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Abstract

“Table talks” have long been a familiar genre of writing for jurists, theologians, politicians, and novelists. The little “table talk” volume introduced and illustrated in this article offers short talks on how to thrive in law school and in the legal profession: 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.

Keywords: table talk; law school; law and religion; Bible; vocation; faith, freedom, and family

Literature Highlights

Table Talk: Short Reflections on the Weightier Matters of Law and Religion

John Witte, Jr.

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 talks—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. 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. 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. 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). 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, not least his (in)famous adage that “jurists are bad Christians” (*Juristen böse Christen*). 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. 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. 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.

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

This little volume gathers thirty short talks delivered over the past thirty years from law school lecterns and church pulpits, and at academic roundtables and media briefings. These talks offer avuncular reflections to law students about the vocation of the law. They offer public education about controversial legal matters of faith, freedom, and family. They offer reflections on a few legal themes in the Bible. And they offer tributes to a few fallen heroes in my life. Cast in avuncular form, these texts probe what makes life worth living, work worth doing, history worth reading, and Scripture worth heeding.

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. My hope in bringing these talks together is to provide a few nuggets of insight, perhaps even wisdom, that readers will find helpful at different stages in their lives and careers. I have also tried to share some of the ideas and experiences that have helped to shape me and my work over the past six decades—yielding to autobiographical impulses that have started to kick in as my thin hair grays and my gray matter thins. What follows are a few sample texts from this collection.

A Whale for the Killing

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 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 motorboats, sometimes tearing the back of the beast with their propellers. 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 propeller 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 ghettos. 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.

Unwanted Children

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 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.

Spare the Rod!

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 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’ 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.

The Freedom of Silence

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 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 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.

The Cathedral of the Law

A passage in a late medieval diary 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.

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.

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