

‘IN THESE WESTERN PARTS OF THE EMPIRE’: MILTON AND ROMAN
LAW

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More than forty years ago, concluding a survey of Milton’s intellectual development, H. F. Fletcher voiced his regret that neither he nor anyone else had yet dealt adequately with the topic of Milton’s ‘extraordinary knowledge of legal matters’. He for one was convinced that ‘there is no more fertile field of Miltonic studies remaining today than what can be found in the general topic of Milton’s knowledge of law, whether or not we circumscribe it by the limiting word, English’. These were large and, if true, important claims. However, they have never been put to the test, with the result that we know very little more now than we did then about Milton’s ‘highly sentient knowledge of law’ or his ‘constant use of legal material’.¹

At first sight, of course, what Fletcher was saying appears to fly in the face of the evidence. Indeed, it would be far easier to construct the exactly opposing case and demonstrate from Milton’s published writings, early and late, that his detestation of the law was such as seemingly to preclude any sustained or detailed engagement with it. Thus in the seventh Prologue, for example, he derides the dialect of the lawyers which resembles ‘no human speech at all’,² and, in Elegy 1, the ‘barbarous jargon’ of the barrister.³ Much later, in *The Tenure of Kings and Magistrates*, he scorns those who hanker after ‘that old entanglement of Iniquity, thir gibrish Lawes, though the badge of thir ancient slavery’. Rejecting constitutionalism, he celebrates instead ‘great actions, above the form of Law or Custom’ (3: 193-4). And later still, in *Samson Agonistes*, the impasse reached when Samson argues the Chorus into

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¹ H. F. Fletcher, *The Intellectual Development of John Milton*, 2 vols. (Urbana, Ill., 1956-61), II: 530, 551.

² John Milton, *Complete Prose Works*, ed. Don M. Wolfe *et al.*, 8 vols. (New Haven, 1953-82), I: 301. Hereafter cited in the text by volume and page number.

³ John Milton, ‘Elegia prima ad Carolum Diodatum’, l.32 (Milton, *Complete Shorter Poems*, ed. John Carey (London, 1971), pp. 20, 23).

accepting his view that 'Our law forbids at their religious rites / My presence', can only be resolved by his sudden antinomian impulse to 'go along' with the Philistine Officer to the temple of Dagon.⁴

The manuscript sources – Milton's *Commonplace Book* and the marginalia – tell the same story, perhaps even more clearly. A sermon by Savonarola yielded the precept 'that one should obey the spirit rather than the letter of the law'. An entry from John Stow prompted the wish that we could now be 'rid ... of this norman gibbrish'. Alessandro Tassoni's *Pensieri* furnished a scathing account of the interpreters and lawyers who, 'bending the sword of justice', had buried cases beneath 'a thousand points of law, a thousand opinions, a thousand judgements'. As Tassoni pointed out, several Italian cities had even proscribed lawyers from public office. From Trajano Boccalini, he learned that the kings of Spain had banned lawyers from the Indies, and he also agreed with him that the study of law was not a liberal art but rather a trade (or mystery: *mestiere*), a mechanical art invented to afflict the human race. The single detail he highlighted in Tomasini's life of Petrarch is 'where young Petrarch scorns the study of law' in favour of poetry (1: 423, 424, 467-9). Milton even fashioned a Petrarchan gesture of his own in the form of the couplet he affixed to his copy of Harington's translation of Ariosto, of which only the following cancelled line remains: 'Tu mihi iure tuo Iustiniane vale' ('Farewell, Justinian, with your law book').⁵

Yet this cannot be the whole truth. According to Tomasini, even Petrarch was prepared to distinguish between the professional and the intellectual aspects of the law: when he eventually abandoned his legal studies after several years at Montpellier and Bologna, this was 'not because the authority of the law did not please me, which is no doubt great and full of Roman antiquity, in which I delight, but because the practice of it is corrupted' (1: 468). Milton was surely capable of equal discrimination. After all, he also noted in the *Commonplace Book* that 'Civil law favours liberty' (1: 471).⁶ And as late as September 1637 he disclosed in a letter to

⁴ John Milton, *Samson Agonistes*, ll. 1320-21, 1384 (*Shorter Poems*, pp. 386, 388).

⁵ Milton, *Shorter Poems*, p. 155. Cf. Virgil, *Aeneid*, V. 97.

⁶ Quentin Skinner has recently argued that classical moralists and historians – and hence their renaissance followers – derived their understanding of freedom and slavery in large measure from the Roman law of persons: see Skinner, *Liberty before Liberalism* (Cambridge, 1998), especially pp. 39-41. For the way in which Milton's writings are similarly informed by Roman private law, see Martin Dzelzainis, 'Republicanism', in *A Companion to Milton*, ed. Thomas N. Corns (Oxford, 2001), pp. 294-308.

his friend Charles Diodati that he was considering a 'move into some one of the Inns of Court' precisely because of the 'companionship' he expected to find there (1: 327).

On the principle of better late than never, therefore, the aim of this essay is to see to what extent Milton's knowledge of Roman law bears out Fletcher's high estimate, focusing on a single instance where the point at issue is precisely one of what Milton knew and when he knew it. My point of entry is a passage from *The Judgement of Martin Bucer, Concerning Divorce* (August 1644); that is, Milton's translation of excerpts from *De Regno Christi*, which Bucer wrote to further the reformation under King Edward VI though it was only published posthumously in 1557 (Milton actually used the 1577 second edition). A main plank in Bucer's argument for divorce by consent was the contention that the generous allowance that the Roman law had made for divorce was fully congruent with the teachings of Scripture. This was true above all of the legislation of Theodosius II and Valentinian III, fifth-century emperors of the East and West respectively. According to Bucer (in Milton's translation), it was

manifest that the law of *Theodosius* and *Valentinian*, which begins *Consensu, & c.* touching divorce, and many other decrees of pious Emperours agreeing heerwith, are not contrary to the word of God. And therefore may be recall'd into use by any Christian Prince or Common-wealth, nay ought to be with due respect had to every nation. (2: 462)

In a later chapter, Bucer elaborates and qualifies the point about consent:

It was permitted also by Christian Emperours, that they who would divorce by mutuall consent, might without impediment. *Or if there were any difficulty at all in it, the law expresses the reason, that it was only in favour of the children, so that if there were none, the law of those godly Emperours made no other difficulty of a divorce by consent.* Or if any were minded without consent of the other to divorce, and without those causes which have bin nam'd, the Christian Emperours laid no other punishment upon them, then that

the husband wrongfully divorcing his wife should give back her dowry... (2: 469)

Milton here faithfully reproduces the tenor of the original – with one crucial exception: after ‘without impediment’, he omits the phrase ‘sed eam concessionem Iustinianus rursus sustulit’⁷ (‘but this concession Justinian later recalled’) in which Bucer disclosed that the Theodosian law on divorce by consent (Code, V.17.8) had in fact been repealed by the sixth-century Emperor Justinian in Novella 117. Not only does Milton suppress this inconvenient fact, but he also compounds the offence by substituting a passage in italics (used throughout by him to signal his departures from Bucer’s text) which actually reiterates the provisions of the very law which Justinian had revoked.⁸

Now it is certainly true that the fact of revocation mattered much more to Milton than it did to Bucer. For Bucer, just as subsequent revocation could not detract from the essential equity of the Theodosian law, so it could in no way hinder its later reintroduction. He could thus assure Edward VI that while he was ‘not bound to the imperial law, yet it is the duty of a Christian King to embrace and follow what ever he knows to be any where piously and justly constituted’ (2: 445). For Milton, however, Justinian’s action represented a fatal breach in the historical pattern. Like Bucer, Milton wanted to attribute the idea of marriage as indissoluble – that ‘pernicious entanglement to distressed consciences’ – wholly to the ‘the invention of Antichrist’ (2: 446-7). But it was difficult to maintain that ‘*Popery and superstition*’ alone had ‘*attempted to remove and alter divine and most prudent Laws for human and most imprudent Canons*’ if there was one outstanding secular ruler, Justinian, who had done just that (2: 438). Even so, Milton does appear to have played fast and loose with Bucer’s prose and, as a way out of the quandary, expediently omitted the phrase altogether.

⁷ *Martini Bucer Scripta Anglicana*, ed. C. Hubert (Basle, 1577), p. 121.

⁸ In the italicized passage, Milton is expanding upon the Latin of Code V.17.8: ‘solutionem etenim matrimonii difficilior debere esse favor imperat liberorum’ (*Corpus Iuris Civilis*, eds. P. Krueger, T. Mommsen, R. Schoell, 3 vols. (Berlin, 1954), 2: 212; for the identical text in the Codex Theodosianus, see *Theodosiani libri XVI cum Constitutionibus Sirmondianis: et leges novellae ad Theodosianum pertinentes*, eds. T. Mommsen and P. M. Mayer, 2 vols. in 3 (Berlin, 1954), 2: 29).

This is in itself might not matter so much were it not for the extraordinary status of Bucer's text. For what makes Milton's departure so noteworthy is the remarkable significance which Milton himself attached to the coincidence between his views and those of Bucer. This is indeed the main theme of the exultant epistle to Parliament prefixed to *Martin Bucer*: one of the most revealing of all Milton's autobiographical excursions, it also deserves to be recognized as a classic expression of the puritan doctrine of providence. On the one hand, that is, Milton insists on the fruits of his own '*severe industry and examination of my self*'. He had worked out the arguments in the first edition of his first divorce tract, *The Doctrine and Discipline of Divorce* (August 1643), with '*no light, or leading receav'd from any man in the discovery of this truth*', having only the '*infallible grounds of Scripture to be my guide*'. The precise moment at which he came across helpful suggestions in the writings of Grotius and Fagius during the final stages of composing the 1643 *Doctrine and Discipline of Divorce* and just after its publication are scrupulously recorded, the upshot being that it was therefore '*not as a learner, but as a collateral teacher*' that he eventually encountered Bucer's work '*wel-nigh three months*' after the second edition of *The Doctrine and Discipline of Divorce* appeared early in February 1644. On the other hand, Milton is more than prepared to concede that, '*if it be in mans discerning to sever providence from chance*', then his role throughout could be characterized as having been that of '*no other then a passive instrument under some power and counsel higher and better then can be human*'. Thus the '*sympathy of judgment*' between them was no mere chance but rather a signal instance of the workings of providence (2: 433-6). For

if we know at all, when to ascribe the occurrences of this life to the work of a special providence, as nothing is more usual in the talk of good men, what can be more like to a special providence of God, then in the first reformation of England, that this question of divorce, as a main thing to be restor'd to just freedom, was writt'n, and seriously commended to Edward the sixt, by a man call'd from another Countrey to be the instructor of our nation, and now in this present renewing of the Church and Common-wealth, which we pray may be more lasting, that the same question should be again treated and presented

to this Parliament, by one enabl'd to use the same reasons without the lest sight or knowledge of what was done before. (2: 437)

Milton was in no doubt that it was God who had '*directed him to the forgott'n Writings of this faithfull Evangelist*' which he now tendered to the Lords and Commons '*as from a divine hand*'. And he clearly expected that this provenance, the fact that the doctrine had been '*twise born*' in so notable a fashion, would of itself do much to bring about '*the convincment of a pervers age*' (2: 436, 438).

The dilemma is therefore acute. On the one hand, Milton's discovery and translation of Bucer's work was divinely ordained – indeed, nothing short of special providence could have overcome Milton's deeply-ingrained reluctance to appeal to the authority of another author. By the same token, however, tampering with Bucer's text so as to procure an apparent '*sympathy of judgment*' would constitute a more than ordinary betrayal of the translator's trust and take on an aspect of outright impiety.

All this is deeply disturbing to the Yale editor, Arnold Williams. Though it is difficult to see it as anything else, he is anxious to acquit Milton of intellectual dishonesty, contending that the text '*furnishes no clear instance of dishonest or even questionable alteration*'. Unfortunately, the case Williams puts forward is far from convincing. Thus he later appears to concede that, in this instance at least, Milton's alterations are open to question, and even goes so far as to agree that '*the charge [of dishonesty] would be justified if Milton had promised a faithful translation of Bucer*'. However, he immediately goes on to insist – somewhat speciously – that the question does not actually arise since Milton '*did not promise more than to show wherein Bucer agreed with his own already expressed opinions*'. Having cleared Milton of tampering with Bucer's text by virtue of his not having explicitly undertaken not to tamper with it, Williams leniently concludes that '*it would be nearer to the truth to say that Milton is here functioning as an advocate, not as a scholar*' (2: 420, 816-17)

Williams's other main line of argument, rather at odds with the first, is flatly to deny that Milton did anything wrong at all. In fact, the alteration to the passage

represents a correction of Bucer by Milton, who had probably already made the intensive study of the Civil law on matrimony which figures so

prominently in *Tetrachordon*. Milton knew that Bucer's statement needed some qualification and proceeded to make it. The matter of Justinian's revocation was less important; he would take care of that impious and changeable emperor in *Tetrachordon*. (2: 811)

This too begs several questions. In the first place, Bucer does not actually make any mistakes requiring 'correction', and certainly none that requires the deletion of his perfectly correct statement about Justinian's revocation. Nor is the appeal to Milton's later writings admissible. Strictly speaking, this requires Milton already to have intended to write again on divorce and already to have had some plausible argument about Justinian in mind which would allow him to delete the phrase with a clear conscience. But Milton clearly expected the Bucer translation to silence his critics once and for all, and it was only its failure to do so which elicited a further exposition of his views. Neither can we infer from the relative familiarity with the Roman law which Milton displayed in *Tetrachordon*, published some seven months later in March 1645, what the state of his knowledge was at the time of the Bucer translation. This is moreover another topic on which Williams contradicts himself, asserting both that Milton had 'probably already made an intensive study' of the law before translating Bucer and that Bucer's 'evidence of the practice of the early church from some of its fathers and from Roman law probably came as a very useful discovery to Milton' (2: 419). In many ways, this is the nub of the issue, for it is only if Milton had studied Roman law beforehand that the liberties he took with Bucer appear excusable.

Nevertheless, the best place to begin is with Milton's resolution of the problem in *Tetrachordon*. Once again, he cited the permissive legislation of Theodosius and Valentinian, 'pious emperors both', but this time admitted that 'In the 117. *Novell*. ... the liberty of divorcing by consent is repeal'd: but by whom? by *Justinian*, not a wiser, not a more religious emperor then either of the former, but noted by judicious writers for his fickle head in making and unmaking lawes' (2: 700-1). This *ad hominem* thrust represents a complete change in Milton's view of Justinian from that expressed in the first and second editions of *The Doctrine and Discipline of Divorce* where, citing Grotius, he approvingly describes 'the Christian Emperours, *Theodosius* the second, and *Justinian*' as 'men of high wisdom and

reputed piety' (2: 334). As recently as February 1644, therefore, Milton had seen no reason to differentiate between Theodosius and Justinian but thought of them as equally admirable.

Apart from this, Milton had two further convincing arguments to offer. Firstly, he pointed out that Justinian's revocation had itself been revoked by his nephew and successor, Justin II in Novella 140, the effect being 'to restore that *Theodosian law*', which – to the best of Milton's knowledge – 'remain'd in force, as long as the Greek empire subsisted' (2: 702). Secondly, Milton made the no less telling claim that the original revocation had never had the force of law in the West because, insofar as any Roman law had obtained after the Germanic invasions, it had been the *Codex Theodosianus* (AD 439) and its Visigothic and Burgundian derivatives, and not the Justinianic codification. This was shown by the absence from the West (it was thought) of any of Justinian's texts with the exception of one manuscript of the Digest, the so-called *Pisana* or Pisan Pandects. It was on the acquisition of this crucial text by Pisa in 1137 that Milton focused in a passage of historical argument, the remarkable breadth and subtlety of which distinguishes it from the mundane list of authorities in which it is embedded:

in these western parts of the empire it will appeare almost unquestionable that the cited law of *Theodosius* and *Valentinian* stood in force untill the blindest and corruptest times of Popedom displac't it. For that the volumes of *Justinian* never came into *Italy*, or beyond *Illiricum*, is the opinion of good Antiquaries. And that only manuscript thereof found in *Apulia* by *Lotharius* the *Saxon*, and giv'n to the state of *Pisa* for their aid at sea against the *Normans* of *Sicily*, was receav'd as a rarity not to bee matcht. And although the *Gothes*, and after them the *Lombards* and *Franks* who over-run the most of *Europ* except this Island (unless wee make our *Saxons* and *Normans* a limm of them) brought in their owne customes, yet that they follow'd the Roman laws in their contracts and mariages, *Agathias* the historian is alleg'd. And other testimonies relate that *Alaricus* & *Theodoric* their Kings writ their statutes out of this *Theodosian Code* which hath the recited law of Divorce. (2: 704)

With this elegant finesse, Milton disposed of Justinian and realigned the course of events with the truths of history. Justinian's revocation of the Theodosian law of divorce was neither here nor there, not only because it had itself been revoked, but, more importantly, because the impact of Justinian's codification of the law as a whole had been delayed in the West until the twelfth-century revival of Roman law studies which was associated above all with the Pisan manuscript of the Digest. Thus, Milton triumphantly concluded, as far as 'these western parts of the empire' were concerned, it was not an emperor, Justinian, but, as one might have expected, a pope, Alexander III, who much later 'first actually repeal'd the imperial law of divorce' (2: 706).

The question thus assumes a precise form: was this solution to the problem something that was already known to Milton prior to translating the Bucer or was it something which he only came across in the course of working on *Tetrachordon*? Answering the question is a good deal less easy than framing it since it broaches a number of vexed issues in Milton studies.

The first of these is the chronology of Milton's private studies, a Serbonian bog which badly needs draining. A few examples will suffice to illustrate the chronic uncertainty and ignorance which prevails. The long passage from *Tetrachordon* quoted above derives substantially from Leunclavius, *Iuris Graeco-Romani*.⁹ But when did Milton actually read it? Hanford suggests probably after 1643 and, by inference, 1644;¹⁰ Ruth Mohl, less certainly, 1643-44 (see 1: 401); and W. R. Parker, more generally still, 1642-45.¹¹ Or when did Milton inscribe the verses about Justinian in his copy of Harington's *Ariosto*? John Carey suggests around 1632, that is, 'nearer to [Milton's] renunciation of the legal profession in *Ad patrem*'.¹² (Of course, the date of *Ad patrem* is itself in dispute.¹³) The Columbia editors, however, prefer 1642 since that is when Milton, in a separate inscription, dates his reading of Harington.¹⁴ The dates do make a difference to how the line is read; the earlier one, 1632, invests it with all the vehemence attending Milton's rejection of the law; the

⁹ See J. Leunclavius, *Iuris Graeco-Romani tam Canonici quam Civilis Tomi duo* (Frankfurt, 1596), sigs. iii^v-iii^v (dedicatory epistle).

¹⁰ See J. H. Hanford, 'The Chronology of Milton's Private Studies', *Publications of the Modern Language Association of America*, 36 (1921), p. 277.

¹¹ See W. R. Parker, *Milton: A Biography*, 2 vols. (Oxford, 1968), II: 882-3.

¹² Milton, *Shorter Poems*, p. 155.

¹³ See now Barbara K. Lewalski, *The Life of John Milton: A Critical Biography* (Oxford, 2000), pp. 71, 568.

¹⁴ See *The Works of John Milton*, ed. Frank A. Patterson *et al.*, 18 vols (New York, 1931-8), 18: 605.

later, 1642, suggests more a respite from sterner labours in the spirit of, say, the 'cheerful hour' of Sonnet 18: 'Let Euclid rest and Archimedes pause'.¹⁵ We also know that Milton made entries about slavery from Justinian's *Institutes* in his Commonplace Book (see I: 410, 411, 426, 438, 470, 471). But when? Hanford comments that the 'fact that Milton makes no citations on divorce, though he had evidently carefully studies the subject in the *Institutes* before writing *Tetrachordon* (1644/45) ... points to a date before 1643 for these entries'.¹⁶ It may be that these entries date from 1643, but this cannot be because they fail to mention divorce for the simple reason there is next to nothing on divorce in the *Institutes*! In *Martin Bucer*, Milton certainly sounds as if he has read more widely in the Roman law, announcing ostentatiously that he will not follow Bucer in reciting the 'causes wherfore a wife might send a divorce to her husband': '*I set them down not beeing easie to be found in the body of the civil Law*' (2: 469).¹⁷ All this bears out Fletcher's complaints about the lack of serious study; more ominously, it means that no argument that depends on the supposed date of entries in the Commonplace Book can be entirely secure.

Another vexed issue is Milton's alleged access to another source of specialized knowledge; namely, the manuscripts of John Selden prior to their publication--in this case, the manuscript of Selden's *Uxor Ebraica* (first published in 1646), which lays out the sequence of imperial legislation on the topic of divorce.¹⁸ Eivion Owen speculates that Milton must have read Selden's work in manuscript 'towards the end of April 1644'.¹⁹ And it is on the basis of this speculation that Jason Rosenblatt has more recently advanced the hypothesis that when Milton was preparing *Pro populo Anglicano defensio* (1651) he also had access to not only the

¹⁵ Milton, Sonnet 18, ll. 7, 14 (*Shorter Poems*, pp. 411-12).

¹⁶ Hanford, 'Chronology', p. 277.

¹⁷ How 'easie' it would be to locate the material '*in the body of the civil Law*' would depend on the scholarly apparatus of the edition of the *Corpus Juris Civilis* being used. In *Corpus Juris Civilis in III. partes distinctum*, 4 vols (Geneva, 1594, 1595), for example, Code V.17.8, Novella 117, and Novella 140 are mutually cross-referenced (see II: col. 406, col. 275 (second pagination), col. 347 (should be 348; third pagination)). This apparatus is absent from, for example, the 1575 Antwerp and 1576 Paris editions. However, we still do not know which edition Milton used. Kester Svendsen, the Yale editor of Milton's *Pro Se Defensio*, does however point out (4: 713) that, whichever it was, it must have been one in which the text of *Institutes* IV.4.1 indicated that the phrase 'aut historiam' was suspect. This is the case in, for example, the 1575 Antwerp, 1587 Geneva, 1587 Frankfurt, 1594, 1595 Geneva, and 1627 Leyden editions, but not in the 1576 Paris and 1608 Lyons ones.

¹⁸ The relevant material is found in Book III, chapters 28-30: see *Ioannis Seldeni Uxor Ebraica, seu De nuptiis & divortiis ex iure civili, id est, divino & Talmudico, veterum Ebraeorum, libri tres* (London, 1646), pp. 557-90; Jonathan R. Ziskind, *John Selden on Jewish Marriage Law: the Uxor Ebraica translated with a commentary* (Leiden, 1991), pp. 462-85.

¹⁹ Eivion Owen, 'Milton and Selden on Divorce', *Studies in Philology*, 43 (1946), p. 241.

first instalment of Selden's *De Synedriis*, printed in 1650, but also to the manuscript of the two parts not published until 1653 and 1655.²⁰ But all of this is no more than conjecture upon conjecture,²¹ and even Owen concedes that if Milton read in *Uxor Ebraica* in manuscript then he did so 'without consulting' the relevant chapter on the civil law.²²

Nevertheless, there is some evidence which suggests that, even before translating Bucer, Milton knew something of the *Pisana* and its historical significance, and that he owed this knowledge in part to Selden's work--though it was to his published rather than his unpublished writings.

In a somewhat baffling passage in the second edition of *The Doctrine and Discipline of Divorce*, Milton refers to 'that noble volume written by our learned Selden, *Of the law of nature & of Nations*'. Selden's work, he says, is far superior to

all those *decretals*, and *sumles sums*, which the *Pontifical Clerks* have doted on, ever since that unfortunat mother famously sinn'd thrice, and dy'd impenitent of her bringing into the world those two misbegott'n infants, & for ever infants *Lombard & Gratian*, him the compiler of Canon iniquity, tother the *Tubalcain* of scholastick Sophistry, whose overspreading *barbarism* hath ... infus'd their own bastardy upon the fruitfulest part of human learning ... and dejected the clear light of nature in us, & of nations... (2: 350-1)

²⁰ Rosenblatt first suggested this possibility in 'Milton's Chief Rabbi', *Milton Studies*, 24 (1988), pp. 43-71, and again in revised form in *Torah and Law in 'Paradise Lost'* (Princeton, 1994), pp. 82-97. In the latter, Rosenblatt does not repeat in so many words the claim that 'Just as Milton drew upon the manuscript of *Uxor Ebraica* in *Tetrachordon*, so does he draw here [in *Pro populo Anglicano Defensio*] upon the manuscript of the other two books of *De Synedriis*' ('Milton's Chief Rabbi', pp. 54-5).

²¹ Without exception, the quotations from rabbinical materials in Milton's *Defensio* upon which Rosenblatt dilates can be found in either the work to which Milton was replying, Salmasius's *Defensio regia* (1649), or a work from which Milton earlier made an entry in his Commonplace Book (see 1: 460), Wilhelm Schickhard's *Mishpat ha-Melekh, Jus Regium Hebraeorum e Tenebris Rabbincis Erutum & Luci Donatum* (Strasburg, 1625)--and sometimes in both: see John Milton, *Political Writings*, ed. Martin Dzelzainis (Cambridge, 1991), pp. 85, 89, 90, 91, 95, 96. Milton's extensive use of Schickhard's *Jus Regium* was first noted by J. B. Carpzov in the second edition (Leipzig, 1674), pp. 149, 164,

²² Owen, 'Milton and Selden', p. 255.

Milton is here alluding to the medieval legend that Gratian, Peter Lombard, and Peter Comestor were bastard brothers--the illegitimate offspring of an unrepentant mother.²³ It is rather striking that this legend is rehearsed in praise of Selden since, although Selden had not mentioned this fiction in the 1640 *De iure naturali*, he did do so in the preface to the first edition of his *Titles of Honor* (1614). There Selden refers to

the two *Bastard* brothers (by whose worth, and of the third, *Peter Comestor*, their Mother thought shee should bee sau'd, neither would repent, but trusted to hir merit in bearing three so famous) *Gratian* a monk in *Bologna*, and *Peter Lombard* at *Paris*, one made the *Decree*, the first Volume autorised for *Canon Law* by Pope *Eugenius III*, and the other the *Sentences*.²⁴

The structure and phrasing of this, together with the focus on Gratian and Lombard to the virtual exclusion of Comestor, was all echoed by Milton in 1644 when fashioning his compliment to Selden.

More importantly, this passage about the bastard brothers in Selden's preface follows an account of the twelfth-century revival of Roman law studies and an attack on the glossators'

impudent barbarisme in the Glosses on so neat a text, which from *Iustinian* (hee died DLXV. [565] vntill *Lothar II*. (hee was Emperor CI[reversed C] .C.XXV. [1125] lay hidden and out of vse in the *Western* Empire, nor did anie there, all that time, professe or read it. But when *Lothar* took *Amalfi*, hee there found an old Copie of the *Pandects* or *Digests*, which hee gaue as a precious Monument to the *Pisans* (hence it was called *Litera Pisana*) from whom it hath been since (in CI[reversed C] .CD.XC.VI. [1406]) translated to

²³ The legend was routinely denied by Catholic scholars: see, for example, R. Bellarmine, *De Scriptoribus Ecclesiasticis* (Coloniae Agrippinae, 1613), p. 340, and Guido Pancirolli, *De Claris Legum Interpretibus* (Venice, 1637), p. 405.

²⁴ John Selden, *Titles of Honor* (London, 1614), sigs. d4^v-A1.

Florence, where, in the Dukes Palace, it is, almost with Religion, preserved,
and neuer brought forth but with Torches, Light, and other reuerence.²⁵

Selden's account, which also derives in part from Leunclavius, may underlie the corresponding one in *Tetrachordon* (where, after all, Milton does refer to the 'opinion of good Antiquaries' plural). But the more important allusion is the one in the 1644 *Doctrine and Discipline of Divorce* because this would mean that even before Milton came across Bucer he was already in possession of the argument that he was later to deploy so effectively against Justinian to the effect that the texts of the Roman law 'lay hidden and out of vse in the *Western Empire*' for more than 500 years.

Selden also revealed that the *Pisana* had been in Florence since 1406, and hence was known to renaissance scholars as the *Florentina* or Florentine Pandects. This fact was routinely recorded in the standard itineraries and guides: Schott, Merula, Borrelli, and Pflaumer.²⁶ When John Evelyn, for example, visited Florence in October 1644, he echoed Pflaumer in noting that 'In the Chapell [of the Palazzo Vecchio] is conserv'd ... the Originall Gospel of St John, writen with his owne hand; together with the so famous Florentine Pandects'.²⁷ We should remember that throughout his Italian journey Milton showed a keen interest in libraries and manuscripts. Not only did he visit the Vatican library, but Lukas Holste, one of the librarians, commissioned him to inspect a 'Medicean codex' at Florence. Milton suggested to Holste that Giovanni Battista Doni (who possibly attended meetings of the Svogliati at which Milton was present) might be better placed to gain access to it (1: 334-5). Moreover, both Doni and Carlo Dati, another of Milton's friends,

²⁵ Selden, *Titles of Honor*, sig. d4. See also Selden, *Notes upon Sir Iohn Fortescue Knight, L. Chiefe Iustice of England, De laudibus legum Angliae* (London, 1616), pp. 20-22, and *The Historie of Tithes* (n.p., 1618), p. 481. Selden discussed the period between the promulgation of the Theodosian Code and the revival of Roma law studies much more extensively in the historical dissertation which he appended to his edition of *Fleta, seu, Commentarius juris Anglicani* (London, 1647): see David Ogg, *Ioannis Seldeni Ad Fletam Dissertatio. Reprinted from the edition of 1647, with parallel translation, introduction and notes* (Cambridge, 1925), pp. 54-103. However, it should be noted that Selden categorically denies at the start of the following chapter (pp. 102-5) that the Theodosian Code was ever used in Britain after the end of the Roman occupation, and maintains that the Anglo-Saxon invaders relied exclusively on their native customs.

²⁶ See F. Schott, *Itinerari Italiae Rerumque Romanorum Libri Tres* (Antwerp, 1600), pp. 279-80; P. Merula, *Cosmographiae generalis libri tres* (Amsterdam, 1605), pp. 894-5; C. Borrelli, *De Regis Catholici Praestantia* (Milan, 1611), pp. 524-5; J. Pflaumer, *Mercurius Italicus* (Aug. Vind., 1625), p. 105.

successively occupied the chair of Greek at Florence originally held by Angelo Poliziano. Indeed, Dati told Milton in 1648 that he felt particularly honoured to be following in Poliziano's footsteps (see 2: 774). Among the most significant of Poliziano's many accomplishments was that he was the first scholar to apply humanist techniques of scholarship to the *Florentina*, and his remarks in his *Letters and Miscellanies* were constantly cited in discussions of the Digest.²⁸ Another of Milton's Italian acquaintances, Agostino Coltellini, founder of the Apatisti, had studied law at Pisa before practising in Florence.²⁹ It is virtually inconceivable that Milton could have spent four months in Florentine humanist circles without either seeing this precious manuscript for himself or at least hearing about it and its provenance from others. Moreover, it may well be that Milton travelled to Florence in the hope that it would be one of the things he would be able to see for himself. In the 1637 letter to Diodati in which he revealed his plan to move into one of the Inns of Court, he also disclosed that he had been 'occupied for a long time by the obscure history of the Italians under the Longobards, Franks, and Germans' (1, 327). This was precisely the period covered by a book from which Milton made several entries in the *Commonplace Book*, Sigonius's *De Regno Italiae*, and in which, under the year 1137, Sigonius rehearsed the movements of the manuscript of the Digest from Amalfi to Pisa to Florence.³⁰

All this makes it highly unlikely that Milton's handling of Bucer's text was in bad faith. However, we can be certain that the episode etched itself in his mind since we can hear echoes of it in his other writings. Thus in *A Brief History of Moscovia* Milton departs from his sources to comment upon Muscovite divorces: 'Upon utter dislike, the Husband divorces; which Liberty no doubt they receiv'd first with their Religion from the Greek Church, and the Imperial Laws' (8: 493-4). To account for this liberal social practice, Milton resorts to the same finesse as in *Tetrachordon*; that is to say, constructing a cultural genealogy which bypasses the medieval papacy.

²⁷ *The Diary of John Evelyn*, ed. E. S. de Beer, 6 vols. (Oxford, 1955), II, 188. The *Florentina* was transferred to the Laurentian Library in 1786: see *Digesta Iustiniani Augusti*, ed. T. Mommsen, 2 vols. (Berlin, 1868-70), I: xii.

²⁸ See A. Grafton, 'On the Scholarship of Politian and its Contexts', *Journal of the Warburg and Courtauld Institutes*, 40 (1977), pp. 167-8. For his comments on the *Florentina*, see *Angeli Politiani Opera* (Basle, 1553), pp 140-41, 260-61, 287.

²⁹ For Coltellini, see now Lewalski, *Life of John Milton*, p. 573.

³⁰ See I: 444, 478, 489, and C. Sigonius, *Historiarum de regno Italiae Libri Viginti* (Frankfurt, 1596), p. 270. Sigonius is one of the sources cited in Selden's *Titles of Honor* and Leunclavius's *Ius Graeco-Romani*.

Similarly, when Milton pointed out in the first edition of *The Tenure of Kings and Magistrates* (February 1649) that the same Theodosius had 'caused it to be enacted ... that a Prince is bound to the Laws', he felt compelled to add that this 'Edict of his remains yet unrepeald in the *Code of Justinian*', later entering exactly the same proviso in *Eikonoklastes* (October 1649): 'it was decreed by *Theodosius*, and stands yet firme in the *Code of Justinian*, that the Law is above the Emperour' (3: 206, 590). It is hardly surprising that Milton cited this edict, the so-called 'Digna vox', since it was regularly referred to in sixteenth-century writings on resistance theory: Martin Bucer, George Buchanan, and the author of the *Vindiciae contra tyrannos* all mention it.³¹ But the emphasis on its not having been repealed by Justinian is distinctly odd.³² I for one cannot see where this nervous display of scholarly scruple had its origins other than in Milton's earnest deliberations during the summer of 1644 on what to do about Martin Bucer and Justinian.

³¹ See Milton, *Political Writings*, p. 13.

³² In the second edition of *The Tenure*, however, Milton deleted 'unrepeald'.