

Review

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## BOOK REVIEWS

**Law, Sex, and Christian Society in Medieval Europe.** By James A. Brundage. Chicago and London: The University of Chicago Press, 1987. Pp. xxiv, 674. \$45.00. ISBN: 0-226-07783-7.

This book, by one of America's preeminent medieval historians,<sup>1</sup> will remain a basic reference and a fundamental guide for scholars researching the history of marriage and the laws regulating the expression of human sexuality in the Western legal tradition. In a work of comprehensive learning and critical solicitude, Brundage traces the laws and their stated rationale from ancient taboos to the complex legal thicket of regulations of marriage and divorce and prohibitions of extra-marital sexual activity that formed the early matrix of the modern European and American legal systems. The book is a *tour de force*, integrating and displacing several generations of particularized studies.

The great value of Brundage's work lies in the breadth of scholarship he has amassed. The work is not only encyclopedic; its nucleus is also firmly built upon the strong analytical foundations of a mature historiography. It is a valuable reference, not only an enlightening study, that merits the highest commendation.<sup>2</sup>

The dialogue Brundage has begun with this book deserves the careful response not only of medievalists, but also of scholars in the collateral disciplines that encircle the core of the work,<sup>3</sup> e.g., archeology, biblical studies, ancient history, and patrology as well as contemporary canon law and jurisprudence. From this perspective, I will suggest several lines of thought to broaden the conversation, ideas occasioned as much by what Brundage has written as by an uneasiness

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1. Professor Brundage, past president of the American Catholic Historical Association, is professor of history at the University of Wisconsin, Milwaukee. He has authored numerous articles and reviews on medieval canon law, as well as several widely acclaimed books on medieval history, such as *THE CHRONICLE OF HENRY OF LIVONIA* (1961), *THE CRUSADES* (1962), and *MEDIEVAL CANON LAW AND THE CRUSADER* (1969).

2. Professor Brundage was awarded the John Gilmary Shea Award of the American Catholic Historical Association in 1988 for this book.

3. Chapters 5-10, pp. 176-546, the core of the book, trace the distinctively medieval development of ethical theories and laws regulating marriage and sexuality. Chapters 1-4, pp. 10-175, survey ancient, biblical, patristic, and pre-medieval laws and customs. Chapters 11 and 12, pp. 551-608, survey the development from the post-Reformation era into contemporary law and canonical jurisprudence.

with what he has left unsaid. Because the author is not only an historian but also an advocate, his brief invites rejoinder.

#### FROM MINISTERIAL PREOCCUPATION TO LEGAL PROHIBITION

The theological curriculum in Catholic seminaries after the reforms of the Council of Trent (1545-1563) included almost a year of study in moral theology of topics variously falling within the rubric of the sixth and ninth commandments, as well as a comparable time devoted to the canon law of marriage and matrimonial processes. No doubt the matter of human sexuality was taken with the utmost seriousness. The classic erudition of theologians such as Tomás Sánchez (1550-1610), the enormously learned Spanish Jesuit commentator upon the Council of Trent's decree *Tametsi*, guided the resolution of myriad contemporary marriage problems. His great three-volume work, *De sancto matrimonii sacramento*,<sup>4</sup> little known outside of Catholic clerical circles, received encomia from canonists not unlike that reserved by Sir Edward Coke for Littleton's *Tenures*.<sup>5</sup> In fact, the casuistic literature on the moral theology and canon law of marriage and sexuality in the Catholic tradition was and continues to be vast, fecund, and fascinatingly complicated. It is so large, indeed, that one may with some justification speculate that for the clergy, sexual activity of one kind or another was the major moral concern of Christians in daily life. The centrality of attention given to marriage, family life, and sexuality did not begin at the Council of Trent; by then it was well confirmed by four centuries of pastoral and consistorial practice.

For canon lawyers staffing judicial and administrative positions in the Catholic Church, the study of this literature, together with the reported matrimonial jurisprudence of the Holy Roman Rota and Apostolic Signatura, continues to be a constant preoccupation. From the reign of Pope Alexander II (1061-1073) until very recently canon law was the preferred career path into the Roman Catholic hierarchy. The canonistic preoccupation, a strange fascination, indeed, for the celibate clergy, very easily became official policy; its rationalization, a

4. T. SÁNCHEZ, *DE SANCTO MATRIMONII SACRAMENTO DISPUTATIONUM TOMI TRES*, 3 vols. in 1 (1621).

5. "This work is the ornament of the Common Law, and the most perfect and absolute work that ever was written in any human science." COKE, *I INSTITUTES*, PROEM. Compare F.X. Wernz, *Ius Decretalium*, T. IV, *Ius Matrimoniale Eccles. Catholicae*, pars prima, 17 (1911) or, more recently, Hennessey, *Canon 1097: A Requiem for Error Redundans*, 49 *THE JURIST* 146, 158-66, esp. 165 (1989). Brundage describes Sanchez' work as comparable to a "complicated tax code." (p. 564)

ministerial and promotional necessity. This was as true for Enea Silvio Piccolomini in the fifteenth century, one of history's great romantic lovers who died as Pope Pius II (1458-1464), as for the present incumbent of Peter's See.

Aside from the rare layman who sought the permission of a church tribunal for a second marriage, however, or perhaps an occasionally scrupulous penitent, the laity seems to have lived, loved, copulated, and borne children, married, parented, dreamed, and caressed, given, received, denied or been denied affection and touch, largely in innocence of the overweening concern of their pastors. Nowhere is the resultant frustration of the Catholic hierarchy more excruciating, and, thus, more abundantly documented, than by the apparent insouciance of the laity in matters of personal sexuality, premarital relationships, and family planning. Maybe it is this stubborn, uncaring, live-and-let-live attitude of the laity that has provoked the flood of official pronouncements for historians to read. Brundage says practically nothing in this long book about the laity's response. Nor does he, good historian that he is, even speculate about what it might have been. The record he supplies, however, is not only one of repeated efforts to repress and legislate away deviant sexuality, but of a history plagued with difficulties of enforcement.

The evidence Brundage has gathered is the written evidence supplied by the clergy, the canonists and theologians, and by the civil legislators, the *brachium saeculare* of the hierarchy. We see the age-old boot stomping upon the embers; but the sparks still fly and burst into flames with perennial Rabelaisian ribaldry or the chivalric chanson that are as much a part of Christian literary tradition in the West as is the desiccated finger-wagging of the anchorites. Brundage knows this (see, e.g. pp. 494-502) but nowhere, even in the medieval core of the book, does he provide detailed allowance for extended discussion of the way Christian men and women really lived. This, of course, may be history's greatest mystery. For the writing of thematic history the necessary tunnel vision of the legal historian limits a larger peripheral consciousness beyond the meager literary sources still extant.

In this context, I find it thought-provoking that while sixteenth-century Catholic divines may have disdained sex as despicable and polluting, the Shakespearean corpus resonates no such sour chord. Neither do the art, manner, and literature of the Renaissance and Baroque. The wedded laity from Dante to More express a gentler, more affectionate and sensitive appreciation of human sexuality. Both the

artist and the ascetic, I believe, reflect a Christian perspective upon life and human sexuality.

If it remains true at all, the famous canon of Pope Gregory VII, *Duo sunt genera christianorum*<sup>6</sup> at least, expresses the perception of a wide gulf between clergy and laity. Nowhere is this more evident than in attitudes towards sexuality.<sup>7</sup> Does not the widespread and almost intractable problem of clandestine marriage itself, from ancient times all the way up to the Decree *Ne Temere* in 1907, and the modern accessibility of civil marriage, indicate a persistent avoidance by large segments of the laity of clerical supervision over their copulatory inclinations?

While Roman Catholic reflection upon sex and marriage translated into the ongoing decretal jurisprudence of the Holy Office and the slowly-evolving rules and dicta, the *stylus*, of the Roman Rota, within the other branches of Christianity moral, ethical, and pastoral norms mirrored a broad consensus that held together along substantive lines until the Second World War. The ethical teachings of the Christian churches on monogamy, extra-marital sex, homosexual sex, abortion, and contraception were almost identical fifty years ago, differing less in essence than in a format for ecclesiastical discipline. The consensus contributed to the rationale of the legal structure of marriage and divorce, as well as penal laws restricting nonmarital sexual expressions with which we are familiar. The breakdown of religious agreement, with the increasing pluralism and secularism of modern society, have undermined the consensus, leaving much of the law without clearly-agreed foundations. This generation, thus, has seen the gradual abolition of much of the statutory law, at least where it concerns the prohibition of sexual activity between consenting adults. It has witnessed, as well, various constitutional challenges to laws restricting sexual activity remaining on the books to serve some secular functionality.<sup>8</sup>

Brundage's work is an historical explanation of why and how the medieval church, starting with the relatively simple and, indeed, meager sayings of Jesus and recorded reflections of several of the Fathers, erected the gothic edifice of matrimonial canon law and how that, in

6. C.12, q.1, c. 7.

7. L. Prosdocimi, *Unità e dualità del popolo cristiano in Stefano di Tournai e in Ugo de S. Vittore: Duo populi e Duae Vitae*, ÉTUDE LE BRAS, 673-80 (1965).

8. See, e.g., *Bowers v. Hardwick*, 475 U.S. 186 (1986) [sodomy] as well as state legislation prohibiting prostitution, rape, exhibitionism, and child abuse, as well as structuring and encouraging monogamous marriage. *Reynolds v. U.S.*, 98 U.S. 145 (1879).

turn, influenced the development both of modern legal prohibitions of extra-marital sexuality, even between consenting adults, and the Church's own attitudes towards all expressions of human sexuality. Lest those of the Reformation tradition feel neglected, Brundage also records the trajectory of agreement and disagreement by sectaries of Puritan and non-Puritan persuasions alike. After all, the Established Church in England exercised exclusive jurisdiction over marriage and matters of personal status, continuing the canonical tradition of the consistorial courts, until the mid-nineteenth century.<sup>9</sup>

### THE SURVEY

As the author says, the regulation of sexuality has been a central feature of virtually every known legal system (p. 1). In chapters one through five he provides the broad sweep of the surveyor's brush through antiquity, from the ancient Near Eastern religions to the later Roman empire, to draw an outline of the religious and civil regulations regarding marriage and sexuality in the first millennium. This survey is intended to provide the prologue to the author's principal contribution, the detailed study of primary theological and canonistic sources that shaped a "peculiarly Western sexual ethos" during the Middle Ages (p. 1).

The survey depends primarily upon secondary sources to weave a theme that "Christian sexual morality is a complex assemblage of pagan and Jewish purity regulations, linked with primitive beliefs about the relationship between sex and the holy, joined to Stoic teachings about sexual ethics, and bound together by a patchwork of doctrinal theories largely invented in the fourth and fifth centuries" (p. 3). Having established the theme to his satisfaction, Brundage finds the linkage between shame and reproductive exclusivity resonating from Jerome and Augustine right down to Pope Paul VI's 1968 encyclical letter *Humanae vitae* (p. 5) and Pope John Paul II's 1980 encyclical *Familiaris Consortio* (pp. 5, 589-90), through thousands of intermediate voices, some more strident than others. Sexual relations as a source of intimacy, a symbol and expression of conjugal love, while occasionally mentioned, is downplayed in significance. Purity, reproduction, conjugal intimacy as a surcease for temptation establish the parameters of the Christian sexual ethic. Brundage finds the whole story, indeed, a sad one, a sexual tradition loaded with guilt that "ex-

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9. See M. INGRAM, *CHURCH COURTS, SEX AND MARRIAGE IN ENGLAND, 1575-1640* (1987) for a continuation in England of Brundage's medieval study.

acted an enormous toll in misery and despair. Both individuals and Western society as whole," he says, "have been poorer as a result" (p. 8).

This judgment upon the value of the tradition occurs throughout the book, particularly in notes and chapter conclusions. Although the judgment implies a comparative analysis, the author offers no comparative evidence to sustain his conclusion. While it is clear that the dried, pessimistic rationalization of sexuality has led to scrupulosity and extreme personal repression in some, it is not at all clear that the substance of Christian reflection upon monogamous marriage and the sanctity of family life is at all unhealthy. Nor do I find historically a sexual paradise provided by either pre-Christian or non-Christian societies. At any rate the value judgment itself is neither self-evident nor proven by the sources supplied.<sup>10</sup>

The problem with the theme becomes crucial when Brundage encapsulates the entire scriptural tradition and that of biblical Christianity into ten meager pages (pp. 51-61). Admittedly, neither he nor the scholars he credits with review of the manuscript (p. xxiv) are scripture scholars, so he must depend upon secondary sources. A fuller, more balanced treatment of the Scriptural data is clearly called for. The first volume of Edward Schillebeeckx's *Marriage: Human Reality and Saving Mystery*,<sup>11</sup> for example, could be recommended. Within this context, use of the Lucan pericope on the invitation to the nuptial banquet (*Luke* 14.20) to set Jesus at odds with prevailing rabbinic opinion on sexual matters is very odd, if not plainly mistaken.<sup>12</sup>

When one surveys the Fathers on the subject of sex and marriage to provide a linkage to the Middle Ages two notes of caution should be sounded. First, we know more about the Apostolic Fathers and patristic theology in general today than did Gratian or, for that mat-

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10. This is not to say that the judgment could not have been supported by *other evidence*. Jesuit moral theologians since 1612, for example, have held it to be uncontroversial that, except for the potentially reproductive marital act, every thought, word, quiver, or activity of a sexual nature is intrinsically evil, *sine parvitate materiae*, and, if intentional, *per se* a mortal sin. M. ZALBA, 2 THEOLOGIA MORALIS, 136, fn. 43 (1958). This, of course, is so absurd as to be pathological. There is abundant evidence that after the seventeenth century, while theologians conceded the goodness of sexuality in marriage, they rationalized all other forms of sexual expression into categories of dreadful inhumanity. The *communis opinio doctorum* that in matters of sexuality there is no parvity of matter is so violently repressive that it nails just about everyone from puberty to grave with guilt. The doctrine itself was not challenged until the Second Vatican Council. Brundage would have improved the book by addition of this evidence into his slim Chapter 11 on the Counterreformation.

11. (New York, 1965).

12. How does the contemporary canon lawyer from Strasbourg, René Metz, rank as a biblical authority for citation here? Or, for that matter, Eric Fuchs? See p. 59, fn. 50.

ter, any of the writers of the twelfth-century renaissance. In fact, the transmission of writings of the Apostolic Fathers in the first millennium was so fragmented and incomplete<sup>13</sup> that these writings could not have supplied the foundation for medieval sexual ethics. Augustine, Jerome, Ambrose, Gregory, and Isidore are more closely linked to the Middle Ages. The use of the latter, not the former, to subserve the purposes of the Cluniac Reform obviously skewed the emphasis upon the monastic ideal as a higher personal status in the Christian dispensation.<sup>14</sup>

Secondly, notwithstanding the persuasive argument John Noonan has made that Justinian considered himself in the mainstream of Catholic thought in allowing exceptions in the Novels to marital indissolubility,<sup>15</sup> not all patristic scholars accept his conclusion. There may be more consistency and continuity in the patristic tradition than the author surmises.<sup>16</sup>

From the Roman law sources, again, one might wish for a bit more clarity throughout Chapter 3 on the distinction between *concubinatus* and *contubernium*. It stretches Hippolytus too much to say that concubinage was "common among Christians" in the second and third centuries (p. 70). In fact, the opposite seems to be his clear admonition to catechumens. That the Church gradually accepted *contubernium* is not remarkable, since it was the only form of marriage available to Christian slaves. Application to *contubernium* of the scriptural teaching on marriage and marital fidelity proves rather than disproves the continuity of doctrine on monogamy.

When discussing early medieval Europe, the author devotes a considerable amount of space to the Penitentials, and rightly so, because of their great importance in the evolution of auricular confession (pp. 152-69). The Penitential books are, indeed, a particularly appealing confirmation of the author's theme that sexual crimes were treated with special harshness because of the implied shamefulness and impurity attached to them. Unfortunately, what the author fails to relate is the limited scope of influence these writings enjoyed. They were unknown in the Mediterranean world within the first centuries

13. See R. Grant, *The Apostolic Fathers' First Thousand Years*, 31 CHURCH HISTORY 421-29 (1962); reprinted in 57 CHURCH HISTORY, CENTENNIAL SUPP. 20-28 (1988).

14. A. Frazee, *The Origins of Clerical Celibacy in the Western Church*, 41 CHURCH HISTORY 149 (1972); reprinted in 57 CHURCH HISTORY, CENTENNIAL SUPP. 108 (1988).

15. J.T. Noonan, Jr., *Novel 22*, in THE BOND OF MARRIAGE 41-90 (W. Bassett ed. 1968), cited by Brundage, pp. 87-88, 94-98, 114-17.

16. See H. CROUZEL, L'ÉGLISE PRIMITIVE FACE AU DIVORCE (1970).



of their provenance from Ireland and probably never had a significant influence even later in the high Middle Ages.

It remains an historical mystery why Orthodox Christianity, both from Constantinople, and Kiev, did not follow the Western tradition in the detail revealed in the dialogues preceding the Council of Florence (1439-1445). It may be that the different approach taken in the West to marriage and the adjudication of the validity of marriages as an exclusive prerogative of the Church was radically an acculturative, rather than a theological, compulsion. The legal structure of the Germanic family unit with its extended kinship relationships was clearly a vehicle of power and the transmission of wealth. Because of this it was necessary in the West to speculate upon the beginning and essence of marriage, as well as legislate to curtail the uncertainties of clandestinity. A similar compulsion did not exist in the Roman law. Thus, in the West the Church may have gradually taken control of marriage, as it did the discipline of the clergy, not to aggrandize itself materially, as Brundage rightly surmises (pp. 606-07), but rather to control the free devolution of church properties and to secure the lines of regal and baronial sovereignty. Orthodox Christianity may have felt no such need where the determination of sovereignty was not coterminous with that of heirship.

A final point is necessary on the survey portions of the book. Chapter 11 begins with a study of the Council of Trent and the promulgation of the reforming decree *Tametsi*, with later effects in the Counterreformation era. It then leaps over four centuries to conclusions upon the present. This ushers in the final chapter intended to recapitulate the book by revealing the link of medieval sexual ethics to contemporary Roman Catholic theology. An appendix then traces out modern civil statutes and caselaw to tie up the religious heritage.

The inadequacy of Brundage's Counterreformation survey is a very serious flaw in the book. To jump from Trent, skipping lightly over Sánchez and Ponce de Leon (p. 565), to the present creates the impression that four centuries of subsequent Christian reflection added nothing to the pinched negativism of earlier times. That is simply not true. The most significant ethical voice of the era, St. Alphonsus Liguori, whom the author fails to mention, but whose opinions were not only widely followed, but even officially approved by the Church,<sup>17</sup> was certainly positive about marriage and human sexual-

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17. Denzinger-Schoenmetzer, *Enchiridion Symbolorum*, n. 2725.

ity.<sup>18</sup> Furthermore, the aftermath of jurisdictional conflicts over the sacramentality of the marriage contract marking Gallicanism and the rejection of the tenets of the Synod of Pistoia (1794), as well as the condemnation of the extreme rigorism of Jansenism, Baianism, and Febronianism, supply so much counterevidence of assimilation in the Church in the late Baroque era of a positive spirit of exaltation in humanity and human sexuality in marriage and family life that the author's despondency lacks sure historical credibility. It distorts Pope Pius XI's encyclical *Casti Connubii* (1930) badly to link it to the misogyny of Jerome.

My own seminary and graduate education in theology and canon law was quite out of harmony with the picture Brundage paints. Disagreements aside, I believe we thought Pope Pius XII reflected the authentic tradition when he said: "The same Creator who in His goodness and wisdom wished to provide for the conservation and propagation of the human race through the cooperation of man and woman by uniting them in marriage, has also disposed that in performing that function they should experience pleasure and joy of body and soul (*conjuges in eius usu voluptatem et gaudium corporis et animi perciperent*). Married persons, therefore, in seeking and in enjoying that pleasure, do no wrong. They share what the Creator has destined for them."<sup>19</sup> That's a long way from Huguccio!

### THE CORE

Brundage's real contribution lies not in the survey, but in the medieval heart of the book. Here he is the expert. His careful production and analysis of theological, canonical, and legal sources, much of which he has studied in manuscript form, are a superb example of critical historical scholarship.

The classical period of the development of canon law as a science, from Gratian (ca. 1140) to the Black Death (1348), is nowhere better chronicled than here. The years of original research the author devoted to the manuscript tradition yield a rich harvest, enhanced by copious bibliographical notes and supplemented by ample indices of legal and canonical sources.

After the canonists came the law-makers to interest themselves

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18. *Theologia Moralis*, Lib. VI, Tract VI, *De matrimonio* (1779). Note that in commenting upon the *Summa Theologica*, II-II, q. 153, 2 a., Alphonsus remarks that for the Angelic Doctor sex was, indeed, good and would have been all the better in the state of original innocence "given the greater purity of man's nature and sensibility of his body."

19. Pius XII, *Allocution to Italian Midwives*, 43 A.A.S. 851 (1951) [translation mine].

in the kinds of problems, including problems of sexual behavior, that previously had been the exclusive domain of the canonists. This resulted, Brundage maintains, in the system of legal control of sexuality which we inherit today from the medieval world. Underlying it all, of course, is the recurrent theme of shame and distaste.

The lived tradition of the Hebrew and Christian heritage includes centuries of mulling over the Law-giver's word in hundreds of successive cultural incarnations. It seems to me the practical result of this long meditation contains, quite remarkably, more continuities than discontinuities. I am not sure yet that modern society has found the correct response in cloaking it all under the veil of privacy.

James Brundage has given us two books in one. The better is the medieval core. Without question it is a superb and enduring work of scholarship. Withal the entire work is a splendid example of grace and clarity.

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