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Ishmael's Bane: The Sin and Crime of Illegitimacy Reconsidered,"

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Abstract

This essay offers a critical rereading of the Western theological and legal doctrine of illegitimacy or bastardy. The text first traces the Western stigma against bastards to the Bible, particularly to the story of Ishmael, the illegitimate son of Abraham and Hagar. It then shows the systematic discrimination against bastards in classic canon law and in early modern Anglo-American common law, and the slow amelioration of their plight in legal reforms in the United States in the past century. The author concludes that the Western doctrine of illegitimacy is theologically illegitimate and suggests a few historically-informed legal remedies, notably adoption, that would help mitigate the plight of illegitimates today.

Keywords: bastard(y); illegitimacy; canon law; history of common law; adoption; equal protection

INTRODUCTION

Sex has long excited an intimate union between law and religion in the Christian West. Western churches and states have long collaborated in setting private laws to define and facilitate licit sex: 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, and much more. Western churches and states have also long collaborated in setting 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, and more. They also operated interlocking tribunals to enforce these rules on sex. The church guarded the internal forum through its canons, confessionals, and consistory courts. The state guarded the external forum through its policing, prosecution, and punishment of sexual crimes. To be sure, church and state officials clashed frequently over sexual jurisdiction. And their respective private and criminal laws of sex did change a great deal -- dramatically in the fourth, twelfth, and sixteenth centuries. But

for all this rivalry and change, Christianity, and the Hebrew, Greek, and Roman sources on which it drew, had a formative influence on Western laws of sex.

Most of these classic laws have now been eclipsed in America by the dramatic rise of new public laws and popular customs of sexual liberty. Courtship, cohabitation, betrothal, and marriage are now mostly private sexual contracts with few roles for church and state to play and few restrictions on freedoms of entrance, exercise, and exit. Classic crimes of contraception and abortion have been found to violate Fourteenth Amendment 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 outrageous obscenity. Constitutional privacy laws protect all manner of sexual conduct, short of exploitation of children or abuse of others. Only the classic prohibitions on incest, polygamy, and homosexuality remain on most law books -- now the subjects of bitter constitutional battles and culture wars.

One tender sexual subject has hovered perennially on the margins of law and religion scholarship and on the boundaries of criminal, private, and public law. That is the subject of illegitimacy or bastardy. In the Western tradition, the bastard was defined as a child born out of lawful wedlock -- a product of fornication, adultery, concubinage, incest, 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, bastards bore the permanent stigma of their sinful and criminal conception, signaled on certificates of baptism, confirmation, marriage, and death. They 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 certain courts, and more. These formal legal disabilities on bastards were often compounded by chronic poverty, neglect, and abuse -- assuming that they escaped the not uncommon historical practice of being secretly smothered or exposed upon birth, or put out to nurse or lease with modest odds of survival (Jackson 1996; James 1957; Rose 1986; Thomas 1972).

Illegitimacy doctrine has been a common feature of most legal and religious traditions of the world. It has long been part of a common effort to regulate the scope of the *paterfamilias'* power and responsibility within the household, and to regularize inheritance of property, title, lineage, and (in some cultures) control of the household religion or the family's ancestral rites (Ayer 1902; Hartley 1975; Laslett et al. 1980; Malinowski 1962).

In the Western tradition, illegitimacy was given special support by Christian theology. Illegitimacy doctrine was a natural concomitant of the church's 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 RSV). 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 man” and was ultimately cast out of his home with minimal prospects of survival. Later biblical laws banned bastards and their seed from the house of the Lord if not from the community altogether. The New Testament equated bastards with those stubborn souls who refused to accept the life and liberty of the Gospel. Christian theologians and jurists alike found in these biblical passages ample new legitimacy for the doctrine of illegitimacy. The doctrine found a prominent place in canon law, civil law, and common law alike from the twelfth to the twentieth centuries.

Illegitimacy doctrine, however, runs counter to a number of standard criminal law doctrines that Christian theology also helped to cultivate (Brennan 2002). Illegitimacy is an unusual kind of status offense that, by definition, forgoes required proof of *actus reus*, *mens rea*, and causation. Illegitimacy doctrine is an unusual form of deterrence that threatens harm to an innocent third party in order to dissuade a couple from committing various sexual crimes. And illegitimacy is a peculiar species of vicarious liability, a sort of *respondeat inferior* doctrine that imposes upon innocent children some of the costs of their parents' extra-marital experimentation.

To be sure, a good deal of the classic law of illegitimacy is now falling aside in the United States. Most states have removed the most chronic disabilities on the illegitimate's rights to property, support, and standing. Several remaining legal disabilities on illegitimates have been struck down since 1968 as violations of the equal protection clause of the Fourteenth Amendment.

But what the Fourteenth Amendment gives with one clause it takes back with another. The Fourteenth Amendment equal protection clause does spare illegitimates from vicarious liability for their parents' extra-marital experimentation. But the Fourteenth Amendment due process clause spares sexually active adults criminal liability for engaging in extra-marital experimentation. With the legal stigma of both illegitimacy and promiscuity removed, it is perhaps no accident that illegitimacy rates in this country have soared. While illegitimate children no longer suffer many formal legal disabilities, they continue to suffer ample social disabilities in the form of higher rates of poverty and poor education, deprivation and child abuse, juvenile delinquency and criminal conduct. Moreover, I shall argue, a new species of *in utero* illegitimates has emerged in the past three decades, condemned even more severely by the very same Fourteenth Amendment that protects the rights of their mothers.

This little essay offers some preliminary research and reflection on the theology and law of illegitimacy. Part I sketches a bit of the biblical context and sanction for this doctrine. Part II summarizes the classic canon law and common law on the subject, and some of the recent legal reforms in the United States. Part III offers some critical theological reflections on the doctrine of illegitimacy, and suggests a few historically informed remedies that might be applied to better the plight of the illegitimate today.

BIBLICAL SOURCES AND SANCTIONS OF ILLEGITIMACY

The Christian doctrine of illegitimacy was born in the biblical story of Ishmael, the bastard son of the great patriarch Abraham. The facts, as recorded in the first book of the Hebrew Bible, are these: At 75-years old, Abraham, a rich and powerful man, grew concerned about his lineage and legacy. He complained to God that he and his wife Sarah were without child. God promised him an heir and countless descendents (Gen. 15:1-6). But for ten years thereafter, he had no children (Gen. 16:3, 16). A concerned Sarah urged Abraham to take her slave maid Hagar as a concubine, and have children by her. Abraham obliged. Hagar conceived. Newly pregnant, Hagar “looked with contempt” upon Sarah, her barren mistress (Gen. 16:4). Sarah was livid. She dealt harshly with Hagar who fled.

An angel enjoined Hagar to return. The angel promised that her child would survive and indeed have many descendents. But the angel also spoke ominously of the bane that would befall her bastard child: “Behold, you are with child, and shall bear a son; you shall call his name Ishmael [meaning “God hears”]; because the Lord has given heed to your affliction. [But] [h]e shall be a wild ass of a man, his hand [will be] against every man and every man’s hand against him; and he shall dwell over against all his kinsmen” (Gen. 16:11-12 RSV).

Ishmael was born and raised in Abraham’s household. Abraham embraced him as his first-born son, and circumcised him to signify him as one of God’s own (Gen. 17:23). Fifteen years later, however, Abraham and Sarah were miraculously blessed with the birth of their own son Isaac (Gen. 17:1, 21:5). Sarah grew jealous of the adolescent Ishmael playing with her newly weaned son Isaac. She grew concerned about Isaac’s claims to Abraham’s vast wealth. “Cast out this slave woman with her son,” she enjoined Abraham; “for the son of this slave woman will not be heir with my son Isaac” (Gen. 21:8-10 RSV). After anguished reflection and prayer, Abraham obliged Sarah, contrary to his own affection for Ishmael and to the custom of the day that a master care for his slaves and their children, however conceived.

Abraham sent Hagar and Ishmael away into the desert, meagerly armed with food and water. Their provisions ran out. Ishmael grew weak. His mother cast him under a bush, walked away, and sat with her back to him, not wishing to hear or see him die. Ishmael cried. The angel returned to Hagar, his mother, and proclaimed: “Fear not; for God has heard the voice of the lad where he is. Arise, lift up the lad, and hold him fast with your hand; for I will make him a great nation” (Gen. 21:17-18 RSV). Miraculously, Hagar found a water well and saved Ishmael. Ishmael grew up to be a skilled huntsman and warrior. His mother later found him a wife from among her kin. Ishmael fathered twelve (legitimate) sons who became princes of the tribes of the ancient Middle East (Gen. 25:12-18; cf. Gal. 4:24-25). He received no inheritance, but joined his half-brother Isaac in burying their father Abraham (Gen. 25:9). Ishmael lived a full life and died at 137 years (Gen. 25:17). Thus far the facts as reported in the Book of Genesis.

The ambiguous moral lessons of this story of Ishmael are echoed later in the Christian Bible and Apocrypha. On the one hand, both the Old and New Testaments

describe God as One who hears the cries and tends the needs of the “poor” and “fatherless,” just as he heard and tended Ishmael. God’s people are repeatedly enjoined to do likewise for the bastards and orphans in their midst (Ps. 68:2; Job 29:12; Is. 1:17; Jer. 5:28; James 1:27).

But these quiet biblical refrains on charity are almost drowned out by the robust biblical orchestrations denouncing bastards and bastardy. The Mosaic law precluded illegitimates and their progeny from the priesthood, if not from corporate worship altogether: “No bastard (*mamzer*) shall enter the assembly of the Lord,” Deuteronomy provides; “even to the tenth generation none of his descendents shall enter the assembly of the Lord” (Deut. 23:2 RSV). The Prophet Hosea condemned the children of the adulteress: “Upon her children also I will have no pity, because they are the children of harlotry. For their mother has played the harlot; she that conceived them has acted shamefully” (Hosea 2:4-5). The Book of Ecclesiasticus imposed on the children of the adulteress vicarious liability for the sins of their mother: “She herself will be brought before the assembly, and punishment will fall on her children. Her children will not take root, and her branches will not bear fruit. She will leave her memory for a curse, and her disgrace will not be blotted out” (Sirach 23:24-26 RSV). The Wisdom of Solomon struck an even more threatening tone for illegitimates: “[C]hildren of adulterers will not come to maturity, and the offspring of an unlawful union will perish. Even if they live long they will be held of no account, and finally their old age will be without honor.... For children born of unlawful unions are witnesses of evil against their parents when God examines them” (Wisd. 3:16-17, 4:6 RSV).

The New Testament went further and labeled as bastards (*nothos*) all those who reject the Gospel’s promise of Christian freedom from the law and sin. The legitimate children of Abraham are those who accept the Gospel. The illegitimate children of Abraham are those who stubbornly cling to the Law, notably the Jews (John 8:31-59; Heb. 12:8). Legitimates are free Christians whose lives are filled with promise. Bastards are enslaved non-Christians whose lives are without hope -- and who accordingly live as the “wild man” Ishmael and need to be curtailed if not cast out. St. Paul captured this new variation on the Ishmael story in a jarring message to the new Christians in Galatia who insisted on continued adherence to the Mosaic law:

Tell me, you who desire to be under law, do you not hear the law? For it is written that Abraham had two sons, one by a slave [Hagar], one by a free woman [Sarah]. But the son of the slave was born according to the flesh, the son of the free woman through promise. Now this is an allegory: these women are two covenants. One is from Mt. Sinai, bearing children for slavery; she is Hagar. Now Hagar is Mt. Sinai in Arabia; she corresponds with the present Jerusalem, for she is in slavery with her children. But the Jerusalem above is free.... Now we, brethren, like Isaac, are children of promise. But as at that time he who was born according to the flesh persecuted him who was born according to the Spirit, so it is now. But what does the Scripture say. “Cast out the slave and her son; for the son of the slave will not inherit with the son of the free woman.” So,

brethren, we are not children of the slave, but of the free woman (Gal. 4:21-31 RSV).

This passage would become a *locus classicus* for all manner of later Christian theories and practices of illegitimacy, as well as antisemitism.

A PRIMER ON THE WESTERN LAW OF ILLEGITIMACY

While the Western Christian doctrine of illegitimacy was born in the Bible, it was raised in Christian theology and jurisprudence. The juxtaposed biblical passages on illegitimacy have inspired nearly two millennia of biblical commentaries, and their moral judgments have passed into the canon law of the church, the civil law of the Continent, and the common law of England and America.

Classic Canon Law. On the one hand, Christian theologians and jurists have long sought to heed the cries of the Ishmaels of the world and to offer them comfort, charity, and kindness (Boswell 1988). For example, the early church fathers and church councils condemned the classic Roman law that gave the *paterfamilias* the power of life and death over his offspring, and that paid little heed to the smothering and abandonment of bastards born in his household -- practices which later Christian emperors outlawed, at least with respect to children of wives and concubines. By the fifth century, the church's canon law grouped bastards with widows, orphans, and the poor as those *personae miserabiles* who deserved special care and charity from the church (Tierney 1959; Courveur 1961). By the twelfth century, bastards were given special standing in church courts to sue for paternal support from indifferent or recalcitrant fathers (Helmholz 1969, 1977). Bastards were also common oblates in medieval Catholic monasteries, ecclesiastical guilds, foundling houses, and cathedral schools (Boswell 1988). From the sixteenth century onward, they were also among those especially eligible for gratis matriculation in Protestant schools and guilds where they received room, board, education, and vocational training (Witte 2002).

On the other hand, Christian theologians and moralists treated illegitimacy as a particularly good case for effectuating the biblical maxim that "the sins of the fathers [and mothers] shall be visited upon their children." The sins of Abraham were adultery and concubinage. The sins of Sarah were contempt for God's promises, complicity in Abraham's adultery, as well as jealousy, cruelty, and greed. Ishmael bore vicarious liability for both parents' sins. There were many sins like those of Abraham and Sarah that should be treated comparably when they produced illegitimate fruit, medieval writers insisted. These included: (1) bodily sins, such as fornication, concubinage, prostitution, and incest; (2) faithless sins, such as breaches of vows of abstinence, chastity, betrothal, or marriage; or (3) spiritual sins of marrying one outside the faith or in violation of the church's rules for marital formation. Children born of all such sins were presumptively the new Ishmaels of the world, and presumptively subject to the same stigma and disabilities imposed on the Ishmael of old (Schmugge 1994).

The church refined its law of bastardy as it refined its law of marriage. The formative era was the twelfth through fifteenth centuries when the church reached the height of its political and legal power, and established church courts through Western Christendom to implement its new laws, called canon laws (Brundage 1987; Mackin 1982). In this formative period, the canon law came to treat marriage systematically as at once a natural, contractual, and spiritual institution, created by God to produce children, to foster faithfulness among spouses, and to sanctify the couple, their children, and the broader Christian community. As a natural association, marriage was created by God to enable man and woman to "be fruitful and multiply" and to raise children together in the service and love of God. Since the fall into sin, this natural association also became a remedy for lust, a channel to direct one's natural passion to proper service. As a contract, marriage was a binding contractual unit, formed by the mutual consent of the parties. This contract prescribed for couples a life-long relation of love, service, and devotion to each other and to their natural children. As a sacrament, marriage symbolized the eternal union between Christ and His Church. Participation in this sacrament conferred sanctifying grace upon the couple and their children. Christian couples could perform this sacrament privately, provided they were capable of marriage and complied with the rules for marriage formation. Once properly formed, a Christian marital union was indissoluble, as much as Christ's bond to his Church remains indissoluble. Children born of such Christian unions were the saints of the next generation, to be baptized, catechized, and confirmed in the Christian church, and nurtured, educated, and socialized in the Christian home (Witte 1997).

The canon law of illegitimacy was grounded in this understanding of marriage. Marriage was the proper and licit place for a Christian to pursue sex and procreation. Sexual intercourse outside of marriage was a serious crime and sin. The natural father and mother were best suited by nature to care for their own children, and in turn to be cared for by them when they grew old and weak. Unnatural relations between parents and children often would not endure nor produce the enduring mutual care that was essential to stable domestic welfare. Blood ties between parents and children were an essential natural foundation for an enduring Christian family.

From these premises, the canon lawyers created a hierarchy of illegitimate children (Généstal 1905; Helmholz 1969; Schmugge 1994). The first and least stigmatized class consisted of "natural illegitimates" born of concubinage or prenuptial sex between fiancées, or, somewhat worse, born of fornication or prostitution by their parents. These children could be legitimated by the subsequent marriage of their parents -- though their parents could face severe sanctions for their sexual sin, particularly if they were recidivists.

The second class was those "unnatural illegitimates" born of the innocent sexual crimes of their parents. These were usually children born of a Christian couple who had married in good faith, then had sex and children, but later discovered a blood or family tie between them that rendered their marriage incestuous. Such children could be legitimated if the impediment to their parents' marriage was dispensed.

The third, and worst off, class were “unnatural” illegitimates born to parents who had knowingly committed incest or adultery. Such children were permanently condemned to illegitimacy because they were born “not only against the positive law, but against the express natural law” (Aquinas 1948 5:2812). Their parents could never marry, given the continued ties of incest between them or the prior indissoluble marriage that their adultery had betrayed. Also irredeemable from bastardy were children born of bigamy or breached oaths of chastity or celibacy. In each of these cases, one or both parents had precontracted to another marriage or to a life of chastity. Such parents, too, could never be married and thereby legitimate their now illegitimate children. For, having made one set of unbreakable vows, they could not make another in a new marriage. Their children were permanently condemned as bastards.

At canon law, bastards were generally barred from the church’s higher religious orders and offices, in emulation of the Deuteronomic law. In firmer decades and dioceses, bastards were also barred from sexual and marital relations, so that their dishonorable seed would die out as Ecclesiasticus and Wisdom had foretold. Canon law did allow for a child’s legitimation through papal dispensation, but this was a rare prize reserved principally for well-heeled and well-connected royals and aristocrats (Brundage 1987; Schmugge 1994).

The canon law rejected the law of adoption practiced in classical Rome and in some civil law countries throughout the medieval and early modern periods. Formal adoption allowed charitable or childless couples to legitimate unwanted children, to nurture and educate them, and then pass to them their property by gift or testament. Adoption found no place in the canon law after the twelfth century. Fosterparenting and grandparenting were well known at canon law, but absent a paternal blood tie, such wards remained illegitimate (James 1857).

Classic Common Law. A parallel law of illegitimacy emerged at English common law. The canon law dealt with spiritual sanctions for the sexual sin of the parents and the pastoral care and control of their illegitimate child. The common law dealt with criminal punishment of the parents’ sexual crime and the civil status and sanctions of their illegitimate child. Before the sixteenth century, these two laws of illegitimacy remained separate -- jealously so in cases involving paternity and paternal property disputes. After the sixteenth-century Protestant Reformation, the two laws of illegitimacy began to merge slowly in England. Much of the canon law on the subject was ultimately absorbed into the early modern common law. It was the merged system taught by the English common lawyers that came to prevail in the American colonies and the young American states, often amply adapted to local conditions and customs.

At classic common law, a child was considered illegitimate if “born out of lawful wedlock.” Illegitimate were children born where there was no wedlock altogether -- products of the crimes of fornication (*fili*), concubinage (*spuri*), prostitution (*mamzeres*), or adultery (*nothi*) (Brydall 1703). Illegitimate, too, were children born of putative marriages that were subsequently found to be unlawful and were annulled by reason of innocent or knowing bigamy or intentional incest (Bacon 1798; Adair 1996). Both

English and American common law dropped the category of illegitimates born of breached vows of chastity or celibacy. American common law added a category of illegitimates born of miscegenation.

The common law, like the canon law, devised endless subclassifications among these illegitimate children. The most important distinctions turned on the severity of the sexual crime of the parents. Children born of adultery, or of intentional incest or bigamy (and, in America before 1865, miscegenation) were the worst off, for these children were products of serious felonies. They faced the most stringent treatment, and their parents faced criminal sanctions of fine, imprisonment, banishment, and, in serious cases of recidivism, execution. Common law, like canon law, rejected the civil law of adoption as a means of legitimating one's own or another's illegitimate children (James 1857; Zainaldin 1979). At the same time, common law made escape from bastardy nearly impossible, save through procurement of a private act of Parliament or, in America, of the state legislature.

The common law diverged from the canon law at two crucial points, however, both to the further detriment of the bastard. First, at canon law, the post hoc marriage of the parents of a "natural illegitimate" child automatically legitimated the child, rendering it subject to its father's support, protection, authority, education, and inheritance (Helmholz 1969; Bacon 1798). At common law, no such legitimation could occur. A child born before his parents married remained illegitimate even if his parents subsequently married (Blackstone 1884). "Shotgun" weddings between conception and birth legitimated the child, but post-birth weddings were of no avail.

Second, at canon law, illegitimate children could sue in church courts for the support of their mothers and fathers, particularly if the parents were well heeled. At common law, illegitimate children had no right to their parents' support, and their parents had no duty to deliver the same (Kent 1827; Burn 1797). This harsh common law rule was slowly changed by the new English poor law of 1576 that empowered local justices of the peace to compel parents to support their illegitimate children who lived in the local parish and were dependent upon the parish church's charity (Helmholz 1977). But this English poor law reform was of no use for religious dissenters in England and had no place in America. Indeed, the harsh common law of no parental support for bastards persisted in America until well into the twentieth century.

Illegitimate children faced several other disabilities at both English and American common law. Lacking the honor of legitimate birth, they were formally precluded from various honorable positions, particularly high political, military, admiralty, and judicial offices, as well as service as coroners, jurors, prison wardens, church wardens, parish vestryman, or comparable positions of social visibility and responsibility. However well-propertied they became, bastards were also often denied access to local polls, clubs, schools, learned societies, and licensed professions. However well qualified they might be, they were also formally precluded from ordination in the established Church of England (Brydall 1703; Godolphin 1687; Burn 1797).

While most of these social disabilities had fallen into desuetude by the turn of the nineteenth century, various testamentary disabilities persisted firmly at common law. As a child of everyone (*filius populi*), the bastard could receive alms and other forms of public charity. But as a “child of no one” (*filius nullius*), the bastard had no inheritable and devisable blood that the common law would recognize. Bastards could thus inherit nothing from parents, siblings, or from anyone else -- whether name, property, title, honor, business, license, charter, or other devisable private or public claim or good (Blackstone 1884; Kent 1827). American state laws extended this disability specifically to prohibit bastards from claiming wrongful death damages in tort, life or residual disability insurance proceeds, social security benefits, military benefits, and other such proceeds that were earmarked generically for the children of a deceased or disabled parent. Several states further prohibited or taxed private *inter vivos* gifts to bastards, and denied or impeded their standing in probate courts to sue for legacies from their intestate natural parents (Vernier 1938; Clark 1988).

Illegitimate children, in turn, were limited in their capacities to alienate or devise their own property. The estates of childless bastards, or of those who died intestate or with defective wills, were seized by officials upon their deaths. Even those illegitimates who donated or devised their property to surviving spouses or children by proper instruments were sometimes subject to special gift and inheritance taxes imposed by authorities on both sides of the Atlantic (Bacon 1797; Clark 1988).

These common law disabilities on illegitimates were considered necessary to protect licit marriage and to deter illicit sex. It was a commonplace of Anglo-American common law until the twentieth century that traditional marriage was a “Godly ordinance,” “a sacred obligation,” “a public institution of universal concern,” “the very basis of the whole fabric of civilized society” (quoted by Witte 1997:194). It was an equal commonplace that Christianity was a part of the common law, including the Bible’s commandments not to commit adultery, fornication, prostitution, incest, and other sexual sins and crimes. Illegitimacy doctrine was part and product of these Christian common law beliefs -- a way for the law to symbolize proper family values and to scapegoat sexual sin at once. An Ohio judge put it thus in a 1961 case: “It might perhaps be mentioned that the Decalog, which is the basis of our moral code, specifically states that the sins of the father may be visited upon the children unto the third and fourth generation, so that the argument against making the children suffer for the mother’s wrong can be attacked on ethical grounds” (quoted by Krause 1971:9). Another authority defended the formal legal disabilities on illegitimates with these words in 1939: “The bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, and undeniable evidence of contramoral forces” (quoted by *ibid.*:1).

Modern American Reforms. Neither moral stigmatization nor legal disability, however, proved enough to deter the conception of illegitimate children. Illegitimacy rates in Europe and America -- while subjects of endless debate among demographers - - have, by all accounts, risen steadily since the first systematic records were kept in the

sixteenth century. Illegitimacy rates stood at 2-5% in the sixteenth and seventeenth centuries in Europe -- with little discernible difference among Catholic and Protestant polities, and surprisingly little demonstrable increase when polities raised the age of marriage or tightened marriage formation rules (Laslett 1977:102ff; Laslett et al. 1980). With growing liberalization, urbanization, and emigration in the eighteenth and nineteenth centuries, illegitimacy rose to median levels of 5-10% in Europe and America, often well over 10% in some of the larger cities (ibid.; Brinton 1936). These rates gradually moved up a percentage point or two from ca. 1850-1950, with larger cities and more liberal communities sometimes reaching rates over 15%.

Both the growing numbers of illegitimates and the growing visibility of their poverty and exploitation in cities at the turn of the twentieth century led to a growing campaign to ameliorate their plight (Reeke 1998). Especially during and after the New Deal, many American states reformed their criminal laws and private laws to give new protection to illegitimate (and legitimate) children. Firm new laws against assault and abuse of children offered substantive and procedural protections, particularly for those who suffered under intemperate parents and guardians. New criminal laws punished more firmly abortion and infanticide. Ample new federal and state tax appropriations were made available to support orphanages and other children's charities, and to establish new children's aid and social welfare societies. Child labor, particularly the cruel industrial exploitation of illegitimate children in factories and workhouses, was firmly outlawed by both federal and state laws. Educational opportunities for children were substantially enhanced through the expansion of public schools. The modern welfare state came increasingly to stand *in loco parentis* for needy children, offering them care, protection, and nurture, regardless of the legitimacy of their birth (Thomas 1972; Krause 1971).

Modern states also facilitated the legitimation of children. Abandoning a 700-year-old common law rule, many states in the first half of the twentieth century began to allow for legitimation of children through the subsequent marriage of their natural mother and natural father. More recently, most states extended this to allow for legitimation upon marriage of the natural mother to any man, not necessarily the father of the illegitimate children.

Modern states further facilitated legitimation by adopting the ancient doctrine of adoption. Both medieval canon law and early modern common law had firmly rejected the Roman and civil law of adoption. Classic canon law had treated natural blood ties between parent and child as essential to the formation of a stable Christian family. Classic common law had made blood ties the absolute condition for vesting the father's right and duty to control and support the child and to transfer family property to him or her. This left "unnatural" illegitimates without much prospect for legitimation. It also left childless couples without much hope for perpetuating their name and legacy, unless they could legitimate a child through a private act of Parliament or of the state legislature.

Massachusetts was the first common law jurisdiction to adopt adoption. An 1851 statute allowed for the permanent transfer of parental power to a third party adopting adult who was biologically unrelated to the child. And, in turn, it automatically legitimated the adopted child as the adopting parent's own, providing it with a name, support, and all the rights and privileges of a legitimate child during and after the adopting parent's lifetime (Zainaldin 1979). A century later this was the norm throughout the United States, as well as in England (Vernier 1938; Clark 1988; James 1857).

Even where children were not or could not be legitimated, modern states removed a good number of the common law disabilities against them. Most importantly, illegitimate children gained firmer standing in courts and surer footing through agencies to file paternity suits, and to sue their father for support during his lifetime. The growing presumption now in most states is that a father owes a duty of support to his natural children and can be subject to mandatory paternity tests in suspicious cases and criminal sanctions in cases for failure to furnish mandated child support. Moreover, a good number of the traditional prohibitions against gifts and devises to illegitimates have fallen aside. In all states, mothers are entirely free to give their illegitimate children property by gift or testament. Illegitimate children, in turn, are freely entitled to receive property from mothers who have died testate or intestate. In most states, this same rule applies to inheritance between fathers and illegitimate children, though several states still impose restrictions on receipt of such paternal legacies, particularly in cases of the father's intestacy. Several states also give priority to legitimate children in cases of inheriting from grandparents or claiming reversionary or remainder property interests (Clark 1988; Abrams & Ramsey 2000), though these traditional preferences, too, are falling aside rapidly.

The plight of illegitimate children has been still further relieved through recent United States Supreme Court interpretations of the equal protection clause of the Fourteenth Amendment (and, in federal cases the equal protection reading of the Fifth Amendment due process clause). In nearly two dozen cases since 1968, the Court has slowly drawn much of the remaining sting and stigma from illegitimacy -- though the formal legal category of illegitimacy still remains licit under the equal protection clause. Illegitimate children are now equally entitled with legitimate children to recover tort damages or workman's compensation benefits for the wrongful death of their parents. They are equally entitled to make claims on the properties and estates of their fathers. They are equally entitled to draw residual social security benefits, residual disability benefits, and life insurance proceeds from their deceased parents (Clark 1988; Zingo & Early 1994; Abrams & Ramsey 2000).

There is ample irony in the protection afforded by the Fourteenth Amendment, however. The Fourteenth Amendment equal protection clause does remove much of the legal stigma from illegitimate birth. But the Fourteenth Amendment due process clause removes most of the legal sanction from extra-marital sex. With the ill legal consequences of both illegitimacy and promiscuity largely removed, the number of illegitimates has exploded. In the past two decades, nearly one-third of all American

children -- and more than one-half of all African-American children -- were born illegitimate (Abrahamson 1998; Popenoe and Whitehead 1998-2000; Blankenhorn 1995). While many of these children thrive in single, blended, and adoptive households, a good number more do not. Illegitimate children still suffer roughly three times the rates of poverty and penury, poor education and health care, juvenile delinquency and truancy, criminal conduct and conviction when compared to their legitimate peers. Illegitimate children and their mothers also drew considerably more heavily upon federal and state welfare programs, with all the stigmatizing by self and others that such dependence often induces (ibid; Reeke 1998; Hendrix 1998; Zingo & Early 1994). While the legal and moral stigma of illegitimacy may no longer sting much, the social and psychological burdens of illegitimacy remain rather heavy.

There is an even greater irony to the protection afforded by the Fourteenth Amendment. The extension of its guarantee of sexual liberty to include the right of abortion has sanctioned a whole new class of "illegitimates" in the past three decades. These new illegitimates are not those unwanted innocents who are born out of wedlock, but those unwanted innocents who are aborted before their birth. These unwanted innocents pay not with a sort of a civil death as in the past, but with an actual physical death without hope of a future.

This is not to suggest that children conceived out of wedlock are the only or even the majority of those being aborted. Nor is it to say that we must return to a system of criminalizing abortion and thus exposing unwanted innocents and their mothers to more desperate and dangerous measures. But I dare say that it is worth pondering the analogies between the current plight of the innocent being *in utero* and the historical plight of the innocent youngster in limbo. Indeed, if the historical doctrine of illegitimacy was a Christian theology of original sin pressed to untutored extremes (as I shall argue below), this new form of illegitimacy is a constitutional theory of sexual liberty pressed to equally untoward extremes.

CONCLUDING REFLECTIONS

Given the shaping historical influence of Christian theology on the Western law of illegitimacy, perhaps it would be useful in conclusion to inquire a bit about what contemporary theology can still say about this doctrine and about its further reform.

It must be remembered that, despite all the recent changes in American law and culture, many religious communities, within and beyond the Abrahamic tradition, continue to maintain a theological doctrine of illegitimacy today. Some of these religious communities continue to predicate this doctrine on explicit theological and moral grounds of deterring extramarital sex, maintaining marital sanctity, and supporting the natural nuclear family. Illegitimate children born in these religious communities sometimes still continue to bear severe sanctions and disabilities imposed on them by internal religious law: indeed "honor killings" of bastards and their mothers have recently risen in some religious communities around the world.

The First Amendment lawyer in me cannot resist saying a few words about this. The free exercise clause mandates that religious communities in this country be left free to preach and practice their theology and law of legitimacy, without undue interference from the state. This corporate free exercise right does not license religious communities to threaten or harm the life and limb of any of its members, whether legitimate or illegitimate. Honor killings or anything remotely resembling the same have no place or protection. Nor does the free exercise clause license the community to impede any party's right to leave that religious community if it finds its preaching and practice on legitimacy unacceptable. But the free exercise clause should protect the religious community's right to preach and practice peaceably against illegitimacy, and to sanction and shun illegitimates in their midst up to the point that they threaten or commit violence against them. Neither the voluntary members of that religious community nor anyone else should have recourse to state legislatures or courts to enjoin or punish the same. Both popular and unpopular religious beliefs and practices deserve constitutional protection. That is the price we pay for religious freedom for all.

Theological Critique. The amateur theologian in me, however, cannot resist saying a few more words to challenge the traditional Christian doctrine of illegitimacy, which many conservative Christian churches still teach today. In my view, the Christian theological doctrine of illegitimacy is theologically illegitimate. It is a misreading of basic biblical texts. It is a misunderstanding of the doctrine of original sin. It is a missed insight into the true meaning and possibility of Christian families.

The biblical story of Abraham and Ishmael is just that -- a story, which must be read as part of the full biblical nomos and narrative. It is a powerful, troubling, and sobering tale. It is, to my mind, best seen as an injunction to faithfulness and patience, a warning against concubinage and adultery, a testament to divine mercy and miracle, all of which lessons are underscored many times over later in the Bible. But Abraham's harsh treatment of Ishmael is no more to be emulated and implemented today than the later story of Abraham carrying his legitimate son Isaac to the top of mountain to sacrifice him on an altar (Gen. 22:1-14).

Illegitimacy doctrine can find no firm anchorage in the familiar biblical adage that "the sins of the fathers shall be visited upon their children." Four times that passage recurs in the Bible. Twice, it appears in the Decalogue as a gloss on the Commandment prohibiting idol worship. "You shall not make for yourself a graven image ... you shall not bow down to them or serve them; 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 RSV; cf. Deut. 5:8-10). The sin at issue is idolatry, not adultery. And nothing is said here to distinguish among legitimate or illegitimate children of the next generations. The threat of vicarious liability is clear for any subsequent generations of children who continue to "hate God" or perpetuate idol worship. But "steadfast love" is promised to those who love God and keep his commandments. Exactly the same promise is repeated in the other two passages that repeat this phrase of "visiting iniquity upon children." Legitimate or

illegitimate children of sinners who perpetuate their parents' sin are condemned. But those children of sinners who are righteous receive God's steadfast love (Ex. 34:7; Num. 14:18). These passages do not teach a doctrine of double original sin for illegitimates. They preach the need for all to repent and be righteous.

Later biblical passages support this reading. In Deuteronomy, for example, Moses lays out various laws of crime and tort, and then explicitly rejects the law of vicarious liability within the family: "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). In the next verse he adds: "You shall not pervert the justice due to the sojourner or the fatherless" (Deut. 24:17; see also Deut. 27:19; Ps. 94:6; Is. 9:17; Lam. 5:3). The prophet Ezekial says clearly that in a community dedicated to "Godly justice," children should not bear vicarious liability for their parents' sin: "You say, 'Why should not the son suffer for the iniquity of the father?' [I say:] When the son has done what is lawful and right, and has been careful to observe all my statutes, he shall surely live. The soul that sins shall die. 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, and the wickedness of the wicked shall be upon himself" (Ezek. 18:19-20 RSV; cf. Is. 3:10-11).

This biblical teaching of individual accountability and liability is further underscored by New Testament teaching. If Christ's atonement for sin means anything for Christians, it means that no one, not least unborn or newborn children, need be scapegoats for the sins of their parents. In Christian theology, one Scapegoat for others' sins was enough. The New Testament says repeatedly that 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 final divine judgment and mercy (see esp. Matt. 25:31-46). Before the judgment seat of God, there will be no class actions, and no joint or vicarious liability for which the individual soul must answer.

Equally exaggerated, in my view, is the conventional theological teaching that blood ties are a *sine qua non* of faithful and stable family life and love. Kin altruism, of course, is an ancient classical insight, which came most famously into Christian theology via Thomas Aquinas's appropriation of Aristotle (Browning et al. 1997). There is something fundamentally sound and sensible in the notion that a parent, particularly a father, will be naturally inclined to invest in the care of a child who carries his blood and name, who looks and acts like him, and who needs him in those tender years to survive.

But it is easy to press this naturalist argument for kin altruism too far. After all, the same Christian theology that insists on blood ties between parent and child insists on no blood ties between husband and wife. Indeed, to marry within the prohibited degrees of consanguinity is to commit the crime of incest, a serious offense if it is done with *mens rea*. But why should the legitimacy of parental love turn essentially on the presence of blood ties, but the legitimacy of marital love turn essentially on the absence of blood ties? The sacrificial love and charity demanded of a parent and a spouse are not the same, but they are certainly very comparable, and they must be discharged

concurrently. Why is a blood tie so essential to one and not to the other relationship? This strikes me as a peculiar form of social transubstantiation doctrine gone logically awry.

This is not to argue, as some do today, that the crime of incest must be dropped and that siblings and blood relatives must be left free to marry. It is instead to argue that natural blood ties between parent and child are not essential to stable families. Parental love, like marital love, is in its essence not only an instinct but also a virtue, not only a bodily inclination but also a spiritual intuition (Jackson 1999). Blood ties between parents and children should not be easily severed. But parental ties to children should not be predicated on blood ties alone. Real family kinship goes beyond “birth, biology, and blood” (Post 2000: 124). Adoption of children is an option that must always be considered by some and applauded by all.

Adoption still remains a theologically tender topic today. Until a few generations ago, it was still forbidden or least severely frowned on in many Christian quarters (Post 2000). But adoption is one of the deepest forms and examples of Christian charity. A Christian need only look so far as the example of the first Christian family: Joseph, after all, adopted Jesus, the purportedly illegitimate child of Mary, and raised him in a stable family despite the absence of a blood tie to him (Schaberg 1987). A Christian might further look at how the New Testament describes God’s mechanism for dispensing grace: Christians are adopted as heirs of salvation, despite the sins that they inherit (Rom. 8:15, 23, 9:4; Gal. 4:5; Eph. 1:5). That is the real point of Paul’s jarring passage to the Galatians that we saw earlier. Adoption by grace is the theological means by which God removes the stigma of sin and the punishment it deserves.

Legal Implications. To castigate the traditional doctrine of illegitimacy, however, does nothing to ameliorate the current plight of outcast children. If theology no longer should support a doctrine of illegitimacy, and the law no longer should stigmatize the incidence of illegitimacy, what can be done about the current problem of so many children born out of wedlock, with all the predictions of social pathos and problems, dependency and delinquency that await them? The ancient angel’s description of Ishmael’s bane still seems altogether too apt a prediction of the plight of the modern illegitimate: “He will be a wild ass of a man, his hand will be against every man and every man’s hand against him; and he shall dwell over against all his kinsmen.”

One obvious legal measure is to assign further responsibility where it is due: on both the mother and the father of the unwanted child. Historically, adulterers, fornicators, and other sexual criminals paid dearly for their crimes -- by fine, prison, or banishment, by execution in extreme cases. But this remedy often only exacerbated the plight of their illegitimate child, who in extreme cases was now often left with no or little natural network of family resources and support. Today, adulterers and fornicators pay little if any for their sexual behavior -- protected in part by new cultural mores and constitutional laws of sexual privacy. Even if one wanted to pursue a neo-Puritan path -- I, for one do not! -- it is highly unlikely that a new criminalization of adultery or fornication could pass constitutional or cultural muster.

But the elimination of criminal punishment for promiscuity should, to my mind, be coupled with a much firmer imposition of ongoing civil responsibility for the care and support of an innocent child born of such conduct. After all, the same constitutional text that exonerates promiscuity also licenses contraception, which is widely and cheaply available now, indeed free in many quarters. Those who choose to have children out of wedlock notwithstanding these options need to pay dearly for their children's support. I am no fan of shotgun marriages or forced cohabitation of a couple suddenly confronted with the prospect of a new child. But I am a fan of aggressive paternity and maternity suits, now amply aided by the growing availability of cheap genetic technology. I am also a fan of firm laws that compel stiff payments of child support for non-custodial parents, and that garnish the wages, put liens on the properties, and seek reformation of insurance contracts and testamentary instruments of those parents, particularly fathers, who choose to ignore their dependent minor children. I am equally a fan of tort suits by illegitimate children who can seek compensatory and punitive damages from their parents or their parents' estates in instances where these children have been cavalierly abandoned or notoriously abused. These and a good number of comparable provisions are happily becoming increasingly common in many American states today, with several federal laws providing interstate support and enforcement, and criminal law standing ready with sanctions when civil orders are chronically breached.

A second obvious legal measure is a much more robust engagement of the doctrine of adoption. For all the pro- and anti-abortion lobbying and litigation that has emerged in the post-*Roe v. Wade* era, there has been relatively little attention paid to the alternative of adoption. Historically, adoption legitimated illegitimate children, removing the cultural stigma and civil shadow that attended their birth. Today, adoption provides not only this protection, but also one of the best hopes and remedies to the new illegitimates who are condemned *in utero*. Adoption should, to my mind, be much more aggressively advocated and actively facilitated -- and amply celebrated and rewarded when a natural mother chooses to make this heroic sacrifice.

The law of adoption has improved somewhat in recent years, and both state and federal laws and appropriations have made it easier and cheaper than in past decades. But adoption is still a clumsy and expensive procedure to pursue in this country, and thus remains reserved primarily for the substantially well to do. It is made worse by the continued insistence of many states that natural fathers and mothers have an effective veto over adoptions -- however irresponsible they may have been in conceiving the child and however notorious they may have been in neglecting or abusing it *in utero* or upon birth. It is too easy to say that blood ties should mean nothing and that children should be placed only with the fittest parents. That is a dangerous step along the way to the bleak anonymous pattern of parenting contemplated coldly in Plato's *Republic* and B.F. Skinner's *Walden Two*. But a more generously funded, administered, and applied law of adoption would do much to alleviate the plight of the modern illegitimates.

* * * *

Bastards, like the poor, will doubtless always be with us -- subjects of pity and scorn, romance and ribaldry at once. Bastards may now have passed largely beyond the province of religion and criminal law. But they live on in our language and literature, with all the ambivalences of the first story of Ishmael. Contrast the sound still today of the pitying phrase: "Oh, you poor bastard" with the angry retort, "You Damned Bastard!!" Read still today of the checkered career of the illegitimate love-child in Hawthorne's *Scarlet Letter* or Shakespeare's plays. Shakespeare's *King Lear* perhaps put the puzzlement and protest over the illegitimate's plight best in the words of Edmund, the scheming bastard, who nonetheless could speak to the injustice of his status:

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 (Act I.ii).

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