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978-0-521-83941-9 - The Sins of the Fathers: The Law and Theology of Illegitimacy  
Reconsidered

John Witte

Excerpt

[More information](#)*Introduction: The paradoxes of illegitimacy*

Sex has long excited an intimate union between theology and law in the Christian West. Western clerics and magistrates have long collaborated in setting private laws to define and facilitate licit sex. These include rules and procedures for sexual etiquette, courtship, and betrothal; for marital formation, maintenance, and dissolution; for conjugal duties, debts, and desires; for parental roles, rights, and responsibilities. Western churches and states have also long collaborated in setting moral and criminal laws to police and punish illicit sex. For many centuries, these two powers kept overlapping rolls of sexual sin and crime: adultery and fornication, sodomy and buggery, incest and bestiality, bigamy and polygamy, prostitution and pornography, abortion and contraception. They also operated interlocking tribunals to enforce these rules on sex. The church guarded the inner life through its canons, confessionals, and consistory courts. The state guarded the outer life through its policing, prosecution, and punishment of sexual crimes. To be sure, church and state officials clashed frequently over whose laws governed sex, marriage, and family life. And their respective laws on these subjects did change a great deal – dramatically in the fourth, twelfth, sixteenth, and nineteenth centuries. But for all this rivalry and change, Christianity – and the Jewish, Greek, and Roman sources on which it drew – had a formative influence on Western laws of sex, marriage, and family life.

Most of these classic legal doctrines have now been eclipsed by the dramatic rise of new public laws and popular customs of sexual liberty and personal privacy in much of the West. Courtship, cohabitation, betrothal, and marriage are now mostly private sexual contracts with few roles for church and state to play and few

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Figure 2 Matthias Stomer (c. 1600–c. 1650), *Sarah Presenting Hagar to Abraham*.

restrictions on freedoms of entrance, exercise, and exit. Classic crimes of contraception and abortion have been found to violate constitutional liberties. Classic prohibitions on adultery and fornication have become dead or discarded letters on most statute books. Free-speech laws protect all manner of sexual expression, short of obscenity. Constitutional privacy laws protect all manner of voluntary sexual conduct, short of child abuse and statutory rape. The classic prohibitions on incest, polygamy, and homosexuality still remain on some law books, but they are now the subjects of bitter constitutional and cultural battles.

One other such classic doctrine has persisted in the West but without too much critical reflection. That is the doctrine of illegitimacy – or, more historically accurate but less politically correct, the doctrine of bastardy.<sup>1</sup> In the Western tradition, the

<sup>1</sup> The term “bastard” first appeared in English in the later eleventh century to describe William the Conqueror, known as “the bastard king.” Though the etymology of the word is unclear, it is thought to derive from the word “bent,” conceived “on a pack saddle,” or “in a

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bastard was defined as a child born out of lawful wedlock – a product of fornication, adultery, concubinage, incest, prostitution, or other sexual crime and sin. A bastard was at once a child of no one (*filius nullius*) and a child of everyone (*filius populi*) – born without name and without home, the perennial object of both pity and scorn, charity and abuse, romance and ribaldry. Absent successful legitimation or adoption, bastards bore the permanent stigma of their sinful and criminal birth, noted on certificates of baptism, confirmation, marriage, and death as well as on tax rolls, court records, and property registrations. For many centuries, bastards lived in a sort of legal limbo, with some claims to charity and support but with severely truncated rights to inherit or devise property, to hold high clerical, political, or military office, to sue or testify in court, and more. These formal legal disabilities on bastards were often compounded by their chronic poverty, neglect, and abuse, assuming that they escaped the not so uncommon historical practice of being secretly smothered or exposed upon birth, or put out to nurse or lease with modest odds of survival.<sup>2</sup>

grange.” “Bastard” was in regular legal usage by the thirteenth century. See Nicholas Orme, *Medieval Children* (New Haven, CT: Yale University Press, 2002), 57. “The adjective ‘illegitimate,’ meaning ‘not born in lawful wedlock’ (the earliest sense of the term in English), joined its predecessor ‘bastard’ in written English . . . in Shakespeare’s *Henry VIII* (1536), in which Elizabeth is described as ‘the kynges daughter illegytimate borne under same mariage [sic]’. By the early seventeenth century ‘illegitimate’ was a synonym for ‘bastard’” and has remained so in Anglo-American law and literature. Gail Reekie, *Measuring Immorality: Social Inquiry and the Problem of Illegitimacy* (Cambridge: Cambridge University Press, 1998), 23. See further Jenny Teichmann, *Illegitimacy: An Examination of Bastardy* (Ithaca, NY: Cornell University Press, 1982). Historically, a whole series of separate and shifting terms attached to the child, depending on the non-marital sexual act of the parents – *mamzerim, spurii, nothi, filii naturalis, incestui, adulterini, favonius, illegitimus, vulgo quaesitus, vulgo conceptus*, and more; by the fifteenth century, the term “bastardi” became the common generic term to describe any child born out of wedlock. See below pp. 52–9, 67–8, 89–99, 107–11, and John Brydall, *Lex Spuriorum, or the Law Relating to Bastardy Collected from the Common, Civil, and Ecclesiastical Law* (London: Assigns of Richard and Edwards Atkins, 1703), 1–14. I shall be using “bastard” and “illegitimate” interchangeably herein in discussing the historical material, with a preference for the milder term “illegitimate.” Current terminology favors “non-marital child.”

<sup>2</sup> Mark Jackson, *New-Born Child Murder: Women, Illegitimacy, and the Courts in Eighteenth-Century England* (Manchester: Manchester University Press, 1996); T.E. James, “The Illegitimate and Deprived Child: Legitimation and Adoption,” in Ronald H. Graveson and F.R. Crane, eds., *A Century of Family Law: 1857–1957* (London: Sweet & Maxwell, 1957), 39–55; Lionel Rose, *The Massacre of the Innocents: Infanticide in Britain 1800–1939* (London: Routledge and Kegan Paul, 1986); Mason P. Thomas, “Child Abuse and Neglect. Part I:

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Illegitimacy doctrine has been a common feature of most legal and religious traditions of the world. It has long served to regulate the scope of the *paterfamilias*' power and responsibility within the household, and to regularize the transmission and inheritance of property, title, lineage, and (in some cultures) to ensure control over the household religion.<sup>3</sup>

In the Western tradition, the legal doctrine of illegitimacy was given special support by Christian theology. Illegitimacy doctrine was a natural concomitant of the church's repeated attempts to shore up marriage as the only licit forum for sex and procreation. Illegitimacy doctrine was also viewed as an apt illustration and application of the biblical adage that "the sins of the fathers [and mothers] shall be visited upon their children" (Ex. 20:5, 34:7; Num. 14:18; Deut. 5:9).<sup>4</sup> The Bible itself seemed to condone this reading in its story of Ishmael, the illegitimate son of Abraham, who was condemned already in the womb as a "wild ass of a man" (Gen. 16:12) and was ultimately cast out of his home with minimal prospects of survival. Mosaic laws banned bastards and their descendants "from the assembly of the Lord . . . for ten generations" (Deut. 23:2). Later Hebrew prophets threatened that "the offspring of an unlawful union will perish," for they are "witnesses of evil against their parents when God examines them" (Wisd. 3:16–17; 4:6). Both Christ and St. Paul analogized bastards with those stubborn souls who refused to accept the life and liberty of the Gospel and were thus condemned to slavery and repression (John 8:31–59; Gal. 4:21–31). From the Middle Ages forward, Christian theologians and jurists alike found in these biblical passages ample sanction for the legal doctrine of illegitimacy. The doctrine became a perennial teaching of Western civil law, canon law, and common law alike. And today, in some Christian and other fundamentalist circles, the

Historical Overview, Legal Matrix, and Social Perspectives," *North Carolina Law Review* 50 (1972): 293–349.

<sup>3</sup> See generally John C. Ayer, Jr., "Legitimacy and Marriage," *Harvard Law Review* 16 (1902): 22–42; Shirley Hartley, *Illegitimacy* (Berkeley: University of California Press, 1975); Peter Laslett, Karla Oosterveen, and Richard M. Smith, eds., *Bastardy and Its Comparative History: Studies in the History of Illegitimacy and Marital Non-Conformism in Britain, France, Germany, Sweden, North America, Jamaica, and Japan* (Cambridge, MA: Harvard University Press, 1980).

<sup>4</sup> Unless otherwise noted, I am using the Revised Standard Version of the Bible throughout.

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doctrine is gaining renewed support as out-of-wedlock births have skyrocketed.

The doctrine of illegitimacy, however, does not sit so easily with other biblical teachings. The doctrine finds no firm anchor in the familiar biblical adage that “the sins of the fathers shall be visited upon their children.” Four times that passage occurs in the Bible. Twice, it appears in the Decalogue. “You shall not make for yourself a graven image . . . for I the Lord your God am a jealous God, visiting the iniquity of the fathers upon the children of the third and the fourth generation of those who hate me, but showing steadfast love to thousands of those who love me and keep my commandments” (Ex. 20:4–6; Deut. 5:8–10). The sin at issue in this commandment is idolatry, not adultery or fornication. And nothing is said here to distinguish between the legitimate or illegitimate children of the next generations. Those children who love God and keep his commandments are promised God’s “steadfast love,” regardless of their status. Those children who continue to “hate God” or perpetuate idol worship will suffer God’s eternal punishment, even if they are legitimate. But even then, a merciful God, who is “slow to anger,” will give his people time to redeem themselves. Rather than punish them right away as they deserve, God will “visit” the question three or four generations later and punish the people only if they have persisted in the idolatry of their forebearers. Exactly the same promise is repeated in the other two “sins of the fathers” passages that threaten “visiting iniquity upon children” (Ex. 34:7; Num. 14:18) for violations of the whole Decalogue. These passages do not teach a doctrine of double original sin for illegitimates. They underscore the need for all to repent and to be righteous before a merciful God.

Other biblical passages reflect this more benign teaching. The Bible repeatedly enjoins believers not to “pervert the justice” due to “the fatherless” (Deut. 24:17; 27:19; Ps. 94:6; Is. 9:17; Lam. 5:3). Mosaic criminal laws make clear that “the fathers shall not be put to death for the children, nor shall the children be put to death for the fathers; every man shall be put to death for his own sin” (Deut. 24:16). Later Hebrew prophets insisted that “the son shall not suffer for the iniquity of the father, nor the father suffer for the iniquity of the son; the righteousness of the righteous shall be upon himself,

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and the wickedness of the wicked shall be upon himself” (Ezek. 18:19–20). The New Testament underscores this teaching of individual accountability. If Christ’s atonement for sin means anything, it means that no one, not least unborn or newborn children, need be a scapegoat for the sins of their parents or of any others. Each individual soul will stand directly before the judgment seat of God to answer for what he or she has done in this life, and to receive God’s final judgment and mercy. Here, there will be no vicarious liability charges to answer.

Moreover, the Bible teaches the doctrine of adoption as a sublime remedy for the illegitimate and ill-born. The Hebrew Bible hints several times that adoption may have been used to remedy the plight of illegitimate, conquered, emancipated, and orphaned children (Gen. 30:1–13; 48:5–6; Ex. 2:7–19; Judg. 11:1–2; I Chr. 2:34–5; Ezra 10:44, Ruth 4:16–17; Esther 2:7). The prophet Jeremiah further hints at the image of adoption to describe how God makes Israel his chosen people and promises them a “beauteous heritage” (Jer. 3:14). The New Testament endorses adoption more directly. First, there is the adoption of five illegitimate children – Perez, Zerah, Boaz, Obed, and Solomon – into the genealogy of Christ (Matt. 1:1–17), and other bastards like Jephthah into the drama of salvation (Heb. 11:32). Next, there is Joseph’s adoption of Christ, the purportedly illegitimate child of Mary (Matt. 1:20–5). Finally, there is the promise to all who have faith that they shall be “adopted as heirs of salvation,” despite the sins that they inherited through birth or committed in life (Rom. 8:14–15, 23; 9:4; Gal. 4:4–5; Eph. 1:5).

The doctrine of illegitimacy runs counter not only to standard theological teachings, but also to standard legal doctrines. First, illegitimacy is an unusual kind of status offense that, by definition, forgoes required proof of the three main elements of any prima-facie case of crime: (1) a defendant’s voluntary act or omission (*actus reus*), (2) that is done intentionally, knowingly, recklessly, or negligently (*mens rea*), and (3) that causes or threatens harm to a victim or society (*causa*). All three of these basic elements of crime – grounded as they are in classic Western teachings on will, reason, and causation – are missing in this case. Yet classically, illegitimates are treated as if criminals.

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Second, illegitimacy doctrine is an unusual form of deterrence that threatens harm to an innocent third party in order to dissuade a non-marital couple from sexual intercourse. This instrumentalizes innocent children, making them a means to the end of achieving the common good of licit sex and procreation. Punishing a duly convicted criminal severely and giving him a criminal record in order to deter others is one thing; upon proper conviction, a criminal “belongs to society for that purpose.”<sup>5</sup> But punishing an innocent child without trial, and giving that child a record of its illegitimacy in order to deter others from illicit sex, is simply cruel and unjust.

Finally, illegitimacy is an unusual species of vicarious liability, a sort of *respondet inferior* doctrine that imposes upon innocent children some of the costs of their parents’ extramarital experimentation. The law is replete with examples of *respondent superior* cases, where liability is imposed on parents, principals, or employers because of the actions of their children, agents, or employees. The point of this vicarious liability scheme is to encourage those in authority to teach, supervise, and control those for whom they are responsible. Illegitimacy doctrine stands this simple legal logic on its head: it imposes liability on the newborn child, the party least able to supervise or control the actions of others.

To be sure, a good deal of the classic law and lore of illegitimacy is now falling aside in the United States and other Western countries. Most Western nations have removed the majority of the chronic legal disabilities on the illegitimate child’s rights to property, support, and standing in courts. State welfare and education programs have relieved some of the traditional social and economic pressures on illegitimates. And the legal doctrine of adoption, which came to be accepted at Anglo-American common law for the first time at the turn of the twentieth century, has provided still further relief for some illegitimate children. Many of the remaining statutory disabilities on illegitimates have recently been struck down as violations of the non-discrimination provisions in the European Convention on Human Rights and as violations of the equal

<sup>5</sup> Sydney Smith, *Elementary Sketches of Moral Philosophy* (New York: Harper and Bros., 1856), 252. Cf. Immanuel Kant, *The Metaphysics of Morals*, 6:336 re: the punishment and killing of illegitimates.

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protection clause of the Fourteenth Amendment to the United States Constitution.

But, in the United States, what the Fourteenth Amendment gives with one clause it takes back with another. The Fourteenth Amendment equal protection clause does spare illegitimates from most vicarious liability for their parents' extramarital experimentation. But the Fourteenth Amendment due process clause spares sexually active adults from criminal liability for engaging in extramarital sex. With the legal stigma of both illegitimacy and promiscuity removed, it is perhaps no accident that illegitimacy rates in the United States have soared. More than 38 percent of all American children, and more than 69 percent of all African-American children, are now born out of wedlock. While illegitimate children no longer suffer many formal legal disabilities, they continue to suffer chronic social disabilities in the form of markedly higher rates of poverty and poor education, deprivation and child abuse, juvenile delinquency and criminal conduct. Moreover, a new species of *in utero* illegitimates has emerged in the past four decades, sometimes condemned to death by the very same Fourteenth Amendment that protects the rights of their mothers to abort them. If the historical doctrine of illegitimacy was a Christian theology of sin run amuck, this new form of illegitimacy is a constitutional theory of liberty run wild.

This little volume parses some of these paradoxes of the historical doctrine of illegitimacy. "The sins of the fathers," I submit, consists not only in the sinful acts of having children "out of wedlock." It also consists in the sinful acts of "visiting the iniquity of the fathers" and mothers upon the innocent children born of these illicit unions. Historically, the sins of the fathers of illegitimate children were compounded by the sins of the fathers of church and state. Their theology and law of illegitimacy, which crystallized in the second millennium, was, in my view, wrongly conceived and improperly nurtured. While illegitimacy doctrine lent itself to clear moral instruction and to clean family legacies, it condemned innocent children to an inferior status which the church's pastoral services and state's equitable remedies could only partly offset. The common law tradition exacerbated these problems by rejecting the civil law tradition of adoption and legitimation until the turn of the



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twentieth century, leaving illegitimate children even more dependent than in civil law communities upon the “kindness of strangers.”<sup>6</sup>

Today, the sins of the fathers (both real and metaphorical) consist more of omission than commission, of indifference to the plight of illegitimate children more than condemnation of them in their cradles. This indifference comes in many forms: in the rise of unsafe sex in a day of easy contraception; in the scourge of drive-by conceptions and one-night stands; in the rise of non-marital cohabitants who flee in the face of unexpected pregnancy and children; in the reality that anti-abortion campaigns claim far more attention and resources than pro-adoption ministries in the United States; in the shame that America, the richest nation on earth, has left untold millions of its illegitimate children underinsured, undereducated, and undersupported.

Chapter 1 of this volume analyzes the classical Western sources and limits of illegitimacy and legitimation – in the Bible and its elaboration by early Jewish rabbis and early Church Fathers. Chapter 2 analyzes the classical Roman law of legitimacy and legitimation, which was well developed before the time of Christ and then transformed by Christian morality in the fourth through sixth centuries. Chapter 3 takes up the medieval canon law, whose intricate theology of marriage provided a more refined gradation of illegitimacy, and whose sacramental theology provided a more refined system of legitimation. Chapter 4 takes up the English common law, which in deliberate departure from Roman law and canon law shifted the focus of illegitimacy doctrine from sin and morality to land and inheritance. Chapter 5 analyzes the gradual eclipse of illegitimacy law in American by an emerging law of natural rights and equal protection for all children, regardless of their birth status. The “Concluding reflections” probe a few remedies for the modern problem of illegitimacy that can be responsibly drawn from Scripture and tradition.

<sup>6</sup> John Boswell, *The Kindness of Strangers: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (New York: Pantheon Books, 1988).

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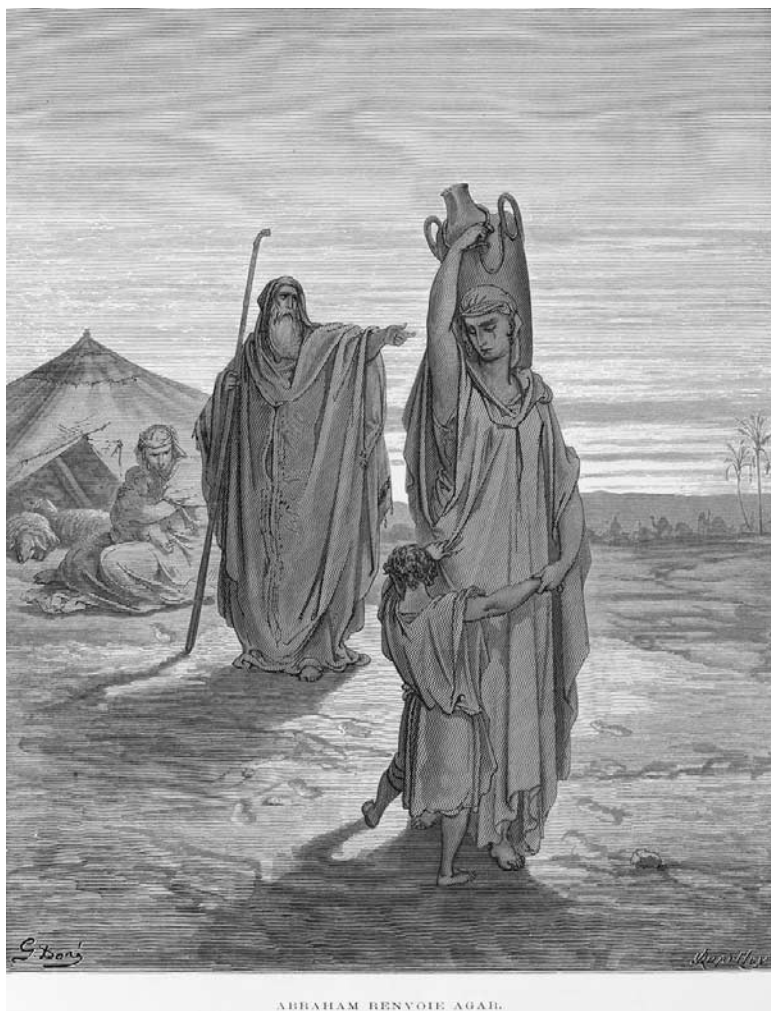
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Figure 3 Gustav Doré (1832–1883), *Sarah Watching the Expulsion of Hagar*.