

Interview with Professor John Witte, Jr. for the *Worldview* magazine (May 6, 2015 at Handong International Law School, Pohang, South Korea)

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HILS Faculty Member (“HILS”):

You're a believer in Christ who has excelled at the highest level of academia, and our readers would be interested in knowing something about your faith background and your academic/scholarly journey. So could you tell us a little bit about that, bringing in perhaps your denominational affiliation together with some family background, as well as your academic journey from Calvin College to Harvard Law School, from history to the study of law, etc.?

Professor John Witte Jr. (“Prof. Witte”):

Yes, I am a Christian believer, and I have been a member of a Christian family from the very beginning. My parents were Dutch immigrants who came over to Canada in the early 1950s. They were of the Christian Reformed faith. I was brought up in that tradition, catechized both at home and at church, sent to Reformed primary and secondary schools, and imbued with the idea that Christianity is the fundamental part of life and that the Christian worldview needs to inform everything that one does and is.

The type of Reformed faith that we were taught was Kuyperianism – with its emphases upon sphere sovereignty, upon Scripture as the Word of God for all of life, and upon the importance of discerning the worldviews that lie behind alternative perspectives. And with that preparation, I went to Calvin College, a small liberal arts college in Grand Rapids, Michigan, founded by the Christian Reformed Church, and committed to the same vision of Christianity and the world. There I took courses in history, philosophy and biology, and I was a pre-med, a pre-law, and a potential graduate school student. Calvin was small enough that you could be a major with nine or ten courses, so I took a triple major, did the MCAT, LSAT, and GRE, and had opportunities to pursue all three careers. I ultimately decided that the field of law was the place where I could find an interesting venue for exploring some of the deep questions about the role that Christianity played in shaping civilization.

I was going to do a J.D./Ph.D. at Yale with Reformation historian Steven Ozment in the history department, but Ozment left Yale to go to Harvard. Harvard, by reason of some long standing animosity, did not allow for a J.D./Ph.D. program with the history department. And I was left with the dilemma of where to go. In that context, I wrote to Harold J. Berman at Harvard Law School whose work I had read at some length as a college student and asked what I should do. He was very generous in responding with a hand-written two-page letter, inviting me to come work with him. It was a deep privilege to sit at the feet of a great master who was wrestling with some of the fundamental questions of law and religion in the Western tradition. Here also was a man who had sacrificed much for the sake of coming to the Gospel, accepting it notwithstanding his Jewish upbringing and with the result of eventual ostracism by his family. Berman worked me very hard, 40-hours a week, during the time I was going to law school; my Dutch Calvinist work ethic carried me in that

context. And I had the privilege of following him from Harvard Law School to Emory University in order to build up this law and religion center that one of Hal Berman's former students, Frank Alexander, had started. And I've been at Emory ever since 1985. I'm still on probation, but working hard. (Laughter)

HILS:

You're an expert in many areas but especially three broadly defined fields – (i) marriage/family law, (ii) religious liberty/human rights, and (iii) law and religion. Our readers would like to know how you came to be interested in marriage/family law in particular as well as religious liberty/human rights as a more general topic. Although I was about to ask you how you came to be interested in law and religion, you already in your answer to the first question touched upon it. So, if you could, please further elaborate on it; that would be appreciated.

Prof. Witte:

Already in college and certainly in law school, I became interested in the Protestant Reformation as a seam or transformative moment in the history of the West, and the influence the Protestant reformers had particularly on law, politics, and society. Marriage and family life were amongst the topics that were of vital interest in the 16th century. Prior to the 16th century, marriage had been viewed as a sacrament of the church under the jurisdiction of Catholic Church courts and subject to an intricate latticework of rules and regulations of the canon law. The Protestant Reformers across the board rejected this sacramental theology and canon law system of marriage, replacing it with new covenantal and social models that placed family law principally in the hands of the state. I was interested in that seam and what was at stake in the controversy of Henry VIII in England, of Luther and his burning of the canon law books, and of John Calvin and his reconstruction of new marriage ordinances for Geneva. Already in my work with Berman as a research assistant, but also in my first scholarship, I began to map the changes in marital theology and law from the 14th through 17th century. Inevitably, as you get into a complex topic like this, with spiritual and temporal dimensions, you start looking backward all the way back to classical sources and Biblical sources, and looking forward to other transformative moments in the Western tradition, including in the Enlightenment and in the modern sexual and divorce revolution. I had an occasion, relatively early in my career, to write an overview book on that topic, called "From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition."

This area of scholarship has continued to fascinate me. I've written more specialty books on the history of bastardy or illegitimacy or non-marital birth, called "The Sins of the Fathers," which thinks through that topic from ancient sources till today. I just published a long book on the contest over polygamy in the Western tradition, called "The Western Case for Monogamy over Polygamy," again a long tour from the classical and Biblical sources till today. I have other books on covenant marriage, marital property, and marriage in Calvin's Geneva. In all these books, I've tried to emphasize that we're dealing with a fundamental institution, a bedrock institution for the Western tradition whose current transformation -- some would say evaporation -- is deeply troubling. We are making fundamental changes to our ancient traditions of sex, marriage, and family life, using the relatively modest constitutional calculus of liberty, autonomy, equality, and privacy. This is pretty thin gruel compared to the

rich ontologies and teleologies of marriages that we have in the tradition.

The second big area of inquiry that I spend a lot of time on is religious freedom and human rights, again starting with the Reformation era, and eventually looking backward and forward. As I tried to document last evening in my little lecture here for the 20th anniversary of Handong Global University on "The Freedom of the Christian," it was Martin Luther who uttered a clarion cry for freedom from what he considered to be the intrusions on conscience and intrusions on the Word of God by the canon law of the Catholic Church and by the scholastic theology that supported it. While the Reformation certainly added to the Western legal tradition's understanding of religious freedom and human rights, it proved to be only one seam in the development of Western rights talk.

In several books and articles, I have had the chance to sketch out the intellectual and institutional pedigree and genealogy of rights or freedom talk in the West. Foundational is Scripture with its frequent talk about liberty, its talk about rights of slaves, rights of children, orphans, widows and the like. Next comes classical Roman law and its thinking about *jus* and *libertas*, right and liberty, and its formulation especially around private law questions. Next comes medieval canon law with its rich latticework of public, private, penal, and procedural laws and rights, fitting into an intricate legal system for the Western tradition. And I have had the chance to study deeply the contribution of the Protestant Reformation, that builds on this Biblical, classical, and medieval Catholic inheritance, reshuffling some of those categories, and then adding a very strong emphasis on finding biblical warrants for thinking through rights talk. And the story going forward is, in part, again watching what the Enlightenment does and watching what 20th and 21st century cultures do with this inheritance.

So, together those scholarly efforts have had me involved me in three fundamental aspects of life: faith, freedom, and family, the three things people will die for.

HILS: Probably, it would be easier for us to group our questions according to those three areas of your expertise, starting with marriage law/family law. And I'd like to turn to Dean Enlow for questions on that.

With respect to that, the law of marriage and family as an opening question, is there a particular legal form for marriage and family that flows from or follows from a Christian rule?

Prof. Witte:

There is, although I would say that it is in part the Greco-Roman family with a twist. Christianity came on the scene in a legal culture that had already established heterosexual, monogamous marriage as the form of marital union that was considered valid and that could give rise to legitimate children who could inherit property from their parents. What the Christian tradition did, especially in the Gospels and in St. Paul's letters, was to give that inherited domestic form an egalitarian twist, as Don Browning at the University of Chicago puts it. It was egalitarian in the sense that the New Testament placed a stronger emphasis upon the mutuality of marriage: 1 Corinthians 7 called the husband and wife to respect the

conjugal rights of the other. Ephesians 5 and 6 called Christian couples to make mutual sacrifices to each other, and to their children – in a way quite different from the muscular patriarchy of the Graeco-Roman culture in the day.

It was an egalitarian twist, furthermore, in the very strong emphasis upon fidelity of both husband and wife to marriage and to making the marital bed the exclusive site for sexual exchange with one's spouse alone. Jesus had rebuked the Roman law and the Jewish law of the day for its practice of unilateral male divorce, saying very clearly that "what God has brought together, let no man put asunder." Divorce was now allowed, per Matthew 19, on grounds of infidelity or adultery, with 1 Corinthians 7:15 adding a possible ground of desertion, too. But outside of those contexts, Christian marriage was a presumptively permanent union which symbolized the mysterious and enduring union between Christ and His church.

Christianity also emphasized the importance of keeping the sexual body pure and free from fornication. This was quite in contrast to the Greco-Roman culture of its day, where women were expected to be chaste, but husbands could rove sexually, and get involved with mixed bathing, prostitution, sodomy, and other forms of sexual expression. Christianity said that both the male and female bodies are temples of the Lord, and need to be restricted in sexual expression, and exclusive in sexual troth and expression with one's spouse. The marital bed should be well used, given both parties' conjugal rights, but the marital bed should be undefiled.

HILS:

Today, marriage law is changed radically from the Greco-Roman period, from the early days of the church, from the middle ages. What are the causes of that change, and are the causes related to the influence that Christianity has had upon the law?

Prof. Witte:

There are major seams in the evolution of the Western legal tradition and the Western moral tradition on marriage and family. In the 4th and the 5th century, the Christianization of Rome and the Roman law had a dramatic influence on the law governing marriage and family thereafter. In the 12th and 13th century papal revolution, as Harold Berman calls it, the church assumed full jurisdiction over marriage, and its teachings had a much more pronounced influence. In the Reformation period, there was a strong emphasis upon church and state cooperating in the governance of the marital institution and the importance of making freedom to marry an area that needed deep reform. That helped reform annulment and divorce practice, and removed many of the traditional impediments to marriage. Interestingly, the Enlightenment in the 18th and the 19th centuries was almost uniform in its acceptance of traditional family values of heterosexual, monogamous marriage presumptively for life with a right for divorce only in cases of hard fault and in its recognition that adultery, fornication, premarital sex, incest, polygamy, wife and child abuse, are all violations of natural rights and social utility. Even though the Enlightenment rejected a good bit of the Christian heritage, it accepted much of the traditional teaching about the form and the nature and the purpose of the marital institution as a private good and a public good in the community.

The 1960s onward, however, were another time of momentous shift in sex, marriage and family norms – a period that we generally call the sexual and divorce revolution. This period featured a firm rejection of any authority over sex, marriage, and family life, including the authority of traditional morals and mores. There was now a very strong new emphasis upon individual choice, sexual gratification, and freedom from the trappings of patriarchy, prudishness, and paternalism. There was a strong desire to liberate the sexual body from all these traditional strictures. This sexual revolution was aided and abetted by changes in constitutional law in the United States as well as in Western Europe. The first American Supreme Court cases, *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973) allowed for contraception and then for abortion.

These cases and their progeny enhanced the idea that sex was for personal gratification as much as for procreation and that it could take place freely within and beyond the marital bed. They enhanced the view that the person's sexual life was a matter of personal choice, autonomy, and privacy, and that the public, whether the state or the church or any other institution, had no role in the decision about how one used one's sexual body. Not surprisingly, this triggered an explosion in the number of non-marital children born -- such that today, 71% of African American children are born out of wedlock; the numbers are over 50% in the Hispanic community, and over 40% in the Caucasian community. Moreover, marriage is increasingly being viewed today as an option only for the educated and the rich. I say that at the risk of sounding classist, but the numbers are quite staggering. Folks with lower education and lower incomes are not marrying anymore, just living together. They don't see the wisdom or expediency of marriage, and the state has certainly not incentivized them to be involved in it. If you have liberty to have sex with impunity, even if you produce a child, why would a person encumber him or herself with this institution called marriage, which suddenly hands to somebody else the authority to decide when and on what conditions you can walk out?

HILS:

Your book, "From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition," is available to readers in Korean. Would you talk about what we might find in that book to orient us to these issues and these changes, and any other of your books that you would recommend, or other authorities you would recommend for a Christian who's trying to orient himself to these sorts of questions?

Prof. Witte:

That book is an attempt to map audaciously in 300-odd pages the second millennium's contribution to the law and theology of marriage – and it has a full bibliography of many other good works on point.

The book starts with the notion that marriage is a multidimensional institution: It is at once a spiritual institution, a contractual institution, a socioeconomic institution, and a natural institution. These are four strings on the bow of the instruments that are played together to create the song of marriage. Or, to change the metaphor, these are the four corners of a canopy under which we group the norms, ideas, and practices that we call the marital family. At different eras in the Western tradition, one of these perspectives gets priority.

In the High Middle Ages, the spiritual or sacramental dimension of marriage was emphasized. The Catholic Church, as the ruler of the West, assumed principal jurisdiction or lawmaking power over marriage. And on the strength of the idea of marriage as a sacramental symbol and structure of the mysterious relationship between Christ and the church, the church put in place some of the basic understandings of marriage as an enduring indissoluble union which could not be replicated until one spouse died. Those ideas were circulating in the first millennium, but they were clearly systematized in the church's law and lore of the 12th and 13th centuries.

The Protestant Reformation rebelled against the marital jurisdiction of the Catholic Church and its sacramental theology, and gave new priority to socio-economic perspectives on marriage. The Reformers believed the medieval church had usurped the state's jurisdiction over marriage. They also believed the medieval church had deprecated marriage by its strong emphasis upon celibacy for its clergy and monastics, and its teaching that the chaste, sexless life was superior in virtue. And the reformers believed that the medieval church had created the conditions for widespread concubinage, prostitution, and fornication by prohibiting clergy from marriage, and prohibiting betrayed spouses from getting divorced and remarried. So the reformers transformed the idea of marriage and family and put in place alternative models that emphasized other dimensions besides the spiritual or sacramental.

Martin Luther lifted up the idea of marriage as a social estate, one of the three fundamental natural orders set out by God in creation. The church, the state, and the family, he said, are the three organic estates on which we build a just and orderly society. All fit men and women with freedom and capacity should marry, Luther said, just as they should participate in the life of the church and of the state. Monasticism and mandatory clerical celibacy were outlawed. Clergy were expected to be exemplars to marriage in their parsonages rather than single celibate folks, and have the insights and experiences as pastors to support and exemplify Christian family life.

John Calvin and the Reformed tradition emphasized the idea of marriage as a covenant modeled on the relationship between Yahweh and his elect bride of Israel in the Hebrew Bible, with a strong emphasis on covenant fidelity for men and women alike, and a strong injunction against male promiscuity and sexual abuse. Calvin insisted that covenants have conditions of performance built within them, however, and that sometimes a fundamental and pervasive breach of those conditions allows for divorce. Using Mathew 19 and 1 Corinthians 7:15 as biblical warrants, he protected the mutual rights of the man and the woman in the cases of persistent adultery or persistent malicious desertion to file for divorce and get remarried.

The Anglican tradition highlighted the public, social, and economic dimensions of marriage. They regarded the marital household as a little commonwealth, a little church, a little seminary for the republic. It was the first school of justice and mercy, the incubator of virtue, the first site of social welfare, the place where all people learned the habits and the norms they need to prosper as members of the church

and the state alike. For Anglicans, the marital commonwealth, the church commonwealth, and the political commonwealth were fundamentally integrated, and the health and order of marriage and family life were critical for the stability of the church and the state.

In the Enlightenment, these spiritual or biblical models of marriage were rejected quite forcefully in favor of contractual and natural view of marriage. The spiritual dimension became optional. The social economic dimension was recognized, but viewed as subordinate to the contractual dimension, to the idea that marriage is first and foremost a private relationship between the parties. But that marital contract was still bound by the natural dimension of marriage, Enlightenment liberals argued – the teachings of nature and natural law that dictate a set of practices around sexuality, marriage and family life that are quite consistent with what the tradition has long taught. So, as I said earlier, the Enlightenment accepted much of the traditional architecture and ecology of marriage and family life, notwithstanding its oft-shrill denunciation of the Christian tradition, its new emphasis upon rights and freedoms, and its liberation of the self from the strictures of the past. Enlightenment liberals still saw marriage as a fundamental institution, whose health was critical to the health of the commonwealth. They still saw that marriage has a form dictated to humans by nature – as a heterosexual, monogamous marriage presumptively for life. They still insisted on no adultery, no fornication, no prostitution, no concubinage, no incest, no polygamy, using a surfeit of arguments from common sense, reason, practical experience, and plain common sense.

What's interesting is that in the later 20th and early 21st century, primatology, evolutionary anthropology, and other evolutionary sciences now teach, as Claude Levi-Strauss put it, that “the deep structure” of the evolved human species favors exclusive pair-bonding strategies of reproduction above all others. No other means of sexual procreation is as successful in producing a vibrant next generation of humans. The “two in one flesh” idea of marriage taught in Genesis 2:24 is now echoed by some of the most interesting evolutionary scientific work on the best way, the fittest way, the most expedient way by which humans reproduce the next generation.

We have had the luxury in the 20th and early 21st centuries of defying that evolved, created, or natural order of a stable marital household and passing on a lot of the cost of non-marital procreation, broken homes, and single family parentage to the welfare state. We will likely be in for a shock in the course of the 21st century when we begin to realize that the welfare state cannot deliver on its promises.

HILS:

Speaking about that point, we have already addressed the issue in a very extended manner, but more specifically what would you say about the current talk of marriage in terms of self-autonomy or privacy under the due process clause and/or equality under the equal protection clause.

Prof. Witte:

I think it's privileging one dimension of marriage, the private contractual dimension of marriage. This dimension has always been part of the architecture of the marriage

institution, but it was balanced by the spiritual, socio-economic and the natural dimensions. In the past two generations, however, marriage has increasingly been viewed as a simple private contract of transient truth, with both parties enjoying freedom of entrance, exercise, and exit. That is a parody of what the institution of marriage is all about. But that is now increasingly becoming the new constitutional ideal, born of a new emphasis on liberty, privacy, autonomy, and equality. In my view, this betrays the fundamental teaching responsibility that the state has to encourage, facilitate, and support an institution that is of vital importance to the state's own well-being in due course. It is also a fundamental intrusion on the traditional idea that marriage is primarily governed by state not federal law, by statutory not constitutional law.

One of the creative responses to this has been the covenant marriage movement that emerged in the late 1990s in Louisiana, Arkansas and Arizona, and was under consideration in two dozen other states in America. Covenant marriage statutes create a contractual option that a marital couple can contract out of the thin contract marriage system that is predicated on these constitutional ideals, and contract into a thicker understanding of marriage as a covenant that has firmer formation and dissolution rules. While this movement has not taken off, it strikes me as a welcome reform.

A second response is the use of religious mediation and arbitration by people of faith who want to rely on their own religious legal systems rather than the secular legal system to deal with marriage and family questions. This is a new and contested chapter in the pursuit of legal pluralism over marriage and family life – a kind of social or religious “federalism,” if you will. Several American religious communities are pressing for the semi-autonomy to abide by faith-based family laws, and asking for deference by the state provided the religious laws meet baseline conditions. We have reached comparable arrangements with education, for example. We have public state-run schools and private, schools, including religious schools. The law sets basic accreditation requirements, certain things that schools have to be and certain things a religious community can't do. People of faith can't go below these standards, but they can go above them.

Interestingly, as the state has pluralized the *forms* of marriage (now including same-sex marriage, covenant marriage, civil unions, and domestic partnerships), folks are pressing the state to pluralize the *forums* of marriage law as well. Churches and other religious communities might well have the opportunity to govern the marriage and family lives of their own voluntary faithful, so long as a person's right of exit is always respected and so long as no coercion is imposed upon the life and limb. There are prototypes of this in place in India, South Africa, and other nations that have had common law experience. That may well be one option that states may want to consider as they think through what's a more responsible legal apparatus to apply to the marriage, family, and sexuality questions of our day.

HILS:

I have interest in your view of history. You speak of “revolution” as in sexual revolution, etc. And I understand from your books that you still take “law and revolution” as a theoretical framework to describe historical events or narratives.

Please tell us about what is your understanding of the relationship between law and revolution? Last night, you talked a lot about Martin Luther's famous article. But to me it was very much focused on the law part. You never mentioned in my memory about the spiritual aspect of the Christian freedom, which was a revolutionary part of Martin Luther's thinking, which made it a discontinuity, which made him cut from the legacy or heritage or some bad old past. In short, what is your understanding of those two words, revolution and law?

Prof. Witte:

This is a discerning question because it gets to the heart of the inspiration for some of the historical work I do. As mentioned, I had the privilege of working with a great mentor, Harold J. Berman, who was my professor at law school and happily became my colleague at Emory. We worked together closely for 22 years before he died in 2007. Professor Berman was the 20th century master of the idea of law and revolution, an idea that he had acquired from his mentor Eugen Rosenstock-Huessy when he Berman was a student at Dartmouth College. The theory of revolution taught by Rosenstock was that there are revolutionary moments in the West, where apocalyptic new visions of a better society drive a group of revolutionaries, often through violence, to unseat a prior regime or prior culture and put in place a better new order as they see it. And over time, the radical phase of the revolution gives way to accommodation with parts of the tradition, but also makes a lasting change that persists until the next revolution.

Berman took that Rosenstockian idea of revolution and applied it especially to law and the legal transformations that occur in those revolutionary moments. He believed that certain periods in the West brought massive legal revolutions -- the 12th and 13th century Papal Revolution, the 16th century Lutheran Revolution, the 17th century English Revolution, the 18th century French and the American revolutions, and the 20th century Bolshevik Russian revolution. Each of these revolutionary eras produced a new master metaphor, a new belief system, on which the legal system was built. Berman set out his theory in two great books on "Law and Revolution" and has defended those in a number of different interesting articles. Some of them collected in a book called "Faith and Order" and some of them are prequelled in a book just out, but written in 1964, called "Law and Language." I was deeply influenced by that periodization in history.

I was also influenced by a Kuyperian scholar named Herman Dooyeweerd, a Dutch philosopher and jurist writing in the 20th century. He emphasized the importance of founding metaphors and motifs or fundamental law ideas that helped anchor the basic ideas and institutions of a given civilization. Dooyeweerd, too, described how shifts in these fundamental ground motifs produced movements of transformation -- especially during the Christianization of Rome, the High Middle Ages, the Protestant Reformation, and the French Revolution.

Those two big figures had a deep influence on me early in my scholarly life. While I believe that each civilization and legal system has founding and grounding metaphors and dominant belief systems, I don't have a refined understanding of revolution on the level of Berman or Rosenstock. I don't want to diminish what they had done; it's just not been my focus. What I have taken from him and Dooyeweerd

is the idea that there are fundamental seams, transformative moments, watershed periods if you will. There are streams of ideas and institutions, norms and practices that continue sometimes throughout that 2500 year tradition. But there are also watersheds that produce a permanent bend in the stream and set off in a new direction. I've sometimes call that bend in the stream a revolution, a fundamental new law idea or ground motif, a la Berman and Dooyeweerd. But I'm less interested in the terminology and more interested in the consequences of what happens when there is a bend in the stream.

Occasionally, when I see some fundamental shift in ideas or institutions that have a lasting impact, I use the term "revolution" to describe that, too. In earlier work, I talked about "the scientific revolution" – from Copernicus to Newton -- and analyzed what that new epistemology meant for law and legal thinking. In fact, I wrote my J.D. thesis on the scientific revolution and law. Berman, by the way, denounced me for calling it a revolution; he wanted to reserve that term for major civilizational shifts. In the same vein, I've talked about the "sexual revolution" of the 1960s forward, in part because it really is a fundamental shift in attitudes and values about sexuality that have had a lasting effect on the way that we think about marriage and family life, sexuality, and sexual expression.

HILS:

I think we can think theoretically of two different responses to sexual revolutionists, one is to be a kind of counter-revolutionary, the other is to be cooperating in order to institutionalize the result of the revolution. Which one do you think Christians should choose - do we have to be a kind of counterrevolutionaries against the sexual revolution, or do we have to participate in institutionalizing that cultural transformation in terms of more sophisticated law which contains continuity, tradition in a sense. This might be a very tough or rude question, but if you have only two choices, which one do you want to take?

Prof. Witte:

I would take both if you are forcing me to make a choice. But I would remind you that there are multiple ways that Christians engage culture, including family culture. Niebuhr's *Christ and Culture* book maps out five of those ways; sociologists of religion now give us ten or fifteen different models. An interesting book by Don Browning, the great dean of the marriage and family life, has a book called "From Culture Wars to Common Ground" where he maps a number of different strategies for people of faith, notably Christians, to engage the culture of the family.

But given the choice of two, I think it has to be both. The church has to live authentically within the tradition that it has been taught in scripture and developed under the inspiration of the Holy Spirit and routinized in creed, confession, catechism, and canon. The church first and foremost has to be authentic to its own calling, and in the marriage and family and sexuality arena that is absolutely critical. Absent that, the church largely just becomes a variation on the status quo, the culture and that's troubling.

That said, I don't favor an Anabaptist withdrawal or a sectarian approach. Christians need to be part of the public debate about the fundamentals of marriage, family, and

sexuality. And their citizenship in the state, alongside the church, requires them in part to be agents of goodwill, prophets of reform, and shrewd operatives in seeking to mitigate what might be viewed as dangers to the polity as a whole caused by the breakdown of the family. It is important for Christians to remain in the debate about marriage and family, and retain an articulate and authentic voice that is true to its tradition, but also able to translate its teachings in terms that others of different faiths or of no faith can understand.

What is interesting is that the modern world has defied the secularization hypothesis of the 1960s 70s and 80s that postulated that Christianity and other forms of faith will die a slow death and increasingly become unimportant in public life and public deliberation. Christianity and many other forms of faith continue to be resilient and indeed have exploded around the world in the last twenty years. The easy notions of a public reason that brackets all comprehensive doctrines and that brackets especially religious discourse about fundamental matters of the state is giving way to a more realistic and inclusive epistemology. Even early architects of religion-free public reason, like John Rawls and Jürgen Habermas, began to realize that a de-theologized discourse, a bleached and bland public reason could not work in debates about fundamental institutions, like marriage and family life.

Christians and other faiths, as a consequence, are invited back into the conversation. And they need to join the conversation with authenticity, depth, power, and precision about what Scripture and tradition, reason and experience, can offer. Too many Christians, however, are marching to the culture wars without ammunition, substituting acerbity for prophecy, nostalgia for deep constructive engagement, platitudes for principled engagement. Many Christians have not done the work of apologetics on these basic questions that seeks to reason with folk on grounds that they can understand, and translate their enduring perspectives in a way that a person of a different faith, no faith, or anti-faith can appreciate nonetheless. Whether that rests on theories of nature or natural law, on convergences between science and religion, or other kinds of common experience, intuition, or knowledge, it is important for those who participate as people of faith in public debate to bring the full arsenal of their own faith perspectives, but also to provide the Pentecostal flames or Rosetta Stones that allows people of various perspective to understand what they are hearing.

HILS:

This is great. I was about to ask you two questions. One was about Christian engagement with the world, and you addressed that issue. The other was about the so called public reason.

Prof. Witte:

You are happy with my answer? I will stick with it.

HILS:

The main audience for the magazine is a group of Christian scholars who themselves like all of us struggle with the question how we should understand our own role as a Christian scholar in this largely pluralistic and to a certain extent hostile world. How would you find your role as a legal and Christian scholar in the context of

your perceived way that the world works, in the academia or outside the academia.

Prof. Witte:

I think it's a variation on the answer I just gave to both of you about the role that the church plays. As a scholar, one critical responsibility is to be a good steward of the wisdom, knowledge, and methodology that you acquired in your profession and to maintain and develop it, to continue to teach it to the next generation, to prepare the next generation of scholars to stand and succeed you. That is an indispensable part of what our job is: to be links of the chain of the areas of knowledge we have acquired. And that's true of Christian and non-Christian scholars alike. If your Christian vocation is to be a scholar, be the very best scholar and teacher you can be, in and on the terms that anyone can understand.

Christian scholars, however, also must try to find ways of reforming and improving their profession or discipline to accord better with what the faith teaches. They do well when they find themes and dimensions of the work where the Christian tradition has had or can have notable influences. That's what I have done in looking at law and religion in the Western tradition, which for many centuries was about law and Christianity. It's what a literature professor might do in teaching medieval or early modern Christian classics. Or an art historian might do in mapping and analyzing religious paintings, statuary, and iconography. Lifting up the religious, often Christian, dimensions, sources, and resources of one's own profession or discipline is a critical way of keeping the Christian tradition alive. When a Christian has that choice – and they sometimes do not – it's worth taking it seriously.

Christian scholars have different ways to engage the community, the polity, and public debate. One can simply produce scholarship, write it, teach it, lecture about it, and equip other specialists to take the work and run with it. That is a lot of what I do. I don't spend a lot of time doing the litigation, lobbying, and legislative work that are a natural outgrowth of what I do. But others are actively engaged in the legal debates about faith, freedom, and family: they participate in cases, they craft legislation, they work hard to be in very detailed conversation with the other leaders of the culture that are dealing with some of the hard questions. Through op-eds, debates, television appearances, and the fabulous opportunities created by all the new social media, they are in the day-to-day fight on what is going on. That is equally important and responsible Christian scholarship as well.

HILS:

One of the things that you have shared with us in the meeting yesterday was that you have in recent days considered, maybe not a shift in direction, but an expansion of your scholarly work, having thus far focused primarily on what other people said in the past, as you put it, but away from it or at least together with it, maybe some new or additional engagements or directions for you for the days to come. Would you like to say more about it, what has prompted you to think in that way, or what specific avenues or vehicles or possibilities that you consider at the moment?

Prof. Witte:

I have long felt that my calling is to be an historian and that my job is to retrieve and reconstruct and reengage some of the wisdom of the tradition. For 2000 years,

Christians have wrestled with place of Scripture in the evolving legal cultures around them; it takes a special form of arrogance to simply pass over that and then offer one's own normative perspective uninformed by the tradition. But I have been doing this for thirty years now, and I have got a little sense of what some of the great masters of the tradition have taught us about some of the fundamental questions of faith, freedom, and family, of politics, law, and society. So it might be wise to try to distill this into a more systematic form and maybe into a more normative form. It might be time for me to start thinking through what a Christian jurisprudence might look like in the 21st century – a jurisprudence that is authentic, that engages the hard legal questions of the day, that is accessible to insiders and outsiders alike, and that tries to distill the 2000 year tradition on many fundamental questions into a systematic form that other people might be able to profit from and build upon.

In my more audacious moments, I feel the pull to try to write a modern Summa, Institutes, or Dogmatics on Christian Jurisprudence. It's not driven by arrogance, although I am sure pride is part of this. It is driven by the thought that maybe what's important for me to communicate now, and leave for others to build on when I'm no longer capable, are attempts to answer the fundamental questions of law, politics, and society with power, precision, and prescription. That's not been my calling in the past, and indeed I was warned against going normative too quickly as a historian. But I am increasingly feeling that it's important to draw out the implications of the wisdom of the tradition for our day. As I have watched my historical books emerge over the last few years, the last concluding reflection sections are getting thicker and thicker as I take liberty of standing on a soap box and making more sweeping normative pronouncements or judgements. And I am finding that that temptation to do that is getting more serious. Maybe my calling is to say more in this vein.

HILS:

Quentin Skinner once told us about liberty before liberalism, but I was interested in the timing when he raised that issue. We are in the era after liberalism. We are looking for liberty before liberalism in the era of after liberalism. I think you surely have something to add or something to correct Quentin Skinner's understanding of liberty before liberalism. Do you have any thoughts on his book or his teaching? I guess a lot.

Prof. Witte:

Quentin Skinner is a wonderful historian at Cambridge and has unearthed a rich collection of material from the Renaissance and early modern Reformation period. He has discovered all manner of interesting things about liberty and human rights that are often ascribed to the Enlightenment, but can be found already in late medieval and Renaissance and Reformation tracts. That work is deeply congenial, and compatible with my reading of the sources. There were rights before there were democratic revolutions fought in their name, and there was liberty before liberalism. There is a tradition of rights talk that, in my view, goes back to the Bible and classical Roman law, builds in medieval Catholicism and early modern Protestantism. The Enlightenment inherited many more rights ideas than it invented. So I find Skinner's work in that respect deeply congenial, especially his little book on "Liberty before Liberalism."

I think the question that you push about liberty after liberalism is much harder. Is liberty a feature of liberalism, or is liberalism just another agent of liberty. If liberalism declines, will liberty decline, too? Are there are sources and frameworks to support liberty? That's an interesting question. Liberty historically, before liberalism, was always bound with responsibility. Rights were always bound with duties. It was a two-sided framework of normativity: you have the liberty or the right to be able to discharge your responsibilities and duties that faith or tradition, reason or conscience teach you.

One of the sad realities of some forms of liberalism and post modernism is that the second leg of that understanding of liberty and rights is increasingly eroded, and you're left with liberties and rights in the air. My own view is that liberty is a gift from God and rights are opportunities to discharge our duties. Whether we're in a liberal, a post-liberal, or a pre-liberal age, liberty and rights are still there in human nature. The question is how they are grounded, and how they are expressed.

HILS:

What I want to ask about that short book, "Liberty before Liberalism," is that Quentin Skinner did not say enough about the puritan revolutions. He just compared Thomas Hobbes' understanding of liberty with neo-republican idea of liberty. In your book, we learn a lot that in 17th century, the Westerner's understanding of liberty was strongly about religious liberty. I don't understand why Quentin Skinner just omitted that aspect in that book.

Prof. Witte:

I don't know Skinner's ideology well enough to be able to criticize him or suggest he is blinkered in his view of what the 17th century offers. The "Liberty before Liberalism" book is a set of lectures, and you can only do so much in any given lecture and you stick with your script. So I wouldn't indict him for a book that by definition is brief and illustrative. I do think there is a powerful religious foundation to the pre-liberalism understandings of human rights and liberty. As I said in my lecture yesterday, it's no small anecdote that, by 1650, many Protestants and Catholics had already defined, defended and died for every one of the rights that would appear in the 1791 U.S. Bill of Rights. You see that early rights talk in the thick discourse of 17th century Puritanism, and the literature of the thinkers in France and Scotland and the Netherlands. You look at a person like Johannes Althusius and his rich rights understanding that he lays out in his "Politics" and "Dicaeologica." You look at early figures like Theodore Beza, François Hotman, the author of the *Vindiciae contra Tyrannos*, George Buchanan and others, and you have a rather thick formulation of the most fundamental rights whose persistent and pervasive breach by a tyrant triggers the foundational rights of revolt.

HILS:

And that is the main content of your book recently translated and published in Korean, right?

Prof. Witte:

Yes, the book in English is called *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism*. You would know the Korean title, and I

don't dare try to pronounce it. The burden of that book is to show that the Calvinists from the 16th century to the 18th century articulated a religious understanding of rights and liberties bounded by responsibilities and duties, and set in a rich covenantal framework. And they pressed these rights with increasing alacrity as they faced harsher and harsher persecution, even genocide during the St. Bartholomew's Day Massacre in 1572 or the Spanish inquisition in the Netherlands in the 1570s and 80s. On the strength of that, these Calvinists articulated many of the basic understandings of the constitutional order, of rule of law, of human rights, of religious freedom, of federalism, and other legal ideas that we take for granted as products of the Enlightenment. But they are not products of the Enlightenment; the Enlightenment was living off the capital of Calvinist and other ideas and practices that were in circulation centuries before.

HILS:

Granting the list of your books we'll find ways to put in the article, what are three books on the topics that we've talked about written by people other than yourself that you admire or would recommend to others as essential readings?

Prof. Witte:

Only three? I would recommend Nicholas Wolterstorff's book *Justice: Rights and Wrongs*. It is a fundamental rethinking of the rights talk in a justice framework animated by deep Christian vision. I would take Jeremy Waldron's book, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought*. It is a wonderful vindication of ideas that many have pressed but not nearly as cogently, that Locke is coming out of his Anglo-Puritan past and is reflecting that deeply in his construction of ideas that the Enlightenment came to appropriate in increasingly secular forms but Locke put in deep religious and theological forms. For a book on family, I'd recommend Don Browning's *Marriage and Modernization: How Globalization Threatens Marriage and What to Do about It*, which deals, with the fluidity and grace of a great social scientist, Christian thinking about the fundamental institution of marriage. It looks at modernization, globalization and its impact on the family, and it presses, in my view, an authentic and rich Christian tapestry of ideas about marriage and family that needed to be taken into account in every culture.

HILS:

Out of your own books, if there is one book you would recommend that everybody else should read, what would that be?

Prof. Witte:

The most personal one was a book called *The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered*, which was in some sense a plea against the stigmatization of the other, especially the bastard as that person is called in this tradition. My adopted brother was a bastard, and that book was dedicated to his memory. It is a short, pithy book you could read in an evening, but it is a troubling story about Christian brutality and charity at once.

Probably the biggest, fattest, most ambitious scholarly book that I have done is the book that just came out that is called *The Western Case for Monogamy over Polygamy*, which broke open a lot of historical material that nobody has ever seen

and that tells the story that really hasn't been told before in the Western tradition. And it was excruciatingly difficult to write. It took me five years of hard research to put that book together. I couldn't find some great 19th century German who had done all the archival work and have a guide to the sources that way. For this book, I had to do it from scratch, and it may show; we'll see how it fares in the hands of the viewers.

HILS:

Final question. What would you say to those, and I think there are many within the Christian church, who somehow see Christian faith and legal profession incompatible, or at least lots of tension they see? What would you say to them?

Prof. Witte:

It's a common sentiment. One of Luther's most famous pronouncements was "Juristen, böse Christen" ("Jurists are bad Christians"). Shakespeare also captures it in the phrase: "first thing to do is to kill all the lawyers." So, law is viewed as a grubby, greedy, and ugly profession, and some of that is true. But law is a fundamental profession. There are few universal solvents of human living any more that we have in place. One of them certainly is law. A society without law would quickly devolve into hell itself. We need lawyers to uphold the basic rule of law, constitutional order, fundamental rights. And we need Christians at work in the law, tending not only to the "mint and dill and cummin," but also to "the weightier matters of the law."

HILS: Thank you very much!

[END]