Table Talk

Short Talks on the Weightier Matters of Law and Religion

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Abstract

"Table talks" have long been a familiar genre of writing for jurists, theologians, politicians, and novelists. In this little volume, thirty sage reflections on how to thrive in law school and in the legal profession are offered: short commentaries on controversial matters of faith, freedom, and family; pithy sermons on difficult biblical texts about law and justice; and touching tributes to a few of his fallen heroes. Most of the thirty texts gathered here were made at seminar tables, academic roundtables, editorial tables, and Eucharist tables. Cast in avuncular form, these texts probe what makes life worth living, work worth doing, history worth reading, and Scripture worth heeding. They aim to provide inspiration and edification for readers at different stages of their lives.

Keywords

law school – the legal profession – rights and liberties – free speech – the power of silence – separation of church and state – religious freedom – marriage and family life – monogamy versus polygamy – abortion – children's rights – sinner and saint – prophet, priest, and king

Introduction

"Table Talks" are unique and valuable sources. They are midrange texts, falling between an author's intimate letters and personal diaries, on one hand, and formal monographs and collected works, on the other. The passages in collections of table talk—ranging from a few lines to a few pages—offer poignant and candid insights into a person's experiences and thinking; glimpses into the conditions and context of his or her life and work; and reflections

on a wide range of topics. These passages can be profound, provocative, and prophetic—sometimes raucous, hilarious, and downright offensive, too.

While prototypes of this genre go back to Greco-Roman and biblical times, table talk collections became a popular form of publication with the advent of the printing press in the later fifteenth century.[1] They remain so today. Many of the early table talk collections gathered notes, speeches, and miscellanea from authors and audiences that biographers pulled together posthumously. Later collections offered more systematically edited sentiments on various topics, often assembled by the authors themselves. Poets, novelists, and essayists in particular loved this medium—among them, Samuel Johnson, Samuel Coleridge, Samuel Foote, Alexander Pushkin, Johann Wolfgang von Goethe, Oscar Wilde, William Hazlitt, William Cowper, Sydney Smith, Samuel Rogers, Thomas Carlyle, W. H. Auden, Thomas Wolfe, and many other worthies.[2] Great statesmen and churchmen also have published table talk texts: Napoleon Bonaparte, Abraham Lincoln, Theodore Roosevelt, Jimmy Carter, Desmond Tutu, Robert Schuman, and John Paul II.[3] And not to forget the many modern French philosophers, from Blaise Pascal forward, who published comparable texts, albeit under the rather bland title of *Pensées*—literally, "thoughts."

Jurists and theologians, too, have published table talk collections over the centuries. I have drawn many shining insights from those texts while studying the historical interaction of law and religion in the Western tradition. The best example I encountered early on was sixteenth-century reformer Martin Luther's massive six-volume *Table Talk* (*Tischreden*, as the editors of *Luthers Werke* dubbed them).[4] Here students and colleagues collected Luther's sundry proclamations, reflections, and debating points from dinner table conversations, catechism classes, public lectures, and strolls with friends around the Lutherhaus garden or neighborhoods of Wittenberg. Included were many pithy statements by Luther on law and Gospel, justice and righteousness, promise and covenant, crime and sin, state and church, and other dialectical topics of law and religion. Luther did offer a number of biting remarks about lawyers,

1 See, e.g., Frieda Klotz, *The Philosopher's Banquet: Plutarch's "Table Talk" in the Intellectual Culture of the Roman Empire* (Oxford: Oxford University Press, 2012); Basil Pennington, *Breaking Bread: The Table Talk of Jesus* (San Francisco: Harper & Row, 1986); Michel Jeannert, *A Feast of Words: Banquets and Table Talk in the Renaissance* (Chicago: University of Chicago Press, 1991).

2 For a convenient early modern sampling, see *A Treasury of Table Talk* (Edinburgh: William Nimmo, 1868); and Charles MacFarlane, *The Book of Table Talk*, 2 vols. (London: Charles Knight, 1836).

3 Regrettably, Adolf Hitler, Joseph Stalin, and Francisco Franco also published table talks.

4 *Martin Luthers Werke: Tischreden*, 6 vols. (Weimar: Böhlau, 1919).

not least his (in)famous adage that "jurists are bad Christians" (*Juristen böse Christen*).[5] But his *Table Talk* also included more sustained and profound meditations on the legal power and place of the Decalogue ("the foundation of all natural laws"), marriage ("the mother of all earthly laws"), equity, judgment, mercy, promise, recompense, punishment, and more. Hermann Beyer later assembled several such passages from the *Tischreden* and other *Werke* in a tidy collection titled *Luther and the Law*.[6] J. M. Porter did the same for Luther's overlapping writings on politics.[7] Many other early modern Protestant theologians and jurists, such as Philip Melanchthon, Johann Oldendorp, Pierre Vermigli, and Martin Chemnitz, issued comparable collections. Instead of labelling them "table talks," however, some used the title made famous by Melanchthon in 1521—*Loci communes*, literally "commonplaces" of thought on theology and law, but also on politics, economics, education, charity, family life, and more.[8] While variously labelled as *loci communes* in Latin, *Tischreden* in German, "table talks" in English, or even *topoi* (echoing Aristotle), these collections on theology and law and other topics have remained familiar genres in Christian theological circles to this day.[9]

I found more gold when leafing through the 1689 *Table Talk* of leading English jurist and legal historian John Selden. This is a lovely and oft reprinted collection of lithe and lively sentiments about law and theology. It bears little resemblance to the learned but often "cumbrous" prose of the forty-four books in Selden's hefty *Opera Omnia*.[10] His *Table Talk* has short, sage, and sometimes sardonic reflections arranged alphabetically by topic—from "abbies" to "zealots." Several topics cut across the fields of law and theology, with separate

5 See John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002), chap. 4 ("Perhaps Jurists Are Good Christians After All: Lutheran Theories of Law, Politics, and Society").

6 Hermann Beyer, *Luther und das Recht*, repr. ed. (Paderborn: Salzwasser Verlag, 2013 [1935]); see also Manfred Kluge, *Luthers Tischreden* (Munich: Wilhelm Heyne Verlag, 1983).

7 J. M. Porter, ed., *Luther: Selected Political Writings* (Philadelphia: Fortress Press, 1974).

8 See, esp., Clyde L. Manschreck, ed., *Melanchthon, On Christian Doctrine—Loci Communes 1555* (Oxford: Oxford University Press, 1965); Johannes Oldendorp, *Loci communes iuris civilis* (Lyon: Sébastian Gryphius, 1551); idem, *Topicorum legalium exactissima tradition* (Marburg: Chr. Egenolff, 1551).

9 See, for example, John D. Godsey, ed., *Karl Barth's Table Talk* (Richmond, VA: John Knox Press, 1963); and more generally, Theodore Viehweg, *Topics and Jurisprudence: A Contribution to Research in Law*, trans. W. Cole Durham Jr. (Frankfurt am Main: Peter Lang, 1993).

10 "Cumbrous" is F. W. Maitland's term in describing John Selden, *Opera Omnia*, 3 vols., ed. David Wilkins (London: T. Wood, 1726). See, further, John Witte, Jr., *Faith, Freedom, and Family*, ed. Norman Doe and Gary S. Hauk (Tübingen: Mohr Siebeck, 2021), chap. 9 ("The Integrative Christian Jurisprudence of John Selden").

entries on bastards, canon law, ceremony, church, clergy, conscience, equity, free will, judgment, law of nature, marriage, oaths, peace, penance, sabbath, tithes, and usury among them. These entries provide wonderful insights into Selden's vast legal ken. Some of Selden's sentiments make him sound like a modern-day critic, writing for the London *Times* or *New York Times*. "Equity is a roughish thing … as long or short as the Chancellor's foot." "Of all actions of a man's life, his marriage does least concern other people, yet of all actions of our life, 'tis most meddled with by other people." Much history writing is "mere antiquarianism: the too studious affectation of bare and sterile antiquity, which is nothing else but to be exceeding[ly] busy about nothing." And about the vaunted Christian doctrine of the Trinity—God as Father, Son, and Holy Spirit—Selden fired off this salvo: "The second person is made of a piece of bread by the Papist, the third person is made of his own frenzy, malice, ignorance, and folly by the Roundhead. One the baker makes, the other the cobbler; and betwixt those two, I think the First Person [of the Trinity] is sufficiently abused."[11] Selden's *Table Talk* is filled with such jibes against fruitless legal and theological niceties as he saw them, alongside profound legal insights.

Legal table talks of this early sort—A to Z collections of sentiments on legal topics—have remained a staple of Anglo-American law and jurisprudence ever since. Sometimes these books have spilled over into longer (auto)biographies of jurists and judges as well as bigger dictionaries, abridgements, encyclopedias, and handbooks on law for general readers and budding lawyers.[12] But plenty of classic table talk texts by jurists have remained in currency, albeit sometimes with different titles. Among American jurists, James Kent, Joseph Story, Oliver Wendell Holmes Jr., John T. Noonan Jr., Richard Posner, Ruth Bader Ginsburg, and several other judges have published them.[13] Today, tweets, blog posts, op-eds, and other virtual entries sometimes stand in for traditional table talk collections. While valuable and insightful, these are often more confectionary contributions that melt away quickly with the next morning's headlines or

11 John Selden, *Table Talk 1689*, ed. Edward Arber (London: Alex Murray and Son, 1868; repr. ed. Philadelphia: Albert Saifer, 1972), s.v. "equity," "learning," "marriage." See also Selden, *Opera Omnia*, 3.1:105.

12 See, for example, Charles Viner, *A General Abridgement of Law and Equity* (London: Henry Lintot, 1758), which was reprinted and further abridged by local topic and with different editors dozens of times in the next 150 years in England, the United States, and many British colonies and later Commonwealth countries.

13 Good recent examples include Ruth Bader Ginsburg, *My Own Words* (New York: Simon & Schuster, 2020); and Richard Posner, *Reflections of Judging* (Cambridge, MA: Harvard University Press, 2009).

the next tidal wave of tweets. There is enduring value in having these short entries properly edited, systematized, and published together.

This volume gathers some thirty short texts of mine on "the weightier matters" of law and theology. I do not pretend to be of the stature of the titans of law, theology, and literature already mentioned, and have accordingly been rather reticent to use this title. But my students and readers over the years have encouraged such a collection, for which the traditional "table talk" title and genre seem apt. Most of the texts presented here are literally table talks—remarks made at seminar tables, academic roundtables, editorial tables, and Eucharist tables, as well as from law school lecterns and church pulpits. The four sections that follow collect a few sample texts from each "table" of discourse.

Since 1987, I have been privileged to serve as a law professor and have taught some nine thousand law students and graduate students. These offerings have included courses and seminars in criminal law, constitutional law, religious freedom, human rights, church-state relations, law and religion, law and Christianity, law and the Reformation, history of family law, and various aspects of American and European legal history. In first-year law courses, I always take ten minutes on the last class of the week for what I called a "Dutch Uncle Talk"—brief reflections on the weightier matters of life in the world of law, designed to help steady and ground these very bright and ambitious but also nervous and pressured young law students in the formative first year of their legal lives. In upper-level law classes as well as at graduations, I often use little stories to drive home bigger points. The first cluster of texts offers several samples.

Law professors are called to offer legal education not only to their students seated at seminar tables and classroom desks but also to citizens gathered in conference halls, senators impaneled at committee tables, judges sitting on their high benches, and editors gathered around newspaper or publishing house tables. Over the years, I have had occasion to address each of these groups about themes of law and religion and to field their fast-flying questions. I have sometimes sent in formal remarks in advance of these meetings, sometimes distilled them into brief op-eds afterwards. The second cluster of texts samples these talks, with a focus on the themes of "faith, freedom, and family" that have been a key focus of my research.

I have enjoyed serving as an occasional lay preacher over the years, mounting pulpits at home and abroad to deliver sermons during regular worship services. Some of these sermons have been in small parish churches at home, others in grand cathedrals and megachurches abroad. Given my Protestant

pedigree and interest in Reformation themes, it was a special joy to preach from John Calvin's pulpit in St. Pierre Cathedral in Geneva and from Richard Hooker's pulpit in The Temple Church in London. I don't have nearly enough training or knowledge to match the meaty, three-part, hour-long sermons that I grew up with—heavy on biblical exegesis, bristling with Hebrew and Greek syntax, and relentlessly dogmatic. My short homilies are far more modest in tone, length, and ambition, often focused on legal and political themes, and showing the pertinence of the biblical readings assigned for the day to our private and public lives. The third cluster of texts presents a few of these sermons.

It has been a sobering but deeply moving experience to offer eulogies for fallen friends and family members. It is no small task to find the right words to capture briefly and celebrate properly a loved one's life in full and to give comfort and encouragement to those who are left—all while keeping one's own emotions in enough check to deliver these words. Lofty and lengthy funeral sermons are, of course, a time-honored genre, and I have used them as valuable historical sources in my scholarship. But I have tried to be more personal and intimate in these homiletic moments. The final cluster of texts samples eulogies for three father figures in my life, ending with the eulogy for my own wonderful father, who gave me his name and so many lessons and examples of a good life of faith and work, love and duty.

1 Talks to Law Students

1.1 *The Vocation of the Lawyer*[14]

It's my privilege to join the chorus of voices welcoming you to law school. Warmest congratulations on your admission to this great law school. You are among the best law students in the country at one of the best law schools in the world. You have a lot to be proud of, and we are so proud to have you join our community. Here, you will find world-class programs and scholars in everything from law and religion to feminist jurisprudence, from international human rights to domestic child advocacy. The faculty will teach you—not TAs. Your professors' doors will be open to you, not hermetically closed. Their ideas will be accessible to you, not hermeneutically sealed. You will work with them in classes and seminars, in directed study and research fellowships, in writing briefs and crafting law journal notes.

14 This was a regular talk I gave to newly admitted students on visiting day and to my first-year law students on the first day of their course.

In these next three years of law school training, you will learn five main things. First, you will learn the bare bones of the law—the black-letter rules and tools of torts, contracts, property, evidence, civil procedure, criminal law, constitutional law, and many other courses that comprise the modern law school curriculum. You have to know those black-letter rules and tools cold in order to be a good lawyer in any jurisdiction of this country—and well beyond our borders now, too. My colleagues and I will help you learn them.

Second, you will learn the craft and power of legal science. The science of the law is not just learning those strange Latin phrases that you have heard on television programs or movies about lawyers—*res ipsa loquitur, nulla poena sine lege*, *in rem v. in personam* jurisdiction, and hundreds more. Legal science is rather mastering what the great seventeenth-century English judge Sir Edward Coke once called "the artificial reason of the law"—that special ability that lawyers have to break down and build up arguments, to separate salient from superficial facts, to argue from analogy and precedent. In brief, it is learning to "think like a lawyer"—and learning how and when to turn that thinking off when you're not in legal mode.

Third, you will learn that the law is an inherent human and social enterprise, a universal solvent of human living. Law is not simply a body of autonomous rules and statutes and how we play with them. Law is also the intricate human process of legislating, litigating, adjudicating, negotiating, challenging, resisting, and reforming the law. And those legal processes take place not only in the state but also in churches, synagogues, charities, schools, businesses, clubs, neighborhoods, and sundry other associations that many of us occupy simultaneously. At this law school—where interdisciplinary legal study is both highly prized and carefully cultivated—you will learn that law is best understood in context, and in conversation with numerous other disciplines like politics, economics, psychology, history, theology, literature, and others.

Fourth, you will learn the meanings and measures of professional responsibility. This is not just learning the canons and rules of the Model Code of Professional Responsibility. Those simply indicate the outer boundaries of proper professional conduct, what you can and cannot get away with. Professional responsibility involves the broader obligations of stewardship and leadership that you as a lawyer and jurist will need to have to the law, to your employer, to your clients, to the bench, to the bar, and to the broader communities that you will be called to serve.

Finally, you will learn that true success as a lawyer requires more than simply the refinement of legal skills. It also requires the cultivation of norms and habits of civility and nobility that have been the timeless trademarks of the legal

profession. For all the Hollywood caricatures of our legal profession, for all the excesses of those few greedy and grubby lawyers who betray us, the law is at heart a noble profession—a "democratic aristocracy," as Alexis de Tocqueville once put it, a "priesthood of civility," as Thurgood Marshall later put it.

When you enter law school, you become an officer of our courts—charged with the responsibility of maintaining our system of justice and equity, of vindicating the rights and liberties, privileges and immunities of your fellow citizens and subjects. You become a trustee of our legal tradition—equipped for the task of carrying on the great experiment of fostering life, liberty, and the pursuit of happiness within a democratic society dedicated to the rule of law. And you become a leader of our public life—called both to demonstrate and to facilitate the noble virtues of charity and compassion, education and learning, forgiveness and peacemaking. "All of the great questions of theology and philosophy, society and culture, science and technology ultimately must come to the law for their resolution," said Justice Oliver Wendell Holmes Jr. You will be expected to work for the just resolution of these questions—beginning on your first day as a law student.

When I started law school—too many years ago now—I remember that our great professor Archibald Cox came into our class the first day and gave a little sermon that merits repeating here. "Many of you have come to law school with lofty goals and ideals of doing justice and of fighting injustice. I applaud you. I salute you. But I also warn you. You will find that law school will test the fortitude and seriousness of your vision and ideals more than any time in your life. In the course of these three years, you will be tempted by cynicism, skepticism, even outright nihilism. I have seen many great students yield to the temptation. I give you one injunction. Whatever you do, do not sell your vision, do not sell your ideals, do not sell your soul to the law."

1.2 *Always Take a Day Off on the Weekend*[15]

Your most important assignment this weekend is to take one day off. A full day off from your studies, routines, and worries about law school. A full day for activities and gatherings that feed you and fulfill you. Some of you will do this on your own. You might go for a hike, hit the gym, play some music, tend your garden, read a novel, see a movie, go to a play, work in your studio, visit your favorite site, volunteer at a charity, go to a service, hang out at your favorite club, or whatever else. Some of you will do these activities with your loved ones—with family members or friends, with old flames or new dates, with

15 This was my "Dutch Uncle Talk" to first-year law students during the first week, and I repeated the assignment each week.

congregants or neighbors. However, wherever, and with whomever you chose to spend this day, please take that day off. Later in the semester, when exam season hits, we'll adjust this assignment a bit to a half day or even a few hours. But this early in the semester, take a day off for you to catch up with life, and for life to catch up with you.

It's important as a law student to establish that boundary for yourself and for your loved ones. The legal profession can be a voracious and all-consuming taskmaster, demanding every bit of your time and energy, and leaving nothing for yourself or anyone else. It is important from the start of law school to learn to set those boundaries of time for yourself outside the law. If you don't learn it now, you will certainly not learn it when you start your busy life as a lawyer with its billowing time sheets and relentless billable hours. And unless you make this clear to your employer from the start, that you need this day off each week, your later request for it will not be easy to accommodate or respect. Of course, in legal practice as in law school, there will be times when the job will need you to be laser focused—say, when you're preparing for a major case, closing, merger, negotiation, or legal emergency. But those need to be exceptions, not the rule.

I have been teaching long enough now that I have midcareer lawyers coming back to see me. One common refrain in these visits goes like this: "I don't remember much of anything you taught me about criminal law, but I remember your telling us each last day of the week: 'Take your day off this weekend.' I always thought that was stupid and self-defeating advice. But I now see it. I'm forty- or fifty-something years old and miserable. I'm dressed to the nines, but these feel like rags. I've made a fortune in the law, but I am divorced for the third time; I hardly can see my kids; I have every luxury possible, but I can't every enjoy them. If I had only taken that day off every weekend, maybe I'd be better off now." And sometimes they ask about going to seminary, establishing a charity, or running a foundation.

You can call this weekly assignment "sabbatarianism" if you wish. Some of you might, in fact, be traditional sabbatarians who use one day a week as a day of rest and worship; some of you might also take other holy days off beyond those recognized on our regular calendar. But sabbatarianism has secular rationales, too, which remain compelling in our postreligious age. Liberal titan Chief Justice Earl Warren said as much in the 1961 *McGowan v. Maryland* case that upheld traditional Sunday sabbath laws against a charge that these constituted an establishment of religion in violation of the First Amendment. Sunday laws that prohibited all "unnecessary" work one day a weekend, said the Court, are "undeniably religious in origin," but they have developed sufficient "secular justifications" to pass constitutional muster. They provide

"a regular and uniform day of wholesome rest and leisure for workers and their families," and cater to the "improvement of the health, safety, recreation and general well-being of our citizens."[16]

We recognize the importance of taking a day off in other contexts. We assign holidays to mark important civic occasions and patriotic leaders—President's Day, MLK Day, Memorial Day, Fourth of July, Labor Day, and Veterans Day. The law mandates maternity and paternity leave to celebrate and care for new babies, and family medical leave days when family members are chronically sick. We make time accommodations in our workplaces for those with different abilities or health challenges. Employers of all sorts, not least busy law firms, must respect these externally defined limits on their employees' time. There is nothing unusual about a lawyer taking a day off to care for their family or to celebrate their country. Why not a day off to care for yourself, too.

So learn to take a day off in law school, and make it a habit of your legal career. Otherwise, please make an appointment to come see in twenty-five years, when you're fabulously rich and famous, but miserable and looking for advice about another career.

1.3 *Assists and the Legal Profession*

Soccer was the big sport we played when I was a youngster growing up in Canada. We had baseball, basketball, football, and hockey, too, but those sports had none of the cultural command they have here in the United States. Soccer was king in Canada (at least before winter ice set in, when hockey took over). I played a lot of soccer and was good enough to start, and we had pretty good grade-school and high-school teams. I always played center halfback—square in the middle of the field and at the center of the team. If you play the center half position right, you are both the anchor of the defense and the anchor of the offense. You set up and command the lines and strategies against the attacking team. And you set up the plays to help your teammates score, sometimes getting a few goals yourself.

My favorite stat every year was how many assists I had racked up. For some reason, I loved setting up a perfect play, or making a perfect pass, to have my teammates nail their goals. I am too old now to play soccer, except kicking the ball around with the grandkids (at the risk of popping a hamstring). But I realize I am still getting a lot of assists now as a law professor and center director. For nearly forty years, I have been privileged to run big international research projects involving hundreds of scholars around the world, all of whom I am "assisting." I am setting them up to score contracts for new articles, books,

16 366 U.S. 420, 444–46 (1961).

lectures, and other academic trophies. And I am assisting the project team to achieve its goals by editing books, establishing book series, sharpening individual articles by commenting or convening roundtable discussions, and more. Sometimes, I need to defend the project and individual team members from critical attack. I am still playing center halfback, but now in a suit and tie, not in shorts and cleats.

That metaphor of playing center halfback helps define your future role, too, as a lawyer. A good lawyer is really a center halfback—anchor of the defense and anchor of the offense for your clients. You protect your clients from attacks on their person, property, reputation, business, or interest. And you set up the legal strategies and plays—the contracts, wills, corporate charters, court briefs, and petitions—to allow your clients to nail their goals. Most lawyers work as part of a legal team, usually within the same law firm, agency, or office, and sometimes when teaming up with other professionals. But you are there to rack up "assists"—and score a few of your own goals, too.

1.4 *Emancipation in Life and the Law*[17]

"Emancipation" is our theme for this week. "Emancipation" is what Jews and Christians are celebrating this week in Passover and Easter. For Jews, Passover celebrates the emancipation of their ancestors from bondage and hardship in Egypt. For Christians, Easter celebrates emancipation from the bondage of sin and eternal punishment. Both Jews and Christians use these holy seasons to remember the sacrifices made on their behalf to provide for this emancipation, and to renew their promises to use their own gifts of freedom wisely in loving service of God, neighbor, and self.

Emancipation and freedom are our hope and prayer for the world in these hard days of the pandemic: freedom from fear and despair, freedom from sickness and hardship, freedom from isolation and loneliness, freedom from poverty and unemployment, freedom from sadness and bereavement, freedom from uncertainty and want.

Freedom is our human condition and telos; it's what we are made for and what we strive for. In strikingly opposite ways, both this horrible pandemic and this holy season (for some) remind us poignantly of this fundamental human condition and aspiration for freedom. They also remind us to use our gifts of

17 During spring semesters, Easter and Passover often appear near each other, and this talk sought to celebrate these holy days for some students, and the broader lessons they offer for law students. This particular talk was delivered during the COVID-19 pandemic of 2020–21.

freedom in service of others, especially at this time of great need: many of you are fulfilling this mandate brilliantly.

These aspirations for the protection and restoration of our freedom tie rather nicely into our work together this semester. Freedom—its foundation, definition, maintenance, protection, and restoration—is what you are learning about in your classes. In constitutional law, with its enumeration of fundamental rights and liberties and the procedures and institutions to protect them. In property law, with its elaborate latticework of rules designed to protect freedoms to acquire, use, maintain, share, or alienate property interests. And in our course in criminal law, too. Criminal law is designed to teach us and to protect us in our freedom—our privacy and liberty, our person and property, our reputation and standing in the community. Criminal law also recognizes that all of us fall short sometimes of ideal behavior, and some of us mess up gravely enough to harm others. Criminal punishment is the pain defendants must bear to be restored to freedom, to be given a second chance to enjoy their freedom. Tort liability is the cost defendants must pay to restore their victims so much as possible to their prior state of freedom.

To be sure, criminal law and tort law do this calculus of restoration of freedom for both defendants and their victims imperfectly, sometimes crudely, cruelly, and with preference and prejudice. But having these legal structures in place to define and defend our freedom is an essential foundation of human civilization. Aristotle noted this already at the beginning of his *Politics*: "Just as man is the best of the animals when completed, when separated from law and adjudication he is the worst of all."[18] American founder James Madison had the same insight in his Federalist Paper No. 51: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls … would be necessary … but experience has taught mankind the necessity of auxiliary precautions," not least a fully functioning system of criminal law and tort law.[19]

1.5 *The Freedom of Silence*[20]

In 1995, I had the privilege of joining a small group of human rights advocates who had a forty-five-minute appointment with Patriarch Alexei II, the

18 Aristotle, *Politics*, trans. C. D. C. Reeve (Indianapolis, IN: Hackett Publishers, 2017), bk. 1, ch. 2.

19 James Madison, *Federalist Paper No. 51* (1788), in Clinton Rossiter, ed., *The Federalist Papers: Alexander Hamilton, James Madison, John Jay* (New York: Signet, 2003), 324.

20 I gave this talk to students a few times when teaching about freedom of speech and the free exercise of religion. For a bit more about Russian Orthodox law and theology, see Paul Valliere and Randall A. Poole, eds., *Law and the Christian Tradition in Modern Russia*

religious leader of the Russian Orthodox Church. The meeting—long and difficult in planning—was designed to foster a frank discussion about the problem of proselytism in post-glasnost Russia.

With Mikhail Gorbachev's liberating policies of *glasnost* and *perestroika*, various Western missionary groups had poured into the long-closed Soviet Union to preach their faiths, to offer their services, to convert new souls. Initially, the Russian Orthodox Church, among others, had welcomed these foreigners, particularly their foreign co-religionists, with whom they had lost contact for many decades. But soon the Russian Orthodox came to resent these foreign religions, particularly those from North America and Western Europe, who assumed a democratic human rights ethic. Local religious groups resented the participation in the marketplace of religious ideas that democracy assumes. They resented the toxic waves of materialism and individualism that democracy inflicts. They resented the massive expansion of religious pluralism that democracy encourages. And they resented the extravagant forms of religious speech that democracy protects.

Led by Patriarch Alexei, the Russian Orthodox Church had turned to the state to protect them, much as a millennium of Orthodox church leaders had done as part of the constitutional and cultural system of *symphonia*. They called for new statutes and regulations restricting the constitutional rights of their foreign religious rivals—through firm new antiproselytism laws, cult registration requirements, tightened visa controls, and various other discriminatory restrictions on non-Orthodox and non-Russian religions.

Our little group of human rights lawyers, led by my colleague Harold J. Berman, a fluent Russian speaker and expert on Russian law and religion, were there to try to persuade the Patriarch to abandon this restrictive campaign, and to embrace free speech and free exercise rights for all parties—Orthodox and non-Orthodox, Russian-born and foreigners alike.

The Patriarch and his entourage came into the room where we had gathered. We all stood and bowed in respect. "God bless you, my brothers and sisters," he said through an interpreter. "Let's take a moment for prayer." For the next forty-four minutes—I timed it—we all stood in absolute silence. The Patriarch had his eyes tightly shut and was swaying slightly throughout. Then the Patriarch fell to his knees, we with him, as he prayed aloud: "Oh Lord, who taught us by word and by deed, by silence and by suffering, teach us all how

(London: Routledge, 2022); John Witte, Jr. and Frank S. Alexander, eds., *Modern Orthodox Teachings on Law, Politics, and Human Nature* (New York: Columbia University Press, 2007); and John Witte, Jr. and Michael Bourdeaux, *Proselytism and Orthodoxy in Russia: The New War for Souls* (Maryknoll, NY: Orbis Books, 1999).

better to live out your final commandment: 'Go ye, therefore, and make disciples of all nations.'" The Patriarch then stood, faced us, and said: "God bless you, my brothers and sisters." And he left, and his entourage with him.

There we stood. Dressed in our best suits, primed with our best arguments for freedom of speech and religion, armed with strong letters from political and religious leaders who opposed the Orthodox Church's political protectionism, we were utterly defeated by the power of silence by a religious leader. Rarely have I heard a more powerful sermon or speech. Rarely have I seen such a moving expression of freedom of speech. Rarely have I been more convinced by the wisdom of the ancient prophecy: "For everything there is a season and a time … a time to keep silent and a time to speak" (Ecclesiastes 3:1, 7b).

Here was a poignant glimpse into one of many distinct features of the Orthodox Christian tradition: its celebration of spiritual silence as its highest virtue—not just for hermits and monastics, but for every member of the church. This was a sobering lesson for us busy Western Christians, particularly Protestants, to hear. We are always so busy getting on with the Lord's work—with our singing and praying, teaching and preaching, billboards and crusades, relentlessly sharing the Gospel in word and deed, in person and on screen. Silence and meditation, the Patriarch taught us, are virtues and gifts to be enjoyed, forms of worship to be exercised. There is a reason the Bible says, "Be still, and know that I am God" (Psalm 46:10).

This was also a sobering lesson for us constitutional lawyers, brought up to believe that an open and robust marketplace of ideas, including religious ideas, was the best way to find truth. We were all weaned on John Milton's famous panegyric to freedom of speech in the *Areopagatica* (1644), which said that the best antidote to bad speech is good speech, and the best pathway to religious freedom was allowing an open contest between truth and falsehood, between old dogmas and new beliefs. In forty-five short minutes, the Patriarch taught us all a rather different way of thinking about the freedom of speech and the freedom of silence.

1.6 *A Whale for the Killing*[21]

Farley Mowat's book *A Whale for the Killing* (1972) was a classic in the little community of my youth in Canada, and I read it several times as a teenager. The

21 I often used this talk in my course in "History of Church-State Relations in the West" to conclude a deep classroom conversation about religious persecution, particularly the vicious medieval pogroms against the Jews. For more about how the exotic spiritual and moral standing of the Jews triggered the vicious Nazi campaigns of the Holocaust, see Timothy P. Jackson, *Mordecai Would Not Bow Down: Antisemitism, the Holocaust, and Christian Supersessionism* (Oxford: Oxford University Press, 2021).

book was an early sobering plea for environmentalism; for me it also became a poignant metaphor about how human beings often treat the exotic other.

The book recounts a true story in a fishing village in Newfoundland on the Atlantic coast. During a heavy storm on a high spring tide, a huge, eighty-ton fin whale had somehow crossed over a usually shallow reef. When the tide and storm receded, the whale was trapped in a lagoon near the fishing village. At first the villagers were amazed, drawn to the shore to watch this magnificent animal as it endlessly circled the lagoon searching for a way out over the now obstructive reef. Local newspapers and newscasters sent photographers and film crews. Local fishermen fed the whale from their catches dragged in from the high sea, since the lagoon held far too few fish to sustain it.

But slowly the villagers turned on the whale, and ignored the pleas of those few, including Farley Mowat, who sought to help it. The fishermen went back out to sea. Boys in the village began throwing rocks at the massive hulk as it swept by. Joy riders chased the whale in their motor boats, sometimes tearing the back of the beast with their propellors. Then young men, filled with drink, took up positions around the lagoon with high powered rifles, riddling the whale's body with bullets, and awarding points to whichever marksman came nearest to hitting the blowhole. The whale slowly starved, began to swell from the many infections that oozed up from the bullet holes and propellor gashes, and struggled to breathe through its ripped up and infected blowhole. Eventually the whale died. The rotting carcass stunk so much that when another high spring tide hit, the authorities and villagers gathered en masse with their boats and lines and dragged the bloated carcass across the reef out to sea, to be devoured by a large school of sharks attracted to the exotic stench.

When I was a youngster, this book shook me deeply, and it instilled in me a lifelong interest in environmental care and a visceral outrage at the cruelty of the whale-hunting trade. Since becoming an academic, I have also seen this book as a powerful metaphor for how human beings often treat the exotic other—people who are handicapped or badly disfigured; who are visibly different in their diet, dress, customs, or language; who are racial, sexual, cultural, or religious minorities. The pattern of reaction to these exotic others is familiar—first fascination, then indifference, then hostility, and ultimately lethal violence and expulsion. We see this pattern already in the Bible's report of Cain slaying Abel for his pure sacrifice to God. And we see it in the latest headlines documenting over and over again acts of deadly violence against blacks and gays, immigrants and refugees, Muslims and Jews.

The history of antisemitism that we have witnessed in this course reflects the same tragic pattern. We saw this already with the escalating Roman persecution of the Jews culminating tragically in the destruction of Jerusalem and

the diaspora. We will see it again in the Nazi turn against the Jews on the way to the horrors of the Holocaust.

The medieval pogroms orchestrated by church and state authorities against the Jews were similar, we have seen. Jews were the exotic others of medieval Christendom. Initially they were treated with great respect because of their biblical learning, disciplined faith life, and sophisticated culture. Gradually, however, the Christian authorities turned on them. The Jews were pushed and trapped in their own metaphorical lagoons, called ghettoes. They were restricted in their movements, relationships, and livelihoods, and dependent on the charity of outsiders to survive. Over time, merchants, missionaries, and magistrates alike began to persecute the Jews. They extracted loans from Jewish bankers that were not repaid, stole their property with impunity, nabbed their children for forced baptisms, and gradually sucked the life of these communities with persecution and hardship. Finally, when these emaciated Jewish communities were no longer useful to them, local authorities banded together and expelled them from their lands, often leaving these beleaguered people to be devoured by others as they embarked on a new forced exodus.

1.7 *Beehive Republics*[22]

I am a legal historian who studies early modern legal and theological texts about church, state, and family. I also happen to like bees—and, indeed, one summer was thrilled to see that bees had built a huge hive in our yard which I enjoyed watching. What struck me anew in watching this beehive is how regular and routinized everything is. The hive is all neatly divided into row after row of tiny holes filled with larvae and honey. The queen, bigger than life, presides in splendor in the middle of the hive. Each group of bees is assigned its role. Some tend to the queen, some fetch pollen, some clean the hive, some dump dead bodies, some stand guard, some attack me when I get too close. The bees line up to fly in and out. They bring back only pollen, not dust, not garbage, not new queen girlfriends. At night, all the bees subside, everyone crawls into the hive into their place, only to resume the same ritual the next day. It's all a very highly structured, orderly, hierarchical, and naturally lawful process.

That's precisely why a number of early modern Protestants regularly used the image of beehives to describe the natural law and communal dimensions of human life. You can find text after early modern text promoting the beehive image of the family, the church, the state, and other institutions, even the commonwealth as a whole—the "beehive republic," as they sometimes called

22 I used this talk in European legal history courses, as well as occasional courses on law and Christianity.

it. This was a familiar trope for the early modern Protestants whom I study. Especially in the hands of seventeenth-century covenant theologians, on both sides of the Atlantic, the analogy was endlessly recited in sermons, pamphlets, and learned tracts.

These Protestant writers liked the image of the beehive to describe core social institutions because it evokes the cherished idea of steady, predictable, role- and rule-bound normative order and practice that benefit both the group and its individual members. The beehive image underscores that social institutions are structured spheres of justice and love, sturdy seats of authority and liberty, living loci of law and order.

There's an important time and place, of course, in every one of these structured social communities—in every political, religious, and family beehive—for movement, freedom, even ecstasy, whether voluntary or involuntarily initiated. Think of the rush to arms in the face of attack on the nation, or the ticker tape in celebration of military victory. Think of the spine-tingling chills of singing or hearing an aria in church. Think of the warming joy of a family picnic or the joy of a new baby's arrival. And initiation rites into these communities are not unusual. Think of the oath-swearing ceremonies of new citizens, the bar and bat mitzvahs and confirmation rituals of religious communities, the wedding and baptismal and circumcision feasts of families.

But it's not so much these occasional ceremonies, wonderful as they are, that keep these political, ecclesiastical, and domestic beehives intact and in function. It's rather their enduring structures, their regularity of operations and functions, their inner mechanisms and practices of normative instruction, enforcement, and implementation.

What makes family beehives work is that there is a set of norms and narratives around the table and the bed and in the living room, playground, and backyard, that guide the complex relationships between spouses and children, siblings and cousins, neighbors and friends. These roles and rules may be more fluid than fixed, more customary than codified, more particular than universal, but they are no less important for the inner structure and normativity of the family. A parent's statement, "We don't do this in our family," has as much legal force within a home as God's command, "Observe the Sabbath day and keep it holy," has within a religious community.

What makes religious beehives work is that there is a creed, a code, a canon, a cult, a confessional community. We celebrate this communion daily in our devotions and prayers, weekly in our collective worship and songs, annually in our holidays on the religious calendar. There are serious set rituals of reading the Torah, of receiving the Eucharist, of reciting the prayers to Allah, which are explained in written texts and presided over by authorized officials, each with

clearly defined roles. We habituate and initiate new generations into this religious structure with Torah school and Sunday school instruction, catechism and confirmation classes, and more, all designed to learn the habits of new religious citizenship.

What makes the political beehive work is that there is a constitutional order, a rule of law, a division of powers, a set of checks and balances, an enumeration of rights and liberties, a set of due processes and right procedures. We celebrate this normative structure, this "rule of law," in the rituals of the courtroom, the decorum of the legislature, the pageantry of the executive office, the liturgical language of the legal document. We habituate and initiate new generations into this political structure with new mandatory classes on American government for naturalized citizens and with mandatory schooling of all children until the age of sixteen at least—so that everyone learns the norms and habits, structures and processes of democratic citizenship.

1.8 *The Vocation of Law and Religion*[23]

The study of law and religion is relatively new in modern Western research universities. A century ago, it was only a tiny boutique area of scholarship and teaching, focused mostly on religious laws and religious freedom. Most Western universities had, if any, only a specialist or two scattered among the faculties of history, divinity, law, politics or anthropology. A half century ago, even these early scholarly lights seemed to be dimming as university campuses came under the thrall of the secularist hypothesis. It was thought that the spread of reason and science would slowly eclipse the sense of the sacred and restore the sensibilities of the superstitious. Liberalism, Marxism, and various new critical philosophies were regnant on many university campuses. Even divinity schools and seminaries were arguing that "God is dead" and organized religion is dying.

No longer. Over the past four decades, another great awakening of religion has broken—now global in its sweep, startling in its diversity, and frightening in its power. Even if the Global North now features more Nones, Neins, and Nyets on affiliation with organized religion than ever before, the Global Middle and Global South have seen powerful new religious upsurges of old and new religions. Globalized media, migration, marketing, and mission work have brought these religions to the Global North and West, too, sometimes with a vengeance. And they have brought with them a whole new alphabetic of law and religion challenges—apostasy, blasphemy, conversion

23 I presented this text to various law students over the years, including most recently at Cardiff University on October 20, 2022.

defamation, evangelism, fundamentalism, genocide, hate crimes, ISIS, jihad, and much more.

Over the past four decades, the Western world has also seen a new great awakening of law. The fall of the Berlin Wall and the collapse of communism; the strengthening of the European Union and Council of Europe; the consolidation and expansion of many branches of the United Nations; the new democratic movements in former colonial and authoritarian regimes in Africa and Latin America—all these seismic legal and political movements since the 1980s have triggered intense and innovative new forms and norms of constitutional ordering and lawmaking. Legal campaigns against terrorism and jihadism have further tested both the strength and the limits of international law and domestic law in Western democracies. Strong new anticorruption campaigns have again been mounted to shore up the rule of law and constitutional democracy against strong new populist authoritarianism in the United States, Mexico, Brazil, Poland, Hungary, and elsewhere in the West. And a vibrant new global-law movement has emerged to address pressing challenges like massive human rights violations, genocide, arms trafficking, refugees and migrants, sex trafficking, global diseases, hunger, famine, poverty, global climate and environmental challenges, and major (bio)technological issues—all of which are beyond the capacity or power of any national law or even international law to address fully.

This new legal awakening, like the new religious awakening, has forced the Western legal academy to abandon its narrow legal positivist views of law that dominated the first two thirds of the twentieth century. Legal scholars have come to see that law is much more than simply the rules and procedures of the nation state, and how we apply and analyze them. Law is also an inherently human and communal enterprise—a living system of legislating, adjudicating, administering, obeying, negotiating, litigating, and other legal conduct not only within the state and among states, but also within churches, colleges, corporations, clubs, charities, and other nonstate associations. Law and legal behavior, moreover, are exercised out of a complex blend of concerns, conditions, and character traits variously shaped by nature, class, race, gender, persuasion, piety, charisma, faith, virtue, and more. To be properly understood, therefore, law must be studied and taught in context, and in conversation with sundry other disciplines: economics, politics, literature, history, science, medicine, philosophy, psychology, anthropology—and notably, too, religion and theology.

This was the interdisciplinary legal seedbed out of which the modern study of law and religion emerged. Today this is a major interdisciplinary field of study involving more than 1500 scholars and 50 centres and institutes of law

and religion around the globe. These academic scholars and groups are being further integrated by international and regional consortia of law and religion studies and by dozens of new periodicals and blogs on law and religion, hundreds of new books, and thousands of new articles.

In the United States at least, and in other countries too, virtually all law schools now have at least a basic course on religious liberty or church-state relations. A growing number of law schools now also teach courses in Christian canon law, Jewish law, Islamic law, and natural law, and include serious consideration of religious materials in their treatment of legal ethics, legal history, jurisprudence, law and literature, legal anthropology, comparative law, environmental law, family law, human rights, and other basic courses. Religion is no longer just the hobbyhorse of isolated and peculiar professors—principally in their twilight years and suddenly concerned about eternal life. It is no longer just the preoccupation of religiously-chartered law schools. Religion now stands alongside economics, philosophy, literature, politics, history, and other disciplines as a valid and valuable conversation partner with law.

Scholars in this interdisciplinary field have devoted themselves to studying the religious dimensions of law, the legal dimensions of religion, and the interaction of legal and religious ideas and institutions, methods and practices—historically and today, in the West and well beyond. These scholars believe that, at a fundamental level, religion gives law its spirit and inspires its adherence to ritual, tradition, and justice. Law gives religion its structure and encourages its devotion to order, organization, and orthodoxy. Law and religion share such ideas as fault, obligation, and covenant and such methods as ethics, rhetoric, and textual interpretation. Law and religion also balance each other by counterpoising justice and mercy, rule and equity, discipline and love. It is this dialectical interaction that gives these two disciplines and two dimensions of life their vitality and their strength. Without law at its backbone, religion slowly crumbles into shallow spiritualism. Without religion at its heart, law gradually crumbles into empty, and sometimes brutal, formalism.

Even in contemporary Western society, the laws of the secular state retain strong religious dimensions. Every legitimate legal system has what Lon Fuller calls an "inner morality,"[24] a set of attributes that bespeak its justice, its fairness, its ultimate transcendence. Ideally, states rules, like divine laws, are publicly proclaimed and known, generally applicable, uniform, stable, understandable, non-retroactive, and consistently enforced. Every legitimate legal system, furthermore, has what Harold Berman calls an "inner conviction" and "sanctity," a set of attributes that command the obedience, respect,

24 Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1964).

even reverence of both political officials and political subjects.[25] Like religion, law has authority—written or spoken sources, texts or oracles, which are considered to be decisive or obligatory in themselves. Like religion, law has tradition—a continuity of language, practice, and institutions, a theory of precedent and preservation, an ethic of abandoning the time-tested principles and practices of the past only with trepidation, only with explanation. Like religion, law has liturgy and ritual—the ceremonial procedures, elaborate pageantry, and ornate words of the legislature, the courtroom, and the legal document that reflect and dramatize deep social feelings about the value and validity of the law, and that underscore the reality that justice must not only be done, but must also been seen and heard to be done.

Even in modern Western society, religion maintains a legal dimension, an inner structure of legality, which gives religious lives and religious communities their coherence, order, and social form. Legal habits of the heart structure the inner spiritual life and discipline of religious believers, from the reclusive hermit to the aggressive zealot. Legal ideas of justice, order, judgment, atonement, restitution, responsibility, obligation, and others pervade the theological doctrines of countless religious traditions. Legal structures and processes—the Halacha in Judaism, the canon law in Christianity, the Shari'a in Islam, the dharma in Hindu—define and govern religious communities and their distinctive beliefs and rituals, mores and morals. Indeed, as Norman Doe has demonstrated, law forms "the backbone of religion," keeping it straight and strong, well ordered and well directed.[26]

The spheres and sciences of law and religion also cross-over and cross-fertilize each other in a variety of ways. Law and religion interact conceptually. They embrace overlapping concepts of sin and crime, covenant and contract, righteousness and justice, mercy and equity. Law and religion interact methodologically. They maintain analogous hermeneutical methods of interpreting texts, casuistic methods of argument and instruction, systematic methods of organizing their doctrines, forensic methods of sifting evidence and rendering judgments. Law and religion interact institutionally, through the multiple relations between political and ecclesiastical officials and offices, which constitutions define through the combined efforts of jurists and theologians.

All of these points of interaction of law and religion have been subjects of specialty scholarly study as we have heard in the past days of conferencing.

25 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 252; Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Grand Rapids, MI: Eerdmans, 1983), 1–4.

26 John Witte, Jr., "Law at the Backbone: The Christian Legal Ecumenism of Norman Doe," *Ecclesiastical Law Journal* 24 (2022): 192–208.

This work has involved scholars of law, religion, politics, history, ethics, philosophy, anthropology, literature, and other social and humane sciences For those of you who intend academic careers, the field of law and religion is broad and wide, with many new frontiers still left to break.

1.9 *The Cathedral of the Law*[27]

My text for meditation today is a passage from a late medieval diary. The passage reads as follows: "A traveller from Italy came to the French town of Chartres to see the great cathedral that was being built there. Arriving at the end of the day, the traveller went to the site of the cathedral just as the workmen were leaving for home. He asked one man, covered with dust, what he did there. The man replied that he was a stone mason. He spent his day carving rocks. Another man, when asked, said he was a glassblower, who spent his days making slabs of colored glass. Still another workman replied that he was a blacksmith who pounded iron for a living. Wandering into the deepening gloom of this unfinished edifice, the traveller came upon an old widow, armed with a straw broom, sweeping up the stone chips, glass shards, and iron filings from the day's work. 'And what are you doing?' he asked her. The woman paused, looked up, and said proudly: 'Me? Why, I am building a cathedral to the glory of Almighty God.'"

The law is like a massive medieval cathedral, always under construction, always in need of new construction. It stands at the center of the city, at the center of matters spiritual and temporal, at the center of everyone's life. All live at times in the glory of this cathedral of the law. All live at times in its shadow. This cathedral of the law houses beautiful altars and hideous gargoyles, stained-glass windows that capture the light of heaven, and bleak marble monuments that signal the darkness of death. Though always under construction, this cathedral of the law is always open to those who knock. Its officials are always available to those who have need.

We jurists are at once the masters and the servants of this cathedral of the law. Some of us build on the edifice, some of us tend its doors. Some of us are the Michelangelos who paint frescoes with fine-haired brushes, others of us are the widows who sweep the floors with crude straw brooms. But we all have a craft, we all have a calling, we all have a place for our tools and our talents in this cathedral of the law.

27 I have used this talk to address several classes as well as legal audiences. A fuller version of it appears in John Witte, Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids, MI: Eerdmans, 2006), 466–68.

The ethic of the widow in Chartres must be our ethic in the legal profession. We must not grow too proud in our own craft, too lost in painting our own frescoes, too confident that our little chapels of study are equivalent to the cathedral itself. We must not be too contemptuous of the past by removing or remodeling too easily what earlier workers have done. We must not be too contemptuous of the future, by believing that our formulations are beyond amendment and emendation. And most of all, we must not forget why we are here in this cathedral of the law—to give glory to Almighty God and to give loving service to our neighbor.

1.10 *The Routes and Roots of the Law*

As we near the end of the semester, we come to our last Dutch Uncle Talk. This one is a brief legal meditation on one of my favorite little poems. The poem appears in J. R. R. Tolkien's great trilogy, *The Lord of the Rings*. These three volumes are an epic tale of good versus evil, hero versus villain, and the many shades and shadows of each. Some of you may have read these volumes, or seen Peter Jackson's epic movies based on them.

One of the heroes of this epic is Aragorn, a shaggy and unassuming woodsman who slowly, in the course of the book, reveals his high birth and noble character, and ultimately becomes the new king of kings on earth. Tolkien offers a long poem to describe his hero Aragorn. I want to focus only on the first stanza, which runs four brief lines:

> Not all that is golden doth glitter
> Not all those who wander are lost
> The old that is strong does not wither
> Deep roots are not touched by the frost.

These are simple words, but sage. The first two lines teach caution and discernment. "Not all that is golden doth glitter." This first line embraces and goes beyond the familiar childhood warning that not everything that glitters is gold. That childhood warning of itself merits consideration. You are entering the legal profession, bristling with shiny brass and glass offices, flashy and fashionable people, lucrative and luxurious lifestyles. It is easy to let the glitter blind and beguile you.

But Tolkien takes you beyond this truism in these first two lines. "Not all that is golden doth glitter. Not all those who wander are lost." You may need to wander for a time before you find your gold, your value, your vocation in the law. Don't be too quickly arrested by the glittering, by the obvious, by the convenient in your choices of jobs, of colleagues, of homes. Don't be too quickly

frustrated by your wandering, by your wondering, by your professional uncertainty. Don't be too easily satisfied with your station in life and your status at law. Examine yourself. You are not just choosing a job. You are choosing a career and a calling with all the responsibility and accountability that such a choice entails. Some of you will find yourself quickly. Others may need to wander for a time before making your choices. There is virtue in both courses.

The last two lines teach depth, excellence, and erudition. "The old that is strong does not wither. Deep roots are not touched by the frost." You are entering an old and venerable legal tradition. We professors this year have tried to teach you the meaning and measure of that tradition—the black-letter rules and tools of the law, the craft and power of legal science, the ethic and values of legal professionalism. These ancient accoutrements of the legal tradition are tested and strong; they will serve you well in whatever you do.

But Tolkien warns that you must constantly develop and deepen yourself as a legal professional. Refine these rudimentary legal tools and talents that we have given you. Dig deeper than your texts. Be restless to reform. Develop critical skills, distance, and discernment. Learn to hypothesize, experiment, and invent, to rethink, redo, and remake what you are learning. Don't be afraid to venture above, beyond, and against your times—to reject and replace stale customs, dull conventions, or bald prejudices. Go beyond your peers. Go beyond your professors. Always do a little more than you have to, when you prepare for your negotiation, your closing, your trial, your argument. For "deep roots are not touched by the frost." When winter comes—when you are frozen by a judge's or opponent's question, when you are pressed to perform seemingly beyond your ken and capacity, when you grow disheartened by your life or your work, when wild winds of skepticism and self-doubt threaten to bend and break you, when winter comes—those deep roots will keep you vital and strong.

1.11 *The Song of the Law*[28]

One of my favorite songs as a youth was Elton John's first big hit in 1969, called "Your Song." The third stanza of "Your Song" goes like this:

> And you can tell everybody this is your song.
> It may be quite simple but now that it's done.
> I hope you don't mind, I hope you don't mind,

28 I sometimes used this talk at the conclusion of courses or at law school graduation ceremonies.

That I put down in words,
How wonderful life is, while you're in the world.

Life is indeed wonderful while you're in the world. And it is important for you to make life wonderful for as many others as you can. You do that first and foremost by being a wonderful son or daughter, grandson and granddaughter, spouse or partner, mother or father, sibling or friend for the many people who love you and who are gathered with you in celebration today. These people must always be the first priority in your life, no matter what else becomes you, or what else you become. You are their wonders; they are yours. Without them, you would not be here. Without you, they would be diminished. Family and friendship are the foundation of a good life, including a good professional life. They are the first and most important audience for all your songs.

As a lawyer, you will make the world wonderful by learning to sing and play your own legal songs before your own legal audiences. Some of you will play in solos or trios; others of you will join mighty legal choruses and orchestras. Some of you will hum hymns of quiet legal comfort; others of you will chant arias of brilliant legal argument. Some of your legal songs will move the hearts of those who do wrong; others will heal the lives of those who have lost hope. Some of your legal songs will save another person's life. Some of them will change the course of history.

For we live not only under the rule of law. We live also under the rhythm of law—the ebb and flow, the different paces and places for legal practice, for drafting, negotiating, litigating, lobbying, legislating, administrating, reforming, and adjudicating the law. We depend upon songs and psalms of justice and mercy, rule and equity, discipline and love to govern us and to guide us. It is now up to you, great lawyer, to set the pace, to keep the harmony, and, when necessary, to change the tune. Whatever you do as a lawyer, learn to find your own audience and to sing your own song.

2 Talks on Public Issues

2.1 *The Superstition of Separation of Church and State*[29]

The civic catechisms of our day still celebrate Thomas Jefferson's experiment in religious liberty. To end a millennium of repressive religious establishments,

29 I have given variations on this talk in a number of public and academic settings. A fuller exposition is set out in John Witte, Jr., "Facts and Fictions about the History of Separation

we are taught, Jefferson sought liberty in the twin formulas of privatizing religion and secularizing politics. Religion must be "a concern purely between our God and our consciences," he wrote in 1802. Politics must be conducted with "a wall of separation between church and state."[30] Public religion is a threat to private religion, and must thus be discouraged. Political ministry is a menace to political integrity and must thus be outlawed.

These Jeffersonian maxims remain for many today the cardinal axioms of a unique American logic of religious freedom to which every patriotic citizen and church must yield. Every American public school student learns the virtues of keeping his Bible at home and her prayers in the closet. Every church knows the tax law advantages of high cultural conformity and low political temperature. Every politician understands the calculus of courting religious favors without subvening religious causes. Religious privatization is the bargain we must strike to attain religious freedom for all. A wall of separation is the barrier we must build to contain religious bigotry for good.

Separation of church and state was certainly part of American law when many of today's civic opinion-makers were in school. In the landmark cases of *Cantwell v. Connecticut* (1940) and *Everson v. Board of Education* (1947), the U.S. Supreme Court for the first time used the First Amendment religion clauses to declare local laws unconstitutional. The Court also read Jefferson's call for "a wall of separation between church and state" into the First Amendment. In more than thirty cases from 1947 to 1985, the Court purged public schools of their traditional religious trappings and cut religious schools from their traditional state support. Hundreds of lower court cases struck down many other traditional forms and forums of church-state cooperation in the public square.

After forty years of such cases, it is no surprise that Jefferson's metaphor of a wall between church and state became for many the source and summary of American religious freedom. Indeed, many now think that Jefferson's words are enshrined in the First Amendment itself. It is often disconcerting for readers to discover that the First Amendment has much more restrained and ambiguous language: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

"Metaphors in law are to be narrowly watched," Justice Benjamin Cardozo once warned, "for starting as devices to liberate thought, they end often by

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of Church and State," *Journal of Church and State* 48 (2006): 15–46, and in John Witte, Jr., Joel A. Nichols, and Richard W. Garnett, *Religion and the American Constitutional Experiment*, 5th ed. (Oxford: Oxford University Press, 2022).

30 In Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation* (New York: NYU Press, 2002), 148.

enslaving it."[31] So it has been with the metaphor of a wall of separation. This metaphor has held popular imagination so firmly that many of us have not noticed that separation of church and state is no longer the law of the land.

Since the 1980s, the Supreme Court has abandoned much of its strict separationism, and reversed four of its harshest cases. In a score of new cases, the Court has upheld government policies that support the public access and activities of religious groups—so long as these religious groups are voluntary and so long as nonreligious groups are treated the same way. Religious counselors can be funded as part of a broader federal family counseling program. Religious student groups can have equal access to public facilities and forums that are open to other civic groups. Religious student newspapers are just as entitled to public university funding as their secular counterparts. Religious schools are just as entitled to participate in a state-sponsored school voucher program as other private schools. Religious messages are just as welcome in open public forums as secular messages. Religiously based civic education groups are just as entitled as others to run after-school recreational and remedial programs for public school students.

The Supreme Court has defended these holdings on wide-ranging constitutional grounds. Several recent cases have featured brilliant and heated rhetorical fireworks in majority and dissenting opinions. Part of this back-and-forth is typical of any constitutional law in action. "Constitutions work like clocks," American founder John Adams once put it.[32] To function properly, they must swing back and forth, and their mechanisms and operators get wound up from time to time. Despite this back-and-forth, several common teachings about religious liberty are beginning to emerge in these cases.

One teaching is that public religion must be as free as private religion. Not because the religious groups in these cases are really nonreligious. Not because their public activities are really nonsectarian. And not because their public expressions are really part of the cultural mainstream. To the contrary, these public groups and activities deserve to be free, just because they are religious, just because they engage in sectarian practices, just because they sometimes take their stands above, beyond, and against the cultural mainstream. Religion, the Court has come to realize, can provide leaven and leverage for the polity and society to improve.

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31 Berkey v. Third Ave. Ry. Co. 155 NE 58, 61 (1928). See further Beryl H. Levy, *Cardozo and Frontiers of Legal Thinking* (Oxford: Oxford University Press, 1938), 205.

32 John Adams, "Letter from the Earl of Clarendon to William Pym (Jan. 27, 1766)," in *The Political Writings of John Adams*, ed. George W. Carey (Washington, DC: Regnery Publishing, 2000), 644, 647 (originally printed in the *Boston Gazette*, with John Adams using the pseudonym of the Earl of Clarendon).

A second teaching of these cases is that freedom of public religion cannot mean establishment of a common civil religion. Government support of a common civil religion might have been defensible in earlier times of religious homogeneity. It is no longer defensible in modern times of religious pluralism. Today, our public religion must be a collection of particular religions, not the combination of religious particulars. It must be a process of open religious discourse, not a product of ecumenical distillation. All religious voices, visions, and values must be heard and deliberated in the public square. All peaceable public religious services and activities must be given a chance to come forth and participate.

Some conservative Protestants and Catholics today have seized on this new insight better than most. Their recent rise to prominence in the public square and in the political process should not be met with glib talk of censorship or reflexive incantation of Jefferson's mythical wall of separation. The rise of the Christian right should be met with the equally strong rise of the Christian left, of the Christian middle, and of sundry Jewish, Muslim, Hindu, Buddhist, and other religious groups who test and contest the Christian right's premises, prescriptions, and policies. That is how a healthy democracy works. The real challenge of the Christian right is not to the integrity of American politics but to the apathy of American religions. It is a challenge for peoples of all faiths, and of no faiths, to take their place in the marketplace.

A third teaching of these cases is that the freedom of religion sometimes requires the support of the state. Today's state is not the distant, quiet sovereign of Jefferson's day, from which separation was both natural and easy. Today's state is an intensely active sovereign from which complete separation is impossible. Few religious bodies now can avoid contact with the modern welfare state's pervasive regulations of education, charity, welfare, child care, health care, family, construction, zoning, workplace, taxation, and security. Both confrontation and cooperation with the modern state are almost inevitable for any religion.

When a state's regulation imposes too heavy a burden on a particular religion, the First Amendment Free Exercise Clause provides a pathway to relief. When a state's appropriation imparts too generous a benefit to individual religions, the Establishment Clause provides a pathway to dissent. But when a general government scheme provides public religious groups and activities with the same benefits afforded to all other eligible recipients, constitutional objections now rarely work.

A final teaching of these cases is that the principle of separation of church and state serves religious liberty best when it is used prudentially, and not categorically as in the past. Separationism needs to be retained, particularly for

its original insights of protecting the church from the state, and protecting the state from the church. Today, as in the past, the state has no constitutional business interfering in the internal affairs of religious groups. The church has no constitutional business converting the offices of government into instruments of their mission and ministry. Government has no business funding, sponsoring, or actively involving itself in one religion alone. Religious groups have no business drawing on government sponsorship or funding for their core religious exercises. All such conduct violates the core principle of separation of church and state and should be outlawed.

The principle of separation of church and state, however, also needs to be contained, and not used as an antireligious weapon in the culture wars of the public square, public school, or public court. Separationism must be viewed as a shield, not a sword, in the great struggle to achieve religious liberty for all. James Madison, despite his firm separationist beliefs, warned already in 1833 that "it may not be easy, in every possible case, to trace the line of separation between the rights of Religion and the Civil authority, with such distinctness, as to avoid collisions & doubts on unessential points."[33]

It is even more imperative today than in Madison's day that the principle of separation of church and state not be pressed to reach the "unessentials." Government must strike a balance between coercion and freedom. The state cannot coerce citizens to participate in religious ceremonies or subsidies, or in religious programs or policies that they find odious. But the state cannot prevent citizens from participation in public ceremonies and programs just because they are religious. It is one thing for the Court to outlaw from the public school daily Christian prayers and broadcast Bible readings, and quite another to ban moments of silence and private displays of the Decalogue in the same schools. It is one thing to bar direct tax support for religious education, and quite another to bar tax deductions for parents who wish to educate their children in the faith. It is one thing to prevent government officials from delegating their core police powers to religious bodies, and quite another to prevent them from facilitating the charitable services of voluntary religious and nonreligious associations alike.

Separation of church and state must be balanced with other essential principles of the First Amendment, notably liberty of conscience, freedom of exercise, and religious equality. The Court must be at least as zealous in protecting religious consciences from secular coercion as protecting secular consciences

33 James Madison, "Letter to Rev. Jaspar Adams (1833)," in Daniel L. Dreisbach, *Religion and Politics in the Early Republic: Jasper Adams and the Church-State Debate* (Lexington: University of Kentucky Press, 1996), 117–21, at 120.

from religious coercion. The Court should be at least as concerned to ensure the equal treatment of religion as to ensure the equality of religion and nonreligion. It is no violation of the principle of separation of church and state when a legislature or court accommodates judiciously the conscientious scruples of a religious individual or the cardinal callings of a religious body. It is also no violation of this principle when government grants religious individuals and institutions equal access to state benefits, public forums, or tax disbursements that are open to nonreligionists similarly situated. To do otherwise is to move toward what Justice Potter Stewart once called "the establishment of a religion of secularism."[34]

2.2 *Keeping the Commandments*

In *Pleasant Grove City v. Summum* (2009),[35] a unanimous United States Supreme Court upheld the constitutionality of a Ten Commandments monument in a city park in the state of Utah. The monument had been privately donated forty years before. It was one of a dozen old signs and markers in the same park. A new religious group, called Summum, sought permission to put up a monument with their Seven Principles of faith. The city refused. Summum then sued under the First Amendment. It charged the city with violating the Free Speech Clause by discriminating against its Seven Principles. It also threatened to charge the city with violating the Establishment Clause by displaying the Ten Commandments alone. This left the city with a hard choice: take down the Ten Commandments or put up the Seven Principles.

The *Pleasant Grove* Court would have none of it. The Court treated the Ten Commandments monument as a form of permissible government speech. A government "is entitled to say what it wishes," Justice Samuel Alito wrote for the Court, and it may select and reflect certain views in favor of others. It may express its views by putting up its own tax-paid monuments or by accepting monuments donated by private parties whose contents it need not fully endorse. In this case, city officials had earlier accepted a Ten Commandments monument on grounds that it reflected the "[a]esthetics, history, and local culture" of the city. The Free Speech Clause does not give a private citizen a "heckler's veto" over that old decision. Nor does it compel the city to accept every privately donated monument once it has accepted the first. Government speech is simply "not bound by the free speech clause," the Court concluded, or subject to judicial second-guessing under the First Amendment. Government

34 Abingdon Township v. Schempp, 374 U.S. 203, 314 (1963) (Stewart J., dissenting).

35 555 U.S. 460 (2009).

officials are "accountable to the electorate" for their speech, and they will be voted out of office if their views cause offense.[36]

It helped the *Pleasant Grove* Court that there were a dozen monuments in the city park, only one of which was religious in content. It also helped that this was a forty-year-old monument that had never been challenged in court before. That allowed other Supreme Court justices to concur in this surprisingly unanimous decision. But the case turned on the characterization of the Ten Commandments monument as a form of government speech. That trumped countervailing concerns about religious establishments or private speech rights. And that shifted from the courts to the people the judgment about the propriety of maintaining such religious monuments.

This is better reasoning than the Court had offered in its earlier cases on religious symbols in public life. In some of these earlier cases, the Court had allowed religious symbols and ceremonies to withstand First Amendment scrutiny only if they were bleached and bland enough to constitute a permissible form of "ceremonial deism." Symbols and rituals of this sort, Justice Sandra Day O'Connor's wrote, serve to "solemnize public occasions, express confidence in the future, and encourage the recognition of what is worthy of appreciation in society."[37] This, in my view, is a dangerous form of constitutional exorcism. In other earlier cases, the Court had allowed government to display religious symbols only if they were sufficiently diluted and buffered by nonreligious symbols of comparable size and greater number. For every holy family in a county crèche, there had to be a herd of plastic reindeer; for every bust of Moses in a courthouse, a frieze of founding fathers. This is a mandatory form of postmodernist cluttering.

The *Pleasant Grove* Court wisely forgoes such arguments with fresh new arguments from democracy and tradition that do not deny or dilute the religious qualities of these symbols. The Court leaves it to elected government officials to reflect and represent the views of the people, including their religious views. It leaves it to the people to debate and decide whether the government's representation of their views is adequate or outmoded. Courts will step in only if the government coerces citizens to accept these religious views, or if the government's speech violates privacy, endangers society, or violates the constitution. A merely passive display of a generic religious text is not enough to trigger a judicial intervention. Had the city put up a flaming Ku Klux Klan cross, the courts would have jumped in immediately. This strikes me as a healthier

36 555 U.S. at 467–69, 472.

37 Lynch v. Donnelly, 465 U.S. 668, 686 (1984).

form of democratic rule than the traditional system of giving a single citizen a "heckler's veto" over majoritarian views.

The age of a religious display should also play a part in the delicate calculus of its constitutionality. The longer a religious symbol has stood open and unchallenged in the public square, the more deference it deserves. "If a thing has been practiced for two hundred years by common consent," Justice Oliver Wendell Holmes Jr. once wrote, "it will take a strong case for the [Constitution] to affect it."[38] Over time, religious symbols become embedded in the culture and tradition of a community and harder to remove. And, over time, the right to challenge them diminishes in strength and becomes harder to press.

The law recognizes the power of time in its historical preservation and zoning rules that "grandfather" various old (religious) uses of property that do not comport with current preferred uses. It also recognizes this in our private property laws of "adverse possession": an open, continuous, and notorious use of a property eventually will vest in the user. Those legal ideas should have a bearing on these religious symbolism cases, leaving older displays more secure but new displays more vulnerable.

The law further recognizes the pressure of time in its rules of pleading and procedure. The law sets statutes of limitations on many claims and penalizes parties for sitting too long on their rights. These legal ideas, too, should have a bearing in these religious symbolism cases. Challenges to older government actions concerning religious symbols should be harder to win than challenges to new government initiatives. The law does not set statutes of limitations on constitutional cases, of course. But surely once a public religious display has reached its proverbial "forty years," we would do well to leave it alone.

2.3 *Lift High the Cross*[39]

The European Court of Human Rights has upheld Italy's policy of displaying crucifixes in its public-school classrooms. In *Lautsi v. Italy*, an atheistic mother of two public-school children challenged this crucifix policy, in place since 1924. After losing in the Italian courts, she appealed to the European Court of Human Rights, arguing that the presence of these crucifixes in public schools violated her and her children's rights to religious freedom and to a secular education guaranteed by the European Convention on Human Rights. On

38 Jackman v. Rosenbaum, 260 U.S. 22, 31 (1922).

39 I presented this text at an editorial gathering of the Italian newspaper in Rome *Ilsussidoro*, and it was later published as John Witte, Jr. "Crocifisso/L'esperto Usa: così l'Europa si salva dal laicismo francese," *IlSussidiorio.Net* (March 21, 2011), and in revised translation as "Lift High the Cross? An American Perspective on *Lautsi v. Italy*," *Ecclesiastical Law Journal* 13 (2011): 341–43.

November 3, 2009, a unanimous seven-judge chamber of the European Court held for Ms. Lautsi. On March 18, 2011, the Grand Chamber reversed, and held 15 to 2 in favor of Italy.[40]

The Court stated clearly that the crucifix is a religious symbol, that atheism is a protected religious belief, and that public schools must be religiously neutral. But the Court held that a "passive display" of a crucifix in a public-school classroom was no violation of religious freedom—particularly when students of all faiths were welcome in public schools and free to wear their own religious symbols. The Court held further that Italy's policy of displaying only the crucifix was no violation of religious neutrality, but an acceptable reflection of its majoritarian Catholic culture. With European nations widely divided on whether and where to display various religious symbols, the Court concluded, Italy must be granted a "margin of appreciation" to decide for itself how and where to maintain its Christian traditions in school.

The *Lautsi* case echoes many familiar arguments that the United States Supreme Court has used over the past three decades to maintain traditional displays of crèches, crosses, and Decalogues on government property. While not entirely convergent in their religious symbolism cases, the American and European high courts now hold six teachings in common.

First, tradition counts in these cases. In American courts, older religious displays tend to fare better than newer displays. The longstanding customary presence of a religious symbol in public life eventually renders it not only acceptable but indispensable to defining who we are as a people. In *Lautsi*, Judge Giovanni Bonello put this argument strongly in his concurrence: "A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people."[41]

Second, religious symbols often have redeeming cultural value. American courts have long recognized that the Decalogue is not only a religious commandment but also a common moral code, that a cross is not only a Christian symbol but also a poignant memorial to military sacrifice. When passively and properly displayed, the meaning of a symbol can be left to the eye of the beholder—a sort of free-market hermeneutic. The *Lautsi* court echoed this logic. While recognizing the crucifix as religious in origin, the Court accepted Italy's argument that "the crucifix also symbolized the principles and values"

40 Lautsi v. Italy, 2011-III Eur. Ct. H.R. 61.

41 Ibid. 63, 68, 95–97, 103.

of liberty, equality, and fraternity which "formed the foundation of democracy" and human rights in Italy and well beyond.

Third, local values deserve some deference. In America, the doctrine of federalism requires federal courts to defer to the practices and policies on religion by individual states, unless there are clear violations of federal constitutional rights to free exercise and no establishment of religion. The Supreme Court has used this doctrine to uphold the passive display of crosses and Decalogues on state capitol grounds. The *Lautsi* Court used the European "margin of appreciation" doctrine in much the same way. Lacking European consensus on public displays of religion, and finding no coerced religious practice or indoctrination in this case, the Court left Italy to decide for itself how to balance the religious symbolism of its Catholic majority and the religious freedom and education rights of its atheistic minorities.

Fourth, religious freedom does not require the secularization of society. The United States Supreme Court became famous for its image of a "high and impregnable wall of separation between church and state," that left religion hermetically, even hermeneutically sealed from political life and public institutions. But the reality today is that the Court has abandoned much of its strict separatism and now allows religious and nonreligious parties alike to engage in peaceable public activities, even in public schools. The European Court of Human Rights likewise became famous for promoting French-style *laïcité* in public schools and public life, striking down Muslim headscarves and other religious symbols as contrary to the democratic "message of tolerance, respect for others, and equality and non-discrimination."[42] *Lautsi* suggests a new policy that respects the rights of private religious and secular groups alike to express their views, but allows government to reflect democratically the traditional religious views of its majority.

Fifth, religious freedom does not give a minority a heckler's veto over majoritarian policies. Until recently, American courts allowed taxpayers to mount establishment clause challenges to any law touching religion, even if it caused them no real personal injury. This effectively gave secularists a veto over sundry laws and policies on religion—however old, common, or popular those laws might be. The Supreme Court has now tightened its standing rules considerably, forcing parties to make their cases for legal reform in the legislatures and to seek individual exemptions from policies that violate their beliefs. *Lautsi* holds similarly. It recognizes that while the crucifix may cause offense to Ms. Lautsi, it represents the cherished cultural values of millions of others,

42 Dahlab v. Switzerland, 2001-v Eur. Ct. H.R. 447, 449, 463.

who in turn are offended by her atheistic views. But personal offense cannot be a ground for censorship. Freedom of religion and expression requires that all views be heard in public life.

Finally, religious symbolism cases are serious business. It's easy to be cynical about these cases—treating them as much ado about nothing, or expensive hobbyhorses for cultural killjoys or public-interest litigants to ride. But that view underestimates the extraordinary luxury we now enjoy in the West to be able to fight our cultural contests over religious symbols in our courts and academies, rather than on our streets and battlefields. In centuries past in the West—and in many regions of the world still today—disputes over religious symbols often lead to violence, sometimes to all-out warfare. Far more is at stake in these cases than the fate of a couple of pieces of wood nailed together. These cases are essential forums to work through our deep cultural differences and to sort out peaceably which traditions and practices should continue and which should change.

2.4 *Scopes II and Beyond*[43]

In the 1920s, America stood transfixed by the spectacle of two giants, William Jennings Bryan and Clarence Darrow, fighting valiantly over the place of creation and evolution in the public school. Bryan, a three-time presidential candidate, defended creationism as "inerrant fact" and denounced evolution as "atheistic fiction." Darrow, representing the new American Civil Liberties Union (the ACLU), insisted that evolution was "scientific fact" and creationism "obsolete myth." Bryan won the argument. But the 1925 *Scopes* case was a storm signal of many battles to come between law and religion, and religion and science.

Eighty years later, the nation stood transfixed again by the same battle, rejoined in Dover, Pennsylvania—now pitting proponents of intelligent design against the ACLU. This time, in *Kitzmiller v. Dover Area School District* (2005),[44] the ACLU won handily. Their main argument: the concept of intelligent design is simply biblical creationism by another name, and to teach it in public schools violates the First Amendment prohibition on government establishment of religion.

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43 I presented this talk at a press briefing at the National Press Club in Washington, DC, when the case was first issued, and then later published it as "Intelligent Design v. Evolution: Both Right and Left Misguided in Fight," *Atlanta Journal and Constitution* (Dec. 23, 2005): A15.

44 400 F. Supp. 2d 707 (M.D. Pa. 2005).

The ACLU had strong precedent on its side. In 1968, the Supreme Court ruled that states may not ban the teaching of evolution in public schools. In 1987, the Court ruled that states may not require that creationism be given equal time with evolution in the science curriculum. Creationism is religion, not science, several later federal courts concluded, and the Establishment Clause forbids its teaching in the public-school science classroom—whether directly or indirectly.

Given these precedents, the result in the Dover case was almost inevitable. Public school board officials had required biology teachers to tell their students that evolution was not a "fact" but "a theory" with ample "gaps" for which "there is no evidence." The teachers thus encouraged students to consider the "explanations of intelligent design" and directed them to a standard intelligent design textbook to read more.

Federal district court Judge John Jones, an appointee of President George W. Bush and a professed Christian, found the Dover school policy patently unconstitutional and its litigation strategy a form of "breath-taking inanity." Intelligent design is not science but creationism in a new guise, he concluded, and the school board's attempts to deny its religious inspiration and implications depended on "subterfuge" and "hypocrisy." The judge was particularly incensed that the defenders of the policy "who so staunchly and proudly touted their religious convictions in public" were repeatedly caught "lying" and engaging in "sham arguments" to disguise their true religious convictions.

For all its purplish prose, and for all the national celebration and lamentation it has occasioned, the Dover decision is legally very narrow. It applies only to a single district in Pennsylvania, not to the whole nation. The decision precludes intelligent design only from public-school *science* classes. It does not preclude stories of creation and theories of intelligent design from public-school classes in philosophy, logic, poetry, literature, cosmology, and more. The decision applies only to actual instructional time in the classroom. It does not preclude the teaching or celebration of creation by voluntary student groups meeting in public-school classrooms after school hours, let alone when they leave the school grounds. And the decision applies only to public schools. It has no bearing on private (religious) schools.

This last point bears emphasis. The Dover case reflects only one side of the two-sided compact that the United States Supreme Court has constructed over the past half century to govern questions about religion and education. Yes, the First Amendment Establishment Clause prohibits religion from much of the public school. But the First Amendment Free Exercise Clause protects religion in all parts of private schools. While confessional creationism might not be

welcome in public schools, it can have full ventilation in private schools, in Bible and science classes alike.

The Court has long forbidden confessional religious teachings from the public school using this logic: the public school is an arm of the state. It must communicate basic democratic and constitutional values to its students, including those of the First Amendment. The state compels students to go to school. These students are young and impressionable. Some relaxation of constitutional values might be possible in other public contexts—where mature adults can make informed assessments of the values being transmitted. But no such relaxation can occur in public schools, with their impressionable youths who are compelled to be there. The First Amendment Establishment Clause in particular cannot be relaxed. The Establishment Clause requires separation of church and state. Thus, in the public school, if nowhere else in public life, no religious texts, teachers, symbols, or rituals are allowed.

The converse logic governs private schools. Private schools are viable and valuable alternatives to public schools, the Court has repeatedly held, and they allow students to be educated in their own religious tradition. Given that public education must be secular under the Establishment Clause, private education may be religious under the Free Exercise Clause. To be accredited, private schools must meet minimum educational standards: they must teach reading, writing, and arithmetic, history, geography, social studies, and the like, so that their graduates are not culturally or intellectually handicapped. But these religious schools are perfectly free to teach all those subjects with a religious slant and to teach religious courses beyond them.

This two-sided compact on religion and education, while by no means perfect, strikes me as a prudent way to negotiate the nation's growing religious and intellectual pluralism. Religious liberty litigants, on both the right and the left, should stop trying to renegotiate the basic terms of this compact, and spend more time trying to maximize liberty for all within these terms. The right has spent untold millions during the past two decades trying to introduce bland prayers, banal morals, and now bleached theology into public schools. That money could have been much better spent on a national scholarship and voucher program that gives real educational choice to the poor. The left has spent untold millions more trying to cut religious schools and their students from equal access to funds, facilities, and forums available to all others. That money could have been much better directed to shoring up the many public schools that are demonstrably failing. We have the luxury in this country of litigating about religious symbolism. But we would be better served by tending to the weightier matters of the law.

2.5 *Go Tell It to the ... Mosque?*[45]

Anglican Archbishop Rowan Williams set off an international firestorm by suggesting that some accommodation of Muslim family law was "unavoidable" in England. His suggestion, though tentative, quickly prompted more than 250 articles in the world press, the vast majority denouncing it. England will be beset by "licensed polygamy," "barbaric procedures," and "brutal violence" against women and children, his critics argued, all administered by "legally ghettoized" Muslim courts immune from civil appeal or constitutional challenge. Consider Nigeria, Pakistan, and other former English colonies that have sought to balance Muslim Sharia with the common law, other critics added. The horrific excesses of their religious courts—even calling the faithful to stone innocent rape victims for dishonoring their families—prove that religious laws and state laws on the family simply cannot coexist. Case closed.

This case won't stay closed for long, however. The archbishop was not calling for the establishment of independent Muslim courts in England, let alone the enforcement of Sharia law by state courts. He instead wanted his nation to have a full and frank debate about what it means to be married in a growing multicultural society. What forms of marriage should citizens be able to choose, and what forms of religious marriage law should government be required to respect? These are "unavoidable" questions for any modern society dedicated to protecting both the civil and religious liberties of all its citizens.

These are quickly becoming "unavoidable" questions for America, too. We already have a lot more marital pluralism than a generation ago—with a number of legal options now available. Federal law now requires all states to offer same sex marriage alternatives. Louisiana, Arkansas, and Arizona offer couples either a simple contract marriage or a covenant marriage with more traditional and rigorous rules of entrance and exit.

While these marital options remain firmly under state law, other options now draw in religious law, too, implicitly or explicitly. Utah and surrounding states, for example, house some thirty thousand polygamous families. These families and the fundamentalist Mormon churches that govern them are openly breaking state criminal laws against bigamy, but the states will not prosecute unless

45 The title is an ironic twist on the familiar biblical passage: "Go tell it to the church" (Matthew 18:17) rather than suing a fellow believer in secular court. I gave variations on this talk at a number of public venues and published an early version as "The Future of Muslim Family Law in Western Democracies," in ed. Rex Ahdar and Nicholas Aroney, eds., *Shari'a in the West* (Oxford/New York: Oxford University Press, 2010), 279–92, and an expanded version in John Witte, Jr., *Church, State, and Family* (Cambridge: Cambridge University Press, 2019), 300–35.

minors are forced into marriage. In New York, Orthodox Jewish couples cannot get a state divorce without first obtaining a rabbinic divorce. This privileges Jewish family law over all other religious laws, and it forces some New York citizens to discharge a religious duty to gain a civil right to divorce. In more than twenty states, marriages arranged by Hindu, Muslim and Unification Church officials have been upheld, with divorce the only option left for parties who claim coercion or surprise. A number of religious couples now choose to arbitrate their marital and family disputes before religious courts and tribunals rather than litigate them in state courts. Courts generally uphold the judgments of Jewish and Christian tribunals in these cases. Muslims, Hindus, and other religious minorities are now pressing for equal treatment for their systems of religious arbitration of marriage and family disputes.

Granting Muslims and others equal treatment in these cases does seem "unavoidable" if the parties have freely consented to this method of dispute resolution. To deny Muslims divorce arbitration while granting it to Jews and Christians is patently discriminatory. But the bigger question is whether state recognition of any religious marriage tribunals and laws puts us on a slippery slope that ends with parallel state and religious legal systems of marriage, and no control over the latter if they become abusive. What if religious parties want freedom to "covenant" out of the state's marriage laws and into the marriage laws maintained by their own voluntary religious communities? Which religious laws deserve deference from the state: just those governing husband and wife, or those on parent and child, property and inheritance, education and maintenance as well? Which religious communities have religious laws that deserve state deference—Christians? Jews? Muslims? Mormons? Hindus? What about the twelve hundred other religions now in place in America, a few with very different marriage and family norms? May a state recognize only some religious laws but not others consistent with the nondiscrimination rules of the First Amendment Free Exercise Clause? May a state cede any of its authority over marriage consistent with the nondelegation rules of the First Amendment Establishment Clause? These are the frontier questions of religion and marriage that will soon face American courts and legislatures. We don't have much constitutional guidance yet.

It's unlikely that courts will invoke the principle of separation of church and state, return all marriage and family questions to the state, and roll back the concessions already made to religious laws and tribunals. Not only is separation of church and state increasingly a constitutional dead letter, but this solution would have enormous implications for the complex laws of labor, charity, and education where religions and states cooperate closely.

We have better guidance in the law of religion and education. A century ago, states wanted a monopoly on education in public schools. Churches and parents claimed a right to educate their children in religious schools. In the landmark case of *Pierce v. Society of Sisters* (1925),[46] the Supreme Court held for the churches and ordered states to maintain parallel public and private education options for their citizens. But later courts also made clear that states could set basic educational requirements for all schools—mandatory courses, texts, and tests, minimal standards for teachers, students, and facilities, common requirements for laboratories, libraries, gymnasia, and the like. Religious schools could add to the state's minimum requirements, but they could not subtract from them. Religious schools that sought exemptions from these requirements found little sympathy from the courts, which instructed the schools either to meet the standards or lose their licenses to teach.

This compromise on religion and education, forged painfully over a half century of wrangling, has some bearing on questions of religion and marriage. Marriage, like education, is not a state monopoly. Religious parties have always had the right to marry in a religious sanctuary or before a state official. Religious officials have long had the right to participate in the weddings, annulments, divorces, and custody battles of their voluntary members. But the state has also long set the threshold requirements of what marriage is and who may participate. Religious officials may add to these state law requirements but not subtract from them. A minister may insist on premarital counseling before a wedding, even if the state will marry a couple without it. But if a minister bullies a minor to marry out of religious duty, the state could throw him in jail. A rabbi may encourage a bickering couple to repent and reconcile, but she cannot prevent them from filing for divorce. An imam may preach of the beauties of polygamy, but if he knowingly presides over a polygamous union, he is an accessory to crime.

If religious tribunals get more involved in marriage and family law, states will need to build on these precedents and set threshold requirements in the form of a license. Among the most important license rules to consider: No polygamy, child marriages, or other forms of marital union not recognized by the state. No compelled marriages or coerced conversions before weddings that violate elementary freedoms of contract and conscience. No threats or violations of life and limb, or provocations of the same. No blatant discrimination against women or children. No violation of basic rules of procedural fairness, and more. Religious tribunals may add to these requirements but not subtract from them. Those who fail to conform will lose their licenses to preside over

46 268 U.S. 510 (1925).

marital disputes, and will find little sympathy when they raise religious liberty objections.

This type of arrangement worked well to resolve some of the nation's hardest questions of religion and education. And it led many religious schools to transform themselves from sectarian isolationists into cultural leaders. Such an arrangement holds comparable promise for questions of religion and marriage. It not only prevents the descent to "licensed polygamy," "barbaric procedures," and "brutal violence" that the archbishop's critics feared. It also encourages today's religious tribunals to reform themselves and the marital laws that they offer.

2.6 *Why Monogamy Is Natural*[47]

Creationists and evolutionists don't agree on much, but they both believe that monogamy is the most "natural" form of reproduction for the human species. This seems counterintuitive. Yes, the Bible recounts the creation story of the first couple Adam and Eve, but it also describes the rampant polygamy of Abraham, Jacob, David, Solomon, and a score of other titans of the faith. Yes, nesting birds, voles, and a few other animals are monogamous, but most mammals reproduce with one dominant male controlling a large harem of females. Polygamy seems "natural," monogamy "supernatural."

Yet, for the past millennium, Christians and post-Christian liberals alike—Aquinas, Calvin, Locke, Hume, and Jefferson—all agreed that God created humans to reproduce by becoming "*two* in one flesh," not three or four. And modern evolutionary scientists, from Claude Lèvi-Strauss to Bernard Chapais, have concluded the same: that pair-bonding is part of the "deep structure" of human reproduction that humans have evolved as their best strategy for survival and success.

Both traditional theorists and modern scientists point to four facts of human nature that commend monogamy. First, unlike most other animals, humans crave sex all the time, especially when they are young and most fertile. They don't have a short rutting or mating season, followed by a long period of sexual quietude.

Second, unlike most other animals, human babies are born weak, fragile, and utterly dependent for many years. They are not ready to run, swim, or fly away upon birth or shortly thereafter. They need food, shelter, clothing, and

47 I gave this talk to an editorial group at the *Washington Post* and then published it under this title in the *Washington Post* (Oct. 3, 2012). I expanded at length on these themes in John Witte, Jr., *The Western Case for Monogamy over Polygamy* (Cambridge: Cambridge University Press, 2015).

education. Most human mothers have a hard time caring fully for their children on their own, especially if they already have several others. They need help, especially from the fathers.

Third, however, most fathers will bond and help with a child only if they are certain of their paternity. Put a baby cradle in a public place, medieval and modern Western experimenters have shown, and most women will stop out of natural empathy. Most men will walk by, unless they are unusually charitable. Once assured of their paternity, however, most men will bond deeply with their children, help with their care and support, and defend them at great sacrifice. For they will see their children as a continuation and extension of themselves, of their name, property, and teachings, of their own bodies and beings—of their genes, we now say.

Fourth, unlike virtually all other animals, humans have the freedom and the capacity to engage in destructive behavior in pursuit of their own sexual gratification. Given the lower risks and costs to them, men have historically been more prone to extramarital sex than women, exploiting prostitutes, concubines, and servant girls in so doing and yielding a perennial underclass of "bastards" who have rarely fared well in any culture.

Given these four factors, nature has strongly inclined rational human persons to develop enduring and exclusive sexual relationships, called marriages, as the best form and forum of sexual bonding and reproductive success. Faithful and healthy monogamous marriages are designed to provide for the sexual needs and desires of a husband and wife. They ensure that both fathers and mothers are certain that a baby born to them is theirs. They ensure that husband and wife together will care for, nurture, and educate their children until they mature. And they deter both spouses from destructive sexual behavior outside the home.

Polygamy might ensure paternal certainty, but only at ample cost. Social science studies of polygamous families in Africa and Asia, and in isolated fundamentalist Mormon communities in North America, have documented these costs. While a polygamous man usually has his sexual needs met, his multiple wives often do not, leading to rivalry and discord in the home. While a polygamous father may know who his children are, his children have to work hard to get his attention, affection, and resources, which are dissipated over multiple wives and children. While polygamy might seem to contain extramarital sex better than monogamy, the opposite is often true. A polygamous man, not schooled by monogamous habits, will always be tempted to add another attractive woman to his harem. A co-wife, once pushed aside by another, will be sorely tempted to test her neighbor's bed, unless threatened with grave

retribution. And single men, with fewer chances to marry, will resort more readily to prostitution, seduction, and other destructive sexual behavior.

The Western tradition reminds us that the biblical polygamists did not fare well. Think of the endless family discord of Abraham with Sarah and Hagar, or Jacob with Rachel and Leah. Think of King David, who murdered Uriah the Hittite to add the shapely Bathsheba to his already ample harem. Or King Solomon with his thousand wives, whose children ended up raping, abducting, and killing each other. Anthropologists point to similar problems in modern polygamous households. They show further that young girls are often tricked or coerced into marrying older wealthy men, and that women and children of modern polygamy are often poorly educated, impoverished, and chronically dependent on welfare.

Even so, our human natural inclinations toward monogamy have always been wobbly. The reality today is that a good number of folks, buoyed in part by the sexual revolution, have sex and children without marriage, let alone monogamous marriage, whether straight or gay. In the modern West, some 40 percent of all children, and some 60 percent of all poor children are born outside of marriage and without the ongoing support of fathers or marriage-based kinship structures. The modern social welfare state has helped to buffer and spread out the costs of this destructive sexual and reproductive behavior. With Western governments on the fiscal and ideological ropes, however, it's not clear how long that support will continue. Of course, we should cherish sexual liberty and autonomy. But we should also develop laws, policies, and curricula to teach the basics about the nature of human sex and marriage, and to encourage and facilitate citizens to live their sexual lives in accordance with the natural norms and limits that govern us all.

2.7 *The Legal Challenges of Religious Polygamy*[48]

A century and a half ago, Mormons made national headlines by claiming a First Amendment right to practice polygamy, despite criminal laws against it. In four cases from 1879 to 1890, the United States Supreme Court firmly rejected their claim and threatened to dissolve the Mormon church if they persisted. Part of the Court's argument was historical: the common law has always defined

48 I gave this talk to a number of audiences in the United States, Canada, and Europe in the early 2000s, when issues of religious polygamy were making headlines. This was one version of the talk published in *Ecclesiastical Law Journal* 11 (2009): 72–75. I greatly expanded on these themes in *The Western Case for Monogamy over Polygamy* (Cambridge: Cambridge University Press, 2015).

marriage as monogamous, and to change those rules "would be a return to barbarism." Part of the argument was prudential: religious liberty can never become a license to violate general criminal laws "lest chaos ensue." And part of the argument was sociological: monogamous marriage "is the cornerstone of civilization," and it cannot be moved without upending our whole culture.[49] These old cases are still the law of the land, and most Mormons renounced polygamy after 1890.

The question of religious polygamy is back in the headlines, however—this time involving a fundamentalist Mormon group on a Texas ranch that has retained the church's traditional polygamist practices. Many of the legal questions raised since this group was raided are easy. Underage and coerced marriages, statutory rape, and child abuse are all serious crimes. If any of the adults on the ranch committed these crimes, or intentionally aided and abetted them, they are going to prison. They will have no claim of religious freedom that will excuse them, and no claim of privacy that will protect them. Dealing with the children, ensuring proper procedures, sorting out the evidence, and the like are all practically messy and emotionally trying questions, but not legally hard. The recent decision by the Texas court of appeals[50] ordering the return of the 450 plus children who had been seized from their homes during the raid underscores a further elementary legal principle—that decisions about child custody and criminal liability must be made case by case as much as possible.

The harder legal question is whether criminalizing polygamy is still constitutional. Texas and all other American states still have criminal laws against polygamy on their books. Can these criminal laws withstand a challenge that they violate an individual's constitutional rights to private liberty, equal protection, and religious liberty? In the nineteenth century, none of these rights claims was available. Now they are, and they protect every adult's rights to consensual sex, marriage, procreation, contraception, cohabitation, sodomy, and more. May a state prohibit polygamists from these same rights, particularly if they are inspired by authentic religious convictions? What rationales for criminalizing polygamy are so compelling that they can overcome these strong constitutional objections?

Theologians often cite the Bible, which says that "two"—not three or four—parties must join in "one flesh" to form a marriage (Genesis 2:24). Others remind us that early biblical polygamists did not fare well. Think of the problems

49 Reynolds v. United States, 98 U.S. 145 (1879); Murphy v. Ramsey, 114 U.S. 15, 45 (1885); Davis v. Beason, 133 U.S. 333 (1890); Church of Jesus Christ of Latter Day Saints v. United States together with Romney v. United States, 136 U.S. 1 (1890).

50 In re Steed, 2008 WL 2132014 (May 22, 2008).

confronted by Abraham with Sarah and Hagar, or by Jacob with Rachel and Leah. Or think of King Solomon with his thousand wives; their children ended up killing each other. This may be a strong foundation for a church or synagogue to prohibit polygamy among its voluntary members, but can arguments straight from the Bible prevail in a pluralistic nation that prohibits the establishment of religion?

Public health experts raise concerns about communicable diseases among children within the extended household, and transmittable sexual diseases within the polyamorous marital bed. But what about all those other group gatherings—schools, churches, and dorms—that children occupy: must they be closed, too, for fear of contagion? And isn't self-contained polygamous sex much safer than casual sex with multiple partners, which is constitutionally protected?

Political scientists raise worries about administrative inefficiency. After all, so much of our law presupposes a single definition of marriage and family life. What would we do if the husband dies, or one of the wives files for divorce? There are no guidelines about how to allocate the marital property, military or Social Security benefits, life insurance, and the like. But we have found a way to do this for the vast numbers of single, mixed-parent, and multiple-generation households that today collectively far outnumber families with two parents and their natural children. This is administratively doable.

Child experts raise serious concerns about the development of children of polygamy. Won't these children be confused by the mixed parental signals and attachments, and by the inevitable rivalries and rancor with their half siblings? And won't these children be stigmatized by their peers for being different? These arguments have some bite. But how different is the polygamous lifestyle in our current pluralistic culture? Children are raised by live-in grandparents, nannies, and day care centers. They live in large, blended families and boarding schools. Their parents may be gay and lesbian couples, or their families may have religious dress or dietary codes that set them apart from their peers. Are children of polygamy so differently positioned?

The strongest argument against polygamy is the argument from moral repugnance. Polygamy is inherently wrong—"just gross," as my law students say; *malum in se*, as we law professors put it. Many states legislate against a lot of activities—slavery, indentured servitude, gambling, prostitution, obscenity, bestiality, incest, sex with minors, self-mutilation, organ-selling, and more—just because those activities are wrong or because they will inevitably foster wrongdoing. That someone wants to engage in these activities voluntarily for reasons of religion, bravery, custom, or autonomy makes no difference. That other cultures past and present have allowed such activities also makes no

difference. For nearly two millennia, the Western tradition has included polygamy among the crimes that are inherently wrong. Not just because polygamy is unbiblical, unusual, unsafe, or unsavory, but also because polygamy routinizes patriarchy, jeopardizes consent, fractures fidelity, divides loyalty, dilutes devotion, fosters inequity, promotes rivalry, foments lust, condones adultery, confuses children, and more. Not in every case, to be sure, but in enough cases to make the practice of polygamy too risky to condone.

Furthermore, allowing religious polygamy as an exception to the rules is even more dangerous, because it will make some churches and mosques a law unto themselves. Again, some religious communities and their members might well thrive with the freedom to practice polygamy. But inevitably closed, repressive regimes like the Texas ranch compound will also emerge—with underage girls duped or coerced into sex and marriages with older men, with women and children trapped in sectarian communities with no realistic access to help or protection from the state and no real legal recourse against a church or mosque that is just following its own rules. We prize liberty, equality, and consent in America too highly to court such a risk. If you're not sure, just ask some of those moms and kids on the Texas ranch.

2.8 *Unwanted Children*[51]

Children are wonderful blessings for many parents and families. But, sadly, children are sometimes not wanted or welcome—say, because of a mother's health, family poverty or disruption, fear of transmitting disease or genetic defects, trying times of war or emergency, or when a child is the bitter fruit of rape, incest, adultery, or other unwanted sexual encounter. Sometimes those children are born anyway, and against the odds they thrive. Sometimes they are aborted.

I don't have much to say about the contested topic of abortion, although abortion remains a deeply contested issue in American and European legal and religious circles. In treating it cursorily here, I do not mean to deprecate the efforts of those who have invested their lives in the intense cultural and constitutional battles over abortion rights, nor to minimize the high moral valence and value of the issues at stake. But I am frankly dismayed that, at least in America, so much cultural, political, and legal time and energy has been

51 This text is excerpted from longer discussion about children's rights presented at various family law conferences. I expand on these themes in John Witte, Jr., *Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties* (Cambridge: Cambridge University Press, 2019), 238–73 ("Why Suffer the Children: Overcoming the Modern Church's Opposition to Children's Rights").

devoted to abortion politics when so many other central questions of sex, marriage, and family life get shorter shrift. Why spend so much time and money on abortion politics, yet not address nearly so forcefully the hard issues of sexual promiscuity, teenage pregnancy, non-marital birth, responsible marital sex, proper family planning, care for pregnant mothers, adoption reform, children's poverty, health care, education, and job training that are all so desperately in need of attention and reform? It's not enough for a culture to fight so hard to bring an unwanted child to life, and then leave the child and its mother and caretakers largely to fend for themselves thereafter. It's not enough to fight for the constitutional and international rights of children, but then to leave viable prenatal children without the basic right to life.

I have a moderate and unsophisticated middle-way position on abortion and pregnancy prevention. I believe contraception and morning-after preventive measures are acceptable, and in many cases prudent and preferable to unwanted pregnancy. Abstinence might be the preferred course, but it is not the common course—if it ever was—especially for teenagers and young adults in their most fertile and sex-driven years. I support a woman's right to abort at any stage of the pregnancy in cases of rape, unknown incest, or endangerment of her own life, or where the fetus is so severely deformed or damaged that post-partum life would be uncommonly cruel or not humanly recognizable. Outside of these special contexts, I support a woman's right to elective abortion prior to the fetus's traditional "quickening"—what is now called "extra-uterine viability"—without the involvement of any others. I support a woman's right to elective abortion of a post-viable healthy fetus into the second trimester, but that choice should now involve the input of the father if known (and their respective families in the case of minors). Ideally, it should also involve the presentation of clear and financially equivalent options of safe and humane abortion or of carrying the child to term and giving it up for adoption or taking the child home (with ongoing child support of the father and his family, regardless of whether the mother and father remain together). I have great difficulty seeing how elective third term or partial-birth abortion of a fully developed, viable, and healthy child struggling to come forth from the womb can be justified, save again in cases to protect the life of the mother. The child's right to life, at that point, must trump the woman's right to abort, except again if her own life is in peril, and she is exercising a right tantamount to self-defence.

I know this is not a sophisticated position. And I know that it's much easier for a man, not a woman, to say these things when he does not have to bear the enormous hardship of pregnancy and birth, nor make and live with the heart-rending decision about abortion. But I come to this position as the

child of a mother who was strongly urged by her doctors to abort me in early pregnancy because of serious complications and worries about her health, yet sacrificially allowed me to be born—even though I was chronically (and uncharacteristically) late and a tiny runt at that (I'm now punctual and 6′4″). I also come to this position as the father of an adopted daughter, whose unwed teenage mother carried her to term against the odds, and then gave her up for adoption to this eternally grateful adopting father. We use the "hero" label rather easily these days, but my mother and the birth mother of my adopted daughter have long been my heroines.

Personal anecdotes, of course, are not substitutes for arguments, and obstetrics and neo-natal care have become much more sophisticated even since my beloved daughter was born. Moreover, battles over abortion rights are parts and products of much larger constitutional and cultural struggles for liberty. But it's just because of these medical advances that doctors and mothers now often have far more precise information on which to make prudent and timely judgments about whether to abort early in pregnancy or to carry a child to term. Moreover, it's just because of advances in modern constitutional rights and liberties, and their international parallels in the UN Convention on the Rights of the Child, that we can now see more clearly the need to protect the rights of all children, born and unborn, beginning with the most basic right to life itself.

2.9 *Sex May Be Free, but Children Are Not*[52]

Thirty-eight percent of all American children are now born out of wedlock, costing American taxpayers $112 billion per year to cover uninsured health care and other expenses. Those are the sobering numbers just reported by the U.S. Census Bureau. The Census Bureau numbers break down as follows: 28 percent of all Caucasian, 50 percent of all Hispanic, and 71 percent of all African American children were born to single mothers in 2007. Compared to children born and raised within marital households, nonmarital children on average impose substantially higher costs on society for antipoverty, criminal justice, and education programs and in lost tax revenues. According to the public policy experts at the Institute for American Values, those nation-wide costs exceeded $1 trillion this past decade.[53]

52 I gave this talk to a group of newspaper reporters and editors in Atlanta, and then published it in *Atlanta Journal Constitution* (Aug. 10, 2008): C1. I expanded on these themes in *The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered* (Cambridge: Cambridge University Press, 2009).

53 *The Taxpayer Costs of Divorce and Unwed Childbearing* (New York: Institute for American Values, 2008).

Happily, we no longer visit the sexual sins of fathers and mothers upon their illegitimate children. American states have removed most of the chronic legal disabilities that were historically imposed on an illegitimate child's rights to property, inheritance, jobs, education, civil benefits, and more. Most remaining forms of discrimination against illegitimate children are now struck down as violations of the Equal Protection Clause of the Fourteenth Amendment.

But what the Fourteenth Amendment gives with its Equal Protection Clause, it takes back with its Due Process Clause. Due process privacy rights now spare adults from criminal liability for engaging in consensual sex outside of marriage. With the legal stigma of both illegitimacy and promiscuity eliminated, illegitimacy rates in the United States have soared—more than doubling since 1975—and the corresponding extra social costs have soared as well.

Rather than simply continuing to pass on the costs of sexual liberty to taxpayers, we need to get better about assigning responsibility where it is due: on both the mother and the father of the nonmarital child. Historically, adulterers, fornicators, and other sexual criminals as they were then called paid dearly for their crimes—by fine, prison, whipping, or banishment, and by execution in extreme cases. But those punishments often only exacerbated the plight of their illegitimate child, who in extreme cases was now left without a natural network of family resources and support. Today, those who have sex outside of marriage pay little if any for their consensual sex—protected in part by new cultural norms and constitutional laws of sexual privacy. Even if one wanted to pursue a neo-Puritan or Talibanic 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 extramarital sex should be coupled with a much firmer imposition of ongoing civil responsibility on couples whose sexual dalliances produce children. After all, the same Due Process Clause that exonerates promiscuity also licenses contraception, which is widely and cheaply available now, indeed free in some quarters. Those who choose to have children out of wedlock notwithstanding these options need to pay for their children's support. And that support needs to be enough to ensure that these children will have a life comparable to that of children born within marriage. Fathers, in fact, need to pay a bigger share of those costs, given that mothers bear the heavier biological costs in bringing the child to term.

I am no fan of shotgun marriages or forced cohabitation of a couple suddenly confronted with the prospect of a new child. That often deepens the pain for everyone. I am, however, a fan of aggressive paternity and maternity suits, now amply aided by cheap genetic technology. I support firm laws that compel stiff payments of child support for noncustodial parents and that garnish the wages, put liens on the properties, and seek reformation of insurance

contracts and testamentary instruments of those parents who choose to ignore their dependent minor children. I also support tort suits by illegitimate children who, as adults, seek compensatory and even punitive damages from their parents or their parents' estates in instances where these children have been cavalierly abandoned or notoriously abused as children. And I am a big fan of a much more ambitiously funded and amply facilitated adoption law that would give parents of illegitimate children another real option.

This is not grumpy conservativism but elementary liberalism. Every right has a corresponding duty, and the misuse of a right can trigger heavy ongoing responsibilities. There may be a right to bear arms in the United States, but there is a duty not to kill another except in proper self-defense. A single impulsive act of unjustly killing another may trigger a lifetime of responsibilities of paying back the victim's family and society. So it is with the right to have sex. Government has no business policing the consensual private sexual activities of adults. But a single impulsive act of conceiving a child should trigger a lifetime of responsibilities to care for that child. As with the taking of life, so with the making of life, there are no statutes of limitation on these responsibilities. Sex may be free, but children are not.

The state imposes child support obligations automatically if the child is born to a married couple; the father or mother will pay dearly if they ignore, abuse, or desert their child, especially in its tender years. It should be no different for a child conceived out of wedlock. Ongoing support for that child should not just depend upon the voluntary good will of the father, or a successful paternity suit by the mother. Absent adoption by another, that child is the moral and fiscal responsibility of its father and mother until it reaches the age of majority. And the state needs to impose these costs automatically and hold parents of illegitimate children accountable if they fail to pay.

In the old days, this was accomplished by putting deadbeat parents of illegitimate children under indentured servitude contracts managed by local justices of the peace. The parents worked for the state for as many years as was necessary to repay the tax costs for their children's support. This is no solution for our day. Indentured servitude has long been outlawed as a species of slavery, and leaving enforcement of child support to local justices does not work, given our modern means and rights to travel.

Modern technology offers a better way to hold irresponsible parents accountable to support their children, regardless of where they go. Birth certificates should carry more specific information about both the parents—not just their names and addresses, as now, but their Social Security numbers, blood types, and genetic data as well. And a national registry of these birth certificates should be developed to ensure that parents can be found regardless of where they move. Having those more refined parental data available will

enable an unsupported child, an abandoned parent, or, if necessary, a government official to track down a delinquent parent and hold that party to account in the case of delinquency. This might sound Orwellian at first blush. But is it really any more intrusive on our liberty than government reaching into all taxpayers' pockets to collect the extra $112 billion a year needed to pay for our nonmarital children?

The government must, of course, develop procedures and safeguards to ensure the privacy and proper use of these parental personal data. The government must also provide back-up support when parents cannot be found or cannot afford support for their children, despite their best efforts. No child in a nation with our wealth and values should be left uninsured, undernourished, or poorly educated. But we need a much better-organized and -advertised state and federal system of holding parents financially accountable for the children they bring into the world. That will do much to deter irresponsible sex and to promote responsible childbearing within marriage.

2.10 *Spare the Rod!*[54]

I do not understand how our culture countenances corporal punishment of children. I recognize that I might well be just projecting my own experience as a child. My parents never spanked, slapped, or hit me, so far as I remember. I certainly remember being naughty enough as a youngster and delinquent enough as a youth to deserve ample discipline and punishment. But my parents would usually ask me to explain what I had done or not done and then told me why that was wrong. They would then send me to sit quietly, stop playing, stay in my room, and/or start doing something constructive—extra chores, longer prayers, helping neighbors, cleaning up the park, giving hard-earned money to the church or a charity. My parents were strict Protestants, but I came to realize as an adult that they administered discipline rather like Catholic priests dispensed the sacrament of penance. I have tried to emulate them as a parent and now as a grandparent.

When I began to teach criminal law, I found the practice of corporal punishment of children even more troubling. If the law prohibits you from striking a fellow adult with impunity, even though that adult person is capable of self-defense and private redress, why should an adult be able to strike a child with impunity, especially when many children cannot defend themselves or turn to others for help? The law today has, properly, become ever more

54 This is an excerpt from a talk given to various civic and church groups over the years in defense of children's rights. I expand on these themes in John Witte, Jr., *Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties* (Cambridge: Cambridge University Press, 2019), 238–73.

vigilant in protecting adults from all manner of physical threats, harassment, and intimidation; even a threatening look in the wrong context, let alone an unwanted touch can constitute assault. Why not extend the same shield of protection for children? Why wait until a parent or guardian's conduct rises to the level of felony child abuse before stepping in? Mounting social-science data show that even light corporal discipline is largely ineffective for a child's physical, mental, spiritual, moral, and social development. More aggressive forms of corporal discipline are deleterious to a child's development—and are sometimes tempting for harried parents, guardians, and teachers struggling with unruly or unduly recalcitrant children.

As an amateur theologian, I have also found biblical warrants for corporal punishment unconvincing. Why pick out one Old Testament Proverb as an enduring command for modern parents: "He who spares the rod hates his son, but he who loves him is diligent to discipline him" (Proverbs 13:24)? How is that proverb more authoritative than so many other actual Mosaic commands about parenting—including violent ones like: "Whoever strikes his father or his mother shall be put to death" (Exodus 21:15).

I do not read these ancient Mosaic laws on parenting as binding laws for biblical Christians or indeed any other groups today; they were the positive juridical laws of the ancient Israelites that no longer obtain. And I read proverbs like "spare the rod, spoil the child" as prudential counsel from the Hebrew Bible, not as an enduring command of the Christian Gospel for the Christian life. Nowhere does the New Testament enjoin Christians to administer corporal discipline to their children, even though such actions were commonplace in the muscular patriarchal households of the first century, when the Gospels were compiled. Indeed, when Jesus encountered rough discipline of children during his ministry, the Bible says that "he was much displeased, and said unto them, 'Suffer the little children to come unto me, and forbid them not: for of such is the kingdom of God'.... And he took them up in his arms, put his hands upon them, and blessed them" (Matthew 19:13–15). That strikes me as the better way of offering firm and loving nurture and discipline of children.

3 Talks from Pulpits

3.1 *Our Twofold Human Nature*[55]

Our Bible texts for today are pulsing with tensions of good and evil. Leviticus 19 calls us to love our neighbors, not hate them; to be just in our judgments, not

55 I gave a version of this talk in St. Pierre Cathedral in Geneva in 2009, on the five-hundredth anniversary of John Calvin's birth, and another version in St. Bartholomew Episcopal

prejudiced. Psalm 1 contrasts the happiness of a lawful life with the misery of sinful living. Saint Paul calls us to "nurse" our neighbors tenderly but to avoid deceit or impurity in so doing. And the Gospel calls us to live by the loving spirit of the law, not just by its harsh letter. All this, we are told, will come under God's final judgment.

It was texts like these, echoed many times more in the Bible, that helped inspire the Protestant Reformation five hundred years ago. Today is Reformation Sunday. On this day, and in this week, much of the Christian world commemorates Martin Luther's posting of his Ninety-Five Theses on the church door in Wittenberg on October 31, 1517. It is the Reformation that gave birth to our Anglican and later Episcopal tradition as well. And so, today we join in remembering the Reformation.

Guided by our biblical texts for today, let me lift up one major teaching of the Reformation that still has enduring lessons for us. That is the Bible's teaching about our human natures. Protestants from Martin Luther to Martin Luther King, from Thomas Cranmer to Barbara Brown Taylor, have pointed to two basic paradoxes of our human nature as described in the Bible. First, each person is at once a sinner and a saint, lost and saved. Second, each saved person is at once a free sovereign who is subject to no one, and a dutiful servant who is subject to everyone. These twin biblical insights about human nature still shape much Protestant theology as well as many modern Protestants' instincts about the nature of authority and judgment, liberty and equality, freedoms and duties.

First, Protestants have long said that the Bible describes human beings as both sinners and saints, lost and saved, flesh and spirit, bodies and souls. As bodily creatures, we are born in sin and bound by sin. By our carnal natures, we are prone to lust and evil, perversion and pathos of untold dimensions. Even the best of persons, even the titans of virtue in the Bible—Abraham, David, Peter, and Paul—sin all the time. "Wretched man that I am," Paul laments. "There is a war within my very members" (Romans 7:23–24). In and of ourselves, we are depraved and deserving of eternal death.

But as spiritual creatures, we are reborn in faith and freed from sin. By our spiritual natures, we are prone to love and charity, goodness and sacrifice, virtue and peacefulness. Even the worst of persons, even the reprobate thief nailed on the cross next to Christ's, can be saved from sin. In spite of ourselves, we are redeemed and assured of eternal life.

Church in Atlanta in 2017 in the five-hundredth anniversary year of the Protestant Reformation. The lectionary readings for the day were: Leviticus 19:1–2, 15–18; Psalm 1; 1 Thessalonians 2:1–8; Matthew 22:34–46.

It is only through faith and hope in the Word of God that a person moves from sinner to saint, from bondage to freedom. This is the essence of the cardinal Protestant doctrine of justification by faith alone. To put one's faith in the Word of God, to accept its gracious promise of eternal salvation, is to claim one's freedom from sin and the threat of eternal damnation. And it is to join the communion of saints that begins imperfectly in this life and continues perfectly in the life to come. But a saint by faith remains a sinner by nature, and the paradox of good and evil, of Jekyll and Hyde, resides within the same person until death.

The very first chapters of Genesis paint a comparable picture of these same two human natures, now with God's imprint on them. The more familiar picture is that of Adam and Eve, who were created equally in the image of God and vested with a natural right and duty to be fruitful and multiply, to dress and keep the garden of creation. The less familiar picture is that of their first child, Cain, who murdered his brother Abel and was called into judgment by God and condemned for his sin. Yet "God put a mark on Cain," Genesis 4:15 reads, both to protect him in his life and to show that he remained a child of God despite the enormity of his sin.

One message of this ancient biblical text is that we are not only the beloved children of Adam and Eve, who bear the image of God, with all the divine perquisites and privileges of Paradise. We are also the sinful siblings of Cain, who bear the mark of God, with its ominous assurance both that we shall be called into divine judgment for what we have done, and that there is forgiveness even for the gravest of sins we have committed.

A further message of this text is that the judgment of God is ultimately a source of comfort, not of fear. The first sinners in the Bible—Adam, Eve, and Cain—were given divine due process. They were confronted with the evidence, asked to defend themselves, given a chance to repent, spared the ultimate sanction of death, and then assured of a second trial on the Day of Judgment, with appointed divine counsel—indeed our Lord and Savior Jesus Christ. The only time that the New Testament God deliberately withheld divine due process was in the capital trial of His Son, Luther reminds us, and, in Christian teachings, that was the only time it was and has been necessary.

The modern lessons of this are very simple and direct. If God gives due process in judging us, we should give due process in judging others. If God's tribunals feature at least basic rules of procedure, evidence, representation, and advocacy, then human judicial tribunals, which represent God's authority on earth, should feature at least the same. God calls us to render "just judgments," our Leviticus passage for today reminds us, and to avoid favoritism, partiality, slander, corruption, or vengeance.

This admonition to justice also requires that we safeguard the judicial tribunal and indeed any office of political authority against the sinful excesses and abuses of those who occupy these offices. The front pages of our daily newspapers remind us how important it remains to keep strict limits on judicial and political authority. This, too, was an old Reformation insight. Having been charred and savaged by sundry tyrants, Protestants have long been in the vanguard of building constitutional safeguards against sinful abuses of governmental authority—using written constitutions, democratic elections, limited terms of office, separated powers, checks and balances, public accountability, and removal from office for those who persist in their abuse. The wisdom of having these structural restraints on power is today alarmingly clear.

The second paradox of human nature emphasized by Protestants also had deep roots in the Bible and direct implications for modern life. Protestants have long argued that each Christian is at once a sovereign who is subject to no one, and a priest who is servant to everyone. As a redeemed saint, every Christian is utterly free in his or her conscience, utterly free in her innermost being. The Christian is like the greatest ruler on earth, above and beyond the power of everyone. Neither pope nor prince nor parent "may impose a single syllable of the law upon him without his consent," Martin Luther wrote.[56] No one may intrude upon the sanctuary of conscience or endanger a Christian's assurance and comfort of eternal life.

But even though appointed by God as an exalted ruler on this earth, each Christian is also a dutiful priest, called to perform good works in service of neighbors, in imitation of Christ, and in glorification of God. Each Christian must freely serve her neighbors, offering instruction, charity, prayer, and material and personal sacrifice—tender nursing care, as our passage in Thessalonians puts it. The precise nature of our priestly service to others depends upon our gifts and vocation. But we are all called to serve freely and fully as God's priests of charity. Not everyone who is charitable has faith. But everyone who has faith is charitable. Charity and priestly service are how we fulfill the greatest commandment described in our Gospel passage today, to love God, neighbor, and self.

These biblical teachings of the lordship and priesthood of all believers render many Protestants instinctively jealous about liberty and equality—but on their own quite distinct theological terms. The heart of the Protestant theory of liberty is that we are all lords on this earth. We are utterly free in the sanctuary of our conscience, entirely unencumbered in our relationship with God. We

56 Martin Luther, *Luther's Works*, 55 vols., trans. and ed. Helmut T. Lehman and Abdel Ross Wentz (Philadelphia: Fortress Press, 1955), 36:70; see also ibid. 31:344–346.

enjoy a sovereign immunity from any human structures and strictures—even those of the church when they seek to impose upon this divine freedom.

Such talk of sovereign immunity sounds something like modern liberal notions of popular sovereignty. And such talk of lordship sounds something like the democratic right to self-rule. Protestants have thus long advocated liberty of conscience and democratic freedoms on these grounds. But when theologically pressed, many Protestants will defend their religious and civil liberties not because of their own popular sovereignty, but because of the absolute sovereignty of God, whose relationship with his children cannot be trespassed. Many Protestants will defend certain unalienable rights of life, liberty, and property, not in the interest of preserving or pursuing their own ends, but in the interest of discharging their divine duties set forth in the law of God.

The heart of the Protestant theory of equality is that we are all equally priests before God, having been equally created as God's image bearers. The Bible says many times over: "You are a chosen race, a royal priesthood, a holy nation, God's own people" (1 Peter 2:9). Among you, "[t]here is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female, for you are all one in Christ Jesus" (Galatians 3:28). These and many other biblical passages have long inspired a reflexive egalitarian impulse in Protestants. All are equal before God. All have vocations that count. All have gifts to be included. This common calling of all to be priests transcends differences of culture, economy, gender, and more.

Such teachings have led a few Protestant groups over the centuries to experiment with intensely communitarian states of nature, where life is gracious, lovely, and long. Most Protestant groups, however, view life in such states of nature as brutish, nasty, and short, for sin invariably perverts them. Structures and strictures of law and authority are necessary and useful, most Protestants believe. But such structures need to be as open, limited, and democratic as possible. Hierarchy is a danger to be indulged only so far as necessary.

To be sure, Protestants over the centuries have often defied these founding ideals, and have earnestly partaken of all manner of elitism, chauvinism, racism, antisemitism, tyranny, patriarchy, slavery, apartheid, homophobia, and more. And they have sometimes engaged in outrageous hypocrisy and casuistry to defend such shameful practice. But an instinct for egalitarianism—for embracing all persons equally, for treating all vocations respectfully, for arranging all associations horizontally, for leveling the life of the earthly kingdom so none is obstructed in access to and accountability before God—is a Protestant gene in the genetic code of democracy.

Such are the paradoxes of human nature. We are at once sinners and saints; we are at once lords and servants. We can do nothing good; we can do nothing

but good. We are utterly free; we are everywhere bound. We are immune from authority; we are under constant judgment. The more a person thinks himself a saint, the more sinful in fact he becomes. The more a person thinks herself a sinner, the more saintly she in fact becomes. The more a person acts like a lord, the more he is called to be a servant. The more a person acts as a servant, the more in fact he has become a lord.

3.2 *Christ the King*[57]

"Christ is our King," we proclaim proudly as Christians—the "King of kings," the "Lord of lords," "the firstborn of all creation" (Revelation 17:14, 19:16; Colossians 1:15). The texts assigned for today, like scores of others in the Bible, ring with pride, hope, and joy that Christ is our king.

But we democratic citizens of America don't do kingship. The last time we had a king was in 1776. We threw him out after a real tea party. And we put very firm safeguards in our constitution to be sure no new king would ever rise here again. We might like kings and queens from afar—in Victorian books and BBC movies, in tours of European castles and palaces, in royal weddings on television, or the series on *The Crown* or *Game of Thrones*. But at home we don't deal much in kings and queens—except perhaps in our bridge clubs. That makes the Bible's repeated talk of kings and kingdoms rather unsettling.

Christ is no ordinary king, however, and heaven is no ordinary kingdom. Both the nature of Christ's kingship during his ministry and the form of Christ's kingship on earth today defy all conventions of royalist logic and political theory. The Bible makes clear that Christ the king is infinitely more powerful than any other ruler on earth—even the Roman Emperor Augustus or the Jewish King Herod, who were the supreme rulers of Christ's day. These earthly kings ruled only for a lifetime. Christ rules eternally. These earthly kings ruled only over a limited territory. Christ rules everywhere. These earthly kings had only political power. Christ has power over all creation. He orders the waves to be still. He turns water into wine. He feeds five thousand from one small lunch bag. He heals the sick. He restores the disabled. He drives out demons from their tormented hosts. He raises the dead from their beds. He summons corpses from their graves. He opens the gates of heaven to the penitent. He descends into hell itself to destroy the Devil's greatest weapon—the power of eternal death.

57 I gave variations of this talk from various pulpits in North America, Europe, and South Korea. One version was published in *Christianity Today* 55, no. 7 (July 2011): 54–56. I expanded on these themes in John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007), 321–44.

And when Christ rises from his own tomb, he makes resurrection and eternal life available to everyone who believes. This is no ordinary king.

But for all this infinite and eternal power over nature and humanity, over heaven and hell, over life and death, for all his flashes of miraculous power during his ministry, Christ's own brief incarnation on earth as a king is modest, understated, sublime, sacrificial. Christ is born not in a palace but in a stable, close to the ground, surrounded by earthy animals and shepherds. He does not travel with a whole legion of soldiers, as the Roman emperor did, but wanders about the countryside with a dozen fishermen in tow. He does not dine in elegant splendor with the rich and the powerful but eats with tax collectors and prostitutes, Samaritans and sojourners, the down-and-outs of the day. Christ did not clatter into Jerusalem, as King Herod did, sitting in a splendid chariot bedecked with gold and jewels and drawn by twelve strong horses with shiny silver saddles. Christ plodded into Jerusalem on the back of a donkey, which had never been ridden, never been broken into saddle. He did not enter Jerusalem through the main wide gate at the end of the straight road. He came through the smaller back gate, having descended the Mount of Olives and passed through the valley of death at the foot of the mountain, which was known as Sheol or Hell. Christ did not come to Jerusalem to attend a royal feast that becomes an heir of the House of King David. He came to preside over a simple last supper with his friends, prefaced by his self-humbling act of washing the feet of his disciples, even the one who would betray him. Arrested on trumped-up charges by local authorities, he did not claim sovereign immunity as any higher power of the day would do. Christ's simple defense was: "My kingdom is not of this world" (John 18:36). Even Pontius Pilate knew this was no ordinary king.

But while Christ's kingdom is not of this world, Christ still does rule in this world. But, in extraordinary defiance of every handbook on royalty, Christ rules through each one of us, despite our fragility, weakness, and temptation to sin. Christ appoints all of us as his kings and queens of the world, his royal witnesses and ambassadors on earth. "You are all a chosen race, a royal priesthood, a holy nation, God's own people," Saint Peter wrote to the new Christians (1 Peter 2:9). You are all God's prophets, priests, and kings upon this earth (cf. Revelation 5:10). Each of us is called to represent and reflect, to embody and embrace God's royal prerogatives and divine rights on earth. These are the rights of God the Father, who created humans in his own image and commanded them to worship him properly and to obey his law fully. They are the rights of God the Son, who embodied himself in the church and demanded the free and full exercise of this body upon earth. And these are the rights of God

the Holy Spirit, who is "poured out upon all flesh" (Joel 2:28) and governs the consciences of all persons in their pursuit of happiness and holiness.

As image bearers of God the Father, each of us is given the natural duty and right to reflect God's glory and majesty in the world, to represent God's sovereign interests in church, state, and society alike. As prophets, priests, and kings of God the Son, each of us is given the spiritual duty and right to speak and to prophesy, to worship and to pastor, to rule and to govern in the communities we inhabit. As apostles and ambassadors of God the Spirit, each of us is given the Christian duty and right to "make disciples of all nations" (Matthew 28:19) by word and sacrament, by instruction and example, by charity and discipline.

Here, in the Bible's teaching about the triune God, we have a key source for some of our most cherished democratic values: popular sovereignty in reflection of the absolute sovereignty of God the Father; freedoms of speech, religion, and rule because we all are prophets, priests, and kings of Christ; rights to serve, evangelize, and teach because we all have the privilege to discharge the Great Commission aided by the Holy Spirit.

Moreover, this common calling that we all have to be God's royal ambassadors on earth makes us radically equal. As Saint Paul writes three times in his letters: "There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus" (Galatians 3:28). The New Testament is a radical leveler of the human race, a standing rebuke against false hierarchy. All are equal before God. All have vocations that count. All have prophetic voices to be heard. All have priestly services to render. All have royal gifts to be cherished. This common calling for all of us to be God's ambassadors on earth transcends conventional differences of culture, economy, gender, and more.

And this common calling also makes us utterly free. The New Testament is chock full of bracing declarations on freedom: "For freedom, Christ has set us free." "Where the Spirit of the Lord is, there is freedom." "You will know the truth, and the truth will make you free." You have all been given "the glorious freedom of the children of God."[58] As God's creatures and ambassadors, we are utterly free in our innermost being. We are like the greatest king or queen on earth, above and beyond the power of everyone. We enjoy a sovereign immunity that no authority can touch or trespass. "Even God," Desmond Tutu reminds us, "who alone in all the universe has the perfect right to be a

58 Galatians 5:13; 2 Corinthians 3:17; John 8:32; Romans 8:21.

totalitarian, has such a profound reverence for our freedom that He had much rather we went freely to hell than compel us to go to heaven."[59]

But while we are utterly free as ambassadors of God, we are not untutored. Christ has left us with the perfect example of how to serve as God's royal ambassadors on earth. The touchstones are there in Christ's ministry recorded in the Gospels—that we remain close to the ground, that we live with humility and grace, that we care for the poor and sick, that we embrace the sojourner and stranger, that we seek out the needy and lost, that we teach by word and example, that we work to heal what is broken, that we share generously of our talents and gifts, that we deal fairly with our neighbors and friends, that we forgive those who do us harm, that we love even our enemies.

This is not a formula for weakness, a résumé of the supine. There are times to rebuke the fools and blasphemers in our midst. There are times to prophesy loudly against injustice. There are times to kick out the merchants and harpies from our temples and homes. There are times to exorcise the demons and devils from our community. There are times to shake the dust from our feet and move on. Christ did as much, and we must do so, too. Not out of pride, anger, or impulse, not out of pretended authority, but out the divine right and divine prerogative. For Christ is our king, and we are his ambassadors.

3.3 *"Compel Them to Come In"*[60]

Our Bible readings today are troubling. Isaiah 25:4–5 tells us of cities and palaces laid waste and ruined, the fearful "noise of aliens," the "blasts of terrible nations," violent "storms against the wall." Psalm 23:4 recounts his walk "through the valley of the shadow of death." Matthew 22 and its parallel in Luke 14 describe a metaphorical royal wedding gone horribly wrong. The host king sends out invitations to the grand nuptials, but his invited guests decline in favor of their families, farms, and businesses. He sends out invitations again, and now his annoyed guests kill his royal emissaries, leading to deadly retaliation by the angry king. He sends out still more invitations, but still the wedding hall remains half empty, and one uninvited guest is bound and thrown out. So the king then sends out his emissaries yet another time, now telling them—as

59 Desmond M. Tutu, "The First Word: To be Human is to be Free," in John Witte, Jr. and Frank S. Alexander, eds., *Christianity and Human Rights: An Introduction* (Cambridge: Cambridge University Press, 2010), 1–7, at 4.

60 I gave this talk from Richard Hooker's pulpit in The Temple Church, Inns of Court, London, in 2018. The lectionary texts for the days were: Psalm 23; Isaiah 25:1–9; Philippians 4:1–9; Matthew 22:1–14. The issues of proselytism and compulsion are elaborated in John Witte, Jr. and Richard C. Martin, eds., *Sharing the Book: Religious Perspectives on the Rights and Wrongs of Proselytism* (Maryknoll, NY: Orbis Books, 1999).

Luke 14 puts it—to go into the "streets and lanes of the city" and "the highways and the byways" of the country to find the "poor and maimed, the blind and lame" and "compel them to come in" (Luke 14:21–23).

These are "texts of terror," in Phyllis Trible's apt phrase,[61] and for many centuries the Christian church used these texts to terrifying ends. Fifteen hundred years ago, the greatest Church Father, Saint Augustine, fatefully interpreted our Gospel passage as a license to coerce, repress, and kill God's enemies. The wedding feast is the Kingdom of God, Augustine said. God's invitations to his chosen people of Israel were repeatedly spurned. God's greatest emissary, his own son, was killed. Despite repeated invitations, God's kingdom is still not full. Thus, the church must go out and compel people to join—if necessary, by physical force. If they refuse to join the church, if they fail to repent of their deicide, if they attack the church from without, if they spread their heresy from within, all enemies of Christ must be bound, cast out, and, if necessary, killed.

It was this argument that fueled some of the ugliest chapters in church history—grim crusades, pogroms, and inquisitions; forced baptisms, torture, and stake-burnings; religious warfare, genocide, and decimation targeting Jews, Muslims, heretics, pagans, infidels, slaves, natives, and more. We look with proper outrage today at Islamicist extremists who behead innocent outsiders, or who stone as apostates those who dare convert from Islam to Christianity. We properly bristle at cowardly acts of antisemitism, Islamophobia, and xenophobia in our community today. But we must remember that this shameful tragedy is part of our Christian history, too. The blood of many thousands is at the doors of our churches. The bludgeons of religious persecution have been used to devastating effect by Christians against each other and their neighbors.

Only in recent centuries has the church finally come to embrace a better way of freedom, love, and peace, in imitation and application of Christ's ministry. That better way, we have come to realize, includes a better interpretation of our hard Gospel passage for today. For one thing, remember that this is a parable, not a prescription. It's a metaphor, not a map of life. It requires no more literal application than, say, the biblical admonition that we pluck out our eyes or cut off our body parts if they cause us to sin. Parables are there to open our hearts to deeper truths, to lift our spirits to higher ends. Notice, too, that in this parable it is only God the king who orders the armies to bind, destroy, and cast out his enemies, and then only at the beginning and the end of the story. That matches what we know from biblical history. In the Old Testament, God did rally the armies of ancient Israel many times against their oppressors. And in

61 Phyllis Trible, *Texts of Terror: Literary-Feminist Readings of Biblical Narratives* (Philadelphia: Fortress Press, 1984).

the end times, God will again send his mighty armies of angels to destroy Satan and his minions for good. But we are living between these violent times. The God of the Gospels is a peaceful God, a patient God, who in the loving ministry of Jesus Christ invites us to come into his kingdom.

That fateful phrase, "*compel* them to come in" (Luke 14:23) is an unnecessarily harsh reading of the original Greek words in our Gospel text. "*Compel* them" is how the Greek *anankázō*, is translated in the Latin Bible used by Augustine and a millennium of churchmen who followed. But the Greek words also have much softer meanings: beckon, entreat, persuade, enable, make possible, draw irresistibly, as in a compelling picture.

Those softer meanings fit this parable better. Remember the scene: the king's splendidly arrayed emissaries have clattered into the inner city and outer camps to find the poor, lame, blind, maimed, lepers, and other wretched souls who have been forced to live there, far away from the royal halls and fashionable sections of town. These emissaries have come to persuade these poor souls that they are worthy to sit with the king in his grand hall, that they are welcome to wear the beautiful wedding cloaks that the emissaries hold out to them. You can just hear these poor souls saying in response: "Come on, you can't be serious. I'm not worthy of this. This must be some trick. Leave me alone. Get away from me." And they turn to get away.

In response comes "compulsion," but now in this softer sense. A royal emissary would normally never touch such an unclean person, except perhaps with a rod, staff, or sword. But now he puts a gentle hand on that poor person's arm or shoulder, and says: "No, no, wait. You are worthy. The king wants you—even you, especially you—to come to his feast. No matter how you look or feel, no matter where you are or where you've been, you are worthy to sit at the king's table, to wear his finest royal clothes. For you are his child. He wants you to come home. So come on, let's go home. Here, let me lead you if you can't see. Let me carry you if you can't walk." That's really what "compel them" means in this parable.

Once we read the parable this way, we discover that part of its point is to invite us to see ourselves on both sides of this exchange. Yes, we are divine ambassadors extending God's eternal invitations to all. But we also are humbled sinners hovering at times in the ghettoes of brokenness and despair. As divine ambassadors, we may well be ignored, rebuffed, persecuted, or even killed for carrying God's word of invitation—as the blood of many Christian martyrs and missionaries can attest. But as sinners, we will never be ignored, we will never be forgotten, no matter how far down the highways we've run or how deep into the shadowy byways we've crawled. For God's feast table is

ultimately set for us. And God will never stop inviting us home. That's the point of this parable. And that's also the point of the parable of the prodigal son, whose father throws him a great feast on his return home from a runaway life of sin, excess, and debauchery on the fast highways and sultry byways of life.

The final point of this parable is that God's invitation always remains open to everyone, no matter how many times we have rejected it before. God's invitations come to us in various ways, and with various kinds of soft compulsion. The invitations come through the glories and beauties of the creation that force our eyes upward in wonder at the Creator. They come through the laws written on our hearts that teach and discipline us in what is just, right, and good. They come through the mysterious promptings of the Holy Spirit that melt the heart of even the most hardened sinner, and drive him to repent.

God's invitation comes more fully in the ministry of Jesus on earth, and the ongoing ministry of his church. Jesus's first words to his would-be disciples, busy with their families, farms, and fishnets, were an invitation: "Come, follow me" (Matthew 18:22). Jesus's last words to his followers were to invite others to follow him, too: "Go, make disciples of all nations, teaching them to observe all that I have commanded you … and I will be with you till the close of the age" (Matthew 28:19–20). The commands that we must obey and teach to others are both simple and profound. Jesus, like Moses, commands us to love God and to love our neighbors as ourselves. But Jesus goes further: "I give you a new commandment, that you love one another. Just as I have loved you, you also should love one another" (John 13:34). He commands us to love especially the down-and-outs of society: the sick, the poor, the lonely, the imprisoned, those cowering in the lanes and the byways of life. "As much as you have done it for the least of these, you have done it to me," he says (Matthew 25:40). Jesus commands us to love even our enemies. If they steal one of our coats, we must give them a second. If they strike us on one cheek, we must turn to them the other cheek as well. If they owe us anything, we must forgive them their debts. "If your enemy is hungry, feed him," Paul adds; "if he is thirsty, give him a drink; for by so doing you will heap burning coals upon his head" (Romans 12:20). "Let your gentleness be known to all men," Paul says in our Philippians passage for today. Strive always "for what is true, noble, just, pure, and lovely." And let "the peace of God, which passes all understanding, guard your hearts and minds through Christ Jesus" (Philippians 4:4–9).

While some of us are called to be missionaries, many of us are called to lead the life that Jesus commanded within our own vocation. This is the first and often the most effective way of making disciples of all nations, of "compelling everyone to come in" to God's kingdom. We must strive, with God's help,

to make our life of faith so true, so lovely, so gentle, so peaceful, so beautiful that even the most bitter and hardened enemies of Christ will be drawn to it irresistibly.

That is the task of the church as well—to make our community of faith irresistible to everyone. That comes in part through the physical and aesthetic beauties of our church: the beauties of music and song, of chanting and chorus, of icons and paintings, of liturgies and ceremonies, of stained-glass windows and colorful priestly vestments. These are all spiritual hallmarks of invitation; they make the life and light of this church community so compelling, so irresistible that all will be drawn to it. The physical beauties of the church are there to uphold and underscore its spiritual beauties—the beauties of word and sacrament, of creed and confession, of discipline and discipleship, of prayer and care, of sharing and sanctuary, of social justice and spiritual righteousness. These are the true marks and signs of the body of Christ on earth. These are the treasures of faith that we celebrate in our weekly worship and Eucharist. These are the gifts of God that we share with the people of God, near and far. These are the sublime spiritual beauties that are so utterly irresistible that all who hear, see, and feel them will be compelled to come in.

3.4 *Resurrection Pluralism*[62]

From January to April, we Christians live between the times—between Christmas and Easter, between Bethlehem and Golgotha, between the Incarnation and the Resurrection. In this "between time," we remember nostalgically the stories of Christmas, and we look forward eagerly to the stories of Easter.

What always strikes me about the Gospel accounts of Christmas and Easter is how differently God operates, and how differently we are expected to operate on God's behalf. In the incarnation, it is God who masterminds the announcement of the good news of the birth of Christ. He sends sundry prophets well in advance to announce the coming of the Messiah. He sends an angel to announce the forthcoming birth to the Virgin. He sets a new star in the heavens to summon the wise men from the East. He sends a company of singing angels to pronounce the birth of Christ to the shepherds in the fields. He quickens Anna the prophetess to declare the arrival of the Messiah on his day of circumcision. Though Christ was born in a lowly manger, there was nothing quiet about his birth.

62 I gave variations on this talk from several different pulpits and lecterns. One version of it was published as John Witte, Jr., "A Manifold Resurrection," *Christianity Today* 51, no. 4 (April 2007): 62–64.

Quite the contrary is the case when it comes to the resurrection story at Easter. Yes, an angel came quietly in the night to roll away the stone from the tomb, but this whole grand miracle takes place with very little pomp and circumstance. There are no angels singing hymns in the heavens, no stars in the East, no wise men on pilgrimage, no prophetess pronouncing the good news. For forty days after the resurrection, Christ flits in and out of the mists of space and time, appearing only occasionally to a few of his followers. And he then he ascends quietly into heaven.

What is even more striking is how diverse the encounters with the resurrected Christ are—how differently Christ appears to his followers in those forty days after his resurrection, and how differently they apprehend him. Mary Magdalene, weeping outside the newly discovered empty tomb, has to be called by name before she recognizes Christ. Before that, she thought he was the gardener. The ten disciples, gathered in an upper room in sorrow and fear after the burial of Christ, need to have Christ breathe his peace on them before they recognize him. Before that, they thought he was a ghost. The two travelers from Emmaus who walk and talk with Christ about salvation history all the way to their city recognize Christ only in the Eucharist, when he holds up the bread and blesses it. Before that, they thought he was just a learned traveler. Thomas, the great doubter, wants to put his fingers in the nail holes, and his hand in the pierced side of Christ, before he believes the resurrection story. Before that, he thought the story was a fraud. And Peter, that enigmatic rock of the church, recognizes Christ only after he performs the miracle of filling the disciples' nets with fish—and then has to sit through a threefold cross-examination as to whether he really believes in the resurrected Lord: "Simon, Bar Jonah, do you love me?" "Do you love me?" "Do you love me?" (John 21:15–17).

In these Gospel accounts, we see five ways in which Christ is experienced and understood immediately after the resurrection: a calling by name; a pronouncement of peace; a sacramental vision; a physical encounter; a miracle and conversation with God. I see both a budding psychology and a budding ecclesiology at work in these passages.

The Gospel records these many stories and encounters of the newly resurrected Christ in part for our spiritual comfort. There is a little bit of Mary Magdalene in all of us: times when we are so overwhelmed by pain and grief that we need God's call to comfort us. There is a little bit of the huddled disciples in all of us: times when our faith puts us in jeopardy and fear, and we need God's peace to be breathed on us. There is a little bit of the Emmaus travelers in all of us: times when we talk idly about matters divine all day, but see God only in the sublime simplicity of the sacrament. There is a little bit of Thomas in all

of us: times when we are so overcome by doubt and skepticism that we need God's touch to assure and anchor us. And there is a little bit of Peter in all of us: times when we betray our Lord and need a miracle to remind us of God's majesty or a divine conversation to induce us to confess our faith unflinchingly. The Gospel narratives of the resurrected Christ reach us at different stages in our life, and assure us that God comes to us in various ways, accommodating our pain, fear, doubt, abstraction, and pride as need be.

The Gospel also records these stories for our corporate edification: for us to appreciate the diversity of ways in which we might experience Christ and worship and celebrate our experience in response. Christ can be experienced in multiple forms and multiple forums, and we can respond to him individually and collectively in multiple ways. Some are called by name. Some are touched by God. Some receive the breath of the Holy Spirit. Some experience miracles and hierophanies. Some see God in the sacraments. And each of these ways of divine encounter and experience draw to themselves their own liturgies, their own communities, their own traditions of cult, confession, creed, and catechism. Some traditions emphasize a personal calling, a moment of rebirth before membership is sealed. Some traditions are focused on an event, an icon, or a site or rite of divine vision. Some traditions emphasize the pulpit, the homiletic exposition of God's Word. Some traditions emphasize the altar, the Eucharistic celebration of the death and resurrection of Christ. All of these are legitimate ways to serve and to celebrate Christ, and all these are legitimate foundations for our ecclesiology. The Gospel stories of Easter remind Christians of our fundamental unity in Christ. But they also remind us of the plurality of ways in which Christ can be experienced, ritualized, and confessed by his followers.

Christian ecumenism is the great calling of the church in the fifty days between Easter and Pentecost. Now is the time that we remember that, despite our often sharp denominational differences, we are part of "one holy catholic and apostolic church" universal. Now is the time that we embrace our brothers and sisters in Christ near and far, west and east, north and south, Catholic and Protestant, Orthodox and evangelical. Now is the time we remember that divisions of gender, race, or culture, of economy, ability, or sexuality must give way to our unity in Christ. Now is the time that we must return to our most basic canons, creeds, and confessions of the faith, and prepare ourselves for the great task before us at Pentecost: "Go ye, therefore, and make disciples of all nations, baptizing them in the name of the Father, Son, and Holy Ghost, teaching them to observe all that I have commanded you, and lo, I will be with you till the close of the age" (Matthew 28:19–20).

3.5 *Confessions of a Christian Historian*[63]

In the spring of 1995, I visited the great Saxon capital of Dresden. I stood on the banks of the Elbe River at the site of the Frauenkirche, the Church of our Lady—the monumental domed church, consecrated in 1734, graced by one of Johann Sebastian Bach's greatest organ concerts two years later, and celebrated in German music, art, and literature ever since.

It was a sobering moment. For the great church lay in ruins. A guide explained that the church did not survive the firebombing of Dresden near the end of World War II. On February 13 and 14, 1945, 773 Allied bombers emptied their payloads on Dresden. No bombs hit the church directly. But the fires were enough. First the art, the woodwork, the pulpit, the organ, and the altars were consumed. As the fires penetrated more deeply, scores of people sheltering in the church's catacombs were burned to death. Eventually, the intense heat of the fires weakened the church so much that it simply collapsed under its own weight. Large chunks of the dome, charred and cracked, still lay where they had fallen some fifty years before. A large piece of the steeple still stuck out from the ground at a grim angle. Only one wall of the nave still stood, its top jagged and pocked where the roof had torn away.

It was also an exhilarating moment. For stretching out from the wall of the nave in all directions were hundreds of rows of scaffolds, where workers were storing the ten thousand-odd pieces of stone that had been collected from the rubble of the fallen church. The Church of our Lady, the guide informed me, would be reconstructed, using as many of the original stones as possible. A giant blueprint assigned each of the recovered stones to its original place in the structure. New stones were being collected from the same quarry that had been mined for the original construction. A massive outpouring of charity had made this reconstruction possible.

I have often given thanks for that brief moment on the banks of the Elbe River. For this small frame captured several themes that are at the center of my life—as a Christian believer and as a legal historian. For me, the story of the Dresden church is a metaphor of life. Construction, destruction, and reconstruction. Work, judgment, and purgation. Birth, death, and resurrection. Creation, fall, and redemption. These are the stages of life. These are the passages of faith. The old must pass away so that the new may come forth. We

63 I gave variations on this talk from several lecterns and pulpits over the years. One version of this talk was published as "Confessions of Christian Historian," *First Things* 139 (Jan. 2004): 16–17, and another in my *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids, MI: Eerdmans, 2005), 1–4.

must die so that we can be reborn. Our bodies must be buried so that they can be resurrected. Our works must be burned so that they can be purified. Our bonds must be broken so that we can be reconciled. This is the nature of biblical religion. It gives life its power. It gives pain its purpose. It gives time its pattern.

These basic biblical themes—that time has a pattern, that history has a purpose, that life has an end of reconciliation—inform my understanding of history. The Bible teaches that time is linear, not cyclical. Biblical history moves forward from a sin-trampled garden to a golden city, from a fallen world to a perfect end-time. Our lives move, circuitously but inevitably, toward a reconciliation with God, neighbor, and self—if not in this life, then in the life to come; if not with the true God, then with a false god; if not in the company of heaven, then in the crowds of hell.

Human history cannot be fully understood without reference to this divine mystery. God is beyond time, yet has chosen to reveal a part of himself within it. Through his creation and incarnation, God pours out a measure of divine being and grace. Through the law and Gospel, God sets forth a measure of his word and will. Through his miracles and messengers, God puts forth a measure of divine power and judgment. All of history, in Martin Luther's words, is "a demonstration, recollection, and sign of divine action and judgment, how God upholds, rules, obstructs, rewards, punishes, and honors the world."[64] We are within time, yet we are able in part to transcend it. Through our conscience and imagination, we gradually discover something of the meaning of God's plan for each creature. Through our creativity and experimentation, we slowly uncover something of the majesty of God's plan for the creation. Through our liturgies and epiphanies, we slowly uncover something of the mystery of God's incarnation for the church. Through our texts and traditions, we gradually accumulate something of the wisdom of God's revelation for all people.

To be sure, God's plan and our history are not identical. God's plan consists of much more than what God chooses to reveal to us or what we are able to discern of it. Much of what we see appears to be the work of a concealed God, even at times a seemingly capricious God. In Luther's colorful image, history is "God's mummery and mystery," "God's joust and tourney." History is "God's theatre," in which the play cannot be fully understood until it ends and until we exit.[65] To equate one act or actor, one speech or text with the divine play itself is to cast a partial and premature judgment. To insist on one interpretation of the play before it ends is to presume the power of eternal discernment.

64 Martin Luther, *D. Martin Luthers Werke* (Weimar: Böhlau, 1911), 50:383–84.
65 Ibid., 15:32; 50:383.

To judge the play on the basis of a few episodes is to insult the genius of the divine playwright.

Human history, in turn, consists of much more than our conscientious struggle to follow God's word and will in our lives, to reflect God's image and immanence in our world. Much of what we see in our personal lives is the "war between our members" (Romans 7:23), the struggle between the carnal and the spiritual, the sinner and the saint. Much of what we see in our collective lives is the sinful and savage excesses of corrupt creatures, the diverse and perverse choices of free human agents. But there is simply too much order in our world, too much constancy in our habits, too much justice in our norms for us to think that the course of human events is not somehow channeled by God's providential plan.

God is thus both revealed and concealed in history. "All events," as John Calvin put it, "are governed by God's secret plan."[66] If God were completely revealed in history, there would be no reason for faith. History would simply be a mechanical execution of a predetermined plan. There would no eternal mystery for which faith could yearn. But if God were completely concealed in history, there would also be no reason for faith. History would simply be a random and rudderless exercise of chaos. There would be no eternal justice in which faith could trust. "Somewhere between those two the Christian has to find his [or her] own balance between concealment and revelation."[67]

This is the balance I try to find in my work as a Christian historian. For me, history is more than a series of tricks that we play on the dead, or that the dead play on us. History is more than simply an accidental chronology of first one thing happening, and then another. For me, history is also a source of revelation, a collection of wisdom. The archive is a treasure trove. Old books are windows on truth. The challenge of the Christian historian is to search within the wisdom of the ages for some indication of the eternal wisdom of God. It is to try to seek God's revelation and judgment over time without presuming the power of divine judgment. It is to try to discern God's justice within God's joust.

3.6 *Christian Legal Studies*[68]

"CLS" was an acronym with two very different meanings when I was a fledgling law student forty years ago. For most, it meant "critical legal studies,"

66 John Calvin, *Institutes of the Christian Religion* (1559), bk. 1, chap. 16.2.

67 E. Harris Harbison, *Christianity and History: Essays* (Princeton, NJ: Princeton University Press, 1964), 102.

68 I gave variations of this talk at various academic conferences and seminars. A version of this text was published as John Witte, Jr., "Foreword: What Christianity Offers to the World of Law," *Journal of Law and Religion* 32 (2017): 4–8, with a more expanded version in John

a burgeoning new movement of sundry neo-Marxist jurists and philosophers collectively bent on exposing the fallacies and false equalities of modern law. Many of my first-year professors at Harvard Law School were the high priests of this CLS movement. They were making serious waves at the time with their denunciation of much that was considered sound, settled, and even sacred in the law. The best CLS professors taught black-letter doctrine, then shredded it with rhetorical and analytical power. That instruction appealed to my native ethic of *semper reformanda*—always reforming and working to improve our traditions. Other professors simply taught their pet critical topics, sending us students scrambling to the bookstore in search of study guides that would acquaint us with the legal basics. After a year of such CLS instruction, I couldn't wait to take the upper-level electives that would no doubt unveil the new and better legal system CLS had in mind. Little was on offer, however. The "crits," I soon learned, were better at deconstruction than reconstruction of the law—more inclined to throw stones than to bring bricks to build better institutions. Not surprisingly, this movement has now fractured into a number of special interest groups.

"CLS" in the early 1980s also meant the Christian Legal Society, a handful of law students who gathered for periodic worship, prayer, reflection, and good works in the community. We were very much a fringe group at my law school, the last remnant of the superstitious in the eyes of many. Ours happened to be a particularly weak local student chapter of a quite vibrant national Christian Legal Society of lawyers, judges, law students, and religious-liberty advocates. But even at the national level, the Christian Legal Society then was still a small group struggling to come to terms with what it means to be a Christian and a lawyer. The Christian Legal Society has become more substantial since then, and the United States Supreme Court has lifted the name to permanent prominence with the case of *Christian Legal Society v. Martinez* (2010).[69]

"CLS" is rapidly acquiring an additional meaning today: to describe a growing Christian legal studies movement in legal education. These scholars are part of a group of some 350 Catholic, Protestant, and Orthodox Christian law professors in North America, and several hundred more around the world, who have dedicated themselves to studying the "weightier matters of the law: justice and mercy and faith" (Matthew 23:23)—often working in earnest collaboration with Christian theologians, ethicists, historians, and political theorists who also address these matters. These Christian jurists are not just abstract legal theorists who have "neglected" the technical aspects of the law—the "mint

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Witte, Jr., *Faith, Freedom, and Family: New Essays on Law and Religion*, ed. Norman Doe and Gary S. Hauk (Tübingen: Mohr Siebeck, 2022), 57–66.

69 561 U.S. 661 (2010).

and dill and cumin," as Matthew 23 puts it. Many of them are leading scholars of the core doctrines of public, private, penal, and procedural law. They have mastered the power of legal science. Some of the weightier matters of the law that they do address are familiar to scholars of law and politics, whatever their persuasion—questions concerning the nature and purpose of law and authority, the mandates and limits of rule and obedience, the rights and duties of officials and subjects, the care and nurture of the needy and innocent, the justice and limits of war and violence, the nature of fault and the means of punishing it, the sources of obligations and the procedures for vindicating them, the origins of property and the means of protecting it, among others. On many such questions of legal doctrine, science, and philosophy, Christian jurists are not noticeably different from their peers with different convictions. A first-year course in contracts, criminal law, or civil procedure looks mostly the same whether taught at Harvard or Pepperdine, Stanford or Notre Dame.

On the other hand, Christian jurists also address questions that are often more specifically Christian in accent, though no less important for understanding law, liberty, and politics: Are persons fundamentally good or evil? Is human nature essentially rational or relational? Is law inherently coercive or liberating? Is law a stairway to heaven or a fence against hell? Did law and government predate or postdate the fall of humanity into sin? Should authorities only proscribe vices or also prescribe virtues? Is the state a divine or a popular sovereign? Are social institutions fundamentally hierarchical or egalitarian in internal structure and external relations? Are they rooted in creation or custom, covenant or contract? What is the place of law and legal procedure in the church, and how must it be enforced? What is the place of hierarchy or democracy in the church, and how is it to be exercised? What is the role of the church in exemplifying and advocating justice for itself and for other institutions, for its own members and for the world beyond? What do the Bible and the Christian tradition still have to offer to classic legal institutions that share both spiritual and temporal dimensions—marriage and family life, education and schooling, charity and social welfare?

Most Christian jurists who engage these questions today work hard to balance the quadrilateral of scripture, tradition, reason, and experience. Many take the Bible seriously in their legal work, but they do not pretend that it is a complete legal textbook or a comprehensive legal code. Many take the Christian tradition seriously, too, but none of them wants to resurrect some purported golden age of Christian law and government. These Christian jurists understand that for every "nomos there is a narrative,"[70] for every Torah a

70 Robert Cover, "Foreword: Nomos and Narrative—The Supreme Court 1982 Term," *Harvard Law Review* 97 (1983): 5–68.

Talmud, for every biblical legal principle a long set of precepts and procedures to make it real and concrete. The laws of the Bible are part of a larger narrative about God and humanity, sin and salvation, faith and order. The Bible's commandments are the anchors of long traditions of legal reasoning, application, and enforcement that are constantly reshaped and reformed by new experiences and new challenges.

The challenge for Christian jurists today is to find responsible ways of making biblical and historical Christian teachings on law effective and responsible vehicles, both for constructive critique and for salutary reforms in intensely pluralistic societies. For those who think this exercise is futile, it's worth noting that some of the Bible's basic laws are still at the heart of our legal system today. "Thou shalt not kill" (Exodus 20:13) remains at the foundation of our laws of homicide. "Thou shalt not steal" (Exodus 20:15) grounds our laws of property and theft. "Thou shalt not bear false witness" (Exodus 20:16) remains the anchor of our laws of evidence and defamation. The ancient laws of sanctuary still operate for fleeing felons, refugees, and asylum seekers. The ancient principles of Jubilee are at the heart of our modern laws of bankruptcy and debt relief. "Honor the authorities" (Romans 13:1–7) remains the starting premise of modern constitutional law. Any good legal historian can show you the biblical genesis and Christian exodus of many of our modern rules of contract and promise, evidence and proof, marriage and family, crime and punishment, property and poverty, liberty and dignity, church and state, business and commerce. Some of these legal creations were wholly original to Christianity, born of keen new biblical insight and theological ingenuity. Others were converted and recast from Hebrew, Greek, and Roman prototypes. Still others were reworked and reformed by Renaissance humanists and Enlightenment philosophers and their modern progeny. But whether original or reformed, canonical or casuistical, Christian teachings on law, politics, and society have made enduring contributions to the development of Western law as we know it today.

These legal teachings of the Bible and the Christian tradition still hold valuable insights for legal reform and renewal in this new millennium, even in post-Christian cultures dedicated to religious freedom for all and religious establishment for none. What would a legal system look like if we were to take seriously the final commandment of the Decalogue, "thou shalt not covet" (Exodus 20:17), especially when our modern systems of capitalism, advertisement, and wealth accumulation have the exact opposite premise? What would our modern law of torts and criminal law look like if we took seriously Jesus's command to "turn the other cheek" (Matthew 5:38–40)? What would our laws of civil procedure and dispute resolution look like if we took seriously the New Testament admonition for those with grievances against fellow believers

to "go tell it to the church" (Matthew 18:17)? What would our system of social welfare, charity, or inheritance look like if we followed the Bible's repeated commands to tend to the poor, the widow, the orphan, the stranger—the "least" of society—knowing, as Jesus put it, that "as much as you do it to me you do it to me" (Matthew 25:31–46)? What would our public and private laws look like if we worked hard to make real and legally concrete the biblical ideals of covenant community or sacramental living?

It is a fair question whether these and many other biblical passages now define the ethics of the communicant and the church rather than the laws of the citizen and the state. That, at minimum, requires that our modern churches get their legal and moral houses in order. But it's also worth noting that the Bible's repeated call to Christians to serve as "prophets, priests, and kings" (1 Peter 2:9, Revelation 5:10, 20:6) provides lawyers with a unique vocation: to speak prophetic truth to power, to offer priestly service to all neighbors, and to foster rules and regimes that are marked with justice, mercy, and faith. Promoting such virtues with critical and constructive courage would give this current Christian legal studies movement a more enduring legacy than the critical legal studies movement of a generation before.

4 Words of Remembrance

4.1 *In Memory of Harold J. Berman*[71]

I first met Hal Berman in 1982, when I showed up as his terrified new research assistant. I last saw him in the hospital the week before he died. In the many years between those meetings, we spent much time together. We broke bread, and we broke archives together. We wrote books. We gave lectures. We led conferences. We argued. We hugged. We laughed. We cried. We worshipped and prayed together. We did it all. Hal Berman was my great teacher, colleague and friend—as he was for so many of us gathered here today.

On that final day together in the New York hospital, Hal and I relived some of these experiences. He was weak, and he needed regular sleep. So the day broke into blocks of conversation between his naps. In the first conversation, we just caught up on the news that he was eager to hear, and we reminisced a bit. Then came a nap. In the second conversation, Hal evidently had decided to rehire me as his research assistant. For he began rattling off a list of books and articles I had to get for him, facts and quotes I needed to track down for him,

71 This talk was given at a memorial service for Harold J. Berman on February 12, 2008, in Atlanta and published as "A Tribute to the Memory of Harold J. Berman," *Emory Law Journal* 57 (2008): 146–64.

memos I needed to have on his desk the next week, and more. And then with great gusto he began to tell me how we should craft the argument of his *Law and Revolution* series, volume three. In midsentence, there came a second nap. The third conversation was very different, more subdued. Hal wanted me to read him some poetry from T. S. Elliot, then a couple of pages from his favorite *Moby Dick*, then some passages from Justice Clarence Thomas's new autobiography. "Just fascinating," "a remarkable man," he kept saying about Thomas. Then came another nap.

The fourth conversation was a long and deep reflection on faith and theology. Hal told me again about his remarkable conversion experience—seeing a vision of Christ on a night train in war-torn Europe. He told me about his wonderful life of faith with his wife, Ruth, and his family, and how much he loved them and would miss them. He told me about things he had done and left undone. I asked him, gingerly, if there was perhaps something we should bring together in prayer. "No, thank you," he said buoyantly and graciously. "I have found my reconciliation." Then came another nap.

When he fell asleep this time, however, it was different. He lay on his back and slowly a big smile crept over his face. He kept reaching straight up into heaven with both hands, grasping eagerly and mumbling excitedly about what he was seeing. His family and caretakers said he had done the same thing at home the last few days—seeing scrolls in the mirror, then books on the ceiling, which he sought to reach and to open. When he awoke from this last nap, Hal smiled and said, "I think it's time for you to leave. It will soon be time for me to go, too." And then, with a big hug, we said our final goodbye.

This was just vintage Hal Berman on that last day—showing his faithful love for his family and friends, his youthful glee about life and literature, his relentless drive to study and learn, his trademark gift to transcend bonds and boundaries, in search of knowledge and reconciliation—even reaching into heaven itself for the same. Throughout his remarkable career, Hal's great mind defied conventional categories and boundaries of text and tradition, language and culture, space and time. Until his last days, he moved easily from scroll to text, from Hebrew to Greek, from Old Testament to New in describing his identity and inspiration. Until his last days, his library was jammed full of literature of every sort, and his learning ranged widely from West to East, from Judaism and Christianity to Islam and Confucianism, from law and jurisprudence to theology, history, philosophy, science, and more.

Hal Berman had the remarkable ability to think above, beyond, and against his time. In the 1960s, the dominant Cold War logic taught that the Soviet Union was a lawless autocracy. Hal argued, to the contrary, that the Russians would always honor contracts and treaties that were fairly negotiated. His view

prevailed and came to inform various nuclear treaties and East-West accords. In the 1970s, the conventional belief persisted that the Middle Ages were the dark ages as the West waited impatiently for Enlightenment and modernization. Hal argued the contrary, that the medieval era was the first modern age of the West, and the founding era of our Western legal tradition. This view is now standard. In the 1980s and 1990s, jurists fought fiercely over whether legal positivism or natural law or some other perspective was the better philosophy. Hal called for an integrative jurisprudence that reconciled these views with each other and with other perspectives on law. This view now prevails in a world dedicated to interdisciplinary legal study. And in the past decade, with the world hell-bent on waging a clash of civilizations, Hal called for a world law, grounded in global structures and processes, and universal customs and principles of peace, cooperation, and reconciliation. This view holds so much more promise than our current jingoism.

Hal based his views, in part, on a holistic theory of knowledge. "The era of dualism is waning," he wrote triumphantly already in 1974, in *The Interaction of Law and Religion*. "We are entering into a new age of integration and reconciliation. Everywhere synthesis," the overcoming of false opposites, is "the key to this new kind of thinking and living." Either/or must give way to both/and. Not subject versus object, not fact versus value, not "is" versus "ought," not soul versus body, not faith versus reason, not church versus state, not one versus many, "but the whole person and whole community thinking and feeling, learning and living together"—that is the common calling of humankind, Hal wrote.[72]

Hal also based these beliefs in his own deep theology of reconciliation. Jewish and Christian theology teaches that persons must reconcile themselves to God, neighbor, and self. For Hal, building on Saint Paul, this meant that there can be "no real division between Jew and Gentile, slave and free, male and female" (Galatians 3:28)—or, for that matter, black and white, straight and gay, old and young, rich and poor, citizen and stranger. For every sin that destroys our relationships, he emphasized, there must be grace that reconciles them. For every Tower of Babel that divides our voices, there must be a Pentecost that unites them and makes them coherent.

Hal also based these beliefs in a providential view of history. Both Jewish and Christian theologies teach that time is continuous, not cyclical, that time moves forward from a sin-trampled garden to a golden city, from a fallen world to a perfect end time. Hal's grand view of evolution and revolution in history was rooted in this belief—that slowly all the peoples of the world would come

72 Harold J. Berman, *The Interaction of Law and Religion* (Nashville, TN: Abingdon Press, 1974), 113.

into contact with each other, and ultimately, after revolutionary struggle and even apocalyptic explosion, would seek finally to be reconciled with each other forever. Each of us is given our time to help achieve this providential plan, Hal believed, and to move the world just a little closer to the peace and reconciliation that is promised.

God gave Hal more time than most of us get. But Hal worked hard to give back all that he had been given and more. He lived his eighty-nine years to their very fullest, and he left a remarkable legacy and example for the betterment of the world and the enduring instruction of us all. It is easy to imagine him now, with the gracious luxury of eternity before him—Socratically grilling the saints about eternal truths, studiously writing his new books in a heavenly library of infinite proportion, and patiently waiting to welcome Ruth and his other loved ones when they are ready to join him in his new home in the golden city.

4.2 *In Memory of Alonzo L. McDonald*[73]

Alonzo McDonald was a great man, but even better, he was a good man, too. He moved easily in high society, but he never lost the common touch. He criss-crossed the globe many times, but he remained a southern gentleman. He amassed tremendous wealth, but he was immensely charitable. He dined in splendor with presidents and tycoons, but a simple Eucharist meal with monks and nuns fed him more. He could wax grandly about theology and church history, but he clung to Jesus's cardinal teaching: "unless you have the faith of a child, you will never enter the kingdom of heaven" (Matthew 18:3).

It was the desire to expound the teachings of Jesus that moved Al and Suzie to establish the McDonald Agape Foundation in 1989. Their founding grants to the Trinity Forum and Williamsburg Charter were safe, sure, and satisfying first steps of Christian philanthropy. But then Al sought to sow his seeds of faith on much rockier grounds, at elite universities. This seemed wrongheaded. The dominant narrative of the Western academy at the time was that the spread of enlightened reason and science had eclipsed the sense of the sacred and dispelled the myths of the superstitious. Even seminaries were pronouncing that God was dead and the church was dying.

Al wanted none of this. Nor was he content with sectarian retreats into biblical fundamentalism or with drive-by Christian punditry on hot-button issues. Al wanted to see the full power of the Gospel unleashed on the best campuses and the deep wisdom of the Christian tradition applied to all the arts, sciences, and professions. He loved the admonition of Yale church historian Jaroslav

73 I gave this talk at a memorial service for Alonzo L. McDonald on December 14, 2019, in Naples, Florida.

Pelikan: "Tradition is the living faith of the dead; traditionalism is the dead faith of the living."[74]

Al's initial overtures on campuses met with stone walls and stony stares from university leaders. That gave him little pause. This was the man who had negotiated a global trade treaty with the most recalcitrant of diplomats. A mere chancellor, provost, or dean stood little chance in a long negotiation with him. And slowly but surely, he brought them round to seeing the wisdom of encouraging and equipping a whole generation of distinguished scholars for Christ at the best universities in the world.

Over the past quarter century, the Foundation has supported twenty-six major academic projects led by fifty-five McDonald Distinguished Professors and Fellows. Six hundred and fifty scholars have gathered at McDonald roundtables; eight hundred and fifty scholars have stood at McDonald lecterns. And all this has yielded more than one hundred major new books and hundreds of major new articles in multiple languages and media, with tens of thousands of readers and on-line viewers.

Behind these impressive numbers lay two of the most incongruous principles of academic philanthropy that Al wove together ingeniously—Christian agape and compound interest.

First, and more obvious, Christian agape: ardent, authentic, unabashed, and sacrificial love of God and neighbor. Agape is the guiding mantra and message of the McDonald Agape Foundation. Agapic love of God was what drove Al's immense charity over many years. Agapic love of neighbor was what Al gave to each of his scholar grantees—as he sat and talked with them regularly and at length, patiently studied their hearts and habits, their strengths and needs, and helped them discover, discern, and deepen their true Christian value, voice, and vocation in the elite academy. For Al, academic philanthropy was an investment in and of the heart. It was the creation of new covenants of faith and works, new partnerships of loving service among fellow brothers and sisters in Christ. In working with scholars, Al administered no religious test oaths; he insisted on no party line; he had no prescribed methodology. But he did make sure that each scholar he supported was authentic and unabashed in their Christian faith; loving and sacrificial in their relations with students and peers; earnest and expert par excellence in cultivating their rows in the Vineyard.

Second, and seemingly less likely: compound interest. Al's son Peter once told me that, except for his love for God and his family—and perhaps we should add love of French cuisine and Scottish culture, too—Al's greatest love

74 Jaroslav Pelikan, *The Vindication of Tradition* (New Haven, CT: Yale University Press, 1984), 65.

was compound interest. Keep making your resources multiply exponentially. Make wise investments at the best institutions. Keep your portfolio diverse but well managed. Spend discerningly but reinvest as much as you can. And know when to cash out and move on.

This principle, too, guided his academic philanthropy. Al invested only in the best scholars at the best institutions. He invested in multiple fields. He kept building to strength, and reinvesting in those who proved their value. He gave his scholars just enough money to get their attention, but not so much to make them dependent. And he encouraged his scholars to follow the same principles—work only with the best students, colleagues, projects, and publishers; share your time and talents widely but wisely; cumulate your knowledge and publications and build to strength; and know when to shake the dust from your feet and move on. Unlike many hopelessly wasteful and bureaucratically bloated foundations, Al's small, lean, and well-leveraged family foundation has catalyzed, created, and compounded a whole new industry of Christian scholarship at the best institutions.

Today, we can take comfort in one of Al's favorite ironic lines: "Perfection will be tolerated." Al has now gone to a heavenly place of true perfection, of perfect love, of unlimited abundance, where not even compound interest is needed. We join you—Suzie, Tom, Peter, Jennifer, Denise, Alex, and your children and extended family and friends—in mourning Al's death and celebrating his life. We join you in praying for the blessed repose of his good soul, and asking God to send his angels of comfort and mercy to help you fill the gaping new holes in your hearts and lives that his death has occasioned.

Those of us in the academy will sorely miss Al's deep wisdom, generosity, tenacity, discipline, and integrity. We will miss his incisive and insightful questions at the conference table, his ability to challenge current times and fashions. With Al's new arrival, the conversations in heaven have just gotten deeper, and the sages in heaven have just met their match.

May the name and memory of Alonzo McDonald be blessed forever.

4.3 *In Memory of Johan David Van der Vyver*[75]

I first encountered Johan Van der Vyver in 1978 when, as a young college student, I asked for his advice on the study of religion and human rights. From his home in South Africa, he sent me a thick packet of writings, including a generously autographed copy of his recent *Seven Lectures on Human Rights*. I last saw him on April 10, 2023, when he proudly came into my office at Emory

75 This text is based on an obituary I prepared on Johan Van Der Vyver's death on May 22, 2023.

Law School, and handed me his latest tome just out, on *International Human Rights*. A few days later, he left for his home in Pretoria, but sadly passed away on May 22, 2023, after a happy reunion with his family.

Johan was a giant in the legal academy with high standing around the globe for his brilliant contributions to many fields of legal study. He published two dozen books in multiple editions and languages and 400 plus articles. He lectured widely around the world, and was a dedicated classroom teacher, often offering four or five courses and seminars per academic year.

He was born and raised in South Africa, and educated at the University of Potchefstroom where he began his law teaching career in 1958. He soon became a chaired professor of law, and served from 1972–1974 as dean of the law faculty. He taught and wrote at length in the fields of property law, family law, the law of persons, church-state relations, legal science, and legal philosophy.

In the 1970s, he began mastering human rights while serving as a visiting scholar and lecturer at Columbia, Michigan, Harvard, and the Institute for Advanced Legal Studies in London. This new accent in his work soon got him in trouble with both the conservative churches of his community and the apartheid state of South Africa. Many local Protestant churches thought human rights to be a dangerous product of Enlightenment liberalism and individualism, which biblical Christians should firmly reject. But Johan argued powerfully and patiently to the contrary that human rights are God's gifts to human nature which should be enjoyed and exercised by every human being, regardless of color, class, confession, or sexual orientation. The apartheid state, in turn, reserved human rights to the white elite, leaving vast portions of South African society trapped in dire poverty, illiteracy, and oppression with little legal recourse or protection. Johan risked much in speaking out against these racist and apartheid policies using the spotlight of human rights to expose the grave injustices that these state policies inflicted. He was soon censored and then dismissed from his position at Potchefstroom, and became professor of law at the University of Witwatersrand in Johannesburg.

While now a pariah in some conservative religious and political communities, Johan became a powerful anti-apartheid voice in South Africa, and a global champion of human rights. In 1976, he secured major funding from the Ford Foundation to support the burgeoning human rights movement in South Africa. In 1979, he organized the first great international human-rights conference in South African history, introducing the world to a still regional hero at the time, Archbishop Desmond Tutu. Throughout this time, he argued constitutional cases in the South African courts on behalf of racial, cultural, and religious minorities. And he remained one of the legal architects, along with his many students and a growing body of coworkers, of the antiapartheid

campaigns and then the constitutional reform movements of South Africa in the later 1980s and early 1990s.

Johan's work soon attracted the attention of Emory Law School's leading international law scholar, Professor Thomas Buergenthal who introduced him to President Jimmy Carter and his human rights team at The Carter Center. They invited him in the early 1990s to make regular visits to Emory. He was appointed in 1995 as the Senior Fellow of Human Rights at the Carter Center and the I.T. Cohen Professor of International Law and Human Rights at Emory Law School. He also became Senior Fellow in the Center for the Study of Law and Religion and worked with us in a series of major international projects on democratization, human rights, religious freedom, proselytism, children's rights, and more.

Once established at Emory, Johan took on several new subjects for him, notably public international law, international humanitarian law, and international criminal law. He followed his trademark method of learning by doing, as he took each of these topics, and wrote voluminously on each of them and created new courses, seminars, and public lectures. Over the last five years, he completed five massive volumes on these international law topics, and had a sixth volume well underway.

In recent years, Van der Vyver was decorated with all manner of academic awards, tributes, and citations, including an appointment as Professor of Law Extraordinaire at the University of Pretoria alongside his positions at Emory. And in sublime acts of sweet justice, the University of Zululand gave him an honorary doctorate for his courageous advocacy for black South Africans and his own alma mater at the University of Potchefstroom gave him an honorary doctorate for his courageous prophecy to white South Africans.

4.4 *In Memory of Dad*[76]

Today, we say goodbye to our beloved Dad, Opa, and friend, John Witte: loving husband of our late Mom and Oma, Gertie; loving father of Ria and Obie, Gertie and John, Jane and Norm, Eliza and me, and our late brother Ponkie; loving Opa of Joel and Rachel, Jon and Kim, Nate and Melissa, Becky and Jon, David and Tamsynn, Ang, James and Stephanie, Celina and Murray, Hope and Justin, Ali and Sam and the many great grandchildren; and loving friend to so many gathered here and so many more who have already departed this life.

76 I gave this talk as a eulogy for my father, John Witte, on June 18, 2014, in my hometown of St. Catharines, Ontario.

Dad would have liked this full recitation of family names, because his family was the centerpiece of his life, and he worked tirelessly till his very last day to ensure that we all would thrive. He was so devoted to our family, because his own family in the Netherlands had faced such adversity in his early life. One of six children born in the town of Brielle, Dad and his family endured grinding poverty and brutal exploitation. His parents were long sick and died young, leaving him rootless and shiftless. Then the Nazis came to town, taking what little he had left, and he joined the Dutch resistance. Right after World War II, he was conscripted to nearly four years of Dutch military service in Indonesia, living in the jungle, and risking his life regularly in running supplies to the front lines and transporting the injured and dying back to camp.

He had every right and every prediction to be a bitter, hard, broken, and abusive man for the rest of his life. But quite the opposite—he was a happy, loving, confident, and charitable soul who rose above his ample adversity to build a beautiful life in loving service of God and neighbor—even in happy sacrifice of himself.

What saved him was his unwavering Christian faith in the grace and love of God—a faith nurtured sacrificially by the Catholic military chaplains who visited him often and who more than once risked their lives to spare his. What also saved Dad was the love of his life, Gertie Witte. He met Mom on his birthday in 1945, and they finally married six years later, after he returned from military service and got himself established. It was love at first sight back in '45, they both said. But it was also love that drove their decision not to marry before he left for war, so that mom would not risk being left a widow or single mother. They wrote to each other every single day for the four years he was away. "She waited for me all those years," Dad always said with a measure of awe. That taught him more than anything the power of love, faithfulness, and loyalty that would become his and Mom's most enduring and endearing qualities.

The young married couple came to Canada in 1953, holding one bag each, and clutching their first baby girl, Ria. They lived in a utility-free chicken coop that first year, and worked furiously to get themselves established—farming, fruit-picking, cleaning, carpentry, and anything else they could scrape together to make ends meet. They eventually built their family home, a modest little bungalow on Lakeshore Road, where we all grew up, now with Gertie, Jane, and me added to the mix. Our home was always open to widows, orphans, the sick, the poor and needy, and we were taught to love and care for them and to visit them when they could not visit us.

A long series of foster kids rotated through our home, too, which eventually brought us our beloved late brother, Ponkie. Given Ponkie's many handicaps

and dubious pedigree, small-minded people in the church would not allow his baptism, and small-minded people in the state would not allow his adoption. Mom and Dad politely but fiercely insisted on those rights for Ponkie, teaching my sisters and me another lesson: yes, you must honor and obey the authorities, but you must resist and rebuke bureaucratic silliness and injustice, especially when the innocent are harmed, or when your family and friends are victimized.

Dad was self-made, self-educated, and self-reliant. His philosophy of life was "if you can go, go." This was the ringing instruction my sisters and I heard when Dad taught each of us how to drive. If it's safe, and you have the right of way, you go. Don't hesitate, don't deviate, and don't stop until you get to where you want to go. That was Dad's philosophy of driving, and that was his philosophy of life, too.

Another part of his philosophy I learned as a youngster taking my first flight. It was dark, cloudy, and raining when we left. But as soon as the plane broke above the clouds, we came into a brilliant night sky filled with stars. I said, with youthful astonishment: "Dad, the stars are shining even though it was raining." "Yes, Johnny," came the reply; "stars shine every night, no matter how dark the sky." That, too, was part of his philosophy of life. And he reminded us of that whenever we coasted or complained, or became cocky or complacent. If you want to be a star, you need to shine every night, no matter how dark things might seem.

Dad applied this philosophy to his own life. He came out to shine every day and night, and he would keep going until he accomplished what he felt called to do. He created his own carpentry and then construction company and thrived as a businessman, well known for his integrity, punctuality, and exacting standards of conduct. He helped build the Maranatha, Covenant, and Immanuel churches, and served frequently on their consistories. He and Mom wore out their pews with their faithful attendance and stretched out the collection bags with their faithful tithing. He helped to build Calvin, Beacon, and Heritage Christian schools, as well as several Christian condo communities, and he served with distinction on their boards. And when his work was finally done, his kids were established, and his and Mom's future was secure, he and Mom retired to a new life of far-flung travel throughout Canada, the United States, and Holland, of regular visits with the kids and grandkids, and of enjoying movies, plays, painting, and the fabulous new vistas opened by the computer.

Dad was insatiably curious, innovative, and adventuresome. He bought one of the very first hand-held calculators on the market, and promptly took it

apart to see how it worked. He tried the same with his first microwave, nearly killing himself with the highly concentrated voltage. He did the same again with computers—crashing, repairing, rebuilding, and replacing at least two dozen of them. No tool or appliance in his home, indeed nothing with a cord, was ever really safe from his curious ministrations.

He loved to fiddle and innovate, especially when he had time on his hands and could save a little money. Three of his dentured teeth were fixed with crazy glue. He always filled his printer cartridges with an ink-filled syringe rather than buying the expensive new ones. Car dings and dents were happy occasion for hours of work with rubber mallets, suction cups, and touch-up paint. His fishing reels had all manner of knobs, gears, spools, and handles he had somehow made himself. Why replace something when a little duct tape, putty, fishing line, and thrifty Dutch ingenuity could save it from the dumpster?

Dad was also irrepressibly mischievous, with a great appreciation for irony. He laughed easily, and wore a permanent smile on his face. He loved stories and parables, and attached profound meaning to simple routines and rituals, especially with his family. Later in his life, he loved nothing more than to sit at Ria's kitchen table for a nice meal or party, to gather around Gertie's beautiful Christmas tree, to join in happy hour on Jane's porch, or to give the fish a good run with me. And when he could no longer leave his home, his favorite pastime was Skyping and welcoming to his home his kids and grandkids, his friends and community members who were so kind to come to the very end.

The world has lost a true gentleman and a truly gentle man. Dad was constantly and consummately polite, modest, measured, loyal, faithful, bold, and brave. With Dad there were no empty words or wasted motion, no self-glory or self-pity, no bathos or pathos. Even in the face of the heavy adversity he endured in his last couple of years, he was always kind and concerned for others, he was always steady, sure, and determined. He taught all of us the meaning and measure of hard work, discipline, and perseverance. He showed us how to live simply, humbly, and within our means. He drove us all to be the best we could be, and to use our time and talents wisely and in loving service of others. Our very close family bond is an enduring testimony to the lessons that Dad and Mom both taught us.

All of us take comfort in knowing that Dad and Mom are now reunited in heavenly rest. This time, mercifully, they had to be apart only for six weeks, not for four years. It's easy to imagine Mom and Dad together again, enjoying their new life in heaven in a prim, proper and polished home, together with Ponkie and their many other family and friends. I can see Dad already quizzing the angels about how everything works. I can see him already oiling the gates

of heaven that have been worn from being opened so often in their deliveries of grace to him and his family. And I can now see Dad and Mom doing what they did every night together—bowing their heads in prayer to give thanks for all they had received, and asking the good Lord to watch over their family and loved ones in their "going out and coming in, from this time forth and forevermore" (Psalm 121:8).

May the name and memory of John Witte be blessed forever.