

PART 3

Faith, Law, and Freedom Historically and Today



Human Dignity and the Christian Foundations of Law and Liberty

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There are no *ordinary* people.
You have never talked to a mere mortal.
[I]t is immortals whom we joke with,
work with, marry, snub, and exploit.¹



1 Introduction

Two opposite narratives have been built around the complex relationship between law and Christianity in historical perspective. On one hand stand those who see modernity and postmodernity as a rupture from the previous ages. Michel Villey and Paolo Grossi are two of the most prominent thinkers who have embraced this hermeneutic of rupture, noticing a steady decline in the interrelationship between law and Christianity through the centuries. Through different paths, and each at its own pace, most legal and political systems of the West would have distanced one from the other.² On the other hand stands another line of impressive scholars, including Harold Berman and Brian Tierney, who have dug into the ground of contemporary legal thinking, uncovering and retrieving the religious sources of today's Western legal thought.³

1 C. S. Lewis, *The Weight of Glory* (New York: Harper One, 1949), 46.

2 Michel Villey, *La Formation de la Pensée Juridique Moderne* (Paris: PUF, 2006); and Paolo Grossi, *Mitologie Giuridiche della Modernità* (Milano: Giuffrè, 2001, 2005, and 2007).

3 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983); id., *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 2003); and Brian Tierney, *Religion, Law and the Growth of Constitutional Thought, 1150–1650* (Cambridge: Cambridge University Press, 1982).

This strand of thinking traces back in history notions and mechanisms that still shape the law.

Within the academic circles that read the trajectory of legal history as a rupture from the past, scholars are also divided between those who mourn the end of Christian culture and those who welcome secularization. Some have read the legal developments of modernity as the progressive liberation of humankind from Christian shackles. In Christopher McCrudden's mocking terms, "the bare bones of an 'orthodox' narrative" of rupture would be that "in the beginning was the Enlightenment which led to the American and French Revolutions, which led in turn to the adoption of human rights as a necessary part of modernity."⁴ On the other extreme of the academic spectrum that believes in this rupture, some complain that modernity lost most of the values that the premodern era cherished. Opinions vary also about the degree to which the contemporary age has betrayed or is in keeping with its origins. The scholars who believe that the Western world is almost irredeemable because it lost connection with its ancestry disagree with those who are of the view that the break from the past is not sufficient. However, whether this sort of scholars mourn the past, celebrate postmodernity, or want to push secularization further, they all agree on a basic fact: the end of Christendom, as Chantal Delsol recently called it. In a few words, they all believe that our age has repudiated the four components of Christian civilization: truth, hierarchy, authority, and constraint.⁵

John Witte, Jr.'s scholarship hardly fits with either the camp of those nostalgic about the past or those who hail secularization. He is safely within the field of those who believe that there is a strong and healthy connection between the past and the present—that contemporary ideas about the law, legal values, and politics in the West are imbued with the past. Despite this positive reading of history, however, he has never turned a blind eye to what he believes to be among the fundamental legal challenges of our time, nor has he overlooked the flaws and the shortcomings of the Christian legacy. Sometimes he has been explicitly critical of the Christian tradition—his tradition—when he believed that it was wrong. But he has always tried to keep a bird's eye on contemporary developments by looking at them in light of the longstanding tradition. He has not simply argued that contemporary Western civilization owes a lot of its achievements to its religious past—that religion occupies a primary place in the genealogy of rights. His scholarship rather sheds light on

4 Christopher McCrudden, "Human Rights Histories," *Oxford Journal of Legal Studies* 35 (2015): 179–212, at 182.

5 Chantal Delsol, *La Fin de la Chrétienté* (Paris: Les Éditions du Cerf, 2021), 17.

contemporary issues precisely by taking a look at the past.⁶ For Witte, the past does not always have a normative dimension; but it is always teaching us something. In his capable hands, legal history—especially the kind that combines religious and secular perspectives on laws—has a hermeneutic value, not a justificatory one.⁷

Faith and the family in the West have drawn much of Witte's attention for a conjunction of reasons, some of which this chapter investigates. Faith and family are among the main pillars on which he has built much of his understanding of Christianity and the Western legal tradition. As Witte has persuasively shown, they are the social, cultural, and legal environments in which human beings find meaning and a place for themselves as well as for those around them. In a nutshell, they are the primary institutions through which human beings become self-aware and aware of others, as they respond to the very basic human need to belong and to experience loving and being loved.⁸

Witte's studies in religion and the family have thus contributed to an increasingly neglected aspect of the crucial constitutional notion of human dignity: the need for humans to socialize and create bonds. By looking at what protects, nurtures, and educates human beings, Witte has in fact uncovered the relational angle of human dignity.

This chapter identifies the standard narrative of modernity and secularization on human dignity and how Witte's scholarship challenges that narrative. To exemplify—and criticize—the conflict between a secular and a religious reading of human dignity, the chapter then briefly considers post-World War II's constitutional settings and the judicial reasoning that has authorized euthanasia in some jurisdictions in recent years. After focusing on the key role of religion and family in nurturing a sense of the dignity of human beings, the chapter concludes with observing that Witte's scholarship stands out for its compelling arguments in favor of religions and the family without being blindly complacent about either.

6 McCrudden, "Human Rights Histories," 180.

7 John Witte, Jr., introduction to *Christianity and Human Rights: An Introduction*, ed. John Witte, Jr. and Frank S. Alexander (Cambridge: Cambridge University Press, 2010), 13. See further id., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids: Eerdmans, 2006), 1–30, 460–65, setting out his theory of history.

8 See esp. John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 2nd ed. (Louisville, KY: Westminster John Knox Press, 2012); id., *Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties* (Cambridge: Cambridge University Press, 2019). See further the chapter herein by Helen M. Alvaré.

2 God, Dignity, and Modernity: Challenging the Mainstream

With the rise of dignity as a key legal concept in the twentieth century, a stream of scholarly and judicial rumination on this topic has almost flooded the field of constitutional studies. Such a pervasive concept has not led to a shared understanding of human dignity, however. Many commentators now believe that human dignity has become a sort of signpost—a symbol that refers to the essence of human beings but largely fails to capture it.⁹ Instead of simplifying and clarifying the debate about rights and the necessity of protecting them, narratives of human dignity now abound, often conflict, and even contradict each other, blurring the contents and contours of the concept as well as of the human rights that the notion is supposed to cover.

A large consensus has developed around the belief that the notion of dignity has sidelined religion, putting human beings at the center of the legal and political edifice and depriving legal reasoning of a transcendent dimension. In her influential book, Catherine Dupré embraces the usual—if not the standard—narrative about the historical development of dignity, which largely overlaps with the one criticized by McCrudden. In her view, dignity took off slowly but steadily with the birth of modernity in Europe: intellectual titans prepared the ground for the widespread awareness about the necessity of protecting human beings that arose from the ashes of World War II. Dupré identifies the pivotal figures and moments of the multicentury legal journey that dignity as a legal concept underwent, from Pico della Mirandola to the French Revolution and Immanuel Kant. She argues that it was largely because of the contribution of these thinkers and the cultural and political turmoil that decapitated the French king, that the concept of dignity acquired a new, modern meaning. Perhaps even more important, through this journey the concept took on a secularized, horizontal meaning and was deprived of its once largely transcendent value. “[D]ignity does not proceed from God, it is not a quality given by God to man as a divine creation and creature,” she writes. On the contrary, “dignity proceeds from man’s inner worth and his unique ability to set his own ends, namely, to make his own laws.”¹⁰ This understanding of dignity is traceable within Pico’s *De Dignitate Hominis* (1496), which magnified the capacity of individuals to make their own destiny, and later peaked with Immanuel Kant, whom also John Rawls celebrated as the main innovator in

9 Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights,” *European Journal of International Law* 19 (2008): 655–724, at 678.

10 Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Oxford: Hart, 2015), 35.

the development of the subject. For Rawls, Kant clarified that “the ground of dignity is the capacity to make universal law and to act from the principle of autonomy. This autonomy reflects the autonomy (or the supremacy) of pure practical reason.”¹¹

This reading of dignity does not just make the reference to God useless. Such a narrative of secularization even rules out any divine foundation or reading of dignity as plainly incompatible with its modern and contemporary developments. In fact, for Catherine Dupré, “a constitutional definition of human dignity” becomes “ontologically incompatible with a religious definition.” This is not just a matter for philosophers and theologians to debate. “This incompatibility,” she writes,

goes to the heart of European constitutionalism, which is based on the paradigm that democracy is about taking the ultimate political power away from God and his or her representative on earth to give it to human beings. It is the rejection of God from the political equation that historically made it possible to turn human beings into citizens and actors in their political destiny.¹²

In a few words, by choosing constitutions, modernity repudiated God and human submission to Him.¹³

3 Misunderstanding History, Law, and Religion

Reading legal history as a clash between a religious understanding of dignity that praised passivity and submission to God, on one hand, and a horizontal, purely immanent reading of dignity that liberated humankind, on the other, is dubious from a biblical point of view. As Rabbi Joseph Soloveitchik once noted, the idea of human beings as submissive hardly squares with the Jewish Bible: when the Psalmist praises God for having made man “a little lower than the angels,” crowning him with honor and dignity, he celebrates “man’s capability of dominating his environment and exercising control over it.”¹⁴ Even

11 John Rawls and Barbara Herman, *Lectures on the History of Moral Philosophy* (Cambridge, MA: Harvard University Press, 2000), 210.

12 Dupré, *The Age of Dignity*, 19.

13 Remo Bodei, *Dominio e Sottomissione* (Bologna: il Mulino, 2019), 221.

14 Joseph P. Soloveitchik, *The Lonely Man of Faith* (New York: Random House, 1965 and 2006), 14–15.

the selection of pivotal figures that would have heralded the modern, secular understanding of human dignity is debatable. As Michael Rosen noted, the “Kantian man is not cut off from God by an act of proud disobedience against a perceived tyrant, but, to the contrary, is essentially tied to him.”¹⁵

Understanding modern dignity purely in secular and horizontal terms also betrays the complexities and dismembers the holistic approach that projected the idea of human dignity on a global scale in the second half of the twentieth century. In the early 1950s, Charles Malik, a member of the committee that drafted the Universal Declaration of Human Rights and an outspoken supporter of the idea of including human dignity within the text, asked himself “What is the ultimate trouble with the world today?”—only to reply, “It is the loss of the dimension of transcendence.”¹⁶

Pitting modernity against premodernity under the prism of secularization is misleading also from a legal point of view, as it hardly squares with the reality of written constitutions that first employed the notion of human dignity. The document that has garnered the reputation for kicking off the success of dignity as a constitutional concept after World War II is the Basic Law of the German Federal Republic (1949), which is still in force and famously enshrines the concept of human dignity in Article 1. Interestingly, the Preamble to the Basic Law begins by stating that Germans were “Conscious of their responsibility before God and man.” The best known instantiation of human dignity as a constitutional concept thus did not pit a secular against a religious reading of dignity, but actually hosted both.

The divorce between the transcendent and the material dimension of human dignity eventually happened in several jurisdictions. But this process developed rather late in modernity and postmodernity, and selectively picked some aspects of the notion while overlooking others. In British as well as Canadian courts, for instance, there is evidence of the dissociation between the secular and religious component of dignity in cases that have dealt with euthanasia and assisted suicide.¹⁷ The religious component of dignity is often expressed through the notion of “sanctity” and identifies the intangibility of human life. Sanctity is thus juxtaposed to the concept of dignity, which signifies

15 Michael Rosen, *The Shadow of God* (Cambridge, MA: Belknap Press of Harvard University Press, 2022), 193.

16 Charles Malik, “The Near East: The Search for Truth,” *Foreign Affairs* 30 (1952): 255–64, at 264.

17 *Airedale NHS Trust v Bland* [1993] AC 789; *R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent), et al* [2014] UKSC 38; *Rodriguez v British Columbia* [1993] 3 SCR 519; *Carter v Canada* [2015] 1 SCR 331.

the human right to make fundamental decisions about oneself, including the control over one's bodily life.

The selective narrative that pits sanctity against dignity is both the cause and the consequence of the scholarship that pits modern and postmodern rights against those of earlier times.¹⁸ Distinguishing sanctity from dignity, in fact, magnifies the gap between an understanding of dignity as untouchable and one that prizes individual autonomy, thereby corroborating the impression that Western legal history translates in terms of dissociation between the secular and the religious planes.

John Witte's viewpoint could not be further from this approach. He does not survey history—and especially legal history—looking for signs of human liberation from legal constraints and from servitude to God. Using a metaphor, he has insisted that the Western tradition has seen the *genesis* of rights “in the accounts of human nature and natural order,” as taught by religious and nonreligious texts of antiquity. The *exodus* phase marked the transition of “primordial rights and liberties in the gradual development of public, private, penal, and procedural rights and liberties for individuals and groups set out in legal, canonical, and other authoritative texts.” Finally, the *deuteronomy* “of rights and liberties in modern times” peaked with the Universal Declaration of Human Rights in 1948.¹⁹

What Witte particularly values in the long historical process that led human societies into modernity and then postmodernity, however, is the insistence on human liberty. A great deal of his scholarship, after all, focuses on the historical roots of liberty as modernity understands it. In particular, he acknowledges the historical importance of Protestantism in calling “for full freedom ... freedom of the individual conscience ... freedom of political officials from clerical power and privilege.... ‘Freedom of the Christian’ was the rallying cry of the early Protestant reformation.”²⁰ The problem, of course, is what the West has made of such a great deal of liberty.

18 Timothy P. Jackson, *Political Agape: Christian Love and Liberal Democracy* (Grand Rapids: Eerdmans, 2015), 88–95, reflects on the dissociation between “sanctity” and “dignity” and links sanctity back to religious thinking. See further the chapter by Timothy P. Jackson herein.

19 John Witte, Jr., *The Blessings of Liberty* (Cambridge: Cambridge University Press, 2021), 290.

20 John Witte, Jr., *Faith, Freedom, and Family: New Essays on Law and Religion*, ed. Norman Doe and Gary S. Hauk (Tübingen: Mohr Siebeck, 2021), 67.

4 The Image of God and the Nature of Man

Assisted suicide and euthanasia are particularly thorny issues. It is therefore little or no surprise that it was within such contexts that a gap between sanctity and dignity developed. After all, the sense of untouchability of human life and the need to pursue the self-determination of the individual were probably bound to collide in such areas. The emphasis on personal autonomy and the necessity of clearing the way for individuals to make their own independent choices, however, is traceable much more widely.

The issue of autonomy has occupied gigantic intellectuals of the twentieth century, such as Joseph Raz. Raz argued that, although distinctions can be drawn between liberalism and individualism, the two historically “grew together.” In fact, he added, “people’s well-being is promoted by having an autonomous life.”²¹ In the twenty-first century, Francis Fukuyama similarly noted that “[l]iberal societies confer rights on individuals, the most fundamental of which is the right to autonomy, that is, the ability to make choices.”²² Nowadays, influential constitutional theories often understand rights as instrumental to individual autonomy. Rights—the argument goes—would leverage “the importance for autonomous persons of being able to choose one’s intimate partners, utter one’s political views, and control what happens to one’s body, and take ... the importance of these interests as the reason for protecting them.”²³

For the detractors of such a logic, the emphasis on the autonomy of human beings and the process of secularization have developed hand in hand to the extent that they have become indissociable. The shift from a transcendent to a horizontal notion of dignity complements an individualized version of dignity, and together they make up the hallmark of late modernity and postmodernity. “[P]lacing the individual in the centre of political attention” would be a characteristic of our times, and would have “contributed to the emergence of the self-centered individuals.”²⁴ The contemporary legal language, loaded with an endless and ever-expanding list of rights and extreme individualism, would belong to a secularized world.

21 Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 17 and 198.

22 Francis Fukuyama, *Liberalism and Its Discontents* (New York: Farrar, Straus, and Giroux, 2022), 1.

23 Kai Moeller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012), 57.

24 J. H. H. Weiler, “Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay,” in *Philosophical Foundations of European Union Law*, ed. Julie Dickson and Pavlos Eleftheriadis (Oxford: Oxford University Press, 2012), 158.

John Witte has taken issue with both these narratives throughout his scholarly work.²⁵ By uncovering the legacy of key legal and political concepts and institutions, he has shed light not just on the limits of pitting modernity and postmodernity against the past, but also on how lively and useful the past is for understanding and living a full life in the twenty-first century. He is neither optimistic because the West abandoned religion and the moral values and traditions that come with it, nor pessimistic because those values cannot be retrieved. Without any nostalgia for the past, he has provided his readers and the public with fresh perspectives on which battles are worth fighting—and which resources the West still has in its pocket. On two resources he has put special attention, often emphasizing their mutual relationships: faith and the family.

5 The Secular Legacy of Christianity

John Rawls famously addressed the place of religion in the public sphere later in his life, when he argued that religiosity could survive modernity and postmodernity, but needed to be confined to specific precincts. In his view,

Political liberalism does not dismiss spiritual questions as unimportant, but to the contrary, because of their importance, it leaves them for each citizen to decide for himself or herself. This is not to say that religion is somehow “privatized”; instead, it is not “politicized” (that is, perverted or diminished for ideological ends). The division of labor between political and social institutions, on the one hand, and civic society with its many and diverse associations (religious and secular), on the other, is fully maintained.²⁶

What Rawls appended to his earlier theories has actually been at the forefront of Witte’s scholarship. But Witte’s argument is more daring and comprehensive than Rawls’s later belief. Witte does not simply argue that social life must accept religious people and religiosity as part of society, lest such individuals be cut off from it. He rather argues that there should be room for religious people, and for Christians in the West in particular, because there is room—and, in fact, need—for religion and its spirit in today’s legal discourse.

²⁵ Witte, *The Blessings of Liberty*, 291.

²⁶ John Rawls, *The Law of Peoples with “The Idea of Public Reason Revisited”* (Cambridge, MA: Harvard University Press, 2003), 127.

Witte indirectly calls on Christians *qua* Christians to participate at a time when the dominant liberalism can become harmful. On a variety of levels, Christianity in the West can stimulate personal and social awareness, especially about one specific fact: that human beings are relational. They do not simply focus on themselves. They partake in a bigger picture, and Christianity can remind them of this. Faith can nurture among people a sophisticated sense of their “moral duties” toward the transcendent and of the “duties of love” toward the neighbor. Taking care of people means heeding their call as well as the call that comes from God, as Witte clarified when he wrapped up his spectacular legal analysis of the Protestant Reformation. He then emphasized Martin Luther’s view that “[f]reedoms and commandments, rights and duties, belong together in Luther’s formulation. To speak of one without the other is ultimately destructive. Rights without duties to guide them quickly become claims of self-indulgence. Duties without rights to discharge them quickly become sources of deep guilt.”²⁷

This mutually sustaining framework of horizontal human relationships among peers and a vertical dynamic with their creator does not simply suggest a Christian twist to contemporary legal systems. It is not an intellectual tool that tries to reconcile modern and postmodern Christians with the place they inhabit while causing no harm to the rest of the society by balancing modern rights with Christian duties. Thanks to his excavations in legal history, Witte has persuasively argued that rights claims themselves can be seen as embodying love of God and neighbors.²⁸ Rights, after all, are the offspring of centuries-long intellectual developments that are rooted in religious thinking, which have given legal substance to the duty to take care of oneself and of anyone else. Religious values have morphed into a web of legal claims and devices. Legal systems of the West are not just capable of accommodating religious needs: they exude religious culture.

John Witte’s line of reasoning does not defend Christianity against modernity. He is actually defending modernity and postmodernity by reclaiming its true nature. Witte thus does not subscribe to the idea that liberalism failed as a political and philosophical project,²⁹ or that the language of rights should

27 John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002), 302.

28 *The Blessings of Liberty*, 297.

29 Patrick J. Deneen, *Why Liberalism Failed* (New Haven: Yale University Press, 2018).

be rejected³⁰ or replaced with a focus on the common good.³¹ Such theories are critical of the logic, the language, and the institutional frameworks that modernity generated, as they would inevitably harm traditional communities and values. In Patrick Deneen's words, "the underpinnings of our inherited civilized order—norms learned in families, in communities, through religion and a supporting culture—would inevitably erode under the influence of the liberal social and political state."³²

On the contrary, Witte's argument is that there is room to improve the status of Western civilization by retrieving its religious roots. In his work, arguing in favor of religion and for a public role of religions is defending modernity, not undermining it or fantasizing about an alternative universe where Pico, the French Revolution, or Kant never materialized. Retrieving the true nature of liberalism is retrieving a role for religions. Religion and modernity should not be pitted one against the other—they can mutually sustain each other.

Make no mistake. John Witte's understanding of faith and the legal and political institutions that it brought about does not equate to a blank check for religious discourse and institutions. Religion does not always shed light on darkness—it may also project darkness, blinding people to their own experience and to people's dignity. His appraisal of the religious contribution to secular law and to the Western world more broadly includes what he has called a healthy "hermeneutic of confession:" a process through which religions take responsibility for the horrible, painful mistakes that they made in the past and may continue to make.³³

Professor Witte calls for religious people to engage in such a hermeneutic of confession, as he once made it plain when he explained how he came to reflect on the longstanding tradition of penalizing illegitimate children:

"Bastards have no place in this assembly of the Lord; even to the tenth generation none of his descendants may enter here." That was the startling admonition that I heard from the pulpit of the conservative Protestant church of my youth. These harsh words ... were intoned gravely as the final public step of banishing a single woman and her illegitimate child from our church. Even as a youth, I remember being shocked.... How could the church banish this little baby and withhold from him the

30 Nigel Biggar, *What's Wrong with Rights?* (New York: Oxford University Press, 2020).

31 Adrian Vermeule, *Common Good Constitutionalism* (Cambridge: Polity Press, 2022).

32 Deneen, *Why Liberalism Failed*, x11.

33 Witte, introduction to *Christianity and Human Rights*, 13.

sacrament of baptism? [W]hat would come of my little foster-brother, Robert, given his illegitimate birth? Surely, he would be banished soon, too. I remember being terrified.³⁴

This painful memory cuts across two decisive aspects of John Witte's scholarship: the role of faith and that of family, the institutions around which the life of people has gravitated for millennia. Borrowing from the marvelous Neibuhr brothers, Witte's scholarship on faith and the family is a profound reminder that "we cannot make individual liberty as unqualifiedly the end of life as our ideology asserts,"³⁵ because "[w]e have not chosen to be social beings, immeasurably dependent on our fellows, nor have we chosen our culture; we have come to consciousness in a society and among established human works."³⁶

6 Communities of Faith

One of the reasons for being optimistic about the future of religions in post-modern times is their necessity. If globalization and the global market of the twenty-first century are gone by now, what has remained is the mentality that they shaped. Michael Sandel's exploration of what he has called the *Tyranny of Merit* describes a social structure that is obsessed with economic success, career achievements, and social recognition³⁷—a toxic environment that measures human worthiness by purely horizontal metrics. Although Sandel targets the United States, many more are the countries and societies that fit the picture quite perfectly.

In an atmosphere saturated with competition, there is hardly a more important institution than religion and religiosity. The late Chief Rabbi Jonathan Sacks put it adamantly when he wrote in the early 2000s that

the global market tends to reduce all things to economic terms. Religion offers a different kind of solace. It speaks of the dignity of the person and the power of the human spirit. It tells us that we are more, or other,

34 John Witte, Jr., *The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered* (Cambridge: Cambridge University Press, 2009), xi.

35 Reinhold Niebuhr, *The Irony of American History* (1952), Italian trans. *L'Ironia della Storia Americana*, ed. Alessandro Aresu (Milano: Bompiani, 2012), 174.

36 H. Richard Niebuhr, *Christ and Culture* (San Francisco: Harper, 1996), 250.

37 Michael J. Sandel, *The Tyranny of Merit* (New York: Farrar, Straus, and Giroux, 2020), 12–13.

than what we earn or what we buy. In the fast-moving world economy there are winners and losers. Life takes on a ruthless, Darwinian struggle for survival. Religion reminds us that there are other sources of self-worth. We are not necessarily set against one another in a win-or-lose competition.³⁸

John Witte's decades-long defense of religion and religious freedom is analogously based on anthropological premises. In Witte's writing, religion gives shape to the personal and collective quest for truth and meaning—from an intellectual as well as existential point of view. Religion provides people with a moral compass. It proposes to them a virtuous life. Most interestingly, it provides people with a transcending social context—a dimension that the early stage of dignity in the twentieth century had crystal clear. Religious institutions cannot subsist as self-centered: religions connect generations, cut across time and space, and project themselves and their peoples to a plane that is beyond human control.

What makes the contribution of religions to human dignity so unique is both their horizontal and their vertical components. Their horizontal aspect surfaces in their institutions: they have legal orders; they set obligations and rights; they have judicial procedures; they devise ways of redress against injustice. But all these aspects find roots in their vertical component—in their reference to the ultimate being.

Witte's scholarship is extremely careful in keeping both the vertical and horizontal components of religions within the picture. He certainly values religious legal orders and their institutional dimensions more broadly—but he never embraces a merely cultural understanding of religion and religious values. Religions' importance and relevance are inseparable from their vertical claim. They are statements about what is worth pursuing, living, and dying for.

His focus on the transcendent dimension of religion is also critical because it embeds the importance of personal liberty—one of the most necessary and yet difficult achievements among religions. It is only by respecting and valuing personal liberty that religions can nurture the vertical dimension that constitutes them. Understanding them as cultural infrastructures betrays their role and overlooks the importance of personal freedom in embracing or denying religious truths: religions can force people into their horizontal dimension, but certainly not into their vertical one.

38 Jonathan Sacks, *The Dignity of Difference* (London: Bloomsbury, 2002), 39.

7 The Secular Meaning of Family

One of the main preoccupations that have kept John Witte busy for decades is the role of the family in historical and contemporary societies. He is interested in protecting the family for the goods it embeds, nurtures, and aspires to achieve, as “the essential components of family life and the ethical and cultural values that they represent are among the most salient questions in modern Western culture and liberal societies.”³⁹ Neither an ethereal institution detached from reality, nor a culturally shaped particular deprived of spiritual or legal significance, the family is the cornerstone of polities.

Balancing freedom with belonging is also one of Witte’s core preoccupations within the field of family law. The contractual component of marriage, about which he has written so frequently, is much more than a metaphor. The idea of contract within marriage fleshes out two necessary components of marriage: the personal adhesion to a set of obligations and rights, and the participation in a partnership that has its own rules, habits, priorities, and goods.⁴⁰ Freedom does not saturate marriage relations; but it is the only way to access them.

Witte’s magnum opus against polygamy is a pivotal example of his efforts to retrieve a conceptually thick understanding of family that does not overlook the importance of liberty.⁴¹ He acknowledges that “exponential changes in modern Western family laws have been, in no small part, valiant efforts to bring greater freedom, choice, and equality to public and private life.”⁴² While developments in the United States and in the West more generally have expanded the notion of marriage and family, Witte’s tour de force survey from antiquity to modernity’s option for monogamy forcefully argues that the notions of marriage and family have boundaries. They simply do not stretch as much as the notion of freedom suggests they should. Freedom itself, he argues, must not be taken in an abstract way. Polygamous marriages are hardly the offspring of free wills of individuals that encounter each other and match on equal grounds. They are born of unequal partners and generate slavery.

Marriage is just one—big—piece of a broader picture in Witte’s body of scholarship on family. Protecting family as such means protecting the very

39 Joseph E. David, *Kinship, Law, and Politics: An Anatomy of Belonging* (Cambridge: Cambridge University Press, 2020), 105.

40 John Witte, Jr., *Church, State and Family* (Cambridge: Cambridge University Press, 2019), 215–18.

41 John Witte, Jr., *The Western Case for Monogamy Over Polygamy* (Cambridge: Cambridge University Press, 2015).

42 *Church, State and Family*, 2.

possibility of human peaceful coexistence and mutual love among people outside the family. As Jonathan Sacks once noted:

The universality of moral concern is not something we learn by being universal but by being particular. Because we know what it is to be a parent, loving our children, not children in general, we understand what it is for someone else, somewhere else, to be a parent, loving his or her children, not ours. There is no road to human solidarity that does not begin with moral particularity by coming to know what it means to be a child, a parent, a neighbour, a friend. We learn to love humanity by loving specific human beings. There is no short-cut.⁴³

As an institution, the family does a critical job in making individuals reach beyond themselves. It fosters mutual care, appreciation, and respect within and across generations. It makes us discover and savor dependency. If contemporary understandings of dignity prioritize individual rights and autonomy,⁴⁴ families make it possible for human beings to discover that human dignity is not atomistic. The institution of family pushes us to understand our relational component in a very concrete, physical way: one that connects the intellect with the body, encompassing the wholeness of humanity. It is no surprise that Witte's book on the legal development of the practice and institution of adoption ends with a reminder: "children do much better when born and raised in intact marital homes."⁴⁵

Because of its critical importance, the family needs protection—from both a cultural and a legal point of view. As Witte argued, "[h]uman families ... need broader communities and narratives to stabilize, deepen, and exemplify" their "natural inclinations and rational norms. They need models and exemplars of love and fidelity, trust and sacrifice, and commitment and community to give these natural teachings further content and coherence.... [T]hey depend ultimately on positive laws and procedures when needed."⁴⁶ After all, religion, family, and policies live or perish together, forming a triad within which people learn their own dignity, the dignity of others, and the normative dimension of dignity itself.

43 Sacks, *The Dignity of Difference*, 58.

44 Nicholas Aroney, "The Social Ontology of Human Dignity," in *The Inherence of Human Dignity, Foundations of Human Dignity*, vol. 1, ed. Angus J. L. Menuge and Barry W. Bussy (London: Anthem Press, 2021), 166.

45 *The Sins of the Fathers*, 184.

46 *Church, State and Family*, 9.

8 Conclusion: John the Heretic

John Witte's scholarly devotion to legal studies about Christianity and the family is rooted in an understanding of legal, political, and social life that values these subjects as fundamental for the survival and well-being of humans in the West. Almost certainly, he would agree that "law and public policy exist *for the protection and flourishing of persons*."⁴⁷ Although very broad in its scope, this might sound as a typically conservative, even traditionalist, statement. Interestingly enough, however, Witte couples this view with a fairly optimistic view of the trajectory of law. If faith and family were among the cornerstones of Christianity and its law, they can also play a pivotal role today, as today's law is so indebted to the past.

In Witte's thinking there is no place for nostalgia. There is, however, a substantial amount of preoccupation. In his works he seems to argue that the law is not a self-sufficient framework that operates independently from human beings. Actually, law relies on human institutions and the willingness to keep up with fundamental values. Witte has insisted that the law in the West has not simply put boundaries and vested rights; it has also created obligations, stimulated care for others, and prompted individuals and groups to develop mutual relationships based on trust. John Witte's multidimensional understanding of human beings encourages an understanding of law that is also complex and multifaceted, and that invites collaborations among human beings. Law does not just provide goods; it also expects people to pursue justice and good for themselves and others.

Not being nostalgic does not mean being naive. John Witte is not convinced that legal progress is ineluctable and that the arc of history spontaneously and effortlessly bends toward justice without the need for people to bend it. In Witte's thinking, the future of Christianity and Western societies at large is in the hands of Christians themselves, as long as they accept living—and are accepted—as "members of pluralistic societies."⁴⁸ Thinkers like Rawls and Habermas put themselves to work at some point, he noted, to show that contemporary societies are capable of transcendence and of being able to accept religious discourse. Witte himself has shown why and how this is possible and even necessary.

47 O. Carter Snead, *What It Means to Be Human* (Cambridge, MA: Harvard University Press, 2020), 65.

48 *The Blessings of Liberty*, 301.

When Jeremy Waldron embarked on an analysis of John Locke's understanding of equality and its Christian roots, he was not driven merely by historical curiosity. "Our thinking—he wrote—is undeniably entangled with the issues of the day, and large parts of it ... are more or less inseparable from context, understandings, and political stakes that would not survive transposition to another time and place.... But we are also conscious that part of our discussion addresses something enduring."⁴⁹ John Witte, Jr. went beyond Waldron. He did not simply explore the past because there are permanent issues that make the past interesting to study. His works showcase that there is a legal and institutional continuity between today's West and its past—and that the West has made value-loaded choices, which is necessary to uncover to move forward.

How to move forward is a theme that John Witte, Jr. has been deeply concerned with, and to which he has contributed in his own way. Professor Witte has provided his readers with a vast array of considerations of a kind that, as he maintains, makes him "a Christian jurist and legal historian, not a Christian theologian or philosopher."⁵⁰ He seems very distant from the approach of legal and political theorists of the caliber of Carl Schmitt. Schmitt famously shed light on the religious legacy of the contemporary constitutional toolkit when he argued that constitutional concepts were secularized theological concepts that Christianity developed through the centuries. But Schmitt found continuity in concepts, not in Christianity. John Witte, on the contrary, believes that Christianity has a future—and that the future of the West is deeply intertwined with it.

Interestingly enough, for Witte, the future of Christianity in the West does not lie primarily in a smarter conceptualization of rights, freedoms, or the relationship between church and state. The future largely depends on social institutions—notably including religion and the family. Secular laws should protect such institutions, because these are the hubs within which human life meets its meaning, purpose, and unfolds, making human dignity thus tangible and visible.

Joseph Weiler once noted that through the "notion of human dignity ... [w]e all ask explicitly, or otherwise, what is the meaning of our being, of our existence. Of course, it is up to each of us, through our actions and emotions,

49 Jeremy Waldron, *God, Locke, and Equality* (Cambridge: Cambridge University Press, 2002), 8.

50 *The Blessings of Liberty*, 11.

to give meanings to our lives.”⁵¹ John Witte would probably agree with these words. He has forcefully argued that, by making room for religions and the family, the West can make room for the institutions that keep that question alive.

51 J. H. H. Weiler, “United in Fear—The Loss of Heimat and the Crises of Europe,” in *Legitimacy Issues of the European Union in the Face of Crisis: Dimitris Tsatsos in Memoriam*, ed. Lina Papadopoulou et al. (Baden-Baden: Nomos, 2017), 362.