

3-1-2020

## The Metaphorical Bridge Between Law and Religion

John Witte Jr.

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Religion Law Commons](#)

---

### Recommended Citation

John Witte Jr. *The Metaphorical Bridge Between Law and Religion*, 47 Pepp. L. Rev. 435 (2020)  
Available at: <https://digitalcommons.pepperdine.edu/plr/vol47/iss2/14>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [Katrina.Gallardo@pepperdine.edu](mailto:Katrina.Gallardo@pepperdine.edu), [anna.speth@pepperdine.edu](mailto:anna.speth@pepperdine.edu).

# The Metaphorical Bridge Between Law and Religion

John Witte, Jr.\*

## *Abstract*

*This Article explores the role of metaphors in shaping our thought and language in general, and in the fields of law and religion in particular. Drawing on modern cognitive theorists like George Lakoff and Mark Johnson, the Article distinguishes and illustrates the roles of “orientation,” “structural,” and “ontological” metaphors in everyday life and language. Drawing on jurists like Robert Cover and Steven Winter, it shows how metaphors work both in describing the law in terms like “the body,” and in prescribing the foundational beliefs and values on which the legal system depends. Finally, the Article explores the ample use of the number three in the law and speculates tentatively whether this legal appetite for “triads” might provide traction for the development of a Trinitarian jurisprudence. This Article is dedicated to Robert Cochran, one of the pioneers of law and religion and Christian legal thought in the United States, whose own writings make ample use of metaphors.*

---

\* Robert W. Woodruff University Professor of Law; McDonald Distinguished Professor of Religion; and Director of the Center for the Study of Law and Religion, Emory University. This Essay is adapted from a chapter I wrote on *Law, Religion, and Metaphor*, in *RISIKO UND VERTRAUEN / RISK AND TRUST: FESTSCHRIFT FÜR MICHAEL WELKER ZUM 70. GEBURTSTAG 177–95* (Günter Thomas & Heike Springhart eds., 2017), and is used herein with permission of the publisher. My thanks to Justin Latterell, Denise Wesley, Cai Roman—all colleagues in our Center for the Study of Law and Religion at Emory—for their helpful assistance. © John Witte, Jr.

TABLE OF CONTENTS

I.	INTRODUCTION .....	437
II.	METAPHORS AND MEANING .....	441
	<i>A. Orientation and Structural Metaphors</i> .....	442
	<i>B. Ontological and Religious Metaphors</i> .....	445
III.	METAPHORS AND THE LAW .....	450
	<i>A. Orientation and Structural Metaphors</i> .....	450
	<i>B. Ontological and Religious Metaphors</i> .....	452
IV.	“TRINITARIAN” METAPHORS IN THE STUDY OF LAW? .....	459

## I. INTRODUCTION

Bob Cochran likes metaphors. In his path-breaking writings on the legal profession, he offers contrasting metaphors of “The Lawyer as Godfather,”<sup>1</sup> “The Lawyer as Hired Gun,”<sup>2</sup> “The Lawyer as Guru,”<sup>3</sup> “The Lawyer as Friend,”<sup>4</sup> and “The Lawyer as Nostromo,” the name of Joseph Conrad’s “honorable” protagonist.<sup>5</sup> Against the popular image of the lawyer as grubby, greedy, and adversarial, he sets out the classic ideal of the law as a “noble” profession<sup>6</sup> charged with leading a “communitarian” system<sup>7</sup> of justice and mercy, law, and love.<sup>8</sup> He calls for a “collaborative practice”<sup>9</sup> of law, built on a striking new legal beatitude: “Blessed are the Compromisers.”<sup>10</sup> For the legal profession to achieve this ideal, Cochran offers yet another metaphor, this time drawn from Thomas Shaffer, his late great mentor and coauthor:

Shaffer envisions a downtown street. On one side of the street is a house of worship; on the other is a courthouse. According to Shaffer, law schools train lawyers to look at the religious congregation from the courthouse—that is, to analyze the problems that the religious congregation creates for the law. Law schools ignore the possibility that there might be a view of the courthouse from the house of wor-

---

1. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 5 (2d ed. 2009).

2. *Id.* at 15, 16.

3. *Id.* at 30.

4. *Id.* at 40, 42.

5. Robert F. Cochran, Jr., *Honor as a Deficient Aspiration for “The Honorable Profession”*: *The Lawyer as Nostromo*, 69 *FORDHAM L. REV.* 859, 863 (2000).

6. *Id.* at 859–60 (discussing lawyers’ concerns with the noble aspects of law).

7. ROBERT F. COCHRAN, JR. & ROBERT M. ACKERMAN, *LAW AND COMMUNITY: THE CASE OF TORTS* 223 (2004).

8. See generally Robert F. Cochran, Jr., *Jesus, Agape, and Law*, in *AGAPE, JUSTICE, AND LAW: HOW MIGHT CHRISTIAN LOVE SHAPE LAW?* 36, 37 (Robert F. Cochran, Jr. & Zachary R. Calo eds., 2017) (collecting essays on how Christian love, or agape, could inform legal systems).

9. Robert F. Cochran, Jr., *Introduction: Can the Ordinary Practice of the Law be a Religious Calling?*, 32 *PEPP. L. REV.* 373, 378 (2005).

10. See generally Robert F. Cochran, Jr., *Introduction: Blessed are the Compromisers?*, 38 *PEPP. L. REV.* 813, 815 (2011) (giving introductory material on the virtue of compromise in law and religion).

ship—that the law might create problems for the religious congregation.

Prophetic witness is discounted in law teaching. Our part of the academy, more than any other, has systematically discouraged and disapproved of invoking the religious tradition as important or even interesting. It ignores the community of the faithful so resolutely that even its students who have come to law school from the community of the faithful learn to look at [the religious congregation] from the courthouse, rather than at the courthouse from [the religious congregation].

Shaffer encourages lawyers to “walk across the street and look at the courthouse from the church.”<sup>11</sup>

This provocative image points to Professor Cochran’s equally important work in law and religion. This work is reflected in his many leading publications, the excellent programs and projects he has regularly convened for the Nootbaar Institute at Pepperdine, and his intense collaborative work with Christian lawyers, law professors, and law students at home and abroad over several decades. This work, too, is peppered with metaphors. Some are familiar biblical terms and tropes: The law “written on our hearts”;<sup>12</sup> the “habits of the heart”;<sup>13</sup> “the race is not to the swift”;<sup>14</sup> “all who take the sword will perish by the sword”;<sup>15</sup> “there is nothing new under the sun”;<sup>16</sup> a voice “crying

---

11. FAITH & LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW 1 (Robert F. Cochran, Jr. ed., 2008) (quoting THOMAS L. SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION 209–10, 214 (1991)).

12. Robert F. Cochran, Jr., *The Catholic Court Appeal: Why So Many Catholic Justices on the Supreme Court? Why Now?*, TOUCHSTONE, July–Aug. 2006, at 40, 42; see also LAW AND THE BIBLE: JUSTICE, MERCY, AND LEGAL INSTITUTIONS 14–15, 155 (Robert F. Cochran, Jr. & David VanDrunen eds., 2013) [hereinafter LAW AND THE BIBLE].

13. Cochran, *supra* note 12, at 42.

14. Robert F. Cochran, Jr., *Modern Legal Traditions: The United States*, in 2 OXFORD ENCYCLOPEDIA OF THE BIBLE AND LAW 88, 94 (Brent A. Strawn ed., 2015) (quoting *Ecclesiastes* 9:11 (New King James Version)).

15. *Id.* (quoting *Matthew* 26:52).

16. *Id.* (quoting *Ecclesiastes* 1:9). See also the use of *Ecclesiastes* in Robert F. Cochran, Jr., *Introduction: Can the Ordinary Practice of Law Be a Religious Calling?*, 32 PEPP. L. REV. 373, 376 (2005).

in the wilderness”;<sup>17</sup> “the letter kills, but the Spirit gives life”;<sup>18</sup> and the doctrine of “Good Samaritan[ism].”<sup>19</sup> Some of these metaphors are the familiar currency of civil society and political theology: the law of “intermediary associations,”<sup>20</sup> “subsidiarity,”<sup>21</sup> “sphere sovereignty,”<sup>22</sup> the “pillars of the church”<sup>23</sup> and society, and the contrasting norms and ends of “agape versus eros.”<sup>24</sup>

Cochran uses a particularly compelling architectural metaphor to describe the shifts away from biblical and other forms of “higher law” and justice in modern legal education:

When I was a law student at the University of Virginia in the mid-1970s, my jurisprudence professor Calvin Woodard used the law school’s architecture to illustrate the twentieth century’s major jurisprudential shift. Above the columns at the entrance to Clark Hall, where I spent my first year of law school, carved in stone was the statement: “That those alone may be servants of the law who labor with learning, courage, and devotion to preserve liberty and promote justice.”

From the front, we walked into a massive entry hall, adorned on

17. Cochran, *Modern Legal Traditions*, *supra* note 14, at 94 (quoting *Mark* 1:3; *Luke* 3:4; *John* 1:23; *Isaiah* 40:3).

18. *Id.* (quoting *2 Corinthians* 3:6).

19. Robert M. Ackerman & Robert F. Cochran, Jr., *Law, Community, and Personal Injury*, *RESPONSIVE COMMUNITY*, Spring–Summer 2004, at 77, 81–82.

20. *See* Cochran, *supra* note 12, at 43.

21. *See id.*; *see also* Robert F. Cochran, Jr., *Catholic and Evangelical Supreme Court Justices: A Theological Analysis*, 41 *U. ST. THOMAS L.J.* 296, 304–07 (2006) (discussing “subsidiarity” and “sphere sovereignty”).

22. *See generally* Robert F. Cochran, Jr., *Tort Law and Intermediate Communities: Calvinist and Catholic Insights*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 486 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001) (discussing the application of “intermediate communitarian” theory to tort law, which is largely individualistic).

23. Cochran, *supra* note 16, at 374.

24. *See, e.g.*, Thomas C. Berg, *Agape, Gift, and Intellectual Property*, in *AGAPE, JUSTICE, AND LAW*, *supra* note 8, at 273, 284–85 (discussing the concept of agape, rather than eros, storge, or philia, in intellectual-property law); Linda Ross Meyer, *Agape, Humility, and Chaotic Good: The Challenge and Risk of Allowing Agape a Role in the Law*, in *AGAPE, JUSTICE, AND LAW*, *supra* note 8, at 57, 63–70 (exploring how different types of love, including agape and eros, might be implemented in a legal system).

either side with murals. On one side was Moses presenting the Ten Commandments to the Israelites. On the other was what appeared to be a debate in a Greek public square. As we gazed up at the larger-than-life figures, they seemed to represent the higher aspirations of the law. During my second year in law school, we moved to a much more modern, efficient building known then as “no-name hall,” some distance from the rest of the University. The statement that had been above the entrance to Clark Hall was placed on a modest plaque at the entrance to the new building. Small pictures of the murals were placed in the lobby. (It is my understanding that a new addition to the law school includes copies of the statement and the mural which split the size difference.)

Mr. Woodard (we always used “Mr.” at the University of Virginia) noted wistfully that few contemporary legal philosophers would have thought that the aspirations for law or lawyers conveyed in the motto above the entrance made sense any longer. Such claims were nostalgic remnants of Blackstone’s era. Legal philosophy had followed Oliver Wendell Holmes, who defined law as merely “prophesies of what the courts will do in fact” and said, “I hate justice, which means that I know that if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms.” Holmes argued that there is no higher law. Law is merely the assertion of power down here. Despite changing views of law, I don’t believe that any law school has chosen to place Justice Holmes’s “I hate justice” statement above its entryway.<sup>25</sup>

It has been a joy for me over the years to work with and learn from Professor Cochran. We were in the early vanguard of law professors who felt called to try to set out the metes and bounds of a new field of law and religion study, and to begin breaking some of the first rows. This field now attracts a substantial guild of some 1500 scholars around the globe<sup>26</sup>—not only law pro-

---

25. Robert F. Cochran, Jr., *Is There a Higher Law? Does It Matter? Introduction*, 36 PEPP. L. REV. (SPECIAL ISSUE) i, i–ii (2009) (internal citations omitted).

26. RESEARCH HANDBOOK ON LAW AND RELIGION xii, xviii (Rex Ahdar ed., 2018). *See generally id.* (collecting essays on the legal issues arising from the interaction between the state and religious communities and individuals).

fessors, but also scholars of religion, ethics, history, philosophy, political science, anthropology, and other disciplines.<sup>27</sup> These scholars are studying “the religious dimensions of law, the legal dimensions of religion, and the interaction of legal and religious ideas and institutions, methods and practices—historically and today,” in the West and well beyond.<sup>28</sup> They believe that at a fundamental level, religion gives law its spirit and inspires its adherence to ritual, tradition, and justice. Law gives religion its structure and encourages its devotion to order, organization, and orthodoxy. Law and religion share such ideas as fault, obligation, and covenant, and such methods as ethics, rhetoric, and textual interpretation. Law and religion also balance each other by counterpoising justice and mercy, rule and equity, discipline and love. It is this dialectical interaction that gives these two disciplines and two dimensions of life their vitality and their strength. Without law at its backbone, religion slowly crumbles into shallow spiritualism. Without religion at its heart, law gradually crumbles into empty, and sometimes brutal, formalism.<sup>29</sup>

This Article—dedicated to Professor Cochran in friendship and fraternity—builds on his efforts in exploring the role of metaphor theory as a new way of bridging the fields of law and religion. This is a rather new topic for me, and I must confess that much of the high-flying metaphor theory in print is several octaves above my usual low pitch as a legal historian. Hence these necessarily preliminary and experimental thoughts below.<sup>30</sup>

## II. METAPHORS AND MEANING

Modern cognitive theorists have shown that our conceptual thought and everyday speech are riddled with metaphors that help us to make sense of our

---

27. See, e.g., *LEADING WORKS IN LAW AND RELIGION* (Russell Sandberg ed., 2019) (examining the personal and social impact of leading British works in the field of law and religion).

28. *RESEARCH HANDBOOK ON LAW AND RELIGION*, *supra* note 26, at xii.

29. *Id.*; see JOHN WITTE, JR., *GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION* 26 (2006) [hereinafter WITTE, *GOD’S JOUST, GOD’S JUSTICE*]; John Witte, Jr., *The Study of Law and Religion in the United States: An Interim Report*, 14 *ECCLESIASTICAL L.J.* 327 (2012).

30. I have been discussing this topic with my friend and colleague, Rafael Domingo, and have benefitted greatly from his recent monograph, *RAFAEL DOMINGO, GOD AND THE SECULAR LEGAL SYSTEM* (2016), and his article, Rafael Domingo, *Body, Soul, and Spirit of the Law: Towards a Holistic Legal Paradigm*, 7 *OXFORD J.L. & RELIGION* 230 (2018) [hereinafter Domingo, *Body, Soul, and Spirit of the Law*].



experiences.<sup>31</sup> The metaphors they have in mind are not only the clever images, similes, fictions, and analogies of the poets and playwrights: “the Ship of State,”<sup>32</sup> “your mind is a machine,”<sup>33</sup> “time heals all wounds,”<sup>34</sup> “necessity is the mother of invention,” and “thou hast cleft my heart in twain.”<sup>35</sup> Nor do they mean just the colloquialisms of common speech: “I smell a rat” or “that idea stinks.” These kinds of word games are everywhere in our language and have long been recognized. Modern cognitive theorists are interested not just in these word games but also in the metaphors that run deeper, sometimes unseen, yet shape our thought and language.<sup>36</sup> “The essence of metaphor is understanding and experiencing one kind of thing in terms of another,” noted cognitive theorists George Lakoff and Mark Johnson in their path-breaking study *Metaphors We Live By*.<sup>37</sup>

#### A. Orientation and Structural Metaphors

Some of these are what cognitive theorists call *orientation metaphors*.<sup>38</sup> Think of how much conceptual and linguistic work we do with the simple spatial image of up and down. “Up” is generally more positive, “down” more negative in our mind and speech: “Things are looking *up*”; “Thumbs *up*”; “We hit our *peak* last year”; “I’m feeling *up* today”; “I’m in *high* spirits”; “That *boosted* my spirits”; “My spirits *rose*.” By contrast: “I’m feeling *down*”; “My spirits *sank*”; “I’m really *low*”; “I’m *depressed*”; I’m in a *rut*”; “It has all been *downhill* of late”; “Even though I walk through the *valley* of the shadow of death.”<sup>39</sup> We draw the same set of contrasts with other spatial images. Think

31. See generally PAUL RICOEUR, THE RULE OF METAPHOR: THE CREATION OF MEANING IN LANGUAGE (Robert Czerny trans., 2003) (studying metaphor in linguistic, semantic, rhetorical, and hermeneutical modes).

32. PLATO’S REPUBLIC, Bk. VI, 487e.

33. See John C. Marshall, *Minds, Machines and Metaphors*, 7 SOC. STUD. SCI. 475, 483 (1977) (discussing the truth behind the “mind is a machine” metaphor).

34. Michael J. A. Wohl & April L. McGrath, *The Perception of Time Heals All Wounds: Temporal Distance Affects Willingness to Forgive Following an Interpersonal Transgression*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 1023, 1032 (2007) (identifying “time heals all wounds” as an axiom).

35. WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 4.

36. See, e.g., Gerard Steen, *The Contemporary Theory of Metaphor—Now New and Improved!*, 9 REV. OF COGNITIVE LINGUISTICS 26, 27 (2011) (discussing “new” contemporary theory of metaphor).

37. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 5 (1980) (italics in original removed).

38. *Id.* at 14–22.

39. *Psalms* 23:4 (New American Standard Bible).

of “front–back,” “on–off,” “in–out,” “near–far,” “center–edge,” and how much they coat our thought and speech. We do the same thing with other kinds of common contrasts in nature: “light–dark,” “day–night,” “summer–winter,” and more. It’s “the winter of our discontent [m]ade glorious summer”<sup>40</sup>—not the other way around. All these orientation metaphors allow us to tie our language and thought to common objects of our experience.<sup>41</sup>

Some of our language and thought is also shaped by deeper *structural metaphors*.<sup>42</sup> These kinds of metaphors do more conceptual work, but often more subtly, sometimes subconsciously. Lakoff and Johnson give a good example: “Argument is war.”<sup>43</sup> That’s not something we normally say or hear in everyday speech—save perhaps in a tough crash course on negotiation, a military command center, or a bruising government budget battle. Yet, this structural metaphor quietly produces all kinds of common images in our mind and turns of phrase in our everyday speech about arguments:

Your claims are *undefensible*.  
He *attacked every weak point* in my argument.  
His criticisms were *right on target*.  
I *demolished* his argument.  
I’ve never *won* an argument with him.  
You disagree? Okay *shoot*.  
If you use that *strategy*, he’ll *wipe you out*.  
He *shot down* all of my arguments.<sup>44</sup>

Obviously, an argument is not a form of war. But the concept of an argument is “metaphorically structured, the activity is metaphorically structured, and, consequently, the language is metaphorically structured” as a war.<sup>45</sup> Once the structural metaphor, “argument is war,” gets pointed out, it’s easy to see how it shapes our everyday language and habits of thought. And, once explored and illustrated, the metaphor might well bring nods of approval by some—say, a hard-nosed litigator whose livelihood depends on winning

---

40. WILLIAM SHAKESPEARE, RICHARD III act 1, sc. 1, ll. 1–2.

41. LAKOFF & JOHNSON, *supra* note 37, at 14–24.

42. *Id.* at 56–68.

43. *Id.* at 4.

44. *Id.*

45. *Id.* at 5–6.

“courtroom battles.” It may bring frowns to others, like psychologists, mediators, or pastors, who use words to promote healing conversation or spiritual elevation. For them, the image of “argument is war” and the common phrases it inspires impedes their cause. They know that “fire away!” is not a good way to start a mediation or healing session. But for many of us who are “just arguing” about mundane things in everyday life, we often subconsciously carry on with the linguistic artillery of warfare. That might help explain a bit why we sometimes can’t stop the argument until we “win”; losers in “war” rarely fare well. But, the metaphor itself—“argument is war”—often remains hidden, unacknowledged, while it quietly shapes our everyday thought and language.

Take another example of a structural metaphor: “Time is money.” This metaphor, too, spins off all kind of habits of thought and speech we use every day:

You’re *wasting* my time.  
 This gadget will *save* you hours.  
 I don’t *have* the time to *give* you.  
 How do you *spend* your time these days?  
 That flat tire *cost* me an hour.  
 I’ve *invested* a lot of time in her.  
 I don’t *have enough* time to *spare* for that.  
 You’re *running out* of time.  
 You need to *budget* your time.  
*Put aside* some time for ping pong.  
 Is that *worth your while*?  
 Do you *have* much time *left*?  
 He’s living on *borrowed* time.  
 You don’t *use* your time *profitably*.  
 I *lost* a lot of time when I got sick.  
*Thank you for* your time.<sup>46</sup>

In this metaphor, we’ve taken something infinite—time—and have not only divided it, but commodified it into something limited, valuable, and calculable.<sup>47</sup> In a Western services market, this is a good way to do our billing

---

46. *Id.* at 6–7.

47. *See id.* at 8 (explaining how modern Western culture’s notion of work developed the metaphorical understanding of time’s calculability in terms of money).

and accounting, and it certainly helps to schedule appointments and airlines. But, the reality is that the “time is money” metaphor, at least in the West, has saturated our everyday speech, even when quantifying or calculating hours and minutes is not important or is counterproductive. Contrast that Western metaphor of “time is money,” say, to the images of the Taliban in Afghanistan who say that “time is a gift” and declare defiantly to the occupying American forces: “You have the watches. We have the time.”<sup>48</sup>

The “time is money” metaphor brings to mind all kinds of other metaphors of the market and the economy that pepper and spice our speech: “Labor is capital”; “Markets must be free”; “Every man has his price”; and “It’s a dog-eat-dog world out there.” Even in the world of economics that deals in hard numbers and exact calculus, metaphors are hard at work shaping our thought and language. We anthropomorphize the market into an agent and object and describe its activities with our familiar orientation metaphors of up and down: “The market fell today”; “The Dow plummeted”; “Coke inched back up”; “GM fought its way back;” or, “NASDAQ leaped forward.” We root for the market as if we were watching our children from the sidelines of a ballgame—having “invested” in both. Sometimes we make the market an object, often a victim of the actions of others: “That new regulation just strangled the market”;<sup>49</sup> “The dollar’s fall killed GM this quarter”; or, “The Fed’s lower interest rate gave the Dow new life.” What’s interesting for our purposes is that “the stock market is one [place] where communicators strive for practical precision rather than inspiring poetry,” but here, too, metaphors work subtly to shape our thought, language, and practice.<sup>50</sup>

### *B. Ontological and Religious Metaphors*

Even deeper than orientation and structural metaphors are what cognitive theorists call *ontological metaphors*.<sup>51</sup> These are more fundamental beliefs,

48. Sami Yousafzai, *10 Years of the Afghan War: How the Taliban Go On*, NEWSWEEK (Oct. 2, 2011), <https://www.newsweek.com/10-years-afghan-war-how-taliban-go-68223>.

49. See, e.g., David Sheppard & Myles McCormick, *Cuadrilla Says UK Fracking Rules Risk ‘Strangling’ It*, FIN. TIMES (Oct. 30, 2018), <https://www.ft.com/content/cb36ad4e-dc5e-11e8-9f04-38d397e6661c>.

50. M.W. Morris et al., *Metaphors and the Market: Consequences and Preconditions of Agent and Object Metaphors in Stock Market Commentary*, 102 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 174, 188 (2007).

51. LAKOFF & JOHNSON, *supra* note 37, at 25–32.

values, and ideals that shape not only our thought and language but our whole intellectual and institutional orientation. Sometimes these deep ontological metaphors are cast in poetic language:<sup>52</sup> “Man is free, but everywhere in chains.”<sup>53</sup> “These are the times that try men’s souls.”<sup>54</sup> “The First Amendment has erected a wall between church and state.”<sup>55</sup> Or “law is the bulwark of freedom.”<sup>56</sup> Sometimes these ontological metaphors are plainer statements but with no less meaning-making and institution-shaping power: “All men are created equal;” “No taxation without representation.” “One man, one vote.” “Popular sovereignty.” “Freedom!”<sup>57</sup>

In politics, these deeper ontological metaphors—whether poetically or plainly stated—can become veritable articles of faith, which we cherish, even adore, which we fight for, even to death.<sup>58</sup> During the American Revolution, these ontological metaphors were clearly stated as articles of faith grounded in “the Laws of Nature and Nature’s God.”<sup>59</sup> “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights.”<sup>60</sup> These founding statements were eventually wrapped in bright patriotic colors and ceremonies, statues and songs that could not be missed as articles of a common political faith. In the Cold War, they were recast as “spiritual weapons” in the struggle of “freedom versus communism,” “Godly America versus atheist Russia.”<sup>61</sup> In the war on terror, they were pitched as a “crusade for freedom” against the “axis of evil,” the “clash of civilizations” between the West and the rest.<sup>62</sup>

52. See Lakoff & Johnson, *supra* note 37, at 13 (“[M]etaphorical concepts can be extended beyond the range of ordinary literal ways of thinking and talking into the range of what is called figurative, poetic, colorful, or fanciful thought and language.”).

53. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*, in ROUSSEAU: THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS bk. 1, ch. 1, § 1, at 43 (Victor Gourevitch ed. & trans., 1997).

54. Thomas Paine, *The American Crisis*, in THOMAS PAINE, COLLECTED WRITINGS 91 (Eric Foner ed., 1995).

55. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947).

56. MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* 23 (1985).

57. See the collection of American founding statements in *THE FOUNDERS’ CONSTITUTION*, 5 vols. (Philip B. Kurland & Ralph Lerner eds., 1987).

58. See, e.g., Marchall Bidwell, *Famous American War Songs*, 25 *ANNALS IOWA* 174, 174–77 (1944).

59. *THE DECLARATION OF INDEPENDENCE* para. 1 (U.S. 1776).

60. *Id.* para. 2.

61. See T. JEREMY GUNN, *SPIRITUAL WEAPONS: THE COLD WAR AND THE FORGING OF AN AMERICAN NATIONAL RELIGION* (2009).

62. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD*

But ontological metaphors in politics, or in other fields, don't have to be so high-flying, so obvious, so revolutionary to inspire followers, or to shape actions, allegiances, and institutional activities reflexively. The great American church historian Martin Marty tells a funny but poignant story:

[There was] an incident in which visitors came upon a tarred-and-feathered refugee as he ran away from the up-in-arms citizenry of a small town. Asked what had led him to this terrible treatment, he declared that an argument had arisen about the Monroe Doctrine and his attitude toward it . . . . [H]e said he believed in the Monroe Doctrine, he lived by the Monroe Doctrine, he would die for the Monroe Doctrine; he just did not know what was in it.<sup>63</sup>

The point is that it's not just soldiers, duty-bound to obey commands, whose activities and attitudes can be reflexively shaped by ontological metaphors that express deep ideals of "freedom," "democracy," or "patriotism." It's often the followers, the crowds, who will join a cause reflexively, often knowing little more than the guiding maxim, the statement of belief, the ontological metaphor of the movement to spur them to dramatic action. "Corporations are greedy" was enough to stoke the WTO riots and Occupy Wall Street movement.<sup>64</sup> "Management is corrupt" has inspired many a labor strike. "Save the rainforest" brings out the greens and greenbacks by the millions. It does not always matter whether these claims are true, verified, rational, or justified. Often, their mere statement is enough to spur allegiance and action among many.

As these examples illustrate, ontological metaphors run deeper than structural metaphors. "Deeper" in the sense that they don't just subtly shape thoughts and words, they also inspire attitudes and actions of greater magni-

---

ORDER (2011).

63. Martin E. Marty, *Foreword* to 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE xv, xvi (John Witte, Jr. & Frank S. Alexander eds., 2006) (citing D.W. BROGAN, THE AMERICAN CHARACTER 130 (1944)).

64. See, e.g., John Burgess & Steven Pearlstein, *Protests Delay WTO Opening*, WASH. POST (Dec. 1, 1999), <https://www.washingtonpost.com/wp-srv/WPcap/1999-12/01/089r-120199-idx.html> (reporting that anti-trade protesters delayed the opening of the World Trade Organization ("WTO") by blocking access to the location where the WTO conference was to be held while "[s]hout[ing] slogans about greedy corporations and damage to the environment").

tude. “Deeper” in that they sometimes concern fundamental or ultimate beliefs or values in life, things for which people make ample sacrifices of time, talent, and treasure—things that people will die for. “Deeper” in that these ontological metaphors sometimes command major allegiances and alliances—literally, on the battlefields and streets, and virtually, in the communities of ideas and the conversations that gather around them. Ontological metaphors do not just orient experiences and emotions in time and space—as in, “I’m feeling down.” Nor do they simply map one observed phenomenon onto another—as in “argument is war” or “time is money.” Instead, they are more-or-less conscious linguistic expressions of deeper truths, higher values, and unseen realities that structure human life and understanding.

Viewed at this deeper level, ontological metaphors can become like religious metaphors. Not all ontological metaphors are religious. But, an ontological metaphor—and the attitudes and actions, allegiances and alliances it inspires—becomes religious if it is based on subjective beliefs and assumptions about the underlying features of experience and reality, and if it involves a cognitive leap, an act of trust or reliance that goes beyond immediate sense experience or the experimentally replicable procedures of science. In taking this leap or relying on this hunch, it takes on the character of faith, becoming at least quasi-religious. Often this is done when, say, Marxism, market capitalism, liberal democracy, cultural individualism, or therapeutic ideologies provide life orientations and directions for individuals and groups.<sup>65</sup> The ontological metaphor becomes more fully religious in character when it gets expressed in and through ceremonies and rituals, statements of belief, canons of conduct, and communities of followers—as we see in some modern forms of secular nationalism.

To call these ontological metaphors “religious” or “quasi-religious” is not to deprecate or defame them. It is rather to show that they shape persons’ and communities’ attitudes and actions, allegiances and alliances much like religious metaphors shape the same in Christians and other religious believers. “[P]rofit is the measure of right”<sup>66</sup> is no less a galvanizing creedal statement than “Do unto others as you would have done unto you.”<sup>67</sup> “Man is free” shapes allegiances and alliances as much as “God is sovereign.” “Marriage is

---

65. For a fuller discussion of this view of religious metaphors, see DON S. BROWNING & TERRY D. COOPER, *RELIGIOUS THOUGHT AND THE MODERN PSYCHOLOGIES* 21–30, 106–43, 203–09 (2d ed. 2004).

66. THOMAS HOBBS, *DE CIVE OR THE CITIZEN* 28 (Sterling P. Lamprecht ed., 1949).

67. *See Luke* 6:31.

a mere contract” is no less a fundamental statement of belief and value than “marriage is a sacrament.”<sup>68</sup>

With this broad understanding of metaphor as our guide, we can see that many schools of thought and action and many cognitive activities are religious or quasi-religious in character. They build on and produce faith-like commitments about the most determinative context of experience and either imply or are further animated by storylines about the whence and whether of reality as a whole.<sup>69</sup> Political historians and philosophers have long shown how modern nationalism is a form of secular religion rooted in deep political metaphors.<sup>70</sup> This same phenomenon can be seen in the world of ideas. In *Evolution as a Religion*, Mary Midgley shows how many scientists and other academics embrace the metaphor of evolution not only as an explanatory concept but also a quasi-religious belief about the origin and nature of reality.<sup>71</sup> For them, old-fashioned talk of a “creation order,” “natural law,” or “teleological structure” is not just unscientific, but anathema, a form of irrationality to be exorcised from the academy. In *Economics as Religion*, Robert Nelson exposes the faith-like economic beliefs and actions of various rational-choice, behavioral, and institutional economics schools at work today.<sup>72</sup> Among some economists, Nelson shows, “cost-benefit analysis” is as devout a belief and liturgical an activity as praying for “our daily bread.”<sup>73</sup> Similarly, in *Religious Thought and the Modern Psychologies*, Don Browning and Terry Cooper have exposed

68. See JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 77–112, 287–324 (2d ed. 2012).

69. See, e.g., Clifford Geertz, *Religion as a Cultural System*, in THE INTERPRETATION OF CULTURES (1973), at 90 (defining religion as “(1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic”).

70. ERNST CASSIRER, THE MYTH OF THE STATE (C.W. Hendel trans., 1946); see also HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION (1993) (on the role of secular nationalism in the modern revolutions). See further discussion of Berman, *infra* notes 93–96 and accompanying text.

71. See generally MARY MIDGLEY, EVOLUTION AS A RELIGION: STRANGE HOPES AND STRANGER FEARS (2d ed. 2003) (arguing that evolutionary theory has become quasi-religious, in the sense that it is a “secular faith” that is “serving as a religion”).

72. See generally ROBERT H. NELSON, ECONOMICS AS RELIGION: FROM SAMUELSON TO CHICAGO AND BEYOND (2001) [hereinafter NELSON, ECONOMICS AS RELIGION] (arguing, through historical analysis, that economics has taken on a religious character in the United States); ROBERT H. NELSON, REACHING FOR HEAVEN ON EARTH: THE THEOLOGICAL MEANING OF ECONOMICS (1991).

73. NELSON, ECONOMICS AND RELIGION, *supra* note 72.



the quasi-religious metaphors that animate the major modern psychologies.<sup>74</sup> Deep metaphors of life against death, harmony, care, and teleological design anchor their thought, and inspire major schools of psychological thought and therapeutic service that still operate all over the West and well beyond.<sup>75</sup>

### III. METAPHORS AND THE LAW

Having seen orientation, structural, ontological, and even quasi-religious metaphors at work in many other fields of study—even technical fields like science and economics—it should come as no surprise to find metaphors at work in law, too. Despite its popular reputation for being bound by neutral logic, exacting reason, and scientific rigor, law is in fact filled with metaphorical reasoning and rhetoric.<sup>76</sup> And the legal system as a whole rests on deep ontological metaphors that reflect fundamental beliefs and subjective values of the people and their rulers.

#### A. *Orientation and Structural Metaphors*

A number of metaphors at work in the law are orientation and structural metaphors. Many of them are based on personifications of the law, metaphors mapped onto the body and its parts. Jurists speak of the “body,” the “corpus” of the law—the *Corpus Iuris Civilis*, the *Corpus Iuris Canonici*, the *Corpus Iuris Hibernici*.<sup>77</sup> This “body” of the law is sometimes depicted in a gendered way as “Lady Justice”—*Justitia* and *Dike*, the ancient Romans and Greeks called her, respectively and respectfully.<sup>78</sup> The law, jurists say, has both an “anatomy” and a “physiology”—a structure and form as well as a process,

74. BROWNING & COOPER, *supra* note 65.

75. See generally *id.* (comparing religious thought to metaphors of death, harmony, care, and teleological design throughout).

76. Jonathan K. Van Platten, *Metaphors and Persuasion*, 58 S.D. L. REV. 295, 298 (2013) (“Because metaphors are widely used in the law, there is already a substantial amount of discussion of metaphor in legal scholarship.”); see Jennie Bricker, *Strike That! Metaphors of the Law*, 76 OR. ST. B. BULL., July 2016, at 27.

77. For background and examples regarding the “body” of the law, see Peter Landau, ‘*Aequitas*’ in the ‘*Corpus Iuris Canonici*’, 20 SYRACUSE J. INT’L L. & COM. 95, 95 (1994); Alan Watson, *Justinian’s Corpus Iuris Civilis: Oddities of Legal Development, and Human Civilisation*, 1 J. COMP. L. 461, 461 (2006).

78. See, e.g., Randy Kennedy, *That Lady with the Scales Poses for Her Portraits*, N.Y. TIMES (Dec. 15, 2010), <https://www.nytimes.com/2010/12/16/books/16justice.html>.

procedure, and proper way of functioning.<sup>79</sup> It also has a “heart,” “soul,” and “spirit”—reflected in the concern for both the letter and spirit of the law.<sup>80</sup> The law “embodies” important principles like “due process,” into which are further “incorporated” (from *corpus*, Latin for “body”) various rights in the Bill of Rights.<sup>81</sup> The body of the law grows, matures, and senesces; some of its members eventually die and become “dead letters.” But even then, some of these dead members “long buried,” like the old forms of actions at English common law, “still rule us from their graves.”<sup>82</sup>

Citizens and subjects are “bound” by the law, and the private contracts made between parties are likewise “binding.” Criminals “break” the law, “harm” the “body politic,” and “tear the social fabric.” Thus “the long arm of the law” reaches out to bring them to justice. An important new case is a “seminal” case. The later cases it “spawns” are its “progeny.” Constitutional courts “strike” down statutes “on their face.” Corporations are “legal bodies,” “fictitious persons,” capable of “corporate speech” and “corporate crime.” Busy lawyers call the law “a jealous mistress” and call themselves “slaves” to their time sheets. Lawyers “stand” at the bar, on behalf of clients whose cases are “live.” Judges “sit” on these cases and preside over the ritualized “battles” of the courtroom, which open with “pleadings” to the judge, followed by the ritualized “motions” and “counter-motions” of the opposing parties. Each side then “attacks” the other with “lines of argument” arrayed as if soldiers on a march, with one side “winning” and collecting the spoils, the “damages,” inflicted on the other.<sup>83</sup>

---

79. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1995); LON L. FULLER, *ANATOMY OF THE LAW* (1968); see Domingo, *Body, Soul, and Spirit of the Law*, *supra* note 30, at 231–34.

80. See generally Martin E. Marty, *The Religious Foundations of Law*, 54 EMORY L.J. 291 (2005) (outlining and redefining discussions of the religious dimensions of law).

81. See U.S. CONST. amends. I–X.

82. STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 335–36 (2001) (quoting F.W. MAITLAND, *EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW* 296 (1909)).

83. See *id.* at 336–39; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1410–12 (1988); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1220–22; (1989). See generally MARK JOHNSON, *THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASONING* (1987) (giving an account of how meaning, understanding, and rationality are grounded in bodily structures, as opposed to only cognitive ones); GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987) (discussing the role

As soon as you let your imagination and memory run this way, all kinds of structural metaphors of the law come to mind. Think of trees: the law has “roots,” “branches,” “ripe cases,” and specialized “fields.” Think of rivers: we have “streams of commerce,” “downstream effects” of decisions, “watershed” cases or statutes, and new laws drawn out of “deep wells.” Think of mountains: we have “high principles” and “lowly precepts”; we have “slippery slopes” and “dangerous passes” that should not be risked. Think of “paths”: Rabbis speak of “the way” or “path of the law” (Halacha), a phrase echoed famously by Oliver Wendell Holmes, Jr.<sup>84</sup> Think of light: important cases are “fixed stars” in the legal “universe,” and important legal tomes and codes are the “windows” or “mirrors” (*Spiegeln*) of law. And on and on we could go.

Some of these legal metaphors are simply rhetorical tropes or short hands to stoke the imagination or to win over the non-lawyer sitting, say, in the jury box or the voting booth. Think of how the “marketplace of ideas” metaphor brings alive one version of free speech doctrines or how “the wall of separation” image captures one ideal of church–state relations. Sometimes these metaphors are “condensed code[s]”<sup>85</sup> designed to communicate legal complexity with simplicity and efficiency. “Having one’s day in court” nicely captures a whole array of important legal doctrines and procedures and constitutional rights. Giving “marital equality” to same-sex partners is a nice rhetorical shorthand for a whole body of learning about privacy, equality, autonomy, non-discrimination, and self-determination, as well as about the nature and purposes of marriage itself.

### *B. Ontological and Religious Metaphors*

But in law, metaphors are more than linguistic tools and rhetorical tropes. They are also designed to help make objective and tangible the deep subjective ideals and beliefs that we hold dear as legal authorities, legal subjects, and legal professionals. These metaphors help us to create enduring legal order and meaningful legal norms—norms that are understandable, acceptable,

---

of categorization in the way humans understand the world).

84. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

85. See Robert N. Bellah, *Marriage in the Matrix of Habit and History*, in FAMILY TRANSFORMED: RELIGION, VALUES, AND SOCIETY IN AMERICAN LIFE 21, 23–24 (Steven M. Tipton & John Witte, Jr. eds., 2005) (quoting MARY DOUGLAS, NATURAL SYMBOLS: EXPLORATIONS IN COSMOLOGY 24 (1982)).

commanding of obedience, and enforceable in a community.<sup>86</sup> As Robert Cover put it in his famous article *Nomos and Narrative*:

Creati[on of] legal meaning . . . requires not only the movement of dedication and commitment, but also the objectification of that to which one is committed. The community posits a law, external to itself, that it is committed to obeying and that it does obey in dedication to its understanding of that law. Objectification is crucial to the language games that can be played with the law and to the meanings that can be created out of it. . . .

Creation of legal meaning entails, then, subjective commitment to an objecti[ve] understanding of a demand. It entails the disengagement of the self from the “object” of law, and at the same time requires an engagement to that object as a faithful “other.”<sup>87</sup>

In saying this, Cover “strips lawmaking down to its roots in human thought and action,” and “rip[s] away the veil of objectivity and rationality that attends the most conventional judicial and academic expositions of the law” as a closed system of auto-generated and self-executing rules and procedures.<sup>88</sup>

Cover’s insight captures, but goes beyond, the insights of the American legal realists in the 1930s and ‘40s, who showed persuasively that judges render their judgments not merely by formal legal logic and ineluctable legal reasoning but just as much in expression of their passions, prejudices, experiences, and ideals.<sup>89</sup> It also goes beyond the more cynical charges of various critical legal scholars who, since the 1960s, have claimed that law is simply an instrument for the rich and powerful to exploit the poor, needy, and vulnerable, and to impose coercively on the community their ideals of class, gender, race, religion, economy, social hierarchy, and more.<sup>90</sup> For Cover, the realists and “crits” were right to expose the reality that law is not the closed

---

86. See generally ROBERT M. COVER, *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* (Martha L. Minow et al. eds., 1992); Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986) (discussing the necessary coercive quality of these binding norms).

87. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 45 (1983).

88. WINTER, *supra* note 82, at 334.

89. See, e.g., *AMERICAN LEGAL REALISM* (William W. Fisher III et al. eds., 1993) (discussing and collecting essays from legal realist scholars in the early twentieth century).

90. See, e.g., *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 3d ed. 1998)

system of formal rules and procedures that the dominant schools of legal positivism of their day were teaching law students. They were right to show that beneath the objective patina of the law, beneath its claims of purported neutrality and pure rationality, are fundamental subjective beliefs, ideals, and values, deep ontological metaphors, that for better or worse drive legislation, adjudication, and executive administration of the law. But this reality is a not a betrayal of the rule of law. To the contrary, the law needs that process of objectifying the subjective, of reifying certain ideas, values, and beliefs, in order to be enduring and effective and to be binding on citizens and officials alike.

The key to the legitimacy of a legal order is for the people and their rulers alike to participate consciously in this reality. They must be aware that the purportedly objective rules and procedures of the law are rooted in deeply subjective choices, even if those choices remain hidden from day-to-day legal and communal life. They must be aware that these deep subjective choices reflect and reify fundamental beliefs and values—deep ontological metaphors, about the meanings and measures of authority and liberty, justice and mercy, rule and equity, nature and custom, canon and commandment, and more. They must be able, when a major crisis and challenge comes, to bring to light these fundamental beliefs, to inspect them, and if necessary, to reform them or the particular rules and procedures that these beliefs and metaphors once inspired. And the people and their rulers must be aware that these fundamental beliefs, and the decisions about whether and how to reform them, are situated in and guided by ongoing communal narratives about the meaning of life and reality altogether. Cover put it memorably:

We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. . . . No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution, there is an epic, for every decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.<sup>91</sup>

---

(collecting essays critiquing law in American society).

91. Cover, *supra* note 87, at 4–5 (footnotes omitted). For comparative perspectives, see generally Lior Barschak, *Constituent Power as Body: Outline of a Constitutional Theology*, 56 U. TORONTO

Metaphor theory, understood this way, has long been a favorite of Western legal historians as they have sought to describe the foundational ideology or belief-system of a legal civilization or age and the major forms and norms of its predominant legal system. In recounting the history of the law, these historians ask: What are the dominant beliefs and values, myths and metaphors that inform this legal system? What happens to this legal system when those myths and metaphors change, especially abruptly through conquest or revolution? The American poet and Harvard Law School graduate Archibald MacLeish captured this notion in his poem *The Metaphor*:

A[] [legal] age becomes an age, all else beside,  
When sensuous poets in their pride invent,  
Emblems for the soul's content.  
That speak the meanings men will never know  
But man-imagined images can show:  
It perishes when those images, though seen,  
No longer mean.<sup>92</sup>

Harold J. Berman offers a splendid example of viewing the history of Western law through shifts in its ontological metaphors, or its founding “belief system[s],” as he called them.<sup>93</sup> There is a distinct Western legal tradition, Berman argues, a set of legal ideas and institutions that has evolved by accretion and adaptation over the centuries.<sup>94</sup> Six great revolutions, however, have punctuated its gradual evolution: the Papal Revolution of 1075; the German Lutheran Revolution of 1517; the English Puritan Revolution of 1640; and the American, French, and Russian Revolutions of 1776, 1789, and 1917.<sup>95</sup> These revolutions were, in part, rebellions against a legal and political order that had

---

L.J., 185 (2006); Kjell Å Modéer, *Lebende Ruinen des Rechts: Rechtliche Metaphern in postkolonialen und spätmodernen Rechtskulturdiskursen* [*Living Ruins of the Law: Legal Metaphors in Post-colonial and Late-Modern Legal Culture Discourses*], 19 RECHTSGESCHICHTE [RG] 228 (2011) (Ger.); and elaboration in LAW & RELIGION IN THE 21ST CENTURY: NORDIC PERSPECTIVES (Lisbet Christoffersen et al. eds., 2010).

92. Archibald MacLeish, *The Metaphor*, in HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION v (1983).

93. *Id.* at 36; HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 10, 11, 23 (2003). These next two paragraphs are adapted from WITTE, GOD’S JOUST, GOD’S JUSTICE, *supra* note 29, at 6–8.

94. BERMAN, *supra* note 93, at 6; WITTE, GOD’S JOUST, GOD’S JUSTICE, *supra* note 29, at 6.

95. *Id.*

become outmoded and ossified, arbitrary and abusive. But, more fundamentally, these revolutions were products of radical shifts in the founding metaphors, in the dominant belief-systems of the people.

Each of these new belief systems offered a new eschatology and a new apocalyptic vision of the perfect end-time, whether it was the second coming of Christ, the arrival of the heavenly city of the Enlightenment philosophers, or the withering away of the state. Each of these revolutions triggered massive changes in prevailing legal forms and norms—movements from canon law to civil law to common law, from the supremacy of the church to the supremacy of the state, to the supremacy of the individual or the collective. Each of these revolutions, in its radical phase, sought the death of an old legal order to bring forth a new order that would survive its understanding of the Last Judgment. Eventually, each of these revolutions settled down and introduced fundamental legal changes that were ultimately subsumed in and accommodated to the Western legal tradition. Today, Berman concludes, this Western legal tradition has been drawn into increasing cooperation and competition with other legal traditions from around the globe, in the struggle to define a new common law, a new legal language for the emerging world order.<sup>96</sup>

Berman's account of law and religion in Western history built on earlier European scholarship. Nineteenth-century German jurists Friedrich Carl von Savigny and Otto von Gierke, for example, offered a quite different account of Western legal history based on shifting images of the individual and the collective, the *Volk* and the *Volksgeist*, and the citizen and the association (*Genossenschaft*).<sup>97</sup> English legal historian Sir Henry Maine depicted millennium-long shifts in the Western legal tradition from status to contract, from

---

96. See BERMAN, *supra* note 93, at 7; WITTE, *GOD'S JOUST, GOD'S JUSTICE*, *supra* note 29, at 7. See generally BERMAN, *supra* note 70 (arguing that law and religion inevitably do and should interact to incorporate public beliefs into social and legal systems); HAROLD J. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 47 (1974). See also literature in HAROLD J. BERMAN, *LAW AND LANGUAGE: EFFECTIVE SYMBOLS OF COMMUNITY* (John Witte, Jr., ed. 2013) (discussing the role of legal language in creating harmony within the local and international communities) [hereinafter BERMAN, *LAW AND LANGUAGE*]. See analysis in Lior Barshack, *The Communal Body, the Corporate Body, and the Clerical Body: An Anthropological Reading of the Gregorian Reform*, in *SACRED AND SECULAR IN MEDIEVAL AND EARLY MODERN CULTURES: NEW ESSAYS* 101, 101–21 (Lawrence Besserman ed., 2006); *THE INTEGRATIVE JURISPRUDENCE OF HAROLD J. BERMAN* (Howard O. Hunter ed., 1996); Harold J. Berman, *The Historical Foundations of Law*, 54 *EMORY L.J.* 1 (2005).

97. See OTTO VON GIERKE, *DAS DEUTSCHEN GENOSSENSCHAFTSRECHT* [THE GERMAN LAW OF ASSOCIATIONS: BD. LEGAL HISTORY OF GERMAN ASSOCIATIONS] (Akademische Druck- und Verlagsanstalt eds., 1954).

equity to legislation, from custom to code.<sup>98</sup> Dutch philosopher Herman Dooyeweerd analyzed the founding and grounding “religious motifs” or metaphors of each age—the motifs of Greek “form and matter,” Catholic “grace and nature,” Protestant “creation, fall, and redemption,” and Enlightenment “nature and freedom”—and the concrete manifestations of these shifting motifs in legal, political, and cultural life.<sup>99</sup>

Legal scholars have used metaphor theory not only to describe the founding metaphors or beliefs of whole legal systems in different historical eras, but also to describe discrete bodies of law in operation today. Constitutional law is a favorite for metaphorical treatment. A number of legal scholars have shown that, for many Americans, constitutionalism is a fundamental cultural activity that sometimes takes on overt religious qualities.<sup>100</sup> The Constitution is thus viewed as a sacred national document, secured in a national shrine, celebrated in national holidays and exhibitions, and confirmed in solemn oaths and pledges of allegiance. The text of the Constitution is authoritative in itself, a canon whose exact meaning remains the subject of endless debate and development.<sup>101</sup> The writings of the founding fathers who created and ratified this document are also authoritative—like Prophets expounding the Torah, or Epistles glossing the Gospels. The judges who interpret the Constitution are

---

98. See HENRY SUMNER MAINE, *ANCIENT LAW* (Transaction, 2001) (1861); HENRY SUMNER MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* (Batoche, 1999) (1883); HENRY SUMNER MAINE, *LECTURES ON THE EARLY HISTORY OF INSTITUTIONS [1875]* (Batoche, 1999) (1875); HENRY SUMNER MAINE, *VILLAGE COMMUNITIES IN THE EAST AND THE WEST* (Arno, 1974) (1871).

99. See HERMAN DOOYEWEERD, *DE WIJSBEGEERTE DER WETSIDEE [THE PHILOSOPHY OF THE LAW IDEA]* (1935–1936); HERMAN DOOYEWEERD, *ENCYCLOPAEDIE DER RECHTSWISSENSCHAFT [ENCYCLOPEDIA OF JURISPRUDENCE]* (1946); HERMAN DOOYEWEERD, *ROOTS OF WESTERN CULTURE: PAGAN, SECULAR, AND CHRISTIAN OPTIONS* (M. Vander Vennen & B. Zylstra eds., J. Kraay trans., 1979).

100. See generally PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS IN THE CONCEPT OF SOVEREIGNTY* 158 (2011) (“A political theory that fails to see that politics treads deeply on the theological will . . . always be . . . unprepared for the violence of politics.”); PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999) (studying the cultural, rather than normative, dimensions of law); LEGAL CANONS (J.M. Balkin & Sanford Levinson eds., 2000); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (rev. ed. 2011); W. Tarver Rountree, Jr., *Constitutionalism as the American Religion: The Good Portion*, 39 *EMORY L.J.* 203, 203 (1990) (“Constitutionalism is the American religion.”).

101. LEGAL CANONS, *supra* note 100, at 331 (concluding that constitutional “interpretation is unavoidable” and “[c]ertain parts of the text of the Constitution, and other derivative texts, are ‘canonical’” to constitutional argument).



secular priests, who, after enduring long passages of ordination and confirmation, utter solemn public oaths to uphold the Constitution. Like priests standing at their high pulpits expounding the biblical commandment to “love thy neighbor as thyself,”<sup>102</sup> judges sit on their raised benches expounding the constitutional commandment to give “due process” and “equal protection”<sup>103</sup> to all. Like congregants in the church, citizens of the state study these priestly interpretations of their authoritative text, debating their veracity, their utility, their allegiance to the original and evolving meaning of the canon.

It is easy to get lofty like this in describing the quasi-religious ontological and structural metaphors of constitutional law, since this topic morphs into some of the quasi-religious political metaphors that we sampled above. But other legal subjects—criminal law, torts, contracts, bankruptcy, evidence, corporations, environmental law, human rights law, and the like—have equally profound, albeit usually more prosaic, beliefs, values, and ideals that shape them. Deep notions of fault and responsibility are at work in torts and criminal law. The meaning of promises, faithfulness, and reliability animates the law of contracts. Redemption and forgiveness are at the core of bankruptcy law. Testimony and truth-seeking are at the heart of evidence law. Profit and accountability are among the founding beliefs of corporate law. Nature and its preservation are at the core of modern environmental law. Human dignity and its protection are at the foundation of modern human rights law.<sup>104</sup> The founding norms and beliefs of these legal specialties may not be as grandly ritualized and celebrated as those of constitutional law—although environmental law and human rights do sometimes inspire marches and demonstrations, canons and declarations, and platforms and associations that attract large numbers of spirited devotees.<sup>105</sup> But, even if not, the ontological metaphors—and the deeper values and beliefs to which they point—in many specialized areas of law today remain deeply held, fervently believed, and reflexively implemented. In that sense, they are what I have called quasi-religious metaphors.

---

102. *Matthew* 22:39 (King James Version).

103. U.S. CONST. amend XIV, § 1.

104. See generally CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION (John Witte, Jr. & Frank S. Alexander eds., 2010) (providing examples of how modern human rights laws operate to protect human dignity).

105. See generally *id.*; RELIGION AND HUMAN RIGHTS: AN INTRODUCTION (John Witte, Jr. & M. Christian Green eds., 2012) (giving examples of how human rights issues draw a lot of support).

## IV. “TRINITARIAN” METAPHORS IN THE STUDY OF LAW?

And now let me hazard a speculative idea, which I put as a genuinely open query: Could the (quasi-)religious dimensions of metaphors in law also be reflected in part in the prevalent use of numbers that are considered special or even sacred in a culture? Nearly half a millennium ago, the great English jurist Sir Edward Coke took note of how often the “sacred number twelve” came up in the law, beginning with the “Twelve Tables” of ancient Roman law:

[I]t seemeth to me, that the law in this case delighteth herselfe in the number of twelve. For there must not onely be 12 jurors for the tryall of matters of fact, but 12 judges of ancient time for the tryall of matters of law *in the Exchequer Chamber*. Also for matters of State there were in ancient time twelve *Counsellors of State*. He that wagheth his law, must have *eleven others with him*, which thinke he says true. And that *number of twelve* is much respected *in holy writ*, as 12 *apostles*, 12 *stones*, 12 *tribes*, etc.<sup>106</sup>

A number of scholars have also pointed to the “special mystical value” attached to the number “three” in ancient systems of belief and law. “To many of the leading nations of antiquity it represented divine power,” writes leading Roman law historian Henry Goudy in a fascinating older study on *Trichotomy in Roman Law*:<sup>107</sup>

As evidence of this it is enough to refer to the three Gods of Hindu mythology—Vishnu, Siva, and Brahma, and the Trinity of Christian doctrine. By some ancient philosophers, [three] . . . was regarded as the most symbolic of numbers, because it represented the beginning, middle, and end of all things, and also the dimensions of space.<sup>108</sup>

This appetite for triads appears similarly in numerous ancient legal doctrines. Goudy explores a score of them at the heart of Roman law: the division

---

106. I EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND* bk. 2, ch. 12, § 234 (The Legal Classics Library 1985) (rev. 1853).

107. HENRY GOUDY, *TRICHOTOMY IN ROMAN LAW* 8 (1910).

108. *Id.* at 8–10 (footnote omitted).

of all law into “*jus naturale, jus gentium, and jus civile*”,<sup>109</sup> the main division of civil law into actions, persons, and things; the aphorism that all laws are concerned with the acquisition, conservation, and restriction of rights; the division of legal persons into *liberi, servi, et libertini*; the three marks of justice being “*honeste vivere, alterum non laedere, [and] suum cuique tribuere*”,<sup>110</sup> the three forms of government as monarchy, aristocracy, and democracy; and much more. This appetite for triads persists in many more recent legal doctrines, too.<sup>111</sup> Modern jurists speak regularly of life, liberty, and property; *liberté, égalité, et fraternité*; three generations of human rights; three purposes of punishment, retribution, deterrence, and rehabilitation; three forms of legal power, executive, legislative, and judicial; three purposes of legislation, health, safety, and welfare; the body, soul, and spirit of the law, and more. Some jurists strive to integrate the three civil, theological, and educational uses of the law and the three legal schools of natural law, legal positivism, and historical jurisprudence.

So, why the persistence of the number “three” as we think both functionally and foundationally about the law and our human interaction with it? Is “three” just an easy trope for presentation and memory? Is it simply an organizational or orientation metaphor? Does it merely connote the sense of aesthetic balance that we three-dimensional human beings crave? Is it just akin to what gardeners tell us about planting flowers, trees, and bushes—that clusters of three together are usually seen as the most harmonious and balanced? Maybe that is all that is involved here.

But, the Trinitarian Christian in me wonders whether there is a view “from the church to the courthouse” (to use Professor Cochran’s opening metaphor from Tom Schaffer) that suggests a deeper source for the use of these triads in law, as in life.<sup>112</sup> In our creeds and confessions, we say that it was the Triune God who announced at creation: “Let us make man in *our* image, after *our* likeness.”<sup>113</sup> As image-bearers of God, humans bear God’s triune image. We reflect these Trinitarian views in our anthropologies of body, soul, and spirit; of reason, will, and memory; of prophet, priest, and king; of faith, hope, and love. Perhaps we also reflect these Trinitarian views in the laws

---

109. *Id.* at 20.

110. *Id.*

111. *See id.* at 20–72.

112. *See* FAITH & LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW 1 (Robert F. Cochran, Jr. ed., 2008).

113. *Genesis* 1:26.

that we create, rooted as they ultimately are in the law of the Triune God who has written the laws on our hearts. Perhaps St. Paul's metaphor of the "body, soul, and spirit"<sup>114</sup> is useful not only for describing our integral human nature but also an integrative jurisprudence. Perhaps the Bible's account of a triune God who creates order from chaos, offers redemption to wrongdoers, and lets "[justice] roll down like waters, and righteousness like a mighty stream"<sup>115</sup> helps guide the fundamental creative, redemptive, and justice-seeking duties of the Christian lawyer.

These are rather grand metaphorical speculations that don't fit neatly into our modern teachings on law or the legal profession. Most lawyers would find more congenial the common metaphors of the lawyer as "Godfather," "hired gun," "guru," "friend," or "Nostromo" that Professor Cochran has lifted up. The metaphor of the lawyer as a "Trinitarian Christian Jurist" will appear foreign to most. Some might even be tempted to turn Martin Luther's famous quip, "*Juristen, böse Christen*"<sup>116</sup> onto its head: not only are lawyers bad Christians, as Luther charged, but Christians are bad lawyers, too. Yet these speculations, inspired in part by Professor Cochran's path-breaking scholarship, might be worth more consideration. I want to try to think and work through them in the years ahead, hopefully in conversation if not collaboration with Professor Cochran and with scholars like Rafael Domingo and David McIlroy who have started to write in this vein.<sup>117</sup> This would be a rather new way of thinking about law and religion, and more specifically about law and Christianity. At the very least, it would provide an interesting view of the courthouse from the church "across the street."<sup>118</sup> And such thoughts might just inspire lawyers within and beyond the church to think anew about their classic calling to be "servants of the law who labor with learning, courage, and devotion to preserve liberty and promote justice."<sup>119</sup>

---

114. See *Thessalonians* 5:23.

115. *Amos* 5:24.

116. 2 MARTIN LUTHER, *TISCHREDEN* [TABLE TALK] 219 (Weimar: Böhlau ed. 1912).

117. See Domingo, *supra* note 30; DAVID MCILROY, *A TRINITARIAN THEOLOGY OF LAW* (rev. ed. 2019).

118. See *FAITH & LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW*, *supra* note 11, at 1.

119. Cochran, *supra* note 25, at i.

[Vol. 47: 435, 2020]

*The Metaphorical Bridge*  
PEPPERDINE LAW REVIEW

\*\*\*