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Law, Religion, and Metaphors

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Abstract

This chapter 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 chapter explores the ample use of the sacred 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 chapter is dedicated to Michael Welker, a leading German systematic theologian and Christian philosopher, who has helped build a strong trans-Atlantic discourse on law and religion.

Keywords: metaphor; law and religion; George Lakoff; Robert Cover; the body of law; fundamental beliefs; constitutional law; triads in the law; Trinity; Trinitarian jurisprudence; Michael Welker; Sir Edward Coke

Introduction

The great English historian, Herbert Butterfield, once wrote of the habit of Protestants “to hold some German up their sleeves ... and at appropriate moments to strike the unwary Philistine on the head with this secret weapon, the German scholar having decided in a final manner whatever point may have been at issue.”¹ Professor Michael Welker has been the German up my sleeve – and, increasingly, at my side -- for nearly two decades now, much to my delight and edification.

¹ Herbert Butterfield, *Christianity and History* (New York: Charles Scribner's Sons, 1949), 9.

I first met Professor Welker at a 1998 Princeton Theological Seminary conference on “Religion, Pluralism, and Public Life.” There he argued strongly that, to be effective in public and interdisciplinary discourse, theology had to be “serious,” “truth-seeking,” “existentially grounded,” and “comprehensible,” with a studied “competence in social and cultural criticism,” and a sturdy willingness to engage “the burning questions that our contemporary cultures and societies pose.”² In the ensuing two decades, Professor Welker has embarked on a major series of brilliant interdisciplinary and international projects and publications that have brought theology into “serious,” and deep “truth-seeking” dialogue with the fields of science, cosmology, politics, law, philosophy, economics, media, literature, and more. All along he has continued to pour out his own marvelous monographs on the doctrines of God, the Spirit, liturgy and the sacraments, human anthropology, the Protestant Reformation and Reformed theology, along with critical studies of great theologians and philosophers from Kant, Hegel, and Schleiermacher to Whitehead, Bonhoeffer, and Moltmann. He has also traveled the world, standing at distinguished lecterns and pulpits on every Continent and having his work translated and celebrated in sundry Romance and Asian languages. Here is one of Butterfield’s great “German scholars” for our own day. Professor Welker has not pretended to “decide in a final manner” the many great questions he has engaged. But, as other chapters in this volume amply attest, he has certainly helped a great deal to “build up trust” and “truth-seeking” dialogue across interdisciplinary, interreligious, and international lines.

I have been a happy beneficiary of the law and religion dialogue that Professor Welker has helped to lead. I have had the privilege of collaborating with him on several international and interdisciplinary projects that included law and religion themes – human dignity and anthropology, religion and globalization, law and biblical Christianity, and legal concepts in the sciences, legal studies, and theology. We have stood at each other’s lecterns at Heidelberg and Emory, edited, reviewed, and translated each other’s work, and led and participated in several roundtables together on the interaction of the spheres and sciences of law and religion and their “concrete applications” to the “burning questions” of our day.

In the course of this collaborative work, we have come to see that the spheres and sciences of law and religion are conceptually related. They both draw upon prevailing concepts of the nature of being and order, the person and community, knowledge and truth. They both embrace closely analogous doctrines of sin and crime, covenant and contract, righteousness and justice. Law and religion are methodologically related. They share overlapping hermeneutical methods of interpreting authoritative texts, casuistic methods of converting principles to precepts, systematic methods of organizing their subject matters, pedagogical methods of transmitting the science and substance of their craft to students. Law and religion are

² Michael Welker, “Is Theology in Public Discourse Possible Outside Communities of Faith,” in Luis Lugo, ed., *Religion, Pluralism, and Public Life: Abraham Kuyper’s Legacy for the Twenty-First Century* (Grand Rapids, MI: Wm. B. Eerdmans, 2000), 110-22.

institutionally related, through the multiple relationships between political and religious officials and the multiple institutions in which these officials serve.

We have also come to see that law and religion are dimensions of each other. Every legitimate legal system has what Lon Fuller called an “inner morality,” a set of attributes that bespeak its justice and fairness. Like divine laws, human laws are generally applicable, publicly proclaimed and known, uniform, stable, understandable, non-retroactive, and consistently enforced.³ Every legitimate legal system also has what Harold Berman called an “inner sanctity,” a set of attributes that command the obedience, respect, and fear of both political authorities and their subjects. Like religion, law has authority -- written or spoken sources, texts or oracles, which are considered to be decisive or obligatory in themselves. Like religion, law has tradition -- a continuity of language, practice, and institutions, a theory of precedent and preservation. Like religion, law has liturgy and ritual -- the ceremonial procedures, decorum, and words of the legislature, the courtroom, and the legal document aimed to reflect and dramatize deep social feelings about the value and validity of the law. In turn, religion maintains a legal dimension, an inner structure of legality, which gives religious lives and religious communities their coherence, order, and social form. Legal “habits of the heart” structure the inner spiritual life and discipline of religious believers, from the reclusive hermit to the aggressive zealot. Legal ideas of justice, order, dignity, atonement, restitution, responsibility, obligation, and others pervade the theological doctrines of countless religious traditions. Legal structures and processes continue to organize and govern religious communities and their distinctive beliefs and rituals, mores and morals. Without religion, law decays into empty formalism; without law, religion decays into shallow spiritualism.⁴

In this chapter -- dedicated to Professor Welker with great admiration, appreciation, and affection -- I explore a bit the role of metaphor theory as an additional “truth-seeking” and “trust building” bridge between the fields of law and religion. This has not been a topic that Professor Welker and I have discussed. Much of the high-flying metaphor theory in print is several octaves above my usual low pitch as a legal historian. But I have learned just enough about this theory from our late great friend, Don Browning, to see some of its power and potential as a further methodological bridge builder between law and religion discussions. And, I have learned just enough about “integrative jurisprudence” from my late great mentor, Harold J. Berman, to think that metaphor theory might help with integrating legal and religious discourse a bit further, thereby further “building trust” and “reducing risk” of misunderstanding across these two great disciplines. Hence these necessarily preliminary and experimental thoughts below.⁵

³ Lon L. Fuller, *The Morality of Law*, rev. ed (New Haven, CT: Yale University Press, 1964).

⁴ Harold J. Berman, *The Interaction of Law and Religion* (Nashville, TN: Abingdon Press, 1974).

⁵ I have been discussing this topic with my friend and colleague, Rafael Domingo, and have benefitted greatly from his recent *God and the Secular Legal System* (Cambridge: Cambridge University Press, 2016) and his unpublished ms., “Body, Soul, and Spirit of the Law: Towards a Holistic Legal Paradigm.”

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 experiences.⁶ 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”; “your mind is a machine”; “time heals all wounds”; “necessity is the mother of invention”; “thou hast cleft my heart in twain.”⁷ 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. “The essence of metaphor is understanding and experiencing one kind of thing in terms of another,” write noted cognitive theorists George Lakoff and Mark Johnson in their path-breaking study *Metaphors We Live By*.⁸

Orientation and Structural Metaphors. Some of these are what cognitive theorists call *orientation metaphors*. 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 all been *downhill* of late.” “Even though I walk through the *valley* of the shadow of death.”⁹ We draw the same set of contrasts with other spatial images. Think 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 made glorious summer” -- not the other way around. All these orientation metaphors allow us to tie our language and thought to common objects of our experience.¹⁰

Some of our language and thought is also shaped by deeper *structural metaphors*. These kinds of metaphors do more conceptual work, but often more subtly, sometimes subconsciously. Lakoff and Johnson give a good example: “Argument is war.” 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:

⁶ See Paul Ricoeur, *The Rule of Metaphor: The Creation of Meaning in Language*, trans. Robert Czerny (London: Routledge, 2003).

⁷ Shakespeare, *Hamlet*, Act 3, Scene 4.

⁸ George Lakoff and Mark Johnson, *The Metaphors We Live By* (Chicago: University of Chicago Press, 1980), 5.

⁹ Psalm 23:4.

¹⁰ Lakoff and Johnson, *The Metaphors We Live By*, 14-24.

Your claims are *indefensible*.
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.¹¹

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.¹²

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 “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.
Is that *worth your while*?
Do you have much time *left*?
He’s living on *borrowed* time.
You don’t *use* your time *profitably*.

¹¹ Ibid., 4.

¹² Ibid., 5-6.

I've *lost* a lot of time when I got sick.
Thank you for your time.¹³

In this metaphor, we've taken something infinite – time -- and have not only divided it, but commodified it into something limited, valuable, and calculable. In a Western services market, this is a good way to do our billing 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.”¹⁴

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.” “It’s a dog-eat-dog world out there.” Even in the world of economics that deals in hard numbers, 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.” “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.” “The dollar’s fall killed GM this quarter.” “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.¹⁵

Ontological and Religious Metaphors. Even deeper than orientation and structural metaphors are what cognitive theorists call *ontological metaphors*. These are more fundamental beliefs, 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. “Man is free, but everywhere in chains.”¹⁶ “These are the times that try men’s souls.”¹⁷ “The Constitution has erected a high and impregnable wall between church and state.”¹⁸ “Law is the bulwark of

¹³ Ibid., 7-8.

¹⁴ *Newsweek* (October 10 & 17, 2011), 62.

¹⁵ M.W. Morris et al., “Metaphors and the Market: Consequences and Preconditions of Agent and Object Metaphors in Stock Market Commentary,” *Organizational Behavior and Human Decision Processes* 102 (2007): 174-192.

¹⁶ Jean Jacques Rousseau, *The Social Contract, and Other Later Political Writings*, ed. and trans. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), bk. 1, chap. 1, sec. 1, p. 41.

¹⁷ Thomas Paine, *Common Sense and the Crisis* (New York: Doubleday, 1960), ___.

¹⁸ *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

freedom.”¹⁹ 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!”²⁰

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. During the American Revolution, these ontological metaphors were clearly stated as articles of faith grounded in “the laws of nature and nature’s God.” “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.” 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.”²¹ 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.²²

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 the funny but poignant story of “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.... He 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.”²³ 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. “Management is corrupt” has inspired many a labor strike. “Save the rainforest” brings out the greens and greenbacks by the millions. It does not matter whether these claims are true,

¹⁹ Milner S. Ball, *Lying Down Together: Law, Metaphor, and Theology* (Madison, WI: University of Wisconsin Press, 1985), 23, 143, quoting James Madison, Lord Denning and others.

²⁰ See the collection of American founding statements in Philip B. Kurland and Ralph Lerner, eds., *The Founders’ Constitution*, 5 vols. (Chicago: University of Chicago Press, 1987).

²¹ See T. Jeremy Gunn, *Spiritual Weapons: The Cold War and the Forming of an American National Religion* (Westport, CT: Praeger, 2009).

²² Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Shuster Paperbacks, 2011).

²³ Martin E. Marty, “Foreword,” to *Modern Christian Teachings on Law, Politics, and Human Nature*, ed. John Witte, Jr. and Frank S. Alexander (New York: Columbia University Press, 2006), xvi (citing D.W. Brogan).

verified, rational, or justified. Eventually, 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 magnitude. “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, virtually in the communities of ideas and conversation that gather around them.

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 today when, say, Marxism, market capitalism, liberal democracy, cultural individualism, or therapeutic ideologies provide life orientations and directions for individuals and groups.²⁴ 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’s rather to show that they shape attitudes and actions, allegiances and alliances much like religious metaphors shape the same in Christians and other religious believers. “Profit is the measure of right” is no less a galvanizing creedal statement than “Do unto other as you would have done unto you.” “Man is free” shapes allegiances and alliances as much as “God is sovereign.” “Marriage is a mere contract” is no less a fundamental statement of belief and value than “marriage is a sacrament.”

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 hunches 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. Political historians and philosophers have long shown how modern nationalism is a form of secular religion rooted in deep political metaphors. This same phenomenon can be seen in the world of

²⁴ For a fuller discussion of this view of religious metaphors, see Don Browning and Terry Cooper, *Religious Thought and the Modern Psychologies* (Minneapolis, MN: Fortress Press, 2004), 21-30, 106-143, 203-209.

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. 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.²⁵ 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. In these competing schools of economic thought, Nelson finds differing quasi-religious models of what is basic to experience, what can be trusted, and what can be expected in the future. Among some economists, Nelson shows, “cost-benefit analysis” is as devout a belief and liturgical an activity as “praying for our daily bread.”²⁶ Similarly, in *Religious Thought and the Modern Psychologies*, Don Browning and Terry Cooper have exposed the quasi-religious metaphors that animate the major modern psychologies. 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.²⁷

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. 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.

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*. 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. The law, jurists say, has both an “anatomy” and a “physiology” -- a structure and form as well as a process, procedure, and proper way of functioning.²⁸ It also has a “heart,” “soul,” and “spirit”—reflected in the concern

²⁵ Mary Midgley, *Evolution as a Religion* (London: Methuen, 1985).

²⁶ Robert Nelson, *Economics and Religion: From Samuelson to Chicago and Beyond* (University Park, PA: The Pennsylvania State University Press, 2001).

²⁷ Browning and Cooper, *Religious Thought and the Modern Psychologies*.

²⁸ See Lon L. Fuller, *Anatomy of the Law* (New York: Praeger, 1968); Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process*, ed. William N. Eskridge, Jr. and Philip P. Frickey (Westbury, NY: Foundation Press, 1994). See other examples in Domingo, “Body, Soul, and Spirit of the Law.”

for both the letter and spirit of the law.²⁹ 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. 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.”³⁰

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,” “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.³¹

As soon as you let your imagination run this way, all kinds of such structural metaphors of the law come to mind. Think of trees: the law has “roots,” “branches,” “ripe cases,” 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*); Justinian regarded “the legal remedy as a path” to peace and order. Think of light: important cases are “fixed stars in the 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 shorthands to stoke the imagination or to win over the non-lawyer sitting, say, in the jury box or the

²⁹ See Martin E. Marty, “The Religious Foundations of the Law,” *Emory Law Journal* 54 (2005): 291-324, with responses by Frank S. Alexander, Timothy P. Terrell, and Paul J. Zwier, in *Emory Law Journal* 54 (2005): 325-375.

³⁰ F.W. Maitland, *Equity and the Forms of Action at Common Law* (Cambridge: Cambridge University Press, 1909), 296, quoted and discussed in Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (Chicago: University of Chicago Press, 2001), 335-336.

³¹ Winter, *A Clearing in the Forest*, 336-39; id., “Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law,” *University of Pennsylvania Law Review* 137 (1989): 1105-1237; id., “The Metaphor of Standing and Self-Government,” *Stanford Law Review* 40 (1988): 1371. See also Mark Johnson, *The Body in the Mind: The Bodily Basis of Meaning, Imagination, and Reasoning* (Chicago: University of Chicago Press, 1987); George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind* (Chicago: University of Chicago Press, 1987).

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 codes”³² 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 gays and lesbians 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 purpose of marriage itself.

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, commanding of obedience, and enforceable in a community.³³ As the late Yale legal philosopher Robert Cover put it:

Creation 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 to the meanings that can be created out of it.... Creation of legal meaning entails, then, subjective commitment to an objective 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.”³⁴

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

³² Mary Douglas, *Natural Symbols: Explorations in Cosmology* (New York: Pantheon Books, 1982), 24, quoted and discussed with reference to the family in Robert N. Bellah, “Marriage in the Matrix of Habit and History,” in *Family Transformed: Religion, Society, and Values in American Life*, ed. Steven M. Tipton and John Witte, Jr. (Washington, DC: Georgetown University Press, 2005), 21-33.

³³ See Robert M. Cover, “Violence and the Word,” *Yale Law Journal* 95 (1986): 1601 on the necessary coercive quality of these binding norms. See further Robert M. Cover, *Narrative, Violence, and the Law: The Essays of Robert Cover*, ed. Martha L. Minow, Michael Ryan, Austin Sarat (Ann Arbor, MI: University of Michigan Press, 1992).

³⁴ Robert M. Cover, “Nomos and Narrative: The Supreme Court 1982 Term,” *Harvard Law Review* 97 (1983): 4-68, at 45.

judicial and academic expositions of the law” as a closed system of auto-generated and self-executing rules and procedures.³⁵

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.³⁶ 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.³⁷ For Cover, the realists and “crits” were right in exposing the reality that law is not the closed 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, there 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, Cover insists. 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 be aware of this reality. They must be aware that the purportedly objective rules and procedures of the law are rooted in deep 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

³⁵ Winter, *A Clearing in the Forest*, 334.

³⁶ See, e.g., William W. Fisher, Morton J. Horwitz, and Thomas Reed, *American Legal Realism* (Oxford: Oxford University Press, 1993).

³⁷ See, e.g., David Kairys, ed., *Politics and the Law: A Progressive Critique*, rev. ed. (New York: Pantheon Books 1990).

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.³⁸

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, captures 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 speaks the meanings men will never know
But man-imagined images can show.
It perishes when those images, though seen,
No longer mean.³⁹

Harold J. Berman offers a splendid example of viewing the history of Western law through shifts in its ontological metaphors, or its founding “belief systems,” as he called them. 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. 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. These revolutions were, in part, rebellions against a legal and political order that had 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 that be 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

³⁸ Cover, “Nomos and Narrative,” 4-5. For comparative perspectives along comparable lines, see Lior Barshak, “Constituent Power as Body: Outline of a Constitutional Theology,” *University of Toronto Law Journal* 56 (2006): 185; Kjell Å Modéer, “Lebende Ruinen de Rechts: Rechtliche Metaphern in postkolonial und spätmodernen Rechtskulturdiskursen,” *Rechtsgeschichte* 19 (2011): 228 and elaboration in Lisbet Christoffersen, Kjell Å Modéer, Svend Andersen, eds., *Law & Religion in the 21st Century – Nordic Perspectives* (Copenhagen: Djøf Publishing, 2010).

³⁹ Quoted by Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983), v.

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 and 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.⁴⁰

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*, the citizen and the association (*Genossenschaft*). English legal historian Sir Henry Maine depicted millennium-long shifts in the Western legal tradition from status to contract, from equity to legislation, from custom to code. 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.

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.⁴¹ The Constitution is 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. The writings of the founding fathers who created and ratified this document are also authoritative -- like Prophets expounding the Torah, Epistles glossing the Gospels. The judges who interpret the Constitution are secular priests,

⁴⁰ See *ibid.*; Berman, *Faith and Order*; *id.*, *Law and Language: Effective Symbols of Community*, ed. John Witte, Jr. (Cambridge: Cambridge University Press, 2013). See analysis in Howard O. Hunter, *The Integrative Jurisprudence of Harold J. Berman* (Boulder/London: Westview Press, 1996); Symposium, "The Foundations of Law," *Emory Law Journal* 54 (2005): 1-375; Lior Barshak, "The Communal Body, The Corporate Body, and the Clerical Body: An Anthropological Reading of the Gregorian Reform, in *Sacred and Secular in Early Modern Cultures: New Essays*, ed. Lawrence Besserman (New York: Palgrave MacMillan, 2006), 101.

⁴¹ See, e.g., Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988); Jack Balkin and W. Sanford Levinson, *Legal Canons* (New York: NYU Press, 2000); Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999); *id.*, *Political Theology: Four New Chapters in the Concept of Sovereignty* (New York: Columbia University Press, 2011).

who, after enduring long passages of ordination and confirmation, utter solemn public oaths to uphold the Constitution.⁴² Like priests standing at their high pulpits expounding the biblical commandment to “love thy neighbor as thyself,” judges sit on their raised benches expounding the constitutional commandment to give “due process” and “equal protection” to all.⁴³ 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’s 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.⁴⁴ The founding norms and beliefs of these legal specialties don’t usually get 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, platforms and associations that attract large numbers of spirited devotees.⁴⁵ But even if not, the founding ontological metaphors and beliefs at work in many specialty areas of law today remain deeply held, fervently believed, and reflexively implemented. In that sense, they are what I have called quasi-religious metaphors.

“Trinitarian” Metaphors in the Study of Law?

And now let me hazard a speculative idea, which I hope Professor Welker will accept 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:

⁴² W. Tarver Rountree, “Constitutionalism as the American Religion: The Good Portion,” *Emory Law Journal* 39 (1990): 203-216.

⁴³ Jaroslav Pelikan, *Interpreting the Bible and the Constitution* (New Haven, CT: Yale University Press, 2004).

⁴⁴ See examples in John Witte, Jr. and Frank S. Alexander, eds., *Christianity and Law: An Introduction* (Cambridge: Cambridge University Press, 2008).

⁴⁵ See examples in John Witte, Jr. and Frank S. Alexander, eds., *Christianity and Human Rights: An Introduction* (Cambridge: Cambridge University Press, 2010) and John Witte, Jr. and M. Christian Green, *Religion and Human Rights: An Introduction* (Oxford: Oxford University Press, 2012)

It seemeth to me that the Law in this case delighteth herself in the number of twelve. For there must not onley 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 12 Counsellors of State. He that wageth his law, must have eleven others with him, which thinke hee sayes true. And that number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc.⁴⁶

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*. “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, it [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.”⁴⁷ 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 of all law into *ius naturale*, *ius gentium*, and *ius civile*; 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*; the three forms of government as monarchy, aristocracy, and democracy; and much more. This appetite for triads, for three-ness persists in many more recent legal doctrines, too.⁴⁸ Modern jurists speak regularly of life, liberty and property; *liberté*, *égalité*, *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 just an organizational or “orientation metaphor”? Does it just connote the sense of basic 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.

⁴⁶ Sir Edward Coke, *Institutes of the Lawes of England*, Part I, bk. 2, ch. 12, sec. 234.

⁴⁷ Henry Goudy, *Trichotomy in Roman Law* (Oxford: Oxford University Press, 1910), 8-10.

⁴⁸ *Ibid.*, 20-72.

But the Trinitarian Christian in me wonders whether there might be something deeper at work that drives this appetite for triads in law, as in life. 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.”⁴⁹ As image-bearers of God, humans thus ultimately 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. If we humans are created as Trinitarian beings, perhaps it is inevitable that the laws that we create, rooted as they are in the Triune God who gave us law, should reflect some of these Trinitarian dimensions as well.

That’s a big claim, and one that I want to try to think and work through in the years ahead, hopefully in conversation if not collaboration with Professor Welker. He is, after all, working on the last volume of his trilogy on the Trinitarian Godhead – on God the just and righteous. What will be interesting to discover is whether an integrative Trinitarian jurisprudence can be built akin to the integrative Trinitarian theology that has been worked out over the centuries; and whether St. Paul’s metaphor of the “body, soul, and spirit” of the human person might be a useful metaphor for centering an integrated theory of the “body, soul, and spirit” of human laws. This would be a rather new way of thinking about law and religion, and more specifically law and Christianity. It might well build better “trust” between jurists and theologians than is reflected in Luther’s famous quip, “*Juristen böse Christen.*” I don’t know enough yet to speculate further here, but I suspect Professor Welker will have a lot to say about this topic. I won’t be just holding him “up my sleeve” as Butterfield did with his favorite German scholar; I will be sitting at his feet, eager to learn more from him.

⁴⁹ Genesis 1:27.