From Silver to Gold: The Next 25 Years of Law and Religion

The Currie Lecture in Law and Religion
“Against Utopian Legalism”
Jean Bethke Elshtain, Laura Spelman Rockefeller Professor of Social and Political Ethics, University of Chicago
Thursday, October 25

I told John Witte that I probably would say a few things that were politically incorrect and he said, “I’m deeply shocked. You’ve never done that before.” And I said, “I know but it’s possible I’ll do it this time.” So with that, let me begin.

One of the most eloquent defenses of law in the dramatic theater is put into the mouth of St. Thomas More by the playwright Robert Bolt. Realizing that his life may well be in jeopardy given the latest moves by King Henry VIII against the church for not granting him a divorce, More speaks to his daughter, Meg, and his hotheaded son-in-law, Roper.

More: What would you do? Cut a great road through the law to get to the devil?

Roper: I’d cut down every law in England to do that.

More: Oh? And when the law, the last law, was down and the devil turned ’round on you, where would you hide, Roper, the laws all being flat? This country’s planted thick with laws from coast to coast. Man’s laws not God’s, and if you cut them down do you really think you could stand upright in the winds that would blow then?

Yes. I’d give the devil himself benefit of law for mine own safety’s sake.

Now this is stirring stuff and to those of us from law-governed societies such as the United States, a society that does political philosophy, my field, primarily in the form of constitutional law, it is often all or nearly all that needs to be said. Yes, we cheer, the rule of law not of men.

It follows that we are loathe to take up the possibility that law, or perhaps better put an excess of legalities, may not so much protect us against tyranny as itself constitute an overbearing structure. This is not, of course, a new worry but instead a very old one.
There are intimations of this worry in St. Thomas Aquinas’s *Summa contra Gentiles*. St. Thomas, fretting about legal overreach, taxes the law should it pretend that it can read into the human heart, govern interiority, create a kind of moralistic omniscience.

St. Thomas no doubt mentions this because Christians may well be tempted in that very direction. Didn’t our Jesus himself talk about the grave sin of “lusting in the heart” and not just doing the sinful deed? But, Thomas reminds us, only God can see into, pry into human hearts.

When human law aims to do so it is deeply problematic at best and it can become tyrannical at worst. And More, at his trial in the Robert Bolt play, “A Man for all Seasons,” says to those who were arrayed against him, “What you have hunted me for is not my actions but the thoughts of my heart. It is a long road you have opened.”

Now chastening legal overreach that turns law into a tyranny over human beings requires that the law acknowledge that it cannot eliminate or prohibit, in St. Thomas’s words, “every human action because in trying to eliminate evil it may also do away with many good things and the interest of the common good which is necessary for any society may be adversely affected.”

Now tyrannical law, as you know, for St. Thomas is no real law at all, no matter how well intentioned it may be. Given St. Thomas’s high view of the law and of the law’s normative function, his weariness about legal overreach should give us pause.

Law is an ordination of reason for the common good. Law helps to habituate human beings to virtue, but again there are limits. Not every sin is a crime. Not every sin can or should be punished by the civil law. Law, yes; legalistic overreach, no.

Now surely part of what is going on here is St. Thomas’s general Aristotelian approach, roughly that one’s inner world can be transformed as one conforms to worthy norms through processes of habituation. That is, the outer can help to reconfigure the inner.

From the point of view of the law, behavior counts for more than intention, again because the law cannot probe into human hearts--only God can do that.

Now I’ll be painting in broad strokes for a few moments but with the coming of Protestantism, one finds, I submit, more stress on interiority, a reaction at times – perhaps an overreaction – to Catholic stress on externalities, on doing, on rituals, on sacraments, and so forth.

Protestants, again painting in broad strokes, kept spiritual diaries, engaged in private devotion, emphasized praying in secret. Interior transformation precedes outer behavior. That I finally come to see the light will in turn prompt an alteration in how I act in the world, so the burden of the trajectory seems to move more from inner to outer.

Law could not help but be affected by these broad changes in orientation. For St. Thomas, the law aimed at a public or common good, always remembering that earthly dominion was a good but never the summum bonum. The aim of the law was, in the first instance, regulative to make
regular our social relations, the guarantee, if you will, that society not fall below a level of minimal decency. The law could not make us perfect, but how high could it aspire?

For St. Thomas, higher than for St. Augustine, who reckoned that we could reach higher than a den of robbers but perhaps not that much higher most of the time. St. Thomas put a stronger stress on the res publica, the public thing, so that the law aims higher but never at ultimacy or perfection. If the law becomes totalistic, it would make us all into spies and informers trying to pry into our neighbor’s heart, to look into our neighbor’s window, to pay less attention to the mote in our own eyes.

So a golden mean of sorts do not too readily conflate sins and crimes. Some sins are crimes but not all are. A looser social order and what comes later is clearly what St. Thomas works with and knows. This view will no doubt surprise many who continue to see the Middle Ages as a very rigidly structured authoritarian time but bear in mind that life and work were not yet tied to the clock. The workforce was not yet disciplined in the way it later became. This is before the era of identification cards and all the other insignia of modern identity and here I would recommend to you Natalie Zemon Davis’ wonderful book, The Return of Martin Guerre – a great film, too – to alert us to the difference between the old, more loosely structured medieval world that is passing and the newer more law-governed, more regulated, more – if you will – Protestant-ordered world that is coming into being.

Now the law, I submit, acquires an even higher normative status, more normative weight, with Protestantism. No one has done more to recuperate this history than John Witte. I think it is fair to say – and I hope that John agrees with me, it’d be terrible if he didn’t – that greater attention was because – he could out-argue me, I’m sure – that greater attention was paid to human hearts and inner motivation and not just with the aim of getting people to behave in certain ways but in lifting up a higher standard of honor and virtue for ordinary folks.

The secular vocations were lifted up including housewifery and husbandry. The distance between the ‘spiritual’ and the ‘temporal’ was reduced. Charles Taylor has called this the affirmation of ordinary life. I called it the redemption of everyday life in my 1991 book, Public Man, Private Woman, and certainly the greater expectation that high standards embodied in law could be attained and sustained as part of that.

Now where’s the problem? The problem is this. It is a few short steps, taken no doubt incrementally, from granting the law a high moral and normative purpose to a kind of legal moralism and a quest for a form of totalizing perfectionism. We say concerning nearly every problem and issue “there oughta be a law,” and before you know it, there is, and then another and then another and then another and sometimes these laws go way too far.

Now let me give you an example from my own experience of 35 years now in the American Academy as a teacher, and my example is going to be sexual harassment codes. There was a problem, absolutely, and how to remedy it. The solution was frequently a stifling overreach based on the presumption that all men as these – I was there on the ground floor when these things were being debated – were rapists in situ. There was a kind of orthodoxy in the 1970s and 1980s. Women had been told this in text after text – the women who were helping to formulate
these codes – that all men were guilty before being charged. All men harbored a desire to rape and to ravish. Thus Susan Brownmiller, Andrea Dworkin, Mary Daly, Ti-Grace Atkinson, Catherine MacKinnon and other legalistic authoritarians.

So you could not just regulate behavior and punish infractions. You had to try to arrest every possible bad thought because, the assumption was, there is a direct unbroken conduit between a bad thought and an ugly deed given the ontological taint borne by male human beings, as if men bore the entire burden of original sin, if you will, and women were the morally pure and virtuous victims.

Now do you think I exaggerate? I would ask you to think again and to go back and reread these texts and tracts, many of which are now considered classics and required readings, and read the remedies proposed to fight back the male threat. Thus Brownmiller: “all men” carry a lust to power that comes out as an ideology of rape, so actual rapists are the “shock troops” doing the dirty work in behalf of all men and the man who condemns rape in fact covertly approves of and benefits from the practice. Thus Mary Daly: Men are “demons” sucking the lifeblood of women, “like Dracula, the he-male has lived on women blood.” Women who do not share Daly’s views are condemned as “mutilated, muted, moronized …docile tokens mouthing male texts.” A lot of M’s – a lot of alliteration in there. Well, there are more examples but I’ll stop.

Just as radical feminist ideology declared an identity between public and private, so law must eschew all together any distinction between the intimate and the public; must breach any barrier of inhibition, shame or taboo. There was, after all, proclaimed Andrea Dworkin, a “Dachau in the heterosexual bedroom.” So law had to reach into its interstices. Now let me be absolutely clear. This went beyond any level of appropriate concern and punishment of physical abuse and violence to become an absolute catechism in which every sin became a crime, although the category of sin of course was eliminated but you take my point. Law had to reach into the human heart, had to turn men inside out, and even then they could not be trusted unless there was a klieg light shining on every deed so that any untoward thought could not usher into an action. All men were guilty as charged. A small step from that to punishing – as did the sexual harassment code at the university where I was then teaching – “unsolicited ogling.” Now I’m not sure what solicited ogling consisted in. A friend of mine and I – she taught in economics – thought we would try to solicit ogling and see if we got any response and we didn’t. There were also proposals – oh, by the way, some of my male colleagues decided they would start wearing dark sunglasses at all times so they couldn’t be punished for ogling whether solicited or unsolicited. There were also proposals (and humor is probably the best way to deal with some of this) -- hence my klieg light reference – to cut down all the trees and bushes on this beautiful campus because rapists might be lurking there at all times.

This natural greenery was to be replaced by klieg lights so that all darkness was repelled--putting me in mind of the stunning and horrifying portrayal of Nazi Germany in the brilliant film “Mephisto,” in which the protagonist, at the film’s terrifying dénouement, is suddenly trapped as the klieg lights come on. This is the kind of horrible excess and parody of the stage lights that he as an actor loves and he’s collaborated with the regime so that he can continue to act. The klieg lights come on. The sirens blare and he is a captive of this all-seeing, all-knowing state.
So every interaction then between male and female was to be policed. Now this fundamental mistrust of people, this loathing of the messily human, was a perverse mirror image of the uplifting of the ordinary I characterized as one feature of the rise of Protestantism. It’s as if we were being told we trusted people too much. We certainly trusted men too much and now we’ve got to clamp down. The upshot was that all of this made young women in my experience not stronger but weaker. How were they to feel, up against what they were told was such a relentless implacable foe and this is what the law – certainly the campus law – told young women, too, that everything must be regulated, that human sociality, or at least male being, was so thoroughly corrupted nothing else was possible.

So legal overreach makes people weak. It removes responsibility and an appropriate level of culpability. It puts everything into the hands of draconian codes and overzealous administrators and campus authoritarians and all the rest we know too much about.

Now I have some other examples in here that in the interest of time I think I’ll foreshorten, examples drawn from our elementary school playgrounds where, as you know, just this week there was another case of a little six-year-old boy suspended from school for drawing two smiling stick figures, he and his school chum, and he’s shooting at his school chum. There are little circles coming out of his gun and it turns out he was representing a water pistol and he and his friend are at play, but suddenly the child is a threat. He’s suspended. This is the sort of thing I’m talking about. What at one point might have been a pedagogical occasion is calling the teacher; see if this little boy is obsessed with guns – almost all little boys are, so you’d have to have every parent in there at some point or another – almost all, not all. But at any rate, why turn all of these things into legal occasions, into litigious occasions. It’s as if we’re saying nothing any longer can be innocent or childish. All must be construed through the lens of forbidden or permitted, legal or illegal, and we really do think we can pry into human hearts, but again, legal moralism does not guarantee a decent order. It can in fact constitute a great disorder.

Now I realize it is too easy – way too easy – to draw examples from National Socialist Germany, which was, in its own way, a very legalistic society with new laws being promulgated nearly every day to cover nearly every vice, including the vice of secretly harboring anti-regime notions even though one had said or done nothing, which was a habit that Europe had already got into with the French Revolution and people being guillotined for secretly dissenting from the revolutionary project. So I don’t want to do what’s called an ad Hitlerum here, but there are aspects to Nazi law that should perhaps make us a bit squeamish.

We all know about and deplore the race laws and the eugenics madness but I’m going to report on something else, the astonishingly expansive public health laws of the Third Reich. Brilliant book by Robert Proctor called _Nazi Medicine_ details this. Because German doctors had articulated the link between smoking and lung cancer in the 1920s, the Third Reich prohibited all public smoking even by soldiers; pushed nonsmoking for pregnant women who were to be mothers of the master race – for women who weren’t part of the master race and were pregnant, there was another fate – pushed herbal and homeopathic and holistic medicine against the divisiveness of the Jewish science of modern medicine, forced prisoners at Dachau to tend to the largest herbal gardens in Europe in order to prepare these homeopathic remedies, pushed vegetarianism even as they were murdering Down syndrome children and other persons with
mental and physical handicaps, all this as part of the great project of purification, of making the body politic pure. We must cleanse it of taints. That puts me in mind of Mary Douglas – a brilliant anthropologist – of her book on purity and danger, sorta bringing back taboo in the sort of legalistic structure. Well, why am I mentioning all this? Because the rush to become legally virtuous in a totalizing way need not mean that a society is in fact virtuous. It may be anything but. I’m happy there’s no smoking in this room. Don’t get me wrong. But when we get on the moralistic high horse about something, it does not necessarily signal how advanced we have become and our own censorious totalists now want to go back and airbrush history into the classics of cinema and airbrush out the cigarettes.

You know, Bogie without a cigarette in “Casablanca” as he sits at Rick’s Café? That’s both a sin and a crime. Once you start mucking about with film classics you have gone a statute too far. We lose a sense of history and place even as we pat ourselves on the back about just how advanced we are.

When I was an eighth grader, we signed a pledge never to permit demon rum to pass over our lips. This following a dramatic display of the dangers of drink when an earthworm was dropped into a glass of gin and appropriately and predictably shriveled up and died. Of course, water would have invited the same outcome but one wasn’t supposed to point this out. But the enforcer of that pledge was one’s own conscience. Now one of my 11-year-old grandsons this year had to sign a pledge at his school never to harass anybody, but harassment was left tantalizingly vague. Is sticking up for yourself harassing somebody? If in our political culture those who take to the airwaves all the time – thinking of one film star who did this just recently – to proclaim they’re being censored and marginalized as they’re on television preaching to millions because someone has the audacity to disagree with them, it doesn’t take much of an imagination to see an over-zealous manager constrain a vigorous disagreement as an instance of someone – probably, alas, the little boy – harassing someone else. And it isn’t one’s conscience that’s the enforcer now. It’s this sort of lopsidedly sort of weighted structure with a kind of legalistic therapeutic administrative apparatus that we’ve invented and secured in our schools and universities and everywhere else.

All right, one more example from everyday experience and then I’m going to turn to Immanuel Kant and I hope I’m staying reasonably within the time limits. My example is going to be hate crimes. Why does that fit within my general thesis? I hope I can explain it. When hate crime legislation was first debated, I recalled in one of my medieval history courses my study of early medieval legal codes and the Frankish clans and tribes. It was a system called the wergild whereby lopping off the arm of the lord was a far more serious offense than lopping off the arm of the serf. Arms were missing in each instance but the one was a more punishable crime, a more severe crime, than the other. So it seems to me with hate crime, again legalistic overreach. A person has been murdered but we rank the victim morally and legally higher in our estimation if he is black, let’s say, or homosexual or from some category against whom we believe hate crimes are most likely to occur.

On what does the determination of a hate crime, as opposed to just simply having murdered someone, turn? Once again, prying into the human heart. Doesn’t it suffice that a precious
human life has been taken? There is an objective offense here, a rending of the fabric of the moral universe. Punish the crime of murder. If the victim is the white, male CEO of an international global corporation, does his life count for less than that of the gay man attacked on his way home on a Saturday night? A human life is a human life. We can never adequately plumb motive. There have been many who have tried. All these books on understanding Adolph Hitler, understanding Stalin, understanding Ted Bundy, all these efforts come up short perhaps because we have expunged the terms of discourse that might really serve us well here, namely evil or sin.

Be that as it may, surely the important question is, “What did they do?” Severely punish the deeds. As the saying goes, if the law could look into our hearts, none would ’scape whipping. So the moral equality of persons then, something that this sort of overreach in the case of hate crimes violates, and believing that motivation in and of itself is an additional punishable offense, an add-on to the crime of homicide.

All right, let me turn to Immanuel Kant, who I think is one of the architects of a kind of legalistic overreach, and give you an example from current international relations to show you how this regime of a kind of perfectionism may function there or attempt to function. And as counterpoint to Kant, I’m turning to Dietrich Bonhoeffer, the anti-Nazi German theologian hanged by the Gestapo April 9, 1945, for his part in the conspiracy to assassinate Hitler. And Bonhoeffer makes his argument in the name of Christian freedom in an essay, “What Does it Mean to Tell the Truth?,” that some have mistakenly construed as a piece of ‘situationist ethics.’ It is not. Rather, it is a preliminary foray into the area of legalistic-moralistic overreach in the name of truth, an approach that Bonhoeffer links to Kant’s severe deontological ethics.

Now Bonhoeffer reminds us that it is Kant who insisted one must give an honest answer to the query put by a would-be murderer as to whether his intended victim and one’s friend is hidden on the premises. If the friend is indeed hidden there, one has no choice – for the prohibition against lying is absolute – but to reveal that fact and to give one’s friend over thereby to the murderer. This invites Bonhoeffer’s comment that the moralist at this point becomes a “tormentor of humanity.” This severity breaks sociality. It fractures friendship. It splits us off from the responsibilities of caritas, for certainly Christians face the prospect, at least those who put themselves on the line as rescuers did, that the scenario was none too hypothetical. Suppose the Gestapo knocked on the door. Is one’s Jewish neighbor hidden within? Well, if you were a Kantian deontologist, you must say “yes.” You all know about the severity of the categorical imperatives: they cannot be modified, they cannot conflict with one another, there can be no taint of a consequentialist dimension. One lives in a very simplistic moral universe indeed in Kant world, so the Jewish neighbor would be given over to his depredator. Now Kant, quite unconvincingly, when some people criticized this said, well, perhaps a person could make an escape or not be found. And that’s pretty lame stuff. I think you’ll agree.

In the name of responsibility, in the name of caritas, in the name of Christian freedom, Bonhoeffer says do not break the bonds of sociality, do not deny the neighbor. There is more truth spoken by the school child assaulted in a classroom by a teacher who accuses the child’s father of being a drunk and the child stoutly denies it, although the child’s father is a drunk, Bonhoeffer argues, because the child is speaking to the truth of fundamental human social
familial relations that the school teacher ought not to be in the business of assaulting publicly. If you follow the deontological line and add to it some of the histrionic overreach I alerted us to earlier, including the eradication of any public-private distinction, then you are going to be in this legalistic nightmare where, as Bonhoeffer says, everything has to have a placard on it saying: “permitted or forbidden.”

I have another example – in the interest of time, perhaps in the Q and A we can get to it – the area of torture and an argument that I made against Professor Alan Dershowitz’s suggestion that interrogators should go before a judge and seek “torture warrants” to legally permit them to torture a terrorist suspect who likely has information that if revealed would save countless human lives. I use this as another example again of going a bit crazy with the legalistic dimensions of all of this and removing it from the realm in which I believe it is more properly talked about. Again, in the interest of time, I’m going to pass that over and I think pass over as well my worry – but I’ll summarize it very quickly – that soldiering in the current U.S. context seems to be moving from a rule-governed activity and a just war tradition to one that is now excessively legalistically constructed. And we again seem to increasingly mistrust the capacity of ordinary soldiers to make decent decisions even under situations of horrific stress, so that’s the argument I make there.

But let me get to my final example from Kantian ethics and that’s in the area of humanitarian intervention. And in order to say something about that, I need to remind you of Kant’s famous essay on perpetual peace. Now some of you have surely read this essay and if you have you’ll know that for Kant, a mere truce, that is when people aren’t fighting and killing one another, doesn’t count for very much at all. For him, that’s paltry, puny stuff. What you’ve got to do is to extirpate, he says, the will to war, entirely eliminate the intent, and then and only then do you have something that could reasonably be called peace. One worry here would be that this kind of argument makes the humanly possible work people do to make life less violent look pretty puny by comparison to extirpating the will.

Now Kant offers a hard teleology whereby nature dictates thus and so, there’s a kind of inevitability in the argument. The British international relations scholar Martin Wite warned some years ago that followers of these Kantian ideas “could be merciless and unrestrained. They could see themselves as righteous agents of historic necessity bringing about a better world.” For this reason, Wite concludes that, “If you are apt to think the moral problems of international politics are simple, you are a natural, instinctive Kantian.” And as we all know, those who are in possession of a Grand Telos very commonly look askance at those of us who are more inclined to agree with Max Weber that politics is most of the time the “slow boring of hard boards.” It proceeds with great difficulty and slowly.

So let me give you this one example – humanitarian intervention. It isn’t a new thing. It’s been talked about in one way or another for centuries. Here we might recall Augustine’s sparing the innocent from certain harm as a legitimate casus belli for an outside party to bring force to bear. Current discussions of humanitarian intervention – I heard this just three weeks ago at a forum at Fordham University on the morality of exit from Iraq, heard this repeated – stress “right intention” as the single most important criterion when we’re making an assessment of the rightness or wrongness of a humanitarian intervention. It must be entirely – what’s the motive?
Humanitarian intervention must be motivated by one single motive: disinterestedness. Now how so? Disinterestedness is certainly not entailed in the classic just war notion of right intention. There’s nothing so severe as that, no probing to be certain one’s motives are at one and entirely pure.

The worry here is that if humanitarian intervention requires an “a priori right intention criterion,” as many of these international legal people are arguing, construed as disinterestedness, we are never going to see humanitarian intervention. Augustinian Christianity surely teaches that, for all human motives are mixed. We are limited finite creatures who are never just of one mind about something who will and nill simultaneously absolute purity of intention you are not going to find on this earth.

Now humanitarian intervention advocates operating within this Kantian-infused perspective pushed disinterestedness with scant regard for the very raison d’etre of the state which is “to protect its own citizens and to defend the national interest.” An absolute disinterestedness would be by definition a grave failure of the state’s responsibility, as grave as the dereliction of the parent who claims that he or she reckons his or her own child on an identical plane to the abstract category of all children everywhere. We would find something monstrous about that. Do mixed motives then disqualify humanitarian intervention? These people using Kant as inspiration say “yes” for there can be no consequentialist consideration of any kind: all must be transparent, nothing held in reserve. Any appeal to one’s own national interest is absolutely forbidden and sullies the matter, and you can’t then legitimately engage in a humanitarian intervention.

If we accept that all human motives are a complex admixture, a humanitarian intervention is not perforce invalidated if it overlaps with other motives. Indeed, how could one possibly disentangle them? Now when the hardcore legalists get hold of this, however, to disinterestedness is added a requirement that humanitarian intervention must be approved by the United Nations Security Council which pretty much guarantees that nothing is going to be done.

Now let’s conclude with Kant in this way in this section. I would say that it is as naïve to believe that a purely humanitarian intervention is possible in the reality of international relations as to believe that an intervention that is not exclusively motivated by humanitarian goals cannot have a humanitarian effect. Remember, “By their fruits ye shall know them.” That’s what Scripture tells us. By their fruits, ye shall know them.

Now there’s much more that can be said but let me move to conclude and remind you of some words from Dr. Martin Luther King, appropriate surely here in Atlanta. At one point, at the height of the civil rights struggle, King stated, “We are not asking you to love us, just get off our backs.” Just behave. You don’t have to convert. But guess what? By behaving, by adhering to an alternative normative structure of the law, you might just convert along the way. King’s imagining, I think, a trajectory or the possibility of such that St. Thomas harkened to, altered behavior over time as we become habituated to new practices.

Now I want to acknowledge before I conclude one danger in the position I’m talking about, and to do that, I’m going to recall a famous exchange between Sigmund Freud and Albert Einstein on the question, “Why war?” For Freud, wars occur because people haven’t sufficiently rearranged
their interior furniture. They’re still driven too much by what Augustine would call the libido dominandi. Now in peaceful times this doesn’t get put to the test. The law restrains reckless and violent behavior, but when the barriers are down or in a situation of chaos or when the law is in fact calling upon us to go forth armed, Freud tells Einstein one learns who has truly been reconstituted internally and cannot find it in his or her heart to hate sufficiently to kill. For Freud assumed wrongly, I believe, that wartime killing was always accompanied by hate, and he says you’re going to see that the numbers of people who have become truly moral is very few. He and Einstein were two such people but he said they’re very few. Now Freud, interestingly enough, thought he was offering with psychoanalysis a secular substitute for Catholic confession, but in the interior rising of the subject, he seems far more Puritan in many ways and I’m not using Puritan in a derogatory way here.

Be that as it may, I submit that the democratic wager is such that we cannot base our law and our politics and our social relations on the worst case scenarios which is what those given to this legalistic overreach tend to do. All men are rapists. All human beings are beasts underneath. The patina of civilization is shockingly thin, and all the rest of it. We simply must make the wager most human beings most of the time are capable of minimally decent behavior even if from time to time they harbor murderous thoughts.

The law cannot get into those thoughts but the law will run amuck if it tries and we will all be suffocated and ironically because we think the law covers everything, we may in fact let down our guard in how we actually form decent societies.

So I’m going to end on that note of Christian freedom that Bonhoeffer lifts up. Luther and St. Thomas as well. I’m going to conclude with a scene from one of my favorite books and films, *To Kill a Mockingbird*. It’s a parable about the legal thing to do and the right thing to do.

Now this comes towards the end of the book and the film. As matters build to a climax, the sheriff of Maycomb County, having identified the odd and reclusive ‘Boo’ Radley as the person who killed a drunk, wicked man who was trying to murder lawyer Atticus Finch’s two children, the sheriff is in intense conversation with Atticus.

The back story here – I’m sure you all know it – is that Atticus is defending an innocent black man accused of rape by the daughter of this racist drunk when in fact he’s the person who’s guilty of having beat her up and so on. And the accused black man, having been found guilty, tries to flee and he’s been shot dead. So that’s the back story here and then this vicious guy decides to punish Atticus for defending the man and goes after his kids.

Atticus, sizing up the situation, his son with a broken arm and bruises, his daughter, Scout, unhurt, having been carried home by the rarely-glimpsed recluse, ‘Boo,’ assumes that it is his son, Jim, who grabbed the knife wielded by Bob Ewell, the drunk villain, and stuck the knife into Ewell killing him during the wrestling match when Jim was trying to protect himself and his sister, Scout.

Now as Atticus, who’s always a lawyer, a very good one, staying within the language of the moral view of the law and responsibility, goes on in this vein. Sheriff Tate, running out of
patience, says, “Your boy didn’t kill Bob Ewell.” He identifies the shy, wounded ‘Boo,’ at that point sitting on the porch swing with Scout, as the defender of Atticus’ children and the person who dispatched Ewell. The sheriff continues, drawing upon a wellspring of theologically-graced language, as he speaks directly to Atticus. “I never heard tell that it’s against the law for a citizen to do his utmost to prevent a crime from being committed, which is exactly what he did, but maybe you’ll say it’s my duty to tell the town all about it and not hush it up. Know what’ll happen then? All the ladies in Maycomb, including my good wife, will be knocking on his door bringing angel food cakes.” He means in prison because Boo would have to be arrested and so on. “To my way of thinking, Mr. Finch, taking the one man who’s done you and this town a great service, an’ draggin’ him with his shy ways into the limelight, to me that’s a sin. It’s a sin, and I’m not about to have it on my head. I may not be much, Mr. Finch, but I’m still sheriff of Maycomb County and Bob Ewell fell on his knife. Good night, sir.”

Now working with the sin-crime distinction, this humble small-town sheriff in this situation makes the right judgment. It is not, of course, the narrowly legal one and it strikes me that it’s a judgment based on some grace, some mercy, but of saving slack in the order, if you will.

And I think we should never lose sight of some of these distinctions as we certainly do if we’re pushing a heavy-handed regime of legal moralism and utopian overreach of the sort that legally prescribes minutiae, doesn’t trust people to handle most of their own affairs, and undermines, it seems to me, moral responsibility and freedom in the process. Thank you very much. Thanks.