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BOOK REVIEW SYMPOSIUM: JOHN WITTE, JR., *CHURCH, STATE, AND FAMILY: RECONCILING TRADITIONAL TEACHINGS AND MODERN LIBERTIES*

FAMILY LAW ISOLATIONISM AND *CHURCH, STATE, AND FAMILY*

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Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties. By John Witte, Jr. Cambridge: Cambridge University Press, 2019. Pp. 454. $130.00 (cloth). ISBN: 9781316882542.

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INTRODUCTION

The United Nations' Convention on the Rights of the Child, or CRC, turns thirty this year. Adopted by the UN and opened for signatures on November 20, 1989, the CRC met a warm embrace by the international community: within a year, twenty nations had ratified it, and it entered into force in September 1990.[1] When the United States signed the CRC in 1995, nearly all of the world's nations had already ratified it. By the mid-2000s, a common refrain among academics and activists was that the United States was joined only by Somalia and South Sudan in failing to ratify the CRC. That changed in 2015, when Somalia and South Sudan ratified the CRC. Now, the United States stands alone.

To understand the United States' committed and deliberate family law isolationism, one need look no further than John Witte's latest book, *Church, State, and Family*, and especially the chapter "Why Suffer the Children? Overcoming the Modern Church's Opposition to Children's Rights." The book charts the centrality of the marital family, even as the law allows couples to privatize their marital and intimate arrangements, as Brian Bix discusses at length in a companion reflection. Throughout, Witte conveys the thick shield erected by state laws around the family, which have allowed the family to serve, in his words, as a "cradle of conscience, chrysalis of care, and cornerstone of ordered liberty" (i).

On the specific question of the CRC's ratification by the United States, Witte aptly paints the pushback to the CRC by religious groups and by persons opposed to government intervention in the family. CRC skeptics see the family as a private domain outside the government's reach.

1 United Nations Convention on the Rights of the Child, Sept. 2, 1990, 1577 United Nations Treaty Series 3, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#2.

Witte probes critics' fear that freedoms granted children in the CRC would restrict the authority of parents to shape and mold their children. These guarantees include

- the right to "form[] his or her own views" and "the right to express those views freely";
- the "right . . . to seek, receive and impart information . . . of all kinds";
- the "right . . . to freedom of thought, conscience and religion";
- the "rights . . . to freedom of association and to freedom of peaceful assembly";
- the right to "his or her privacy . . . or correspondence"; and
- the right to "mass media" and "access to information and material . . . aimed at the promotion of his or her social, spiritual and moral well-being." (249, citing CRC, arts. 12, 13, 14, 15, 16, 17)

Although tempered by "the strong presumption of the CRC, stated in Articles 5 and 27, that the state must respect the rights and duties of parents to provide direction to their children in exercising all of their rights, including freedom rights," critics worry that "categorically stated children's rights" will not bend to that presumption over time (249).

Citing one of the preeminent family law scholars in the world, his Emory University colleague Barbara Woodhouse, Witte contends that "in most cases of routine conflict between a child's freedom right and a parent's rights to control the exercise of that right, the parent's wishes will prevail." The state could easily intervene, for instance, when "the parents' decision was not consistent with the child's evolving capacities and/ or was harmful to the child," such as when a parent for religious reasons refuses to consent to a "life-saving blood transfusion" for a child (249, quoting Woodhouse).

Witte very sensibly concludes thus: "Courts usually hold for a child over the parents' objections when the child's life or limb is in danger. This strikes me as correct: a child's right to life (the most fundamental right) has to trump a parent's rights if there is a direct conflict, and in cases of emergency the state should have the power to step in to save that child's life" (249–50).

And he candidly notes, "[c]onflicts are harder to resolve when the stakes are lower and involve non-life-threatening tensions between a parent and an older child who is sufficiently mature to make a decision and opposes the parent's wishes" (250). He gives as an example the conversion of a child's parents from one religion to another—and whether the parent should be permitted to drag the child from the family's old faith to its new. Whether parents must acquiesce to a child's decision to alter the child's gender is a second example.

In both instances, Witte weighs in on how the tension over parents' or children's rights should be resolved. Giving parents room to decide what happens with a child's gender dysphoria "until their child is an adult and can make his or her own decisions does not strike [him] as a violation of the child's rights, especially given that many such procedures are irreversible" (250). Likewise, Witte concludes, "[p]rotecting a child's desire to continue on the peaceable religious path of his or her youth does not strike [him] as a violation of parental rights, given the child's fully protected right to convert to another faith later on, including perhaps the new faith of the parents" (250).

Witte ultimately argues in favor of "qualified ratification" of the CRC, emphasizing "the broad profamily ethic that informs both the CRC and many earlier international human-rights platforms going back to the Universal Declaration of Human Rights of 1948" (242). He believes that "the CRC captures some of the best traditional Western legal and theological teachings on marriage, family, and children" (242).

In various places, Witte suggests that state law would reach the same result as does the CRC. For instance, on corporal punishment, where social conservatives have hotly faulted the CRC as preventing families from "train[ing] up a child in the way he should go," Witte believes that the CRC's prohibitions are best aimed at severe beatings and whippings, outrageous sexual violations,

and even military exploitation of children, but not at mild spanking or grounding of a child, as the committee charged with implementing the CRC has suggested.[2] The most egregious treatment of children today constitutes assault and battery, Witte says. Because this is so, the "CRC reflects those legal commonplaces and encourages states without such criminal protections to enact them." Witte continues: "It strains belief that Christian parents or teachers would insist on a unique religious right to harm their children severely but to be exempt from charges of aggravated assault and battery or felony child abuse (253–54).

IF ONLY THE LAW, AND PARENTS, WERE SO SENSIBLE

Although the United States Supreme Court has described the parent-child relationship as a "fundamental" one, it has bracketed parental authority over children. A careful reading of the four cases often invoked as proof of thick parental rights to the care, custody, and control of minor children and dependents—*Meyer v. Nebraska, Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary, Prince v. Massachusetts*, and *Wisconsin v. Yoder*—shows that states *may wield* their police power against a "parent's claim to control of the child" when harm to children is likely to result, even if parents claim religious or cultural reasons for placing their children at risk.[3] But states do not always act so protectively. In fact, states have erred far on the other side. Many states *authorize* parents to engage in childrearing practices that carry significant risks to their children. Parents literally hold the child's life in their hands.

In Idaho, for example, state officials calculate that the number of child deaths in the Followers of Christ's community in Canyon County is ten times that for the rest of Idaho.[4] This Christian sect has become infamous for the number of child deaths that occur because parents persist in healing children afflicted with ordinary illnesses by "faith alone." Although statistics about death from faith healing are hard to come by, a 1998 national study published in *Pediatrics* reviewed 172 child deaths in the United States from 1975 to 1995 in which faith-healing parents denied their children conventional medical care. Of the 172 children who died, 146 had a 90 percent chance of survival if they had been treated using modern medicine. Sixteen children may or may not have survived if treated with modern medicine. Only 10 of the 172 children—roughly 5 percent—would likely have died even if the parents had used modern medicine to treat their condition.

Tragic cases of children dying at the hands of their parents flout the no-harm principle that bounds both religious liberty and parental rights. These cases do not follow the sensible lines Witte sketches. But these outcomes are fully consonant with state law.

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2 United Nations Committee on the Rights of the Child, General Comment No. 8, CRC/C/GC/8 ¶ 11 (March 2, 2007), https://www.refworld.org/docid/460bc7772.html ("The Committee defines 'corporal' or 'physical' punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ('smacking,' 'slapping,' 'spanking') children, with the hand or with an implement—a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.").

3 Robin Fretwell Wilson & Shaakirrah Sanders, *By Faith Alone: When Religion and Child Welfare Collide*, *in* THE CONTESTED PLACE OF RELIGION IN FAMILY LAW 344 (Robin Fretwell Wilson, ed., Cambridge University Press, 2018).

4 *Id.*

CRADLE OF CONSCIENCE, CRADLE OF ABUSE

In swaths of the United States, states permit their citizens to engage in conduct that leads to the wholly preventable deaths of their own children. Eight states give parents a religious defense to negligent homicide, manslaughter, and capital murder when their child dies because they elected to treat an illness "by faith alone."[5] Seventeen states give parents religious exemptions to child endangerment or neglect charges for acts that would otherwise be a felony. These laws provide immunity to parents from child neglect and child abuse laws.

True, as Witte notes, the weighing of competing interests here would seem easy in one sense. On one side, the child has the most significant of fundamental rights at stake, her life. On the other, are parents' interests in parenting, privacy, and autonomy from the state, and transmitting and norming their child's values. Whether the child's right is seen as fundamental or whether the parents' rights have constitutional import as religious values or through the parent-child relationship may not matter much in the end—the state will surely have a compelling government interest in safeguarding a child's life when parents will not.

But states have taken from themselves the ability to safeguard children. This stems in part from the difficulty of reaching into insular communities to better protect children. Prosecuting Followers of Christ and other faith-healing parents has not eradicated the practice. And the state cannot easily take into custody every child in Canyon County or any other community simply because a child may, at some time, become gravely ill and not be treated. By many accounts, the families are loving and otherwise functioning well. Instead, more bridges must be built to reach into communities that treat "by faith alone," so that the state can act protectively once illness strikes. And that requires trust.[6] That no good answer exists may explain why these ill-conceived laws have proven surprisingly resistant to legislative revision.[7]

THE STATES AS LABORATORIES OF EXPERIMENTATION

U.S. states are often lauded by jurists as laboratories of experimentation. In Justice Louis D. Brandeis's famous articulation, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[8] However, the directions that the states strike out in on their own are not always positive, or protective of children.

This variability in policy decisions made by the 50 states appears in a second realm explored by Witte, corporal punishment. Here, Witte wildly underestimates America's commitment to family law isolationism. As with faith healing, the wild variability in approach by the states means that many place a heavy weight on the scale for protecting parents' discretion over protecting children from potential abuse.

Just six states follow the hardline view against any punishment of children recommended by the CRC—namely, that any willful act that causes harm, physical injury, pain, shame, or humiliation

5 THE CONTESTED PLACE OF RELIGION IN FAMILY LAW appendix 1 (Robin Fretwell Wilson, ed., Cambridge University Press, 2018).

6 Wilson & Sanders, *supra* note 3, at 344–45.

7 *Id.* at 341.

8 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

constitutes abuse of a child.[9] In Massachusetts, for example, it is "abuse" to willfully inflict injury, unreasonably confine a child, intimidate a child, including with verbal or mental abuse, or to punish a child "with resulting physical harm, pain or mental anguish or assault and battery"; however, the verbal or mental abuse must have been knowing and willfully "directed at a specific person."[10] This description includes a lot of the parenting that many parents engage in every day.

The overwhelming majority of states, however, simply deem a wide range of disciplinary behaviors to be outside definitions of illegal child abuse. Thirty-three states and the District of Columbia allow the use of "reasonable" or "not excessive" force.[11] Colorado law, as one example, expressly permits parents and caretakers of "a minor [to] use reasonable and appropriate physical force upon the minor . . . when and to the extent it is *reasonably necessary* and *appropriate* to maintain discipline or promote the welfare of the minor."[12] Although the choice to discipline the child at all must be a reasonable one, this is a far cry from an outright ban on discipline. The District of Columbia, hardly a hotbed of social conservativism or religious conservatives, permits parents to use "reasonable" discipline "provided, that the discipline is reasonable in manner and moderate in degree and otherwise does not constitute cruelty."[13]

In eight states, discipline must poses substantial risk of death or serious injury to a child before it slips over from permitted behavior to prohibited child abuse.[14] Kentucky treats as "justifiable" a parent's "physical force . . . upon another person" in her care when she "believes that the force used is necessary to promote the welfare of a minor" and "is not designed to cause or known to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain, or extreme mental distress."[15]

Three states, Alaska, New York, and Texas, prohibit the use of deadly force.[16] For example, New York expressly permits "[a] parent, guardian or other person entrusted with the care and supervision of a person under the age of twenty-one [to] use physical force, but not deadly physical force, upon such person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person."[17]As before, the parent disciplining the child must still be reasonable in the choice.

Altogether, forty-four states and the District of Columbia permit corporal punishment by parents. Some specifically contemplate the need to "safeguard" a child's welfare by preventing or punishing the child's misconduct.[18] Many, including Missouri, draw a sharp line between "spanking"

9 *See* The Contested Place of Religion in Family Law, *supra* note 5, appendix 1 (listing Delaware, Florida, Iowa, Massachusetts, North Carolina, and Vermont).

10 Mass. Gen. Laws chapter 111, § 72F (2016).

11 *See* The Contested Place of Religion in Family Law, *supra* note 5, appendix 1 (listing Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

12 Colo. Rev. Stat. 18–1-703 (2016) (emphasis added).

13 D.C. Code § 16–2301 (2015).

14 The Contested Place of Religion in Family Law, *supra* note 5, appendix 1 (listing Hawaii, Illinois, Kentucky, Michigan, North Dakota, Pennsylvania, and South Carolina).

15 Ky. Rev. Stat. § 503.110 (West 2015).

16 The Contested Place of Religion in Family Law, *supra* note 5, appendix 1.

17 N.Y. Penal Law § 35.10 (McKinney 2016).

18 Neb. Rev. Stat. § 28–1413.

and other acts: "Discipline including spanking, administered in a reasonable manner, shall not be construed to be abuse."[19]

CONCLUSION

Witte admirably unpacks the difficulty of bringing U.S. law into the norms adopted internationally about children's rights. He admirably argues for sensitivity and charity in a realm dominated by rights language—rights of parents and rights of children and rights of the state. Those concerned for the welfare of children, both in the United States and abroad, fervently believe that, if only the United States adopted the CRC, matters would improve for children dramatically. But the norms of respect for children contained in the UN Convention on the Rights of the Child represent sharp breaks from the democratically arrived-at, if sometimes ill-conceived approaches hammered out by U.S. states in its federalist system.

Adding the UN Convention on the Rights of the Child to the mix of U.S. laws may throw the law of many states into question. To be clear, I believe that many of these laws—whether understood as protecting religious liberty or protecting the parent-child relationship—have overprotected parental prerogatives. But if one wants to understand the United States' continued and deep family law isolationism, it *ironically* stems from the fact that the states themselves have acted as laboratories of experimentation, but not always for good.

19 Mo. Rev. Stat. § 210.110 (2015).