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BOOK REVIEWS

The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered

John Witte Jr

Cambridge University Press, Cambridge 2009, 211 pp (hardback 45.00) ISBN 978-0-521-83941-9; (paperback £15.99) ISBN: 978-0-521-54824-3

This work is part of a larger project entitled 'The Child in Law, Religion, and Society', being undertaken by the Centre for the Study of Law and Religion at Emory University, Atlanta. It is a detailed, illustrated, historical essay which seeks to provoke new thinking on the doctrine of illegitimacy. Tracing the evolution of the laws on illegitimacy in the Western world from Biblical times through to the present day, it demonstrates the influence of Christianity, drawing from Jewish, Greek and Roman sources, on the development of canon law, civil law and common law, all of which systems sanctioned illegitimacy.

Witte's introduction, which reveals motivating personal and family experiences, focuses on the paradoxes of illegitimacy. Throughout the ages, Church and State provided and reformed legislation not only for marriage and the family, but also for the control and punishment of illicit sexual acts. An illegitimate child was at one and the same time 'a child of no-one (*filius nullius*) and a child of everyone (*filius populi*)'. Provided they escaped death, unless adopted or legitimated, these innocents were very often the subjects of poverty and abuse and suffered severely restricted rights.

Chapter one reviews Biblical references to illegitimacy in both Old and New Testaments, from Jewish and Christian perspectives; for example, the harsh treatment of Hagar and Ishmael (Gen 16: 6) and the Mosaic law prohibiting illegitimates from 'entering the assembly of the Lord … even to the tenth generation' (Deut 23:2).

The author argues that interpretation is key. The rabbis interpreted the passages referring to 'visiting the iniquities of the fathers upon the children' (eg, Ex 20: 4–6, 34: 5–9; Deut 5: 8–10; Num 14: 18–19) as applying to idolatry, not adultery. They made no distinction between legitimates and illegitimates. The reference to further generations was a promise of postponement of punishment, allowing for repentance. The prohibition on entering the 'assembly of the Lord', applied solely for marriage; an illegitimate could not marry. Early Jewish law defined 'adultery' and 'illegitimacy' narrowly, affording protection to some children. The author suggests that Christian interpretation was similar. Early Church Fathers rejected the doctrine of vicarious responsibility. Illegitimate

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and abandoned children were supported, as was adoption. Although rabbinic tradition rejected adoption as legal fiction, any evidence of Jewish parentage sufficed for an abandoned child to become a full member of the community, which was then responsible for providing care and support. The child could be afforded a legal guardian.

The second chapter analyses the classical Roman law and medieval civil law of marriage, extra-marital sex, illegitimacy, legitimation, adoption and guardianship. Witte demonstrates the vulnerability of illegitimate children for whom the *paterfamilias* had no responsibility. Although fathers were permitted to take custody of illegitimate children, early Roman law allowed illegitimates to be 'exposed' at birth or sold into slavery; otherwise they were the responsibility of the mother, from whom they could inherit. In any case, they were not a burden on the State. They were stigmatised more by their social class than their birth status. Witte argues that Christianity sometimes further disadvantaged illegitimates and he distinguishes between different categories of illegitimates, only some having the capacity for legitimation.

Chapter three deals with medieval canon law, the evolution of the theology of marriage, and legitimation. As the autonomous ruler of the Christian world, the Church claimed and exercised, through its canon law, exclusive jurisdiction over marriage and related issues, such as child care, education, sexual sin, and inheritance. Canon law reflected the expanding theology of marriage, described as both a natural association and a contract. It was a sacrament between the baptised, although considered subordinate to celibacy; consequently, mandatory celibacy for clerics gained support. Impediments to marriage resulted in invalid unions and therefore illegitimate children, which led to the introduction of 'putative marriage', but created a new category of legitimate children, with fewer inheritance rights than the normally legitimate. New positive canon law led to new categories of illegitimates, which in turn led to new methods of legitimation, available to some. The Church allowed some children to sue their parents for support, or to enter a monastery themselves. Papal dispensation was also available for illegitimates to enter monastic Orders or clerical offices. Others, however, were subjected to the literal interpretation of the biblical prohibitions and sanctions, despite the awareness of other biblical passages counselling against the imposition of vicarious liability.

Chapter four looks at the English common law of illegitimacy, which, departing from both Roman law and canon law focused on land and inheritance rather than morality. Witte highlights the tensions which arose between the Continental '*ius commune*' and English common law, exacerbated by the Reformation, after which Protestant teaching held sway. Some of the reforms disadvantaged illegitimate children even further whilst some benefited them. For example, the Council of Merton in 1234 rejected the doctrine of legitimation by subsequent marriage. Common law considered adoption artificial,

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endangering family inheritance. Consequently, illegitimates continued to be deprived of inheritance rights. Rejected also was the doctrine of putative marriage, based on the common law rule that ignorance or mistake was no defence. On the other hand, a child born to any married woman, or recent widow was presumed legitimate. Mandatory celibacy was rejected and therefore, children of clerics were no longer automatically illegitimate. The bar to clerical office was lifted. Inter-religious marriages were permitted. Clandestine marriages, however, posed their own problems. The common lawyers accepted the canon law provisions of support for illegitimates. Consequently, following the dissolution of the monasteries, which gave support, the Poor Law (1576) was introduced. Church and State cooperated where there was no conflict of laws; otherwise the secular courts decided both the fact of illegitimacy and its consequences.

Chapter five turns to the evolution of American law, influenced by notions such as natural rights, freedom of expression, sexual liberty and privacy, much of which eventually found its way back to Europe. Before the 1776 Revolution, the American colonies inherited, with variations, much of the English common law on illegitimacy, for example, rejecting the concept of putative marriage. However, children of clandestine marriages and common law marriages were legitimate. New categories of illegitimates emerged: children born between whites and African-Americans; and between whites and native American-Indians. Although not uniformly throughout the States and not without resistance, laws most favourable to illegitimates, drawn from canon law, civil law and common law were enacted. In an attempt to make natural rights real for children, the notion of *filius nullius* was rejected, hence the reform of inheritance laws. Eventually, a child could be legitimated simply by, *inter alia*, the father's formal declaration. Adoption also found favour. New laws protecting all children appeared; abortion, infanticide, child abuse and child labour were criminalised. However, later legal protection for extra-marital sex greatly increased the number of illegitimates. The Fourteenth Amendment Due Process right of privacy has now been extended almost beyond recognition.

Witte argues that although the harsh legal penalties are gone, illegitimates still suffer the economic, social and psychological consequences. He concludes with some reflections for further reform, based on a more enlightened interpretation of Scripture and Tradition and the enforcement of responsibilities on parents. Church and State have new roles to play.

Witte does not distinguish crimes of ecclesiastical law from those of civil law. Whilst ecclesiastical crimes are sins, not all sins are ecclesiastical crimes. It would, therefore, have been helpful to learn of the role of the ecclesiastical courts in dealing with non-clerical sexual offences.

The extensive bibliography is testament to the interest in this subject and Witte's detailed research of the evolution of laws governing illegitimates will

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appeal to lawyers, sociologists and historians. His clear, factual yet sensitive approach makes this book an easy read. The principal reform proposed in this work is the new thinking Witte seeks to bring to bear on the area, aptly expressed in his phrase: 'Before the judgement seat of God, there will be no class actions, and no joint or vicarious liability for which the individual soul must answer'.

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In Defense of Religious Liberty

DAVID NOVAK

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Most of the chapters that make up Novak's book have their origins in lectures he has delivered at various universities. Three began life as the Test lectures delivered at the University of Princeton. To these Novak adds a revised version of a previously published chapter. That may seem to promise a volume with a disjointed content but, in fact, a clear consistency of argument and unity of concern runs throughout the book. It is also a book with much broader ambitions than its title suggests. Novak's concern is not just with 'religious liberty' but with the entire relationship between religion, the modern state and civic life. His wide-ranging argument can be broken down into three related concerns: the way in which the basic constitution and laws of the state, including those of a secular, multicultural state such as the US, Canada or Britain, need to be grounded in the law of God; the similar need to ground human rights in the law of God; and the place religion should occupy in the public square.

What is the role of religion in the life of the modern democratic state? Novak's answer is 'fundamental'. He sees religion as essential both to the legitimation of political power and to the basic framework of laws that a state should recognise and maintain. That is not an easy case to make given the diversity of religious beliefs present in western societies and the predominantly secular character of western states, which is itself in part a response to the problems created by religious diversity.

Novak accepts that it would be inappropriate to make his case on the basis of his own Jewish religious tradition, or any other tradition that speaks only to a particular community, although he does take pains to show that what he argues is endorsed by the theology of Judaism. The case needs to be universal; it must speak to all. Hence, he relies on the resources of reason rather than