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Book Review

The History and Evolution of Marriage

*From Sacrament to Contract: Marriage, Religion, and
Law in the Western Tradition*

by John Witte, Jr.

Westminster John Knox Press (1997)

I. INTRODUCTION

Over a century ago, Friedrich Nietzsche prophesied that “the family will be slowly ground into a random collection of individuals,” haphazardly bound together “in the common pursuit of selfish ends and in the common rejection of the structures and strictures of family, church, state, and civil society.”¹ In his recent book, *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, Professor John Witte, Jr., argues that the grim predictions of Nietzsche have come to pass and that in contemporary Western society, “contractual freedom and sexual privacy reign supreme, with no real role for the state, church, or broader civil society to play,” especially in the context of marriage law.² *From Sacrament to Contract* depicts this degradation, giving a historical perspective of Western marriage and family law over the last 500 years. It documents how current law concerning marriage has been changed from a consecrated sacrament to what is now a mere contract; from a holy institution mirroring the relationship between Christ and His Church to an individual decision affecting no one but the parties to the contract.

Professor Witte’s book contains a comprehensive and dense history that offers great insight into how Western marriage law

1. JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* 215 (1997) (citing Letter of August 1886, in FRIEDRICH MERZBACHER, *LIEBE, EHE, UND FAMILIE* 113 (1958)).

2. *Id.* at 214.

848 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999]

was formed; it will undoubtedly become one of the seminal treatments of this subject.³ Yet *From Sacrament to Covenant* leaves the reader wanting a clearer pronouncement of Witte's position and suggestions for how to use this comprehensive history in the future. This Book Review gives a brief summary of the book in Section II, asks questions that the author leaves unresolved in Section III, and offers possible applications of this scholarly work to religious and secular scholarship, as well as to public policy decisions concerning modern marriage and family law, in Section IV.

II. *FROM SACRAMENT TO CONTRACT*

In the field of law and religion, Professor John Witte, Jr., currently is one of the most prolific and respected writers of legal and theological history.⁴ *From Sacrament to Contract* is one installment in a series of books published by the Religion, Culture, and Family Project at the Institute for Advanced Study in the University of Chicago Divinity School.⁵ Although the series as a whole was designed to give "no single point of view on the American family debate" and "no one solution to the problems concerning families today,"⁶ each work in the series does represent a particular viewpoint. While Professor Witte thoroughly documents the Christian history of marriage, he ends there. Herein lies the problem. *From Sacrament to Contract* offers a history, but no analysis, opinion, or guidance.

A. *Introduction to From Sacrament to Contract*

From Sacrament to Covenant stems from Professor Witte's

3. See Donald W. Shriver Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 115 CHRISTIAN CENTURY 1191 (1998) (book review) (stating that the book "should long be the standard reference for anyone interested in knowing how Europeans have sought to connect the personal and the public in family life").

4. John Witte, Jr., is the Jonas Robitscher Professor of Law and Ethics at Emory University School of Law and has been the director of the Law and Religion program there since 1987. *From Sacrament to Contract* is his first book, but *Essential Liberty: The American Experiment in Religious Freedom* is forthcoming this year. He is the editor of the Emory University Studies in Law and Religion, and has co-edited multiple volumes on religion and human rights. He is also the author of over seventy-four journal pieces. See John Witte, Jr., (visited 4/1/99) <<http://www.law.emory.edu/LAW/CATALOG/faculty/wittecv.html>>.

5. See WITTE, *supra* note 1, at xi.

6. *Id.* at ix.

847] BOOK REVIEW: *SACRAMENT TO CONTRACT* 849

concern for the current state of, and uninformed debate over, the well-being and future of the American family.⁷ Witte's principal purpose is "to uncover some of the main theological beliefs that have helped to form Western marriage law in the past, and so to discover how such beliefs might help to inform Western marriage law in the future."⁸ The work explores Christian theological norms and Western principles of marriage and family life in the last half of the past millennium and focuses primarily on Western Europe.

Professor Witte has focused his work on five "watershed"⁹ models in the Western tradition of marriage: the Catholic, Lutheran, Calvinist, Anglican, and Enlightenment traditions. Describing these five formations of marriage in detail, he demonstrates the beginning of Christian marriage law as a form of Sacrament with a bearing on one's eternal salvation and traces its development to the current Western view of purely contractual marriage. Professor Witte's historical description is well written and enlivened with historical accounts of intriguing legal challenges to marriage law, such as Johann Apel's challenge to the requirement of clerical celibacy during the Lutheran reformation¹⁰ and King Henry VIII's challenge to his marriage to Catherine of Aragon during the formation of the Anglican tradition.¹¹ Yet despite its historical breadth and agreeable format, the reader still is left asking, "So what?"

7. See Peter Steinfelds, Book Review, N.Y. TIMES, June 7, 1998, § 7, at 28 (reviewing ROBERT H. VASOLI, *WHAT GOD HAS JOINED TOGETHER: THE ANNULMENT CRISIS IN AMERICAN CATHOLICISM* (1998)); Andrew M. Greeley, *When Does Marriage Become a Sacrament?*, STUART NEWS, Aug. 8, 1998, at D4 ("Many marriages have from their beginning been so steeped in mutual selfishness, immaturity, and egotism that, no matter how many children have been produced and how long the relationship has persisted, it would be ludicrous to say the marriage gives even a slight hint of God's self-emptying love for humankind."). See also Major Fenton, *Louisiana First State to Pass Covenant Marriage Statute*, ARMY LAW., Sept. 1997, at 45 (demonstrating a new approach that states are taking toward marriage law).

8. WITTE, *supra* note 1, at 1.

9. *Id.* at 3 (stating that the marriage models represented in his work are "watershed periods in the Western tradition of marriage—eras when powerful new theological models of marriage were forged that helped to transform the prevailing law of marriage").

10. See *id.* at 44-45.

11. See *id.* at 134-40.

*B. The Five Watershed Models**1. The Catholic sacramental model*

Professor Witte describes the first religious model in his book, the Catholic model, as having a threefold purpose.¹² First, marriage was a natural association created by God to permit men and women to have children and to protect themselves from the evils of lust.¹³ Second, marriage was seen as a contractual matter where couples would determine the duties owed to each other and the family.¹⁴ Valid marriages were deemed indissoluble, while marriages tainted with “mistake, duress, fraud, or coercion or between parties that had either legal, spiritual, blood, or familial ties” were deemed invalid contracts from their inception.¹⁵

Finally, marriage was a sacrament, where “[t]he temporal union of body, soul, and mind within the marital estate symbolized the eternal union between Christ and His Church, and brought sanctifying grace to the couple, the church, and the community.”¹⁶ Celibacy was still a sign of spiritual superiority, a gift given to only the most spiritually pure.¹⁷ Marriage was not instituted to edify, but to save the soul from its lustful nature. This system of marriage law was formalized by the Council of Trent in 1563 and still influences thought on marriage law today, especially among Christian circles.¹⁸

2. The Protestant models

Developing from the Catholic model were three Protestant models of marriage that still treated marriage as an institution to protect procreation and familial ties between consenting couples. But, unlike the Catholic ideal, the Protestant models did not view celibacy as a higher state.¹⁹ Marriage was not seen as a sacrament, but as a social estate.²⁰ Each of the three Prot-

12. *See id.*

13. *See id.* at 3.

14. *See id.*

15. *Id.* at 4.

16. *Id.*

17. *See id.*

18. *See id.*

19. *See id.* at 5.

20. *See id.*

847] BOOK REVIEW: *SACRAMENT TO CONTRACT* 851

estant traditions emphasized a different dimension of marriage. Lutherans emphasized the social aspect of marriage, Calvinists stressed covenantal dimensions, and Anglicans focused on considerations of the commonwealth.²¹

a. *The Lutheran tradition.* The Lutheran model developed in Germany in 1517 and continued to flourish in Austria, Switzerland, Scandinavia, and their respective colonies.²² Martin Luther taught that marriage was a creation of the earthly world and not a sacred institution and was therefore subject to the state and not to the church. Although not governed by the church, marriage was still to be governed by God's law through magistrates who acted as God's "vice-regents" on earth.²³ Marriage was to "reveal" to persons their sin and their need for God's marital gift.²⁴ Divorce was only an option if the marriage was tainted; for example, by desertion or adultery.²⁵

b. *The Calvinist tradition.* The Calvinist tradition was established in mid-sixteenth century Geneva²⁶ and dispersed to "Huguenot, Pietist, Presbyterian, and Puritan communities in Western Europe and North America."²⁷ It contained aspects of both sacramental and contractual formations of marriage. Calvinism taught that marriage was a covenantal association with the entire community: a marriage required parental consent as well as two witnesses and was legitimized by both a minister who explained spiritual duties and a magistrate who registered the couple legally. Each party was considered equally important to the marriage and "represented a different dimension of God's involvement in the covenant."²⁸ This model attempted to confirm the sacred nature of marriage while at the same time not ascribing to it sacramental functions; marriage was more than a contract, yet not quite a sacrament.²⁹

c. *The Anglican tradition.* Professor Witte has described the Anglican tradition of marriage that prevailed in Great

21. *See id.*

22. *See id.* at 5-6, 10.

23. *Id.* at 6.

24. *Id.* at 5.

25. *See id.* at 6.

26. *See id.* at 7.

27. *Id.* at 10.

28. *Id.* at 7.

29. *See id.* at 8.

852 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999]

Britain and its colonies as a “commonwealth model” that “embraced the sacramental, social, and covenantal models, but went beyond them.”³⁰ The purpose of this model was to strengthen the couple, their children, and the church, all at the same time, through Christian living.³¹ Yet as Great Britain became revolutionized and democratized in the seventeenth century, marriage was also revolutionized. Equality became the word of the day, and the “biblical duties of husband and wife and of parent and child were recast as the natural rights of each household member against the other.”³² This revising of the family led to the increasing liberalization of English marriage law and to the eventual transformation into the Enlightenment model.³³

3. *The Enlightenment contractual model*

The Enlightenment model, the forerunner to modern marriage law and accompanying aspects such as premarital contracts, no-fault divorces, common law marriage, and the debate over same-sex marriage, began in the eighteenth, and spanned to the twentieth, century.³⁴ In England and America, an increasingly contractual model developed where the terms of the arrangement were created and agreed upon between the parties. Although this regime brought with it increased protections and equality for women and children, it also made it easier to marry and easier to dissolve a marriage.³⁵ “[T]he state began to replace the church as the principle external authority governing marriage and family life.”³⁶

This in-depth description of the evolution of these five traditions brings us to the present, where a purely contractual model reigns. Professor Witte implies his dissatisfaction with the current state of the law, yet offers no suggestions for change. A companion piece to his work could offer insight into how this history could and should come alive to inform and to provide guidance to the modern debate on family and marriage law. A historical account such as this is not useless; in fact,

30. *Id.*

31. *See id.* at 9.

32. *Id.*

33. *See id.* at 10.

34. *See id.*

35. *See id.* at 11.

36. *Id.*

847] BOOK REVIEW: *SACRAMENT TO CONTRACT* 853

many interest groups have and will undoubtedly use this work to suit their purposes.³⁷ In the context of such a value-laden controversy, a scholar of Professor Witte's magnitude is needed to help make suggestions and provide moral direction as the American family continues to disintegrate.

III. UNANSWERED QUESTIONS

In the last four pages of the book, in a section entitled "Reflections," Witte finally begins to reveal what appears to be his perspective. He argues that marriage law has come full circle in that celibacy, which was seen as the ideal of Catholicism at the beginning of the millennium, and was condemned by Protestants in the middle of the millennium, has now resurfaced in social preference for single life, although celibacy now means remaining unmarried while still sexually active.³⁸ He traces the development, but draws no conclusions, thus failing to offer direction as to what this history should mean to scholars, theologians, and legislators today. Three questions could be asked that, if answered, would help the reader apply Professor Witte's work to the modern debate.

A. *Three Questions*1. *How should this historical account be applied?*

In the beginning of the book, Professor Witte proclaims in the beginning of the book that his goal is to offer some guidance as to how historical law could be applied to the challenges the American family faces today,³⁹ yet he never identifies which aspects of this rich religious history he holds valuable, or what persuasive effect this history should have. In their forward to the book, Don S. Browning and Ian S. Evison argue that the modern debate over the health of families in America has been for the most part uninformed and "is riddled with historical,

37. This is already the case. Many same-sex marriage advocates have used his historical recounting of the Enlightenment contractual theory of marriage to advance a historical justification for the practice. See e.g., David Orgon Coolidge, *Same Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997).

38. See WITTE, *supra* note 1, at 217.

39. See *id.* at 1 (stating that the book's "principle goal is to uncover some of the main theological beliefs that have helped to form Western marriage law in the past, and so to discover how such beliefs might help to inform Western marriage law in the future").

854 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999]

theological, and social-scientific ignorance.”⁴⁰ It is clear that Professor Witte advocates a more informed discussion of marriage and family law. It is also clear that Professor Witte is, perhaps, one of the most informed scholars on the subject. As the debate continues to rage, we need, now more than ever, scholars such as Professor Witte to apply his research, personal knowledge, and *faith* into coherent and meaningful arguments. The connection needs to be made between the academic scholarship and potential practical application that could shape communities and national family policy. Professor Witte writes,

To adduce these ancient sources is instead to point to a rich resource for the lore and law of modern marriage that is too little known and too little used today. Too much of contemporary society seems to have lost sight of the rich and diverse Western theological heritage of marriage and the uncanny ability of the Western legal tradition to strike new balances between order and liberty, orthodoxy and innovation with respect to our enduring and evolving sexual and familial norms and habits. . . . There is a great deal more in those dusty old tomes and canons than idle antiquaria or dispensable memorabilia. These ancient sources ultimately hold the theological genetic code that has defined the contemporary family for what it is—and what it can be.⁴¹

Throughout this work, Witte describes how in the past, marriage was not solely the formation of a contract between two individuals. For example, in the Protestant tradition, marriage was to be consented to by both parties, by the parents of those to be married, and by the community. Marriage required theological, as well as community, approval. Professor Witte argues repeatedly that we now lack the ability to mix the factions of church, state, and community in one tradition. This may be how he would urge this history be used, as a way to show how religion and secularism have been, and possibly in the future could be, joined. Yet he never clearly states this, or any other method of making this mostly historical account relevant to marriage law today.

40. *Id.* at ix.

41. *Id.* at 15.

847] BOOK REVIEW: *SACRAMENT TO CONTRACT* 8552. *What audience does this work intend to inform?*

It is unclear whether Professor Witte is addressing Christians, other academics, participants in the American democratic process, or any number of other parties to the marriage debate. He states that “[t]oo much of contemporary society seems to have lost sight of the rich and diverse Western theological heritage of marriage.”⁴² At one point he implies that he might be addressing modern day Christians when he declares: “Too much of the contemporary Christian church seems to have lost sight of the ability of its forebearer to translate their enduring and evolving perspectives on marriage and family life into legal forms, both canonical and civil.”⁴³ If aimed at Christian religious scholars and leaders, this analysis is undoubtedly important as they captain their parishioners and lead discussions in religious schools of thought. Yet he also seems to be addressing those who are making, or have the power to change, the law. How should a legislator, judge, or advocate use this perspective appropriately?

Should policymakers consider this type of a study in creating law? Is it realistic to believe that a historical overview of Christian marriage law might actually be looked at in the formation of modern marriage law? Whom should a work like this inform about the future of modern-day marriage and family? If Professor Witte is writing merely to Christian church communities, there is no doubt that this historical journey should at least be discussed and applied in each respective marriage tradition. But is there an application of this research that is really plausible on a broader level? By leaving his audience ambiguous, Professor Witte leaves these questions unanswered.

3. *Is a religious historical perspective important to the modern debate?*

Many would argue that this historical account is, by definition, a thing of the past. In many respects, the contract formation of Enlightenment marriage law tends to “fit” the pluralistic society of today’s Western world. The Western world is no longer divided into relatively small geographical areas governed by a singular religious majority. The United States of

42. *Id.*43. *Id.*

856 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999]

America was formed for the exact purpose of creating a society free from limitations on religious belief. There are many religious and moral codes, essential to the development of modern law, that Professor Witte does not discuss.⁴⁴ It is not at all clear that an analysis such as Professor Witte's could apply beyond Christian circles. Is there any real possibility that our nation's laws could be governed by a Christian norm? A religious historical perspective is facially questionable in a society that separates church and state in every aspect.

Perhaps Professor Witte would have his reader respond at a deeper level, encouraging a reevaluation of the general moral characteristics of marriage law that may be applicable to the modern debate. Should some natural, higher law govern marriage relationships? Should some moral code govern marriage formation? Should it be a matter for state legislatures and local government to decide public policy that reflects the morals of each community? Could an overarching national tradition or Western theory be created that would satisfy Equal Protection and the guarantees of the First Amendment? Professor Witte's analysis leaves the reader with many more questions than answers.

IV. POSSIBLE APPLICATIONS

It may be helpful to mention three areas where Witte's analysis has been, and could be, appropriately used to facilitate further discussion.

A. *Same-Sex Marriage*

The most controversial application of Witte's work to date is the debate over homosexual marriage. Witte's work has been cited to support a long historical basis for the completely contractual view of marriage.⁴⁵ If the Enlightenment vision of a purely contractual marital joinder prevails, an Equal Protection analysis may, in the end, legitimize the union. Witte states that "the strong presumption in America today is that adult parties have free entrance into marital contracts, free exercise of marital relationships, and free exit from marriages once

44. See Shriver, *supra* note 3, at 1192 ("The book is an intentionally Eurocentric study, and I wish that comparisons with extra-European models of marriage had entered at least the footnotes.").

45. See Coolidge, *supra* note 37, at 1.

847] BOOK REVIEW: *SACRAMENT TO CONTRACT* 857

their contractual obligations are discharged of.”⁴⁶ If our Western tradition of marriage continues to ignore its religious underpinnings in lieu of the currently popular notions of individualism, equality, privacy, and freedom above all costs, there will be diminishing justification for denying marriage between any two partners.

Homosexual marriage also challenges us as a society to rethink our purposes in favoring legitimized marriages. *From Sacrament to Contract* recounts the historical justifications for marriage and could very well provide a helpful historical perspective. The same-sex marriage debate seems to turn on whether we are going to view marriage as a matter of “public commitment of intimate friends,” as the foundations for providing support for man and wife, as a cure for moral indiscretion, or as the setting where children can be brought into the world.⁴⁷

B. Prenuptial Agreements

Premarital agreements pose yet another challenge to traditional Western marriage. With increasing frequency, Western couples are making their roles within the marriage relationship and the processes for dissolution of a marriage relationship a matter of written contract.⁴⁸ Premarital agreements demonstrate the Enlightenment tradition at its height: the pure contractualization of the marriage relationship. Currently, “courts do not always enforce marriage contracts, and the bases on which they review such contracts is not entirely clear.”⁴⁹ It is not clear whether the hesitancy to enforce premarital contracts is merely the slow process of changing to a completely contractual system, or whether the law truly does struggle as to whether marriage is a contractual right or the moral foundation of society. The court’s natural tendency to shy away from enforcing matrimonial contracts might demonstrate

46. WITTE, *supra* note 1, at 214.

47. Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 159 (1998).

48. See Gregory S. Alexander, *The New Marriage Contract and the Limits of Private Ordering*, 73 IND. L.J. 503, 503-04 (1998) (discussing the interesting idea of contracting to make marriage harder to dissolve in order to place a higher importance on preserving the marital relationship).

49. *Id.* at 503.

858 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999]

a desire to turn away from the purely contractual model of marriage that has emerged over the past centuries toward a more religious-based theory of marriage, where married couples are responsible to God, family, community, and children, rather than solely to each other. A historical perspective such as Professor Witte's might provide guidance in retracing our steps and prioritizing what we hold sacred.

C. Common Law Marriage and Divorce

Common law marriage poses still further questions in this debate. That we value legal marriage is demonstrated in our common law, which affords certain rights and status to legally married couples. What message is sent when common law cohabitation is treated as a legal marital-like partnership?⁵⁰ How we characterize divorce also reveals how we, in essence, view the marriage relationship. If marriage and divorce are both easy to obtain, do we as a society teach our children from the outset that marriage is something that affects the individual only, and not others in the family or community? Scientific studies would indicate otherwise. For example, some studies have shown that children living in single parent families have more trouble in school, are lower achievers, are more often late, more often truant, more likely to be sent to the principal's office, more likely to be suspended, and more likely to be expelled.⁵¹ Will studies such as these redirect future marriage law?

The continuing uneasiness and trouble felt within the courts in making these tough decisions as to what a family is, and how we will legitimize it, indicates that a historical outlook such as Professor Witte's might provide helpful direction and inspire more discussion to guide the creation of common and statutory law.

50. See Ariela R. Dubler, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885 (1998); Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829 (1987).

51. See Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 86-87 (1982) (proposing new legislation that would require parents to show that remaining in the marriage would be more detrimental to the children than the divorce itself in order to obtain a legal divorce).

V. CONCLUSION

Ultimately, questions of morality must play major roles in deciding how Western law will dictate the direction of the modern family in the future. In a world searching for direction, scholars and theologians such as Professor Witte are much needed to give guidance as well as to inform. In this reviewer's opinion, Professor Witte has correctly identified that the American family is coming to a crossroads. Either the family as an institution will be strengthened both in legal and social practice, or it will continue to slowly disintegrate. There can be no doubt that the concepts of marriage and family have mutated and adapted over the centuries. Professor Witte's discussion of changes in the law during the past 500 years succeeds in its attempt to inform the debate regarding the evolution of marriage law from its beginnings into its present day form. Yet a companion volume to this work would provide meaning to the thought and research that has gone into recounting this historical perspective. It would be helpful if in the future Professor Witte would give more insight into how "[t]hese ancient sources ultimately hold the theological genetic code that has defined the contemporary family for what it is, and what it can be."⁵² As a society of families at risk, we are in desperate need of Professor Witte's help to break that code.

Jennie Holman Blake

52. WITTE, *supra* note 1, at 15.