



May 2014

Catholic Ideas About War: Why Does Carl Schmitt Reject Natural Law Justifications Of War?

G.J. McAleer

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Religion Law Commons](#)

Recommended Citation

McAleer, G.J. (2014) "Catholic Ideas About War: Why Does Carl Schmitt Reject Natural Law Justifications Of War?," *Touro Law Review*: Vol. 30 : No. 1 , Article 6.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol30/iss1/6>

This Excerpts from the Conference: RLT IV: Religious Legal Theory - Expanding the Conversation is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

Catholic Ideas About War: Why Does Carl Schmitt Reject Natural Law Justifications Of War?

Cover Page Footnote

30-1

CATHOLIC IDEAS ABOUT WAR: WHY DOES CARL SCHMITT REJECT NATURAL LAW JUSTIFICATIONS OF WAR?

G. J. McAleer*

I begin with a quote from T. S. Eliot and will return to it towards the end of the essay:

Yet there is an aspect in which we can see a religion as the *whole way of life* of a people, from birth to the grave, from morning to night and even in sleep, and that way of life is also its culture . . . It includes all the characteristic activities and interests of a people: Derby Day, Henley Regatta, Cowes, the twelfth of August, a cup final, the dog races, the pin table, the dart board, Wensleydale cheese, boiled cabbage cut into sections, beetroot in vinegar, nineteenth-century Gothic churches and the music of Elgar. The reader can make his own list. And then we have to face the strange idea that what is part of our culture is also part of our *lived* religion.¹

It has been widely reported that President Obama, in the words of the *New York Times*, is “[a] student of writings on war by Augustine and Thomas Aquinas.”² The infamous Obama ‘Kill List’ is directed by natural law thinking, it seems.³ Catholic jurists would

* Professor of Philosophy, Loyola University Maryland.

¹ T. S. ELIOT, *CHRISTIANITY & CULTURE: THE IDEA OF A CHRISTIAN SOCIETY AND NOTES TOWARDS THE DEFINITION OF CULTURE* 103-04 (Harcourt Brace & Co. 1976) (emphasis in original).

² Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&_r=0.

³ John Yoo, *John Yoo: Obama, Drones and Thomas Aquinas*, WALL ST. J. (June 7, 2012, 6:58 PM), <http://online.wsj.com/article/SB10001424052702303665904577452271794312802.html>. John Yoo is a sceptic: “According to press reports, aides claim the pres-

likely welcome a thorough discussion with the president on the full implications of Aquinas's theory of homicide,⁴ but equally likely most others in the academy would be bored by it all. Natural law thinking does not figure at all in the major works of ethics and law by leading U.S. intellectuals, and many Catholic theologians have wondered about its continuing usefulness, not least Cardinal Ratzinger, later Benedict XVI.⁵ No matter that most jurists do not find natural law thinking persuasive, it is typical before a war both to read newspaper articles using Aquinas (d. 1274) to assess the legitimacy of the war and to find politicians citing his rules. Aquinas's rules are well-known. Briefly stated: only a properly constituted public authority can wage war, with proper cause, that is, to "avenge[] wrongs," and with right intention, to "advance[] [the] good."⁶ In short, war, rightly ordered, serves to "deliver the needy out of the hand of the sinner."⁷ Aquinas adds various nuances but by far the greatest amplification of these basic norms came from the Spanish jurist and friar, the Dominican Francisco de Vitoria (d. 1546).

How exactly do these norms relate to natural law? Expressed theologically, natural law is a participation in Eternal Law, the life of Christ.⁸ Expressed intuitionally, the first formal principle of natural law, do good and avoid evil,⁹ is derived from the axiom "that the good is diffusive."¹⁰ Catholic jurists have long held that persons are ordered to advance the good and that war, both defensive and offensive,¹¹ might well serve the good and deliver the needy.

Carl Schmitt (1888-1985) is, in my opinion, the most important legal and political philosopher of the twentieth century. He was a conservative and German nationalist and also, as I have argued

ident is a student of St. Augustine and St. Thomas Aquinas who brings their views to targeting choices. This is scarcely believable." *Id.*

⁴ G.J. MCALEER, *TO KILL ANOTHER: HOMICIDE AND NATURAL LAW* 199 (2010).

⁵ CARDINAL JOSEPH RATZINGER (POPE BENEDICT XVI), *VALUES IN A TIME OF UPHEAVAL* 38-39 (Ignatius Press 2006).

⁶ THOMAS AQUINAS, *THE SUMMA THEOLOGICA*, Pt. II-II, Q. 40 Art. 1 (Fathers of the English Dominican Province trans., 2d ed. 2008), available at <http://www.newadvent.org/summa/3040.htm>. (last updated Jan. 6, 2014).

⁷ *Id.*

⁸ THOMAS AQUINAS, *TREATISE ON LAW* 38-39 (Regnery Gateway 2001).

⁹ *Id.* at 59-60.

¹⁰ G. J. MCALEER, *ECSTATIC MORALITY AND SEXUAL POLITICS: A CATHOLIC AND ANTITOTALITARIAN THEORY OF THE BODY* 14 (2005).

¹¹ FRANCISCO DE VITORIA, *POLITICAL WRITINGS* 296-98 (Anthony Pagden & Jeremy Lawrance eds., 1991).

elsewhere, a Catholic theorist.¹² I say this despite his awful record in the formation of Nazi law from 1933 through 1936¹³ and his unpleasant chip-on-the-shoulder ambitious character.¹⁴

Schmitt's basic complaint against natural law is that it subverts rule of law. This is a startling attack because natural law theorists see securing rule of law as one of the theory's great virtues.¹⁵ In this essay, I want to present Schmitt's critique. I have discussed elsewhere some of what I believe is positive in Schmitt's work, and also, relying on the work of his Catholic contemporaries, Scheler and Kolnai, some of my reservations.¹⁶

In 1945, Schmitt was paid to write a brief as part of the defence case for the German industrialist Friedrich Flick. This brief¹⁷ contains many of the arguments Schmitt elaborates upon in his post war opus, his 1950 *The Nomos of the Earth*.¹⁸ Through his business empire, Flick was accused at Nuremburg of conspiracy to commit aggressive war.¹⁹ The brief is long with a number of arguments, but a central thrust is that in European positive law before the war, no such crime existed; thus, the charge against Flick transgresses the famous axiom of criminal procedure no crime, "[no] punishment without

¹² Graham McAleer, *Introduction to CARL SCHMITT, POLITICAL ROMANTICISM* ix (Guy Oakes trans., Transaction Publishers 2011) (1986).

¹³ See Aurel Kolnai's contemporary assessment of Schmitt amongst his collected essays: AUREL KOLNAI, *POLITICS, VALUES, AND NATIONAL SOCIALISM* (Graham McAleer ed., Francis Dunlop trans., 2013). See especially the essays on Schmitt, high-mindedness, and the total state.

¹⁴ See JOSEPH W. BENDERSKY, *CARL SCHMITT: THEORIST FOR THE REICH* 7 (1983) (describing Schmitt's ambition and other character traits).

¹⁵ IOANNES PAULUS PP. II, *Evangelium Vitae*, VATICAN ¶ 19 (Mar. 25, 1995), http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_2503_1995_evangelium-vitae_en.html.

¹⁶ MCALEER, *supra* note 4, at 139-60, 187-98.

¹⁷ CARL SCHMITT, *The International Crime of the War of Aggression and Principle 'Nullum crimen, nulla poena sine lege,'* in *WRITINGS ON WAR* 129-30 (Timothy Nunan ed. & trans., 2011).

¹⁸ CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 259-80 (G.L. Ulmen trans., 2003) (showcasing the incorporated Flick brief, with some changes, but there are many other places in the book where the arguments on natural law are developed).

¹⁹ U.S. GOV'T, *TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS*, U.S. Gov't Printing Office 3 (1952). Flick was specifically charged with "criminal conduct relating to slave labor, the spoliation of property in occupied France and the Soviet Union, the 'Aryanization' of Jewish industrial and mining properties, beginning in the year 1936 (charged only as crimes against humanity), and membership in and support of the SS and the 'Circle of Friends of Rimmler.'" *Id.*

law.”²⁰ Schmitt distinguishes between atrocities, which make one an outlaw,²¹ and the “crime of the war of aggression.”²² Flick is accused of the latter, but such a crime “represents, both in respect of international law as well as penal law, not only something new compared to the previous legal status, but something novel.”²³ The source of this novelty is natural law.²⁴ I will return to the full significance of Schmitt’s use of the word novel here in the conclusion.

Schmitt accepts that there are crimes stemming from acts “*mala in se*,” the atrocities.²⁵ Natural law identifies such crimes: “all arguments of natural sensation, of human feeling, of reason, and of justice concur in a practically elemental way to justify a conviction that requires no positivistic norm in any formal sense.”²⁶ As the crime of aggression was not formally stated in law prior to the war, natural law would subvert positive law if it sought to move by analogy from the atrocities to criminalize participation in aggressive war.²⁷ The obviousness of the outlawry of the atrocities is not present in the matter of war and its aggression: “[t]o deliver the first shot or to be the first to overstep the boundary is clearly not the same thing as being the initiator of the war in its entirety.”²⁸

There is a more troubling ambiguity, however. Schmitt argues that natural law is unstable, being sometimes juristic and other times moral.²⁹ This instability infects rule of law itself, with moral claims often generating novel prosecutions, therewith increasing the number of acts criminalized.³⁰ The classic literary example is, of

²⁰ HUMAN RIGHTS ACT 1998, C. 42 § 1, art. 7 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1998/42/schedule/1> (last visited Jan. 6, 2014).

²¹ SCHMITT, *supra* note 17, at 197.

²² *Id.* at 135.

²³ *Id.* at 128.

²⁴ *Id.* at 133.

²⁵ *Id.* at 135.

²⁶ SCHMITT, *supra* note 17, at 135. As the argument progresses, it is clear that Schmitt’s critique of natural law has much to do with its de-Christianization in modern variants, albeit that the hyper objectivity of medieval natural law lent itself to the modern secular appropriations which have misshapen it. For example, Schmitt commends natural law for holding tight to the axiom of all political order, the “mutual relation between obedience and protection” and indeed, including in its criminal jurisprudence the principle *nullum crimen, nulla poene sine lege*. *Id.* at 195-96.

²⁷ *Id.* at 165, 197.

²⁸ *Id.* at 148-49.

²⁹ *Id.* at 135, 177; see also SCHMITT, *supra* note 18, at 142-43.

³⁰ SCHMITT, *supra* note 18, at 142.

course, Albert Camus's *The Stranger*.³¹ Meursault is on trial for the murder of a man, but the prosecutor rapidly turns the trial into a judgment about why Meursault did not cry at his mother's funeral. Moral anger swiftly switches the trial to a case of matricide: the prosecutor, arguing that failing to cry at a mother's funeral is a greater threat to law than murder. Moral anger oftentimes runs counter to the specificity of law.³² "The Continental European way of thinking demands determinate regulations with regard to legal circumstances, perpetrators, penal threats, and penal court."³³

Schmitt, persistently skeptical about things English,³⁴ sees the Common Law as a continuation of medieval law.³⁵ Though a Catholic, Schmitt is no revivalist, akin in this regard to a Catholic thinker like Max Scheler, who died in 1928.³⁶ Schmitt had profound reservations about Scheler's value ethics but is, like him, a modern.³⁷ Schmitt traces his legal thinking to the absolutist monarchical tradition that emerged in the seventeenth century³⁸ and the Catholic counter-revolutionary thinkers' writings in the wake of the French Revolution.³⁹ Schmitt's beacons are the likes of Bodin and de Bonald, not Aquinas and de Vitoria.⁴⁰ He conceived of his life's work as a validation of the *Jus Publicum Europaeum*, and thus styled it as the positive law tradition emerging from Europe from around the time of

³¹ ALBERT CAMUS, *THE STRANGER* (Matthew Ward trans., Vintage International 1989).

³² SCHMITT, *supra* note 17, at 140.

³³ *Id.* at 157.

³⁴ See SCHMITT, *supra* note 18, at 177-78 for an elaboration of this idea. England, in Schmitt's lexicon, is a sea power, meaning a distinctive consciousness indifferent to land and vaunting commercialism. The role of England in European positive law is complex, and cannot be discussed here. *Id.* at 145. Schmitt thought somewhat in terms of an Anglosphere and saw America as akin to England but intriguingly took his idea of the *Reich* from America's Monroe Doctrine. SCHMITT, *supra* note 17, at 101-04, 124.

³⁵ SCHMITT, *supra* note 17, at 133.

³⁶ Zachary Davis & Anthony Steinbock, *Max Scheler*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/archives/sum2013/entries/scheler/> (Dec. 8, 2011).

³⁷ See generally CARL SCHMITT, *THE TYRANNY OF VALUES* (Simona Draghici ed., trans., Plutarch Press 1996).

³⁸ See generally CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., University of Chicago Press 2005). He believes this tradition of law to be genuinely theological as opposed to the deeply flawed theology of natural law. *Id.* This last point is explained in the conclusion to this essay.

³⁹ *Id.* at 5-15, 53-66 (providing multiple and specific examples of these absolutist monarchical traditions).

⁴⁰ See SCHMITT, *supra* note 18, at 152-54.

Westphalia.⁴¹ Catholic jurists tend to a neo-medievalism, that is, they seek to retrieve medieval, as opposed to early modern, Protestant natural law theory. They see Aquinas as the high point but intriguingly, Schmitt sees modern European sovereignty-based positive law as the high point of Christian reflection on law.⁴² This positive law emerged from “the relations between the Christian sovereigns of Europe from the sixteenth to the nineteenth century.”⁴³

This positive law tradition replaced medieval natural law jurisprudence⁴⁴ and Schmitt saw its great accomplishment, the significant containment of European war,⁴⁵ as beset by detractors, not least, by the revival of interest in de Vitoria’s natural law formulations.⁴⁶ The jurisprudence behind the Flick trial is a case-in-point, thinks Schmitt. The problem being, that “[t]he legal positivistic interpretation of Continental European jurists depicted above means, in the eyes of a jurist working with ‘natural justice,’ nothing else than the transformation of all crimes into mere ‘*mala prohibita*.’”⁴⁷ Natural justice or moral sense requires wide punishment for the carnage of the war and so “[i]t is apparently Mr. Jackson’s intention to use the current war criminal trials as an especially effective creative precedent for the new international crime of the war of aggression.”⁴⁸ The Flick prosecution is an abandonment of the *Jus Publicum Europaeum*, a tradition of law that meant “it was possible for each side to recognize the other as *justi hostes*. Thereby, war became somewhat analogous to a duel, i.e., a conflict of arms between territorially distinct *personae morales*”⁴⁹ Just as moral anger twisted the prosecution at Meursault’s trial, so equally likely is it that the prosecutor’s anger at Nuremberg obscured the fact that

[a]ggression and defense are not absolute moral concepts but rather events determined by the situation

⁴¹ *Id.* at 145; see also SCHMITT, *supra* note 17, at 143 (discussing the origin of international aggression stemming from the post World War I international political scheme).

⁴² SCHMITT, *supra* note 18, at 143-44.

⁴³ SCHMITT, *supra* note 17, at 197; see also *supra* note 26 and accompanying text (explaining Schmitt’s critique of natural law in relation to de-Christianization and the principle of *nullum crimen, nulla poene sine lege*).

⁴⁴ SCHMITT, *supra* note 17, at 191.

⁴⁵ SCHMITT, *supra* note 18, at 140.

⁴⁶ SCHMITT, *supra* note 17, at 187-88.

⁴⁷ *Id.* at 134.

⁴⁸ *Id.* at 135.

⁴⁹ SCHMITT, *supra* note 18, at 141-42; see *supra* note 26 and accompanying text.

[A]ggression and defense can be mere methods that change with the situation. In all great martial conflicts first one side, and then the other side, is on the offensive or on the defensive.⁵⁰

Schmitt does not, therefore, reject a basic moral sense. Atrocities trigger moral disgust, an emblem of a natural layer of value in the human psyche. However, most moral categories, thinks Schmitt, are inherently unstable and make for poor guides in adjudications of law.⁵¹

Moreover, how one transitions from fundamental moral insights to ethical applications that trace the intricacies of state policy managing the developments in war is far from clear. Historically, suggests Schmitt, this was the fatal flaw: the efforts of natural law jurists to map out the legitimacy of policy were greeted with profound scepticism,⁵² and even de Vitoria seems to acknowledge the limits inherent in his jurisprudence.⁵³ Law, however, relies on specification:

The crime of war, the crime of the war of aggression, and the crime of aggression are clearly three different crimes with three different facts of the case. For a complex judgment of war, they nonetheless overlap with one another, and their separation seems to a large section of public opinion a mere juridical artifice. The differentiation of a war of aggression from an act of aggression appears artificial and formalistic only upon first glance. As soon as one raises the question of what the acts of men who are being punished as criminals actually are, a certain legal specification becomes necessary.⁵⁴

Natural law is liable to obscure these specifications whenever the moral emphasis of natural law overwhelms the juristic. And worse, a basic Schmittian argument is that wars where one makes a claim to goodness and justice are bound to be pursued “surely in the most gruesome way.”⁵⁵ Bodin began a juristic tradition where “state sov-

⁵⁰ SCHMITT, *supra* note 17, at 149.

⁵¹ SCHMITT, *supra* note 18, at 155-56.

⁵² *Id.*

⁵³ *Id.* at 155.

⁵⁴ SCHMITT, *supra* note 17, at 149.

⁵⁵ SCHMITT, *supra* note 18, at 156.

ereigns ended such murderous assertions of right and questions of guilt.”⁵⁶ Thus, “[i]n reality, juridical interest no longer was concerned with the normative content of justice and the substantive content of *justa causa*, but rather with form, procedure, and jurisdiction in international as well as domestic law.”⁵⁷

This is why Schmitt is so anxious about the Flick case: *nullum crimen sine lege* is axiomatic to any coherent account of criminal procedure and it is the forms of law that have done so much to bracket the trauma of European war.

Schmitt has at least three other reasons for rejecting natural law jurisprudence. Medieval just war thinking, argues Schmitt, stemmed from an institutional setting, evolving from a feudal and estate-based consciousness bound to a spiritual power whose jurists also functioned as spiritual directors.⁵⁸ Moreover, medieval spirituality was geographical. The unity of spirit and law in Thomas and de Vitoria was also a spatial orientation.⁵⁹ “Thus, for Vitoria, Christian Europe was still the center of the earth, both historically and concretely oriented to Jerusalem and to Rome.”⁶⁰ This meant that de Vitoria law was encased in ideas of place and history and the people who populated that history; Schmitt gives the example of “Mary as the Immaculate Virgin and Mother of God.”⁶¹ Around World War I, however, when the work of de Vitoria was reintroduced into international law,⁶² this peculiar lived context of the medieval use of natural law jurisprudence was ignored.⁶³ Natural law thinking now operates, as Schmitt puts it, in an “empty space.”⁶⁴ In isolation from the geographical spiritual consciousness of Catholic Christianity,⁶⁵ contem-

⁵⁶ *Id.* at 157.

⁵⁷ *Id.*

⁵⁸ SCHMITT, *supra* note 17, at 188.

⁵⁹ See Graham McAleer, *Introduction* to CARL SCHMITT, *POLITICAL ROMANTICISM* xv-xvi (Guy Oakes trans., Transaction Publishers 2011) (1986) (discussing Schmitt’s general use of de Bonald’s account of legal and political agency).

⁶⁰ SCHMITT, *supra* note 18, at 114 (stating “The continuity that bound medieval international law to the Roman Empire was found not in norms and general ideas, but in the concrete orientation to Rome.”). *Id.* at 59.

⁶¹ *Id.* at 104; see ST. BONAVENTURE, *THE JOURNEY OF THE MIND TO GOD* 1 (Stephen F. Brown ed., Philotheus Boehner trans., Hackett Publishing 1993) (1956) (discussing Mary as the mother of God).

⁶² SCHMITT, *supra* note 17, at 188; see generally SCHMITT, *supra* note 18, at 101-27 (discussing the reemergence of de Vitoria’s work into international law after World War I).

⁶³ SCHMITT, *supra* note 18, at 157-58.

⁶⁴ SCHMITT, *supra* note 17, at 188.

⁶⁵ See Tracey Rowland, *Natural Law: From Neo-Thomism to Nuptial Mysticism*, 35

porary uses of de Vitoria are really just humanitarianism.⁶⁶ Like Max Scheler,⁶⁷ Schmitt has a real horror of humanitarianism centered on “the inhuman-humanitarian distinction;”⁶⁸ it generates a new ferocious kind of enemy. The objective, abstract and humanistic quality of contemporary natural law was incipient in de Vitoria’s thinking, most clearly in his famous argument for war, humanitarian intervention and regime change. Expressing moral disgust for the practice of cannibalism, de Vitoria argued that the Spanish could overthrow the Aztec rulers and transform Aztec government and culture even if the people themselves consented to the sacrifices.⁶⁹ Schmitt argues that this natural law branding of the inhuman⁷⁰ subverts rule of law. He asserts that certain parties are now viewed as enemies of mankind.⁷¹ Hence, the law becomes discriminatory and it is used to select out targets so that killing efforts can be intensified.⁷² Law here cloaks cruelty.⁷³

The humanitarianism incipient inside de Vitoria’s jurisprudence itself stems from natural law being a theory of personal embodiment.⁷⁴ As such, natural law always makes rule of law precarious for it obscures the territorial or geographical dimensions of law.⁷⁵ Famous for the claim that politics is rooted in the friend-enemy distinction, Schmitt links land and law. Rule of law and the law of the land are one for Schmitt: war has its flashpoint at the borderline between territories.⁷⁶ The *Jus Publicum Europaeum* attained complete

COMMUNIO 374 (2008).

⁶⁶ SCHMITT, *supra* note 18, at 103-04, 115.

⁶⁷ MAX SCHELER, *RESSENTIMENT* (Lewis A. Coser ed., William W. Holdheim trans., Schocken Books 1972) (1961).

⁶⁸ SCHMITT, *supra* note 18, at 103-04.

⁶⁹ DE VITORIA, *supra* note 11, at 207-30, 287-88.

⁷⁰ SCHMITT, *supra* note 18, at 104-06; SCHMITT, *supra* note 17, at 168-69.

⁷¹ *But cf.* SCHMITT, *supra* note 37, at 23-25 (explaining the philosophy of values and the “struggle between [the] valuator and [the] devaluator”).

⁷² *Id.*

⁷³ SCHMITT, *supra* note 18, at 141-42.

⁷⁴ *See* JOHN PAUL II, *MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY* 619-20 (2006); *cf.* MCALEER, *supra* note 10, at 13 (arguing “natural law is rooted in eternal law” and drives humans in pursuit of ecstasy).

⁷⁵ SCHMITT, *supra* note 18, at 74; MCALEER, *supra* note 4, at 196. I think Schmitt’s point here is actually powerful, and as a natural law theorist I have tried to address it.

⁷⁶ SCHMITT, *supra* note 38, at 5.

Sovereign is he who decides on the exception. Only this definition can do justice to a borderline concept. Contrary to the imprecise terminology that is found in popular literature, a borderline concept is not a vague

clarity on this point: “Now the state was conceived of juridically as the vehicle of a new spatial order . . . [o]nly with the clear definition and division of territorial states was a balanced spatial order, based on the coexistence of sovereign persons, possible.”⁷⁷ War is always defensive, therefore, for Schmitt, a matter of protecting rule of law, not a humanitarian going abroad to root out enemies.

Lastly, on most interpretations of natural law, law is a function of rationality, and thus favourable to a certain marginalization of religion. De Vitoria at one point declared that whilst it is useful to consult Scripture, natural law concerns acts “*mala in se*” and for their identification the deliverances of reason suffice.⁷⁸ Schmitt was famous as an advocate of political theology: all legal systems are, in fact, theological systems. Using anthropology and linguistics, Schmitt showed how human communities form themselves into “man-ring[s]”—one of his most fertile ideas, I think—the common feature of which is the hedging around, and protection of, its central objects of veneration.⁷⁹ Bodin saw this clearly when he changed the “medieval concept of war” into “interstate war.”⁸⁰ “The core of this *nomos* lay in the division of European soil into state territories with firm borders”⁸¹ Thus, the law of the land was also the expression of a community’s religious core; this insight is Eliot’s, also. To return to T. S. Eliot: “bishops are a part of English culture, and horses and dogs are a part of English religion.”⁸²

This point is very important for it explains what otherwise might seem a conundrum in Schmitt’s logic. Bodin and De Bonald were political theologians who saw clearly, as Schmitt approvingly noted, that their jurisprudence was an expression of belief in the Christian God of creation and miracles.⁸³ As noted, Bodin ushered in

concept, but one pertaining to the outermost sphere. This definition of sovereignty must therefore be associated with a borderline case and not with routine.

Id.

⁷⁷ SCHMITT, *supra* note 18, at 145.

⁷⁸ FRANCISCO DE VITORIA, REFLECTION ON HOMICIDE & COMMENTARY ON SUMMA THEOLOGIAE LIA-LIAE Q.64 (THOMAS AQUINAS) 83 (John P. Doyle trans.) (1997).

⁷⁹ SCHMITT, *supra* note 18, at 73-74; *cf.* PLATO, THE REPUBLIC 3-5 (B. Jowett trans., Modern Library 1982) (describing “[t]he gathering of friends at the house of Cephalus.”).

⁸⁰ SCHMITT, *supra* note 18, at 154.

⁸¹ *Id.* at 148.

⁸² ELIOT, *supra* note 1, at 105.

⁸³ *See* HEINRICH MEIER, THE LESSON OF CARL SCHMITT: FOUR CHAPTERS ON THE DISTINCTION BETWEEN POLITICAL THEOLOGY AND POLITICAL PHILOSOPHY 36-38 (Marcus

the *Jus Publicum Europaeum*, which Schmitt defended as an achievement of the “relations between the Christian sovereigns of Europe.”⁸⁴

At the same time, Schmitt argues that the great age of law is inaugurated by Bodin⁸⁵ who achieved “the detheologization of argumentation” in law.⁸⁶ The solution is to think of religion as having a geography. Thus, Bodin posited a “new relation between religious belief and a spatially closed territorial order.”⁸⁷ The consequence: “But the transformation of the *gentes* into centralized, self-contained, and limited territorial states gave rise to a new spatial structure. The *jus inter gentes* thereby was freed from the supra-territorial ties that had obtained until then, i.e., the ubiquitous ties to the supra-territorial church”⁸⁸ Theology remains but now one not merely incarnational but geographical.⁸⁹ Humanitarianism as an internationalist ethic revives the idea of a ubiquitous church. Natural law, in its modern variant, is the tool of this internationalism and thus subversive of European jurisprudence.

What is Catholic in all of this? Thomistic natural law is the normative tradition of Catholic social thought. It was affirmed by the popes in their encyclical letters because a Catholic doctrine of law should be optimistic. As John Paul II was keen to emphasize, “Christ has redeemed us!”⁹⁰ Natural law affirms that you and I can know and venerate the good, true, and beautiful.⁹¹ The Jesuit theologian Karl Rahner speaks of the “luminosity of being” and natural law offers itself as the sure way that rule of law reflects this luminosity. Carl

Brainard trans., University of Chicago Press, expanded ed., 2011) (discussing the theology of legal and political which is Schmitt’s own position).

⁸⁴ SCHMITT, *supra* note 17, at 197.

⁸⁵ SCHMITT, *supra* note 18, at 127.

⁸⁶ *Id.* at 127-28, 140-43.

⁸⁷ *Id.* at 128.

⁸⁸ *Id.* at 129.

⁸⁹ SCHMITT, *supra* note 38, at 5; MEIER, *supra* note 83 at 36-38 (overplaying Schmitt’s interest in theology, casting Schmitt as a theorist of divine positive law, and missing the same point that theology is geographical).

⁹⁰ IOANNES PAULUS PP. II, *Veritatis Splendor*, VATICAN ¶ 103 (August 6, 1993), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html.

⁹¹ See *Id.* at ¶ 51; see also Pope Benedict XVI, *Meeting with the Representatives of Science in the Aula Magna of the University of Regensburg: Faith, Reason and the University Memories and Reflections*, VATICAN (Sept. 12, 2006), available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html (addressing the Platonism of Christianity).

Schmitt is a skeptic and more agonistic, but perhaps because he channels, in some respects, the fraught existentialism of St. Augustine. There is perhaps a deeper point.

It is highly possible that Schmitt has a moral theological critique of the modern use of natural law. This returns us to his charge of novelty laid at the door of the Flick prosecution. Aquinas argued that the leading characteristic of vanity was fascination with the new, the novel.⁹² *Political Romanticism*⁹³ is one of Schmitt's earliest works and there he both identifies romanticism as the spirit of the age and condemns it. Romanticism is an aesthetic, taking its name from roman, a "work of fiction," the novel.⁹⁴ The Romantic casts all history "in fantastical draperies and in strange colours and hues"⁹⁵ and "[e]very historical moment is an elastic point in a vast fantasy of the philosophy of history with which we dispose over people and eons."⁹⁶ Natural law, now isolated from its own history, geography, and personages, subverts rule of law. Its moral content rids rule of law and instead, taking on an aspect of mobility, creates novel charges that breach the protections built into criminal procedure: *Nullum crimen, nulla poene sine lege*.⁹⁷

⁹² ST. THOMAS AQUINAS, ON EVIL 349 (Brian Davies ed., Richard J. Regan trans., 2003).

⁹³ CARL SCHMITT, *POLITICAL ROMANTICISM* (Guy Oakes trans., Transaction Publishers 2011) (1986).

⁹⁴ McAleer, *supra* note 12, at xiv.

⁹⁵ *Id.*

⁹⁶ SCHMITT, *supra* note 93, at 74.

⁹⁷ See MCALEER, *supra* note 4, at 76-77 (arguing that double jeopardy is another protection of criminal procedure under assault).