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From Imperfection to the Will to Ignorance: Augustine and the Adversarial Ethic

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The law which is made to govern states seems to you to make many concessions and to leave unpunished things which are avenged nonetheless by divine providence—and rightly so. But because it does not do all things, it does not thereby follow that what it does do is to be condemned.

Augustine, *On Free Choice of the Will*

I begin with an apology and proceed in the manner of an explanation. The apology concerns the fact that I will not be delivering quite the talk I had planned to deliver when I submitted my proposal for this conference. The explanation concerns the misunderstanding I find central to the practice of law today. I have become convinced that that error, while most obvious among secular radicals, is more interesting and troubling in its manifestations among a rather significant group of honest Christians seeking to act on their faith as lawyers. The misunderstanding begins with the notion of the adversarial ethic, especially the view that it justifies the lawyer's undermining the legal system, and the rule of law itself, in the name of loyalty to client. Its deeper roots lie in a misunderstanding of law itself rooted in a willful ignorance of law's limits. For it is a mistake, at best, to believe that law is an instantiation and tool of power that is more malleable, more powerful, and less fragile than is in fact the case.

I had planned to begin by outlining Augustine's views concerning the nature of law and the legal process. Obviously, any such outline would be embedded in Augustine's tragic understanding of our nature and existence. Laid out most famously in his *City of God*,

Augustine's vision focuses on the reality of sin, the limits of knowledge, and the inability of any human system to achieve sustained, consistent virtue, given our fallen nature. In particular, Augustine points to the situation in which judges find themselves. They have a duty to judge, so that wrongdoers may be restrained and so that good, or at least decent people may live in less fear of crime and disorder. According to Augustine, the judge constantly finds himself fulfilling his Christian mission in very unchristian ways. He must torture the innocent as well as the guilty to find out if they are telling the truth, visiting pain and even death on them in the name of justice. And too often, even with brutal means at his disposal, the judge still punishes the innocent and allows the guilty to go free.[1]

There is no escaping this dilemma, Augustine argues, because of the reality of sin and human imperfection. People lie, knowledge is limited, and even those with good intentions make mistakes. This is not to say that Augustine believes we are utterly powerless in the face of our tragic circumstances. But he is determined not to expect more from human law and the human legal system than is possible given the nature of man himself. The undeserving get rich, the deserving remain poor and too often oppressed, and the law is helpful only in the limited sense that it keeps peace and restrains evil. "In this life the wrong of evil possessors is endured and among them certain laws are established which are called civil laws, not because they bring men to make a good use of their wealth, but because those who make bad use of it become thereby less injurious."[2]

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[1] For present purposes I have used the texts made available in O'Donovan and O'Donovan, *From Irenaeus to Grotius* (1999). Much of the discussion comes, of course, from *City of God*, reprinted in part at 148-63. But additional materials are found in Augustine's *On Free Choice of the Will* (113-14), *Against Faustus* Books 19 and 22 (115-19), and *Letter 153* (119-30).

[2] Id., at 130-31.

The law, then, is necessary in that we cannot live together in even relative peace and order without it. But the law is highly imperfect, visiting pain upon the innocent even as it leaves the guilty free to commit more crimes. This does not mean, for Augustine, that we should give up on the law. Neither does it mean that we should give in to *hubris* and seek to perfect it. Rather, we must recognize law's limits, value it for what it does achieve, and look elsewhere for additional assistance in seeking peace.[3]

Augustine's answer to the tragedy of law is not itself law; but neither is it a rejection of law. It is an addition to the law through mercy. Augustine does not call the law into question. He notes that Jesus, in saying to those who would stone the adulteress that he who is without sin should cast the first stone is not denying law. Jesus here recognizes the justice of law. Rather than question it, he adds to it a call to our own sinfulness that should bring out in those with the power to punish a mercy that too often is ignored.[4]

Augustine's "solution" to law's imperfection is highly limited. Mercy cannot replace justice, instead only mitigating its severity. And it must be applied persistently and watched over lest man's imperfections delegitimize mercy itself. Nevertheless, mercy remains necessary and applicable to regular legal process. For Augustine, mercy is the part of the Church, the role of bishops and priests as intercessors adding to, rather than replacing, the role of the adversaries in judicial process. Even mercy, when applied by men, is highly imperfect; priests, too, may believe lies, misjudge character, and be mistaken regarding facts and circumstances. It remains the case, and will remain the case until the Second Coming of our Savior, that law tempered by mercy is the best we can hope for in this life, within the City of Man. Still, we

[3] Id., 149-49.
[4] Id., 122.

should not disparage this system too much for, while the law cannot do all things, in fact is powerless in the face of many things, it deserves our esteem and loyalty for what it can do.[5]

It may seem, here, that I am merely making a great deal out of Augustine's recognition of the imperfections of criminal procedure and the necessity of mercy within a society that recognizes the sin of both criminals and the innocent. But this extends to what I would insist is a separate realm, namely that of lawmaking. And here, too, what we see is that the law that can be made by men is imperfect and highly limited. Augustine makes clear the limitations of law to achieve good public policy. Thus, famously, he recommended against laws punishing prostitution. His reasoning begins, not with the notion that prostitution is licit, but rather with the recognition that men, being sinful, demand outlets for vice. Augustine argued that prostitution cabined the vice of lust such that it limited potential damage to society (and to innocent women).[6] Thus, again, a tragic recognition of the limits of law is necessary for such good as can be achieved in this life—and to maintain our understanding that the Church in this world cannot force the City of Man to become the City of God.

I still think all this is true. But my original plan had been to contrast this vision with the modern expositors of an extreme, ideological and non-theistic version of the adversarial ethic. Most obviously, Monroe Freedman's view that lawyers should actively engage in furthering the lies of their clients undermines any conception of the legal system as having to do with truth.

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[5] Ibid. It is worth noting that Augustine leaves much room for an adversarial ethic himself, noting that defenders of the accused have a duty to work to protect their clients from punishment, in part by keeping some things from the court.

[6] Augustine, *De Ordine* (II, 4). Of course, changed circumstances (e.g. development of effective police forces, increased knowledge regarding venereal disease and the evils of human trafficking, and increased attention to the crime of rape) may alter the proper answer to the prudential question of lawmakers' appropriate response to the social consequences of a given vice.

For Freedman and those of his opinion, law is about power, and those who face the power of a class-based structure should be aided as much as possible in their struggle for autonomy. Thus, also, Lord Brougham (supposed originator of a full adversarial ethic) should be praised, despite sacrificing the interests of his client, Queen Caroline, and for feeding into anti-Catholic bigotry because, after all, he was an abolitionist and "on the right side of history" in terms of progress toward political equality.[7]

There is much, here, to criticize. There is, as I have said, a kind of willful ignorance of the sins of heroes, the virtues of law as it is, and the consequences of law-as-ideology. But in the end I think it an unworthy topic of discussion in this forum because the issues it raises are so clear and so resistant to rational discourse. Why? Because it so obviously substitutes radical ideology for theology. So long as lawyers continue to leave unexamined the results of their efforts at radical transformation, at home and in nations that follow their view of law-as-power, and so long as it remains in their own interest financially and in terms of their self-esteem to treat the law as a tool of unjust power, no amount of argument will cause them to rethink their approach to the practice of law. This is a question of ideology—of a second, false reality being placed atop the first reality, with the ideologue then working to force the world as it is to suit his model. The results will be unsatisfactory. But so long as the ideologue enjoys the work of attacking the underlying reality, it will remain next to impossible to convince him to stop.

For this reason, I have taken the perhaps unwise decision to contrast Augustine's view with one I think is much more attractive to this august assemblage. Indeed, the announcement

[7] See Monroe Freedman, *Henry Lord Brougham—Advocating at the Edge for Human Rights*, 36 Hofstra L. Rev. 311. For a telling critique of Lord Brougham see Michael Ariens, *Brougham's Ghost*, 35 N. Ill. L. Rev. 263.

of this very conference includes a prominent passage taken from the dean of Christian lawyering, Thomas Schaffer. In this passage Professor Shaffer argues that the law, in a separate building from religion, may be viewed in a different light from outside the law's own walls, a light that will show its flaws and the need for lawyers themselves to choose new standards of conduct.

Now, it is true that law and religion occupy different buildings, in Professor Schaffer's terms, within the city in which we as Americans, and as children of the West, continue to dwell. Moreover, they both are buildings within that same city, such that what happens in each, and especially what the denizens of each do when they enter the public square, affects us all. But it seems to me that the purpose of those trained in the law is different from, and aimed at lower, more basic goods, than that for which the house of worship by nature exists. Taken at an abstract level, lawyers and ministers seek the same end-goal—virtue in this life and the possibility of beatitude in the next. But where the house of worship by nature seeks to form communities in which people learn to live the Gospel, law at best can only help the house of worship by protecting it against wrongdoers, including an overreaching, intolerant state.

Lawyers, like ministers and religious folk in general, seek the form of peace Augustine identified with eternal life, which is possible only in the next life, yet must be served as possible even in "human affairs that offer anything but eternal life."[8] And Professor Shaffer is to be commended for a long, selfless career seeking to act as a Christian Gentleman in his professional life. But it seems wrong, to me, and even destructive to treat the law as if it should or even could be an embodiment of religious truth, or of virtue in its full sense. And I would

[8] O'Donovan and O'Donovan 152.

make a further claim, here, namely that it is wrong to simply bow toward inevitable failure as part of the tragedy of a course of conduct aimed at said unattainable perfection. Such a move merely adds pursuit of a kind of secularized martyrdom to the hubristic goals of lawyers demanding more of law than it can by nature provide.

This critique extends to the highly attractive call on lawyers to act in the prophetic tradition. In particular, I would deny the moral reality of the call for lawyers to strive to be prophets in the full sense. Why? Because human law is not only incapable of fully embodying and imposing God's will on society, the attempt to make it do so renders law, not just weak, but non-existent. In the end, the attempt to use law as a tool of social reconstruction destroys it.

This is not to say that some laws are not better than others, or that lawyers should not seek to make the law better. But it is to say that legal reform must be undertaken through pre-established means and with both its fragility and its necessity for any decent life fully in mind. Law is a system of rules intended by nature to pacify human relations, rendering us able to treat with one another peacefully, consistent with public order. It provides known rules necessary for people to go about their lives without fear of arbitrary punishment, to plan for their futures, and to build deeper, more constitutive relationships with their fellows. Our sympathy for wronged and suffering clients—as for wronged and suffering people not our clients—is good. It should motivate us to action. But it should not motivate our actions as lawyers in such a way as to undermine the necessary but limited social structure that is the law.

The rule of law is essential to civilized life in its Western mode. But it is not self-sustaining. It relies on deeper, more fundamental norms and virtues. Unfortunately, modern critiques of law and especially of law's role in sustaining Western social, political, and economic

structures, focus on insular conceptions of justice and the need for radical transformation to achieve such notions; they focus on these conceptions to such an extent that they obscure, at best, the fact that a chief virtue, humble but essential to any decent life, is law-abidingness. And law-abidingness requires that we accept, live, and practice law according to the central conventions of our legal system.

One of the most often discussed and criticized legal conventions is truth-telling. Lawyers are punished for lying (especially to courts) because the legitimacy of law, as its very purpose, rests on its capacity to find and act on what is true—at its most basic level the facts of cases. Augustine himself noted the problems, here. But these problems are rendered far more serious if the court cannot count on those who serve it to refrain from lying to it.

Yet lawyers lie. They lie to serve their clients, to serve their own interests, and to serve their ideas of justice. To take perhaps the most attractive example, Professor Shaffer argues that lawyers may be right in lying for clients when the parties on the other side are evil. Here he references General Eisenhower's deceptive moves prior to D-Day. He does back off a bit from likening to Nazis "hotel managers who discriminated against homosexuals," the Immigration and Naturalization Service, and "relentless creditors who design, impose, and exploit the small claims court system to garnish the wages of the working poor." But only a bit. Here Professor Shaffer makes common cause with Monroe Freedman, arguing that "Professor Freedman and I will not convince anyone that these opponents are as bad as the armies that occupied France and threatened Britain … but we could parade familiar horrors, I think, to the point where people of reason and good conscience would locate oppression, even systematic oppression—and injustice, even systematic injustice." Indeed, "We might even persuade reasonable people

of good conscience to recognize the presence and persistence of a class system in modern America." And "If we got that far—to the point where the practice of law in modern America could be seen as a theatre for class warfare—we could raise for consideration" Machiavelli's argument that one should not deal fairly with those who would not deal fairly with one. "Oppressor" classes do not deserve the truth. And the law, being a tool of oppressor classes, appears to have little independent integrity or legitimacy.[9]

I do not want to minimize Professor Shaffer's dedication to clients. For him, the lawyer's central concern is "to which community am I responsible as a lawyer?" His answer focuses on the client, and those the client loves. Such a focus clearly has real virtue. But it may raise conflicts and problems. To begin, one owes duties to a variety of communities, including the legal profession, but also the nation as a whole, especially as it is served or disserved by its legal system. Should one's service to a client undermine the legal system on which the nation relies, one hardly can consider one's actions virtuous in any full sense. Moreover, one's clients rely on the legal structure for protection and for the peace of legal order. Actions undermining that order, for example denying the legitimacy of the courts and/or lying to them and so rendering them incapable of discerning truth in relevant circumstances, thus harm the client, at least over the long run.

This set of dilemmas is rendered both deeper and less visible in Professor Shaffer's rendering of lawyerly duty. He asserts an openly Marxist vision of good and evil in American law and society. The poor, the undocumented, the "victims" of structures Shaffer finds unjust are

[9] Thomas Shaffer On Lying for Clients, 71 Notre Dame L. Rev. 195 1995-1996) 205-207.

the proper objects of patronage from the lawyer.[10] One lies to protect those who deserve protection. One shows one's virtue by choosing the right clients, and also by doing what is necessary to serve those clients in the name of social justice.

This is not so say that Professor Shaffer fails to recognize the dangers of lying. He says he understands that lying can become habitual and can undermine community. But I fear that the role he sees for lawyers is intrinsically destructive of both communities and law.

Central, here, is Professor Shaffer's insistence that lawyers should seek to emulate the ancient Hebrew Prophets. He goes so far as to identify the prophets as "lawyers more than anything else."[11] He argues that, like prophets, lawyers must begin, professionally speaking, by recognizing and being angry with the injustice and exploitation around us. Lawyers should pay attention to the "social, political and economic conditions that moved [the prophets] to outrage." Here Professor Shaffer gives us a parade of horribles including very real problems of poverty and injustice, as well as various statistics showing a failure of institutions to act according to his own notions of radical material equality (e.g. figures on who receives how much financial assistance to attend college) and culminating in condemnation of the nation state as fundamentally unjust and corrupt, and always willing and able to use "lethal power" to sustain itself.

There is in Professor Shaffer's critique at least as much Marx as prophet. That said, the question is not whether he denounces true injustice—in Augustinian terms he often does. Rather, the question is what lawyers and the law they serve are to do about these injustices.

[10] Id., 210-12.
[11] Lawyers as Prophets 15 St. Thomas L. Rev. 469 (2002-2003).

According to Professor Shaffer, prophets are "God's subversives" whose sacred duty is to undermine power structures, even legitimate ones, in the name of justice. They put justice and order "in tension" and undermine existing orders in the name of the poor. Here Professor Shaffer quotes a Presbyterian minister to the effect that the People of God is a community that "refuses to accept a God who is positioned above the fray" or to accept authorities or legitimated structures.[12]

I leave to one side questions of whether Christians in particular can "refuse to accept" God, whatever his position in regard to human conflicts. My point is that the demand for a God of Progress has political consequences, and that Professor Shaffer overtly imports this conception and its consequences into law. He urges lawyers to emulate various Progressive activists from the past, and to look at ethics in terms of an "ideal pattern of economic life embodied in the [Biblical] Law." The result is an unsurprising vision of social democracy, in which Christian values are transformed into aggressively egalitarian laws using the state to keep the market "small." [13]

Whether attempts to produce such a system can succeed or will continue, as they uniformly have, to produce tyranny, corruption, and massive impoverishment is an openly political question. The question whether bureaucratic structures are more likely to treat the downtrodden with justice, let alone mercy, than local associations (especially Church, families, and other local associations) is one of political judgment as well. It is a somewhat different question what attempts to bring about such a system will have on legal ethics. Given the anger and hostility a prophet holding to this view of what is demanded by God will have toward our

[12] Id., 476-77.
[13] Id., 481.

legal system, it seems clear to me, at least, that the impact will be detrimental to the rule of law and, from there, to the citizens who rely on law for their protection and ability to go about their lives.

In recent decades Progressive lawyers have sought to further social justice, as they define it, through their legal practice. Accordingly, they have read statutes in a manner clearly opposed to the intentions of their drafters, conducted themselves in court in a manner calculated to produce outcomes at odds with precedent and the reasonable expectations of the parties, and otherwise subordinated their specifically legal duties to their political program or, perhaps, their loyalty to a particular client within our adversary system. I submit that such practice is not good for law, clients, or citizens.

Americans now "go to law" more than ever before. And we do so precisely because we no longer find legal rules to be clear, even where we find them legitimate. Increasingly, laws are complex, precedents unstable, and rules promulgated by shifting and even unknown authorities within the administrative state. It is not popular, especially among Christian lawyers, to bemoan the trials of regulated industries. But the use of consent decrees to change the policies of corporations, universities, and other bodies subjects them to political control, and subjects their constituents to wildly changing rules.[14]

Then there is the dilution of the right to trial. Whether in civil or, much more worrisome, criminal law, plea bargaining has become standard. For example, the percent of guilty pleas in American courts rose from under 65 percent in 1908 to over 95 percent in 2002.[15] Between

[14] See generally Philip Hamburger, *Is Administrative Law Legal?* (2015).
[15] Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

1980 and 2002 the federal criminal trial rate dropped from 23 percent to less than 5 percent.[16] Our system now is one of plea bargaining, not law. Bargaining is a process whereby parties assess the strength of one another's positions, then act accordingly. Clarity of the evidence and severity of the accusation are relevant. But so are the reputations of lawyers and the amount of influence the defendant (or, in civil cases where consent decrees are involved, the regulated entity) has with the higher ups in government. Influence and personality are key factors—as well as genuine, predominantly state power—as befits a process of bargaining rather than law.

These may seem like small matters in light of the injustices of society as it is. But it is precisely the poor who are disserved by systems in which simple, evenly-applied rules are foregone in favor of complex ideological class warfare waged by experts. An occasional poor person may escape wage garnishment under a prophet-led system. But we all become unsure of our rights and duties, and even of the rules on which our daily conduct once relied. The peace of society is undermined, people increasingly sue one another, poor people become victims of mistreatment and are unable to afford competent legal counsel, all in the name of a justice that will never be attained.

Rulers are the greatest beneficiaries when a system loses law, for they are released from law's constraints. Here one might include another parade of horribles, highlighting groups and persons like the Little Sisters of the Poor, threatened with destruction for acting on their religious convictions. But the problem is systemic; people can no longer trust the law to mean what it says, and so can trust one another less, even in contractual relations because law and

[16] Floyd R. Gibson, *American Buffalo: Vanishing Acquittals and the Gradual Extinction of the Federal Criminal Trial Lawyer*, 156 U. PA. L. REV. PENNUMBRA 226, 226 (2007).

the relatively thin normative consensus on which it relies have been delegitimized in the name of Progress.

My point in this relatively brief paper requires little more, save to reiterate the differing goals of law and religion. Courtroom law seeks justice in the limited sense of vindicating the reasonable expectations of the parties. The drive to achieve more inevitably undermines law's true purpose, to the detriment of all. Law more generally seeks peace, but can achieve only the limited peace of the City of Man. The attempt to use law to achieve more undermines both court law and law more generally by creating unreasonable expectations and by undermining law's clarity and legitimacy.

This is not to say that revolution can never be justified. But, much as the Christian gentleman lawyer is to be respected, the revolutionary cannot be a virtuous lawyer, *qua* lawyer. Even in an adversarial system, there are rules, conventions, and shared understandings within the community that are necessary for the court to function; and these preclude turning the court into a theater of class warfare.

As to religion, it by nature aims at higher, more permanent goods than law can even seek. But, as Augustine noted, its purpose in this life is to help we mere mortals lead decent lives in hopes of a better life in the hereafter. Because law seeks peace (or due order) it by nature seeks conditions conducive to religion. Moreover, a decent, religious people is necessary for law to sustain a credible peace over time. Religion sets the norms on which civilization and its laws are built. As Augustine pointed out, sinful men will never live out their proper norms, and neither will the societies in which they live. Thus people, and lawyers in particular, must accept the limitations of the City of Man, seeking to provide what service they can within the

law even as they strive to make improvements within the law's limitations, addressing abuses and pointing out, where possible, the call to mercy. We are not left powerless. We may pursue higher goals. But as lawyers we must always keep in mind that our vocation is limited by the nature and limits of law itself. Perhaps this is a tragic vision, but it is the only vision in keeping with limited good that is law.