

85
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III

Church, State and Divorce in Late Roman Egypt

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A recently published papyrus from Oxyrhynchos¹ contains a petition from one Aurelia Attiaina to Flavius Marcellus, tribune and officer in charge of the peace.² She recounts that

A certain Paul, coming from the same city, behaving recklessly carried me off by force and compulsion and cohabited with me in marriage. [She had a female child by him and lived with him in her house. He behaved badly (the context is damaged) and cohabited with another woman. Then] after some time again he beguiled me through priests until I should again take him into our house, agreeing in writing that the marriage was abiding and that if he wished to indulge in the same vile behaviour he would forfeit two ounces of gold, and his father stood surety for him. I took him into our house, and he tried to behave in a way that was worse than his first misdeeds, scorning my orphan state, not only in that he ravaged my house but when soldiers were billeted in my house he robbed them and fled, and I endured insults and punishments to within an inch of my life.

So taking care lest I again run such risks on account of him, I sent him through the *tabularius* a deed of divorce through the *tabularius* of the city, in accordance with imperial law. Once more behaving recklessly, and having his woman in his house, he brought with him a crowd of lawless men and carried me off and shut me up in his house for not a few days. When I became

1. *P.Oxy.* L 3581.

2. This paper grows out of a portion of a lecture given at Bar-Ilan University (Israel) and at the Hebrew University of Jerusalem in May, 1986. I am grateful to Ranon Katzoff for the invitation to Bar-Ilan, which prompted its writing, and to the audiences at both institutions for their comments.

pregnant, he abandoned me once more and cohabited with his same so-called wife and now tells me he will stir up malice against me. Wherefore I appeal to my lord's staunchness to order him to appear in court and have exacted from him the two ounces of gold in accordance with his written agreement together with such damages as I suffered on his account and that he should be punished for his outrages against me.

Scarcely an edifying tale. The document has, alas, lost its dating formula, and the editor dates it to the fourth or fifth century on the basis of the handwriting.³ As the editor points out, such a date makes the text of interest for the question of the interaction of church and state in the restricting of divorce in late antiquity. That in the fourth to sixth centuries both civil and ecclesiastical authorities sought to discourage divorce has long been known; but the nature of these attempts, their relationship to one another, and their effects in practice have all, I think, been misunderstood.

First, the civil restrictions. The Roman law of marriage had for centuries allowed both divorce by mutual consent and unilateral declarations ending marriages, with hardly any restrictions,⁴ until Constantine introduced new regulations in 331 (*CTh* 3.16.1): women were forbidden to send notices of repudiation to their husbands on "slender" grounds such as that they were drunkards, or gamblers, or philanderers. Wives could use only homicide, sorcery, or tomb destroying as grounds; otherwise, they would be deprived of property and exiled to an island. A man could claim only adultery, sorcery, or procuring, on penalty otherwise of restoring the wife's dowry and not being able to remarry — and if he did remarry, his former wife could seize his house and the dowry of the new wife. None of the restrictions thus actually invalidated either the divorce or the new marriage.

Constantine's legislation lasted three decades. Julian seems, to judge from a passage of 'Ambrosiaster', to have cancelled Constantine's penalties for forbidden repudiation:⁵ "Ante Iuliani edictum, mulieres viros suos dimittere nequibant. Accepta autem potestate, coeperunt

3. The reference to priests, *presbyteroi*, guarantees in any case a date after the church in Egypt came above ground in the second decade of the fourth century, after the edict of toleration of 313.

4. F. Schulz, *Classical Roman Law* (Oxford, 1951), p. 134, notes that Augustus forbade remarriage by a freedwoman who divorced without his consent a husband who was also her patron.

5. See M. Kaser, *Das Römische Privatrecht*, 2 ed. (Munich, 1971), pp. 175 ff. The passage is 'Augustine', *Quaestiones de utroque testamento mixtim* 115 (PL 35: 2348-49).

facere quod prius facere non poterant; coeperunt enim quotidie viros suos licenter dimittere." One fragment of this law, dated 363, apparently survives in the Theodosian Code,⁶ but we do not have its text for the part which concerns us here. 'Ambrosiaster', to be sure, misleads in suggesting that Julian changed a situation existing from time immemorial, rather than merely restoring longstanding Roman custom, but his purpose in this argument did not make exact legal history necessary or, perhaps, desirable.

So far as we know, it was not until 421, long after Julian's death, that restrictions were again imposed. In *CTh* 3.16.2, Honorius imposed a new set of distinctions. Repudiation by the woman without cause led to the loss of marriage gifts and dowry and to her deportation, as well as to denial of the right of remarriage; repudiation for ordinary traits of bad character led to the same financial penalties and denial of remarriage, but not to deportation; and repudiation for serious crimes allowed her to remarry after five years had passed. Husbands' repudiations were divided in the same three classes, but with somewhat different penalties: groundlessly, the same penalties as for the woman who divorced on grounds of bad character (and the repudiated woman would be allowed to remarry after a year); on bad character, he returns the dowry, recovers his gifts, and can remarry after two years; on grounds of criminal behavior, he keeps all of the property and can remarry immediately.

Eighteen years later, Theodosius (in *NovTheod* 12, 10 July 439) ordered that the dissolution of marriage required the sending of a *repudium*.⁷ He went on, however, to say, "But in sending a notice of divorce and in investigating the blame for a divorce, it is harsh to exceed the regulations of the ancient laws. Therefore the constitutions shall be abrogated which commanded now the husband, now the wife to be punished by the most severe penalties when a marriage was dissolved, and by this our constitution we decree that the blame for divorce and the punishments for such blame shall be recalled to the

6. *CTh* 3.13.2 (363); this passage deals with dowry and marital gifts.

7. The reference to imperial law in *P.Oxy.* 3581 is clearly tied to the notion of *repudium*: "I sent him through the *tabularius* a *repudium* through the *tabularius* of the city in accordance with imperial law." This reference seems to me to refer most obviously to the requirement of a *repudium* stated in the legislation of 439 and repeated in 449. (Coles in his note to line 16 cites *P.Stras.* III 142 [a divorce document of 391, discussed below] as evidence for Julian's repeal of Constantine's legislation, thus allowing a fourth-century date for this papyrus. But, as we shall see, the Strasbourg papyrus reflects a divorce by mutual consent, not affected by either Constantine or Julian, and thus is irrelevant to the date of the Oxyrhynchos papyrus.)

ancient laws and the responses of the jurists." This law of Theodosius followed by little more than a year the appearance of his Code, which included the law of Honorius (issued in the name of Theodosius and Constantius as well as himself) quoted above, which it appears to contradict.

Ten years later, however, Theodosius (*CJ* 5.17.8) returned to a more specific regulation of the causes for divorce which could be cited in a *repudium*. This time the sexes are treated more equally, for a woman has a wide range of causes allowed, including the husband's adultery, criminality, or violence toward her. Justified repudiation allowed the woman to recover her property and remarry after a year, a man to remarry immediately. Unjustified repudiation subjected the woman to a five-years' wait, the man to forfeiture of the dowry. Anastasius later (*CJ* 5.19.7, of 497) allowed the woman to remarry after a year if a groundless repudiation was by common consent.⁸

These meanderings of imperial legislation have received quite differing interpretations from modern scholars. It is neither possible nor useful to cite all of the extensive bibliography here; two examples of imprecision by great scholars will suffice. H.J. Wolff⁹ describes Constantine's legislation as a "rigid restriction of justified divorce to a few cases of grave offense," and regards the legislation of 421 and 449 as a continuation of its development, while the novel of 439 is a "shortlived return to classical principles." A.H.M. Jones¹⁰ claims that "since divorce under the old legal forms had been rendered so difficult, many couples dissolved their marriage by consent. This was forbidden by Theodosius II in 439, but he at the same time abolished all the penalties for divorce, and went back to the classical law." It is true, of course, that not requiring grounds for termination of the marriage is classical, but the requirement of a formal *repudium* to accomplish this termination is not. On the other hand, it is surely incorrect to think that this requirement made divorce by mutual consent impossible. Anastasius' constitution, mentioned above, shows that that is not what

8. A.H.M. Jones, *The Later Roman Empire, 284-602* (Oxford, 1964), p. 975, (= Jones, *LRE*) wrongly describes this law as ruling "that if a husband divorced his wife with her consent" she could marry after a year. Anastasius actually does not distinguish the sender of the repudiation, ordering only that it be sent by common consent ("Si constanter matrimonio communi consensu tam mariti quam mulieris repudium sit missum, quo nulla causa continetur").

9. "Doctrinal Trends in Post-Classical Roman Marriage Law," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Rom. Abt.* 67 (1950), 262. This article, occupying pp. 261-319, has very extensive bibliographical notes.

10. *LRE*, p. 974.

he thought the law meant; and Valentinian's abrogation of the Theodosian novel of 439 (*NovVal* 35.11, of 452) suggests that that novel's burden for him was its permission for unilateral and unjustified repudiation, not any restrictions put on consensual divorce.¹¹ Indeed, Justinian's legislation in the next century prohibiting divorce by mutual consent (*Novel* 117.10) says explicitly that it was not previously prohibited.

To summarize the course of legislation: apparently Constantine's limits on the possible grounds for unilateral divorce were repealed by Julian some thirty years later, and for six decades there was no imperial legislation known to us on the subject. In 421 similar restrictions were reintroduced; in 439 they were removed in the East in favor of a requirement for written repudiation, a law accepted in the West in 448;¹² but in 449 Theodosius changed his mind and again reintroduced restrictions (a bit more systematic and equitable this time), a course essentially followed by Valentinian in 452 with his return to the law of 421. Apart from Anastasius's clarification late in the century, the next major change did not come until Justinian tried to prohibit divorce by mutual consent in 542, a ban repealed by Justin in 566 (*Novel* 140).

Many modern works, apart from failing to observe consistently the distinction between unilateral and consensual divorce and that between prohibiting and penalizing a divorce, go on to describe this legislation as the result of Christian influence. "Christian legislation allowed divorce only for certain reasons and instituted penalties in case of contravention," said Schulz.¹³ "The Christian empire, however, brought restrictions on divorce itself," said Thomas.¹⁴ Such statements will not do; the imperial legislation of the fourth and fifth centuries is not "Christian" legislation, and the empire was not a "Christian" empire, no matter how often it is called one. But underlying these remarks is a serious debate about the extent of Christian influence on the imperial legislation on divorce. Positions have ranged from the view expressed by Schulz and Thomas to the opposite extreme, a denial

11. Valentinian's novel orders that "those regulations which were decreed by our sainted father Constantius shall be preserved inviolate." Pharr's footnote: "Not extant, but cf. *CTh* 3, 16, 1." An error for citing 3.16.2? The latter law includes Constantius among the Augusti, in 421, and is surely what is meant.

12. As part of the general affirmation of Theodosius' laws after the Code, see *NovVal* 26.

13. Above (n. 3), p. 134.

14. *Textbook of Roman Law* (Amsterdam, 1976), p. 426.

of all Christian influence.¹⁵ Jones rather enigmatically remarked that "the Christian emperors tightened up the laws of divorce, but not in an entirely Christian sense."¹⁶

There is no doubt that the emperors of the fourth and fifth centuries did enact some laws which show a distinctively Christian viewpoint. A random example is the edict of Valentinian, Theodosius, and Arcadius (*CTh* 9.7.5) in 388 forbidding any marriage of a Jew with a Christian; such a marriage is to be considered adultery, and anybody is allowed to accuse the culprits. Many others could be cited. Nor was the church shy about asking for imperial legislation when it thought it needed; the title on heretics in the Theodosian Code (*CTh* 16.5) is sufficient evidence.¹⁷ And there is even one piece of well-known evidence for a request by a church council (that of Carthage in 407) for imperial legislation to prohibit remarriage while a former spouse is alive;¹⁸ it seems to have been ignored. On the other hand, the church showed considerable reluctance to try to impose generally on this world what it proclaimed as the ethical norms of the City of God.¹⁹

But these are not sufficient considerations to establish the intent of these laws. For that, two important points need examination. First, do the laws correspond to the position of the church both on divorce and on the relationship of church and state with respect to it? And second, what do the legislators have to say about their reasons?

The church took a strong position against divorce right from the start. Paul (1 Co 7:8-11) gave as Christ's prescription that those who were married should not be separated and that a woman should not leave her husband; if she did, she should reconcile with him or stay unmarried; and that a husband should not dismiss his wife. This position rests on the same tradition reported in the Synoptic Gospels

15. A summary can be found in Wolff, pp. 263-69, esp. pp. 267-68 n. 23, who himself thinks that "doubtless the emperors did go a long way toward meeting the ethical demands of the new faith." Cf. the opposing view of J.B. Bury, *History of the Later Roman Empire* (London, 1889), 2: 416: "The influence of Christianity on the legal conception of the conjugal relation was, as Zacharià remarks, small up to the time of Justinian; and it was the Isaurian Emperors who really introduced a christian legislation on the subject." Bury points out that it was only Leo, in 740, who instituted punishment for fornication and who forbade divorce, even by mutual consent, except on very narrow grounds (wife's adultery, husband's impotence, life-endangering slander by either, leprosy).

16. *LRE*, p. 974.

17. Cf. the chapter on "Conversion by Coercion" in R. MacMullen's *Christianizing the Roman Empire* (New Haven, 1984), pp. 86-101.

18. C. Munier, *Concilia Africae*, Corp. Christ. 149 (Turnhout, 1974), p. 218: "In qua causa legem imperialem petendam promulgari."

19. See the cogent remarks of S. Mazzarino, *Aspetti sociali del quarto secolo*, *Problemi e ricerche di storia antica* 1 (Rome, 1951), pp. 38-41.

(Mk 10:2-12; Mt 5:31-32, 19:3-12; Lk 16:18), where Jesus denounces divorce as Moses' concession to "hardness of heart" and not in accordance with God's plan for men and women. Paul on his own authority further counsels Christians not to divorce unbelieving spouses, urging them to hope for their conversion (1 Co 7:2-16). Neither the Gospels nor Paul's letters, of course, are systematic treatises; and Paul does not give the church at Corinth any sanctions for disobedience to enforce on those who do not follow his prescriptions.

The church fathers down to the fifth century dealt with the subject of divorce on many occasions. Their reasons for forbidding it vary, as does their attitude toward marriage itself (some, for example, admitting affection as well as procreation as grounds for marriage), but they are mostly agreed that while divorce (in the sense of separation) is allowed for adultery by the other spouse, remarriage is not allowed to either party under any circumstance while the former spouse is still living.²⁰ The theologians and councils thus strongly urge the faithful not to take advantage of their civil right to remarry after divorce, even though many (a majority, in fact) of the theologians took as a command Jesus' permission to divorce an adulterous spouse (unclear though the interpretation of that passage is) and considered it mandatory. Ambrose (*Commentary on Luke*, 8.4) deals directly with the relationship of the church's teaching to civil law, in saying that human law allows divorce, but divine law forbids it. As a sacramental conception of marriage takes form with Augustine, a still stronger theoretical basis is provided for regarding marriage as indissoluble, at least at a spiritual level, while the partners lived.

In taking Jesus' radical statements on divorce at face value as ethical prescriptions for believers, the church had already from early days

20. For a careful and exhaustive treatment of the patristic discussions of divorce, see Henri Crouzel, *L'église primitive face au divorce du premier au cinquième siècle*, *Théologie historique* 13 (Paris, 1971), on which most of what follows relies. The subject is, of course, enormously controversial. Crouzel deals with many of his critics and those of a different persuasion in a collection of articles, *Mariage et divorce, célibat et caractère sacerdotaux dans l'église ancienne* (Turin, 1982). Ample bibliography will be found in both books. B. Löbmann, *Zweite Ehe und Ehescheidung bei den Griechen und Lateinern bis zum Ende des 5. Jahrhunderts* (Leipzig, 1980), though he lists (p. 47 n. 59) Crouzel's book of 1971, seems hardly to have used him, repeating his examination in detail. He sees a more substantive theological division (eschatological vs. legalistic) between East and West; while he seems right that the West is more legalistic, it is not clear to me that this is the result of theological differences so much as of disciplinary and pastoral ones. The book is overall less satisfactory than Crouzel's. Much of the bibliography on divorce is apologetic and polemical in tone, seeking (especially since Vatican II) to support a particular view of how the Roman Catholic church of today should deal with divorced and remarried members.

taken a step it did not take with much of his other radical preaching.²¹ Perhaps more important, affecting all areas of moral teaching, was the general development of a conception of church discipline which excluded from communion not only heretics but those regarded by the church as grievous sinners. This development did not take place all at once, but it was nearing maturity in the fourth century. It must be emphasized that this legalistic conception of regulating Christian behavior was equally a choice which could have gone differently. And even with that choice made, the formation of canon law was a long process, with no centralization or uniformity for a long time. It is anachronistic, I think, to look to the authors of this period for clear distinctions between behavior which is allowed and that which is only tolerated.²² The authors tell us that certain behavior is contrary to divine law. A few of them, and some of the church councils, tell us that the church imposed penance or more severe penalties on certain behavior.

We find in the theologians and councils of the ancient church a considerable variety of opinion about how best to deal with the pastoral issues raised by the failure of many of the faithful to conform to the church's teaching on the issue of divorce. (None of them, however, except the council at Carthage cited above, sought to make the civil law conform to the church's teaching.) Not all of them took the view which ultimately prevailed in the West, that those who remarry after divorce should be excluded from communion. From the third and fourth centuries, the texts which pertain to the actual practice of pastoral clergy (as opposed to the abstract dictates of theologians) show some latitude. Origen cites the practice of some bishops in permitting remarriage to a woman while her husband is alive. He describes this behavior as contrary to scripture, but as intended to avoid greater evils,

21. See Crouzel, *L'église primitive*, p. 33, on Jesus' equally uncompromising teaching about oaths: "Or, non seulement l'Église a constamment admis le serment dans la vie publique et privée, mais elle a condamné à plusieurs reprises des hérétiques qui en refusaient la licéité et elle a imposé des serments aux membres du clergé, reconnaissant par le fait même qu'elle vit dans un monde où le "mal," c'est-à-dire le mensonge, existe encore, bien que l'idéal du Royaume comporte la sincérité absolue. Or elle refuse d'appliquer à la troisième antithèse le même réalisme, supposant ainsi que le baptême a radicalement supprimé la "dureté de coeur" de l'Ancien Testament, et elle impose à tous les séparés avec une rigidité juridique absolue, sous peine de refus des sacrements, la continence "en vue du royaume des cieux", comme si c'était "donné à tous" malgré les empêchements psychologiques et les insuffisances spirituelles."

22. On this point I believe that Crouzel is throughout his work too quick to use categories not really applicable at this date; that does not, however, diminish my agreement with his analysis of the authors' views.

and he thinks that the bishops have not acted unreasonably.²³ The Council of Elvira in Spain (probably 306), while maintaining on the whole a strict line, makes an exception in admitting to communion, in the event of infirmity, a woman who remarried after divorcing an adulterous husband.²⁴ The Council of Arles, in 314, ordered that husbands who put away unfaithful wives and were prohibited by the church from remarrying be advised (*consilium eis detur*) not to remarry while their wives lived; but no sanctions were imposed on them if they did remarry.²⁵ As these are the first two councils from which such canons are known, they are valuable evidence for the state of things in the early fourth-century West.

A more complex situation, which shows how much actual practice might vary, is found in the canonical work of Basil of Caesarea.²⁶ Basil's views are found in three letters of 314-315; all of them are based on and envisage specific situations. Basil allows hardly any reason for a woman to leave her husband; if she does, a woman who lives with the deserted husband is not condemned, he says. (The latter's behavior is classified as fornication but excused.) Basil says that the reason for the difference in customs for men and women is not easy to give, but that this is the way local custom goes. The view described by Basil (it is not at all clear that it is his own) is somewhere between the Roman and Pauline views of male/female equality in the matter of adultery, but closer to the Roman; the husband is treated as a fornicator with unmarried women, as an adulterer only with a married one. Even more striking is Basil's distinction in the matter of what behavior a spouse must put up with: a wife is to put up with almost anything, a husband not with adultery. Basil's practice and doctrine are thus different for the sexes, in that an abandoned husband can cohabit without being excluded from communion, whereas an abandoned wife cannot. Most striking of all is his admission that he cannot justify the local Cappadocian practice on the basis of the church's doctrine.

The apocryphal canons of Nicaea²⁷ seem to provide that a wife or husband unjustly accused by her or his spouse can repudiate him or her

23. Origen, *On Matthew* 14.23, cited by Crouzel, *L'église primitive*, pp. 82-83, from *Die griechischen christlichen Schriftsteller* 10: 340.25.

24. See Crouzel, *L'église primitive*, pp. 116-21 on this text.

25. Crouzel, *L'église primitive*, pp. 121-23; see C. Munier, *Concilia Galliae*, Corp. Christ. 148 (Turnhout, 1963), p. 11. Crouzel, *Mariage et divorce*, pp. 88-91 and 127-42, discusses this canon, but his attention is focused on one textual crux, the outcome of which does not affect the question at stake here.

26. Crouzel, *L'église primitive*, pp. 133-50.

27. *Ibid.*, pp. 240-43.

and remarry within the church. These canons come from an Egyptian source, perhaps as early as the start of the fifth century, but the date is not absolutely certain. They do not, however, give permission to divorce an adulterous spouse and remarry: if anyone does this, he or she will be chased from the church. There are also some Armenian canons²⁸ whose date is uncertain; some probably belong to 365. From them it seems that the Armenian church allowed remarriage after delay and penance.

The general conclusion to which these texts lead is that neither in the West nor particularly in the East was there uniformity in practice in the fourth and fifth century church in the discipline of communicants who remarried after a divorce. This does not mean that the church accepted and blessed such marriages, but it did in some instances show pastoral indulgence in dealing with the remarried member. We have no way of estimating how widespread exclusion was; the majority of the church councils do not deal with such marital issues at all.²⁹ Nowhere does the church invoke penalties other than public penance or exclusion from communion, nor suggest the application of the restrictions actually known to us from imperial laws, most of which concern property which the majority of communicants did not have.

On our second major question, the actual character of the late imperial legislation, two approaches are useful. First, the legal doctrine underlying the legislation. Wolff has shown that "the main pattern of thought which dominated Constantine's and his successors' divorce laws is already apparent in Augustus's well-known ban on the divorce of her husband-*patronus* by the *liberta*."³⁰ And after extensive study of the doctrinal foundations of the late imperial legislation, he concludes,

divorce is forbidden, but once effected it cannot be brushed aside, since it always remained essentially the actual dissolution of a primarily social relationship. Only — in the *lex Iulia* — some of the normal consequences of a lawful divorce are eliminated, or — in the legislation of Constantine and his successors — the

28. *Ibid.*, pp. 244-46.

29. The Gallic councils hardly touch on the subject at all; the African ones only a little more. Ferrandus' *Breviarium Canonum*, drawn up in Carthage c. 523-546 on the basis of a wide variety of councils from West and East, includes only two rules (out of 232 canons) dealing with divorce (*Concilia Africae*, pp. 287-306).

30. Wolff, "Trends," pp. 279-88.

unlawful divorce brings into play private and criminal law sanctions against him or her who disobeys the law.

In short, nothing in the late legislation either specifically adduces or implicitly rests on a doctrine of marriage different from the classical Roman one, so opposed in character to what we have seen of the church's understanding of the relationship.

Motives are harder. Wolff, though denying any doctrinal change in marriage law, thinks that "the Christian emperors were motivated by objectives entirely different from those of Augustus."³¹ Is this true? The emperors are on occasions explicit about their reasons. First, as Theodosius II said in his *Novel* 12 (439), "the consideration of children demands that the dissolution of marriage must be more difficult." The remark is repeated at the start of *CJ* 5.17.8 (449). From the fact that all of the marital legislation is largely concerned with the disposition of dowry and marital gifts, we may surmise that what this means is that the consideration of the protection of the property of the children was at stake; the same is true of restrictions on remarriage.³² The children of a first marriage were assumed to be injured by a second one. There was also a need for the safe-guarding of the separateness of the upper classes. We see both these motives at work, for example, in *CTh* 9.9.1, an edict of Constantine in 329: he prohibits the union of a woman with her own slave. Both violators are to receive a capital sentence, and anyone has the right of prosecution. Any existing unions of this sort are to be broken up and the slave exiled; any children are to be deprived of the insignia of rank and their property. It is this last point which gives the game away, and it is brought home by later imperial legislation as well.³³ Most people did not have any insignia of rank to be taken from them, after all. Exactly the same motives lay behind Augustus' legislation on morals and marriage: he wanted senators to marry within their order, keep their marriages intact, be faithful, and produce lots of children. What the less exalted classes did, he could not have cared

31. *Ibid.*, p. 287. He rejects, as too closely tied to the details, the detailed arguments of E.J. Jonkers, *Invloed van het Christendom op de romeinsche Wetgeving betreffende het Concubinaat en de Echtscheiding* (Wageningen, 1938), who emphasized the continuity of this legislation with earlier imperial enactments and identified in prechristian thought sufficient basis for the ideas which the emperors express. As we will see, however, when one tries to move from the specifics to the "general tendency," as Wolff calls it, one finds oneself in quicksand.

32. Cf. Jonkers, *Invloed*, p. 190, citing *CJ* 5.9.5.6.

33. See especially *NovAnth* 1, where the rule is extended to include freedmen as well as slaves, though existing unions are not broken up. Anthemius is explicit that it is the upper class which is the intended audience.

less,³⁴ and the same is true of his Christian successors more than three centuries later.³⁵

These prudential considerations for family property and the integrity of the upper classes have nothing in common with the dogmatic basis of the Christian view of marriage described above, any more than the doctrinal basis underlying the actual edicts corresponds to a Christian understanding. And the laws themselves, which limit unilateral divorce to various acceptable grounds, allow divorce by mutual consent until Justinian, and permit remarriage after no lapse of time or one determined by the frivolity of the excuse for divorce, have no common ground with the church's view that remarriage after divorce was inconsonant with the nature of marriage in the first place. It seems, therefore, that neither doctrinal underpinnings, nor stated motives, nor actual results concord with a view that Christian influence is at work in the limits on repudiation.

And yet almost all writers on this subject have thought that the Constantinian and Justinianic limits on unilateral divorce proceeded from the influence of Christianity. For the most part, however, these writers have simply affirmed this influence, as if it were self-evident.³⁶ The few discussions to speak to the matter more explicitly are

34. Cf., e.g., R. Syme, *The Roman Revolution* (Oxford, 1939), pp. 443-46.

35. The same attitudes can be seen in other areas of legislation. For example, social policy did not discourage sex for hire, as long as it involved women of the lower class. A law of Constantine from 326, classified in the Theodosian Code (*CTh* 9.7) as being on the law of adultery, makes this and much else clear: in cases of accusation, one is to check into the status of the woman. Tavern girls go free: "In consideration of the mean status of the woman who is brought to trial, the accusation shall be excluded and the men who are accused shall go free, since chastity is required only of those women who are held by the bonds of law, but those who because of their mean status in life are not deemed worthy of the consideration of the laws shall be immune from judicial severity." Serving women in drink shops were practically synonymous with prostitutes in antiquity, and it could hardly be clearer that (as three centuries earlier with Augustus) social class was the essential point of moralis legislation. One sees no trace of any intrusion into this legislation of the uncompromising teachings of the gospels.

36. The literature is vast. As examples: C. Hohenlohe, *Einfluss des Christentums auf das Corpus juris civilis* (Vienna, 1937), an uncritical and pious account; J. Gaudemet, *La formation du droit séculier et du droit de l'église aux IV^e et V^e siècles*, 2 ed. (Paris, 1979), who describes Christian influence on family legislation as "indéniable, encore que plus limitée qu'on ne l'a cru parfois"; J. Vogt, "Zur Frage des christlichen Einflusses auf die Gesetzgebung Konstantins des Grossen," *Festschrift für Leopold Wenger*, Münchener Beiträge 35 (Munich, 1945), 2: 118-48 at p. 134: despite the lack of resemblance of Christian and legal views, he insists on a connection (admitting, however, that the punishment of a second marriage is only a matter of protecting the children of the first, not of a Christian view of remarriage); cf. Wolff, "Trends," p. 267 n. 23 for further bibliography, and a more detailed report on the literature concerning Christian influence on late Roman law by L. Wenger in *Archiv für Papyrusforschung* 12 (1937), 298-307.

unsatisfactory, no doubt because motives which find no expression and which cannot be deduced from the doctrine of marriage at work in the laws are hard to demonstrate.³⁷ For example, Wolff cites in support of "the general tendency which, especially with Constantine and again with Justinian...was directed toward strengthening the marital bond in the Christian sense" a work of Biondo Biondi on Justinian, in which Biondi proclaims that Justinian was "the first Christian emperor who promulgated a truly Christian law," referring to *Novel* 117.10. "Riforma audace che di tanto si allontanava dalla tradizionale concezione pagana del matrimonio di quanto rispondeva alla concezione cristiana," says Biondi.³⁸ Now the *Novel* in question does not offer any justification for its denial of consensual divorce, any more than for other provisions. Insofar as one sees a consistent theme throughout *Novel* 117, it is (as usual) the protection of the property rights of the children of repudiated marriages. The one overtly "Christian" element is the exception made for those who wish to devote themselves to a chaste religious life;³⁹ but such separation is in general not approved of by the main Christian theologians of the period before Justinian.⁴⁰ Biondi's affirmation is in fact nothing more than an act of

37. Cf. V. Basanoff, "Les sources chrétiennes de la loi de Constantin sur le repudium," *Studi in onore di Salvatore Riccobono* (Palermo, 1932), 3: 177-99, who bizarrely describes the penalties in the Constantinian law as (p. 194), "la formule de transaction inspirée, selon toute vraisemblance, par le texte du Pasteur, adapté à des conditions nouvelles." It is hard to see what possible connection between Hermas' teaching and the Constantinian legislation can have provoked this remark. Equally odd is his insistence that classical Roman law knew no divorce by consent (p. 193); since the decision of one person was sufficient, surely that of two was also adequate, and classical law required no particular form of divorce.

38. *Giustiniano primo, principe e legislatore cattolico*, Pubbl. Univ. Catt. del Sacro Cuore, 2 ser., Scienze giuridiche, 48 (Milan, 1936), p. 43.

39. *Castitatis concupiscentia*, in the deliciously oxymoronic phrase of the apparently contemporary Latin version of the law preserved in the Appendix to the Epitome of Iulianus (*sophrosynes epithymia* in the original Greek); Biondi apparently did not appreciate the phrase, for he substitutes *desiderium* (from the translation of the editor, Schoell) for *concupiscentia* in quoting it! One should also note relegation to a monastery as punishment for contravention of these laws by women æ hardly a Christian view of the monastic vocation.

40. See Crouzel, *L'église primitive*, pp. 376-77. Such separation is forbidden by a canon from a Council of Gangra cited in Ferrandus' *Breviarium*, in *Concilia Africae*, p. 301, no. 164: "Ut si qua mulier quasi religionis causa virum dimiserit, anathema sit."

faith in his "catholic" Justinian.⁴¹ Now one cannot demonstrate Justinian's state of mind before ordering this legislation, and that a Christian emperor wanted to discourage divorce may be quite right; but to affirm his motives, in the total absence of evidence, is the work of a hagiographer, not an historian.⁴²

We now turn to inquire what the effect in practice of all of this legislation was. An enumeration and description of the surviving documentation for divorce is enlightening. Traditionally, Egyptian law had, like Roman law, allowed divorce either by mutual consent or by repudiation, with no penalties for either party unless some had been established in a contract concerning property.⁴³ In Roman Egypt up to the fourth century, these compatible traditions produced a consistent habit of divorce agreements by mutual consent, in which both parties are freed of liability.⁴⁴ The first of our fourth-century documents (*P.Oxy.* XXXVI 2770, of 26 January 304) shows the expected pattern: Herakles and Maria⁴⁵ agree that they are divorced, that each has his own property, and that they have no claims against each other. There are no children, each is able to remarry at will. The document itself is called τὰ τῆς ἀποζυγῆς γράμματα, the document of divorce. A similar formula is found in the undated *P.Oxy.* XLIII 3139 (late third/early fourth century), which calls itself τὰ τῆς περιλύσεως καὶ ἀνεγκλησίας γράμματα, the document of dissolution (of marriage) and of renunciation of claim. From the following year comes *M.Chr.* 295 (= *P.Grenf.* II 76 = *Jur.Pap.* 21, 305/6, Great Oasis). It begins "Since, as a result of some

41. "Certo non tutta l'attività di Giustiniano è encomiabile," writes Biondi, *Giustiniano*, p. 189; but he demurs only at his excess of zeal, and the purpose of his book is overtly encomiastic, a hymn of praise to Justinian for supposedly making civil law conform to the law of the church.

42. It should, however, be mentioned that the quaestor responsible for issuing the legislation was evidently Tribonian's successor Junilus, who seems to have been a (lay?) theologian as well; cf. A.M. Honoré, *Tribonian* (Ithaca, 1978), pp. 237-40.

43. See P. W. Pestman, *Marriage and Matrimonial Property in Ancient Egypt*, *Pap.Lugd.Bat.* 9 (Leiden, 1961) for a comprehensive treatment; there is also an interesting article by S. Allam, "Quelques aspects du mariage dans l'Égypte ancienne," *Journal of Egyptian Archeology* 67 (1981), 116-35, stressing practical deterrents to behavior as free as theory would allow.

44. The standard list is O. Montevecchi, *Aegyptus* 16 (1936), 20, with additions in her *La papirologia* (Turin, 1973), p. 206. A comprehensive treatment of divorce in the later period can be found in Andreas Merklein, *Das Ehescheidungsrecht nach den Papyri der byzantinischen Zeit* (Dissertation, Erlangen-Nürnberg, 1967).

45. The editor remarks, "on Tcherikover's criteria... she should be considered as Jewish. But since her family and husband's family bear Graeco-Egyptian names, and the document itself offers no other indication of her religion, it is possible to accept her as a pagan, believing her name to be a reflection of Jewish or Christian influence." In a fourth-century context, surely a Christian identity is more likely.

evil demon's having come upon us, we have agreed to be divorced from one another with respect to our common marriage," and again proceeds to declare that neither party has any obligations to the other. All of these thus have clear antecedents in the Egyptian practices of earlier centuries; all (probably) are prior to Constantine's legislation.⁴⁶

Regrettably, we have no actual divorce documents from the thirty-year period after Constantine's legislation limiting repudiation. The next such document is found only with *P.Stras.* III 142, of the year 391. The core of the contract, in the form of a letter from the woman to the man, runs as follows:

Since I, Allous, lived with you, Elias, for some time, but we decided for some reason of an evil demon which came upon our common life together to separate, in accordance with this I, Allous, agree that I have no claim against you concerning our life together or any other written or unwritten debt or collection or claim or inquiry at all, and that you Elias have the right to cohabit in another marriage, with you being free of complaint about this.

Blame is missing: some evil demon came upon the relationship, it ended, both parties are free, and no one has any claim on the other. The document describes itself as a *perilusis*. It is obviously close in character to earlier documents of the type. A similar document seems to be referred to in *P.Lips.* 39 (390), a petition in which a woman states that she sent her former husband a *repudium* after a *dialysis*, a mutual dissolution of the marriage, executed between them. (Her current complaint concerns his subsequent assault on her.)

The terminology here is of great interest. *Repudium* is linked to *dialysis*; evidently an agreement to divorce was followed by at least the wife's, and probably both parties', sending to the other a document stating that they were divorced and that they had no claim against the other (though such documents were evidently not required until 439).

46. The one new element in this century is the "evil demon" phrase. This is treated in detail by Merklein, *Das Ehescheidungsrecht*, pp. 73-79; he concludes that it is a means of avoiding any question of the culpability of one spouse or the other which might lead to later legal problems. R.C. McCail, *Mnemosyne* 21 (1968), 76-78, points out that the evil demon appears in Justin's *Novel* 140 ("Therefore we pray that marriages may be happy for those who enter on them, so that they never become the work of the evil demon") and argues for a reference to its *phthonos* in *Anth.Pal.* 7.596 (Agathias). These passages suggest that it is not used merely as a legal self-exculpation in the papyri, but was a widespread conception.

This linkage, observed here first in 390, continues in later documents. Regrettably, we have no actual divorce documents from the fifth century, but sixth-century terminology is consistent with the Leipzig papyrus. *P.Herm.* 29 (586), executed between two Samaritans, presents itself as ἀντισυγγραφαί, mutual agreements, of διάλυσις ἤτοι ρεπούδιον; each party is to have a copy for security. The formula is familiar:

Whereas we were of late joined together in lawful marriage and community of life and for the procreation of children according to the usage of men, with good hopes; and today, we know not whence, through some malign spirit, they decided to part from each other....

Claims are renounced. Another mutual agreement of divorce from 569 (*P.Flor.* I 93 = *M.Chr.* 297) describes the document as a *repudium*. The term could, of course, be used also of a unilateral declaration, like that by which the father of a married woman who was still in his *potestas* terminated her marriage on the grounds of "lawless deeds, which are pleasing neither to God nor man and are not fit to be put into writing" on the part of his "most honorable son-in-law" (*P.Oxy.* I 129 = *M.Chr.* 296; translation from *Select Papyri* I 9). This latter declaration is addressed to the son-in-law through the *defensor civitatis* (*ekdikos*).⁴⁷

What we find so far, then, is substantial continuity, in substance and phraseology, from the time before Constantine to the late sixth century, after numerous changes in imperial laws. It is true that we have no divorce documents from the period between Constantine and Julian, nor from the fifth century, although *P.Cair.Masp.* II 67154 from the reign of Justinian (which year, we cannot tell⁴⁸) does provide an example of divorce by mutual consent in the first half of the sixth century. It is sworn to by the Holy Trinity and the emperor, thus breaking impartially Jesus' bans on divorce and oaths in one breath. But the fifth century is not in any case a well-documented period. A

47. Other sixth-century references to *repudia* are *P.Cair.Masp.* I 67121 (573), II 67153 (= 67311) (568), 67154 (Justinian), 67155 (date lost). Several of these contain the same language as the earlier divorce agreements, blaming an evil demon; all are mutual agreements. Merklein, *Das Ehescheidungsrecht*, pp. 64-67, thinks that the papyrological use of *repudium* does not indicate a full "reception" of the Roman concept in Egypt.

48. The date is provided only by an oath formula invoking Justinian; the editor thought that the text on the other side of the papyrus was written "assez longtemps" after the recto, and specifically in the period 566-570. But that does not help us to know whether the divorce fell before or after 542.

review of our scanty material on marital relations from the period will bring us back to the document with which we started.

In a papyrus of 362,⁴⁹ a petitioner alleges that six years earlier he married a woman named Tamounis and gave her marriage gifts. He carried out all of the legal and normal duties and lived with her three years. But her mother took her away and gave her to another man in marriage while the complainant was away on private business trying to make enough to live on. When he came back... the papyrus breaks off. After three years, what redress is he seeking? We cannot tell. But it is worth pointing out that three years before was in 359, before any possible Julianic abrogation of Constantine's legislation. (Indeed, the date of that abrogation seems to be 363, as we have seen, or after the date of this papyrus.) There is no question of mutual consent to divorce in this case;⁵⁰ of course, since we do not have the mother's side, we do not know what cause she can have alleged. Since Constantine left wives hardly any usable causes for repudiation, however, the mother's action would on the face of it appear to violate the law. After three years, no consequences have followed.⁵¹

That we have no traces of the effects of any of the imperial legislation on divorce should not unduly surprise us.⁵² Modern studies of such areas as civil procedure and restrictions on social mobility have concluded that the effectiveness of imperial legislation in later Roman Egypt was very limited. Schiller has shown that there is no evidence for civil procedure in sixth-century Egypt, a fact he suggests may in part be a result of Coptic disaffection with the Chalcedonian central government.⁵³ In fact, Schiller argued that in the sixth century "contemporaneous legislation emanating from Constantinople likewise had no impact on the current law of Egypt."⁵⁴ On the other side, Taubenschlag gave a very optimistic account of the effectiveness of

49. *P.Cair.Preis.* 2 (Hermopolis; cf. *BL* 3.36).

50. *P.Stras.* III 131, a marriage agreement of 363, specifically foresees divorce by mutual consent if differences arise between the couple.

51. Parental meddling turns up in another petition of earlier date, and was no doubt a common phenomenon; *P.Sakaon* 38 (Theadelphia, 312).

52. Merklein, *Das Ehescheidungsrecht*, pp. 102-4, notes that there is no sign of the enforcement of imperial laws on divorce in Egypt, nor of any other curtailment of freedom of divorce.

53. A.A. Schiller, "The Courts are no More," *Studi in onore di Edoardo Volterra* (Milan, 1969), 1: 469-502, esp. 498-502.

54. A.A. Schiller, "The Fate of Imperial Legislation in Late Byzantine Egypt," *Legal Thought in the United States of America under Contemporary Pressures*, ed. J.N. Hazard and W.J. Wagner (Brussels, 1970), pp. 41-60 at p. 45.

Justinian's legislation on divorce,⁵⁵ but without any real basis, for his only item of interest is the father's repudiation of his daughter's husband in *P.Oxy.* I 129, which would have been equally possible at any time before Justinian and thus need not reflect his legislation at all. The fourth and fifth-century situation is less clear. Keenan showed that late antique Egypt's population seems neither more nor less mobile than that of earlier periods, despite imperial legislation; he cautions, however, against excessively sweeping conclusions about the effectiveness of imperial laws.⁵⁶ Schiller, who thought that fourth and fifth-century laws had some effect in Egypt through the efforts of private notaries (rather than through direct governmental enforcement), placed the end of that effectiveness in the early sixth century.⁵⁷ In any case, imperial legislation directly addressed to officials in Egypt in almost all cases concerns matters of public law (liturgies, taxes, and the like), not the civil law.⁵⁸

An undated fourth-century affidavit (*P.Oxy.* VI 903) provides an interesting glimpse which leads us back to the violent marital conflicts of *P.Oxy.* 3581 and the church's involvement in these marriages. The couple in question lived together without any written documents; both were evidently well-off slaveowners. There were disputes over property, with the man suspecting theft by the staff.

He shut up his own slaves and mine with my foster-daughters and his overseer and son for seven whole days in his cellars, having insulted his slaves and my slave Zoe and half killed them with blows, and he applied fire to my foster-daughters, having stripped them quite naked, which is contrary to the laws. [Other insults are recounted. Then there was an agreement, in the presence of the bishops.]

"Henceforward I [the husband] will not hide all my keys from her (he trusted his slaves but he would not trust me); I will stop and not insult her." Whereupon a marriage contract was drawn up, and after these agreements and the oaths he again hid his keys.

55. "The Legislation of Justinian in the Light of the Papyri," *Byzantion* 15 (1940-41), 280-95 = *Opera Minora* (Warsaw, 1959), 2: 69-89 at 73-74.

56. J.G. Keenan, "On Law and Society in Late Roman Egypt," *Zeitschrift für Papyrologie und Epigraphik* 17 (1975), 237-50. He gives extensive bibliography on earlier discussion of the general topic of the effectiveness of imperial laws in Egypt.

57. Schiller, "The Fate," pp. 54-58.

58. See V. Dautzenberg, *Die Gesetze des Codex Theodosianus und des Codex Justinianus für Aegypten im Spiegel der Papyri* (Dissertation, Cologne, 1971).

She went to church on the sabbath, and he asked her why. He did not pay the 100 artabas of wheat due on her land and prevented her from doing so. His assistant was taken to prison. And so on. He ordered her to send away her slave Anilla. He said, "After a month I will take a courtesan for myself." "God knows these things," concludes the woman.

The role of the bishops (perhaps of Oxyrhynchos and Antinoopolis) here is as reconcilers and witnesses or guarantors of the reconciliation. This is, of course, the same role that the presbyters, priests, exercised in *P.Oxy.* 3581, although in retrospect it looked like being "deceived" by the man through the priests. There is not in either document any indication of any disciplinary attempts or coercion by the clergy; rather, so far as we can see, these texts are evidence for a reconciling pastoral role. We may perhaps have evidence of a similar sort of work in *P.Grenf.* II 73, where we find one priest sending someone who is probably a prostitute to another priest, who finds people to take care of her until her son arrives.

There is no trace in the papyri of any sentiments depreciating the body, sexual expression, or marriage, despite the growth of monasticism during this very century. There are, to be sure, signs of that monasticism and its possible difficulties with civil society: mention of a consecrated virgin in conflict with what I suppose to be some relatives over ownership of some Christian books,⁵⁹ and an interesting letter dated by its handwriting to the fifth century.⁶⁰ Written to someone who is evidently the head of a religious community on behalf of a third party, probably described as a priest, it contains two key sentences:

Let me not then fail of my petition; for he took his wife [*eleuthera*] a long time ago, and, in my view, cannot divorce her. So I beseech you to have compassion for his unhappy plight and to give him a decision to enter his topos [i.e., religious community].

That marriage was excluded from the life of those entering monastic communities can hardly surprise us; what is interesting is the appeal to let a married man enter the community without divorcing his wife.⁶¹

59. *P.Lips.* 43 (Hermopolite).

60. *P.Herm.* 16 (5th century).

61. The fathers, following Paul, generally refused to countenance separation of a

Though the maintenance of the marriage may for all we know have been of more significance for property than for any personal relationship, the writer's stance is marked by concern and compassion for the personal situation rather than legalism.

When Christianity spread and became publicly visible in fourth-century Egypt, it faced a country with traditions which favored easy marriage and easy divorce, and in which the consent of both parties to both was the principal ingredient. There is no indication that in practice it tried to enforce its view of marriage by widespread ecclesiastical discipline⁶² of the sort which it had developed earlier when Christians were a small, cohesive minority.⁶³ The eastern churches, in medieval and modern times, have, it is true, allowed divorce followed by remarriage in many cases where the western church did not, a position often viewed in the West as "laxity."⁶⁴ The Coptic church, for example, has historically allowed divorce for adultery, for the nonvirginity of a bride, for entry into monastic life, and in certain other cases.⁶⁵ But the situation we see in the papyri does not show us the church legalistically enforcing the continuance of marriage subject to certain escape routes. What we do find it doing, rather, is acting to encourage marriage, to reconcile spouses who were

married couple so that one could enter monastic life; cf. Crouzel, *L'église primitive*, pp. 376-77.

62. An interesting comparison is afforded by *P. Ness. 57*, a divorce agreement of 689 from Nessana in Palestine, in which a priest and his wife part company before seven witnesses who include a priest, an archdeacon, and a deacon. He retains the dowry without contest; she seeks only her freedom ("We want nothing from you.... Only release me.")

63. Those divorcing were certainly mostly Christians. As Merklein, *Das Ehescheidungsrecht*, p. 75, notes, many late divorce documents have explicit marks of Christianity, such as crosses at the top and other such elements. It should be added that most divorce documents include explicit guarantees of the ability of the other party to remarry at will. I rather suspect that in this period visible disciplining of members for divorce or remarriage was limited to prominent and wealthy persons whose example might be hoped to do some good.

64. Cf. Ignaz Fahrner, *Geschichte der Ehescheidung im kanonischen Recht 1: Geschichte des Unauflöslichkeitsprinzips und der vollkommenen Scheidung der Ehe im kanonischen Recht* (Freiburg i. Br., 1903), pp. 33-34. The medieval eastern churches had a much closer relationship with the government than the western church, with mutual influence: the emperors required church solemnization of marriage, while the church tended to accept the government's definition of grounds for divorce. For the latter phenomenon, see J. Dauvillier and C. DeClercq, *Le mariage en droit canonique oriental* (Paris, 1936), p. 85.

65. See Luigi Bressan, *Il divorzio nelle chiese orientali* (Bologna, 1976), p. 36. Bressan is concerned mostly with the Orthodox churches, which have a complicated history of allowing divorce on grounds of adultery as well as other bases.

at odds, to sustain marriage, even to help those on the edge of social acceptability as prostitutes.⁶⁶ Just as in the Cappadocia of Basil,⁶⁷ this picture reflects the reality of a pastoral church with limited power over its members⁶⁸ at work in a society with a well-defined set of traditional standards for relationships between men and women and a normal assortment of the standard human failures that mark such relationships.⁶⁹

66. And we find at least more of the rhetoric of family affection in private letters in Christian circles than otherwise. Cf., e.g., *P.Ant.* II 93.

67. Though with quite a different (and much more egalitarian) set of cultural standards for behavior than the Cappadocians'.

68. A factor not limited to this time and place. Cf. P. Ariès, "The Indissoluble Marriage," *Western Sexuality: Practice and Precept in Past and Present Times*, ed. P. Ariès and A. Béjin (Oxford, 1985), pp. 140-57, who argues that it was not until the twelfth century in France that the church concentrated its efforts, with some success, on the indissolubility of marriage.

69. The Orthodox churches developed in time a doctrine of divorce as being a matter of *oikonomia*, or pastoral understanding and ministry to those who fail to live up to its norms. Bressan, *Il divorzio*, pp. 43-44, regards this view as a recent and (as explicit doctrine) minority view, but one with unstated roots in long-standing pastoral practice. It is set out, with a clear rejection of a legalistic approach to the biblical norm, from a contemporary perspective in J. Meyendorff, *Marriage: an Orthodox Perspective*, 2nd ed. (Crestwood, NY, 1975), pp. 60-65. Meyendorff's modern approach resembles strikingly what we can see of actual pastoral practice in the ancient Egyptian church.