lighter punishment. For he will live more carefully who has some unspoilt good left. No one looks after honour that is lost."

The next paragraph starts with a strange reference to the grant of freeborn-

<sup>41</sup> C.J. 5.4.23, Justin, A.D. 520-3, Procopius, *Anecd.* 9.30. As for the mistaken attribution of the enactment to Justinian in the inscription of Casinas 49, see *supra* note 1.

<sup>42</sup> E.g., Mt 6.12, 14f., 7.1f., 18.23ff., Mk 11.25f. Cp. also Eccles 28.1ff., Tosephta Baba Qamma 9.29f., Bab. Shabbath 151b, and (for gentle chastisement with a view to reform) Zadokite Fragments 13.9f.

<sup>43</sup> De Clem. 1.7.1, 1.22.1.

hood, that curious institution on which I have already touched. May I recall: slaves could always be released, and from the early Empire they could be given the rights of freeborn citizens. But from, roughly, the reign of Commodus, around A.D. 180, a more radical transformation was recognized: they could be made freeborn (not only given the rights) by imperial grant. Sometimes this was interpreted as a new creation, sometimes as an elevation of the person to the ideal status which prevailed in the golden age before the breaking up of mankind. Here, then, in the paragraph under discussion, Justin—the uncle who is legislating, but we must always remember that the guiding hand is Justinian's—asserts that it would be unjust that slaves can be fully helped up in this manner whereas penitent actresses should have no chance.

The argument is quite unconvincing, based as it is on a highly defective parallel. Slaves are what they are without fault, actresses by their own choice. Why does he put up such a bad analogy? We might indeed ask: why does he need an analogy at all?

Very possibly there is here an allusion to, almost a refutation of, the dead Empress who had blocked the plans of Justinian and Theodora though herself secure in her marriage only by virtue of a grant of freebornhood, which had lifted her out of her subordinate class. A far more important point, however, is revealed by the provisions enunciated in the following, substantive, portion of the enactment. Henceforth, it is ordained, a penitent actress may apply for an imperial grant of full marriage privileges, upon which the highest aristocrat may marry her: all blemish, all *macula*, attaching to her from the stage is utterly wiped out and—now I quote—“she is so to speak handed back to her pristine, native condition.”<sup>44</sup> Here lies the main reason for the introduction of the parallel. By the imperial grant of freebornhood a man born a slave “was handed back to his native condition”—this was a technical term<sup>45</sup>—in the sense that he was born afresh in freedom or (an alternative interpretation) was placed under the ideal dispensation of the golden age with no gulf in society. This institution was the nearest available model in the law for a grant with a direct effect on a person's past, not just remedying what had happened but altering it head-on. Theodora must be flawless. It was not enough to rule that, from now, she was acceptable. The blemish must never have been, must be totally eradicated even from the past. She was to be restored to her sinless state at birth or the ideal state of the world before sin entered. For such a step, a model—the only one in law, as distinct from religion or philosophy—was provided by the grant which made a man who was born a slave a freeborn

<sup>44</sup> *Quasi suis natalibus huiusmodi mulieribus redditus.*

<sup>45</sup> D. 39.2.3.1, Ulpian XII ad edictum. Often “to restore (*restituere*) to native condition”: D. 40.11.2, Marcian I institutionum, 40.11.5.1, Modestinus VII regularum, C. 6.55.6, Diocletian and Maximian, A.D. 294.

man. This feature of directly getting at the past was so desirable for blotting out her taint as an actress that the weakness of the analogy—the slave being innocent, an actress guilty—was brushed aside.

Of course, these attempts to interfere with the past are never more than partially successful. The law enjoins that, once the grant is obtained, she is no longer to be called an actress, "no longer to be so dishonourably designated."<sup>46</sup> Would it be permissible to say that she had been one? I suppose so, even though all taint is gone and she is as pure as on the first day. Remember the tomb inscriptions of freedmen made freeborn, suppressing all indication of an unfree origin. I suppose she was an actress in a different life—just as a convert, newborn, a new creation, would still have a former life in the dark.

The law continues with a paragraph to the effect that the children of an actress who marries after rehabilitation are legitimate; and yet a further paragraph lays down that a daughter from such a marriage does not count as the daughter of an actress. As for the latter provision, I observed above<sup>47</sup> that Augustus had ruled unfit for marriage into the aristocracy the children of actors, whether sons or daughters; but that in course of time the ban was confined to daughters. That is why this paragraph makes no mention of the former: they were no longer in need of relief.

Strictly, indeed, both paragraphs—that the children from such a marriage are legitimate, and that a daughter does not count as the daughter of an actress—might be judged superfluous: once the mother is rehabilitated and her marriage with a senator recognized without reservation, what these two paragraphs state follows automatically. If it was thought prudent not to rely on inference in this matter, and to create one-hundred-percent clarity, it was because, potentially, the future of the dynasty was involved: there must not be the shadow of a doubt as to the legitimacy of any offspring that might result from the proposed union, and as to the unsullied status of any daughter. We know that Justinian and Theodora badly wanted children, from the tragic scene in A.D. 530, when they had been married some seven years and Abbot Sabas had an audience with Theodora.<sup>48</sup> She fell at the holy man's feet and asked him to entreat God to grant her a child. The abbot, however, was orthodox while she was a Monophysite. So in answer to her request he prayed: "God the Lord of all may guard your Empire." She asked him again, and this time he prayed: "The God of glory may preserve your Empire pious and victorious." Tearfully she got up and he left her. When questioned by his entourage why he had been so hard, he replied: "Believe me,

<sup>46</sup> *Neque vocabulum inhonestum eis inharere de cetero.*

<sup>47</sup> See notes 21f.

<sup>48</sup> KYRILLOS VON SKYTHOPOLIS, ed. SCHWARTZ (49 *Texte und Untersuchungen zur Geschichte der ALTCHRISTLICHEN LITERATUR*, pt. 2=4th ser., 4, pt. 2), 173f (1939). (St. Sabas 71); see NAGL, *THEODORA*, 2d ser., 5 *PAULYS REAL-ENCYCLOPÄDIE 1782* (1934).

Fathers, that no fruit will come from her womb, lest it should suck of the tenets of Severus and trouble the Church worse than Anastasius."<sup>49</sup> They never in fact did have a child. But at the time the law enabling them to marry was promulgated, obviously the position of offspring would be very much in their minds.

The case of an actress's daughter born before her mother's reinstatement is not overlooked: she will be entitled, the law ordains, to an imperial conferment of unrestricted marriage capacity. It is worth noting that Theodora had a daughter from an earlier union who, if she so desired, might benefit from this provision. Bury claims<sup>50</sup> that this daughter was the fruit of her mother's pre-marital friendship with Justinian himself. This is incredible. It is not hinted at by a single source; and the argument from silence is strong in this case, since the writers hostile to the couple would have been happy to mention the point had it been remotely plausible.

Bury is definitely wrong on a fundamental issue. So far I have accepted what Procopius reports in his *Secret History*—that this legislation was passed for the purpose of Justinian's marriage with Theodora. Some forty years ago Bury argued<sup>51</sup> that the law was not needed at all because, some while before, Justin, the uncle, had promoted Theodora to the Patriciate, a high dignity (bestowal of which Euphemia had not prevented<sup>52</sup>); and a woman-Patrician was at liberty to marry anyone, however noble, even if she was an ex-actress. This thesis of Bury's is taken over by several scholars.<sup>53</sup> It is, however, based on an enormous fallacy. The regulation that a woman-Patrician, even if previously an actress, may marry anyone was introduced in a paragraph of the very law we are considering, the very law enacted by Justin for his nephew's sake. So Procopius is perfectly right: but for this law, Justinian could not have married Theodora though she was indeed a Patrician.

It is true that the paragraph giving women who have received a dignity full marriage privileges does constitute a problem. But the proper question

<sup>49</sup> Severus of Antioch, the Monophysite leader, and Anastasius I, the Monophysite Emperor.

<sup>50</sup> 2 *HISTORY OF THE LATER ROMAN EMPIRE* 27 (1939).

<sup>51</sup> *Supra* note 50, at 29.

<sup>52</sup> See above, p. 385.

<sup>53</sup> *E.g.*, by VASILIEV, *op. cit. supra* note 3, at 100f. Not, *e.g.*, by NAGL, *op. cit. supra* note 48, at 1778; HOLMES, *THE AGE OF JUSTINIAN AND THEODORA* 347 (2d ed. 1912); SCHUBART, *JUSTINIAN AND THEODORA* 34 (1943); STEIN, 2 *HISTOIRE DU BAS-EMPIRE* 236 (1949); URE, *JUSTINIAN AND HIS AGE* 200 (Pelican, 1951); RUBIN, *DAS ZEITALTER JUSTINIANS* 107 (1960). There are, however, a number of other recurrent errors: Vasiliev, *op. cit. supra* note 3, at 97, 395, Nagl, Holmes, Schubart, and Ure throw together actresses and prostitutes and believe that Justin's enactment encouraged both equally to return. Ure in the decisive sentence actually forgets about the former: the enactment repealed, he says, "the law which prohibited senators from marrying courtesans, and Theodora became Justinian's lawful wife." Cp. *supra* note 16, and below, notes 64ff. Rubin falls into a different blunder: he thinks the enactment authorized a senatorial marriage only with such ex-actresses as were Patricians. Nagl's position is quite self-contradictory: she does not accept Bury's conclusion, yet she does share his mistaken premise that from the moment Theodora was a Patrician, there was no longer any obstacle. The confusion is truly remarkable.

to ask is: why does the law do two things when, apparently, one—either of the two—would suffice? In its principal part, which I have reviewed at some length, the law says that a penitent actress may apply for an imperial grant which will abolish her stain. Then a special paragraph adds that a woman promoted to high rank—such as the Patriciate—is likewise rid of blemish. Either of the two provisions, it looks at first sight, would have done, would have achieved what Justinian wanted. Why, then, do we get both? Pursuing this line of inquiry we shall see just how wrong Bury and his followers are: every detail of the law is tailored to the particular dilemma of Justinian and Theodora—which does not exclude the effectiveness of wider, charitable considerations.

Let us begin by imagining that the law had confined its remedy to a woman raised to the Patriciate or an equivalent honour. The result would have been most unsatisfactory, for such a law would have been a crudely individual favour for the couple in question, and the general formulation—the reference to any woman-Patrician—would have deceived no one; it would only have played into the hands of the critics who would have seen how specious it was. In that age, it just was not on the cards that there would be a series of further cases of circus girls being ennobled. The law might just as well have acknowledged, in a short sentence, without much ado, the particular marriage between Justinian and Theodora. If this was not good enough, then a wider regulation, a regulation going beyond Patricians, became inevitable.

There is a further aspect we should do wrong in neglecting. We must give some credence to the benevolent and pious feelings expressed in the law. The three, Justin, his nephew and the bride-to-be, were really inspired by religious-moral fervour. They did want to extend to others, to ordinary mortals, the remedy which made marriage possible in this instance. This is not speculation: Justinian's subsequent legislative reforming activity as sole Emperor after his uncle's death proves it.<sup>54</sup> The immediate purpose of the law was *ad hoc*, but this does not mean that it was not at the same time intended to give encouragement to fellow-beings in similar plight. We may conclude, then, that though it would have been open to the lawgiver merely to annul the lapse of a Patrician, that course was rejected for two reasons: it would have been impolitic, too crassly personal, and it would not have satisfied the genuine charitable aspiration to come to the assistance of penitent actresses in general, high or low.

This leaves us with the question why the law contains more than the principal part authorizing penitent actresses to seek rehabilitation: why, in addition, does it contain the special little paragraph saying that an ex-actress

<sup>54</sup> See BIONDI, *infra* note 73. Cp. also *supra* note 35, and *infra* note 78.

admitted to the Patriciate is equally fit to marry anyone? Here again the main reasons are two. For one thing, this was a gallant gesture to Theodora, who was thereby relieved of applying to the Emperor as a penitent actress. It was he who did all that was necessary; her promotion automatically put her on a level with an actress who had received a grant. This object, of sparing her the awkwardness of the procedure and of representing her rehabilitation as freely offered her by the old Emperor's goodwill, comes out in the wording of the paragraph. We are told that the privileges acquired by penitent actresses who have sought a grant shall be enjoyed also by women "who, without supplicating to the most Serene Emperor, have prior to their marriage been honoured with high rank by his spontaneous gift."<sup>55</sup>

However, there is more—far more—to this extra paragraph which confers free marriage ability on a Patrician. It has never been noticed that the ruling differs in a significant substantive detail from that about an ordinary penitent actress. The latter obtains an imperial grant, whereupon the blemish of the stage is wiped out. In the case of a Patrician, her rank, the law declares, wipes out not only the blemish of the stage but "also any other blemish whatsoever" which might impede a high union.<sup>56</sup>

Theodora was widely reputed to have been a prostitute, and thus, quite apart from her theatrical past, to belong to a category not to be taken in marriage by any freeborn man, let alone a senator.<sup>57</sup> Neither she nor Justinian nor Justin would admit this for one moment; on the contrary, they were greatly concerned to mark off her venial offence, the theatre, from prostitution which, in this world, remained in principle unredeemable. Even Justinian's later humanitarian reforms, we shall see,<sup>58</sup> never ameliorated the status of a penitent harlot. Accordingly, the bulk of the enactment is devoted to penitent actresses, of whom Theodora was avowedly one. Yet something had to be done about the graver charge, warranted or unwarranted, if only for dynastic reasons. I have already adverted to the couple's hope for progeny. Suppose there would be children, and after Justinian's death their claim to the succession would be contested because the father's marriage with an ex-prostitute had been invalid. If the law cleared Theodora only from her career as an actress, then, rightly or wrongly, somebody would at-

<sup>55</sup> *Quae dignitatem aliquam, etsi non serenissimo principi supplicaverunt, ultronea tamen donatione ante matrimonium meruerint.*

<sup>56</sup> *Aliam etiam omnem maculam per quam certis hominibus legitime coniungi mulieres prohibentur.*

<sup>57</sup> D. 23.243pr.ff., Ulpian I ad legem Juliam et Papiam, 23.2.44.8, Paul I ad legem Juliam et Papiam, Ulp. Reg. 13.2. In D. 23.2.43.4, Ulpian states that "not only she who practises prostitution but also she who has practised it, though she has now ceased to do so, is marked by this statute: for her vileness is not abolished by discontinuance," *non solum autem ea quae facit (palam corpore quaestum) verum. ea quoque quae fecit, etsi facere desiit, lege notatur: neque enim aboletur turpitudine quae postea intermissa est.*

<sup>58</sup> *Infra* notes 64f.

tack the marriage on that other ground: on a monarch's death, all sorts of things happen. Justinian had to provide against the day when he could no longer cow those who held this view of his wife into silence or clandestine rumour. Which means that it was essential to render the marriage lawful even should it be assumed that she had in fact been guilty of prostitution. Here we have a further weighty reason—in addition to consideration for her feelings, sparing her the application—of the special paragraph regarding a Patrician: by it, a woman promoted to high dignity was enabled to contract an aristocratic marriage however low she had once fallen.<sup>59</sup>

It will be noticed that this paragraph was not likely to benefit any group of persons. I previously observed that in that age it was not to be expected that the Patriciate would be conferred on other actresses; still less would it be conferred on worse offenders. There was indeed no intent to generalize the relief, no intent to do anything for ex-prostitutes at large. The paragraph was designed as a strictly personal protection of the couple and their issue should Theodora at some future time be deemed—unjustly, from the lawgiver's point of view—to have been in that despicable trade. We have before us an admirable specimen of legislative craft. The task before the lawgiver was, while not conceding the reproach, to see to it that it would do no harm even if accepted as true; and again, while seeing that it would do no harm in this particular case, not to blunt its consequences in other cases (since ex-prostitutes remained damned); and again, to achieve all this without openly singling out the people concerned. The task is solved by this paragraph.

Actually, the draftsman has performed an even subtler feat. The provision is formulated in so subdued a fashion and tucked away in so subordinate a place that it is barely noticed. The lawgiver did not wish it to be noticed, certainly did not wish its major point to be understood at that time. He was forced to put it in just in case, after Justinian's death, the more serious aspersion against Theodora might be voiced and, but for the paragraph, create obstacles for their offspring; but for the moment it was to be as inconspicuous as ever possible. Significantly the particular charge in view of which the provision was needed is not even specified: that would indeed have attracted attention—but all we get is a bland, innocent-looking phrase, "any other blemish." How successfully it has been done may be gathered from the fact I have just noted, that until now nobody has spotted the thrust of this little section—remarked that the law goes much further in rehabilitating a Patrician than a mere penitent actress, and connected it up with the gossip about Theodora.

There is one exception: Procopius (and I regard this as confirmation of

<sup>59</sup> Whether the paragraph would have made a difference if put to the test is another question. It would be rash to deny that in certain circumstances it might have done so.

my analysis). If love makes blind, hate makes seeing. Procopius in his *Anecdota* alleges that the enactment legalized marriages between senators and courtesans; to this monstrous concession, he claims, Justinian's infatuation had led. This is, of course, a perversion of the truth, but not without the proverbial grain. The grain lies in the singling out by the law of actresses elevated to high dignity—meaning, in effect, Theodora alone, but speaking in general terms—whose entry into a senatorial family was not to be impeded by anything at all that could be said against their character.

In the history of legislation, this case of a camouflaged provision is far from unique; many illustrations could be given from present-day law. It would indeed be interesting to examine systematically the technique of authorities throughout the ages in employing the device. At first sight one might perhaps assume that in modern democracies, with free and open debate of proposed legislation, this kind of thing could not happen. But it does: what is required is an understanding between those charged with the debate or (quite enough) between the knowing ones among them. Where to look for examples? Constitutions are worth probing—say, the section dealing with the emergency powers of the head of State. Immigration acts—the way it is made possible, if the worse comes to the worst, to keep a group or race out. Currency exchange laws. Income tax laws. Lower down the scale, a university's (or a professional body's or a country club's) admission or disciplinary code. If we go still lower down, into the arena of contract, it is well known—though rarely looked at from this angle—that, say, standardized insurance terms, money-lending arrangements, hire-purchase agreements, tenancy forms, are all apt to contain stipulations overlooked by the unwary and meant to be overlooked, but no less operative if need be.<sup>60</sup>

The ill-founded dismissal of Procopius's information that the law was promulgated with a view to the marriage between Justinian and Theodora has produced much basic misrepresentation. Vasiliev infers that the law "was merely one step in the process of the emancipation of women which goes back to the fourth and fifth centuries and was in accordance with Christian sentiment."<sup>61</sup> This is an exaggeration. No doubt the law marks a stage in a gradual advance of the kind he envisages. But that such advance was not its central purpose comes out in many ways. Why were only penitent actresses considered and no other female sinners? Why no other female sufferers with better claims and more comparable to slaves or freedmen not responsible for their unfortunate condition?<sup>62</sup> It was not till some twenty years later that Justinian allowed senators to marry, say, the daughters of female

<sup>60</sup> I refrain from illustrations: far be it from me to give away an artist.

<sup>61</sup> VASILIEV, *op. cit. supra* note 3, at 395. Holmes more judiciously takes the law to be *ad feminam* at the same time as chiming with the development of Christian sentiment.

<sup>62</sup> See above, p. 388.



tavernkeepers or pimps.<sup>63</sup> Harlots who repented were never relieved of their disabilities even by Justinian—contrary to the prevalent view which credits his great reform Novel with a range it does not have.<sup>64</sup> Procopius both in his official and in his secret writings describes their seclusion on inaccessible islands off-shore, expanding on their ensuing happiness and saintliness in the official account, on their misery and unwillingness to be saintly in the secret one.<sup>65</sup>

Here a word may be said about Theodora's actual standing. Beyond question she had led a dissolute life (being brought up to it from earliest childhood, as the only means of mitigating total destitution). Procopius's biography, however biased, is too circumstantial to be dismissed as a pack of lies, and, above all, its main thesis is corroborated by John of Ephesus, equally contemporary, a Monophysite who would not unnecessarily testify against the admired benefactress of his creed.<sup>66</sup> No use trying to explain it away.<sup>67</sup> In fact, for John of Ephesus there was something wonderful in this conversion and exaltation which proved such a blessing for the true faith. (It would be of some interest to work out to which types of modern historians and theologians the thought is abhorrent.) In law, it would be very material whether she fell under the definition of a prostitute or only came near being one: I think she was in the latter case. She was free with her favours and not averse to earning money, yet, refusing to become a mere tool, she was not technically a prostitute.<sup>68</sup> But she did come close and many considered her guilty. As I have already pointed out, the long, principal portion of the law under discussion is carefully designed to convey that she could be accused of nothing worse than acting, and the relative lightness of this lapse is insinuated by means of ingeniously picked moderate terms—such as "ill-considered choice."<sup>69</sup> (We are also given to understand that women go in for the stage from "feminine weakness,"<sup>70</sup> presumably misled by ruthless men.<sup>71</sup> Ruthless

<sup>63</sup> Nov. 117.6, A.D. 542, abolishing the restrictions of C.Th. 4.6.3 = C.J. 5.27.1, Constantine, A.D. 336, and Nov.Marc. 4.3—C.J. 5.5.7.2, Valentinian and Marcian, A.D. 454, *supra* notes 5, 22, 29.

<sup>64</sup> See BUCKLAND, *TEXT-BOOK OF ROMAN LAW* 115 (Stein 3d ed. 1963); KASER, 2 *DAS RÖMISCHE PRIVATRECHT* 113 (1959). *Supra* notes 16, 53, 58.

<sup>65</sup> Ktism. 1.9.1ff., Anecd. 17.5f.

<sup>66</sup> "The good God... directed the virtuous Stephen to Theodora who came from the brothel, who was at that time a Patrician, but eventually became Queen also with King Justinian." BROOKS, *op. cit. supra* note 1, at 189.

<sup>67</sup> VASILIEV, *op. cit. supra* note 3, at 97, rightly rejects such attempts. As mentioned above, note 53, where he goes wrong, here as elsewhere (e.g., at 395), is in missing the vital legal distinction between actress and prostitute. He says: "The two terms were almost synonymous." That may be so in many social, moral, and theological contexts. In law, there was a huge difference.

<sup>68</sup> D. 23.2.43.1, Ulpian I ad legem Juliam et Papiam: *palam autem sic accipimus, passim, hoc est sine delectu.*

<sup>69</sup> *Improvida electio.*

<sup>70</sup> *Imbecillitate sexus*; cp. D. 16.1.2.2, Ulpian XXIX ad edictum.

<sup>71</sup> Cp. C.J. 1.4.33, Justinian, A.D. 534.

men, however, are responsible for prostitution too.<sup>72</sup>) The continued harshness displayed by Justinian and Theodora against ex-prostitutes, out of keeping with the general trend of their government, may have been partly motivated by the urge to demonstrate that she had nothing in common with this category. It was malice which prompted Procopius to fasten on the subsidiary paragraph which provided against the possibility of her being misjudged; and, disregarding the religious-moral aims of the law, to suggest that it paved the way for unions with former prostitutes. That was definitely not true.

Biondi is the author of a book on Justinian as a Catholic ruler and an admirable three-volume work on the Christian law of Rome.<sup>73</sup> He quotes the law some ten times, but never once mentions its purpose of authorizing the marriage between Justinian and Theodora. For him, whatever Procopius may say, it is "veritable hymn to the redemption of women and the benevolence of God whom the lawgiver seeks to imitate,"<sup>74</sup> nothing but an example of Christian pity for the sinner and facilitation of repentance. He cites the stretch: "We hold that their lapses should be remedied by a suitable means and we ought not to deprive them of the hope for a better condition in order that, looking forward to this, they may more readily give up their ill-considered and shameful choice." And he adds: "Who does not see in these phrases the distant echo of the gospel episode of the adulterous woman in John?"<sup>75</sup> The echo, however, is highly dubious. In John, it is not a question of making it easier for adulteresses to give up their way of life, but—an entirely different matter—Jesus reprieves an adulteress caught in the act. Nor is there any significant verbal affinity between the episode in John (in its Latin versions) and Justin's legislation. Biondi continues: "Towards those women the lawgiver feels not contempt but humane understanding calculated to bring about penitence and redemption." "These women" is very ambiguous; from the context it seems to include both actresses and adulteresses. But the latter are not contemplated by Justin's law; in fact their treatment at the time was far from lenient.<sup>76</sup> Biondi also quotes the passage where the law speaks of actresses who "spurning their evil condition have turned to a better intent and have fled their dishonourable profession, have embraced a worthier life and have turned to decency." He asks: "Who does not hear in these provisions the echo of the gospel warnings in Matthew con-

<sup>72</sup> Procopius, *Ktism.* 1.9.2f.

<sup>73</sup> GIUSTINIANO PRIMO PRINCIPE E LEGISLATORE CATTOLICO, 1936, *IL DIRITTO ROMANO CRISTIANO*, 1 & 2, 1952, 3, 1954. As this article is going to press, I learn of this great and high-minded scholar's death.

<sup>74</sup> GIUSTINIANO, 62f.

<sup>75</sup> 2 *IL DIRITTO* 166; *John* 8.3ff.

<sup>76</sup> See MOMMSEN, *RÖMISCHES STRAFRECHT* 698f. (1899), BIONDI, 3 *IL DIRITTO* 473ff.

cerning prostitutes who convert?"<sup>77</sup> Here the echo is not dubious but plainly imaginary. What Matthew complains about is that, while publicans and prostitutes, both of them outcasts, believed the Baptist, the Pharisees, the élite, though offered more evidence, showed no repentance. This is not a portion of the gospel to which the law is specifically indebted.

The law is permeated by the spirit of Christianity and rich in thought and sentiment deriving from the New Testament, directly or indirectly, and merging with Stoic culture. But over-idealization ultimately enhances neither the stature of the *dramatis personae* nor the value of their legislation as *exemplum*, as stimulus and guide—not to mention the violence done in the process to the gospel texts invoked. What is moving about the law is precisely the interplay of self-interest and generosity. The primary impulse comes from Justinian's passionate resolve to marry Theodora. Nothing wrong with it, but it is a personal cause. The two have, however, thought profoundly about their situation and terrible difficulties, and about why it is right to seek an escape not only for themselves but for any couple similarly placed. The law, while assisting them, extends relief to many and, indeed, propagates considerations which would inevitably be an incentive to further progress.<sup>78</sup> No point in de-humanizing the measure. Some fifteen years later, at the age of fifty-five (about my age), in another reforming law, Justinian, by now the greatest Byzantine Emperor ever, avowed: "For we know, though we are lovers of chastity, that nothing is more vehement than the fury of love."<sup>79</sup> This is Justinian speaking, not any member of his Legislative Council, not Tribonian, his Minister of Justice. No official, however high, would have thought of putting in a confessional aside of this nature. It is the same mind that we meet in the law signed by Justin I.

Theodora died in A. D. 548, so they had about twenty-five years of married life, during which she exercised an enormous and—if we make allowance for their historical setting—beneficial influence. The mosaics in the choir of S. Vitale at Ravenna, showing the two, date from A.D. 547, one year before her death. Justinian died in A.D. 565, aged eighty-three. From the moment of Theodora's departure, however, his government had declined: he lost his grip, or rather, he lost her grip. He was succeeded by his nephew Justin II, as he had succeeded his uncle; only, unlike his uncle, he never made his nephew his co-regent, he remained sole ruler to the last. On the morrow of his death, Justin II issued a proclamation in which he declared: "We found

<sup>77</sup> 2 IL DIRITTO 168; Mt. 21.32.

<sup>78</sup> We may compare, or contrast, C.J. 5.4.28, A.D. 531 or 532, referred to above, note 35. Justinian here laid down that a marriage between an ordinary citizen and a freedwoman was to remain intact even should the husband become a senator. The memory of his uncle's problem may well have played a part; yet by this time the object of the law was entirely altruistic, it was only others who could benefit.

<sup>79</sup> Nov. 74.4, A.D. 538.

the treasury crushed by debts and reduced to the last degree of poverty"—it almost sounds like Harold Wilson taking over from Sir Alec Douglas-Home, or Governor Reagan from Brown.

In conclusion, a philological remark. It would be worth going into the vocabulary of the law (and other laws by Justinian as well as his predecessors) and investigating its relation to the Latin versions of the Bible, Itala and Vulgate—especially, of course, where Scripture is cited or alluded to. Complicated problems are involved.<sup>80</sup> For example, the law uses *venia* for "forgiveness,"<sup>81</sup> *ignoscere* for "to forgive,"<sup>82</sup> *sublevare* for "to remedy."<sup>83</sup> All three words are found in the Old Testament, none in the New, where different ones are preferred.<sup>84</sup> The first question, therefore, is what significance, if any, to assign to this distribution: the answer might throw light on the role of these words generally in the area of theology. Another question is whether the distribution has been a factor in the phrasing of the law; in other words, is there some specific Old Testament influence at work? With respect to *venia* at any rate, the answer is in the negative. Surely, this word comes down from the Roman imperial tradition: the exercise of *venia* was always a prerogative and ornament of the Emperor.<sup>85</sup> How powerful that tradition

<sup>80</sup> Far more complicated than in the case of the *Collatio legum Romanarum et Mosaicarum*. For literature concerning the Biblical quotations in the *Collatio* see WENGER, *DIE QUELLEN DES RÖMISCHEN RECHTS* 547 (1953).

<sup>81</sup> In the introductory paragraph discussed above: if the Emperor does not emulate God's mercifulness, "we ourselves shall not be worthy of forgiveness."

<sup>82</sup> In the same paragraph: it is incumbent on the Emperor to imitate the benevolence of God "who always deigns to forgive."

<sup>83</sup> "We hold that their lapses should be remedied by a suitable means."

<sup>84</sup> *Venia* denotes "forgiveness" in Gn. 4.13 (Cain: "My iniquity is greater than that I can merit forgiveness"), Nu. 15.18 (the priest obtains forgiveness for a man who has sinned in error), Wisdom 12.11 (God refused forgiveness to the Canaanites). It can mean "indulgence," "patience": Ecclus Prol. (where the translator asks his readers' indulgence should he be guilty of an occasional slip), 3.15 (enjoining patience with a senile father), or "permission," "freedom": 25.34 (a warning against giving a wicked woman freedom to go about). Both in the Old Testament and in the New we find *dimittere* and *remittere* for "to forgive," though, in the Old, *remittere* is confined to Psalms. *Remissio* in the sense of "forgiveness" and *donare* in that of "to forgive" occur only in the New Testament (in the Old, *remissio* signifies "release of debt" in the Jubilee and the like). *Sublevare* is an Old Testament word (except for Jn 6.5. and 17.1, *sublevare oculos*, "to lift up the eyes"); and in several passages the meaning is comparable to that in Justin's law—Dt 15.10 (a slave gaining his statutory freedom has a right to some provision, nor must his master be grudging about "his necessities to be remedied"), Prov. 29.25 (he who trusts in God "shall be relieved"), Jonah 2.7 ("thou will lift up my life from corruption"). Other terms, of course, are of interest. *Lapsus*, which is used by Justin ("We hold that their lapses should be remedied"), is met only in the Old Testament, and even here in a different sense: the "stumbling" of a foot. *Macula* is frequent in the Old Testament, rarer in the New (Eph. 5.27, i Tim. 6.14, II Pet. 2.13, Jude 12, Rev. 14.5). *Poenitentia* is frequent in both Testaments. *Benevolentia* and *clementia* are divine attributes Justin wishes to imitate, and the law itself is styled a *clementissima sanctio*, "a most clement disposition." *Benevolentia* occurs once only in the entire Latin Bible, in Ecclus. Prol. just quoted: the reader is asked to approach the translation with "benevolence." On *clementia*, see *infra* note 87.

<sup>85</sup> The word occurs in Pliny's famous letter to Trajan about Christians and in Trajan's reply, 10.96f. Suetonius, among his illustrations of the promising start of Domitian's reign, mentions the *venia* with which he presented certain minor offenders: Dom. 9.3. Professor

was is brought out by the fact that, in the Codex Theodosianus, about one hundred-and-twenty years after the Edict of Milan, there is next to no direct quotation of Scripture.<sup>86</sup> An enquiry on the lines indicated would certainly illumine the blend and relative weight in these laws of Christian and pagan notions; also the greater or lesser dependence on different Church Fathers and doctrines; and, conceivably, here and there, we might even gain a little more information about textual readings current at the time. I wonder whether the Benedictines, who have already done so much in this field, would add this formidable enterprise to their program.

As I was looking into terms like *clementia*, *benevolentia* and their synonyms, I came upon what must be the most optimistic passage in world literature—in the Epistle to Titus, where God is praised for his *humanitas*, “humanity”: “But after that the kindness and humanity of God our Saviour appeared.”<sup>87</sup> The life and work of Pope John seem like a justification of this charming usage. *Zikhrono libherakha*, may his memory be for a blessing.

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Stein of Aberdeen University, who kindly read this lecture in typescript, draws my attention to WALDSTEIN, UNTERSUCHUNGEN ZUM RÖMISCHEN BEGNADIGUNGSRECHT (1964). This is a broadly based, meticulous analysis of the various uses of *venia*, *indulgentia* and allied terms in the province of law from the late Republic down to Justinian. The latter, Waldstein points out (at 198), employs *venia* only in one constitution, C.J. 5.74.3pr., 2, A.D. 529. In a sense, however, we may add Justin's enactment about ex-actresses, Justinian being its intellectual author.

<sup>86</sup> I have heard it affirmed that there is none. A few passages, however, do come rather near being quotations. C.Th. 9.40.2=C.J. 9.47.17, Constantine, A.D. 315, prohibits the branding of a criminal's face, “in order that the face, which is shaped in the likeness of the celestial beauty, be not stained,” *quo facies, quae ad similitudinem pulchritudinis est caelestis figurata, minime maculetur*. This is a reference to the creation; though, to be sure, there must be an intermediate theological authority—or more than one—between Gn. 1.26f. and the enactment. For one thing, in Gn. 1.26f. it is man who is created similar to God (*faciamus hominem ad imaginem et similitudinem nostram, et creavit Deus hominem ad imaginem suam*), in the enactment it is his face alone: hands or legs may be branded. Again, Gn. 1.26f. speaks of creation in the likeness of God, the enactment more distantly of creation in the likeness of the heavenly beauty. (*Pulchritudo* and *pulcher*, incidentally, are both peculiar to the Old Testament.) Lastly, Gn. 1.26f. employs *facere*, “to make,” and *creare*, “to create” (and Gn. 2.7 *formare*, “to form”), the enactment *figurare*, “to shape.” (Has this to do with the emphasis on the face? In French, *figure* ultimately acquired the sense of “face.”)

<sup>87</sup> Titus 3.4, *cum autem benignitas et humanitas apparuit salvatoris nostri Dei*. The Greek is *philanthropia*. In C.J. 5.16.27.1, Justinian, A.D. 530, *humanitas* is the Emperor's means of imitation of God. It should be observed that to ascribe *humanitas* to God is still not quite the same as to describe him as *humanus*: one would hardly expect the latter in a careful writer. This example shows that, in tracing the history of such concepts, it is advisable to be mindful of possible divergences between noun, adjective, adverb and so forth. The excellent article on CLEMENTIA by Winkler, in 3 REALLEXIKON FÜR ANTIKE UND CHRISTENTUM 206ff. (Klauser ed. 1957), suffers from too little attention to this aspect. The adverb *clementer* is met twice only in the Latin Bible, both times in Gn. (43.27, 45.4), both times in the sense of “courteously,” “graciously”—approximated by *pro tua clementia* in Acts 24.4.



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