

## “THERE OUGHTA BE A LAW”—NOT NECESSARILY

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One of the most eloquent defenses of law in the dramatic theater is put into the mouth of Sir Thomas More by the playwright, Robert Bolt.<sup>1</sup> Realizing that his life may well be in jeopardy, given the latest moves by King Henry VIII against the Church for not granting the King 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 after the Devil?

*Roper:* I'd cut down every law in England to do that!

*More:* (*Roused and excited*) Oh? (*Advances on Roper*) And when 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 . . . d'you really think you would stand upright in the winds that would blow then? (*Quietly*) Yes, I'd give the Devil benefit of law, for my own safety's sake.<sup>2</sup>

This is stirring stuff. And to those of us from law-governed societies, such as the United States, a society with a political philosophy 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 often loathe to take up the possibility that the law or, perhaps better put, an excess of legalities, may not so much protect us against tyranny, as itself constitute a tyrannical structure of sorts. This is not a new observation or concern but, rather, a very old one that I hope to illustrate in this Essay. I then go on to contrast legalistic overreaching with the “freedom of the Christian,” tethered, as it is, to responsibility.<sup>3</sup> Initially, I will be painting in broad strokes to sketch out some differences among traditions within Christian thought.

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<sup>1</sup> See ROBERT BOLT, *A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS* (Vintage Books 1962).

<sup>2</sup> *Id.* at 38.

<sup>3</sup> This seemed an apt course to follow given the distinguished record of Emory's Center for the Study of Law and Religion in bringing those two discourses into a critically and mutually fructifying relationship with one another. This Essay builds on a previous one, see Jean Bethke Elshtain, *The Perils of Legal Moralism*, 20 *J.L. & POL.* 549 (2004).

## THE “INNER” AND THE “OUTER”: OLD WORRIES, NEW CONCERNS

There are intimations of concern lest law overreach in St. Thomas Aquinas's *Summa Theologica*.<sup>4</sup> St. Thomas, fretting about legal pride, taxes that the law should pretend that it can reach into the human heart, govern interiority, and create a kind of moralistic omniscience.<sup>5</sup> St. Thomas no doubt mentions this because many Christians may be tempted in that very direction. Did not Jesus himself talk about the grave sin of “lusting in the heart” and not just doing a sinful deed? That is so.<sup>6</sup> But St. Thomas reminds us that only God can see into, pry into human hearts.<sup>7</sup> When human law aims to do so, it is deeply problematic at best, tyrannical at worst. Consider, once again, the words of Sir Thomas More at his trial: “What you have hunted me for is not my actions, but the thoughts of my heart. It is a long road you have opened.”<sup>8</sup>

Chastening legal overreach that turns law into a tyranny over human beings requires that law acknowledge that it cannot eliminate or prohibit every human action because in “seeking to eliminate all evils, one would thereby also take away many goods and not benefit the common good necessary for human companionship.”<sup>9</sup> Tyrannical law is no real law at all—no matter how well-intentioned it may be. Given St. Thomas's high view of law and of law's normative function, his wariness 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 and not every sin can or should be punished by the civil law. Law, yes; legalistic overreach, no.

Surely part of what is going on here implicates St. Thomas's general Aristotelian approach, including the assumption that one's inner world can be transformed as one conforms or habituates to worthy norms. That is, the outer can help to reconfigure the inner. From the point of view of law, behavior counts more than intention, again because the law cannot probe into human hearts—only God can do that. With the coming of Protestantism, one found more stress on interiority—a response and, at times no doubt, an overreaction

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<sup>4</sup> 1 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Q. 91, art. 4, at 998–99 (Fathers of the English Dominican Province trans., 1947).

<sup>5</sup> *Id.*

<sup>6</sup> See *Matthew* 5:28.

<sup>7</sup> 1 AQUINAS, *supra* note 4, Q. 91, art. 4, at 998–99.

<sup>8</sup> Again, a line from Bolt's wonderful play and the film by the same title. See BOLT, *supra* note 1, at 91.

<sup>9</sup> 1 AQUINAS, *supra* note 4, Q. 91, art. 4, at 998.

to Catholic emphasis on “doing,” on ritual, on sacraments, on being with others within that strong ecclesiological body, *mater ecclesia*. Protestants—again painting in very broad strokes—invited praying in secret and private devotion, together with participation in church. The dialogic sociality of personal confession was eliminated. Interior transformation precedes exterior behavior. That I finally come to see the light will, in turn, prompt an alteration of how I act in the world.

Law could not help but be affected by these broad changes in orientation. For St. Thomas, law aimed at a public or common good<sup>10</sup>—always with the proviso that earthly dominion was a good, but never the *summum bonum*.<sup>11</sup> The aim of law was, in the first instance, regulative—to make regular our social relations and to guarantee, if you will, that society not fall below a level of minimal decency. Law could not make perfect. But how high could it aspire? For St. Thomas, higher than it could for St. Augustine, who reckoned we could reach higher than a den of robbers but perhaps not that much higher most of the time.<sup>12</sup> St. Thomas put a stronger stress on the *res publica*, so law aims higher—not for ultimacy or perfection, but higher.<sup>13</sup> If, however, law becomes totalistic, it threatens to turn us into spies and informers, who try to pry into our neighbors’ hearts, look into their windows, and pay less attention to the mote in our own eyes.

The upshot? A golden mean of sorts couched as a warning: Do not too readily conflate sins and crimes. A looser social order than what came later is clearly what St. Thomas works with and knows. This view will no doubt surprise many who see the Middle Ages as an authoritarian time, not least on matters of sex and marriage. But bear in mind that life and work were not yet tied to the clock; the work force was not yet disciplined in the way it later came to be disciplined. This was before the era of identification cards, personal income tax, social security numbers, medical records, and all the other insignia of modern identity. Mind you, I am not lamenting modernity—just observing a major distinction between then and now.<sup>14</sup>

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<sup>10</sup> *Id.*, Q. 96, art. 1, at 1017–18.

<sup>11</sup> *Id.*, Q. 91, art. 4, at 998–99.

<sup>12</sup> See JOHN MARK MATTOX, SAINT AUGUSTINE AND THE THEORY OF JUST WAR 27 (2006) (discussing St. Thomas’s view of human association).

<sup>13</sup> I AQUINAS, *supra* note 4, Q. 96, art. 1, at 1017–18.

<sup>14</sup> See NATALIE ZEMON DAVIS, THE RETURN OF MARTIN GUERRE 82 (1983) (alerting us to the old, loosely structured medieval world that is passing and the newer, more “Protestant” and ordered world that is coming into being).

If anything, law acquires an even higher normative status with Protestantism.<sup>15</sup> The “secular” vocations, including housewifery and husbandry, were lifted up. The distance between the spiritual and temporal was reduced. Charles Taylor has called this the “affirmation of ordinary life.”<sup>16</sup> I call it “the redemption of everyday life”<sup>17</sup> in my 1981 book, *Public Man, Private Woman: Women in Social and Political Thought*, and certainly the greater expectation that high standards, embodied in law, could be attained and sustained is part of that.

Where is the problem? It comes into focus as one recognizes that it is but a few short steps from granting the law a high moral and normative purpose to legal moralism and a quest for perfectionism. We say concerning nearly every problem and issue, “there oughta be a law,” and before you know it, there is another, and then another, and then another. And sometimes these laws go way too far.

Let me give you an example from my own experience of thirty-five years in the American academy as a teacher. The example is sexual harassment codes. There was a problem, absolutely. How to remedy it? The solution was frequently a stifling overreach based on the presumption that all men were rapists *in situ*. This was the radical feminist orthodoxy of the 1970s and 1980s. Women had been treated to the bitter truth in text after text that all men harbored a desire to rape and ravish. This was provided by Susan Brownmiller, Andrea Dworkin, Catherine McKinnon, Mary Daly, and other legalistic authoritarians.<sup>18</sup> You could not just regulate behavior and punish egregious infractions. You had to try to arrest every possible bad thought because there was a direct conduit between a bad thought and an ugly deed, given the ontological taint borne by male human beings.

Do you think I exaggerate? Think again. Go back and reread those texts and tracts and the remedies proposed to fight back against the male threat.

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<sup>15</sup> I think it is fair to say that no one has done more to recuperate this often glorious history than John Witte. Greater attention was paid to human hearts and inner motivation, not just with the aim of getting people to behave in certain ways, but, as well, in holding up a higher set of expectations for the honor and virtue of ordinary folks. See JOHN WITTE JR., *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* (2002); 1 JOHN WITTE JR., & ROBERT M. KINGDON, *SEX, MARRIAGE, AND FAMILY IN JOHN CALVIN'S GENEVA* (2005); JOHN WITTE JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* (2007).

<sup>16</sup> CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 13–15 (1989).

<sup>17</sup> JEAN BETHKE ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* 335 (1981) (emphasis omitted).

<sup>18</sup> See *id.* at 201–97 (discussing these authors and various forms of feminism).

Thus, Brownmiller: “all men” carry a lust to power that comes out as an ideology of rape.<sup>19</sup> Actual rapists are the “shock troops” doing the dirty work on behalf of all men.<sup>20</sup> The man who overtly repudiates rape covertly approves of and benefits from the practice.<sup>21</sup> Thus, Mary Daly: men are “demons” sucking the life blood of women. “Like Dracula, the he-male has lived on women’s blood.”<sup>22</sup> Women who do not share her view are “mutilated, muted, moronized . . . docile tokens mouthing male texts.”<sup>23</sup> Thus, Firestone: all women are oppressed because of biology itself. Even the female cocker spaniel is oppressed because she is female.<sup>24</sup> The sexual division itself creates a biological tyranny, and law must be severe to counter this tyranny.<sup>25</sup>

Just as radical feminist ideology declared an identity between public and private, so law must eschew altogether any distinction between the intimate and the public and must breach any barrier of inhibition, shame, or taboo. There was, after all, proclaimed Dworkin, a “Dachau in the heterosexual bedroom,” so law had to reach into its interstices.<sup>26</sup> Let me be absolutely clear.

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<sup>19</sup> SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 4–5 (Bantam Books 1976) (1975).

<sup>20</sup> *Id.* at 209.

<sup>21</sup> Brownmiller comes perilously close to justifying the murder of young Emmett Till. *Id.* at 270–74. She claims to abhor Till’s death but insists that the overwhelming thrust of “evidence” in the case loads the discussion against him. *Id.* Till, Brownmiller argues, knew the Southern white man’s “property code.” *See id.* at 270–72. Yet this young teenager, in a macho display of male will-to-power, whistled at a married white woman who happened to be brandishing a gun in his direction at the time. *Id.* at 271, 273. Till’s whistle—and not just the woman’s gun waving—was, Brownmiller states, a “deliberate insult just short of a physical assault, a last reminder to Carolyn Bryant that this black Boy, Till *had in mind to possess her.*” *Id.* at 273. (emphasis added). Here, Brownmiller claims to know what is in Till’s mind—his intent—and that is germane to her insistence that the whistle is, in Brownmiller’s words, an act “just short of physical assault.” *Id.* This is very, very dangerous stuff based on the assumption of the inner state of a fourteen-year-old boy.

<sup>22</sup> MARY DALY, *BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN’S LIBERATION* 172 (1985).

<sup>23</sup> MARY DALY, *GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM* 5 (1990).

<sup>24</sup> SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* 1–15 (1970).

<sup>25</sup> Again, for those who think I am re-plowing old ground, I suggest checking out PAUL NATHANSON & KATHERINE K. YOUNG, *LEGALIZING MISANDRY: FROM PUBLIC SHAME TO SYSTEMATIC DISCRIMINATION AGAINST MEN* (2006). In this 650-page tome—the second in a promised three-volume series—the authors meticulously document the ways in which a legal double-standard has emerged in Canada and the United States that accepts as fact the most dismal accounts of male-female interactions, whether in marriage, work-life, education, or other fields of human endeavor. *See id.* This double standard is the work of what the authors call “ideological feminism” by contrast to the “egalitarian feminism” they endorse. *Id.* at 269–308, 325. The long list of legislative initiatives alone offers compelling evidence of an urge not to right the balance, but to criminalize maleness itself in many instances. *See id.* I should note that the book is published by a respectable university press and is written by two liberals. One has to say these things or books of this nature, tackling a subject most prefer to avoid, are discounted before anyone has even cracked them open.

<sup>26</sup> ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 68–69 (1981).

This went well beyond any level of punishment of physical abuse and violence to become an absolute catechism in which every sin becomes a crime—although the category of sin is, of course, eliminated because God is a patriarchal tyrant who supports female oppression. But you get my point, I trust.

The law reaches into the human heart, for men must be turned 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 a sexual harassment code at a university where I was then teaching, “unsolicited ogling.” There were also proposals—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.<sup>27</sup>

Every interaction between male and female was to be policed. A sexual code of behavior at one liberal arts college indicated that any touch, any gesture—“May I put my arms around you?” and the like (you can imagine how that might go in a romantic scene)—had to be confirmed by a loud “Yes.” Were I a young man in such a situation, I would insist on taping the entire encounter. This fundamental mistrust of people, this loathing of the messily human was a perverse mirror image of the uplifting of the ordinary that I characterized as one feature of the rise of Protestantism. Turns out we trusted people too much. Now we have got to clamp down. The upshot was that all of this made young women 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 her, too. All must be regulated; human sociality, or at least male being, is so thoroughly corrupted that nothing else is possible.<sup>28</sup> Legal overreach makes people weak; removes responsibility and an appropriate level of culpability; puts everything in the hands of tort

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<sup>27</sup> This suggestion put me in mind of an excellent film portraying National Socialist Germany by following an actor, devoted to his craft, as he continues to act under Nazi conditions. At the film’s terrifying denouement, the protagonist is suddenly trapped as klieg lights—a horrible parody of the stage lights that he, an actor, loves—come on, the sirens blare, and he is a captive of the totalitarian state. Everything is always illuminated; there is no place to evade the klieg lights of the omnipresent state.

<sup>28</sup> I recall one student telling me that the fact that *Playboy* magazine was sold in a news and magazine shop in the town where the university was located—just the fact that it was there, albeit in brown wrapper and behind a counter—was so emotionally draining that she could scarcely crawl out of bed in the morning. Clearly, this young woman needed professional help, but instead, she was constantly fed a diet of intense rage and fear that worsened her condition.

lawyers and gives to judges in excess, and all the rest we know way too much about.

Each of us can produce examples. One wonders: what sort of person does not know coffee is hot?<sup>29</sup> As I worked on this Essay, there came a report that a six-year-old boy was suspended from school for drawing two smiling stick figures—he and his school chum.<sup>30</sup> The suspended artist is depicted shooting at his school chum as little circles come out of his gun. Turns out, the boy was representing a water pistol that he and his best friend were using while at play. But the child was declared a threat under the school’s new Draconian code, so it was suspension time.<sup>31</sup>

This is one small example of the sort of thing I am talking about, criminalizing normal, innocent forms of child behavior. It bespeaks a desire for a legally sanitized world with no slack in the order, with little boys being suspended for drawing stick figures and for sandbox sexual harassment. In this scheme of things, all must be construed through the lens of the legal or illegal, the permitted or forbidden. And, pace St. Thomas, we do think we can pry into human hearts. Alas, legal moralism does *not* guarantee a decent order. It can, in fact, constitute a great disorder.

I realize it is too easy to draw examples from National Socialist Germany—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—a habit some in Europe got into with the French Revolution.<sup>32</sup> I do not intend to do an *ad Hitlerum* here. But there are aspects to Nazi law that should concern us and compel us to focus on grave matters. We all know about and deplore the race laws and the eugenics madness. But I am going to report on something else: the expansive public health laws of the Third Reich. 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

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<sup>29</sup> The reference here is to the infamous case involving take-out coffee from a fast-food chain that spilled, apparently, when the customer opened it. The customer suffered a burn, going on to sue for millions.

<sup>30</sup> See Associated Press, *7-Year-Old Suspended over Stick-Figure Drawing*, MSNBC, Oct. 21, 2007, <http://www.msnbc.msn.com/id/21397455>.

<sup>31</sup> *Id.*

<sup>32</sup> The result was forty thousand people guillotined, seventy percent of them working-class. Hannah Arendt marks the distinction between the French Revolution and its prying into human hearts and the very different approach to law, politics, and inner life in the American Revolution. Arendt insists that the entry of “the heart” into politics is in general dangerous and often pernicious. HANNAH ARENDT, *ON REVOLUTION* passim (1966).

pregnant women who were, after all, mothers of the master race (or at least some mothers were); pushed herbal and homeopathic medicine and alternative treatments against the “Jewish science” of much of modern medicine; forced prisoners at Dachau to tend to the largest herbal gardens in Europe; and pushed vegetarianism. All this while they were murdering Down syndrome children and other persons with mental or physical handicaps, and so on.<sup>33</sup>

Why mention all this? Because the rush to become legally virtuous—in a totalizing way—does not mean a society is, in fact, virtuous. It may be anything but virtuous. The fact that we get on a moralistic high horse about something, like smoking, does not necessarily signal how advanced we are or have become. In fact, pettiness may reign, rather than virtue. For example, our own censorious totalists now want to go back into the classics of cinema and airbrush out cigarettes—Bogie without a cigarette in *Casablanca* as he sits at the table at Rick’s Cafe. Once you start mucking about with film classics, you are going a statute too far. We lose a sense of history and place in this manner, even as we pat ourselves on the back about just how advanced we have become.

The way things used to work was by means of a moral object lesson, to wit, when I was an eighth grader, we signed a pledge never to allow demon rum to pass over our lips; this following a dramatic display of the dangers of drinking 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, although it might have taken a bit longer, but one was not supposed to point that out. The enforcer of that pledge, however, was one’s own conscience. One of my eleven-year-old grandsons this year had to sign a pledge at his school never to “bully” anyone, a document that has the force of “law” in the school. Bullying is left tantalizingly vague. Is sticking up for yourself bullying? If in our political culture, those who take to the airwaves to proclaim that they are being censored and marginalized—this because someone had the audacity to disagree with them—are thought to have been bullied, it does not take much of an imagination to see an overzealous “manager” construing a vigorous disagreement as an instance of someone, probably the boy, bullying someone else. And it is not one’s conscience that is the enforcer now—it is the lopsided legalistic structure that we have invented and secured in our schools and universities and nearly everywhere else.

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<sup>33</sup> The complete, sad story is found in Robert Proctor’s award-winning book, *THE NAZI WAR ON CANCER* (1954).

Consider another example from our recent legislation and the culture that fueled it. I refer to the category of the hate crime. When hate-crime legislation was first debated, I recalled in my study of early medieval legal codes—in the Frankish clans and tribes—a system called the *wergeld*, whereby lopping off the arm of the lord was a far more serious offense than lopping off the arm of the peasant or serf. Arms are missing in each instance, but the one was a more punishable crime than the other. So, too, is the case with hate crimes. A person has been murdered. But we rank the victim morally and legally higher in our estimation if he is black, homosexual, or from some other category against whom hate crimes are most likely to occur in the views of those who formulated such legislation. We do this by assessing murder a more egregious offense in the case of a hate crime than a plain, old-fashioned murder. Is this not a disparate valuing of human beings when the focus should be on the dreadful equality of violent death?

On what does the determination of a hate crime turn? Once again, we pry into the human heart. Does not it suffice that a precious human life has been taken, for 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 conglomerate, does his life count for less than that of the gay man attacked on his way home from a gay bar on a Saturday night?<sup>34</sup> A human life is a human life.

We can never adequately plumb motive. Who can really figure out the mass murderers—the Stalins, the Hitlers, or the Ted Bundys? Many have tried and all such efforts come up short—often because those who try nowadays have expunged their terms of discourse of any reference to evil or sin. Be that as it may, surely the important question is: *What* did they do? Severely punish the deeds. God will deal with the human heart.<sup>35</sup> As the saying goes, if the

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<sup>34</sup> There are ideological claims that, if taken seriously, create a situation in which a member of “the oppressor class”—white and male, is always culpable for a hate crime possibility, whereas members of the “oppressed classes”—women, blacks, gays, etc.—cannot *by definition* be guilty of hate crimes. The law, of course, does not state this. But there is an underlying assumption that runs along these lines, making it far more likely—depending to some extent on jurisdictions—that the leap to hate crime will come more readily if the alleged perpetrator is male and white.

<sup>35</sup> Here it might be worth mentioning the triumph of “feelings” or the “therapeutic” in much of contemporary culture and politics, another aspect to this general area of concern. For example, during the hearings before the Senate Judiciary Committee on the confirmation of current Supreme Court Justice John Roberts Jr., the “heart” came into play big time. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/sh109-158.zip>. During the hearings, Senate Minority Leader Harry Reid (D-Nevada) announced that he would oppose

law could look into our hearts, none would “escape whipping.” Our lives are structured through and through with certain saving graces, tissues that make life bearable, hypocrisies some would say.<sup>36</sup> I speak here of saving graces and the moral equality of persons, something hate-crime legislation violates in believing that motivation is in and of itself a punishable offense, an add-on to the crime of homicide.

I recognize that the above claims concerning hate crimes are highly controversial and quite easy to misconstrue. I by no means wish to minimize racially (or any other) prejudicial form of hate that may goad someone to violence. This is a very tough issue in a society with a long history of racial tension. But there is, once again, a real danger in the aspiration toward comprehensiveness here; trying to find a covering law for everything, including adding “hate” as an additional punishable offense. In a loaded racial context this is understandable, but it often stokes the fires of racial suspicion and hatred. It is widely assumed that motive is relevant to the degree of punishment. But there is a fundamental difference when hate-crime law lifts the relevance of motive from judicial judgment about punishment to statutory categorization.<sup>37</sup>

We can never satisfactorily separate intention, motivation, and other “inner” drives as directly causal to “the deed,” although good police work often helps to discern whether a murder is one of highly personal rage or a more impersonal desire to kill just anyone who happens to pass by. Again, such information is entirely appropriate and quite important to take into account in a judicial proceeding. We also assess situations by whether a victim

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Roberts’s nomination to the Supreme Court. He indicated that, although he was impressed by Roberts’s qualities of intellect, he fretted that Roberts had made hurtful comments as a twenty-six-year-old lawyer about women and minorities—in the form of a joke that committee member Diane Feinstein (D-California) also cued in on. *See id.* at 221 (statement of Sen. Feinstein). Roberts made a lawyer joke in 1985 about whether the world really needed more housewives to become lawyers. (One could substitute any category of persons.) This wisecrack signified that Roberts was “insensitive” and that might well disqualify him for the court. *See, e.g., id.* at 260 (statement of Sen. Schumer). Senator Charles Schumer (D-New York) went even further. He stated that Roberts “may very well possess the most powerful intellect of any person to come before the Senate for this position,” but he was worried about Roberts’s “heart.” *Id.* at 441. Posing heart versus intellect sows the seeds of mischief, suggesting that how one “feels” is more important than one’s intellect, one’s knowledge of constitutional history, case law, etc.

<sup>36</sup> A homey example: We say, “Thanks, Aunt Mildred, for this . . . er . . . embroidered thingy.” In the interest of full transparency we *should* say, “I don’t want this dreadful thing. Here, take it back.” Truth, and nothing but the truth, can be an exceedingly cruel taskmaster. There are saving graces in telling innocent untruths, if that is the best way to put it. Our relationship with Aunt Mildred, our basic God-given human sociality, is far more important than whether we really dislike the embroidered thingy.

<sup>37</sup> I thank Kent Greenawalt for pushing me to clarify this issue and for offering challenging suggestions.

was entirely helpless or whether the victim was killed during a mutual altercation, and so on. The law discriminates in many essential ways. But to lay on a global, generic category like “hate crime” opens the way to legalistic overreaching and the differential valuation of persons. That is what I oppose.

Finally, I will turn to one architect of lofty legalism, Immanuel Kant. The anti-Nazi German theologian, Dietrich Bonhoeffer, characterized Kant, the great philosopher, as a tormenter of humanity.<sup>38</sup> I will not provide a complete discussion, but I want to say enough to put into place portions of Bonhoeffer’s critique of Kant and then go on to offer a real-world example from current international relations that shows how problematic a hard Kantianism can be in practice. Bonhoeffer, in the name of Christian freedom, takes Kant to task in his book *Ethics*—in a chapter entitled “What Is Meant by ‘Telling the Truth’?”<sup>39</sup>—which 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 Bonhoeffer links to Kant’s severe deontology.<sup>40</sup>

Bonhoeffer reminds us that it is Kant who insisted that 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.<sup>41</sup> If the friend is indeed hidden, then one has no choice—for the prohibition against lying is absolute—but to reveal this fact and to give one’s friend over, thereby, to the murderer. This invites the comment I alerted us to earlier—when Bonhoeffer describes Kant as a tormenter of humanity. Kantian severity breaks sociality, breaks friendship; splits us off from the responsibilities of *caritas*, of tending to the bleeding brothers and sisters of Jesus Christ.<sup>42</sup> Certainly, Christians did 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 knocks on the door and asks, “Is your Jewish neighbor hidden within?” Well, if you are a Kantian deontologist you must say yes.<sup>43</sup> We are familiar with the severity of categorical imperatives: they cannot be modified and cannot conflict with one another. One lives in a rigid and overly simple moral universe in Kant’s

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<sup>38</sup> See DIETRICH BONHOEFFER, *ETHICS* 365–69, 369 n.1 (Eberhard Bethge ed., Neville H. Smith trans., Macmillan Co. 1968) (1955).

<sup>39</sup> See *id.* at 363–72.

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* at 369 n.1.

<sup>42</sup> See *id.* at 365–66.

<sup>43</sup> See Immanuel Kant, *On a Supposed Right to Lie from Altruistic Motives*, reprinted in *ABSOLUTISM AND ITS CONSEQUENTIALIST CRITICS* 15 (Joram Graf Haber ed., 1994) (1797).

world. There is insufficient nuance, a lack of awareness of the fact that the raggedy ends of lived life do not conform to a deontological grid. So the Jewish neighbor is given over to his *depradator*. I do not exaggerate. This is the outcome. Kant, quite unconvincingly, said, in response to criticism, “After you have honestly answered the murderer’s question as to whether his intended victim is at home, it may be that he has slipped out so that he does not come in the way of the murderer, and thus that the murder may not be committed.”<sup>44</sup> But the die was cast.

In the name of responsibility, in the name of *caritas*, in the name of Christian freedom, Bonhoeffer insists: do not break the bonds of sociality; do not deny thy neighbor.<sup>45</sup> 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 denying it, although the father is a drunk, Bonhoeffer argues, because the child speaks to the truth of fundamental human social-familial relations—that the school teacher ought not to be in the business of assaulting publically.<sup>46</sup> If you follow the deontological line and add to it some of the histrionic overreach I alerted us to earlier with the eradication of any public or private distinction, you may wind up in a legalistic nightmare where, as Bonhoeffer says, everything has a placard posted on with either the word “permitted” or “forbidden.”<sup>47</sup>

Another area one might probe at present with legalism in mind, including its deontological form, is the fraught matter of torture and contemporary warfare (at least the American version). Some of the legalists have argued that interrogators should go before a judge and seek “torture warrants” to permit them to legally torture a terrorist suspect who likely has—a very high degree of probability—information that if revealed would save many human lives.<sup>48</sup> This seems to me a stunningly bad idea.<sup>49</sup> Nowadays we are making warfare, as waged by the United States, more and more a legalistic matter. Soldiers are hemmed about with a slew of legalisms. I am *not* referring to rock-bottom, fundamental, *jus in bello* rules of engagement dictating that you do not target civilians. Instead, I have in mind taking some account of the anxiety and fear

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<sup>44</sup> *Id.* at 17.

<sup>45</sup> See BONHOEFFER, *supra* note 38, at 365–66.

<sup>46</sup> *Id.* at 367–68.

<sup>47</sup> See *id.* at 24.

<sup>48</sup> See, e.g., Alan Dershowitz, *Tortured Reasoning*, in TORTURE: A COLLECTION 257–80 (Sanford Levinson ed., 2004).

<sup>49</sup> Jean Bethke Elshtain, *Reflections on the Problem of “Dirty Hands,”* in TORTURE: A COLLECTION 77, 83 (Sanford Levinson ed., 2004).

in ordinary soldiers that they might commit a legal infraction based on a split-second decision made under the stress of battle, in the realm of harsh necessity.

Imagine the soldier who, upon seeing a mortally wounded enemy with a hideous head wound—someone who cannot possibly survive—and, to be merciful, administers a *coup de grace*, then finds himself hauled up on charges. Once again, we see the inverse of the uplifting of the capacity of ordinary people for making decent judgments, even under conditions of horrible stress. We need the laws of war and we have had them for hundreds of years now. But these must be tempered by the realities of war and the imperfections of human judgment under such stress. Soldiering is a rule-governed activity in the “just war” tradition, which is by no means identical to being legalistically over-determined. For every soldier in the field nowadays, someone estimated that there are seven civilian lawyers making determinations about everything from mission to uniforms to diet. Is this proliferation of legalistic codes making warfare more humane? No, legalisms do not do that. Training in the norms of *jus in bello* do, however, together with new generations of weapons with less destructive collateral damage. In fact, excessive legalism can also become an easy way out for soldiers in particular circumstances. Arguably, this happened during the bombing of Serbia at the height of the Kosovo campaign by NATO. Lawyers and ethicists legitimated targets and soon ran out of those targets. Secretary of State Madeleine Albright had insisted that the Serbian leader, Slobodon Milosevic, would capitulate in seven days, but he did not. It became more difficult to find appropriate targets. Legalistically driven, hair-splitting calculations were entered into that were very troubling to someone working within the ethical framework of the just war tradition. Again, the onus of responsibility was taken off the soldiers—the military trained in the laws of war, which are infused with *jus in bello* restraints—and put into the hands of lawyers: if it is legal, it is okay. This does not seem to me the way war ought to be conducted.<sup>50</sup>

I turn to a final example, also drawn from current international relations. As I have already indicated, once you get into the realm of laws, norms, and rules, categorical imperatives are ready at hand. In the stronger deontological versions, one finds a tight combination of teleological certainty ushering into “perpetual peace”—from the title of Kant’s famous essay—and in this world

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<sup>50</sup> For a more complete detailing of this story, see Jean Bethke Elshtain, *Humanitarian Intervention and Just War: The Grotius Lecture*, AM. SOC’Y INT’L L., PROC. ANN. MEETING 1 (2001).

one law governs all.<sup>51</sup> The will to war is no more. Observe that you must go in and extirpate a “will,” an “intent.” As for Kant, what matters is a good will. Kant offers a hard teleology whereby Nature has dictated this and so there is a kind of inevitability. Nature herself wills that something should follow.

The British international relations scholar, Martin Wight, warned that followers of Kantian ideals “could be merciless and unrestrained . . . . They could see themselves as righteous agents of historic necessity bringing about a better world.”<sup>52</sup> For this reason, Wight concludes that “if you are apt to think the moral problems of international politics are simple, you are a natural, instinctive Kantian.”<sup>53</sup> 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.”<sup>54</sup>

An additional instance of the severity of Kantian international politics is present in the realm of humanitarian intervention. Humanitarian intervention is not a new thing—it has been talked about in one way or another for centuries. For Augustine, sparing the innocent from certain harm is a legitimate *casus belli* for an outside party to bring military force to bear.<sup>55</sup> Current discussions of humanitarian intervention stress “right intention,” a criterion, of course, of the just war doctrine. It follows, according to such humanitarian intervention advocates, that humanitarian intervention must be entirely disinterested. How so? Disinterestedness is not entailed in the classic just war notion of right intention—nothing as severe as that; no probing to be certain one’s motives are entirely pure, if you will. If humanitarian intervention requires an a priori right intention criterion, construed as disinterestedness, we will never see humanitarian intervention. Augustinian Christianity teaches that all human motives are mixed; we are limited finite creatures who will and nill simultaneously. Absolute purity of intention we are

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<sup>51</sup> IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 107–44 (Ted Humphrey trans., Hackett Publishing 1983).

<sup>52</sup> MARTIN WIGHT, FOUR SEMINAL THINKERS IN INTERNATIONAL THEORY: MACHIAVELLI, GROTIUS, KANT, AND MAZZINI xli (Gabriele Wight & Brian Porter eds., 2005). For the work that prompted Wight’s response, see Robert Latta, *Preface to IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY* (M. Campbell Smith trans., 1917).

<sup>53</sup> WIGHT, *supra* note 52, at 33.

<sup>54</sup> MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 238 (H.H. Gerth & C. Wright Mills trans., 2001) (1946).

<sup>55</sup> See JEAN BETHKE ELSHTAIN, JUST WAR AGAINST TERROR: THE BURDEN OF AMERICAN POWER IN A VIOLENT WORLD 57 (2003).

not going to find—not on this earth. An anti-perfectionist Augustinian perspective insists that one cannot eradicate *superbia* (pride) or the *libido dominandi* (the lust to dominate), in human affairs on any and every level. You can attempt to deflect or mute these effects, but the law should be modest in this regard, as human action can never be entirely sanitized.

Advocates of humanitarian intervention, operating within a Kantian-infused peace politics, push disinterestedness with scant regard to the very *raison d’être* 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.”<sup>56</sup> Do mixed motives disqualify humanitarian intervention? Kant would say “Yes” because there can be no consequentialist consideration of any kind; all must be transparent, nothing held in reserve.<sup>57</sup> If we accept that all human motives are a complex admixture, a humanitarian intervention is not perforce invalidated if it overlaps other political motives.

How, indeed, could one possibly disentangle them? When the hard-core legalists get hold of this, however, to disinterestedness is added a requirement that humanitarian intervention must be approved by the United Nations, which pretty much guarantees that little or nothing will be done to save lives. There is much, much more to be said on this, but let us conclude with Kant in this way: “[I]t 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 at first motivated by humanitarian goals cannot have, in fact, a humanitarian effect.”<sup>58</sup> Remember, “By their fruits ye shall know them,” Scripture tells us. By their fruits.

There is much more than can be said on this topic. We would do well to recall the words of Dr. Martin Luther King Jr. who, at one point, at the height of the Civil Rights struggle, cried: “We’re not asking you to love us, just get off our backs.”<sup>59</sup> Just behave. There is no need to convert, however, because in behaving one might just convert along the way. King imagines the possibility that St. Thomas hearkened to: altered behavior over time may bring about inner change.

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<sup>56</sup> Jean-Baptiste Jeangène Vilmer, *Humanitarian Intervention and Disinterestedness*, 19 PEACE REV. J. SOC. JUST., 207, 208 (2007).

<sup>57</sup> See discussion *supra* notes 41–43 and accompanying text.

<sup>58</sup> Jeangène Vilmer, *supra* note 56, at 212.

<sup>59</sup> JEFF WEINTRAUB & KRISHAN KUMAR, PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 178 (1997).

Let me acknowledge a danger in the position I am staking out here—or the bits and pieces of what would be a position were I to get more systematic. I want to recall a famous exchange between Sigmund Freud and Albert Einstein on the question, “Why War?”<sup>60</sup> For Freud, war happened because people had not sufficiently rearranged their interior furniture<sup>61</sup>—they were still driven by what Augustine would call the *libido dominandi*.<sup>62</sup> In peaceful times, matters of such inner transformation—or not—are rarely put to the test. The law restrains reckless and violent behavior. But, when the barriers are down, 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.<sup>63</sup> Freud’s assumption here is a very Protestant enterprise, one might say. He even opined in an essay that we must take moral responsibility for our dreams.<sup>64</sup> Freud thought that he was offering a secular substitute for Catholic confession, but in the interiorizing of the subject he is surely more Protestant, even Puritan. Be that as it may, I submit that the democratic wager is such that we cannot base our law, our politics, and our social relations on worst-case scenarios: all men are rapists; all human beings are beasts underneath; the patina of civilization is shockingly thin, and the like. 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. Law cannot get into those thoughts and will run amuck if it tries. We will all be suffocated and, ironically, because we think law covers everything, we may, in fact, let down our guard in how we form minimally decent societies. I end on a note of Christian freedom, here putting together Augustine, St. Thomas, and Luther in a salutary way. A full treatment of these fraught issues awaits another day.

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<sup>60</sup> For the fascinating exchange, prompted by a short query from Einstein, see *Why War?*, in 22 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD: NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS AND OTHER WORKS 199–215 (James Strachey ed. & trans., 1968) [hereinafter STANDARD EDITION].

<sup>61</sup> See *id.* at 209.

<sup>62</sup> See LUCY BECKETT, IN THE LIGHT OF CHRIST 111 (2006) (defining the *libido dominandi* as the “lust for domination”).

<sup>63</sup> See STANDARD EDITION, *supra* note 60, at 209.

<sup>64</sup> See Sigmund Freud, *Moral Responsibility for the Content of Dreams*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD: NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS AND OTHER WORKS 131, 131 (James Strachey ed. & trans., 1961).