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John Witte, Jr.
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THE BLESSINGS OF LIBERTY

Leading legal scholar John Witte, Jr. explores the role religion played in the development of rights in the Western legal tradition and traces the complex interplay between human rights and religious freedom norms in modern domestic and international law. He examines how US courts are moving toward greater religious freedom, while recent decisions of the pan-European courts in Strasbourg and Luxembourg have harmed new religious minorities and threatened old religious traditions in Europe. Witte argues that the robust promotion and protection of religious freedom is the best way to protect many other fundamental rights today, even though religious freedom and other fundamental rights sometimes clash and need judicious balancing. He also responds to various modern critics who see human rights as a betrayal of Christianity and religious freedom as a betrayal of human rights.

John Witte, Jr. is Woodruff University Professor, McDonald Distinguished Professor, and Director of the Center for the Study of Law and Religion at Emory University. A world-class scholar of legal history, human rights, and law and religion, he has published 300 articles and 40 books. Recent works include *The Western Case for Monogamy over Polygamy* (Cambridge, 2015), *Christianity and Family Law* (Cambridge, 2017), and *Church, State, and Family* (Cambridge, 2021).

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HUMAN RIGHTS AND RELIGIOUS FREEDOM
IN THE WESTERN LEGAL TRADITION

JOHN WITTE, JR.

Emory University



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For Johan D. van der Vyver,
Friend, Brother, and Colleague

[N]o free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.

Virginia Declaration of Rights, sec. xv (June 12, 1776)

We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Preamble to the US Constitution (1789)

Every Circumstance in our present Situation must lead us to reflect, with the deepest Gratitude, on . . . the inestimable Blessings of Liberty and Order, which we consider as being, under the Favor of Providence, the principal Source of all our present Advantages.

Address of Parliament to King George IV of England (1792)

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Preface and Acknowledgments

For the past thirty plus years, I have been writing on the history, theory, and law of human rights and religious freedom. My main arguments have been (1) that religion has long been a critical foundation and dimension of human rights; (2) that religion and human rights still need each other for each to thrive; and (3) that robust promotion and protection of religious freedom is the best way to protect many other fundamental rights today, even though religious freedom and other fundamental rights sometimes clash and need judicious balancing. I have defended these propositions with various historical, legal, and theological arguments, and have learned much from deep conversations with Christian, Jewish, and Muslim scholars as well as self-professed secular and postreligious scholars who variously defend, deride, and demur on the value and validity of human rights and religious freedom.

This volume presses further on all three of these main arguments. It includes nine studies on human rights and religious freedom historically and today – ranging from the earliest urtexts on liberty in the Bible and classical sources to the latest machinations of the American and European high courts. The first chapters explore the foundational role of Christianity in the development of rights and liberties in the Western tradition, particularly in the Anglo-American common-law tradition. Other chapters show how the protection of religion and religious freedom proved critical to the development of domestic and international protection of human rights. Several chapters analyze closely and critically the efforts of the American and European high courts to protect religious freedom and other fundamental rights and liberties. The “Concluding Reflections” respond to criticisms of human rights and religious freedom offered by various scholars and defends these rights and freedoms, particularly against various Christian critics.

These chapters are drawn in part from various articles that have gone to press since the publication of several earlier volumes of mine in this field. Those earlier volumes included *The Reformation of Rights* (Cambridge University Press, 2007), *Christianity and Human Rights* (Cambridge University Press, 2010), *Religion and Human Rights* (Oxford University Press, 2012), *No Establishment of Religion*

(Oxford University Press, 2012), and *Religion and the American Constitutional Experiment*, 4th ed. (Oxford University Press 2016). I am grateful to the *Journal of Law and Religion*, the *Journal of Church and State*, the *Emory Law Journal*, the *Southern California Law Review*, and the *Texas Journal of International Law* for permission to publish updated excerpts from articles that first appeared in them.

I am deeply grateful to the McDonald Agape Foundation, particularly its great founder, the late Ambassador Alonzo McDonald, and his successor and son, Peter McDonald, for their continued generous support of my work on this and other volumes and projects. My warm thanks to my colleague Dr. Justin Latterell, who provided and coordinated research support for this volume and coauthored an article with me, which is excerpted in part of Chapter 1. I am most grateful as well to my friend Professor Andrea Pin of the University of Padua, who first inspired me to look carefully at the new religious freedom jurisprudence of the pan-European courts, and who coauthored two law review articles with me that are revised and reworked here. I am also grateful for the excellent research tips and guidance into several specialty literatures offered by my friends Silas Allard, Nathan Chapman, Norman Doe, Rafael Domingo, Daniel Dreisbach, Richard Garnett, Christy Green, Dick Helmholz, Mark Hill, Russell Hittinger, Patrick Judd, Douglas Laycock, David Little, Martin Marty, Alexander Rudofsky, Jan Stieverman, Christoph Strohm, Eric Wang, and Michael Welker.

For the past thirty-five years, I have been privileged to serve as director of the Center for the Study of Law and Religion at Emory University. For much of this time, the Center has been home to two stalwart professional staff members and friends, Amy Wheeler and Anita Mann, who have again generously supported the production of this volume. In recent years, the Center has also been privileged to engage the brilliant services of Dr. Gary S. Hauk as senior editor, whose editorial handiwork has greatly improved all these pages.

Several of my Center colleagues have been kind enough to engage me in ongoing conversations about human rights and religious freedom – particularly Professors Frank S. Alexander, Abdullahi Ahmed An-Na'im, Michael J. Broyde, Rafael Domingo, Timothy P. Jackson, Michael J. Perry, and Johan D. van der Vyver. I have benefited greatly from interactions with them and with the hundreds of scholars who have worked on our Center's international research projects on religion, human rights, and religious freedom over the years, and the thousands of students since 1985 who took my courses on the History of Church–State Relations in the West; First Amendment: Religious Freedom; Comparative Religious Freedom; and Advanced Religious Liberty.

Finally, I am grateful to John Berger, Beatrice Rehl, and Jackie Grant at Cambridge University Press for taking on this volume and applying their usual standards of excellence in their editing, production, and marketing. It is a special joy to appear in the Cambridge Studies in Law and Christianity book series.

I dedicate this volume to my distinguished friend, brother, and colleague, Professor Johan D. van der Vyver. Johan serves as the I. T. Cohen Professor of International Law and Human Rights at Emory Law School, Senior Fellow in our Law and Religion Center, and former Senior Fellow for Human Rights at the Carter Center of Emory University. Johan's lifelong devotion to human rights and religious freedom have been an inspiration to me since my early college days, when he kindly sent me a copy of his sterling book, *Seven Lectures on Human Rights* (Juta, 1976). We have worked side by side from the start of our Center's work on democracy, human rights, and religious freedom. Johan contributed a brilliant lecture and chapter to our first conference and volume on *Christianity and Democracy in Global Context* (Westview, 1993). We ran several more conferences together and coedited two massive volumes on *Religious Human Rights in Global Perspective* (Martinus Nijhoff, 1996), and several later journal symposia and anthologies on religious freedom, church–state relations, proselytism, children's rights, and more.

Johan began teaching law in 1958 at his alma mater, the University of Potchefstroom, South Africa, where he soon became a chaired professor and then dean of the law faculty. He taught and wrote at length in the fields of property law, family law, the law of persons, church–state relations, legal science, and legal philosophy. He produced several leading texts, in multiple editions, some of which are still in print.

In the 1970s, he added human rights to his scholarly repertoire. He studied human rights as a visiting scholar and lecturer at Columbia, Michigan, Harvard, and the Institute for Advanced Legal Studies in London, yielding his LL.D. dissertation on “The Juridical Meaning of the Doctrine of Human Rights.” This new accent in his work soon landed Johan in trouble with both the conservative churches of his community and the apartheid state of South Africa. Many local Protestant churches thought human rights to be a dangerous product of Enlightenment liberalism and individualism, which Bible-believing Christians should firmly reject. Johan argued powerfully and patiently to the contrary, that human rights are God's gifts to human nature, which should be enjoyed and exercised by every human being, regardless of color, class, confession, or sexual orientation. The apartheid state, in turn, reserved human rights to the white elite, leaving vast portions of South African society trapped in dire poverty, illiteracy, and oppression with little legal recourse or protection. Johan risked much in speaking out against these racist and apartheid policies using the spotlight of human rights to expose the grave injustices that these state policies inflicted. He was soon rejoined, rebuked, censored, demoted, and then dismissed from his deanship at Potchefstroom, and eventually forced to leave the university and take up a position at the University of Witwatersrand, in Johannesburg.

While now a pariah in some conservative religious and political communities, Johan became a powerful antiapartheid voice in South Africa and a champion of human rights and democratic reform, which he defended on Christian

philosophical and jurisprudential terms. He wrote several pathbreaking books and articles in this field and led workshops and lectures around South Africa and well beyond. In 1976, he flew to New York City and walked in without appointment to the Ford Foundation offices, asking them to support the burgeoning human rights movement in South Africa. They supported this effort generously, and in 1979 Johan organized the first great international human rights conference in South African history, hosting it in the glorious city of Cape Town. There he helped introduce the world to a still regional hero at the time, Archbishop Desmond Tutu. Throughout this time, he argued constitutional cases in the South African courts on behalf of racial and religious minorities. And he remained one of the legal architects, along with his many students and a growing body of coworkers, of the antiapartheid efforts and then the constitutional reform movements of South Africa in the later 1980s and early 1990s.

Johan's work attracted the attention of the leading human rights scholar at Emory Law School at the time, Thomas Buergenthal, as well as President Jimmy Carter, who had established the Carter Center of Emory University. In the early 1990s, they invited him to make regular visits to Emory, where, in 1995, he became senior fellow at the Carter Center and was appointed to the law school in the I. T. Cohen Professorship, which he still holds. My colleagues and I in the field of law and religion saw the power of his mind, heart, and work, too, and we drew him into our Center's projects.

After moving permanently to Emory, Johan added yet another thick layer to his scholarly work. While retaining his earlier legal specialties, he now took on the new subjects of public international law, international humanitarian law, the laws of military conflict, and international criminal law. He followed his trademark method of learning by doing, as he took each of these topics and wrote voluminously on each of them while creating new courses, seminars, and public lectures. He is now bringing this new phase of scholarship into a capstone multivolume work on the International Criminal Court.

Johan remains a quiet giant in the legal academy today with high standing around the globe for his brilliant contributions to many fields of legal study, captured in a score of books in multiple editions and languages and 300 plus articles. He has stood at distinguished lecterns on every continent, save Antarctica, and in the last few years alone has traveled to India, China, Morocco, Belgium, Bulgaria, Singapore, Chile, and various cities in North America and South Africa to give lectures and lead conferences. He still teaches full time at Emory, while flying back and forth to South Africa between semesters.

On some of these recent trips back to his native land, Johan has finally gotten his just due from his native South Africa as well. He has now been decorated with all manner of academic awards, tributes, and citations, including an appointment as Professor of Law Extraordinaire at the University of Pretoria. In sublime acts of sweet justice, the University of Zululand gave him an honorary doctorate for his

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courageous advocacy for black South Africans, and eventually his own alma mater, the University of Potchefstroom, gave him an honorary doctorate for his courageous prophecy to white South Africans.

I dedicate this volume to Johan van der Vyver with all admiration, appreciation, and affection. May his remarkable life, work, and example long continue to the edification of us all.