John Witte, Jr. came to Emory University in 1985 directly after his graduation from Harvard Law School. That change of venue has mattered to him, and also to us in assessing Witte’s own contributions to the field of legal history. He had made the move together with Harold J. Berman, whose famous work *Law and Revolution* (1983) had made a case for recognizing the medieval canon law as the first truly developed European legal system. Witte had done research for that book, helping its author put its argument together. It was a good start and a happy one. The work dealt with legal history, and it had an impact on the scholarly consensus of the course of Western legal history. Witte, along with many others, has continued to make appreciative use of its contents.\(^1\) In the years that have followed, however, he has also gone beyond what he learned in completing that assignment—far beyond.\(^2\) Quite apart from his organizational skills and the many scholarly conferences on subjects involving legal history which he has organized, his own record of scholarship and publication on this subject has been noteworthy. There is a great deal of it. Some of it is corrective, some of it looks both forward and backward, and all of it is of interest. Every piece of it is the product of patient research clearly and engagingly presented. This chapter takes up four of what its compiler believes are Witte’s most significant contributions to the field of legal history.

It should be said first, however, that the honoree of this volume did not forget his obligations to Berman. In 2013, six years after Berman’s death, Witte published a book that Berman had begun but not finished. It was *Law and Language: Effective Symbols of Community*. In 2002, Witte had described him as his

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\(^1\) See, for example, his introduction in John Witte, Jr. and Frank Alexander eds., *Christianity and Law: An Introduction* (Cambridge: Cambridge University Press, 2008), 5, where Witte described it as a one of the four “massive transformations of the Western Legal Tradition.” See also his “The Integrative Christian Jurisprudence of Harold J. Berman,” in *Great Christian Jurists in American History*, ed. Daniel Dreisbach and Mark Hall (Cambridge: Cambridge University Press, 2019), 230–44.

“mentor, friend, and colleague,”3 and finishing a work that touched upon law’s history, a project Berman had not been able to complete, was a recognition of the debts he owed to his mentor. By then, however, he was more than a pupil. He had also gone beyond the projects Berman had initiated. In particular, he had taken a step to help fill a gap to which Berman had once remarked wistfully: there had been “a time not long ago when a good lawyer was required to know the story of the development of European legal institutions.”4 Helping to keep that knowledge alive, and in fact to advance it, has been one of Witte’s achievements.

1 Human Nature in Legal History

The first advance has been in treating the Protestant reformers as human beings—able and strong men, to be sure, but also subject to human frailties. Most men and women are capable of growth—or at least change—over the course of their lifetimes. These changes extend even to important matters, and they are not necessarily equivalent to backsliding. It may seem strange to discover that Witte’s recognition of this obvious feature of human life is an important contribution to legal history, but it is. It provides a corrective to what has become an all too common habit among historians—identifying a participant in the religious development of the sixteenth century with a single characteristic. Martin Luther is probably the best example of the more balanced view that has marked Witte’s treatment of the most prominent among the reformers. It has been too easy for historians to focus on two significant events in Luther’s life. First, he publicly burned the papal lawbooks, that is the *Corpus iuris canonici*, which contained the law of the church, and he never repented having done so. Indeed, he seems to have been proud of it. Second, he is known for endorsing the Latin phrase that equated good lawyers with bad


Christians. *Bonus Jurista Malus Christa*.\(^5\) It has been a natural step, therefore, to portray him as an enemy of the traditional law of the church.

In one sense, this is correct. Luther did remain a critic of several parts of the church’s law throughout his life. However, he also came to recognize the worth of many of the rules that were stated in the canon law. Witte’s discussion of the reasons for his change of mind on the subject is exemplary. One explanation for it was that he found himself besieged by queries from his supporters. They came from many sides, asking him for clear answers to their own difficult problems. As Witte put it, Luther was “not at all comfortable with his role as de facto Protestant pope.”\(^6\) He did not want that to take place. So he took stock.

The world as it is has always required legal rules, and Luther came to recognize the worth of many of the rules found in the substantive canon law. Much of the medieval church’s law, including papal decretals, actually provided “a valid and valuable source of Christian equity and justice.”\(^7\) It is true that Luther always remained a vocal critic of exercise of the papal power of dispensation, particularly where it was exercised to permit what would otherwise have been an unlawful or immoral act. However, he also came to recognize the worth of much of what was found in traditional canon law. He grew into this position—learning from experience one might say—and in this he was acting in a way most of us do. A strength of John Witte’s treatment of Luther is attributable to his demonstration of the reformer’s ability to moderate his views as he grew older. Witte put it pithily in the title to one of his chapters: “Perhaps jurists are good Christians after all.”\(^8\)

His treatment of the other great reformer, John Calvin, is different in its coverage from that devoted to Luther, but it is equal in its recognition of the complexity of human nature and consequent actions. It is contained in a volume published in 2007 devoted to the subject of the history of religious liberty and human rights in Calvinist thought, and it begins appropriately with Calvin himself. About this reformer’s role in its recognition and implementation, past authors have disagreed sharply. Some have praised him as a champion of religious liberty. He was “pioneer of the freedom of conscience

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6 *Law and Protestantism*, 69.

7 Ibid., 83.

and human rights.”9 Others have done the reverse. In their view, Calvin was “as undemocratic and authoritarian as possible.”10 His treatment of Michael Servetus—burned for heresy with Calvin’s approval in Geneva—has long been a particular black mark on this great reformer’s reputation.

Witte admitted the existence of contradictions in Calvin’s thought, but he showed that when fully understood, they were much less stark than critics have allowed. He noted first that Calvin lived in an age of “bombast and hyperbole that typified sixteenth-century humanist literature.”11 Strong statements and strong actions were the order of the day. Roughly speaking, Calvin’s record, including his condemnation of Servetus, should also be viewed in a comparative light. It should also be divided into two halves, an early and a late period. In the first, writing as a theologian rather than as a jurist, he focused his attention on spiritual liberty of the individual and also on political liberty. In the second, from the late 1540s till his death in 1564, his thinking on the subject matured. He learned from experience. The two periods should therefore be considered in that light. In the second, Calvin had assumed the direction of Geneva’s church and much of its government. This left less room for the recognition of individual liberty in his writing, required as he then was to face “the hard realities of Genevan ecclesiastical and political life.”12 Who does not recognize the humanity inherent in this situation? Our minds change, sometimes slightly, sometimes greatly, over the course of our lives. So did Calvin’s. Our beliefs are also colored by the duties we assume. So were Calvin’s. Throughout, however, his penchant was always “for orderliness and moderation.”13 It was the stable feature that linked the two periods in Calvin’s life.

2 Surprises in Legal History

A second strength of Witte’s historical work, related to but not identical with the first, is the attention he has always paid to the works of little-known lawyers among early Protestants. This has sometimes revealed surprising results, and

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9 John Witte, Jr., The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism (Cambridge: Cambridge University Press, 2007), 39, here referring specifically to the views of Emile Doumergue and Walter Köhler, but also giving additional examples.
10 Ibid., 42; referring specifically to the views of Ernst Troeltsch, but also giving other examples.
11 Ibid., 41.
12 Ibid.
13 Ibid., 52.
it has always enlarged our understanding of what we learn from discussions of the thought of Luther and Calvin. Theologians and historians of religion, often those from Germany, have made occasional use of the works of some of these men, particularly with theologians like Philip Melanchthon (1497–1560), but it has not been common for legal historians to do so, and Witte’s patient examination of his contribution to the field of law and history has yielded significant results.\textsuperscript{14} Witte has also dealt with examples of the role in shaping the law which emerged from the Reformation played by many jurists, such as Johann Oldendorp (ca. 1480–1567), Melchior Kling (1504–71), and Johannes Schneide-\textsuperscript{15}win (1519–69). Their work has been forgotten by most historians of the period, but it is given its due in Witte’s hands.

He went even further in his research of the subject, investigating the careers and work of some now quite obscure figures. Among them were reformateurs like Wenceslaus Linck of Nürnberg and Wolfgang Capito of Strassbourg. These men effectively curtailed the hold the medieval church’s law had exercised on significant subjects, as by helping to end clerical immunity from civil responsibility in courts of law or by asserting a freedom from payment of taxation. A further example of Witte’s treatment of a largely unknown figure is that of Johann Eberlin von Günzburg. He spoke out strongly against the place of papal dispensations in the received canon law, together with its excessive use of excommunication.\textsuperscript{15} And that led to concrete results. Further examples are those of Argula von Grumbach and Johann Apel, who reacted strongly against the requirement of celibacy among the clergy, treating it as though its principal effect was to encourage them to take concubines. The careers and writings of reform-minded critics like these have demonstrated something of the scope of the attacks on the received canon law during the early years of the Reformation, and Witte was right to call their influence to the attention of legal historians. Many lawyers, acting alone or together with men in holy orders, were involved in this movement, and it has been Witte’s accomplishment to bring their accomplishments into Reformation history.

Witte has also been patient in exploring the other side—the men and the factors that worked toward the retention of the canon law, despite its connection with the papacy. The medieval canon law was more difficult to dislodge

\textsuperscript{14} For these references, see Law and Protestantism, 60–63; see also John Witte, Jr., “The Good Lutheran Jurist Johann Oldendorp (ca. 1486–1567),” in Great Christian Jurists in German History, ed. Mathias Schmoeckel and John Witte, Jr. (Tübingen: Mohr Siebeck, 2020), 80–98.

\textsuperscript{15} See, for example, Susan Groag Bell, “Johan Eberlin von Günzburg’s ‘Wolfaria’: the First Protestant Utopia,” in Church History 36 (1967): 122–39.
from practice in Protestant lands than has traditionally been supposed. The scope and the reasons for its retention were the theme of Witte’s contribution to a volume on the fate of canon law in Protestant lands.\textsuperscript{16} His chapter in it opened with a quotation from the famous Hugo Grotius stating that the canon laws had “acquired the force of law” in the Netherlands despite their apparent origin from the papacy. As it had turned out, this was also true elsewhere. Some of what was found in the medieval canon law was abandoned or altered, but most of it nevertheless continued to be treated as a valid source of law in most Protestant lands.

How can this have been? It seems contrary to common sense to link Protestant lawyers with Catholic canon law. The continued connection between them has been, however, a result of scholarship of the past fifty years, and in making that connection John Witte has pulled an oar. Closer examination of legal records, including those from Scotland, Germany, England, and Scandinavia, has shown that by the sixteenth century, canon law had worked its way into the law accepted throughout Europe, and it proved virtually impossible to dislodge.\textsuperscript{17} Together with Roman law, it provided rules that had long governed many aspects of legal practice—the \textit{ius commune}—and a large part of them remained in force \textit{faute de mieux}. The world of polemics and the world of law are not identical.

This surprising result calls attention to an error in jurisprudence. Retention of the canon law in Protestant court practice is better understood by recognizing that it is a mistake to think of sixteenth-century jurisprudence in terms of legal positivism. Positivism holds that the test of a law’s validity depends upon its recognition in the commands of the lawmaker. That was not the view taken by the classical jurists, however, and we must make room for their assumptions, not ours. Custom was then a valid source of law, for example, and in


sixteenth-century Europe, the canon law had become something like a custom. Its contents could be accepted and applied for that reason.\textsuperscript{18}

We must recognize also that most of the substantive canon law had little to do with the papacy. The law of tithes, wills and trusts, defamation, marriage and divorce, charity, elections, court procedure, and evidence stood on their own. Their contents could be used even if they had been stated in a papal decretal found in the \textit{Corpus iuris canonici}. Some of them, it is true, were thought to require amendment. The reach of the prohibited degrees in matrimonial law provides an example. However, that could be accomplished without rejecting the basic law on other parts of the canon law, and in fact here change was also achieved in Catholic lands by the decrees adopted at the Council of Trent. It amounted to amendment, not rejection of the received law. So it could happen, although it seems ironic, that many Protestant lands followed the medieval law on the subject more closely than was true in Catholic areas of Europe, where the decree \textit{Tametsi} amended the medieval canon law by adding a requirement that to be valid, a marriage had to have been contracted in the presence of the parish priest. Witte has not been alone in tracing both the retention and the development of the medieval canon law on subjects like the continued use of the canon law in Protestant lands, but he has made significant contributions to it. His work has played a part in a real advance.

3 Natural Rights in Legal History

A third historical subject to which Witte has made significant contributions has become a topical and controversial one—the history and current status of legal rights. He has published at least four books related to this subject, and he has organized groups to meet in order to uncover the religious and historical elements of this subject. A result of his initiative has been the production of a collection of seventeen separate essays devoted to natural rights—one called \textit{Christianity and Human Rights: An Introduction}. Witte's introduction to that volume contains a valuable summary of its contents together with a strong statement of his own belief in the importance of religiously motivated contributions to this subject. However, it is not one-sided in its assessment. His

\textsuperscript{18} The contemporary reasoning that lay behind the real but limited acceptance of the canon law is well explained in an Irish report: \textit{Le Case de Commenda (CP 1611)}, Davies 68, 80 Eng. Rep. 552.
introduction to that volume begins with a Dickensian flare. The opening words of *Tale of Two Cities*: “It was the best of times. It was the worst of times”—and so, Witte believes, has been the long history of human rights rooted in the law of nature. For every “springtime of hope” in their recognition, there has also been a “winter of despair” when one regards modern developments, but that is not unique to our times. There have always been ups and downs in the historical record of human rights. There have also been false steps. What Witte’s initiative has added to that record is a recognition of the importance, indeed the necessity, of considering the religious dimension to the subject’s history. Human rights did not begin with the Enlightenment. It is appropriate that his work is recognized in the most recent assessments of this subject.

The place of religion in the creation of human rights has been one of the consistent themes of his scholarship. Both the chapters of the 2010 volume and Witte’s introduction begin with the Christian Bible. It is good to be reminded of its contents. The Ten Commandments, for example, have provided “an organizing framework for the understanding of fundamental religious and civil rights” (p. 17). The New Testament also contains statements of a “radical Christian message of human equality.” If the realities of life in the first centuries of the Christian era did not always match these calls, as for instance in securing what we now recognize as women’s rights, that does not render religion irrelevant in their recognition today. In this, Witte is no Pollyanna. Often recognition of religion’s importance has been limited to the importance of the correct religion, and thus becomes a means of denying human rights to those whose religious views differ from those of the majority. Still, it is worthy of note that the sixteenth-century reformers “all began their movements with a call for freedom from the medieval Catholic Church” (p. 26). Today their successors would be required to acknowledge that even the Catholic Church has endorsed the concept of religious freedom, acknowledging its importance in the decrees of the Second Vatican Council (1962–63).

In one particular, Witte’s familiarity with and interest in the history of all forms of Christianity has been of particular use in advancing our understanding

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19 Ibid., 43: “The Enlightenment inherited many more rights and liberties than it invented, and many of these were of Christian origin.”


of Western law’s past. That is in the role played by the law of nature. A generation ago, natural law was widely perceived as an exclusive preserve of Roman Catholic doctrine. Its utility for Catholics was drawn most often from the writing of Thomas Aquinas, whose great treatise contains a statement that a human law that is contrary to the law of nature could not be a true law, and the application of natural law in the Catholic effort to hold back the flood tide of contraception played a part in cementing the impression that natural law was “a Catholic preserve.”

Whether or not that was a fair assessment of today’s situation, it is far from an accurate description of the history of the subject. It served many purposes. It was expressly invoked in great matters: for example, to justify the Dutch rejection of the rule of Philip II, king of Spain. However, its relevance was not reserved for such great events. At Witte’s initiative, a conference and subsequent volume exploring the place of the law of nature within other legal traditions was held. A scholarly success, it surveyed the positive place which that source of law had played in many forms of Christianity. The Lutheran, Anglican, Orthodox, and Reformed traditions embraced it in earlier centuries. Even the leaders of Baptist churches had sometimes appealed to it as a source of guidance and justification. What this contribution to the historical record proved was that before the middle of the nineteenth century, natural law was accepted as a matter of course by virtually all European lawyers, including some of the most able and best-known Protestants. In other contributions to the subject, Witte had shown that Hugo Grotius was only one among the many Protestant jurists who accepted and made ordinary use of the law of nature.

We do not know, of course, what the future of that subject will be in our own day. Some predict its revival in the service of the common good. If such a revival actually occurs, it will find support in the historical work of this volume’s honoree.

22 Summa Theologiae: 1a2ae. 95, 2, Blackfriars ed. (London: Blackfriars Press, 1966), 104–05: “Si vero aliquo a lege naturali discordet, jam non erit lex, sed legis corruptio.”
24 See Doe, Christianity and Natural Law, xii–xiv.
25 See Paul Goodliff, “Natural Law in the Baptist Tradition,” in Doe, Christianity and Natural Law, 140–61; at 160, the author concludes that the historical appeals to liberty of conscience have drawn upon both biblical and natural law sources.
26 See, for example, Law and Protestantism, 143–75, carefully exploring its place in the works of Johannes Eissermann and Johann Oldendorp in order to cement the point.
Some of Witte’s best work has concerned the history of the law of marriage and the family. The book which he and Robert Kingdon published on matrimonial law and its enforcement in Calvin’s Geneva is easily the leading work on that subject. It is thorough, interesting, and full of insights. The collection of his essays contained in the recent Faith, Freedom, and Family, a work edited by Norman Doe and Gary S. Hauk, contains a collection of thirteen of his articles on the subject. They cover a wide range. Some of them have been mentioned above, but one of them has not. It concerns the future of a subject that has roots in the past: the subject of plural marriage—in other words polygamy.

Polygamy has not been high on the agenda of many modern reformers in this field. However, so much has changed in society’s attitude towards sexuality and marriage during the past sixty years that it is far from impossible that this subject will arise. Indeed, it seems likely. Who in the mid-twentieth century could have supposed that sodomy would come to be recognized as a constitutionally protected human right? But it has happened. Of course, polygamy is not sodomy, but like sodomy, it can be a matter of choice for men and women. With some reason, many object that if polygamy becomes lawful, women will be the losers in the end, but it is possible to answer that dealing with that problem is simply a matter of fixing upon a sensible public policy to curb abuses. The possibility also leads to the adoption of an approach like that taken by Judge Richard Posner. He treats the prohibition of polygamy as a taboo, concluding that many women might sensibly prefer a plural marriage with a rich man over an exclusive marriage with a poor man. He then asks: why should women not have the ability to make that choice? He appears to think they should.

An answer to Posner’s question is the subject of one of Witte’s most impressive books: The Western Case for Monogamy over Polygamy. It is notable for eschewing Posner’s theoretical approach, tracing instead the actual history of polygamy from its early acceptance to its gradual abandonment in Judaism, its later history in Europe, and then its similar history in the United States among adherents of the Church of Jesus Christ of Latter-day Saints. Instead of speculation about possibilities, Witte relies on the history of the subject for what it tells us about the subject. The past contains lessons, ones we should heed.

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29 See, for example, Russell Sandberg, Religion and Marriage Law: The Need for Reform (Bristol: Bristol University Press, 2021).
We learn that polygamy was tolerated in the Hebrew Bible. Its acceptance was attributed, at least in part, to necessity. The Bible started with God’s direction that the earth be filled with men and women (Genesis 1:28), or as in the story of Abraham, Sarah, and Hagar (Genesis 16:2). Polygamy served that purpose. But gradually the earth was filled, the practice was first restricted and then forbidden, both by the commands of Roman emperors and those of Jewish leaders themselves, the most influential of whom was Rabbi Gershom ben Judah (960–ca. 1040). What may have been a necessity, or at least a possibility, in primitive times had become a vice with the passage of time and changes in society. The medieval canon law forbade it, as did secular law in Western lands during the Middle Ages and beyond.

For Witte, this history matters. The pattern has been repeated more than once. Some early Protestants had also experimented with permitting polygamy. Even Luther had once recognized it as an alternative in the absence of any possibility of divorce.31 Henry VIII seems also to have considered it as a possibility. However, after the death of the “first generation of heady Protestant reform,” the Continental movement’s leaders reversed course. They “came down hard on polygamy.” The leaders and the law of the Church of England did the same. By act of Parliament in 1604 polygamy became a felony.32 A chapter in Witte’s book—“The English Case against Polygamy”—gives the significant details, although it also exhibits an admirable completeness, shown by his coverage of counter examples like the later arguments in favor of plural marriage advanced by John Milton.33

Other examples of the normal pattern—initial inclination toward acceptance of polygamy followed later by its rejection—are found in the works of Enlightenment thinkers and, of course, the history of the Mormons in the American West during the nineteenth century. Witte’s book pays ample attention to them. In each case, early willingness to admit the possibility of plural marriage gave way in time to its prohibition. The obvious exception is Islamic law. The influx of immigrants from Muslim lands makes its influence a possibility, although it is represented in Witte's book by a picture of three Muslim women holding up a sign that reads “Say No to Polygamy” (p. 442). Of course,

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32 1 Jac. 1, c. 11. See also his “Prosecuting Polygamy in Early Modern England,” in Texts and Contexts in Legal History: Essays in Honor of Charles Donahue, ed. John Witte, Jr., Sara McDougall, and Anna di Robilant (Berkeley CA: Robbins Collection, 2016), 429–48.
33 The Western Case for Monogamy Over Polygamy, 330–35.
the book’s subject is the history of Western law, and that is what the book describes. It is part of our history, one from which we can and should learn.

The justification for dealing with monogamy in the context of evaluating Witte’s scholarship on legal history is that it demonstrates, almost better than any other facet of his work, the importance that legal history has occupied in his thought and his work. Starting with his partnership with Hal Berman, he has followed a historical trail. And he has widened it. The subject of polygamy demonstrates both the insights legal history provides and the respect Witte has for them. He does not favor its revival. That is clear enough. But he does not find or seek support for his view in a theoretical approach—feminist, economic, or social—as fashionable as they are. He finds what he needs in the historical record. Many times tried but always rejected after a trial: that is what our legal history reveals about polygamy, and that has convinced Witte that it would be a mistake to begin yet another such adventure.34 History matters.

5 Conclusion

This essay began by recalling Witte’s arrival at Emory University in the company of Harold Berman. In the years that followed, many reviews and books have been published in praise of Berman’s scholarship,35 and Witte was an editor of one of them. Berman had sought to integrate the study of law and religion. He demonstrated the need for the return to taking account of one of the vital characteristics of the study of law, one that had been prominent in earlier centuries—its religious roots. Witte has been faithful to that insight, and as this essay has shown, he has also gone beyond it, enriching it in (at least) four distinct ways. His career is an advertisement for the merits of beginning with an able mentor, especially one who will also become a friend.