Journal of Law and Religion (2023), 38: 1, 108–117

BOOK REVIEW SYMPOSIUM

A Magnum Opus

Michael Welker

Senior Professor and Director of the Research Center International and Interdisciplinary Theology, University of Heidelberg
Email: mw@uni-hd.de

doi:10.1017/jlr.2022.46

Abstract

Discussed: *Faith, Freedom, and Family: New Studies in Law and Religion*. By John Witte, Jr. Edited by Norman Doe and Gary S. Hauk. Tübingen: Mohr Siebeck, 2021. Pp. 791. €99.00 (paper); €99.00 (digital). ISBN: 9783161608766.

Over the first two decades of the twenty-first century, John Witte, Jr. has not only carefully documented but also creatively promoted in many ways three very important developments: (1) the almost revolutionary worldwide reawakening of cooperation in the fields of law and religion after the termination of their long, fruitful history of cooperation in the mid-1800s; (2) the efforts to strengthen a justice-oriented legal culture in democratic societies and the legal, academic, and political appreciation of human rights (also in disputes with human rights skeptics); and (3) the reconciliation of traditional values and new needs for freedom in the ethos and law of marriage and family.

Keywords: law and religion; faith; freedom; family

John Witte, Jr., professor of law and the director of the Center for the Study of Law and Religion at Emory University, is a leading international authority on legal history, human rights, religious freedom, and marriage and family law. No one else has promoted the new international dialogue between law and religion as strongly as he has. Witte has published more than three hundred scholarly articles and forty books, his writings have been translated into fifteen languages, and he has given more than 350 public lectures on six continents.

His most recent book, *Faith, Freedom, and Family: New Studies in Law and Religion*, edited by Norman Doe and Gary Hauk, is in many ways a magnum opus. In nearly eight hundred pages, Witte offers thirty-seven highly interesting and erudite essays on the major themes of faith, freedom, and family. It opens with a foreword by former Emory University vice president Gary S. Hauk and an introduction by Norman Doe, director of the Centre for Law and Religion at Cardiff University, in Wales. Two substantial interviews with Witte conclude the volume. One, "Freedom and Order: Christianity, Human Rights, and Culture," conducted in Hong Kong in 2019, focuses particularly on the influence of the great Dutch theologian and politician Abraham Kuyper on Witte's work, the role of religion and human rights, and the meaning of human rights in China. The other, conducted in 2015 at Handong International Law School in South Korea, addresses the relationship between Christianity and law; the cultural significance of marriage and the family; the major themes of history, law, and revolution in the work of Witte's mentor and friend Harold Berman; and, finally, the

relationship between liberty and liberalism. An extensive bibliography of Witte's books and scholarly essays and a series of indexes conclude the book.

Faith, Freedom, and Family is a magnum opus in several respects, not only because of its scope and its collection of weighty contributions by Witte from the past two decades of his immense scholarly productivity but also because of the importance of the complex of topics he addresses in it. Witte himself formulates this point: "Faith, freedom, and family together form the bedrock of a good life and a just society" (xiii). As he has often stated in writing and lectures, "Faith, freedom, and family—these are the three things for which people are willing to lay down their lives."

As suggested by the summary that follows of the thirty-seven essays in the book, all "three things" are characterized by existential depth, but this does not mean that their profound significance provides easy messages and answers to the problems and questions addressed.

Witte on Faith

The first part, "Faith," begins with an excellent survey article, "The Educational Values of Studying Law and Religion" (21–36). Witte notes that by the mid-eighteenth century, a fruitful connection between jurisprudential and theological research that had existed for centuries had broken down under the influence of Enlightenment philosophies and a general education shaped by them. Until the eighties of the twentieth century, only a few scholars worldwide dealt with this complex of topics. Then the situation changed dramatically. Global political, religious, and legal developments led to a veritable flood of international research projects, publications, and new institutionalizations in the fields that can be generally summarized under the rubric of law and religion.

The topic of religious freedom attracted as much attention in the national and international reshaping of power relations among political, legal, and religious forces as the topic of religious freedom did in the pantheon of human rights and as the different considerations of human rights did in the major religious communities. The relationship between religious and secular legal systems became explosive topics, especially against the background of the sometimes dramatic changes in the family ethos and the tensions between the needs for religious and sexual freedom. Often associated with these issues was a new revival of discussions about the role of natural law and about the relationship between legal ethics and other expressions of religious and professional ethics.

I defer my discussion of "Law, Religion, and Metaphor" (37–55) to the end of this essay, for the text, which Witte dedicated to me for my seventieth birthday, has helped me to deal fruitfully with a weighty difference between our projects, namely the assessment of the validity of so-called natural law and its legal and ethical orienting power.

The third essay, "What Christianity Offers to the World of Law" (57–66), highlights a growing group of now several hundred "Christian legal scholars and studies in legal education" and the increasing challenges of interreligious dialogues and collaborations in this thematic web.

In the following chapters of part one, Witte—who repeatedly refers to himself modestly as a "legal historian"—turns to his major research focus: the influence of the Protestant Reformation on law and politics, especially through the works of Martin Luther, John Calvin, and Anglican traditions (67–100, 101–18, 139–54). Witte first sketches the medieval Catholic tradition of determining the relationship between law and religion, then briefly presents in each case the development of law with regard to the relationship between church and state and religious freedom in Lutheranism, among the Anabaptists, among the Anglicans, and in Calvinism. Finally, he examines the impact of these movements on criminal law, education law, and social welfare law. In another chapter, he examines the extent to which the classical doctrine of the twofold or threefold "uses of the law" can gain relevance in late modern societies.

https://doi.org/10.1017/jlr.2022.46 Published online by Cambridge University Press

The true richness of Witte's historical, legal-historical, legal-systematic, and legal-dogmatic education, however, becomes evident beyond his Reformation studies in subsequent chapters on seven influential thinkers. He first discusses the German jurist, politician, and reformer Johann Oldendorp (1488–1567), who emphasized the steadfastness of divine law and natural law over mutable human law and developed important insights into the relationship between justice and equity (119–37); then the great German jurist and Calvinist state theorist Johannes Althusius (1563–1638), who also developed a theory of natural law, which he combined with a theory of a general right of reason and a theory of covenantal agreements encompassing the various political strata (155–76); and finally the English jurist and connoisseur of Jewish legal thought, John Selden (1584–1654), a representative of historical jurisprudence, which he combined with an approach to natural law based on creation theology (177–98).

Witte then turns to Abraham Kuyper (1837–1920), a great Dutch polymath, founder of the Free University of Amsterdam, and, for a time, minister of justice and prime minister of the Netherlands. Kuyper developed a sophisticated theory of interdependent social spheres, among which the family has a highly relevant position both socially and politically. Internationally, oriented especially to developments in North America, Kuyper gave many impulses to liberal-democratic institutions and concepts of structured social pluralism (199–214).

Witte's great teacher Harold J. Berman (1918–2007), to whom he turns next, was also a polymath, a pioneer in exploring the relationship between law and religion, religion and law. He was an expert of the Soviet legal system and maintained intensive connections in the Russian world in its political, legal, and religious expressions. His own magnum opus was a study of the role of major revolutions (of 1075, 1517, 1640, 1776, 1789, and 1917) on legal development. Berman's central interest at the end was the development of an "integrative jurisprudence" linking different traditions of legal theory, but also the fruitful interactions of law and religion (215–28).

Witte concludes part one with two appreciations. The first, "Law, Religion, and Reason in a Constitutional Democracy," is on the debate between philosophers Lenn Goodman and John Rawls. Differing conceptions of the justified or unjustified influence of religion and metaphysics in communicating truth claims in pluralistic societies are illuminated (229–46). In the final chapter of this section, Witte offers an appreciation of the work of his friend Norman Doe. Doe sees law as the backbone of Christian doctrine and formation of the church and Christian ecumenism. He then broadens this view to include comparative considerations of the role of law in Judaism, Christianity, and Islam. He thus speaks not only of the ecumenical relevance of law but also of its interreligious unifying capacity (247–59).

Witte on Freedom

Witte opens the second part of the book, "Freedom," with two excellent overview articles before turning to an appreciation of ten individuals. In what I consider the major contribution of this section, "The Right to Religious Freedom in the Western Legal Tradition" (263–86), Witte sketches the development of this theme from biblical traditions through patristic positions, the revolution sparked by Pope Gregory VII, the Protestant Reformation, the Anglican Reforms, and the French and American revolutions to the present. In the background are the insights of Witte's mentor, Berman, in *Law and Revolution: Effective Symbols of Community* (2013). In the second survey, "Rights, Resistance, and Revolution in the Western Tradition: Early Protestant Foundations" (287–313), Witte expands on these ideas. Here the Magdeburg Confession of 1550 and the writings of the Geneva reformer of French origin, Theodor Beza (1519–1605), are of paramount importance (for example, *De Iure Magistratuum* of 1574).

https://doi.org/10.1017/jlr.2022.46 Published online by Cambridge University Press

Witte's individual profiles of important jurists and fighters for religious freedom and human rights begin with Herman Dooyeweerd (1894–1977), professor of law and jurisprudence at the Free University of Amsterdam, who first conceived a doctrine of the natural laws of creation, but then sharply criticized this position and developed a general philosophy of laws and rights. Witte concludes Dooyeweerd's account with a critical appraisal (315–34).

David Little has had a most impressive career at leading North American universities. He advocates an ethics of God-given human equality and a moral law given in conscience. A sophisticated theory of differentiated human rights and a doctrine of the basic norm of self-defense characterize his position, which Witte presents and appreciates in contrast with Calvinist precursors and various early modern liberal positions (335–48).

The third individual profile offers some key statements by Pope Benedict XVI concerning human dignity and human rights. Witte primarily cites key public statements by the pope against those questioning religious freedom as an essential first principle of a just and peaceful order. Most important, Witte addresses with his own thoughts the theses that human rights depend on religious support and that religions need a foundation of human rights (349–61).

The following chapter is devoted to jurist John T. Noonan Jr., who was honored for his service to the Roman Catholic Church as a consultant to numerous bodies. Despite some mild criticism, Witte pays tribute to Noonan's passionate defense of the freedom of religion, including its function as the backbone of American liberty, between "undue timidity and undue triumphalism" (363–70, at 370).

Constitutional lawyer and legal philosopher Kent Greenawalt was very much involved in the American civil rights movement. Conceptualizing and institutionalizing a balance between personal liberties and state power have been his central concerns throughout his life—how to balance freedom of conscience, freedom of worship and religious expression, equality of a diversity of faiths before the law, separation of church and state, and avoidance of institutionalization of religion through law. His major work, the two-volume *Religion and the Constitution* (2006–2008), documents his distinguished contribution to the major theme of the second part of this volume (371–83).

Philip Hamburger, of Columbia Law School, and Daniel Dreisbach, of the American University School of Public Affairs, chart the "serpentine" path of the American history of separation of church and state from the seventeenth and eighteenth centuries, through the difficult developments in the nineteenth and early twentieth centuries, and into the present. Hamburger's *Separation of Church and State* (2002) opens up numerous long-hidden sources in the form of speeches, sermons, and pamphlets. Dreisbach, for his part, analyzes the crucial texts (as in, for example, *Thomas Jefferson and the Wall of Separation between Church and State,* 2002). Drawing on his own political-historical, legal-historical, and religious-historical knowledge and texts, Witte intervenes in the account of the two authors and offers a nuanced summary of five variants of American separatism (385–409).

Natan Lerner taught at the Buchmann Faculty of Law in Tel Aviv. His major work, *Religion, Secular Beliefs, and Human Rights* (2006; rev. 2012), and numerous other writings opened up the connections between the defense of religious freedom and related human rights, with a very special focus on the protection of minority rights and the struggle against multiple forms of discrimination (411–25).

Witte concludes the second part of this book with two critical arguments. He reconstructs the skepticism that Anglican theologian and philosopher Nigel Biggar, of Oxford University, develops toward human rights. Witte first briefly traces the development of the teaching and institutionalization of human rights, then illuminates Biggar's multifaceted intellectual development and his pronounced skepticism toward talk of both so-called natural rights and human rights. Witte observes that this skepticism is based largely on philosophical texts and

https://doi.org/10.1017/jlr.2022.46 Published online by Cambridge University Press

arguments about them and elegantly ignores the impressive real-world development of rights with its manifold political and cultural consequences (427–40).

He offers a similar critique of Samuel Moyn, professor of history and law at Yale University. After the provocative publication of *The Last Utopia: Human Rights in History* (2010), Moyn kept himself in the public conversation with numerous similarly titled books. Witte criticizes Moyn's thesis that human rights are an achievement of the 1970s, and he accuses Moyn of a massive obliviousness to history. Witte concludes with a brief account of the development of international human rights from the Edict of Milan, in 313, to the Universal Declaration of Human Rights by the United Nations, in 1948. He also vehemently disputes Moyn's assertion that the propagation of human rights was primarily a program of "conservative Christians," especially Roman Catholics (441–53).

Witte on Family

The third part of the book, "Family," is more complexly structured than the first two, with their introductory overview articles followed by a sequence of appreciations of exemplary individual academic positions. To be sure, this part also begins with two substantial overviews followed by valuable chapters on Luther, Calvin, Anglican developments, and Emil Brunner. But these overviews are followed by other survey articles—for example, on the contemporary situation of marriage and family in Western democracies, the tensions between traditional norms and contemporary needs for freedom, and the question of the future of the law and ethos of the Muslim family in Western societies.

In the first chapter (457–82), Witte deals with the so-far-failed attempt to contrast a legally and morally lightweight "contract marriage" in the United States with a "covenant marriage" supported by traditional religious and legal values as a helpful alternative. Against the background of a dramatic decline in the stability of marriage and the family in the last quarter of the twentieth century (primarily to the detriment of children and women), the aim of covenant marriage was to promote healthier developments by drawing on biblical traditions and long-established religious, legal, and ethical practices. But this plan failed.

In the second chapter (483–500), Witte outlines Lutheran, Calvinist, and Anglican models of replacing Roman Catholic doctrines of marriage and the family and the path to a modern ethos, which Witte links to the thinking of John Locke. Over three additional chapters on Luther, Calvin, and the Scottish Enlightenment Witte refines and deepens these insights (501–54). Witte highlights the ambivalences of these reforms (for example, continuation of an ethos of inequality in patriarchal structures, lack of tolerance for celibate lifestyles) but also the gains in freedom and commitment (Witte's appreciation of Calvinist-influenced covenant theology is clear). He also shows great openness to the (partly biblically critical) "natural theology" of Scottish Enlightenment thinkers from the seventeenth to the nineteenth centuries (Home, Hutcheson, Hume, and Paley), who sought to support a viable ethos of marriage and family even in non-Christian and nonreligious settings.

Witte sees a fruitful combination of biblically and Christologically oriented and natural-rational theology in the twentieth-century Swiss theologian Emil Brunner. He acknowledges Brunner's biblically and theologically motivated reception of covenant theology in his ethos of marriage and family, but also his political foresight regarding the crisis of marriage and family already shortly after the end of World War II. Witte highlights Brunner's sensitivity to the place and dignity of children in the family, and he defends Brunner's theological-philosophical dual perspective in the face of massive criticism from Karl Barth (555–68).

Another thorough survey article bears a title supplied by a phrase of American sociologist Robert Bellah, "It Takes a Society to Raise a Family." Amid widespread lamentations about the crisis, decay, and breakup of conventional forms of family, Witte presents the

https://doi.org/10.1017/jlr.2022.46 Published online by Cambridge University Press

multidimensionality of the family with its satisfaction of natural life needs, its social dimension, its communicative dimension, its contractual-legal dimension, and its spiritual dimension. For a long time, the instability of the family's orientation to only the natural needs of life was compensated for by the social institutions of church and state. Church and state were supported in their work by the findings of theology, law, and medicine. In the present, however, we see a much more differentiated support system for the family: therapists and psychological counseling, financial counseling, kindergarten, schools and universities, associations, neighborhood groups, and an immense wealth of organized and informal initiatives and associations.

Witte then describes the great force of changing economic developments, the push for the economic independence of spouses in often unstable family relationships, and the mostly helpless external recommendations for stronger state stabilization of conventional living conditions. He describes the immense richness of communicative forms in the organization of family life—from supposedly inconspicuous and everyday person-to-person contacts to the festive organization of family and neighborly coexistence. Here, however, the dominance of electronic media in the present would have to be appreciated even more. He outlines the dense network of rights and duties in the family and touches on deficits in economic, legal, and educational protection. His portrayal of the spiritual dimension is still strongly influenced by a retrospective view of a religiously based culture. The very considerable influences of the media, competitive sports mediated by the media, entertainment music, and informal sociability among young people on family life would need to be examined more thoroughly (569–97).

Witte addresses an explosive topic under the heading, "Faith-Based Family Laws: The Future of Muslim Family Law in Western Democracies." In February 2008, the former archbishop of Canterbury, Rowan Williams, prompted a torrent of public outrage by announcing that greater incorporation of Muslim family law was "inevitable" in England. Was this a call to tolerate polygamous lifestyles, allow physical violence against moral deviants, and permit violation of human rights by religious courts? A plethora of research set in, illuminating the varying spectrums of tolerance in different countries with significant Muslim populations. However, considerable changes in guiding conceptions of marriage and family in the West and related moral and legal developments in recent decades were also highlighted, such as the rise of a private agreement mindset with regard to sexuality, marriage, and family.

From the Muslim side, important opposing positions argued for religious freedom, equal treatment of religions, and nondiscrimination. Witte opposes the assumption that appeals to conscience and freedom of religious practice always take precedence in moral, legal, and political matters. Although religious freedom is cherished in modern democracies, they insist on numerous legally and economically binding obligations. Taxes must be paid, legal ordinances and procedures cannot be questioned, compulsory education is not up for debate, and polygamy as well as child marriage and physical violence against family members are criminalized. Nor is the state's monopoly on the use of force in modern democracies up for discussion.

Nevertheless, Witte does not stop at a merely defensive attitude toward the demand for equal treatment of Muslim positions. He emphasizes four possible potential developments. First, it takes time and patience for a secular legal system to adjust to established forms and needs of religious communities and to initiate appropriate legal developments. Second, religious communities require flexibility to recognize and take into account legitimate concerns of secular legal development and cultures. Third, religious communities must at least tolerate the core values of their secular host nations. The primary values of freedom, equality, human rights, democracy, and the rule of law cannot be questioned. Fourth,

https://doi.org/10.1017/jlr.2022.46 Published online by Cambridge University Press

training in jurisprudence must be improved for Muslims, although this also applies to parts of the current jurisprudence in non-Muslim societies (599–616).

Under the title "Who Governs the Family?" Witte continues the discussion of the question about which forms of marriage and family should be recognized by the state—against or with the will of religious communities? The rapid liberalization of sexual morality since the late 1960s was only one of the triggers for the heated discussion of this question. The "deep shadow of 9/11" and the anti-sharia campaigns in American states have brought with them a chain of barely concealed discrimination against Muslim communities and their jurisprudence that, as yet, in Witte's judgment, has been simply "unnecessary, harmful, and most often unconstitutional" (631). Arguably, not all familial activities of religious individuals and groups can be considered the exercise of religious rights. Nevertheless, the question remains as to what limits the state can impose on these activities. Neither the state's withdrawal from jurisdiction in religiously motivated family matters nor its respect for the view of a religious, moral, and political majority opinion can be a solution. The persistent joint search for politically, legally, and religiously viable solutions and the indispensable protection of vulnerable people and groups should guide developments (617–40).

Many readers may find irritating the fact that Witte deals with the question of the place of traditional sexual morality in modern liberal societies under the heading "Church, State, and Sex Crimes" (641–62). With long lists of conventional classifications of "sex crimes," Witte shows that only a small spectrum of these "offenses" survived moral and legal liberalization in the twentieth century. Appeal to the dual natural-unnatural was too "wobbly [of a] normative framework"—a phrase Witte employs to describe the views of natural law's great proponent, Thomas Aquinas (649). Arguably, some of the biblical moral foundations remain in modern criminal law. Arguably, too, massive moral violations among religious officials are perceived with particular indignation and contempt. Nevertheless, a certain moral and legal perplexity is evident in large segments of liberal Western societies at the level of consensual sexual morality. Witte counters ethical relativism with a clear plea for monogamy over polygamy.

In the following chapter, he discusses critical inquiries regarding his book *The Western Case for Monogamy over Polygamy* (2015), and then continues with a critical review of Sarah Pearsall's book *Polygamy: An Early American History* (2019). A further discussion of critical voices on his contributions concludes the third part of this volume.

Witte proudly describes *The Western Case for Monogamy over Polygamy* as "the first attempt to write a comprehensive history of Western arguments against polygamy." He admits that he studied the Old Testament thoroughly but could only touch on the Talmud and later Judaism. Likewise, he argues, he may have studied the church fathers thoroughly but did not sufficiently illuminate the Orthodox theology of marriage. Now that the United States and several other countries in the West have legalized same-sex marriage with astonishing speed, a similar development is expected with regard to polygamous families. But Witte sees a very crucial difference here. Legal prohibitions on polygamy in the West were pre-Christian in their inception and post-Christian in their application, and these prohibitions did not restrict but strengthened constitutional freedoms, especially for children and women. In the Bible we do not find a clear prohibition against polygamy, at least not in the Old Testament. It was not until 258 CE that polygamy was criminalized by the Roman emperor, and it was not until the Western Enlightenment that a firm position was taken in rejecting polygamy as a betrayal of reason, nature, utility, fairness, freedom, and common sense.

Historians and social-historical observers saw that polygamy often presses young women into early marital unions with older men, that they are later often demoted to household servants in favor of other cowives and abused by aloof husbands, and that they and their children must then often live on poor economic resources and not infrequently end up in

https://doi.org/10.1017/jlr.2022.46 Published online by Cambridge University Press

poverty and misery. This depressing trend often affects the children of disadvantaged cowives, who are deprived of resources for education, care, and preparation for a healthy adult life. But men have also been damaged by polygamy. Polygamy encourages marriage by the older, wealthier men and creates subsequent rivalries. The stories of polygamy in the biblical traditions also speak of conflict in a variety of ways.

Witte summarizes: polygamy destroys agreement and fidelity, undermines loyalty and devotion, reinforces inequality and rivalry, and gives room for adultery and misorientation of children. He observes that polygamy is also a declining practice in Muslim environments, although fifty-three of the fifty-five Muslim-majority nations still allow the practice, with the exception of Turkey and Tunisia (663–68).

Witte's 2019 review of *Polygamy: An Early American History* by Sarah Pearsall, a historian at Johns Hopkins University, acknowledges her thorough account of the tensions between "colonial monogamist policies and indigenous polygamous practices in Spanish North America" (670) in the sixteenth century. Yet the account of "occasional polygamous households of African American chattel slaves" (671) in eighteenth-century Virginia and other manifestations of polygamous lifestyles, in all its richness, hardly incorporates the perspectives of law and religion. The account of monogamous lifestyles remains surprisingly flat and unnuanced next to the subtle descriptions of supposed polygamous alternatives (669–75).

Witte's guiding legal, religious, and ethical concern can be clearly summed up in the formula that provides the title of his 2019 book, *Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties.* In the final chapter of this third part (677–89), he briefly summarizes his concerns and addresses five reviews of that work. He encourages churches, states, and other social institutions to protect and promote the monogamous family united in marriage, including those of same-sex couples.

Responding to Mark Jordan's review, Witte notes that Jordan sees in Thomas Aquinas an effort to combine "the universal law of nature and the New Law of the Gospel" (679–80 [internal quotation marks omitted]). Aquinas offers up a veritable conglomerate of eternal law, divine law, positive law, common law, and the like, but this provides, Jordan says, only a "wobbly foundation" (680) for a serious legal culture. Still, Witte wants to uphold talk of "natural law"—pointing to standards of reproduction.

Agreeing with Robin Fretwell Wilson, Witte speaks out clearly against corporal punishment of children, dismayed that the defense of this parenting practice is still legally and politically tolerated in states across America.

Witte agrees with Michael Broyde, who writes that only a joint search from the legal and religious sides for politically, legally, and religiously viable solutions (and the indispensable protection of vulnerable people and groups) should guide the legal evolution.

Witte takes up rather hesitantly Brian Bix's call for a better culture of private forms of ordering family life. Witte looks for a grounding in a "created or natural order or something comparable" (686). I think that here the "shaky ground" of natural law deceptively promises security that would be more likely to be provided by a familial legal culture.

Responding to Jonathan Chaplin's review, Witte repeats points from his paper on the multidimensional family sphere. Indeed, as mentioned above, I think Witte should give more significance to economic and media influences on family life.

Postscript: Natural Law—A Reality, a Metaphor, or a "Blunt Instrument"?

Many of the legal and theological classics presented by John Witte in this great work advocate one or another variant of natural law. Thus, it is not surprising that the educated legal historian takes an open and friendly attitude toward even contemporary representatives of natural-law thought. Although Witte and I have been closely connected for many

https://doi.org/10.1017/jlr.2022.46 Published online by Cambridge University Press

years, not only amicably but also academically and in many international and interdisciplinary research projects, I simply cannot agree with his judgment on this point. In my farewell lecture in Heidelberg, I definitively said goodbye to an appreciation of natural-law thinking—for systematic reasons.[1] I was very pleased that jurists present at that lecture—even rather conservative Roman Catholic jurists—agreed with my arguments.

What is at stake in this argument? In a famous dialogue with Jürgen Habermas in Munich on January 19, 2004, Cardinal Joseph Ratzinger stated, on one hand, that "natural law has remained—especially in the Catholic Church—the figure of argumentation with which it appeals to common reason in discussions with secular society and with other faith communities and seeks the foundations for an understanding about the ethical principles of law in a secular pluralistic society."[2] On the other hand, he conceded, "this instrument has unfortunately become blunt… . The idea of natural law presupposes a concept of nature in which nature and reason are intertwined, nature itself is reasonable. This view of nature has been shattered with the victory of evolutionary theory. Nature as such is not reasonable, even if there is reasonable behavior in it."[3] However, not the victory of the theory of evolution but the lack of systematic viability of a connection between nature and justice-oriented law destroys in the long run the hope that this "instrument" would continue to be powerful and only need to be sharpened again.[4]

The classic collection of Roman law, the *Corpus Iuris Civilis*, in its first part, the *Institutiones*, differentiates private law into "rules of natural law, of international common law, and of civil law."[5] In 533, this doctrine was given the force of law by the Roman emperor Justinian. Natural law, according to this doctrine, is what nature teaches not just humans but "all living things that exist in the air, on the land, and in the water."[6] How problematic it is to connect the teachings of nature with law and justice becomes clear when we follow the further listings of the *Corpus Iuris Civilis.* The introduction to the *Institutiones* states, "The commandments of law are these: live honorably, injure no one, grant to each his own."[7] The commandment to injure no one, however, is difficult to apply to all living things—in the air, on the land, and in the water—even as more and more people embrace a vegetarian diet. For all natural creatures, natural life can be sustained only at the expense of other life. But once the so-called right of the strongest has been admitted as natural law, the commandment to grant everyone his own loses the aura that it is still about justice. Cruelly and cynically, the Nazi henchmen famously put the phrase "To each his own" over the main gate of the Buchenwald concentration camp, readable from the inside.

[1] Michael Welker, "God's Justice and Righteousness," in *Responsibility and the Enhancement of Life: Essays in Honor of William Schweiker*, ed. Günter Thomas and Heike Springhart (Leipzig: Evangelische Verlagsanstalt, 2017), 179–90. Some of these thoughts are taken up in my Gifford Lectures: Michael Welker, *God's Image: An Anthropology of the Spirit. The 2019/2020 Gifford Lectures at the University of Edinburgh*, trans. Douglas W. Stott (Grand Rapids: Eerdmans, 2021), 53–58.

[2] Joseph Ratzinger, "Was die Welt zusammenhält. Vorpolitische moralische Grundlagen eines freiheitlichen Staates" [What holds the world together. Pre-political moral foundations of a free state], in Jürgen Habermas and Joseph Ratzinger, *Dialektik der Säkularisierung. Über Vernunft und Religion* [Dialectics of secularization. About reason and religion] (Freiburg: Herder, 2005), 39–60, 50.

[3] Ratzinger, "Was die Welt zusammenhält," 51.

[4] Michael Welker, "Habermas and Ratzinger on the Future of Religion," *Scottish Journal of Theology* 63, no. 4 (2010): 456–73.

[5] *Corpus Iuris Civilis. Die Institutionen* [The body of civil law. The institutes], ed. Okko Behrens et al., 3rd ed. (Heidelberg: Müller, 2007), 2.

[6] *Corpus Iuris Civilis,* 2.

[7] *Corpus Iuris Civilis*, 2.

https://doi.org/10.1017/jlr.2022.46 Published online by Cambridge University Press

In his *History of Justice*, the great Italian historian Paolo Prodi has reconstructed "how the concept of justice has been lived and thought in our Western world."[8] Prodi traces the constant change of coalitions of divine law, natural law, cosmic and natural regularities, and political and juridical designs of order and practices of execution in occidental history. This ongoing transformation is associated with the changing dominance of ecclesiastical, political, theological, legal, and philosophical institutions and thinkers. Luther's laconic statement, "We prattle much about natural law,"[9] is impressively confirmed by the development and history of the impact of natural-law thought.

As noted above, in a contribution to a festschrift for my seventieth birthday, John Witte has indirectly offered me a bridge to continue giving an honorable place to talk about natural law. In his essay, "Law, Religion, and Metaphor," which is part of this collection (37–55), he suggests "that metaphor theory might help integrate legal and religious discourse a bit more fully … reducing the risk of misunderstanding across these two great disciplines" (39). His impressive demonstration of the rich use of metaphor in the legal system and in religion almost provokes the question: despite the inherent ambiguity and unavoidable cruelty in nature (alongside all the well-ordering, beauty, and fertility), why should we not give an honorable place to metaphorical talk of "natural law"?

I think that to do this we would not reduce but rather increase the risks of misunderstanding between disciplines. Particularly in our ecologically sensitized times, we observe in religion and in general culture precisely a flight into an unrealistic romanticism of nature and into an ideological charging of the speech of "life." In a misleading way, "nature" and "life" are treated like concepts of salvation.[10] Naturalistic conceptions of creation fade out important potential spiritual orientations for religion and law, but also for a deeper scientific thinking. In religion, this leads through too close connections of God and nature (for example, God as weather god) to skewed ideas of God and untenable abstract notions of omnipotence, which make talk of God empty, boring, and unbelievable. We should therefore realize that the talk of a natural law, despite a long history of impact, does not provide a viable basis for future fruitful cooperation between law and religion.

Conclusion

Faith, Freedom, and Family offers a most impressive summary of Witte's rich work in the huge and vibrant global area of the study and research on law and religion over the last two decades. It is a remarkable source of documentation, dealing with very different and even conflicting approaches to the topics of faith, freedom, and family. Above all, it is a witness to Witte's circumspect and creative furthering of the developments in international and interdisciplinary dialogue, cooperation, and cultural implementation of the interactive relationship of law and religion, its challenges, and its blessings.

Acknowledgments. *This essay was translated with DeepL Translator (www.DeepL.com), with further editing by Gary S. Hauk.*

[8] Paolo Prodi, *Eine Geschichte der Gerechtigkeit. Vom Recht Gottes zum modernen Rechtsstaat* [A story of justice. From the law of God to the modern constitutional state] (Munich: Beck, 2003).

[9] Martin Luther, *Römervorlesung (Hs.) 1515/16* [Lecture on the book of Romans, 1515/16], vol. 56 of *D. Martin Luthers Werke: kritische Gesamtausgabe (Weimarer Ausgabe)*, ed. Georg Bebermeyer (Weimar: Hermann Böhlaus Nachfolger, 1938), 355 ("De lege naturae multa fabulamur.").

[10] See my critical reflections on Jürgen Moltmann, *The Spirit of Life: A Universal Affirmation* (Minneapolis: Fortress, 2001), and Leonardo Boff, *Traum von einer neuen Erde—Bilanz eines theologischen Lebens* [Dream of a new Earth—Assessment of a theological life] (Münster: LIT, 2019): Michael Welker, "Der Geist der Freiheit und die Freiheit des Geistes" [The spirit of freedom and the freedom of spirit], in *Theologie im Gespräch. Jürgen Moltmann zum 95. Geburtstag* [Theology in discussion. Jürgen Moltmann on his 95th birthday] (Frankfurt: Gemeinschaftswerk der Evangelischen Publizistik, 2022), 7–12.

https://doi.org/10.1017/jlr.2022.46 Published online by Cambridge University Press