

Two Great Legislators

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Shael Herman's devotion to the civil law in circumstances which were sometimes difficult has been so admirable that I thought it might be a good idea to write in his honour something about the two men to whom civilian legislation is most indebted, Justinian and Napoleon. I was intrigued by the precedent of Plutarch, who observed of his *Parallel Lives* (which have had modern followers)¹ that "it is not histories I am writing but lives", and if his modern editor finds that his "comparison of the two careers and characters . . . is often fanciful and forced" she admits that they can be "of great literary charm".²

Why not, then, try to compare and contrast the two great lawmakers? At first sight all the Illyrian and the Corsican have in common, apart from their rural and unpromising background, is their imperial status and their contributions to law, but reflection and some research³ showed that there is more to it than that. They were alike in making extensive territorial conquests⁴—and in losing them.⁵ Both were

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1. For example, STEPHEN AMBROSE, *CRAZY HORSE AND CUSTER* (1965); ALAN BULLOCK, *HITLER AND STALIN* (1991).

2. PLUTARCH, *LIVES I*, at xiv (B. Perrin ed., Loeb Library, Harvard, 1914).

3. The secondary sources on Justinian are extensive enough but the literature on Napoleon is simply overwhelming, including the first of twelve volumes of his 33,000 letters. Sources are not given for every assertion herein, partly because of space limits, partly because "Nothing is . . . more irritating for a reader to confront than a text making no pretensions to scholarship and yet peppered with footnotes and page references". S. GORLEY PUTT, *THE FICTION OF HENRY JAMES 19* (1966).

4. Justinian's were reconquests (though the Vandals had been in Africa for over a century): the lands Napoleon invaded were the homes of other civilised nations.

5. Napoleon lived to see his country reduced once again to its old frontiers; Justinian died just in time to avoid seeing Africa taken over by the Moors and Italy by the Lombards. In the

great builders, of which more anon. Both had the remarkable gift of surrounding themselves with assistants of great ability:⁶ in addition to his staff of generals and marshals Napoleon had, on the civil side, Talleyrand, Fouché, and Cambacérès,⁷ while Justinian had Belisarius and Narses to fight for him, Tribonian and John of Cappadocia, on the civil side, and to fortify him, his wife Theodora.⁸ Both lost their nerve once: Napoleon in November 1799 (19 brumaire) in the process of dismantling the Directory and making himself First Consul, and Justinian in January 532, during the riots in the hippodrome, where the cry of the mob “Nike” (Victory) proved premature, since some 30,000 of them were about to be cut down by Belisarius and Narses. Justinian, the fanatical believer, and Napoleon, who believed in nothing but himself,⁹ both had problems with the Church¹⁰ leading each to imprison the Pope of the day. Neither

West Byzantium retained only a handful of cities in Italy and also, until the Moors got there too, the southern littoral of Spain, thanks to the generalship of Liberius, then aged over eighty.

6. Chateaubriand said of Napoleon “C’était un grand découvreur d’hommes; mais il voulait qu’ils n’eussent de talent que pour lui.” CHATEAUBRIAND, I MÉMOIRES D’OUTRETOMBE 492 (M. Levaillant & G. Moulinier eds., Pléiade, 1946). As to Justinian, “The emperor may not have been the cleverest man of his age, only the most determined. But he could pick those who were the ablest in their field.” TONY HONORÉ, TRIBONIAN 26 (1978). Both Emperors rewarded their helpers. In 1802, as First Consul, Napoleon created, but not without difficulty, the Légion d’Honneur, for civilians as well as soldiers—see William Hazlitt, *Life of Napoleon*, in 14 COMPLETE WORKS 110-12 (P. Howe ed., 1931); COMTE P.L. ROEDERER, JOURNAL 120 (Vitrac ed., Paris 1909)). The first awards were made immediately after Napoleon became Emperor, and Goethe was a recipient in 1808. Later, in derogation of his *Code civil*, Napoleon created the *majorats*, titles and estates heritable by male primogeniture. Justinian abolished consulships, except for himself, but added two higher ranks to the *illustres*, *spectabiles* and *clarissimi*, namely the *gloriosi* and the *gloriosissimi* (Nov. 43.1 (537)). He did, however, behave disgracefully towards Belisarius who had served—and continued to serve—him selflessly.

7. Chateaubriand memorably describes the entry of Talleyrand and Fouché to the presence of Louis XVIII as “vice leaning on crime”—CHATEAUBRIAND, *supra* note 6, at 984. Talleyrand was made Prince of Benevento, Fouché Duke of Otranto and Cambacérès Duke of Parma.

8. Justinian “looked into the gutter for a wife, and picked out a diamond.” H.A.L. FISHER, A HISTORY OF EUROPE 128 (1936). Napoleon’s Josephine, less hard, was also less faithful. Napoleon was in Egypt when he heard of her affair with Lt. Charles Hippolyte, a man more amusing than himself, and the distraught letter he wrote to his brother in Paris was intercepted by the British and published. See VICTOR CRONIN, NAPOLEON 132-33 (1971). Napoleon did not divorce Josephine then, as he threatened, and did so later only with reluctance, in order to marry an Austrian princess, whose great-aunt had been decapitated in the Revolution. She bore him a son, went off with a one-eyed Austrian count, von Neipperg (provided for the purpose by Metternich), and became Duchess of Parma. “She had the sentimentality of a seamstress and the taste of a maidservant” per EDITH TEMPLETON, THE SURPRISE OF CREMONA 86 (2001), but did amend the Code of Parma so as to improve the position of women.

9. “I ended the war in the West of France by becoming a Catholic, I established myself in Egypt by embracing Islam, and won over the Italians by turning ultramontanist. Were I ruling the Jews I would rebuild the temple of Solomon.” ROEDERER, *supra* note 6, at 16.

10. Justinian wanted a unified church, Napoleon a unified state, so he turned into a state institution the church which had been expropriated by the Convention, on the proposal of Bishop

Emperor spent much time in bed or at table.¹¹ Finally, neither Justinian nor Napoleon was a lawyer,¹² despite their recognition of law as a vital social institution, both being especially interested in the family (Justinian legislating against divorce on religious grounds,¹³ Napoleon in favour of it on personal grounds) and succession (Napoleon in the succession to his throne,¹⁴ Justinian more altruistically, for he himself had no family problems,¹⁵ while Napoleon was constantly beset by his appalling siblings.)¹⁶

Alas, there was so much to say that the parallel lives seemed likely to reach to infinity—the draft of perhaps a third of what I had in mind to write exceeded the whole of what was wanted. Surgery, more drastic

(!) Talleyrand. The Concordat was one of Napoleon's greatest achievements, though he did it by misleading the Pope, whom he not only expropriated but maltreated very badly indeed. Like Talleyrand, Napoleon was excommunicated. See *L'âme de Napoléon* where the mad author Léon Bloy, a devout Catholic who regarded Napoleon as sent by God, is tortured by his quarrel with the Church.

11. Justinian “never had a sufficiency of food or drink or sleep, but taking a taste at haphazard of that which was set before him walked about the Palace at unseasonable hours of the night . . .” PROCOPIUS, *SECRET HISTORY* xii, 27 (Atwater trans., 1927). Napoleon's dinners, often long delayed, to Josephine's distress, lasted at most half an hour (ROEDERER, *supra* note 6, at 107). In deference to the Austrian appetite of Josephine's successor, dinners became longer and more copious.

12. Roederer tells us that in his youth Napoleon learnt Justinian's Institutes by heart (ROEDERER, *supra* note 6, at 97), but we need not believe him for Roederer, described by Josephine as a toady (*flagorneur*), was one of the few aides dismissed by Napoleon for being “quarrelsome, sanctimonious and tactless”. ISSER WOLOCH, *NAPOLÉON AND HIS COLLABORATORS* 159 (2001). It is certainly true that in addition to having a prodigious memory, Napoleon was a voracious reader (including Plutarch, especially on his heroes, Alexander and Julius Caesar); his travelling library had 1,000 volumes selected by himself.

13. For Justinian's extreme legislation, see A.H.M. JONES, *THE DECLINE OF THE ANCIENT WORLD* 335-36 (1966).

14. Josephine Beauharnais gave him no children, and on his abdication his son by her successor went back to Austria with her, where he was demoted from King of Rome to Duke of Reichstadt, whose bones were eventually returned to Paris on the orders of Hitler. Napoleon III, oddly enough, would have succeeded in accordance with Napoleon I's order of succession, for his father was Napoleon's brother Louis (and his mother the daughter of Josephine Beauharnais).

15. Justinian, who had no children, was succeeded by his nephew Justin, who promptly murdered his cousins Justin and Justinian, and later went mad. Alexandre, Napoleon's son by the charming Polish Mme Waleska in 1810, was made a count and became Minister for Foreign Affairs and a Senator in 1855.

16. “[A] peculiarly unpleasant set of people [whose] excessive greed, envy and inefficiency [was] matched only by self-conceit.” PIETER GEYL, *NAPOLÉON: FOR AND AGAINST* 179 (O. Renier trans., 1965)—the best book on Napoleon to start with. In his early years as an officer, Napoleon spent so much more time with his family in Corsica than with his units that he was actually removed from the army list: see JEAN TULARD, *NAPOLÉON—THE MYTH OF THE SAVIOUR* 26-35 (T. Waugh trans., 1984). The opening words of the formal invitation to Napoleon's coronation (which neither his mother nor his brother Julien attended) were “Divine providence and the constitution of the Empire having placed the imperial dignity in our family . . .” FRANÇOIS FURET, *THE FRENCH REVOLUTION 1770-1814*, at 243 (A. Neville trans., 1996).

than plastic, was required, so what I submit is simply a torso, with a few bleeding chunks in the footnotes.

I. THE LAW

The good news first—the law they produced. Justinian’s legislation is much more extensive than Napoleon’s, since in addition to his *Codex* (the statute-book) he also enacted a case-book (the *Digest*, itself larger than the Bible) and a text-book (the *Institutes*).¹⁷ By contrast, the *Code Napoléon* is a slim volume no longer than Justinian’s *Institutes*, whose structure it follows¹⁸ and whose content it reflects—the relations between individuals,¹⁹ omitting public law, criminal and procedural.

Napoleon’s aim in procuring the enactment of the Code civil in 1804 (Year XII)²⁰ is clear enough, namely to unify the country under himself, to confirm the better ideas of the Revolution and excise the excesses. But what was Justinian’s aim? Here much nonsense has been written.²¹ Leaving aside such inanities as that his purpose was to quell the Nika riots,²² we are told again and again that just as he sought to re-establish the territory of the Roman Empire, much of which was under the control of “barbarians”, his aim with the legislation was to re-establish the grandeur of law as it was in the classical period three centuries earlier.²³ Our informants proceed to tell us that in this he failed:

17. This is to ignore the Novels (less interesting than the name suggests), an unofficial collection of 168 imperial laws enacted after the codification was complete, between 534 and Justinian’s death in 565. They are evidence of Justinian’s obsession with controlling everything. Though they deal with public and tax law more than private law, the Novels on succession (118 and 127 of 543 and 548 respectively) are historically very important, and Novella 22 on marriage shows the baleful effect of Christianity.

18. Unlike the *Digest*, whose 432 chapters strike us as rather higgledy-piggledy, the *Institutes* and the *Code civil* are rationally ordered, thanks to Gaius’s genial division of private law into the *who* (persons), the *what* (property) and the *how* (actions).

19. Justinian’s ensemble was not called the *Corpus Iuris Civilis* until the sixteenth century.

20. The Revolutionary calendar, which Napoleon brought to an end in 1806, was decimalisation run mad, as you would expect of demented rationalists. Weeks were of ten days, which deprived the Christians of their Sunday and the Jews of their Sabbath. The months (twelve of them, surprisingly, of three weeks (decades) each plus a few extra days to make up) were given pretty names, recalling not gods and heroes, but natural events and seasons, such as “fructidor” and “frimaire” (mocked as “cuspidor” and “frigidaire” by ROBERT CONQUEST, *THE DRAGONS OF EXPECTATION* 28 (2005)). Even the Bolsheviks did not start time running anew in October 1917, but the Vandals had done so, as perhaps the French had forgotten.

21. But much hard work has been done on the actual process of production of the Digest: see HONORÉ, *supra* note 6, at 139-86.

22. Having the Gospels in his hand did nothing to quell the rioters, whom he vainly sought to assuage by dismissing Tribonian and one or two other ministers, promptly reinstated.

23. The Romans were proud of their law: it was their principal patrimony, the ark of their secular covenant, and they saw it as their duty (see VERGIL, *AENEID* 6.851 ff.), their *mission*

self-evidently you cannot bring rules up-to-date and keep them as they were. But rather than impute a purpose to Justinian and carp that he failed to fulfil it, might it not be better to ask what the obvious *effect* of his enterprise was and then do him the justice of supposing that that was his purpose? If so, there can be little doubt what his aim was: it was to facilitate the resolution of disputes. If this means ignoring his repellent rhetoric, so much the worse: you can hardly give thanks to God²⁴, as Justinian constantly did, for making the life of advocates easier.

Litigation certainly needed to be made easier since by the time of Justinian it had become almost impossible. This was due to the techniques of book production in the ancient world, a matter from which we can learn two important points. The first is this. The works of the jurists were originally on scrolls. Scrolls are fine for literary works which you read from beginning to end, but hopeless for law, since law books are not for reading, just for reference.²⁵ The constant rolling and unrolling must have made legal scrolls deteriorate rapidly, and every recopying introduced the likelihood of error, omission and inadvertent inclusion of random marginalia. It is difficult to believe that after three centuries any three copies, one in the hand of each advocate and one in the hands of the judge, were the same.²⁶ This must have made litigation a nightmare. Actually we know full well that the litigational situation was problematical, because a century earlier Justinian's predecessors had made a valiant attempt to solve the problem by reducing the number of jurists whose works could be cited²⁷ and adopting a method of determining which was to be preferred. One thing at least Justinian did: he produced a *single authoritative text* for all law, both imperial and

civilisatrice, to extend it to all those they conquered; this was completed in 212 AD by the *Constitutio Antoniniana*. Only such a conviction can explain the phenomenon of the *jurists*, whose works are excerpted in Justinian's *Digest*: they were neither professors nor advocates nor judges; the closest analogue today is the rabbi or imam, whose prestige, like theirs, comes from their knowledge of the law. Contrast the attitude of the English towards their common law, which had spread, with some success, halfway round the world: on entering the "Common Market" they simply abandoned it to foreigners who were themselves fit successors to the Romans in their hostility to any law not Roman in origin.

24. *Deo auctore*, the significant opening words of the Preface to the Composition of the Digest; see C.J. 1.17. "In his edicts Justinian buttressed everything from his wars to his regulation of the price of vegetables with divine authority." ANTHONY KALDELLIS, PROCOPIUS OF CAESAREA 2 (2004).

25. Especially as monographs were relatively rare in juristic writings: most "books" were commentaries or collections of opinions.

26. That is why the invention of printing was of particular use for lawyers. There might be misprints (when not?), but each copy would have the same ones.

27. The "Law of Citations" of 426, in the Theodosian Code, 1.4.3. England has recently produced its own Law of Citations in response to the proliferation of "authorities" on the Internet: see Practice Note (Citation of Authorities) of 9 April 2001, [2001] 1 Weekly L.R. 1001.

juristic, and in order to keep it single and authoritative, he strictly forbade amendments, alterations or even abbreviations. Since this was the greatest immediate effect of his efforts, it is reasonable to suppose that this was what they were intended to procure.

The second consequence of the failure to pay sufficient attention to book production in the ancient world is exemplified in the frequent assertion that “The Digest is divided into fifty books.”²⁸ This is about as sensible as saying that a modern work is “divided” into 341 pages. The fact is that in the ancient world a “book” was a unit of length, like our modern page, variable, certainly, but only within limits, so the Digest, which is divided into 432 chapters, is fifty books *long*. Indeed, if Justinian had not told Tribonian how long the anthology was to be, Tribonian could not have set about his task at all.²⁹ Having received this instruction, it was easy, for he had his 1500-odd books sitting on a shelf, all the same length more or less, and he could allocate them more or less equally to his three teams, and tell them to reduce the bulk to 5% or whatever. Now since we know approximately how long a “book” was, we can tell how much the members of the teams had to read each day in order to get the work done in three years rather than the predicted ten. The answer is “not very much”, perhaps forty pages. Even a law student can read forty pages in a day and highlight the 5% he thinks important.

In any case the modern astonishment at the completion of the task in three years is misconceived. In those days people *worked*—and so would you if the insomniac Justinian was marching up and down the corridor outside your workroom. After all, the Theodosian walls, which kept invaders out of Byzantium for a millennium, were completed in sixty days! And the great Hagia Sophia was completed in five years after the Nike riots in Byzantium had produced a physical *tabula rasa* like that produced by the great Fire of London which enabled Christopher Wren to leave his mark on the city, or indeed the social *tabula rasa* which enabled Napoleon to produce his *Code civil*. Contrast the time it took,

28. Other absurdities abound. One critic complained that there were no cross-references in the Digest. How would he have liked to make cross-references in Roman numerals, and how could he have done so in view of the fact that the fragments were not numbered at all until the sixteenth century?

29. On Tribonian, who seems to have done most of the legal work, see HONORÉ, *supra* note 6. The statement in the text fails to take account of the fact that some time after the jurists ceased to be great (and the whole system of procedure was altered) the scrolls were turned into what we would recognise as “books”, and a book typically contained the text of four scrolls. Titles of works in the Renaissance often gave the number of books they comprised, e.g., GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (1625). I have been unable to ascertain the reason for this practice.

with all our labour-saving devices, to reconstruct the *Frauenkirche* in Dresden in the past decade!

Some scholars, determined to explain the speed of composition of the Digest (which, as we have seen, is a non-problem) have suggested that there was a “pre-Digest”. There certainly was no such thing, but equally certainly there were Codes before the *Code civil*, and three of them, no less, were by Jean-Jacques Régis Cambacérès, at whose suggestion Napoleon nominated the four members of the drafting committee and who proposed that Napoleon be consul for life rather than for ten years, as recommended by the Senate. As second consul and Napoleon’s second-in-command in Paris whenever he was away killing people, Cambacérès presided over 52 of the 109 sessions at which the draft was discussed in the Conseil d’État. He became Archichancelier of the Empire and though he was of course exiled in 1815, Louis XVIII allowed him to return after two years and restored his title as Duke of Parma, despite the uncertainty of whether he had actually voted for the death of the King’s father.³⁰ He died of apoplexy, as befits the great gourmet he was.

II. EDUCATION

Both emperors put their name to their legislation. Justinian went even further and insisted that law students in their second year be called “Justiniani”. Napoleon, too, was interested in legal education. Four days before the enactment of the *Code civil* he created twelve law schools,³¹ which became Faculties some weeks later.

Legal education is not the only kind of education which is important, but Justinian seemed to think that it was. Napoleon, on the other hand, was devoted to education and science.³² The state education

30. He is not mentioned at all in PIERRE BLIARD, *LES CONVENTIONNELS RÉGICIDES* (1913). Napoleon probably did not twit Cambacérès about his possible role in 1793, but when he teased Fouché with voting for the King’s death, that clever man replied “Yes, Sire, that was the first service I was able to perform for Your Majesty”. There is an excellent appraisal of Cambacérès in WOLOCH, *supra* note 12, at 120-55, and see also RICHARD BOULIND, *CAMBACÉRÈS AND THE BONAPARTES* (1976). There is a goodish reappraisal of Fouché in HUBERT COLE, *FOUCHÉ, THE UNPRINCIPLED PATRIOT* (1971). Fouché, not given to praise said of Cambacérès that he was “enlightened: a man of probity, though avaricious.” *MEMOIRS OF JOSEPH FOUCHE, DUKE OF OTRANTO* 120 (1896).

31. Including one each in Turin, Brussels and Koblenz! This is not so surprising: “By 1810 the 83 departments of the Republic had been increased to the 130 departments of the Empire . . . including such novelties as ‘Bouches de l’Elbe’ (Hamburg) . . .” NORMAN DAVIES, *EUROPE—A HISTORY* 729 (1996).

32. As is shown by his pleasure at membership of the Institute (which he rehoused) and his great scientific outing to Egypt (leading to the discovery of the Rosetta Stone) as well as his creation of the National Museum in the Louvre, filled with plunder from his conquests. It is a

which he instituted was admittedly geared to creating soldiers and civil servants, boys being catered for, girls not. Here, too, centralisation was the keyword. A single University was created for France.³³ Professors were, of course, state employees, and still are. The subject-matter of courses was controlled from the centre. Napoleon did not create the *École Polytechnique*, the greatest of the *grandes écoles*, whose existence has done so much to keep the universities poor and unloved—it was founded before Napoleon became consul—but it was militarised by him as Emperor. He also reinstated the French Academy in Rome which had been closed in the 1790s. By contrast, one cannot imagine Justinian taking any interest in secular education, so hopelessly embroiled was he in barren theological disputes. To his shame he closed, and confiscated the property of, the great Academy of Athens, the scene for a millennium of seminal philosophical disputations, for no better reason than that the professors tended to be pagans.

III. ADMINISTRATION

Unlike the commissars in Brussels today, the two emperors were administrators as well as legislators.³⁴ Napoleon inherited much that had been done by the Convention, in particular the division of the country into departments³⁵ and the dismantling of the provinces, but it was he who procured that each department would be under the control of a prefect (a Roman word!) nominated by himself and required to report to him with great frequency and in great detail. This remains an essential

matter for regret that Stendhal helped him to help himself to German art treasures, and then had the nerve to assert that it was the Allies themselves who were guilty of plunder in 1815 when (with the help of Canova) they repatriated the marvellous works which Napoleon had exacted from a feeble Pope by the Treaty of Tolentino. See D. Quynn, *The Art Confiscations of the Napoleonic Wars*, 45 AM. HIST. REV. 437-60 (1945). Canova's works include a marvellous sculpture of Napoleon's sister Pauline in the Galleria Borghese (she married Prince Borghese, after the death of her husband General Leclerc in Saint-Domingue) and a less beautiful more-than-life-size statue of Napoleon himself, quite naked, which astonishes visitors to the Victoria and Albert Museum in London.

33. Set up in principle in 1806, details in 1808. Its officers were required to obey "the statutes of the teaching body, which have for their object uniformity of instruction, and which tend to form for the state citizens attached to their religion, their prince, their country and their family."—hardly a recipe for a liberal education, one might think.

34. The speedy decisiveness of Napoleon is amazing. In 1800 he was in Malta for only five days, long enough to give it a constitution and reorganise the whole place, including its education system. For his administrative activities in Elba (where he did not stay very long!), see DOMINIQUE DE VILLEPIN, *LES CENT-JOURS* 33-38 (2001).

35. The division was done by the Constituante, sensibly not accepting a proposal that each department be a regular square. Yet it is odd that so many departments, which are compact, are named after rivers, which are linear. Edmund Burke makes mock of them in his *REFLECTIONS ON THE REVOLUTION IN FRANCE* 286 (Penguin Books 1982) (1790).

feature of French centralisation. The empire that Justinian inherited had been divided into two and reorganised by Diocletian at the end of the third century, but Justinian had no opposite number in the West, since Odoacer the Ostrogoth had deposed Romulus Augustulus in 476 (a non-event, comparable to Napoleon's coup de grace to the Holy Roman Empire in 1806).³⁶ It must suffice to say that Justinian's changes were far-reaching,³⁷ and not rendered any easier by the reconquest of Northern Africa, which had been under Vandal control for over a century or that of Italy, ruined first by the war with the good Goths and then by the rapacity of the Byzantines.

IV. BUILDING

Buildings have been mentioned. Justinian's historian, Procopius, wrote a whole book about his buildings, the greatest of which was doubtless Hagia Sophia, a wonderful if charmless building inaugurated by Justinian in 537. It was built at speed, and the great dome collapsed in 558, just seven years before the Emperor's death. Not far from it is another wonder, rather more numinous—a vast underground water cistern, built by Justinian in 532. Water was a problem in large cities, and its provision was one of the things that Napoleon did for Paris. Otherwise not much due to Napoleon is visible in the city: there is the column in the Place Vendôme,³⁸ and there are some bridges over the Seine.³⁹ There is certainly the little Arc de Triomphe (which he thought too small), but the big one which we circumspectly circumnavigate on wheels was completed only in time to let his corpse pass through it on the way from St. Helena to Les Invalides, which had been built under Louis XIV. The Madeleine, which he decided in 1806 was to be a temple to the glory of the Grande Armée, was not consecrated until 1842.

36. "No Empire fell in 476. It is true that a specific line of Roman sovereigns ended in that year." JOHN W. BARKER, *JUSTINIAN AND THE LATER ROMAN EMPIRE* 5 (1966). Of the end of the Holy Roman Empire Goethe tells us that the passengers in his coach were more interested in the postilion's quarrel with the ostler.

37. See for details J.B. BURY, *HISTORY OF THE LATER ROMAN EMPIRE* 334-59 (1923). "[T]he Emperor addressed himself earnestly . . . to the task of thoroughly overhauling the system of provincial government, and, in the appreciation of his work as a ruler, these reforms have hardly received due attention." *Id.* at 346; see also WILLIAM G. HOLMES, *2 THE AGE OF JUSTINIAN AND THEODORA* 470-89 (1912).

38. The present statue atop the column is a replica of one destroyed in the Commune of 1871. The original statue was of Napoleon in a toga. He was displaced in 1815 by a white cockade, but replaced in 1833, this time in his familiar dress as the little corporal.

39. Marcel Proust makes his catty Mme de Guermantes say, on hearing of the Iéna family, that they were named after a bridge: MARCEL PROUST, *I A LA RECHERCHE DU TEMPS PERDU* 332 (J-Y Tadié ed., La Pléiade 1987).

Though the names of his victories are everywhere there is only a single rue Bonaparte.⁴⁰ But as he said on St. Helena, his works are elsewhere.⁴¹

V. WARS

Having seen the achievements, and before turning to the crimes, cruelties and duplicities of the pair, let us consider very briefly their military enterprises, the seeking of the bubble reputation even in the cannon's mouth, the hunt for glory regardless of cost.⁴² They both spent much time on military matters, Napoleon in the saddle and Justinian on his throne.⁴³ Justinian left the fighting to his generals, Belisarius,⁴⁴ Narses⁴⁵ and Liberius,⁴⁶ while Waterloo was Napoleon's fiftieth pitched battle, he having won almost all the rest by his astonishing grasp of situation and speed of reaction. It should be remembered, however, that he abandoned his army twice—once to bake in the Egyptian desert, once to freeze in the Russian snow—in each case to return to Paris to secure or advance his career.⁴⁷ A further distinction is that Justinian was involved in reconquest of Roman territory which the “barbarians” had invaded, a

40. The Quai Bonaparte is now the Quai Anatole France, the Quai Napoléon the Quai aux Fleurs.

41.

Harbours at Antwerp, Flushing, Cherbourg and Venice; docks and dikes of Dunkirk, Havre and Nice; roads from Antwerp to Amsterdam, Mainz to Metz, Bordeaux to Bayonne, Parma to Spezia, Savona to Piedmont; the Simplon, Mont Cenis and Mont Genève passes; bridges not only in Paris but in Tours, Lyons, Turin, Bordeaux, Rouen and over the Isère and the Durance; canals from the Rhine to the Rhone, the Schelt to the Somme, the Rance to the Vilaine, and canals in Arles and Pavia; marshes drained in Bourgoing, the Cotentin and Rochefort; rebuilding of most of the churches pulled down during the Revolution and some new ones; factories, especially in Lyons; the construction of the Louvre, public granaries, of the Bank, the water system of Paris, sewers and quays

R.M. JOHNSTON, *IN THE WORDS OF NAPOLEON* 333 (Philip Haythornthwaite ed., 2002).

42. Napoleon is alleged to have said to Metternich at Dresden in 1813 “A man like me is hardly concerned about a million lives”, and Metternich to have responded “Shall I open the doors and windows so that all Europe can hear?” GEYL, *supra* note 16, at 269-70.

43. Napoleon was in Paris for only 900 days between 1805 and 1814. STUART WOOLF, *NAPOLEON'S INTEGRATION OF EUROPE* 39 (1991). Justinian seems to have left Byzantium once only—characteristically to visit a church.

44. Procopius, who was on the staff of Belisarius and accompanied him in Africa and Italy, wrote much about him in the *Wars*, less but more critically in the *PROCOPIUS, SECRET HISTORY*, *supra* note 11. See also the historical novel, ROBERT GRAVES, *COUNT BELISARIUS* (1938).

45. See LAWRENCE FAUBER, *NARSES, HAMMER OF THE GOTHIS* (1990).

46. *Id.* at 651.

47. On landing in France on his return from Egypt, Napoleon, as Fouché acerbically remarked, “violated the laws of quarantine, so essential to the preservation of the public health.” *MEMOIRS OF JOSEPH FOUCHÉ*, *supra* note 30, at 75.

reconquest accentuated by his fanatical concern to extirpate heresy—for the barbarians were bearded Arians, who did not believe that Christ was divine at all (whereas Justinian's view was that Christ was both divine and human, his wife's, and that of the Monophysites, that Christ was wholly divine). By contrast, Napoleon, actuated by nothing other than ambition and greed, sought to conquer lands which had never been French and were ruled by families much better established than his own, though he established his own family on a number of thrones.⁴⁸

Justinian's military exploits in the West started well, for against all advice he sent Belisarius to wrest North Africa from the Vandals, who had been established there for a century or so and who had destroyed a huge Byzantine expedition some fifty years previously.⁴⁹ Belisarius was remarkably successful, largely because the Vandal king was in Sicily at the time. Justinian's pretext for the intervention was that he was coming to the aid of friendly old Hilderich against the evil young upstart Gelimer, but one of his actual reasons was that the Vandals had been oppressive to the Christians. Another disputed succession gave Justinian a pretext for invading Italy, though the Goths had been treating the Christians perfectly well.⁵⁰ Belisarius took Naples and then Rome, the Emperor being delighted to receive the keys of the Eternal City, but severe reverses followed. Belisarius was besieged in Rome for nearly a year, but emerged for further victories, including taking Ravenna by a trick. However, when Totila was elected King of the Goths he retook Rome in 546 and reconquered almost all of the mainland as well as Sicily.⁵¹ It took a huge further expedition under the eunuch Narses, then

48. Joseph was made King of Naples, then Spain; Louis King of Holland till ousted by Napoleon for being independent-minded; Jérôme King of Westphalia; Joseph and Louis both refused the Crown of Italy, so Napoleon took it himself. Pauline became Princess of Guastalla, and though the title was good, she was outraged at the small size of the principality; Elisa became Grand Duchess of Tuscany, Caroline Queen of Naples after her husband Murat succeeded Joseph as King. Napoleon had his uncle Fesch made a cardinal, who then conducted an uncanonical religious ceremony of marriage between Josephine and Napoleon prior to his coronation. Even some non-family members were rewarded with kingdoms: he conferred royal status on the rulers of Bavaria, Württemberg and Saxony. The King of Bavaria (the father-in-law of Eugene Beauharnais) abandoned him at the Battle of the Nations in 1813, whereupon Napoleon kept shouting "Munich must burn" (COLE, *supra* note 30, at 226), much as Hitler was later to shriek "Is Paris Burning?".

49. Most of the barbarians were terrestrial, but the Vandals were good seamen. Compare the French and the British in the early nineteenth century.

50. The quite successful Byzantine conquest of coastal Spain by the very aged Liberius was likewise triggered by a succession dispute among the Visigoths.

51. Totila and his brother Teias are the heroes of *Ein Kampf um Rom*, surely the most successful historical novel of all time (and deservedly so); there were 136 editions between its publication in 1876 and the death of its author, Felix Dahn, a professor of Law (!), in 1912. There is no modern translation, more's the pity, nor even a film: Brad Pitt would be a good Totila.

70 years old, to win the battles in which Totila and his brother were killed, and Gothic control of Italy definitively ended—only to be replaced by the invading Lombards, who were much worse. Both emperors conscripted large numbers of foreigners to fight for them, barbarians of every tribe for Byzantium, thousands of Germans for Napoleon.⁵² There is one marked difference, however; Justinian was ready to buy peace if he could not impose it by arms;⁵³ Napoleon made the conquered people pay for his victories and what they did not offer, he took, much as the Italians whom Justinian “liberated” from the easy-going Goths had to pay through the nose when his tax-gatherers arrived.

VI. CRIMES

Much of what we know about Justinian’s wars comes from Procopius, whose writings on his buildings we have seen. Almost all that we know of Justinian’s crimes also comes from Procopius, whose *Secret History* was not published till the seventeenth century. It could hardly have been published in his lifetime (he died before Justinian, but witnessed the plague in Byzantium in 542) since it is appallingly critical of both the emperor and his wife. We need not believe him when he says that they were literally demons incarnate, but much of what he said must be true. Napoleon’s crimes are better attested, though commonly ignored.

Let us look at some of the deplorable acts of the two men. Justinian punished people not only for their acts—bishops accused of paedophilia were castrated, stripped naked and beaten through the streets⁵⁴—but their thoughts as well. Those whose beliefs differed from his own—pagans, Jews, Samaritans and any whom he considered heretics—he persecuted with religious fanaticism in a manner which shocked even his contemporaries. We do know that he had Vitalian, previously consul, murdered at dinner and was grossly ungrateful to the honest and active general Belisarius,⁵⁵ but of the many appalling crimes of which the contemporary historian Procopius accused Justinian in his *Secret History* we do not have much independent evidence. If a quarter of them are

52. The “Grande Armée” had soldiers from twenty nations.

53. In 532 Justinian bought an “Eternal Peace” from the Persian King for 11,000 pounds in gold. Eight years later, after Chosroes had destroyed Antioch—a very important city—Justinian agreed to pay him 5,000 pounds of gold there and then, and then a further 500 each year. In 545 he bought a five-year truce for 2,000 pounds of gold. In 561 a further truce involved an annual payment of 30,000 solidi. See JONES, *supra* note 13, at 109.

54. R. BROWNING, JUSTINIAN AND THEODORA 61 (1987).

55. Though it is not true that he had him blinded, as portrayed in the first great painting by Napoleon’s portraitist, Jacques-Louis David.

true, however, (and it is likely that the proportion is higher than that) Justinian, married to an equally murderous wife, was as thoroughly unprincipled as only a religious fanatic can be, an evil man whom Dante should not have placed in *Paradiso*⁵⁶ but elsewhere.

Of Napoleon's crimes we have better evidence. "More than a crime, a mistake" was Fouché's description of the murder of the Duc d'Enghien, the last surviving male of the noble family of the Condé, kidnapped from foreign territory and shot in a ditch at Vincennes, after a kangaroo court.⁵⁷ Doubtless this was a pre-emptive strike against royalists outside France who might have been contemplating assassination but it caused outrage.⁵⁸ Again, when Andreas Hofer, a Tyrolean patriot who tried to defend his native land against the Bavarians, to whom Napoleon had high-handedly transferred it, Napoleon had him pursued to Mantua and executed there. At least Hofer had taken up arms against the tyrant. Much worse was the murder of a bookseller of Nuremberg, called Palm, whose only offence was to distribute an anonymous pamphlet deploring Napoleon's disastrous effect on Germany. When the Mayor of Antwerp, prosecuted by a French chief of police on a trumped-up charge, was acquitted by the jury Napoleon was so enraged that, despite the hesitations of the Senate in Paris and the resignation of the prefect, he had the poor man arrested and thrown into jail, where he soon died. Freiherr von Stein,⁵⁹ one of the architects of the renaissance of Prussia after its gross humiliation by Napoleon,⁶⁰ had to flee from Napoleon's rage. Another example: When

56. Had Dante read the *Secret History of Procopius*, which was not published in the West until the seventeenth century, he would have found that author stating that "Nature seemed to have removed all baseness from the rest of mankind and to have concentrated it in the soul of this man." PROCOPIUS, *supra* note 11, at viii, 27.

57. Cambacérès alone in the Conseil d'État opposed the kidnapping. Talleyrand might have been behind it. Those close to Napoleon were appalled: see COMTE DE SÉGUR, MÉMOIRES D'UN AIDE-DE-CAMP DE NAPOLÉON 116-125 (1894).

58. See CHATEAUBRIAND, *supra* note 6, at 538-45, which can also be consulted for a comparison of Napoleon and George Washington (in favour of the latter). *Id.* at 222-25.

59. He was declared an enemy of France and his property in the Confederation of the Rhine was confiscated, all because of the interception of a letter of his, expressing the hope that Germany, like Spain, might rise up against the conqueror. The most prestigious prize in Europe bears the name of Stein: it was awarded to Edward Heath, Prime Minister of Britain, for selling his country to Europe.

60. Napoleon's attitude to Prussia was much more severe than his attitude to Austria. Although Prussia had refused to join the Second Coalition against him, he required it to invade Hannover, with which it had no quarrel and which he then tried to sell back to Britain, and by the Treaty of Tilsit in 1807, after the battle of Jena, his territorial depredations reduced the population of Prussia by half. See MICHAEL V. LEGGIERE, *NAPOLÉON AND BERLIN* 20 (2002). 16,000 of the Prussian Army (limited to 42,000) were to be at France's disposal should there be further trouble with Austria. In addition Prussia was to pay 154.5 million francs as reparation and bear the cost of maintaining 150,000 French soldiers on its territory. No wonder Bluecher was vindictive and a more determined enemy than Wellington.

the Governor-General of Liguria proposed to deal leniently with an uprising in the Appenine valleys between Parma and Piacenza, Napoleon replaced him with General Junot who was ordered to burn five or six villages and execute some 60 people.⁶¹ But worst of all was his treatment of Toussaint L'Ouverture, a matter which calls for more extended treatment.

The French colony of Saint Domingue, which occupied the island of Hispaniola in the Caribbean, was immensely valuable, producing, it is said, one quarter of all the wealth of France—something hard to believe when one considers the present state of Haiti, the Western half of the island.⁶² At the time there were half a million slaves, and 50,000 others, persons of mixed race and whites in the proportion of three to two. When war with Britain broke out in 1793 and the British were about to land, Toussaint declared all slaves free and fought for the French against the British, who withdrew in 1798, having lost there nearly thirteen thousand soldiers through death, at a cost of over £10 million.⁶³ Until 1801, when he produced a Constitution, adopting Catholicism, Toussaint was in control of the colony. In one of his letters to Napoleon, who failed to reply, he unwisely described himself as the Bonaparte of the Antilles, and despite the fact that the Peace of Amiens, which would return to France all the Caribbean islands taken by the British in the previous decade, was not yet signed, Napoleon sent an army of 34,000 under his brother-in-law Leclerc, to Saint Domingue, with instructions to arrest “the sable chieftain”. Toussaint was simple enough to trust of the safe-conduct of which he was assured, fell into the trap, was arrested and shipped to France.⁶⁴ There he was immured in a fort high in the Jura, where he quite soon died of cold, but not before Leclerc himself died of fever, along with most of his troops. Of the larger force under Rochambeau then sent by Napoleon, who had disregarded Leclerc's entreaties for reinforcements, nearly all had died before he surrendered to the British in 1803, once again in control of the seas after the end of the Peace of Amiens. The Caribbean certainly taught the colonialists a lesson, though the natives do not seem to have learned one.

61. WOOLF, *supra* note 43, at 230.

62. For a vivid explanation of the relative decline of Haiti, see JARED DIAMOND, *COLLAPSE—HOW SOCIETIES CHOOSE TO FAIL OR SURVIVE* 334 ff. (2005).

63. The figures are dubious: see David Geggus, *The Cost of Pitt's Caribbean Campaigns, 1793-1798*, 26 *HIST. J.* 699-706 (1983).

64. Never trust a despot. Justinian, having promised safe conduct to Vitalian, previously consul, had him stabbed to death at dinner, with the justification that an oath given to a heretic was not binding. GRAVES, *supra* note 44, at 65.

Napoleon's dishonesty and underhand tricks did not stop there, however. As Leclerc was leaving France with Toussaint's two children, Placide and Isaac, Napoleon assured them "Tell your father that, as first magistrate of the French people, I promise him protection, glory and honour".⁶⁵ He had already proclaimed, in December 1799 and again in May 1800, that the sacred principles of liberty and equality of the blacks in Saint-Domingue would never be impugned or modified, and although in a report to the Corps Législatif in November 1801 he stated that slavery would not be introduced in Saint-Domingue or Guadeloupe (it was retained in Martinique, his wife's place of birth), in fact he empowered the governor of Guadeloupe to reintroduce it, as he did. A Law of 19 May 1802 reintroduced the slave-trade (*le traite*).

But it's an ill wind that blows nobody good, for the United States gained from the French debacle. Napoleon gave up his plans for expansion in the West (while retaining his grandiose plans to emulate Alexander in the East) and when Livingston and Monroe were sent to Paris to offer \$2 million for New Orleans and the adjacent hinterland, Napoleon offered them the whole of continental French North America for \$15 million.⁶⁶ The sale was confirmed by treaty in Paris in April and ratified by the U.S. Senate in October 1803. On St. Helena where Napoleon had the leisure to rewrite history, he admitted that the Saint Domingue enterprise was a mistake: as to Toussaint l'Ouverture he admitted to no crime.

It was not his only mistake, of course. The diplomacy by which he procured the abdication of the Bourbon king of Spain and installed his brother Joseph (moved willy-nilly from his kingdom of Naples) is recognised as shabby even by his admirers. His inability to understand that peoples who did not speak French might actively resent being ruled, brutally, by those who did,⁶⁷ led to the troubles in Spain thereafter, the consequence of which was that in 1814 as the Prussians entered France

65. PIERRE PLUCHON, TOUSSAINT L'OUVERTURE, DE L'ESCLAVAGE AU POUVOIR 323 (1979).

66. Better than what happened in 1797, when a distinguished delegation including John Marshall came from the United States for negotiations. The Directors refused to see them, and they could speak only to unaccredited persons sent by Talleyrand, Minister for Foreign Affairs. These persons immediately said that Talleyrand would not even report to the Directors unless a bribe of £50,000 were paid. When the Americans said "No, not a sixpence", they were told that the United States might suffer the fate of Venice (which Napoleon had just brought to an end), and two of the three delegates were required to leave France. The matter was reported to Congress. See AUTHENTIC COPIES OF THE CORRESPONDENCE OF CHARLES COTESWORTH PINCKNEY, JOHN MARSHALL AND ELBRIDGE GERRY AS PRESENTED TO BOTH HOUSES OF CONGRESS, APRIL 3, 1798 BY HIS EXCELLENCY JOHN ADAMS, PRESIDENT OF THE UNITED STATES OF AMERICA (London, 1798).

67. As he would probably have realised had he actually invaded England.

from the East, in hot pursuit of the remnants of the Great Army Napoleon had led into Russia against the advice of his ministers, General Wellesley and his men entered France from the West.

VII. WHAT MANNER OF MEN WERE THEY?

Of Justinian H.A.L. Fisher concluded that “A man so jealous, vain and irresolute, a man for whom no design was too great, no detail too small, no superstition too absurd, and no subject irrelevant or remote, cannot excite admiration.” “Few men, whose personality is so uncertain, fill a greater place in history.”⁶⁸ “There had been despots before, but few, or none, had made despotism a matter of legal principle.”⁶⁹ Nor was he generally effective: “Justinian, dying in 565 at the age of eighty-three, left his Empire poorer, weaker and less Roman than it was when he mounted the throne thirty-eight years before.”⁷⁰

On Napoleon Sir Walter Scott wrote nine volumes and concluded thus:

The consequences of the unjustifiable aggressions of the French Emperor were an unlimited extent of slaughter, fire and human misery, all arising from the ambition of one man, who, never giving the least sign of having repented the unbounded mischief, seemed, on the contrary, to justify and take pride in the ravage which he had occasioned. This ambition, equally insatiable and incurable, justified Europe in securing his person, as if it had been that of a lunatic, whose misguided rage was not directed against an individual, but against the civilized world⁷¹

In Macaulay’s view though Napoleon had to a remarkable

degree all those intellectual qualities which distinguish the founders of dynasties from their successors . . . his moral character . . . was such as is rarely found except in princes born to despotic power. With talents for war and government not inferior to those of Julius Caesar, he united a violence of temper and an impatience of all opposition, such as the Greek historians ascribe to Cambyses and Xerxes It is not easy to understand how a man of very great talents, who had been born in an obscure rank, who had been educated under a rigid discipline, who had passed through the lower grades of military service, who had known poverty and dependence, who had married from attachment, who was happy in domestic life, and who retained to the last many of the tastes and feelings of the class from which he sprang, should have been selfish, arbitrary, capricious and intolerant of

68. FISHER, *supra* note 8, at 135.

69. KALDELLIS, *supra* note 24, at 2.

70. BROWNING, *supra* note 54, at 132.

71. SIR WALTER SCOTT, LIFE OF NAPOLEON, at ix, 327-28 (2d ed., Edinburgh 1827).

restraint to a degree very unusual even in despots surrounded by flatterers, from the cradle taught to believe that everything is made for them and accustomed to find every thing bend to them. Yet thus it was⁷²

They were great men in some sense, obviously, but Lord Acton was surely right to say that great men are hardly ever good.⁷³ As Tocqueville said of Napoleon “Il était aussi grand qu’un homme puisse l’être sans la vertu” (He was as great as a man can be without being good).⁷⁴ Napoleon was doubtless a genius, but the phrase “evil genius” comes to mind.⁷⁵ As to evil, recall what Shakespeare has Mark Antony say about his (and Napoleon’s) hero Julius Caesar: “The evil that men do lives after them, The good is oft interred with their bones.” The very opposite is true of our two emperors: their legal work survives, but we need reminding that our legal heroes were moral monsters.

72. T.B. MACAULAY, *NAPOLEON AND THE RESTORATION OF THE BOURBONS* 49 (J. Hamburger ed., 1977). Napoleon, a master of duplicity, disinformation and outbursts of rage, real or simulated, was not above cheating at cards, even when playing with children in St. Helena.

73. ROLAND HILL, *LORD ACTON* 300 (2000), yet citing Acton as writing that “wicked men sometimes accomplish what is necessary for the welfare of nations.” *Id.* at 388.

74. ALEXIS DE TOCQUEVILLE, *DISCOURS À L’ACADÉMIE*, 21 APRIL 1842, 16 *OEUVRES COMPLÈTES* 251, 263 (Paris 1989).

75. It is not surprising that so many madmen suppose themselves to be Napoleon. He did so himself. He was “a visionary who could foresee the moment when Europe would be united under one political association, with a common court, a single currency, and a shared system of weights and measures.” LAS CASES, 2 *MEMORIAL DE SAINTE HÉLÈNE* 233, 583, *cited by* S. HAZAAREESINGH, *THE LEGEND OF NAPOLEON* 167 (2004). One is reminded of the slogan “Your dreams are our nightmares”.