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

John Witte

Frontmatter

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THE SINS OF THE FATHERS

For nearly two millennia, Western law visited the sins of fathers and mothers upon their illegitimate children, subjecting them to systematic discrimination and deprivation. The graver the sins of their parents, the further these children fell in social standing and legal protection. While some reformers sought to better the plight of illegitimate children, only in recent decades has illegitimacy lost its full legal sting. Yet the social, economic, and psychological costs of illegitimacy still remain high even in the liberal, affluent West.

John Witte, Jr. analyzes and critiques the shifting historical law and theology of illegitimacy. This doctrine, he argues, misinterprets basic biblical teachings on individual accountability and Christian community. It also betrays basic democratic principles of equality, dignity, and natural rights for all. There are no illegitimate children, only illegitimate parents, Witte concludes, and he presses for the protection and rights of all children, regardless of their birth status.

JOHN WITTE, JR. is Jonas Robitscher Professor of Law, Alonzo L. McDonald Distinguished Professor, and Director of the Center for the Study of Law and Religion at Emory University. He has published two dozen volumes, including *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (2002), *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism* (2007), and *Christianity and Law: An Introduction* (2008), with Frank S. Alexander.

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In memory of Ponkie
(1964–1980)

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[T]he gods visit the sins of the fathers upon the children.

Euripides, *Phrixus*, fragment 970

For the sins of your fathers you, though guiltless, must suffer.

Horace, *Odes*, III, 6:1

I the Lord your God am a jealous God, visiting the iniquity of the fathers upon the children to the third and the fourth generation of those who hate me, but showing steadfast love to those who love me and keep my commandments.

Exodus 20:5–6

Thou, Nature, art my goddess; to thy law
My services are bound. Wherefore should I
Stand in the plague of custom, and permit
The curiosity of nations to deprive me,
For that I am some twelve or fourteen moonshines
Lag of a brother? Why bastard? Wherefore base,
When my dimensions are as well compact,
My mind as generous, my shape as true,
As honest madam's issue? Why brand they us
With base? with baseness? Bastardy base? Base?
Who, in the lusty stealth of nature, take
More composition and fierce quality
Than doth within a dull, stale, tired bed,
Go to th'creating a whole tribe of fops
Got 'tween sleep and wake? Well then
Legitimate Edgar, I must have your land.
Our father's love is to the bastard Edmund
As to the legitimate. Fine word "legitimate."
Well, my legitimate, if this letter speed,
And my invention thrive, Edmund the base
Shall top the legitimate. I grow. I prosper.
Now, gods, stand up for bastards!

Shakespeare, *King Lear*, I.ii (Edmund the Bastard)

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Figure 1 Cristoforo Savolini?, *The Expulsion of Hagar and Ishmael*.

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“Bastards have no place in this assembly of the Lord; even to the tenth generation none of his descendents may enter here.” That was the startling admonition that I heard from the pulpit of the conservative Protestant church of my youth. These harsh words, taken from Deuteronomy 23:2, I now realize, were intoned gravely as the final public step of banishing a single woman and her illegitimate child from our church. Even as a youth, I remember being shocked. How could our church, so filled with sinners, banish a fellow sinner who just wanted to have her new child baptized? Furthermore, how could the church banish this little baby and withhold from him the sacrament of baptism? Was fornication so much worse a sin against the Decalogue than the sins of lying, stealing, or dishonoring parents – all of which were already on my ample roll of youthful follies? Perhaps I was next out the door. Even worse, what would come of my little foster-brother, Robert, given his illegitimate birth? Surely, he would be banished soon, too. I remember being terrified.

I also remember that the issue of banishing this mother and her illegitimate child was controversial in our tight-knit little Christian community. When challenged, the minister had stuck to his guns and fought off dissenters with the ammunition of the Law – not least the Decalogue’s call to “visit” the “sins of the fathers” and mothers upon their children. Other leaders of the community struck back with the Gospel. Who were we, after all, to “cast the first stone” against a fornicator, or to disobey Christ’s commandment to “suffer the little children to come unto me”? Here, in miniature, was my first real encounter with the great dialectics of Law and Gospel, justice and mercy, discipline and love. Happily,

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the glum minister soon left our church, and with him went the stark discipline and dark sermons that marked his troubled tenure. But the memory of that sad day has never left me. It explains a bit of the motivation for this book.

This book is a brief historical essay, not a thick, note-strewn monograph. It is intended to provoke new thinking about the historical doctrine of illegitimacy, not to challenge settled accounts of its history. My main aim is to retrace what warrants there are for and against illegitimacy doctrine in Scripture and tradition. My main findings are that the weight of Scripture is against the doctrine of illegitimacy, and that both early Jewish and Christian interpreters taught this. It was only in the second millennium that Christian theologians and jurists together took up the doctrine of illegitimacy in earnest, as part of their effort to shore up the doctrine of marriage. Using both Roman law precedents and selected biblical passages, sundry medieval Catholics and early modern Protestants visited the extramarital sins of parents upon their children. They set up something of a caste system of illegitimacy, making the rights of illegitimate children a function of the sins of their parents. The greater their parents' sin, the lower these children fell in social rank and legal protection. While early modern reformers in church and state alike sought to better the plight of illegitimate children, only in the course of the twentieth century did illegitimacy lose its full legal sting. Yet the doctrine of illegitimacy persists in some conservative theological and political quarters to this day, and the economic and psychological consequences of illegitimate birth remain grim even in the affluent West.

This book may surprise some readers who have grown accustomed to my more favorable treatments of law and religion in the Western tradition, particularly in the history of marriage and family life. I am not turning a new leaf in this book. I have always tried to avoid nostalgia in my historical writing, and have always tried to compare the evolving teachings of the tradition with the enduring teachings of Scripture. On the topic of illegitimacy, in my view, the tradition comes up shorter than on many other family topics; hence my call to reconsider the doctrine and its alternatives. There are no easy solutions to the problem of illegitimacy. But forcing illegitimate children to bear the sins of their fathers and mothers – as

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parts of the tradition and a few of our neo-traditionalists teach – is neither just nor necessary.

I have incurred a number of debts in the preparation of this volume. I express my profound appreciation to Dr. Craig Dykstra and his colleagues at the Lilly Endowment, Inc. for a generous grant that provided me with release time and research support to work on this volume and others on the interaction of law and Christianity in the Western tradition. I wish to thank Gina Weiser, a graduate of the Candler School of Theology, for her outstanding and prodigious research on the theological sources of Western illegitimacy doctrine, and Colleen Flood, a graduate of Emory Law School, for unearthing several valuable classical and medieval legal sources on point. I also wish to thank Chris Hudson, Will Haines, and Kelly Parker for their excellent library support and Trevor Pinkerton for his research and review. Special thanks as well go to my friends and colleagues – Frank S. Alexander, Michael Ausubel, Patrick M. Brennan, Don S. Browning, Michael J. Broyde, M. Christian Green, Judith Evans Grubbs, E. Brooks Holifield, Timothy P. Jackson, Martin E. Marty, Charles J. Reid, Jr., and Robert Wilken – for their valuable constructive criticisms and guidance on draft chapters. Finally, I wish to thank Kevin Taylor and Kate Brett at Cambridge University Press for soliciting this volume and collecting such helpful reviews of the preliminary manuscript.

This volume is part and product of a major project on the “The Child in Law, Religion, and Society,” undertaken by the Center for the Study of Law and Religion at Emory University. This project is focused on children *qua* children – in their being and becoming, in their birth and growth. As a team of twenty scholars, directed by Professor Martin E. Marty, we are studying the rites and rights attached to birthing and naming, baptism and circumcision, education and discipline. We are examining the steps and stages in a child’s physical, emotional, sexual, moral, and spiritual formation, as well as the rituals and ordeals, and the rights and responsibilities, attached to each. We are examining the pathos of child abuse and rape, child poverty and homelessness, juvenile delinquency and violence, and illegitimacy and infanticide. And we are probing the mystery of the child – that combination of innocence and imagination, acuity and candor, empathy and healing, sharing and

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caring that uniquely become a child. I wish to express my deep gratitude to Rebecca Rimel and her colleagues at The Pew Charitable Trusts for their very generous support of our Center and this project on children. I also offer my profound thanks to Amy Wheeler for her excellent work on the manuscript and illustrations, and my other Emory Center colleagues in addition to Ms. Wheeler, namely, April Bogle, Eliza Ellison, Anita Mann, and Linda King, for their extraordinary work on this project on children, which is scheduled to yield a score of other volumes.

This volume is dedicated to the memory of my brother Robert, whom our family nicknamed “Ponkie.” Though dumped by his natural parents on account of his illegitimacy and severely plagued by physical and mental handicaps to which he succumbed by the age of sixteen, he was the best model I have ever seen of the pure faith and simple joy that become the true Christian life. He brought out the angels in my parents and siblings, and he taught me more than a thousand books and sermons could ever do what it means to be a humble and happy child of God. May his name and memory be blessed forever.

JOHN WITTE, JR.