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LAW AND LOGOS

*Harold J. Berman**

INTRODUCTION

We usually think of the relationship between law and religion from a legal perspective and only rarely, if at all, from a religious perspective. We think of the legal requirement that government not restrict the free exercise of religion, and at the same time not give undue support to religious causes. We speak of the separation of Church and State as though these were two legal entities locked in litigation. We speak often of what law requires of religion and only rarely of what religion requires of law.

In this presentation I propose to take a different approach. I start not from the United States Constitution but from the Ten Commandments, with their implicit assertions that all human law is founded ultimately on divine law and that the ultimate purpose of human law is to create conditions in which love of God and love of neighbor may flourish.¹

From this perspective, I shall consider two principal topics. The first is the relationship of theology to the major theories of law that have competed for dominance in Western legal philosophy — positivism, natural-law theory, and the historical school; I propose to try to integrate these three competing theories of law in the light of a Christian jurisprudence. My second principal topic is the challenge of the future, as we enter a new age of global communications, global technology, and global economy — the challenge to find a

• Robert J. Woodruff Professor of Law, Emory University, and James Barr Ames Professor of Law, emeritus, Harvard University. The collaboration of Charles J. Reid, Jr., Research Associate in Law and History, Emory University, is gratefully acknowledged.

1. "You shall love your neighbor as yourself, I am the Lord ..." "You shall love the Lord your God with all your heart, with all your soul, and with all your might." *Leviticus* 19:18, *Deuteronomy* 6:5; quoted by Jesus as "the summary of the Law" in *Mark* 12:25-31.

common spiritual faith that will support the emerging common law of an emerging world community. Such a common faith cannot be only Christian, since it must be a faith common to adherents of many different belief systems. Nevertheless, the jurisprudence that I shall analyze in the first part of my presentation will, I believe, help to define the kind of common faith that is needed.

I. A CHRISTIAN JURISPRUDENCE

In taking the phrase “Law and Logos” as my title, I have in mind the famous aphorism of Oliver Wendell Holmes, Jr., on which American lawyers have been weaned for over a century, that “[t]he life of the law has not been logic: it has been experience.”² By “logic,” Holmes indicated that he meant “the syllogism” and “the axioms and corollaries of a book of mathematics.”³ By “experience,” he indicated that he meant “the felt necessities of the time, the prevalent moral and political theories ... even the prejudices which judges share with their fellow men.”⁴ These are certainly very narrow views of both logic and experience. The aphorism needs to be revised. I would say that the life of the law is not logic but Logos, and that Logos includes not only felt necessities, political and moral theories, and intuitions and convictions (“prejudices”) of judges, but also a spiritual faith grounded in a larger experience, both psychological and historical.

We know the Greek word Logos from the famous opening of the Gospel According to St. John: “In the beginning was the Word” — Logos.⁵ Although he wrote in Greek, the author of the Gospel was a Jew, and for him “the Word” had both a Hebrew and a Greek meaning. The Hebrew term is *dabar*, which means living speech, communication, a call, as in the ten “Words” of Exodus, Chapter 20, which are loosely translated as the Ten Commandments.⁶ We may render the opening words of St. John's Gospel: “In the beginning God spoke!” One is reminded of the first chapter of Genesis:

2. OLIVER W. HOLMES, JR., *THE COMMON LAW* I (1881).

3. *Id.*

4. *Id.*

5. *John* 1:1.

6. The tint of the “words” was not a commandment at all: “I am the Lord thy God who brought thee out of the land of Egypt, out of the house of bondage.” *Exodus* 20:2. In the Jewish tradition this, taken by itself, is counted as the first of the ten “words.” Christians later combined it with the second. “Thou shalt have no other gods before me,” *Exodus* 10:30, thus making it sound more like a commandment.

God spoke, and his words called into being, gradually, the whole of creation.⁷ They were what present-day linguists would call performative utterances.⁸

In Greek, Logos has the additional connotation of reason, or understanding, or truth; we get from it our endings to such words as “psychology,” “biology,” “theology,” and also, of course, the word “logic,” meaning “method of reasoning.” The Gospel says that the Word *was* God, but then it adds that the Word was also *with* God: a light to illuminate and guide and motivate wayward humanity. That light was — and is — not so much God the Father, God the Creator, God the Lawgiver, as it was — and is — God the Holy Spirit, God the Inspirer and Strengthener (“Comforter”), God the Communifier (if I may invent a word), who at Pentecost brought a common understanding to the diverse multitude of nationalities, so that each person heard the words of the disciples in his own language.⁹

Finally, according to St. John's Prologue, the Word was incarnated in Jesus Christ. From an early time there has been a strong tendency in traditional Christian theology to identify the Word, in John's Gospel, solely with Christ, “the Word made flesh”; nevertheless, it is apparent from the whole text that the Word is identified there with all three persons, or forms, of the triune God:¹⁰ His activity in creation (vv. 1-5), his activity in lighting the way to under-

7. *Genesis* 1: 1-31.

8. In a recent book. Professor Milner Ball emphasizes the source of “the Word” in the Hebrew *dabar*, which in the context of St. John's Gospel he interprets as a divine command to lead a sacrificial life of service. MILNER S. BALL, *THE WORD AND THE LAW* (1993). Ball struggles with Jesus's statement to the Apostles that while the secrets of the Kingdom of God have been disclosed to them, to others they will remain impenetrable parables. *Id.* at 106-08. He interprets this passage as a call to the followers of Christ to seek meaning in everyday experience. Ball disclaims an intention to “make a linear argument or advance a set of propositions toward a conclusion designed to compel readers' assent by the force of its logic.” *Id.* at 1-2. Instead, he makes his point through narrative, by relating the experiences of seven people who, through their engagement in the law, have responded creatively to the divine Word. *Id.*; see generally Frank S. Alexander, *Speaking Theologically: A Review of Milner S. Ball. The Word and the Law*. 42 EMORY L. J. 1081 (1993) (book review).

9. *Acts* 2:1-14.

10. The word “person” as used in this context meant — and means — something quite different in Christian theology from what it has come to mean in current secular speech. In the first centuries A.D., the Latin word *persona*, like the Greek word *prosopon*, meant “face,” or “aspect,” or “role.” When applied to the Trinity, it meant something more than that. Exactly what it meant, however, was the subject of fierce theological debate. The orthodox view speaks of one “essence” or “substance” and three “persons” through whom that essence is manifested. I use the word “form” as a modern translation of the ancient word “person” in trinitarian theology, with the connotation that the one God appears in three different forms.

standing and truth (vv. 6-13), and his incarnation in the messianic person of his Son (vv. 14-18).¹¹

I do not propose to explore further the mysteries of the interrelationships of the three forms of the triune God, as set forth by Christian theologians from Tertullian¹² and St. Augustine,¹³ to Karl Rahner¹⁴ and Jürgen Moltmann.¹⁵ I do propose, however, to explore further the implications of religious beliefs, including the belief in the Trinity, for our understanding of law.¹⁶

Here I turn first to the belief shared by Judaism, Christianity, and Islam that humanity is created in the image of God. We are told in Genesis that “God created humanity in his own image ... male and female created he them.”¹⁷ Since we are created in God’s image, we have divine attributes. God has, however, given us freedom not only to obey him but also to defy and to betray him, and we have used our freedom to seek our own aggrandizement and even to destroy each other and ourselves. Both individually and collectively, humanity has repeatedly succumbed to what, in a theological perspective, are satanic forces. Nevertheless, humanity does have three kinds of attributes that may be called divine: the capacity to be creators and lawmakers; the capacity to live — or at least to seek to live — holy and redemptive lives; and the capacity to inspire, teach, prophesy, and form new relationships of community.

In the Christian conception, these three types of human capacities

11. Cf. THE NEW JEROME BIBLICAL COMMENTARY 951 (Raymond E. Brown et al. eds., 1990) (providing commentary on the Gospel According to St. John): THE ANCHOR BIBLE. THE GOSPEL ACCORDING TO JOHN, 3-36 (William F. Albright et al. eds. & Raymond E. Brown trans., 1966) (same).

12. See generally JOSEPH MOINGT. THÉOLOGIE TRINITAIRE DE TERTULIEN (1966) (discussing Tertullian's theories).

13. See generally CATHERINE MOWRY LACUGNA. GOD FOR US: THE TRINITY AND CHRISTIAN LIFE 81-109 (1991) (discussing St. Augustine and the Trinitarian economy of the soul).

14. See KARL RAHNER. THE TRINITY (Johannes Feiner et al., eds., & Joseph Donceel, trans., 1970).

15. For a discussion of Moltmann's theories, see JÜRGEN MOLTSMANN. HISTORY AND THE TRIUNE GOD: CONTRIBUTIONS TO TRINITARIAN THEOLOGY (1992) [hereinafter “MOLTSMANN. HISTORY”]; JÜRGEN MOLTSMANN. THE TRINITY AND THE KINGDOM: THE DOCTRINE OF GOD (Margaret Kohl trans. 1981) [hereinafter “MOLTSMANN. TRINITY”].

16. Christian theologians identify the “immanent” Trinity with the reciprocal relationships of Father, Son, and Spirit to each other, and the “economic” Trinity with the three forms of manifestation of God's activity in the world. The “economic” Trinity, in turn, is treated as part of “salvation history” (a translation of the German *Heilsgeschichte*), which stresses the continuing manifestations of God's will in the world and the transcendent character of history lived out in the Christian era. Cf. Rudolf Schnackenburg et al., *Heilsgeschichte*, 5 LEXIKON FÜR THEOLOGIE UND KIRCHE 147, 153-156 (Josef Höfer & Karl Rahner, eds., 1960).

17. *Genesis* I: 26-27.

correspond to the three persons of the triune God in whose image we are created. In traditional Judaism, there is not a belief in the humanity of God and the corresponding brotherhood of God and man. Only at the end of history will the Messiah come to bring reconciliation between God and man, and the reign of universal peace and goodwill on earth.¹⁸ There is, however, in Judaism, in addition to the belief in God as creator and lawgiver and father of us all,¹⁹ a belief in a divine spirit, which at the Creation “hovered on the face of the water”²⁰; which, when the last day comes, God “will pour out on all mankind”²¹; and which in the meanwhile, as the Shekhinah, or Presence, is the feminine spirit of God indwelling in his children.²² Also in Islam, there is at least a weak belief in a holy

13. “Messianic Judaism is Judaism that takes seriously the belief that Jewish history ... is a prelude to an extraordinary act of God, by which history will come to its climax and the reconciliation of God and man, and man and man, realized.” David R. Blumenthal, *Michael Wyschogrod, in INTERPRETERS OF JUDAISM IN THE LATE TWENTIETH CENTURY* 393, 396 (Steven T. Katz, ed., 1993). The difference from Christianity is that the climax and ultimate reconciliation is only in the future. However, “[e]ven for Christians, the eschatological redemption and consummation has still to take place: there has been a delay in the ‘parousia.’” HANS KÜNO, *JUDAISM — BETWEEN YESTERDAY AND TOMORROW* 344 (John Bowden trans., 1992). At the same time, the emphasis of leading Jewish thinkers such as Abraham Heschel on both Biblical and post-Biblical prophesy as a revelation of God’s presence in the human soul and of his compassion for human suffering brings Judaism closer to the Christian belief in the Incarnation. See e.g., ABRAHAM HESCHEL, *THE PROPHETS* (1962).

19. The metaphor of divine fatherhood is used only occasionally in the Hebrew Scriptures. Some examples are: *Deuteronomy* 32:6 (quoting Moses as saying, “in the hearing of the whole assembly of Israel, Do you thus repay the Lord, foolish and senseless people? Is not he your father, who created you, who made and established you?”); *Isaiah* 64:8 (“Yet, O Lord, you are our father: we are the clay, and you are our potter.”); *Isaiah* 63:16 (“For you are our father, though Abraham does not know us and Israel does not acknowledge us.”); *Malachi* 2:10 (“Have we not all one father? Has not one God created us?”). The Qur’an, on the other hand, “while it has 99 names for Allah, avoids the name ‘Father,’ which from Muhammad’s standpoint was hopelessly compromised by the tribal religions of Arabia, with their belief in the children of the gods.” HANS KÖNG ET AL., *CHRISTIANITY AND WORLD RELIGIONS: PATHS OR DIALOGUE WITH ISLAM, HINDUISM, AND BUDDHISM* 120 (Peter Heinegg trans., 2d ed. 1993). Nevertheless, the Qur’an, like both the Hebrew Scriptures and the New Testament, presents God as the all-wise and merciful creator and lawgiver, and hence in a metaphorical sense as the parent of the human race. Cf. *id.* at 72 (“We describe human beings as God’s children, and God is not just the Lord, but the Father, too. This sort of language is just not heard in Islam, but we must consider the reason for that: A child for the Arabs is always a son, and God has no son; he does not ‘beget.’ That formula is impossible, because it has trinitarian associations. In point of fact, God’s mercifulness contains a good deal of the fatherliness that we look upon as typically Christian.”).

Here and throughout this article I have intentionally varied the use of initial capital letters, depending on the theological context, in referring to the forms in which God’s activity and presence are manifested.

20. *Genesis* 1:2.

21. *Joel* 2:28-32.

22. See MICHAEL E. LODAHL, *SHEKHINAH / SPIRIT DIVINE PRESENCE IN JEWISH AND CHRISTIAN RELIGION* 42-65 (1992) (discussing the divine presence and the Shekhinah); MOLTSMANN

spirit, which is identified with those angels — especially Gabriel — through whom God communicates with his human family.” And in most non-theistic religions as well, the Way or the Truth or the Light is conceived as an immanent spiritual reality.²⁴

The belief in a Spiritual Presence, a sense of the holy, which is common to most of the cultures of the world,²⁵ undoubtedly reinforces the tendency toward altruism and cooperation which — together with its opposite — exists in human nature and without which we would live in a Hobbesian world of all against all.²⁶

TRINITY, *supra* note 15, at 29-30 (discussing the relationship between God and the Shekhinah). In the Jewish tradition, distinctions among the forms in which God is experienced are less sharp than in the Christian tradition; nevertheless, his presence as a holy spirit is sometimes stressed. Thus the Psalmist says, “O God ... take not thy holy spirit from me.” *Psalms* 51:11. Later rabbinic writings vary widely in their interpretation of the manifestation of the holy spirit. In the thirteenth century, Maimonides specifically identified the outpouring of the holy spirit [*ruah kadosh*] with the gift of prophecy. MAIMONIDES. LAWS OF THE FOUNDATIONS OF THE TORAH 7:1; *cf.* RABBI JOSEPH B. SOLOVEITCHIK. HALAKHIC MAN 129-30 (Lawrence Kaplan trans., 1983) (discussing Maimonides). Abraham Heschel follows Maimonides in describing the prophet as a man filled with the holy spirit (*ish ha-ruah*), which Heschel also renders as a transcendent “divine pathos.” See HESCHEL. *supra* note 20 at 317, 483-88 (1962) (discussing and defining pathos); *cf.* Edward K. Kaplan, *Metaphor and Miracle: Abraham Joshua Heschel and the Holy Spirit*, 56 CONSERVATIVE JUDAISM, 4, 17 (1994) (“For Heschel, modern Judaism is a religion of the Holy Spirit ...”).

23. KAREN ARMSTRONG. A HISTORY OF GOD: THE 4000-YEAR QUEST OF JUDAISM, CHRISTIANITY, AND ISLAM 138 (1993). Although Islam powerfully stresses the Oneness of Allah, angels also play a significant role in Islamic theology, and especially in prophetic revelation. See Sachiko Murata, *The Angels*, in ISLAMIC SPIRITUALITY 324, 338-43 (Seyyed H. Nasr ed., 1987) (discussing mankind and the angels); Louis Gardes, *Les Anges en Islam*, 21 STUDIA MISSIONALIA 207, 211-12 (1972) (discussing God’s use of the Angels).

24. There are, of course, many different forms of Buddhism. Taoism, Hinduism, and other non-theistic religions, and almost any generalization about them all is bound to require qualifications. Hans Küng has pointed out that although the Buddhist belief in dharma, or truth, does not generally include a belief in a transcendent reality, nevertheless, in Mahayana Buddhism, the idea of dharmakaya, or body of truth, does in fact “manifest divine qualities: a different dimension beyond or within phenomena, a true reality.” KÜNO, *supra* note 19, at 592.

25. See PAUL TILUCH. CHRISTIANITY AND THE ENCOUNTER OF THE WORLD RELIGIONS 58 (1963) (“All religions ... grow out of a sacramental basis, out of the experience of the holy as present here and now ... But no higher religion remained on this sacramental basis; they transcended it, while still preserving it ...”). The definition of religion as “the sense of the holy” was a principal theme in the writings of Rudolf Otto. See RUDOLF OTTO, THE IDEA OF THE HOLY (John W. Harvey trans., 1968); *cf.* FRIEDRICH HEILER. PRAYER: A STUDY IN THE HISTORY AND PSYCHOLOGY OF RELIGION XV (Samuel McComb. trans. & ed. 1932) (“[P]rayer is the heart and centre of all religion.”); see also MIRCEA ELIADE. COSMOS AND HISTORY: THE MYTH OF THE ETERNAL RETURN 21-23 (Willard R. Trask trans., 1959) (discussing the divine origins of religious rituals); MIRCEA ELIADE. IMAGES AND SYMBOLS: STUDIES IN RELIGIOUS SYMBOLISM (1969).

26. LEWIS THOMAS. THE FRAGILE SPECIES 123 (1992) (“Altruism is one of the strange biological facts of life, puzzling the world of biology ever since Darwin ... [B]ut an even deeper scientific quandary is posed by the pervasive existence of cooperative behavior all through nature.”). In the last pages of the book, Dr. Thomas struggles with the question whether there exists “something like a mind at work, adrift somewhere around or over or within the mass” of “living

At least from the time of St. Augustine, Christian theologians have ascribed to the soul of every person the separate but interlocking qualities of the three forms of the triune God. For St. Augustine, these were, respectively, *being* (*esse*, which he also identified with memory, or the experience of time), *knowledge* (*nolle*, which he also identified with reason and understanding) and *will* (*velle*, which he also identified with desire and with love).²⁷ Only in recent years, however, have some Christian theologians begun to ascribe a divine trinity of characteristics not only to the individual human being but also, in a very tentative way, to social formations.²⁸ None,

species, all engaged in some kind of thought." *Id.* at 192. He goes on to write: "[M]y friends will object to the word 'mind,' worrying that I am proposing something mystical, a governor of the earth's affairs, a Presence ... Not a bit of it, or maybe only a little bit ..." *Id.*

27. See ST. AUGUSTINE. *CONFESSIONS*, 317-18 (E. B. Pusey tram., 1907)

Now, the Three I spake of are, To Be, to Know, and to Will. For I Am, and Know, and Will: and I Know myself to Be, and to Will: and I Will to Be, and to Know. In these three, then, let him discern that can, how inseparable a life there is, yea one life, one mind, and one essence, yea lastly how inseparable a distinction there is, and yet a distinction.

Id.; cf. ST. AUGUSTINE. *THE TRINITY* 271-89, 308-09 (Roy Deferrari et al. eds. 4 Stephen McKenna trans., 1963) (discussing the trinity of the mind, knowledge and love). Leonardo Boff has stated:

To elucidate unity in trinity and trinity in unity, Augustine produced two famous analogies with human beings, who are created in the image and likeness of God: he speaks of mind, knowledge, and love (*mens, notitia, amor*), or memory, intelligence and will (*memoria, intelligentia, voluntas*). Each of these terms contains the others: the mind knows and loves, knowledge supposes mind and love, love implies mind and knowledge. The three form the human soul, which is continuous life and action in complete simultaneity of action and being.

LEONARDO BOFF. *TRINITY AND SOCIETY* 56 (Paul Burns trans., 1988) (endnotes omitted).

St. Augustine's insights into the "vestiges" of the Trinity in the human soul were amplified in the thirteenth century by the great Franciscan scholar St. Bonaventure, especially in his book *Itinerarium mentis in Deum*. See BONAVENTURE, *The Soul's Journey Into God*. in BONAVENTURE 80-85 (Ewert Cousins trans., 1978). For a discussion of Bonaventure's definition of memory, see *infra* note 43 and accompanying text.

A recent book devoted to the three-fold character of the human psyche as analyzed by scholastic writers, including St. Bonaventure, focuses on their discussion of reason and will and neglects their discussion of the temporal character of "being." See EDOUARD-HENRI WEBER. *LA PERSONNE HUMAINE AU XIII^E SIECLE: L'AVENEMENT CHEZ LES MAITRES PARISIENS DE L'ACCEPTION MODERNE DE L'HOMME* (1991).

28. See MOLTSMANN. *TRINITY*, *supra* note 15, at xii-xiii ("The triune God is community, fellowship, issues an invitation to his community and makes himself the model for a just and livable community in the world of nature and human beings."). Raimundo Pannikar analogizes the three persons of the Trinity to the three persons of grammar represented by the pronouns "I," "Thou," and "He / She / It," and "We," "You," and "They," which are present in all known languages. He states:

The Trinity appears then as the ultimate paradigm of personal relationships ... An I implies a thou, and as long as this relation is being maintained, it implies also a he / she / it as the place where the I-thou relation takes place. An I-thou relation implies

however, so far as I know, has attempted to relate a trinitarian theology to law.²⁹ I propose in this part of my presentation to discuss a theory of law that integrates the Augustinian categories of will, reason, and memory.

I call this a Christian jurisprudence (although I believe it should be entirely persuasive to non-Christians) because it corresponds to the Christian theological conception of a triune humanity created by God in his own image. It may also be justified to call it "Christian" on the ground that it builds on jurisprudential theories that were first developed in Western Christendom, in the period from the twelfth to the eighteenth century, by jurists and philosophers who were themselves devout Christian believers.³⁰ Of course, the fact that it is a Christian jurisprudence in these two senses does not mean that all Christians must agree with it or that there cannot be another Christian jurisprudence.³¹

In the past I have expounded an "integrative" jurisprudence, which would combine the three major schools of Western legal philosophy that split apart in the late eighteenth and nineteenth centu-

equally a We-you dimension, which includes the they in a similar way as the he /she / it is included in the I-thou.

RAIMUNDO PANNIKAR. *THE TRINITY AND THE RELIGIOUS EXPERIENCE OF MAN* xv (1973); see 'also BOFF, *supra* note 27, at 236-37 (discussing the Trinity and the three divine persons).

29. The eminent German theologian Wolfhart Pannenberg has adumbrated a theological foundation for an integrative jurisprudence similar in a very general way to that presented in the following pages. He has written about the tension between the conception that the validity of law is grounded in the created order and the conception that it is grounded in Christ. He resolves this tension by grounding the validity of law in the historical character of human reality. Pannenberg does not, however, relate these three sources of the validity of law (which I associate with the political, moral, and historical dimensions of law) to the three persons of the Trinity, nor does he expressly relate the historical character of humanity, and therefore of law, to the working of the Holy Spirit. See Wolfhart Pannenberg, *Toward a Theology of Law*, 55 *ANGLICAN THEOLOGICAL REV.* 395 (1973).

30. See HAROLD J. BERMAN. *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 165-98 (1983); *Law and Belief in Three Revolutions*, in HAROLD J. BERMAN. *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 83-139 (1993) [hereinafter "BERMAN. FAITH AND ORDER"].

31. Raimundo Pannikar states that each of the world religions, in its own fashion, strives toward synthesis of the three spiritual attitudes that are reflected in the Christian doctrine of the Trinity, and that "the kairos of our time" is to bring the religions together on this basis. PANNIKAR. *supra* note 23, at 43.

Trinitarian tendencies can also be found in all of the world's legal systems, but Donald Kelley surely goes too far in stating that Gaius's three-fold division of Roman law into persons, actions, and things corresponds to, and even gave rise to, the Christian "myth" of the Trinity. See DONALD R. KELLEY. *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 118-19 (1990). This juxtaposition is effectively rebutted in John Witte, Jr.'s review of Kelley's book: John Witte, Jr., *From Homer to Hegel: Ideas of Law and Culture in the West*. 89 *MICH L REV* 1618, 1634 (1991) (book review).

ries: positivism, natural-law theory, and historical jurisprudence. Each of these three schools, taken separately, unconsciously reflects distinctive qualities of a different one of the three persons of the triune God as conceived in traditional Christian theology. I shall review very briefly, from that perspective, some of the basic tenets of the three schools.³²

The positivist school, which in the twentieth century has come to dominate American and European legal thought, identifies law with the policies of the lawmaker, “the will of the state,” expressed in the form of a more or less self-contained body of rules laid down by the state and enforced by state sanctions.³³ Beneficent lawmakers will presumably issue beneficent rules; however, the law is what they have “posited” (hence “positivist”), beneficent or otherwise, and in analyzing it one should sharply distinguish what it *is* from what it *ought to be*.³⁴ The key concepts of the positivist school of jurisprudence are politics, order, will, power, legislation, and rules.³⁵ In the language of trinitarian theology, the state reflects in a distorted way the authority, the will, of God the Father, God the Creator, God the Lawgiver; and its law consists primarily of rules that embody its policies.

Natural-law theory, on the other hand, which predominated in the West prior to the sixteenth and seventeenth centuries, and which has fought a rear-guard battle against positivism ever since, identifies law primarily with a morality higher than the state, a morality arising from human nature itself, and especially from our inborn reason and conscience.³⁶ Natural-law theory does not deny the virtues of political order, but it would subordinate them to standards of justice. In England “the law of nature” was translated in fourteenth and fifteenth century statutes as “due process of law,” and later as “the law of reason.”³⁷ Its advocates would put reason over will and conscience over power; they would stress as the principal source of law not legislation but equity, the sense of fairness; they would subordinate rules to the purposes which they embody. The natural-

32. See Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 779 (1988) (discussing “integrative” jurisprudence and the three schools of Western legal philosophy), reprinted in BERMAN, FAITH AND ORDEX, *supra* note 30, at 289.

33. *Id.* at 780.

34. *Id.*

35. *Id.*

36. *Id.* at 781, 784-85.

37. *Id.* at 783-85.

ist's assertion of the supremacy of the moral order over the political order corresponds — again, in a distorted way — to the trinitarian doctrine of the holiness and redemptive power of God the Son, the God-man, who is without sin, who has introduced the reign on earth of peace and good will, and who at his second coming will judge both the living and the dead.

A third philosophy of law, later called the historical school, first emerged as an articulate theory in England in the seventeenth century,³⁷ although it had been implicit in the development of the Western legal tradition from the twelfth century on.³⁸ Only in the early nineteenth century, however, did it break apart from positivism and natural-law theory and become a separate school.⁴⁰ By the latter part of the nineteenth century it had become the predominant Western legal philosophy, at least in both Germany and America.⁴¹ Today it has almost died out completely among the jurists,⁴² though it remains strong in English and American courts, at least to the extent that the doctrine of precedent and the common law survive.

Historical jurisprudence proclaims that the primary sources of law are not politics and not morality but history, not order and not justice but experience, not will and not reason but tradition, not power and not conscience but community consent, not legislation and not equity but precedent and custom. The founder of the historical school, the great German jurist Savigny, said that the ultimate source of law is the ethos of the people, the *Volksgeist*, the spirit of the nation as it has manifested itself in different ways in the course of its history. Here the theology of the third person of the Trinity, the Holy Spirit, the God of a common language and a prophetic tradition, is transformed into the secular deity of the nation. History, in this concept, is not merely factual data of the past; it is a tradition; it has purposes to which we are committed. It is group

38. *Id.* at 788-89.

39. Harold J. Berman. *The Origins of Historical Jurisprudence: Coke. Selden. Hale.* 103 YALE L. J. 1651 (1994) [hereinafter "BERMAN. ORIGINS"].

40. See generally FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., 1975).

41. "The historical school ... was dominant in Continental Europe and in America in the last half of the nineteenth century." ROSCOE POUND, 1 JURISPRUDENCE 63 (1959).

42. Alan Watson, in the course of examining positivist and natural-law justifications of the validity of customary law, disdains to discuss historical jurisprudence at all, on the ground that "Savigny's ... general theory of law ... is today universally rejected ..." ALAN WATSON, THE EVOLUTION OF LAW 48 (1985).

memory, but in an older sense of the word “memory,” as including not only recollection of the past but also awareness of the present and anticipation of the future.⁴³ In law, such temporally extended collective being, or ongoing tradition, has normative significance; we are bound by it.

Prior to the late eighteenth century it was possible for a legal philosopher to hold these three forms of the triune law — its political form, its moral form, and its historical form — in what Christian theologians, speaking of the Trinity, call perichoresis; that is, each of the three interpenetrates the others. Only in the so-called Enlightenment of the latter eighteenth and nineteenth centuries were the links finally severed, in legal philosophy, between positive law and morality, on the one hand, and between each of those and historical tradition, on the other. With the virtual demise of the historical school — among contemporary American writers on jurisprudence I seem to be one of the last of its defenders — the battlefield has been left to the multitude of positivists and naturalists, locked in combat on mutual terms of unconditional surrender. Indeed, as a believer in historicity, I would argue that they cannot possibly be reconciled, except in the context of the ongoing history of a given legal order. That, in fact, is how they are often reconciled by American courts, which in deciding cases will turn a positivist eye to the applicable legal rules, a naturalist eye to the equities of the particular case in the light of the moral principles underlying the rules, and a historicist eye (they do have three eyes!) to custom and to precedent, having in mind not only the precedents of the past but also the significance of their decisions as precedents for the future. A conscientious judge cannot be solely a positivist or solely a naturalist or solely a historicist. The three “schools” are three dimensions of his judicial role.

Ultimately, however, the belief that the political, the moral, and the historical forms of law constitute a triunity depends upon a prior belief in the triunity of the human psyche, on the one hand,

43. This is St. Bonaventure’s definition of memory. See BONAVENTURE, *supra* note 27, at 80-81. It corresponds to the concept of “the temporally extended self” developed by the eminent cognitive psychologist Ulric Neisser. See Ulric Neisser, *Five Kinds of Self-knowledge*, I PHILOSOPHICAL PSYCHOLOGY 35, 46-50 (1988). Neisser defines the extended self as “the self as it was in the past and as we expect it to be in the future, known [to itself] primarily on the basis of memory.” *Id.* at 46. “What we recall depends on what we now believe as well as on what we once stored.” *Id.* at 49.

and the tri-unity of the communities, local and translocal, to which we belong — not only the nation but also the other communities from which law is ultimately derived: the family, the neighborhood, the workplace, the religious community, the profession, the ethnic group, the region, and others, including transnational communities. Each of these communities appears in three different forms. Each recognizes itself to be a unified body: this may be said to be its political personality, its structure of authority and its power to act creatively, in St. Augustine's terms its "will." Each also has its own inner life; this may be called its moral personality, its conscience, in St. Augustine's terms its "understanding of itself," its "reason." Finally, every real community is motivated to achieve its goals, to realize its own historical destiny; this may be called its historical personality, its evolving spirit, in St. Augustine's terms its memory, its ongoing being in time.⁴⁴ If these qualities are not combined, if they do not interpenetrate each other, the community is threatened with disintegration. Indeed, in a community that has separate agencies to represent these separate forms of its life, it is essential that those agencies are coordinated and constitute a single entity.

A Christian jurisprudence would take us one step further. It would contend that the reciprocal interpenetration of the three forms of a community must be understood as part of, and subordinate to, a higher Spiritual Presence — in Christian terms, to the perichoresis of the three forms of the triune God. Otherwise, it becomes difficult, and sometimes impossible, for them to be held together either at the philosophical level or at the practical level. Where rules of positive law conflict with principles of justice, it is often possible to resolve the conflict by resort to its historical context — past, present, and future — and by application of norms drawn from historical experience, including its extension into the future. But where all three basic sources of law are in conflict with each other, an act of faith — or, in secular terms, of imagination and courage — is needed to harmonize them. Their synthesis, in such a case, cannot be explained by a purely secular legal philosophy, such as pragmatism, since the three basic sets of norms from which a solution must be drawn are fixed and are at the same time, by hy-

44. Here I depart from St. Augustine, who would identify "being" with the first person of the Trinity, and "will" (including "love") with the third person. ST. AUGUSTINE, *supra* note 27, at 16. I would ascribe "love" to all three persons equally, but would relate "will," in the sense of authority, primarily to the first person, and "being" (in the temporal sense) primarily to the third person.

pothesis, irreconcilable by resort to any one of them. It is not merely a “practical” solution that is sought in such a case, but one that reconciles the irreconcilable.⁴⁵

It was, in fact, the almost total secularization of legal philosophy in the late eighteenth and early nineteenth centuries that led to the divorce of the three major schools of legal philosophy from each other; and more recently, the almost total secularization of public discourse in general has contributed substantially to a corresponding crisis of law on the practical level as well. To a critical extent, the political dimension of law has become dissociated, both in theory and in practice, from its moral dimension, and both have become dissociated from its historical dimension, which has been narrowed almost to the point of irrelevance. A trinitarian jurisprudence can help us to understand the nature of this crisis, and it can provide a key to the reintegration of the three forms of law.

II. A COMMON FAITH TO SUPPORT THE LAW OF THE EMERGING WORLD COMMUNITY

Yet we cannot be saved — in either the material or the spiritual sense of that word — by a legal philosophy alone. Even on the philosophical level, it may be hopeless to try to communicate a Christian jurisprudence to an almost wholly secularized Western legal culture, on the one hand, or to non-trinitarian religious cultures, on the other. Some legal philosophers may be intrigued by the effort to integrate that which without faith is, in some situations, unintegratable. Most will continue to see the jurisprudential problem as one of choice between one of the various forms of positivism and one of the various forms of natural-law theory. The normative character of his-

45. The resort to politics, morality, and history in determining what the law is, and how it should be interpreted and applied, does share some common features with pragmatism, in that it is directed to achieving consequences that have maximum practical value. If analysis of what the positive law requires, what natural law requires, and what the particular legal tradition requires all lead to the same judgment, that judgment will have maximum acceptability. Conflicts between positive law and natural law may be susceptible of resolution in the light of the legal tradition. If, however, all three are thought to be in conflict with each other, then practical consequences must be taken into account, but the determination of those consequences is not solely a rational process. A principal method of reconciliation of the three sources of law when they are in conflict may be found in the dictates of conscience. The theory of a resort to conscience in the application of the law, in order to overcome defects due to the necessary generality of legal rules and principles, was developed by Lutheran jurists in the sixteenth century. See Harold J. Berman & John Witte, Jr., *The Transformation of Western Legal Philosophy in Lutheran Germany*. 62 & CAL. L. REV 1575, 1635-50 (1989) (discussing Johann Olderdorp's theory of divine law, natural law, and positive law).

torical experience will remain an obscure concept, partly because of the loss of any belief in the providential character of history. Why take history seriously if it has no direction, no pattern, no purpose? Why speak of “whence we have come” if we have no sense of whither we are headed? Why speak of historicity if we have no faith in the future?

This is my second topic: not the remote future, but the future we are now entering, as the twentieth century A.D. draws to a close. Are we not now entering a new age in the history of humankind? More particularly, are we not experiencing (among other things) the emergence of a world society, and the prospective emergence of a world community?

It is hard for me to doubt the providential character of this historical development, which appears to be a culmination of more than five thousand years of human history. Especially in the second millennium of the Christian era, gradually, century by century, all the peoples of the world have been brought into contact with each other; Western Christendom, through its missionaries, its merchants, and its military, gradually made a world around itself. Now as we enter the third millennium of that history, “the West” is no longer the center. All humanity is joined together in a common destiny through global communications, global science and technology, and global markets, on the one hand, and, on the other hand, through global challenges of environmental destruction, disease, poverty, oppression, and war. Despite two world wars and their aftermath of terrible ethnic, territorial, and ideological conflicts, St. Paul’s extraordinary insight, that all persons are made of one blood, has now not only been proved scientifically but has also become an historical reality.

Although most people still think of law in national terms, as the law of the nation-state, the fact is that a whole new body of world law has emerged in the past fifty years. One may refer, first, to the 20,000 international treaties and the five hundred international organizations that are now registered with the United Nations, and second, to international law in a larger sense, including national legal implementation of universal standards of order and justice. Even more significant, in my view, are the various kinds of transnational customary law that have been created by communities that cross national boundaries – transnational communities of persons involved in processes of global communications, technology, and finan-

cial and commercial markets, as well as in global cultural, scientific, scholarly, athletic, and other types of activities. In virtually all countries of the world, associations of people at various levels of political, economic, and social life are being called upon, and will be called upon increasingly in coming generations, to create legal structures and legal processes of peaceful interchange across cultural and territorial boundaries.⁴⁶

The enormous economic, political, social, and legal significance of these developments is gradually being appreciated by scholars in the various disciplines. Even legal educators are beginning to grasp the meaning of the statement attributed to Benno Schmidt that “the world has replaced the nation as the context in which the professions operate.”

We have not, however, even begun to confront the equally important fact that a common spiritual faith is needed to support the fragile emerging law of the emerging world community, a spiritual faith grounded in history but adapted to a new millennium of global integration. Such a common spiritual faith must draw, I believe, on the resources not only of Christianity, Judaism, and Islam – the traditional theistic religions – but also of various forms of Buddhism, Taoism, and other non-theistic religions, as well as on various forms of humanism that are not called religions but share with them a passionate commitment to a higher spiritual truth. I believe that we are already entering this new age, which may be called the age of the holy spirit.

I speak of a common spiritual faith rather than of a common ethic, on the one hand,⁴⁷ or a common religion, on the other.⁴⁸ It is

46. A striking example of an effective international community is that of persons engaged in international commerce, which I have described elsewhere as,

the transnational community of exporters and importers, shipowners, marine insurance underwriters, bankers, and others — a community which has a European history dating from the twelfth century and which in the twentieth century has become not merely a Western but a worldwide community, held together by innumerable negotiations and transactions among its participants as well as by its own processes of self-government, including its own [lex mercatoria and its own] procedures for mediation and arbitration of disputes.

Harold J. Berman. *Law and Religion in the Development of a World Order*. 52 SOC. ANALYSIS 27 (1991) reprinted in BERMAN, FAITH VND ORDER, *supra* note 30, at 283.

47. In 1933, 250 religious leaders from around the world, in a Parliament of the World's Religions, signed a “Declaration of a Global Ethic.” which affirmed “the fundamental unity of the human family on Earth” and proclaimed “the full realization of the intrinsic dignity of the human person, the inalienable freedom and equality in principle of all humans, and the necessary solidarity and interdependence of all humans with each other.” The Declaration, which was drafted by

obvious that people are not abandoning, will not abandon, and should not abandon, their traditional religious communities in order to come together on the basis of some common religious denominator. Moreover, the spiritual faith of which I speak may be shared by many who do not consider themselves to be religious at all. Yet the kind of shared spiritual faith that is needed to support legal structures and legal processes of a peaceful world society has much in common with most traditional religions. In that perspective, it may perhaps be called not “a religion,” but rather “a religious spirit.” In speaking of a spiritual faith, or religious spirit, that is needed to support a legal order that crosses all ethnic, territorial, cultural, and religious boundaries, I start from the fact that every legal order requires for its vitality the support of a belief system that links law not only with morality but also with fundamental convictions about human nature and human destiny. This is an anthropological truism, not a theological proposition, and should therefore be easily accessible to all persons. And it is a matter of obvious importance, although unfortunately it is not taken seriously by our legal scholars. In all societies religion and law, in the broad sense of those words, are interdependent and interact with each other. In all societies there are shared beliefs in transcendent values, shared commitments to an ultimate purpose, a shared sense of the holy: certain things are sacred. And in all societies, there are structures and processes of social ordering, established methods of allocating rights

Hans Küng, stated that “[b]y a global ethic we do not mean a global ideology or a single unified religion beyond all existing religions,” but rather “a fundamental consensus on binding values, irrevocable standards and personal attitudes.” *Parliament of World Religions’ Global Ethic*. NAT’L CATH. REP.. Sept. 24, 1993, at 11. Missing from the document, however, is any reference to a transcendent spirit that inspires or demands the kinds of commitment to the strengthening of a world society and the creation of a world community for which the Declaration calls.

48.

Religion is a social and individual relationship, vitally realized in a tradition and community (through doctrine, ethos, and generally ritual as well), with something that transcends or encompasses man and his world: with something always to be understood as the utterly final, true reality (the Absolute, God, nirvana). In contrast to philosophy, religion is concerned at once with a message of salvation and the way to salvation.

HANJ KÜNG ET AL.. CHRISTIANITY AND THE WORLD RELIGIONS: PATHS TO DIALOGUE xvi (Peter Heinegg trans., 1986). This definition is useful for the purpose for which it is intended, namely, as a basis for furthering interreligious dialogue, understanding, and tolerance among the world religions, a goal which Küng believes it is necessary to achieve before there can be world peace. As in the case of the Global Ethic of the Parliament of World Religions, *supra* note 48, the recognition that different religions have common features provides an important basis for mutual understanding but does not provide a common determination to form strong bonds of community.

and duties, a shared sense of the just: Certain things are lawful. The prophetic and mystical sides of religion challenge, and are challenged by, the structural and rational sides of law. Yet the two are interdependent: Each is also a dimension of the other.⁴⁹

In all societies law derives from religion at least four characteristic ways of channeling and communicating its values — namely, ritual, that is, ceremonial procedures that symbolize its objectivity; tradition, that is, language and practices handed down from the past that symbolize its ongoing character; authority, that is, reliance upon decisive written or spoken sources that symbolize its binding power; and universality, that is, the claim to embody all-embracing concepts or insights that symbolize its connection with a higher truth. These four elements — ritual, tradition, authority, and universality — are present, I believe, in the legal institutions of all societies, both literate and non-literate. Like religion, law originates in celebration; it reveres the past; it feels bound by authoritative words and symbols; it invokes an all-embracing moral reality. These are legal emotions, legal passions, that may be said to constitute the religious dimension of law. The widespread conception among contemporary social scientists that law is exclusively secular and rational, and that its tasks are exclusively pragmatic, material, and impersonal, disregards the fact that in all societies, even the most despotic, law has emotional elements, sacred elements, that are intended, at least, to help people believe in its inherent rightness.

At the same time, religion shares with law everywhere — despite the enormous variety of particular forms that they take in different cultures — certain types of norms that may be called legal. In all religions there are norms concerning respect for parents as well as prohibitions of some types of homicide, some types of stealing, some types of sexual offenses, some types of perjury, and some types of fraud. Thus, it can be said that the last six of the Ten Commandments have counterparts in all known cultures. Moreover, the summary of those six Commandments in the Golden Rule, “Do unto others as you would have them do unto you,” is found not only in the New Testament but also in the Talmud, and it has almost exact counterparts in Islam and in Buddhism, Taoism, Brahmanism, Confucianism, and Zoroastrianism.⁵⁰ These injunctions are primarily

49. See BERMAN, FAITH AND ORDER, *supra* note 30, at 8-15 (discussing the common elements of law and religion).

50. Christianity: “All things whatsoever ye would that men should do to you, do ye even so to

moral, yet they also have a social and a legal dimension, with structural and procedural consequences.

An awareness of characteristics of law and religion common to all societies is an important antidote to tendencies of modern social thought toward a belief in cultural relativism as well as tendencies of modern political thought toward intense nationalism. It is, indeed, of utmost importance in the world today to affirm that all people everywhere have in common not merely certain physical and psychological characteristics but also certain cultural characteristics, and that among these common cultural characteristics are religion and law — a sense of the holy and a sense of the just.

Yet it would be wrong to suppose that widespread awareness of the common cultural characteristics shared by all the peoples of the world, or even widespread awareness of their common economic, technological, and other material interests, are sufficient to sustain a world order governed by law. As important as it is that strong and imaginative efforts be made to secure such awareness, and to deepen it by study and dialogue, we know from experience, if from nothing else, that even peoples that share both a common religion and a common legal tradition on the one hand, and common material interests on the other, are nevertheless entirely capable of going to war against each other. Indeed, the powerful tendencies toward global integration that exist in the world today are being matched by powerful tendencies toward ethnic and territorial disintegration, often reinforced by strong religious sentiments. Blood and soil still command far greater loyalty than our shared transnational economic, political, and cultural interests as well as our shared transnational religious convictions.

We must make a decision in our minds and hearts concerning these historical alternatives. It is not simply a matter of what we

them: for this the Law and the Prophets" *Matthew* 7,12. Judaism: "What is hateful to you, do not to your fellowmen. That is the entire Law: All the rest is commentary" *Talmud. Shabbat* 31a. Brahmanism: This is the sum of duty: Do naught unto others which would cause you pain if done to you" *Mahabharata* 5, 1517. Buddhism: "Hurt not others in ways that you yourself would find hurtful" *Udana-Varga* 5, 18. Confucianism: "Sure it is the maxim of loving badness: Do not unto others that you would not have them do unto you" *Analects*, 15, 23. Taoism: "Regard your neighbor's gain as your own gain, and your neighbor's loss as your own loss" *Tai Shang Kan Ying P'ien*. Zoroastrianism: "That nature alone is good which refrains from doing unto another whatsoever is not good for itself" *Dadistan-i-dinik* 94, 5. Islam: "No one of you is a believer until he desires for his brother that which he desires for himself" *Sunnah*. H. D. ROST. *THE GOLDEN RULE: A UNIVERSAL ETHIC* (1986); see also C S LEWIS. *THE ABOLITION OF MAN* (1947) (providing appendix: "Illustrations of the Natural Law Drawn From Various Sources").

prefer. It is a matter, first, of what is historically destined, what corresponds to the purposes for which human life was, and continues to be, created on this planet; and second, it is a matter of mobilizing those spiritual forces throughout the world that are dedicated to fulfillment of that historical destiny and those purposes.

One is reminded of Alexis de Tocqueville's discussion of the gradual expansion of political and social equality over the centuries of Western history. Starting in the eleventh century, he wrote, when the clergy opened their ranks to rich and poor, one social class after another achieved greater equality. In his own time, the middle class in France and elsewhere in Christian Europe had risen up and abolished the privileges of the aristocracy, and he predicted that in the future the working class would struggle for and achieve equality with the middle class.⁵¹ To a certain extent, Tocqueville the aristocrat deplored these developments. Yet he believed that they were providential and that therefore one must accept them and make the best of them.⁵² For Tocqueville, history was a progressive revelation of divine will. Similarly, I believe, global integration is providential, and we must make the best of it, regardless of our parochial loyalties.

"Providential," or "destined," does not mean "fated." "Providential" means, literally, "foreseen"; and for fulfillment of what is foreseen, a voluntary response is required. Similarly, "destined" refers to our intended destination, not our inevitable destination.

Our intended destination is global integration — not global homogenization, not a diminution of cultural differences and territorial allegiances, but a bringing together of the diverse constituencies of the world into a transcendent human family. But we must ask, Who will respond to the call to bring this about? In answering that ques-

51. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 3-6 (Phillips Bradley ed., 1945, orig. ed. 1838); cf. 2 *Id.* at 199 (forecasting the emergence of gender equality).

52.

The gradual development of the principle of equality is, therefore, a providential fact. It has all the chief characteristics of such a fact: it is universal, it is lasting, it constantly eludes all human interference, and all events as well as all men contribute to its progress ... If the men of our time should be convinced by attentive observation and sincere reflection that the gradual and progressive development of social equality is at once the past and the future of their history, this discovery alone would confer upon the change the sacred character of a divine decree. To attempt to check democracy would be in that case to resist the will of God; and the nations would then be constrained to make the best of the social lot awarded to them by Providence.

1 *Id.* at 6-7.

tion we think first of the many hundreds of thousands of economic entrepreneurs, technologists, environmentalists, scientists, and others, from all countries, who have an immediate economic or professional stake in transnational trade and investment, transnational communications, transnational cooperation to prevent destruction of the world's environment, the transnational advancement of scientific and other forms of knowledge, and similar causes. We think also of the host of lawyers and other advisors who are associated in these endeavors. We think of international civil servants and other persons working in the United Nations and in its non-governmental organizations. We think also of the statesmen of the various nations of the world who are struggling to create a peaceful world order through treaties and agreements and other means of cooperation, while at the same time protecting their respective national interests.

Yet we cannot rely solely on these economic, social, and political agencies to overcome the forces of disintegration in the world. As we experience the process of gradual creation of a world order, with a common economic and legal structure, we must recognize that a central ingredient of that process is a common commitment to a higher spiritual truth that transcends all loyalties of blood and soil. Such a common commitment, or faith, is needed to hold together people of different nations, different cultures, and different religions. It is an inchoate faith, lacking in dogmas. It is a belief in a sacred spiritual reality that is guiding the process by which the destiny of humanity, its ongoing history on the planet, is to be fulfilled.

The age of the holy spirit, the third millennium in the history of Christianity,⁵³ is an ecumenical age. In it, all who share a belief in a

53. Such a millennial prophecy is reminiscent of that of the Calabrian Abbot Joachim of Fiore (1135-1202), who counted the time of the Hebrew Scriptures as the age of the Father, dominated by the Law, the time of the Christian Church prior to the thirteenth century as the age of the Son, dominated by Grace, and the time soon to come as the age of the Holy Spirit, dominated by Love. See Morton W. Bloomfield, *Joachim of Fiore: A Critical Survey of his Canon, Teachings, Sources, Biography and Influence*. 13 *TRADITIO* 249, 264-68 (1957); see generally BERNARD MCGINN, *THE CALABRIAN ABBOT JOACHIM OF FIORE IN THE HISTORY OF WESTERN THOUGHT* (1985).

Joachim prophesied that the third "Johannine" age would last forty generations and that all mankind would be united under the leadership not of the Roman Catholic priesthood, as in the previous age, but of monastic "spirituals." The Franciscan order, founded soon after Joachim's death, was strongly influenced by his teaching, as were many strands of Protestant thought in the sixteenth century. Joachim's teachings were denounced by the Fourth Lateran Council in 1215 and later came under strong attack by Thomas Aquinas, among others. They nevertheless continue to be influential insofar as they embody the belief that divine revelation was not exhausted in the New Testament and in the previous tradition of the Church, but would continue to introduce

Spiritual Presence, both theists and non-theists, all who speak the language of a higher spiritual faith, all who seek a higher truth, are called to join in giving a foundation of ritual, tradition, authority, and universality to the emerging common law of mankind. The seekers of the world are called to unite against those skeptics who claim that there is no truth higher than the self-interest of the individual or the tribe or the territory, and no law higher than the will of the political authority. They are also called to unite against those dogmatists who believe that they have already found the entire truth and whose minds are closed to new inspiration. The seekers of a higher spiritual truth are called to unite to give to the emerging law of the emerging world community the same kind of emotional commitment, the same kind of loyalty, the same kind of sanctity, that has been given in the past to the legal traditions of the nation.

The key to the age of the Holy Spirit is Logos — the Word, the living language of prophecy on the one hand, and of community on the other. It is the language of language itself, the language of “communification.” It is the language, therefore, of those who are now establishing legal relations across ethnic and territorial boundaries and who are thereby helping to create a common legal language of a world society. With divine guidance, it can become the common

fundamental changes in human history. Perhaps what is most remarkable in Joachim’s prophecy, viewed from the perspective of the twentieth and twenty-first centuries, is its assumption that in a new age all mankind would be brought together in a spiritual unity.

Biblical textual support of the belief in new divine revelation in an age of the Holy Spirit may be found in Jesus’s statement, “I have yet many things to say to you, but you cannot bear them now. When the spirit of truth comes, he will guide you all into the truth.” *John* 16:12-13; cf. PIERRE TEILHARD DE CHARDIN, *CHRISTIANITY AND EVOLUTION* 142-44 (Rene Hague trans., 1969).

Contemporary appreciations of the Joachimite prophecy include that of Jürgen Moltmann. MOLTSMANN, *TRINITY*, *supra* note 15, at 203 (“But in fact, ever since the middle ages, there is hardly anyone who has influenced European movements for liberty in church, state and culture more profoundly than this twelfth-century Cistercian abbot from Calabria ...”); see also MOLTSMANN, *HISTORY*, *supra* note 15, at 91-104.

The vision of a new age presented in this paper is indebted to that of Eugen Rosenstock-Huussy, who divided the Christian era into three millennia, the first of which was concerned primarily with the Church’s conversion of pre-Christians from many gods to one God; the second of which has been concerned primarily with the establishment of the Papacy as a worldly power, the rise of (Protestant) national states, and the scientific conquest of the world of nature; and the third of which is to be concerned primarily with the creation of one human society. Rosenstock-Huussy defined the Christian era as a whole as “the self-conscious period of mankind during which man is making a purposeful effort toward unity and universality ... The story of salvation on Earth is the advance of the singular against the plural ...one God, one world, one humankind.” GEORGE ALLEN MORGAN, *SPEECH AND SOCIETY. THE CHRISTIAN LINGUISTIC SOCIAL PHILOSOPHY OF EUGEN ROSENSTOCK-HUESSY* 48 (1987) (citations omitted).

law not only of a world society but also, in time, of a world community.

CONCLUSION

In the first part of this presentation, I have tried to show that a legal philosophy which combines the conflicting schools of positivism, natural-law theory, and historical jurisprudence bears an important relationship to a trinitarian theology. In law, the divisive powers of Will, Reason, and Memory — or, in their social forms, Politics, Morality, and History — interpenetrate each other and form a triune reality. The political aspect of law, law as an instrument of the transcendent will of the lawmaker, corresponds to the divine form of the creator, the lawgiver; in Christian terms, the Father. The moral aspect of law, law as an expression of an immanent reason and conscience, corresponds to God as redeemer, or brother; in Christian terms, the Son. And the historical aspect of law, law as an embodiment of the ethos and traditions of the community, its life in time, corresponds to the Christian doctrine of the Holy Spirit. One may, of course, and I believe should, accept the integration of the three major schools of legal philosophy, regardless of one's acceptance or rejection of a trinitarian theology. Nevertheless, something like a leap of faith is required to insist on the threefold, or triune, character of the law in those instances when all three of its forms seem to be in conflict with each other — when legislation and justice and precedent seem to lead in three different directions.

In the second part of this presentation, I have tried to show that in the historical context of an emerging and still most fragile global order, a transnational, cross-cultural, inter-religious commitment to the search for a higher spiritual truth is needed if the ethnic and territorial and cultural (including religious) forces of disintegration are not to frustrate the formation of a world society and, eventually, a world community. I have called the new age into which mankind is entering the Age of the Holy Spirit; this is an ecumenical image, which not only corresponds to Christian tradition but is also congenial to adherents of other religions as well as to those humanists who disclaim religious affiliation but nevertheless hold some values to be sacred. I believe that only a shared faith in the common destiny of mankind gradually to form a world community will provide the vision and the emotional support necessary to the continued creation of a world order governed by law.

There is an intimate connection between the creation of such a world order and an integrative jurisprudence. In the new age which mankind is entering, the legal processes necessary to sustain a world society are being established partly by legislation, reflecting the policies of official bodies, and partly by judicial and quasi-judicial action, reflecting official principles of justice in the application of laws, but chiefly by unofficial processes of negotiation and agreement among those who participate in the establishment of various types of transnational relations. It is primarily through the language of contractual negotiation and agreement that transnational customary law has developed in the past and will continue to develop in the next generations. A higher spiritual power is already at work here in making it possible for persons of different cultures and different religious beliefs to understand each other and to create a common legal language.

The Biblical story of the Tower of Babel tells us that at one time all men spoke the same language, but because of their pride God “confused the language of all the earth,” so that men could not “understand one another’s speech.”⁵⁴ As a result they were “dispersed” on the surface of the earth and could no longer make a “name” for themselves as a single universal community. It is significant that the story attributes the existence of separate nations to a breakdown in communication. Implicit in the story of the Tower of Babel is the story of Pentecost, to which I have already referred. It tells us that at a place where a multitude of people of different nationalities had gathered to worship, certain of them received from the Holy Spirit the power to speak in “other languages,” so that all the peoples of the earth could hear “the mighty works of God,” “each in his own native tongue.”⁵⁵ Thus the story of Pentecost gives hope that human pride can be overcome, and that by translation from one language to another all peoples of the world may, by the power of a higher spiritual truth, share each other’s experiences vicariously and become, as they were originally intended to be, united.

54. Genesis 11:1-9.

55. Acts 2:1-13.