

Law and Theology  
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In 1922, Carl Schmitt wrote that “all significant concepts of the modern theory of the state are secularized theological concepts.” Sixty years later, Clifford Geertz called for a “political theology of modernity.” Both Geertz and Schmitt believed that an adequate understanding of a legal order had to focus on culture, not rules, and both understood that theology has a special role in the investigation of culture. I want to speak briefly to the latter point: why should a cultural study of law look to theology as a source and model?

Schmitt comes out of a conservative, Catholic theological tradition. That tradition certainly shaped his own views, particularly his antiliberalism, but it is hardly the source of the contemporary Schmitt revival. Schmitt’s attraction today derives not from his politics, but from his conception of the political. Liberal theory, he thought, fails to see that law engages us politically and that the political rests on an experience of a claim of meaning. Liberals identify the state with law, and law with reason. An unreasonable law is one that should be subject to critique and reform. The ends of reason are efficiency and justice; its means are procedural and epistemic. The state becomes means for advancing individual well being, producing our contemporary focus on economics and human rights. Accepting these ends, law becomes endlessly concerned with process.

Schmitt thought all of this rested on a groundless optimism. It failed to recognize the fundamental character of political life as it had been led in the West and as it was about to explode again in mid-20<sup>th</sup> century. Liberal political theory has about as much critical power as looking at Christian doctrine and proclaiming that Christianity is a

culture of nonviolence and love. Not completely wrong, but not helpful and likely to mislead.

For Schmitt, we are in the presence of the political when we experience a meaning that can take a life; a political claim is one that can displace every other. Politics does not have a particular content -- or, as he put it, anything can become political. Communities sacrifice and kill for all kinds of reasons, none of which make a lot of sense when judged against norms of welfare. To go to war for reasons of abstract justice or economic benefit would be, he thought, quite immoral. The explanation of war must lie in the existential dimension alone.

The political exists when the possibility of killing and being killed to sustain "a way of life" is imagined. This does not mean that we want to die or to kill; it does not mean that there is no politics when there is peace; it does not mean that we should prefer war to peace. It means that the political creates and sustains the possibility of a life and death struggle. As long as we can imagine such a struggle, which means as long as we can imagine the possibility of the sacrificial demand, we engage the political. The ordinary -- the world of law -- remains bound to the exception -- the world of sovereign decision for or against life. On this reading, Schmitt remains very much a political theorist of the American experience.

For Schmitt, to understand the political we must begin with this experience of a transcendent or ultimate meaning. Law is never adequate fully to express the experience of the political. This is so for two reasons. First, law speaks through the general formulation of rules. However rational those rules may be, there is a moment of application -- of decision that the rule applies -- which is always beyond the rule itself.

A polity sustains, alongside of its rules, a practice of authority. Second, there is what Schmitt famously calls the problem of the “exception.” A polity always puts its own existence ahead of its internal commitment to rules. We can better understand the exception if we think of it as the immanent authority of the sovereign people to suspend the rules and claim the right to act directly. For us, this is the moment of revolution.

In both of these respects, at some point the rules give out and we act. Not reason, but the imagination, shapes action. Thus, the political must be approached as meaning, not as a set of norms. Schmitt offered a self-reflection on the culture of the political imagination as he – a constitutional law scholar in Weimar – experienced it. But Weimar was a modernist project of constitutional construction within a community bearing an imagination shaped by the Christian tradition. In these respects, Schmitt's experience was not so different from our own. I follow Schmitt in my work when I argue, for example, that the origins of the political are not in contract, but in sacrifice and that sovereign presence is always a matter of sacrifice.

The step from Schmitt to Geertz is one from a phenomenology of the political to a systematic theology of the political. If politics is a matter of ultimate meanings, then its conceptual organization – its vocabulary and symbols – will come out of the religious traditions of the community. The political is not a co-optation of the religious, but a modern locus of its appearance. The religious genealogy of our fundamental political concepts is obvious. One can have endless fun speculating about the connections. Revelation becomes revolution, the sovereign lawgiver becomes the popular sovereign, the body of Church becomes that of the state, the martyr is the conscript, and the three-in-one of the Godhead becomes the three-in-one of separation of powers. Liberal

theorists are not ignorant of this genealogy. Rather, they see it as a conceptual burden to overcome. For example, Ed Rubin's new book, *Beyond Camelot*, rejects all such traditional categories precisely because of their genealogical baggage.

When Geertz calls for a political theology, he is giving another name to his famous metaphor of a web of meanings. To call a study of politics "theological" accepts that the political is yet another locus of ultimate meanings. While Schmitt tended to think that the political eludes language -- about the decision nothing can be said -- Geertz reminds us that there is a long tradition of scholarship that attempts to bring conceptual representation to the ineffable. We may begin with the experience of revelation: "God spoke." But, we end with an imagination that sustains the extraordinary within the experience of the ordinary. This is the movement from the hierophantic to ritual. The special task of theology is to explain this relationship.

Anthropology and philosophy (of which theology is a branch) share a common methodological insight: meanings don't come as singulars. Just as a speaker cannot accept only certain parts of a language, but is embedded in the whole, every cultural production is embedded in an entire system of meanings. Every belief and practice provides a point of access to the whole. System here suggests coherence, but not as a logical proposition. We are, for example, more than capable of believing contradictory propositions. By describing a culture as a web of meanings, Geertz was simultaneously pointing to this systemic character and to the diversity of meaningful structures sustained by different communities.

Because meanings are interpretive practices, every community maintains a double relationship to itself: it elaborates primary norms, whether religious or legal, and

it explains those norms to itself. Just as jurisprudence is the interpretive practice that arises from law, theology is that which arises from ritual. It is the internal elaboration of that web of meanings constitutive of a practice of faith. The task of theology is quite literally to offer a logos of the sacred – perhaps an oxymoron, but still the intellectual tradition actually exists.

Theology is located permanently in that interpretive space that is most difficult to get hold of in a theory of law: the space between revolution and constitution, between sovereign action and legal form. Mythically, this is the space of divine production; ethically, it is the space of free will; socially, it is the space of cultural production; politically, it is the space of the Schmittian exception. It is the space within which charismatic authority draws and the space that the faithful enter in a practice of sacrifice. Theology would plot the architecture of the imagination as it moves in both directions between the infinite and the finite. If theology leans too far in one direction, it becomes speechless before the ineffable quality of the sacred. If it leans too far the other way, it becomes only the elaboration of another set of norms that must compete with other forms of praxis.

Theological practice tells us that we can give words to faith, without becoming functionalists – or, in Schmitt's sense, liberals. Theorizing is not necessarily the death of faith. Legal study can find in theology a kind of antidote to legal realism. This is just what the study of law needs most. Not another microanalysis of individual roles and not an assessment of the efficiency of various rules. It needs rather to put words to the ineffable, to explain what is the relationship between the sovereign that can claim a life and the law that is dedicated to the preservation of life. The state promises to advance

our well being just until the moment that it demands a life. This is not a new puzzle, for the sacred has always done exactly the same: promising a good life until just that moment when it demands sacrifice. Our political theories have lost a sense of this reality. Revival will require an openness to the theological.

